NOTES

STATE COURT RESISTANCE TO FEDERAL ARBITRATION LAW

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For the past three decades, the U.S. Supreme Court has misconstrued the Federal Arbitration Act (FAA). In the process, the FAA has been transformed from a statute intended to mitigate judicial hostility to arbitration into one that expresses the Court's unyielding preference for legal disputes to be resolved through arbitration. The FAA has thus become a "super-statute" that preempts any state contract law that may frustrate its purpose to promote arbitration nationwide. But following the Court's sweeping decision in AT&T Mobility LLC v. Concepcion*, state courts have started to push back—both expressly and covertly.*

This Note explores the strategies that state courts have used to evade federal arbitration jurisprudence and examines the normative value of state resistance to federal common law in that context. Part I introduces the text, legislative history, and intent of the FAA. Part II discusses how the Supreme Court has used the FAA to displace state laws that it perceives as interfering with the efficiency of arbitration proceedings. Part III analyzes how state courts have responded to federal arbitration decisions that are hostile to state contract law. And Part IV generates a framework to evaluate the desirability of different kinds of state resistance to federal law in a dual sovereignty system. Ultimately, the Note concludes that state courts can optimally balance federal supremacy with state autonomy by narrowly construing the preemptive effect of federal common law.

* J.D. Candidate, Stanford Law School, 2015. I would like to thank Norman Spaulding, Jane Schacter, Abraham Sofaer, and Janet Alexander for their substantive feedback on this Note, Wesley Sze for his helpful comments and edits, and Jeffrey Ma for his endless support. I would also like to thank the members of the *Stanford Law Review* for their careful work.

INTRODUCTION

Congress enacted the Federal Arbitration Act (FAA) in 1925 to end the longstanding judicial hostility to arbitration.[1] Under English common law, judges were unwilling to allow parties to contract out of public litigation and enforce their legal rights without the assurances and protections of a jury system.[2] American courts inherited this skepticism and were wary of upholding any agreement that attempted to remove their jurisdiction over a legal dispute.[3]

In response, the FAA created new procedures in federal court that required judges to recognize arbitration agreements and to compel arbitration if the agreement was valid.[4] In short, Congress wished to put arbitration clauses "on the same footing" as any other contract provision instead of being construed as per se void.[5] The Act intended to provide businesses with a quick and cost-effective means of settling their contract disputes outside of court.[6] But it also provided that state contract law would continue to govern the substance and interpretation of the agreements.[7]

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1. Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1-16 (2013)); *see* Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1197 (2011); Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 LOY. U. CHI. L.J. 391, 394-97 (2012).

2. Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 102 (2006); *see also* S. REP. NO. 68-536, at 2 (1924).

3. Moses, *supra* note 2, at 102.

4. *See* §§ 2, 4, 43 Stat. at 883-84 (codified as amended at 9 U.S.C. §§ 2, 4).

5. H.R. REP. NO. 68-96, at 1 (1924).

6. *Id.* at 2.

7. *See* § 2, 43 Stat. at 883 (codified as amended at 9 U.S.C. § 2) (providing that written arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract").

Today the statute has taken on an entirely different meaning. In its interpretation of the FAA, the Supreme Court has "abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[8] The Act now governs arbitration in nearly all circumstances—from consumer litigation[9] to statutory civil rights claims.[10]

Most recently, in *AT&T Mobility LLC v. Concepcion*, the Court stretched the preemptive effect of the FAA to a new extreme.[11] California law banned the use of class action waivers in certain consumer adhesion contracts.[12] Without such a rule, companies could systematically defraud consumers by small amounts and effectively prevent any recovery by contractually banning the aggregation of claims.[13] Although this ban on class action waivers said nothing about arbitration, the Supreme Court held that the FAA preempted it.[14] Because class-wide arbitration is inherently less efficient than individual arbitration, the Court reasoned, a rule preventing businesses from waiving class-wide arbitration would go against Congress's intent "to facilitate streamlined proceedings."[15]

What ensued in the four years following *Concepcion* can best be described as a power struggle of Shakespearean magnitude between the Supreme Court, which attempted to enforce its own interpretation of the FAA, and state courts that tried to preserve their own laws and public policy. The very next year following *Concepcion*, the Court summarily reversed two state arbitration cases for failing to adhere to *Concepcion*.[16] The Supreme Court of Appeals of West Virginia had struck down an arbitration clause that governed a wrongful death suit.[17] In reaching that conclusion, the state court seemingly brushed aside the U.S. Supreme Court's "tendentious reasoning" in its FAA jurisprudence.[18] So too had the Oklahoma Supreme Court, which attempted to treat state law and

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8. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

9. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

10. *See, e.g.*, 14 Penn Plaza LLC v. Pyett, 556 U.S. 247 (2009).

11. 131 S. Ct. 1740.

12. Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005).

13. *Id.*

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

15. *Id.*

16. *See* Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012) (per curiam), *rev'g* 273 P.3d 20 (Okla. 2011); Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (per curiam), *rev'g* Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W. Va. 2011).

17. *See Genesis Healthcare*, 724 S.E.2d at 292 ("We therefore hold that, as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence.").

18. *See id.* at 278.

the FAA as laws of equal force in its interpretation of an employment contract.[19]

After open rebellion failed, state courts across the country, especially in California, developed novel strategies to limit the FAA's preemptive effect. For instance, some courts have found the FAA to be inapplicable because the contract at issue did not implicate interstate commerce.[20] Others have developed valid legal theories as work-arounds to *Concepcion* that could render the decision effectively meaningless in certain contexts.[21]

Despite the resurgence of federalism, *Concepcion* and its predecessors have only served to erode state sovereignty, and at levels far beyond what any legislative body intended. As such, this Note argues that certain kinds of state court resistance to federal common law are beneficial for the preservation of state autonomy.[22] Part I introduces the text and legislative history of the FAA. Part II discusses how the FAA has systematically displaced state laws that purportedly interfere with the efficiency of arbitration proceedings. Part III explores the strategies that state courts have used to circumvent federal arbitration law. Finally, Part IV situates these state court responses along a spectrum of compliance and uses this framework to examine the normative value of state resistance to federal law in a dual sovereignty system. Ultimately, the Note concludes that state courts can optimally balance federal supremacy with state autonomy by narrowly construing the preemptive effect of federal common law.

I. TEXT AND LEGISLATIVE HISTORY OF THE FAA

Arbitration is an alternative form of dispute resolution in which a neutral third party (the arbitrator) decides the merits of a case. This informal process is quicker and cheaper than litigation because the rules of procedure and evidence are relaxed, and the decisions are final and often not appealable.[23] Arbitration proceedings are also generally conducted in secret and not open to the public.[24]

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19. *See Nitro-Lift Techs.*, 273 P.3d at 26 n.21 (applying precedent in which the court "held that the specific statute in the Nursing Home Care Act addressing the right to commence an action and to have a jury trial would govern over the more general statute favoring arbitration," even though "the Federal Arbitration Act preempted and displaced state anti-arbitration statutes").

20. *See, e.g.*, Favara v. Regent Aerospace Corp., No. B246718, 2013 WL 5832391, at *1 (Cal. Ct. App. Oct. 30, 2013).

21. *See, e.g.*, Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 152 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015).

22. Certainly, there is no consensus as to what the optimal level of state autonomy is. While the federal government has grown substantially since the Founding, the Court has sought to constrain federal powers in recent years.

23. *Cf.* BLACK'S LAW DICTIONARY 125 (10th ed. 2014) (defining "arbitration").

24. *See* STEPHEN K. HUBER & MAUREEN A. WESTON, ARBITRATION: CASES AND MATERIALS 4 (3d ed. 2011) (describing arbitration as a "private alternative to the judicial system").

To understand how state courts have broken away from the Supreme Court's interpretation of the FAA requires some background on the statute. Congress enacted the FAA in 1925 in response to growing judicial hostility toward arbitration agreements.[25] The core provision of the Act is section 2, which today reads:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[26]

Simply put, this statute makes "valid, irrevocable, and enforceable" any agreement to arbitrate that "involv[es] commerce." However, the agreement may be invalidated for any reason that exists "for the revocation of any contract." For instance, under the FAA, a judge couldn't refuse to enforce a contract with an arbitration provision solely because it called for the arbitration of disputes. But that judge could throw out the contract if it was entered into under duress, or on unconscionability grounds if the agreement called for the arbitration to take place in an inaccessible forum, like Antarctica. The clause of the FAA that allows general contract laws to apply to arbitration agreements ("save upon such grounds as exist at law or in equity for the revocation of any contract") is appropriately known as the savings clause.

Before the FAA, courts were reluctant to enforce arbitration agreements based on English common law rules.[27] They perceived such agreements as a way to force potential litigants to surrender their rights to a jury and to a public forum for the resolution of their legal disputes.[28] Congress sought to eliminate this hostility through the FAA and make courts neutral to arbitration provisions; they were to be placed "upon the same footing as all other contracts"[29] and not singled out simply because they were agreements to arbitrate.[30]

The FAA was modeled after a New York statute that required courts to recognize arbitration clauses.[31] The principal drafter of the FAA, Julius Cohen,

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25. *See* sources cited *supra* note 1.

26. 9 U.S.C. § 2 (2013).

27. Moses, *supra* note 2, at 102; *see also* S. REP. NO. 68-536, at 2 (1924).

28. Commentators have also argued that English judges, somewhat less altruistically, adopted anti-arbitration rules for fear of being ousted from their own jurisdiction. *See* Aragaki, *supra* note 1, at 1197; *see also* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 210, 211 & n.5 (1956) (Frankfurter, J., concurring); *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 39 (1924) [hereinafter *1924 Joint Hearings*] (brief of Julius Henry Cohen) (describing the rules as "rooted originally in the jealousy of courts for their jurisdiction").

29. H.R. REP. NO. 68-96, at 1 (1924).

30. *See* Moses, *supra* note 2, at 102.

31. *See* Act of Apr. 19, 1920, ch. 275, 1920 N.Y. Laws 803 (codified as amended at N.Y. C.P.L.R. 7501-7514 (McKinney 2014)); *1924 Joint Hearings*, *supra* note 28, at 16 (statement of Julius Henry Cohen). That statute read similarly to the FAA: "A provision in a written contract to settle by arbitration a controversy thereafter arising between the par-

had also written the New York statute.[32] In a pre-*Erie* legal universe, Cohen saw a uniform federal standard as necessary for the recognition of arbitration agreements in federal diversity cases.[33]

According to Justice O'Connor, "[o]ne rarely finds a legislative history as unambiguous as the FAA's."[34] Indeed, there is an unusual consensus in legal scholarship with regard to the congressional intent behind the statute. And while the legislative history of the FAA is vast, this Part briefly highlights two key takeaways that commentators generally agree on.

First, Congress intended the FAA to apply to agreements to arbitrate between merchants—and not extend to employment contracts, adhesive consumer contracts, or statutory civil rights.[35] W.H.H. Piatt, the chairman of the American Bar Association committee that drafted the bill, testified:

> It is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.[36]

Section 1 of the FAA explicitly excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce."[37] As Margaret Moses explains, even though "the bill did not specifically exclude all employment contracts, the constitutional jurisprudence [of the Commerce Clause] at the time viewed most employment contracts as involving intrastate and not interstate commerce."[38] Therefore, the language of excluding "workers engaged in interstate or foreign commerce" was intended to cover *all* workers that Congress had the authority to regulate.

The bill's authors were equally clear that the law did not cover contracts involving parties of unequal bargaining power. In response to a senator's concern that arbitration provisions would be used in involuntary adhesion contracts, Piatt stated that he "would not favor any kind of legislation that would

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ties . . . shall be valid, enforcible [sic] and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." Art. 2, § 2, 1920 N.Y. Laws at 804.

32. *See* Wasserman, *supra* note 1, at 396.

33. *See* Moses, *supra* note 2, at 101-02.

34. Southland Corp. v. Keating, 465 U.S. 1, 25 (1984) (O'Connor, J., dissenting).

35. *See* Janet Cooper Alexander, *To Skin a Cat:* Qui Tam *Actions as a State Legislative Response to* Concepcion, 46 U. MICH. J.L. REFORM 1203, 1205 (2013) ("The statute was passed to address the problem of discrimination against bargained-for arbitration agreements between merchants having roughly equal bargaining power."); Moses, *supra* note 2, at 105-06; Wasserman, *supra* note 1, at 396.

36. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 10 (1923) [hereinafter *1923 Senate Hearing*] (statement of W.H.H. Piatt) ("[I]t is the primary end of this contract that it is a contract between merchants one with another, buying and selling goods.").

37. 9 U.S.C. § 1 (2013).

38. Moses, *supra* note 2, at 105.

permit the forcing [of] a man to sign that kind of contract."[39] In 1925, courts scrutinized the fairness of contracts of adhesion and boilerplate terms more carefully than they do today.[40] The possibility that a judge would bind parties by involuntary terms was far slimmer than it is under our modern understanding of contract principles.

Second, the FAA was seen as a purely procedural statute intended to make specific performance of arbitration agreements available as a remedy in federal court.[41] In his brief submitted in the Joint Hearings on the FAA, Cohen explained that the statute, as he drafted it, "establishes a procedure in the Federal courts for the enforcement of arbitration agreements. . . . It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws."[42] The savings clause, which sought to preserve general state contract law principles, further reflects this intention.

None of this is to suggest that Congress was blind to the benefits of arbitration—it wasn't. Much of the debate centered on why businessmen needed a simpler solution to resolve disputes between one another. The House Report discussed how "the costliness and delays of litigation" could "be largely eliminated by agreements for arbitration."[43] Representing the New York Chamber of Commerce, Charles Bernheimer explained that "arbitration saves time, saves trouble, saves money. . . . [It] prevents unnecessary litigation, and eliminates the law's delay by relieving our courts."[44]

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39. *1923 Senate Hearing*, *supra* note 36, at 10 (statement of W.H.H. Piatt); *see also 1924 Joint Hearings*, *supra* note 28, at 40 (brief of Julius Henry Cohen) (explaining that the FAA could not be used to "force an individual state into an unwilling submission to arbitration enforcement"); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 279 (1926) ("No one is required to make an agreement to arbitrate. Such action by a party is entirely voluntary.").

40. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011) (acknowledging that "the times in which consumer contracts were anything other than adhesive are long past").

41. *See 1924 Joint Hearings*, *supra* note 28, at 37; H.R. REP. NO. 68-96, at 1 (1924); Cohen & Dayton, *supra* note 39, at 279 ("Arbitration under the Federal and similar statutes is simply a new procedural remedy . . . ."). To this day, Justice Thomas maintains that the FAA should not apply in state courts. *See, e.g.*, Preston v. Ferrer, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting) ("As I have stated on many previous occasions, I believe that the Federal Arbitration Act (FAA) does not apply to proceedings in state courts." (citation omitted)); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 285 (1995) (Thomas, J., dissenting) ("I disagree with the majority at the threshold of this case, and so I do not reach the question that it decides. In my view, the Federal Arbitration Act (FAA) does not apply in state courts.").

42. *1924 Joint Hearings*, *supra* note 28, at 37 (brief of Julius Henry Cohen).

43. H.R. REP. NO. 68-96, at 2. The Supreme Court would later rely on this Report to justify the conclusion that Congress sought to promote the use of arbitration nationally. *See Concepcion*, 131 S. Ct. at 1749.

44. *1924 Joint Hearings*, *supra* note 28, at 7 (statement of Charles Bernheimer, Chairman, Committee on Arbitration, Chamber of Commerce of the State of New York).

The FAA ultimately passed without a single vote against it in Congress and went into effect on January 1, 1926.[45]

II. THE COURT'S ARBITRATION JURISPRUDENCE OVER THE LAST THIRTY YEARS

Over the past three decades, the U.S. Supreme Court has reshaped the purpose of the FAA.[46] The beginnings of this shift can be traced back to *Southland Corp. v. Keating*.[47] There, the Court first held that section 2 of the FAA applied to state courts and preempted conflicting state substantive law.[48] To buttress its holding, the Court announced, without citation, that in enacting the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum."[49] The majority reasoned that if the FAA only reached federal courts and could be encumbered by hostile state law provisions, that would "encourage and reward forum shopping"—a result the Court was unwilling to attribute to Congress.[50] Many subsequent arbitration decisions have cited to *Southland* for the proposition that Congress prefers private disputes to be arbitrated rather than litigated.[51]

In her dissent in *Southland*, Justice O'Connor rebuffed the majority, highlighting that the FAA's repeated direct references to federal courts belied the

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45. Comm. on Commerce, Trade & Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 153 (1925).

46. Moses argues that the Court has created a statute that the 1925 Congress would not recognize and that would not command a single vote. *See* Moses, *supra* note 2, at 100. In short, "the Court has essentially legislated in favor of its own policy preferences without the benefit of any input from Congress." *Id.* at 154.

47. 465 U.S. 1 (1984). The Court planted the seeds for a sweeping ruling on arbitration in the previous Term when it mentioned in dicta that the FAA represented a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability . . . ." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). But that case ultimately resolved the distinct question of whether a district court had abused its discretion in staying a federal proceeding pending the resolution of an identical state court suit. *Id.* at 19.

48. *Southland*, 465 U.S. at 14-16.

49. *Id.* at 10.

50. *Id.* at 15-16. But Congress often passes procedural laws that only apply in federal court. For example, the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified as amended in scattered sections of 28 U.S.C.), compels heightened judicial scrutiny for certain types of settlements. *See* 28 U.S.C. § 1712(e) (2013). This requirement only applies to class actions filed in federal court. *Id.* § 1711(2) ("The term 'class action' means any civil action filed in a district court of the United States . . . or any civil action that is removed to a district court of the United States . . . ."). Congress is therefore willing to pass statutes that would result in forum shopping by embedding differences in the opportunities available to litigants in federal and state courts.

51. *See, e.g.*, Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 684-85 (1996); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985).

Court's legal conclusions.[52] While conceding that arbitration is a worthy alternative to litigation, she disparaged the Court's failure to faithfully apply the congressional intent behind the FAA as an "exercise in judicial revisionism" that stemmed from a desire to encourage the use of arbitration.[53]

Since *Southland*, the Court has continued to fashion a scheme of arbitration policies that bears little resemblance to any policy developed by a legislative body.[54] *Concepcion* is the most recent culmination of this shift.[55]

In *Concepcion*, Vincent and Liza Concepcion had entered into a contract with AT&T to purchase cell phone services.[56] That sales contract provided for the arbitration of all disputes between the parties and required that claims be brought in an individual capacity; in other words, class actions were barred.[57] When the Concepcions were charged roughly thirty dollars in sales tax on their "free phone," they sued for false advertising and fraud.[58] Their action was later consolidated into a putative class action.[59] Although AT&T moved to compel individual arbitration under the terms of the sales contracts, the California court held that the class action waiver was unconscionable.[60] Under California's *Discover Bank* rule, waivers of class-wide procedures in adhesion contracts were per se unconscionable whenever a court suspected that the party with superior bargaining power was engaging in a plot to "deliberately cheat large numbers of consumers out of individually small sums of money."[61]

On appeal, the Supreme Court held that the FAA preempted California's *Discover Bank* rule.[62] Writing for the majority, Justice Scalia acknowledged that on its face California's common law rule banning class action waivers may be an arbitration-blind, generally applicable contract rule that would fall under the FAA's savings clause.[63] But because the rule was applied in a fashion that disfavored arbitration, and therefore "st[ood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," it must be

52. *Southland*, 465 U.S. at 22, 29-30 (O'Connor, J., dissenting); *see also* 9 U.S.C. § 3 (2013) (mandating the stay of proceedings if "any suit or proceeding be brought *in any of the courts of the United States*" involving an arbitration agreement until the arbitration has been resolved (emphasis added)); *id.* § 4 (allowing an aggrieved party to "petition any *United States district court*" to compel arbitration (emphasis added)).

53. *Southland*, 465 U.S. at 22-23, 36 (O'Connor, J., dissenting).

54. *See* Moses, *supra* note 2, at 113 ("The Court has, step by step, built a house of cards that has almost no resemblance to the structure envisioned by the original statute.").

55. *See* Alexander, *supra* note 35, at 1206 ("The Court's recent cases have ignored the FAA's history and structure and have used the statute as a tool to advance an agenda that is hostile to consumer litigation and classwide procedures.").

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

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1744-45.

61. Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005).

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

63. *See id.* at 1747.

preempted.[64] According to the majority, Congress's purpose in enacting the FAA in 1925 was to facilitate informal, streamlined proceedings for dispute resolution.[65] Since a rule that required class-wide arbitration would interfere with arbitration's efficiency (what the Court described as a "fundamental attribute[] of arbitration"), such a rule would be inconsistent with the FAA.[66] The dissent, written by Justice Breyer, raised the familiar retort that the FAA was simply about judicial recognition of arbitration agreements and was designed to abrogate the common law rule that they were not to be enforced—not to promote the expeditious resolution of claims through arbitration.[67] Responding to this criticism, the majority fell back on legislative history: the Court cited the House Report that described the benefits of arbitration, drawing from that the conclusion that Congress must have found those benefits to be fundamental to arbitration and to the statute as a whole.[68]

The *Concepcion* decision has been met with across-the-board criticism by scholars, state attorneys general, and judges.[69] Lest there be any doubt that the

64. *Id.* at 1753 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

65. *Id.* at 1748.

66. *Id.*

67. *Id.* at 1757 (Breyer, J., dissenting) ("As is well known, prior to the federal Act, many courts expressed hostility to arbitration, for example by refusing to order specific performance of agreements to arbitrate. The Act sought to eliminate that hostility by placing agreements to arbitrate '"*upon the same footing as other contracts*."'" (citation omitted) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974))).

68. *Id.* at 1749 (majority opinion) ("[T]he costliness and delays of litigation . . . can be largely eliminated by agreements for arbitration." (second alteration in original) (quoting Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 220 (1985) (quoting H.R. REP. NO. 68-96, at 2 (1924))) (internal quotation marks omitted)).

69. To list all of the sources disapproving of *Concepcion* would be an impossible task. But here is a smattering of them: Alexander, *supra* note 35; Aragaki, *supra* note 1, at 1254-55 (criticizing the Court's FAA preemption jurisprudence, including *Concepcion*, as an exercise of overpreemption that shifts the balance of power "away from local needs and interests toward a centralized government whose legislative expertise has traditionally laid elsewhere"); Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 144 (2012) ("The opinion fights tirelessly but unsuccessfully to prove that it has not made up this new version of the national policy. It struggles strenuously but unsuccessfully to persuade that there is no conflict between its devotion to arbitration and basic principles of Anglo-American contract law."); Myriam Giles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 658-62 (2012) (detailing solutions to the enforcement gap that *Concepcion* will inevitably create); Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1, 10-14 (2013) (examining the court's inconsistent approach to statutory interpretation in the area of preemption and noting that "even though many of the justices are generally attracted to textualist premises, the Court has tended to rest its preemption decisions on a much more open-ended, purposive approach to interpretation"); Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 5-6 (analyzing the Court's decision as "turn[ing] preemption doctrine on its head" and being inconsistent with the statute's text); Lisa Tripp & Evan R. Hanson, *AT&T v. Concepcion: The Problem of a False Majority*, 23 KAN. J.L. & PUB. POL'Y 1 (2013) (arguing that the rationale of Justice Thomas's concurrence diverges so far from the majority's reasoning that *Concepcion* may truly be a plurality opinion); Michael A. Wolff, *Is There*

Court transformed the FAA into a super-statute,[70] it later held in *American Express Co. v. Italian Colors Restaurant*[71] that the congressional preference for arbitration could frustrate the vindication of a competing federal right. In that case, the Court upheld a class action waiver that effectively barred plaintiffs from bringing claims under the Sherman Act because the cost of individually arbitrating each claim would exceed the potential recovery.[72]

Concepcion's scope is potentially vast. The Ninth Circuit recently issued one of the most pro-arbitration readings of *Concepcion* in *Mortensen v. Bresnan Communications, LLC*.[73] The case involved a Montana rule that prohibited the enforcement of arbitration agreements in adhesion contracts where the arbitration agreements run contrary to the reasonable expectations of the parties.[74] In particular, the rule protected against the unknowing waiver of a fundamental constitutional right, including the rights to trial by jury and access to the courts.[75] In denying a motion to compel arbitration, the district court for the District of Montana attempted to cabin *Concepcion*'s holding by characterizing the case as only a limitation on the FAA's savings clause with respect to unconscionability and class action waivers.[76] Not so, according to the Ninth Circuit. It held that Montana's public policy was preempted by the FAA because the policy "disproportionately applies to arbitration agreements, invalidating them at a higher rate than other contract provisions."[77] Under this rationale, a significant body of state contract law could be displaced simply because those laws are applied more often than not to arbitration provisions. This is especially disconcerting given the prevalence of arbitration provisions.[78] Moreover, "[g]iven the broad interpretation of interstate commerce

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Life After Concepcion*?: State Courts, State Law, and the Mandate of Arbitration*, 56 ST. LOUIS U. L.J. 1269 (2012); and Michelle L. Caton, Comment, *Form over Fairness: How the Supreme Court's Misreading of the Federal Arbitration Act Has Left Consumers in a Lurch*, 21 GEO. MASON L. REV. 497, 498 (2014) (arguing that the judicial expansion of the FAA will undermine consumer arbitration as an institution).

70. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216, 1260-63 (2001) (defining the term "super-statute" as, in part, a statute whose "institutional or normative principles have a broad effect on the law—including an effect beyond the four corners of the statute"—and explaining how the FAA is one such statute).

71. 133 S. Ct. 2304 (2013).

72. *Id.* at 2308.

73. 722 F.3d 1151 (9th Cir. 2013).

74. *Id.* at 1156.

75. *Id.*

76. *Id.*

77. *Id.* at 1161 ("The Montana reasonable expectations/fundamental rights rule arose from state court consideration of adhesive arbitration agreements, and most of the rule's applications have been to those provisions." (citations omitted)).

78. Other circuits have interpreted *Concepcion* more conservatively than the Ninth Circuit's treatment of the case in *Mortensen*. For instance, in *Noohi v. Toll Bros.*, 708 F.3d 599 (4th Cir. 2013), the court held that the FAA did not preempt Maryland's rule of *Cheek v. United Healthcare of the Mid-Atlantic, Inc.*, 835 A.2d 656 (Md. 2003), which requires that an arbitration provision be supported by mutual, adequate consideration in order to be valid. *Noohi*, 708 F.3d at 603, 611-13 ("In a basic sense, the *Cheek* rule does single out an arbitra-

adopted by the Supreme Court, the FAA will [now] apply to most every contract."[79]

III. THE RESPONSE FROM STATE COURTS

Concepcion involved a state law rule that prevented parties with uneven bargaining power from contracting around class actions. And yet, because that general state law rule "frustrated" the efficiency of arbitrations, the FAA preempted it. The writing on the wall was clear: the FAA could potentially displace the entirety of state contract law.[80] In essence, *Concepcion* opened the possibility that the FAA could serve as a means for federal judges to reach into states and tinker with any contract rules that could be said to interfere with arbitration. In a world in which the Court's FAA jurisprudence was more closely aligned with Congress's intent, this would simply be an unfortunate consequence of federal supremacy. States would, however, still have the option of mobilizing the political process to exert pressure on their representatives to narrow the scope of the FAA's preemption. But when the U.S. Supreme Court has premised its decisions on such a broad interpretation of the FAA, the upshot is that states are unable to assert their legal sovereignty in their own courts.[81]

This Part examines how state courts reacted to this perceived threat to their autonomy. Subpart A briefly touches on what state courts thought of the Supreme Court's arbitration jurisprudence even before *Concepcion*. Subpart B looks at state cases that openly defied *Concepcion*'s holding. Subpart C describes the strategies state courts have used to more subtly circumvent *Concepcion*.

A. *State Court Hostility to Federal Interpretation of the FAA Pre-*Concepcion

Even before *Concepcion*, states heavily resisted the Supreme Court's arbitration decisions. Most memorably, Justice Triewieler of the Montana Supreme

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tion provision in a larger contract, and assess whether that provision binds both parties to arbitrate at least some claims. But on closer inspection, we are persuaded that all *Cheek* does is treat an arbitration provision like any stand-alone contract."). But *Mortensen* represents the more accurate reading of *Concepcion*.

79. Stephen Smerek & Daniel Whang, *Preemption and the Federal Arbitration Act: What Law Will Govern Your Agreement to Arbitrate?*, A.B.A. BUS. L. SEC. (Mar. 2006), http://apps.americanbar.org/buslaw/newsletter/0051/materials/pp7.pdf.

80. *See* Arpan A. Sura & Robert A. DeRise, *Conceptualizing* Concepcion*: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403, 404 (2013) (arguing that *Concepcion* "threatens to jeopardize a bevy of facially neutral contract laws as they are applied to arbitration agreements").

81. *See* Alexander, *supra* note 35, at 1208 ("[I]n the current political climate it appears increasingly unlikely that Congress will pass legislation to limit or reverse *Concepcion*.").

Court spoke openly about his disagreement.[82] The Montana Supreme Court had just held that the FAA did not preempt a state law requiring notice on the first page of a contract that the agreement was subject to arbitration.[83] Specially concurring in the judgment, Justice Triewieler wrote separately to express his "personal observation regarding many of the federal decisions which have been cited to us as authority":

> What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of congressional intent when it enacted the Federal Arbitration Act, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, all of [the State of Montana's] procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it.
>
> . . . .
>
> Nothing in our jurisprudence appears more intellectually detached from reality and arrogant than the lament of federal judges who see this system of imposed arbitration as "therapy for their crowded dockets." These decisions have perverted the purpose of the FAA from one to accomplish judicial neutrality, to one of open hostility to any legislative effort to assure that unsophisticated parties to contracts of adhesion at least understand the rights they are giving up.
>
> It seems to me that judges who have let their concern for their own crowded docket overcome their concern for the rights they are entrusted with should step aside and let someone else assume their burdens. The last I checked, there were plenty of capable people willing to do so.[84]

The U.S. Supreme Court subsequently reversed the judgment.[85]

B. *The Express Rejection of* Concepcion *by State Supreme Courts*

Post-*Concepcion*, some state courts openly defied the Court's latest arbitration installment as they struggled to protect the autonomy of their own laws from federal usurpation. The year following *Concepcion*, the Court summarily reversed two state supreme court decisions.[86]

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82. *See* Casarotto v. Lombardi, 886 P.2d 931, 940-41 (Mont. 1994) (Trieweiler, J., specially concurring), *rev'd sub nom.* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1995).

83. *Id.* at 938 (majority opinion).

84. *Id.* at 939-41 (Trieweiler, J., specially concurring).

85. *Doctor's Assocs*., 517 U.S. at 681, 688-89 (holding that special notice requirements that apply solely and specifically to arbitration agreements are antithetical to the goals and policies of the FAA).

86. *See* Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500 (2012) (per curiam), *rev'g* 273 P.3d 20 (Okla. 2011); Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (per curiam), *rev'g* Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250 (W. Va. 2011).

In a case out of West Virginia, three wrongful death suits were brought on behalf of nursing home residents, alleging that various acts and omissions of the nursing home negligently caused the fatal injuries.[87] The admission agreement for the nursing home contained an arbitration clause that covered all future disputes.[88] The state supreme court ruled that, as a matter of public policy, an arbitration clause in a nursing home admission agreement could not be enforced to compel arbitration in a wrongful death matter.[89] The opinion accused the U.S. Supreme Court of manufacturing its FAA jurisprudence out of whole cloth, explaining that "[w]ith tendentious reasoning, the United States Supreme Court has stretched the application of the FAA from being a *procedural* statutory scheme effective only in federal courts, to being a *substantive* law that preempts state law in both federal *and* state courts."[90] In its per curiam reversal, the U.S. Supreme Court chastised the state court for deliberately disregarding *Concepcion*.[91]

So too did the Oklahoma Supreme Court reject *Concepcion*. In *Howard v. Nitro-Lift Technologies, L.L.C.*, the state court voided a noncompete covenant in an employment contract even though the contract required an arbitrator to resolve all disputes.[92] The court relied on the ancient interpretive principle of *generalia specialibus non derogant* (the specific governs over the general) to explain why it would not compel arbitration.[93] An Oklahoma statute denying the validity of noncompete agreements,[94] the court reasoned, was more specific than a general federal statute favoring arbitration; therefore, the narrower Oklahoma law applied without needing to compel arbitration.[95] The state court further insisted that its determination rested on "bona fide, separate, adequate, and independent" state grounds.[96]

The U.S. Supreme Court disagreed. After reminding Oklahoma that it could not treat federal and state law as conflicting laws of equal dignity, the Court vacated the decision.[97] It again cited to *Concepcion*'s rule that any state law that prohibits the arbitration of an otherwise arbitrable claim is preempted.[98] Having now summarily reversed two state supreme courts on the same

87. *Genesis Healthcare*, 724 S.E.2d at 263.

88. *Id.*

89. *Id.* at 292 ("Congress did not intend for arbitration agreements, adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, . . . to be governed by the Federal Arbitration Act.").

90. *Id.* at 278.

91. *Marmet*, 132 S. Ct. at 1202 ("Here, the Supreme Court of Appeals of West Virginia, by misreading and disregarding the precedents of this Court interpreting the FAA, did not follow controlling federal law . . . .").

92. 273 P.3d 20, 24-25 (Okla. 2011), *rev'd per curiam*, 133 S. Ct. 500 (2012).

93. *Id.* at 26 n.21.

94. OKLA. STAT. tit. 15, § 219A (2015).

95. *Nitro-Lift Techs.*, 273 P.3d at 26 n.21.

96. *Id.* at 23 n.5.

97. *Nitro-Lift Techs.*, 133 S. Ct. at 504.

98. *Id.*

issue, the Court impressed upon states the significance of compliance with federal precedent: "State courts rather than federal courts are most frequently called upon to apply the Federal Arbitration Act (FAA), including the Act's national policy favoring arbitration. It is a matter of great importance, therefore, that state supreme courts adhere to a correct interpretation of the legislation."[99]

C. *Veiled Efforts to Undermine* Concepcion

After open rebellion against *Concepcion* failed and the Supreme Court expressed no qualms with summarily reversing decisions that ignored its FAA jurisprudence, state courts employed a number of covert methods to undermine the decision. This Subpart, by providing a sampling of the rationales that state courts have used to bypass *Concepcion*, is intended to be illustrative rather than exhaustive. It could be argued that these decisions are genuine attempts to faithfully apply the Court's arbitration rulings rather than conscious attempts to subvert them. And for some cases, particularly the California Supreme Court's decision in *Iskanian v. CLS Transportation Los Angeles, LLC*,[100] that is likely true. But sometimes, the state court's reasoning seems stretched to the point of incredulity, suggesting that the courts are actually trying to circumvent *Concepcion*.

1. *"The FAA does not apply because the contract at issue does not involve interstate commerce"*

One line of cases argues that the FAA does not apply to contracts that do not involve interstate commerce. This is true enough.[101] But in applying this rule, courts are taking an inappropriately narrow approach to what constitutes interstate commerce.

Favara v. Regent Aerospace Corp.[102] is a good example of this problem. There, a state appellate court held that the FAA did not compel the arbitration of an employee's claims for wage violations because "the employer did not prove that the employment involved interstate commerce."[103] Because the record did not show that the plaintiff's employment involved interstate commerce, the court reasoned that the FAA did not apply.[104] This conclusion is hard to take seriously, for the "[p]laintiff's job involved the responsibility to manage the designing and maintaining of computer and telephone networks and sys-

99. *Id.* at 501 (citation omitted).

100. 327 P.3d 129, 152 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015).

101. *See* Perry v. Thomas, 482 U.S. 483, 489 (1987) (explaining that the FAA applies "unless the agreement to arbitrate is not part of a contract evidencing interstate commerce").

102. No. B246718, 2013 WL 5832391 (Cal. Ct. App. Oct. 30, 2013).

103. *Id.* at *1.

104. *Id.* at *3.

tems in California, other states, and other countries."[105] While the court may have been making a waiver argument,[106] it seems disingenuous to argue that the FAA does not apply in a case that plainly implicates interstate commerce.

In a similar New York case involving a contract for a home security system, plaintiffs sued their security and alarm system company under a contract that contained an arbitration clause.[107] New York General Business Law section 399-c prohibits the use of mandatory arbitration clauses in consumer contracts.[108] The court never reached the question of preemption because it first addressed the predicate question of whether the contract affected interstate commerce.[109] While the court acknowledged that "the holdings in more recent United States Supreme Court cases (*AT&T Mobility*, *Marmet* and *Nitro-Lift*) are conceptually inconsistent" with New York arbitration law, the court stated that it would continue to apply New York common law until the Supreme Court "expressly overrule[d]" that law.[110] The court ultimately held that the contract was not subject to the FAA because it did not affect interstate commerce (even though the alarm company operated in nine states).[111]

These decisions are at odds with modern understandings of the Commerce Clause. The Supreme Court has held that Congress intended the FAA's reach to extend to the limits of the Commerce Clause power.[112] And under the Court's broad interpretation of the Commerce Clause, it is difficult to imagine any commercial contract that does not implicate interstate commerce so as to render the FAA inapplicable.[113] Therefore, the argument that these contracts did not implicate commerce is suspect.

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105. *Id.* at *2 (quoting Appellant's Opening Brief at 16, Favara, 2013 WL 5832391 (No. B246718), 2013 WL 6846473) (internal quotation marks omitted).

106. *Id.* ("Regent's motion to compel arbitration did not advise the trial court that the FAA governs; instead, Regent referenced only the California Arbitration Act.").

107. Schiffer v. Slomin's, Inc., 970 N.Y.S.2d 856, 857-58 (Dist. Ct. 2013).

108. N.Y. GEN. BUS. LAW § 399-c (McKinney 2014).

109. *Schiffer*, 970 N.Y.S.2d at 864.

110. *Id.*

111. *Id.* at 859, 864.

112. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 268 (1995) (holding that section 2's interstate commerce language should be read "broadly, extending the Act's reach to the limits of Congress' Commerce Clause power").

113. While the Rehnquist and Roberts Courts have constricted the power of the Commerce Clause, the cases in which they have done so have been in the criminal context. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995). Moreover, the economic inactivity doctrine developed in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), does not readily apply to merchants and employers. We are therefore left with a New Deal perspective on what constitutes interstate commerce for commercial enterprises. *See* Katzenbach v. McClung, 379 U.S. 294 (1964); Wickard v. Filburn, 317 U.S. 111 (1942).

2. *"The contract at issue incorporates governing rules other than the FAA, which do not require the claims to be arbitrated"*

Some state courts have found that the FAA does not apply because the contract at issue incorporates rules besides the FAA to govern the question of arbitrability. In theory, there is nothing wrong with this argument; two parties may contract to any set of rules to govern the arbitration of a personal dispute.[114] The error lies in an overly broad application of this principle.

In *Harris v. Bingham McCutcheon LLP*, the plaintiff alleged that she was fired from her law firm after she requested reasonable accommodations for a sleep disorder.[115] Her employment contract contained both an arbitration clause and a choice-of-law provision that incorporated Massachusetts law to govern the contract.[116] This included the common law rule of *Warfield v. Beth Israel Deaconess Medical Center, Inc.*, which required agreements to arbitrate statutory discrimination claims to be "stated in clear and unmistakable terms."[117] The court reasoned that, because the parties had agreed to incorporate Massachusetts law into the contract, the *Warfield* rule rendered the arbitration provision void because it did not unambiguously cover claims of discrimination.[118]

Another case employing this line of reasoning, *Imburgia v. DIRECTV, Inc.*, involved a class action against DIRECTV alleging, inter alia, unjust enrichment for improperly charged early termination fees in violation of California's Consumers Legal Remedies Act (CLRA).[119] The customer agreement contained a class action waiver similar to the one addressed in *Concepcion*.[120] It also contained a provision voiding the class action waiver if it was "unenforceable" under the law of the consumer's state—in this case, California.[121] Though *Concepcion* had held that the FAA preempted California's *Discover Bank* rule, that preemption would only apply if the FAA governed the terms of the contract.

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114. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) (holding that Congress's principal purpose in passing the FAA was to ensure "that private arbitration agreements are enforced according to their terms").

115. 154 Cal. Rptr. 3d 843, 844 (Ct. App. 2013).

116. *Id.* at 845-46.

117. 910 N.E.2d 317 (Mass. 2009), *overruled in part by* Joulé, Inc. v. Simmons, 944 N.E.2d 143 (Mass. 2011); *see Harris*, 154 Cal. Rptr. 3d at 846-47.

118. *Harris*, 154 Cal. Rptr. 3d at 848-49. The court also independently determined that *Warfield* had not been abrogated by *Concepcion*. *Id.* at 849. This ruling is somewhat baffling given the similarity between the facts of this case and those of *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), where the Court found Montana's heightened notice requirement for arbitration provisions to be preempted.

119. 170 Cal. Rptr. 3d 190, 192 (Ct. App.), *review denied*, No. S218686 (Cal. July 23, 2014), *cert. granted*, 135 S. Ct. 1547 (2015).

120. *Id.* at 193 ("Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other individuals or entities . . . ." (internal quotation mark omitted)).

121. *Id.* ("If, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [section] is unenforceable." (internal quotation mark omitted)).

The court therefore examined whether the contract's incorporation of California law intended to integrate California law "to the extent it is not preempted by the FAA" or to integrate California law "without considering the preemptive effect, if any, of the FAA."[122] The court held that the latter interpretation made the most sense and applied the CLRA's antiwaiver provision to void the class action waiver despite *Concepcion*.[123]

The flaw in both *Harris* and *Imburgia* is that, presumptively, a contract that incorporates a state's law is meant to only incorporate the laws of that state that are not unconstitutional by federal preemption. To hold that the parties meant to incorporate unconstitutional state laws through a choice-of-law provision is counterintuitive. When deciding a similar case against DIRECTV involving the same customer agreement, the Ninth Circuit described this reasoning as "nonsensical."[124] But it is a convenient way for state courts to bypass FAA preemption by arguing that the parties did not intend for federal law to apply.

As this Note goes to print, the Supreme Court has granted certiorari in *Imburgia* to resolve the question, as framed by petitioner DIRECTV, of whether "a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law preempted by the Federal Arbitration Act."[125] It remains to be seen whether the Court's decision will be primarily based on FAA preemption or on basic principles of contract interpretation. But regardless, it is unlikely that the same five-Justice majority from *Concepcion* will decide this case. Justice Thomas, who provided the fifth vote for the majority in *Concepcion*, has maintained a principled stance that the FAA has no application in state courts.[126]

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122. *Id.* at 195 (internal quotation marks omitted).

123. *Id.* at 195-98.

124. Murphy v. DirecTV, Inc., 724 F.3d 1218, 1226 (9th Cir. 2013). While the Ninth Circuit is correct in its conclusion that a choice-of-law provision should not be interpreted as excluding applicable federal law, some of the court's own reasoning in arriving at that decision is questionable. Judge Wardlaw explained that "the *Discover Bank* rule is not, and indeed never was, California law" because it was automatically nullified by the FAA. *Id.* A contract selecting California law as the governing law, she reasoned, could therefore never incorporate the *Discover Bank* rule. *Id.* But this is not entirely accurate. The *Discover Bank* rule still remains applicable to contracts that do not implicate interstate commerce, as the FAA does not apply to those contracts. *See supra* note 101. While it is admittedly a small pool of contracts that would fall into this category, the *Discover Bank* rule would still be valid California law as applied to those contracts.

125. Petition for Writ of Certiorari at i, DIRECTV, Inc. v. Imburgia, No. 14-462 (U.S. Oct. 21, 2014), 2014 WL 5359805.

126. *See supra* note 41.

3. *"This case is not between the employer and the employee, but between the employer and state enforcement agencies not bound by any contract"*

Finally, some courts have developed legal theories that, though entirely valid, effectively render the FAA moot in certain circumstances. The most prominent example of this is the application of the Private Attorneys General Act (PAGA) in California courts.[127] In California, a number of statutes provide for significant civil penalties for violations of the Labor Code.[128] The Labor Commissioner would normally collect these penalties.[129] But due to a shortage of government resources, the state government had not been doing so.[130] The state legislature resolved this problem by enacting PAGA in 2004.[131] The Act allows aggrieved employees to sue on behalf of the state to enforce these civil penalties.[132] A share of the recovery goes to the employees as an incentive for private enforcement.[133] And a single aggrieved employee may bring a representative action on behalf of other similarly situated employees.[134]

Until recently, California courts were split on whether suits brought under PAGA were subject to the FAA.[135] But in *Iskanian v. CLS Transportation Los*

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127. *See* CAL. LAB. CODE §§ 2698-2699.5 (West 2014).

128. *See, e.g.*, *id.* § 210 (imposing penalties for failure to pay wages in the proper time and manner); *id.* § 222.5 (imposing penalties for the unlawful withholding of wages).

129. *Id.* § 210(b) ("The penalty shall be recovered by the Labor Commissioner as part of a hearing held to recover unpaid wages and penalties pursuant to this chapter or in an independent civil action.").

130. *See* ASSEMBLY COMM. ON LABOR & EMP'T, BILL ANALYSIS, SB 796, 2003-2004 Reg. Sess., at 3 (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0751-0800/sb_796_cfa_20030708_130803_asm_comm.html (describing how some state agencies were "failing to effectively enforce labor law violations").

131. Arias v. Superior Court, 209 P.3d 923, 929-30 (Cal. 2009) ("The Legislature declared that adequate financing of labor law enforcement was necessary to achieve maximum compliance with state labor laws, that staffing levels for labor law enforcement agencies had declined and were unlikely to keep pace with the future growth of the labor market, and that it was therefore in the public interest to allow aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.").

132. LAB. § 2699(a) ("[A]ny provision of this code that provides for a civil penalty to be assessed and collected by the Labor and Workforce Development Agency . . . may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees . . . .").

133. *Id.* § 2699(i) ("[C]ivil penalties recovered by aggrieved employees shall be distributed as follows: 75 percent to the Labor and Workforce Development Agency . . . and 25 percent to the aggrieved employees.").

134. *See supra* note 132 and accompanying text.

135. *Compare* Baker v. Tognazzini Family, Inc., No. B247137, 2013 WL 6159167, at *3-4 (Cal. Ct. App. Nov. 25, 2013) (holding that an arbitration provision did not waive the right to bring a PAGA claim), *and* Brown v. Ralphs Grocery Co., 128 Cal. Rptr. 3d 854, 863 (Ct. App. 2011) ("In short, representative actions under the PAGA do not conflict with the purposes of the FAA. If the FAA preempted state law as to the unenforceability of the PAGA representative action waivers, the benefits of private attorneys general actions to en-

Angeles, LLC,[136] the California Supreme Court put the issue to rest. The case involved a class action lawsuit on behalf of an employee and similarly situated employees alleging failure to compensate for overtime work and meal and rest periods.[137] The plaintiffs had signed an agreement to arbitrate "any and all claims" arising out of their employment.[138] The central question was whether an aggrieved employee could waive his right to bring a representative action under PAGA in court and, if not, whether such a common law prohibition ran afoul of the FAA.[139]

After answering the first question in the negative, the court went on to address the elephant in the room—whether making PAGA actions unwaivable frustrated the FAA's objectives of ensuring an efficient forum for the resolution of private disputes.[140] It would not, the majority decided:

> Simply put, a PAGA claim lies outside the FAA's coverage because it is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the state, which alleges directly or through its agents . . . that the employer has violated the Labor Code.[141]

Because the FAA's command to enforce arbitration only reaches private disputes "arising out of such contract or transaction,"[142] and because the government was not a party to the arbitration agreement, the court held that it was not bound to arbitrate its public enforcement action.[143]

This ruling will have significant implications in California. The civil penalties imposed by PAGA are cumulative and hefty—$100 for each aggrieved employee per pay period for the initial violation and $200 for each subsequent violation per employee per pay period.[144] And a single employee can sue as a proxy for all aggrieved employees,[145] functionally creating a public enforcement action that bears many similarities to a class action without imposing the requirements of class certification.[146] Most importantly, PAGA allows twenty-

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force state labor laws would, in large part, be nullified."), *with* Goss v. Ross Stores, Inc., No. A133895, 2013 WL 5872277, at *5 (Cal. Ct. App. Oct. 31, 2013) (reversing a trial court's denial of a motion to compel individual arbitration under PAGA because the "FAA preempts any attempt by a court or state legislature to insulate a particular type of claim from arbitration"), *and* Iskanian v. CLS Transp. L.A., LLC, 142 Cal. Rptr. 3d 372, 384 (Ct. App. 2012) ("[A]ny state rule prohibiting the arbitration of a PAGA claim is displaced by the FAA."), *rev'd*, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015).

136. 327 P.3d 129.

137. *Id.* at 133.

138. *Id*.

139. *Id.*

140. *Id.* at 149.

141. *Id.* at 151 (emphasis omitted).

142. 9 U.S.C. § 2 (2013).

143. *Iskanian*, 327 P.3d at 152-53.

144. CAL. LAB. CODE § 2699(f)(2) (West 2014).

145. *See supra* note 132 and accompanying text.

146. Arias v. Superior Court, 209 P.3d 923, 933-34 (Cal. 2009) (holding that PAGA actions do not violate due process just because they are not brought as class actions).

five percent of any recovery to go to aggrieved employees.[147] From the employees' perspective, PAGA suits may substitute for regular lawsuits to the extent that their recovery approaches what they would receive in compensatory damages.

Janet Alexander proposed this very solution as a means to fill the deterrence gap created by *Concepcion*.[148] State legislatures, she argued, could create statutory qui tam regimes that would deputize citizens to enforce violations of state consumer protection and employment laws.[149] For many of the same reasons put forth by the California Supreme Court in *Iskanian*, Alexander believes such an approach would survive federal preemption.[150] To conclude otherwise, she argues, "would seriously impair the state's ability to execute core governmental functions" and would be an "intrusion into state sovereignty that should give pause to neo-federalists such as the majority in *Concepcion*."[151]

While this approach represents a novel legal theory, there are several potential issues with it. First, it is not entirely true that the representative action at issue in *Iskanian* does not arise out of the contract. As the concurrence in *Iskanian* pointed out,[152] a PAGA suit may only be brought by an "aggrieved employee."[153] An employee's ability to act as a proxy for the government is contingent on her existing employment status, which in turn is contingent on the employment contract with an arbitration provision governing all claims arising out of the employment. Second, the U.S. Supreme Court may still find that the California Supreme Court's approach runs afoul of the FAA. It could view the recovery as serving the same function as compensatory damages because only injured parties can bring representative actions. As such, the Court could characterize these technically public enforcement actions as private disputes. A failure to compel arbitration would therefore undercut the spirit of *Concepcion* and frustrate the FAA's purpose of promoting efficiency in private disputes. Alternatively, the Court may respond by developing its own theory that limits the flexibility of state agencies to deputize private citizens in qui tam actions.

IV. CREATING A FRAMEWORK TO DISCUSS STATE RESISTANCE TO FEDERAL ARBITRATION LAW

The arbitration cases reveal how federal preemption can broadly interfere with state statutory and common law. Needless to say, this is not the first time

147. *See supra* note 133.

148. Alexander, *supra* note 35, at 1239.

149. *Id.* at 1203. Alexander even provided detailed advice on how to draft such statutes so that they do not conflict with the FAA. *See id.* at 1234-39.

150. *Id.* at 1224-25.

151. *Id.* at 1203.

152. Iskanian v. CLS Transp. L.A., LLC, 327 P.3d 129, 157 (Cal. 2014) (Chin, J., concurring), *cert. denied*, 135 S. Ct. 1155 (2015).

153. CAL. LAB. CODE § 2699(c) (West 2014).

preemption has had this effect. Throughout the twentieth century the Court took up over one hundred cases solely to address the sufficiency of evidence in cases brought under the Federal Employers' Liability Act (FELA).[154] In the vast majority of these cases, the Court reversed jury decisions that were in favor of the defendant.[155] This culminated in a dissent by Justice Frankfurter in which he decried the Court for granting certiorari for reasons that were antithetical to the purpose of the Supreme Court and the rules governing the certiorari process. Justice Frankfurter criticized the Court's reliance on ideology: "With a changed membership, the Court might tomorrow readily affirm all four of these cases that it decides today. There is nothing in the Federal Employers' Liability Act to say which view is correct."[156] One could argue that this era of FELA jurisprudence may have actually been, in part, about restructuring the tort and jury systems in states that were not plaintiff friendly.[157]

And as with FELA, the Court's FAA jurisprudence may also have the effect of restructuring state common law. Even before *Concepcion*, states often applied the doctrine of unconscionability to curtail the FAA's preemptive effect.[158] The question now is whether such pushback is ever appropriate. The state cases that have resisted a faithful and expansive application of *Concepcion* provide an excellent case study on the implications of state hostility to federal law in a dual sovereignty system.

When the Supreme Court misinterprets a statute, it may disrupt both horizontal and vertical separation of powers principles. Under horizontal separation of powers, the legislative and executive federal branches may exert checks on the Court to restore balance. For instance, via the amendment process, Congress may start the process of rectifying a constitutional interpretation that carries with it profound negative consequences—as has occurred on a number of occasions[159] and has been attempted countless more times.[160] Congress may

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154. *See* Ferguson v. Moore-McCormack Lines, Inc., 352 U.S. 521 app. A at 548, app. B at 549 (1957) (Frankfurter, J., dissenting) (listing all the FELA cases the Court had taken up from the 1911 Term through the 1955 Term).

155. *See id.* app. B at 549.

156. *Id.* at 545-46 ("[A]t one time the chief concern may be lively regard for what are conceived to be unfair inroads upon the railroads' exchequer while at another period the preoccupation may be with protection of employees and their families . . . ." (footnote omitted)).

157. *Cf.* F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 466 (2006).

158. Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1420 (2008) ("As the Supreme Court has shut off most other means of resisting arbitration, the state law doctrine of unconscionability has in the last several years become a surprisingly attractive and successful tool for striking down arbitration agreements." (italics omitted)). Ironically, such strategies likely led to decisions like *Concepcion*.

159. *See, e.g.*, U.S. CONST. amend. XI (abrogating *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793)); U.S. CONST. amends. XIII-XIV (abrogating *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856)); U.S. CONST. amend. XXVI (abrogating *Oregon v. Mitchell*, 400 U.S. 112 (1970)); *see also* William N. Eskridge, Jr., *Overriding Supreme Court Statutory*

also revise a statute that has been interpreted or applied in a way that is inconsistent with its intent.[161]

This rebalancing has no adequate analogue in the context of vertical separation of powers. If the Supreme Court (or any branch of the federal government for that matter) chips away at state power, states have no means to affirmatively assert their own sovereignty. In part, this is the price of the Supremacy Clause. But the upshot is a one-way ratchet that has allowed the federal government to grow and take over many of the powers that were traditionally reserved for the states. Even with the current federalism resurgence, states' rights have eroded and the role of the federal government has vastly increased relative to the role of the states. The Commerce Clause has expanded far beyond its original meaning, allowing Congress to regulate almost any activity. Preemption doctrine has developed a purposivist angle that allows federal law to displace state laws that create an obstacle to achieving congressional goals.[162] Both the FELA line of cases and the Court's arbitration jurisprudence embody the consequences of such a one-way ratchet.

Against this backdrop, state resistance may play an essential part in preserving states' legal autonomy. The state court responses to the Supreme Court's interpretation of the FAA can be placed along a spectrum according to their level of divergence from federal law. At one end of this spectrum is outright noncompliance. The Supreme Court of Appeals of West Virginia's decision in *Brown ex rel. Brown v. Genesis Healthcare Corp.*, in which it disregarded what it considered to be the U.S. Supreme Court's "tendentious reasoning," epitomizes this category.[163] Cases in which judges fully comply with federal precedent despite disagreement with its application would fall on the opposite end. In the middle of the spectrum lie court decisions that abide by federal precedent but limit its potential preemptive scope. They do so by developing novel theories that function as valid work-arounds to preemption or by

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Interpretation Decisions, 101 YALE L.J. 331 (1991) (conducting an empirical analysis of congressional override of Supreme Court decisions).

160. *See, e.g.*, S.J. Res. 19, 113th Cong. (2013) (attempting to overturn *Citizens United v. FEC*, 558 U.S. 310 (2010), by constitutional amendment, but dying on the Senate floor); H.R. 595, 98th Cong. (1983) (attempting to overrule *Carlson v. Green*, 446 U.S. 14 (1980), but dying in committee); S.J. Res. 41, 97th Cong. (1981) (attempting to modify *United Steelworkers v. Weber*, 443 U.S. 193 (1979), but dying in subcommittee); *see also* Eskridge, *supra* note 159, at 442-49 (cataloging congressional attempts at overriding judicial interpretations of federal statutes between 1977 and 1988).

161. *See, e.g.*, Pregnancy Discrimination Act, Pub L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2013)) (amending Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy, abrogating *Geduldig v. Aiello*, 417 U.S. 484 (1974)); *see also* Eskridge, *supra* note 159, at 424-49.

162. *See* Note, *Preemption as Purposivism's Last Refuge*, 126 HARV. L. REV. 1056 (2013) (arguing that the textualist revolution has taken over nearly all areas of legal interpretation, except for the Supreme Court's preemption doctrine, in which purposivist thinking still thrives).

163. 724 S.E.2d 250 (W. Va. 2011), *rev'd per curiam sub nom.* Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012).

cabining the federal precedent to its facts. *Iskanian* is representative of this approach. This Part addresses the deficiencies of the strategies at either extreme of this spectrum and the benefits of the middle-ground approach.

A. *One End of the Spectrum: States Fully Comply with the Court's Interpretation of Federal Law*

Under a perfect-compliance approach, state courts fully internalize federal precedent in both letter and spirit no matter the impact on state law and policy. This approach does not necessarily lead to negative outcomes. If state and federal interests are aligned, then there would be no need for anything but perfect compliance.

The problem arises when national policy diverges from local policy, as is often the case in the context of arbitration law. As discussed above, vertical separation of powers leaves states with little ability to stop the encroachment of federal law into areas of state concern. In theory this route leaves open the political process to allow citizens who are displeased with the federal government's encroachment on states' rights to pressure lawmakers to show greater respect for state sovereignty. But that presumes the availability of federal lawmakers who would be willing to shrink their own authority once elected.

If states acquiesced to *Concepcion*, the result could be a permanent dilution of state contract law principles. In a world in which states are perfectly compliant to federal preemption, the power of local communities to control the laws they live under will be continually eroded. The severity of this approach may ebb and flow with time, but it will ultimately result in the narrowing of the roles of state governments in society.

But this approach is not without its benefits. Most significantly, with national uniformity on the meaning of federal law, there would be greater certainty and predictability. All other approaches lack this feature.

B. *The Other End: Outright Noncompliance with Federal Law*

At the other end of the spectrum, state courts are encouraged to disregard federal interpretations of the law that run contrary to state policy. They run the risk of getting overturned on appeal or summarily reversed, but given the limited capacity of the U.S. Supreme Court, that risk could be acceptably negligible.

The question of whether state courts have independent authority to formally void federal law was originally open to debate. The doctrine of interposition represented the idea that a state could interpose itself between the federal government and its citizens by voiding what it perceived to be unconstitutional

federal law.[164] A series of cases chipped away at this concept. First, *Martin v. Hunter's Lessee* established that federal courts have the authority to review state court decisions on issues of federal law.[165] Later, *Ableman v. Booth* held that state courts' interpretation of federal law cannot contradict prior decisions of federal courts.[166] Finally, if any doubt remained, the role of the federal courts in post-Civil War reconstruction solidified the notion that states lack equal authority to interpret federal law. Presently the doctrine of interposition has been wholly repudiated by courts and is not recognized as a valid doctrine of constitutional construction[167]—and with good reason. Interposition brings with it a host of problems, many of which would be present if state courts were informally allowed to defy federal supremacy.

First, state judicial noncompliance sanctions lawlessness. Defiance of this breed undermines the rule of law and reduces faith in the legal order, which could lead to more general kinds of illegality. It could also cause the perception of unfairness. Defiance jeopardizes the protections that come with the legal system.[168] As Justice Stewart once explained, respect for the judicial system and its processes "is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom."[169]

Some may argue that state noncompliance with federal arbitration law is just like jury nullification, which many consider to be a legitimate aspect of the legal system.[170] But key differences set apart jury nullification from state noncompliance. Jury nullification is inherently a one-off phenomenon, whereas court decisions have precedential value that impact future litigants. Also, unlike

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164. BLACK'S LAW DICTIONARY, *supra* note 23, at 943 (defining "interposition" as "[t]he action of a state, while exercising its sovereignty, in rejecting a federal mandate that it believes is unconstitutional or overreaching").

165. 14 U.S. (1 Wheat.) 304, 351 (1816).

166. 62 U.S. (21 How.) 506, 525 (1858) ("But the decisions in question were made by the supreme judicial tribunal of the State; and when a court so elevated in its position has pronounced a judgment which, if it could be maintained, would subvert the very foundations of this Government, it seemed to be the duty of this court, when exercising its appellate power, to show plainly the grave errors into which the State court has fallen, and the consequences to which they would inevitably lead.").

167. *See, e.g.*, Cooper v. Aaron, 358 U.S. 1 (1958); Bush v. Orleans Parish Sch. Bd., 188 F. Supp. 916, 921, 922-27 (E.D. La. 1960) (invalidating an interposition statute "by which Louisiana declare[d] that it w[ould] not recognize the Supreme Court's decision in Brown v. Board of Education").

168. *See Cooper*, 358 U.S. at 18 ("No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it."); *Orleans Parish Sch. Bd.*, 188 F. Supp. at 924 ("Assuming always that the claim of interposition is an appeal to legality, the inquiry is who, under the Constitution, has the final say on questions of constitutionality, who delimits the Tenth Amendment. In theory, the issue might have been resolved in several ways. But, as a practical matter, under our federal system the only solution short of anarchy was to assign the function to *one supreme court*.").

169. Walker v. City of Birmingham, 388 U.S. 307, 321 (1967).

170. *See, e.g.*, Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1155 (1997) (arguing that "jury nullification can, and in many contexts does, occur *within* the rule of law rather than subvert it").

juries, who make binary decisions without needing to proffer a formal explanation, judges often must explain their reasoning and thus make their break from precedent unambiguous.

Second, noncompliance has historically led to disastrous results. When the Supreme Court held racial segregation in schooling unconstitutional in *Brown v. Board of Education*,[171] some state legislatures and governors defied the ruling and refused to enforce integration.[172] President Eisenhower ultimately had to send troops to Little Rock, Arkansas, to restore order.[173] A more recent example of the detriments of state noncompliance is playing out regarding the constitutionality of same-sex marriage. Bills are being introduced in a number of states that would forbid government employees from issuing marriage licenses to same-sex couples, despite numerous holdings by federal courts that such a practice is forbidden by the Fourteenth Amendment.[174] The chief justice of the Alabama Supreme Court recently said he would continue to enforce the state's same-sex marriage ban despite a federal court ruling holding the ban unconstitutional.[175] While much of this may be political posturing, it inevitably undermines the integrity of the judicial enterprise.

Third, federal law would lack uniformity. If states freely dismissed interpretations of federal law, national law could change drastically from one state to the next. This patchwork system would lead to reduced predictability of judicial outcomes, which in turn would hamper one of the law's main purposes—to influence people's future behavior. This is especially critical in an area of law such as contracts, where parties are looking forward to predict how courts will enforce the terms as they are written.

Finally, and perhaps most critically, if state courts freely disregarded Supreme Court decisions, the Supremacy Clause would be rendered meaningless.

C. *The Middle Ground: State Courts Narrow the Preemptive Effect of Federal Law*

In the middle of the spectrum lie decisions like *Iskanian*. In cases like these, state courts do not disregard authoritative interpretations of federal law. Rather, they adopt their own interpretations of federal law that are limiting and confine the federal precedent to its facts. This approach comes with a number of benefits.

First, it is an effective means of preventing state law from being entirely swept up by preemption. In California, the people and the legislature deter-

171. 347 U.S. 483 (1954).

172. *See, e.g.*, *Cooper*, 358 U.S. at 8-12.

173. Anthony Lewis, *President Sends Troops to Little Rock, Federalizes Arkansas National Guard; Tells Nation He Acted to Avoid Anarchy*, N.Y. TIMES, Sept. 25, 1957, at 1.

174. Richard Fausset & Alan Blinder, *States Renew Fight to Stop Same-Sex Marriage*, N.Y. TIMES (Jan. 28, 2015), http://www.nytimes.com/2015/01/29/us/battles-over-same-sex-marriage-roil-statehouses-ahead-of-supreme-courts-decision.html.

175. *Id.*

mined through the passage of PAGA that violations of the Labor Code were a significant societal harm.[176] If the California Supreme Court adopted an expansive reading of *Concepcion*, which perhaps would be more consistent with the spirit of the decision, this policy choice would be lost. Instead, by arguing that the employment contract at issue in *Iskanian* does not govern PAGA suits because such claims technically belong to the government, the California Supreme Court was effectively able to preserve this policy choice while still respecting the preemptive bounds of the FAA.

Second, state decisions on this end of the spectrum do not sanction lawlessness; the rule of law is still respected and adhered to. As some evidence of this, consider that the U.S. Supreme Court recently denied certiorari in *Iskanian*.[177] While a denial of certiorari can arise for any number of reasons—for example, the issue presented may be too muddled by other confounding, dispositive issues—it can represent some indication that the Court does not disagree with the application of federal law. At the very least, were *Iskanian* to be as off base as the Supreme Court of Appeals of West Virginia's decision in *Genesis Healthcare* was, the Court could have just summarily reversed it.

Finally, it is well established that some common law is best created at the trial court level.[178] Judges who have witnessed live testimony themselves have the strongest sense of where the equities lie and are thus best situated to determine how the law should apply. When trial courts adopt alternative theories of liability or craft exceptions, they are communicating to appellate courts and the legislature that the law, as currently interpreted, does not align with the real-world purposes for which it was created. This is especially important in the context of arbitration because, as the Court has noted, state courts are often the ones most relied on to apply the FAA.[179] Courts that narrowly confine *Concepcion* to its facts are thus signaling that the FAA's broad preemptive effect may not function properly on the ground level.

Of course, this is not a perfect solution. Complete uniformity of federal law will not be achieved if states differ in their treatment of Supreme Court precedent. But is such a result lamentable? If the Court theoretically had unlimited judicial capacity and could hear and resolve every issue of federal law that remained an open question, would that system be superior to the status quo? Or should law exist in a state of dynamic equilibrium in which precedent is faithfully applied but still tailored to local concerns?

Moreover, while this middle-ground approach appears to balance federal supremacy with a respect for state law, it remains unclear where the line sepa-

176. *See* ASSEMBLY COMM. ON JUDICIARY, BILL ANALYSIS, SB 796, 2003-2004 Reg. Sess. (Cal. 2003), *available at* http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_0751-0800/sb_796_cfa_20030626_110301_asm_comm.html.

177. CLS Transp. L.A., LLC v. Iskanian, 135 S. Ct. 1155 (2015).

178. *See* David P. Leonard, *Appellate Review of Evidentiary Rulings*, 70 N.C. L. REV. 1155, 1204 (1992) (discussing this theory as applied to evidence law).

179. Nitro-Lift Techs., L.L.C. v. Howard, 133 S. Ct. 500, 501 (2012) (per curiam).

rating this kind of nuanced resistance from noncompliance should be drawn. As previously discussed, *Iskanian* is convincing in its own right and merely has the secondary effect of limiting *Concepcion*'s scope. But several of the other decisions discussed, such as those finding the FAA inapplicable because interstate commerce was not implicated, would purportedly fall into this category even though their reasoning is unpersuasive. In reality, these state court opinions may be just as noncompliant as those cases that the Supreme Court summarily reversed—the only difference being that, rather than expressly rejecting *Concepcion*, these decisions were veiled in nominal legal rhetoric. Therefore, and unsurprisingly, the legitimacy of this middle-ground approach is highest when a state court can *convincingly* distinguish federal precedent so that the decision is not suspect.

CONCLUSION

Globalization has forced the United States to be a far less local society than it was at the Founding. The country as a whole may gradually be acquiescing to or even embracing a more centralized system of government. But as long as we continue to value the concept of state sovereignty and the benefits that come with it, local communities should maintain a role in designing the norms and customs that govern them.

The Supreme Court has adopted an interpretation of the FAA that strays far from the original congressional intent behind the law. In doing so, countless state laws that "frustrate" the purposes of the FAA stand to be displaced. State courts have ranged in their responses—from outright defiance to more veiled efforts that purport to abide by federal law—as they struggle to preserve state contract law. This Note concludes that this pushback from states is most functional when state courts abide by federal precedent but limit its application to narrow circumstances. This tug-of-war playing out between state and federal courts is inherent in our system of government. Congress and the President may try to expand the constitutional power of their respective branches while the other branches resist such expansion. The case is no different for the allocation of power between the states and the federal government. And when states resist or hamper the expansion of preemptive federal law, they allow local needs to continue to shape the rules that impact our daily lives.

None of this is to suggest that arbitration is inherently undesirable. When businesses agree to arbitrate rather than litigate, it unburdens court dockets and prevents taxpayers from footing the bill for their dispute. Nor is it to imply that federal law has no part to play in establishing contract law. There are significant benefits to having a default set of rules to apply to all transactions that occur within a national economy. But it is also true that the law needs to be flexible and that a one-size-fits-all approach is not always appropriate.