

## Fully Federalizing the Federal Arbitration Act

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*There is a widely shared belief that the Supreme Court’s Federal Arbitration Act (FAA) doctrine is far too solicitous of arbitration and not sufficiently solicitous of state lawmaking power. That may be so, but the Court has interpreted one provision of the FAA, the savings clause, to permit the application of state law to invalidate otherwise*

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*enforceable arbitration agreements. This Article examines the savings clause and its impact on provisions in arbitration agreements that interfere with the ability of claimants to effectively enforce substantive federal- or state-law rights.*

*The Court's interpretation of the savings clause as preserving a role for state law is dicta. A better reading is that the savings clause authorizes federal courts to create federal common law to govern the enforcement of covered arbitration agreements. That alternative interpretation is consistent with the Court's treatment of the rest of the statute; it is consistent with an analogous regulatory scheme—federal common law regulation of the enforcement of collective bargaining agreements—and it reflects a division of lawmaking authority that would have been familiar to the Congress that passed the FAA in 1925. Moreover, while there are no doubt legitimate state interests in regulating arbitration agreements and guaranteeing parties a judicial forum for the assertion of certain rights, that alone does not require application of state law to FAA-covered arbitration agreements. Like it or not, Congress has the authority to regulate the enforcement of arbitration agreements in interstate commerce, and a necessary consequence is the displacement of some overlapping state law.*

*A fully federalized savings clause would result in the development of a uniform body of arbitration law, and that body of law could prove to be at least as effective, and perhaps even more effective, in addressing the major arbitration issue of our time: the imposition on relatively weak parties, like consumers and employees, of agreements that effectively deprive those parties of the right to assert their federal- or state-law rights. This nascent body of federal common law helps shed light on the Supreme Court's recent decision in *AT&T v. Concepcion* and helps chart a post-*Concepcion* approach to the issue of "lopsided" arbitration agreements.*

## INTRODUCTION

**T**he Supreme Court's Federal Arbitration Act (FAA) jurisprudence has been, to put it mildly, much maligned.<sup>1</sup> Perhaps the most

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<sup>1</sup> *E.g.*, *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) ("[T]he 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."); Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326, 327 (2007) ("I regard the set of Supreme Court arbitration decisions to create an atrophied role for state arbitration regulation, to ignore respected,

common criticism is that this “simple procedural statute enacted to require enforcement of arbitration agreements in federal court” has been transformed by the Court into a source of substantive federal arbitration law that governs and favors the enforcement of virtually every arbitration agreement entered into in the United States and displaces otherwise applicable state law.<sup>2</sup> That “simple procedural statute” provides, in § 2:

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>3</sup>

At ground zero of this critique is the Court’s 1984 decision in *Southland Corp. v. Keating* that the FAA applied in a state court

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long-standing tenets of federalism, and to use a strange, unorthodox mode of preemption analysis almost preordained to overwhelm state arbitration law.”); 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, 157–58 (2006) (“[T]here is no change of mores or understanding that supports the extraordinary rewriting of the FAA by the Supreme Court[,] . . . which leads back to the *Lochner* era, when state protective legislation . . . was struck down in the name of ‘freedom of contract’ . . . .”); Richard C. Reuben, *Western Showdown: Two Montana Judges Buck the U.S. Supreme Court*, A.B.A. J., Oct. 1996, at 16, 16 (reporting that two justices on the Montana Supreme Court described “the United States Supreme Court’s decision[s] in . . . cases which interpret and apply the Federal Arbitration Act” as “legally unfounded, socially detrimental and philosophically misguided”); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. (forthcoming 2012) (manuscript at 12) (“The Supreme Court is as irretrievably lost in its arbitration jurisprudence as it has ever been in any line of cases . . . .”), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1761675](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1761675).

<sup>2</sup> Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 61 DUKE L.J. (forthcoming 2012) (manuscript at 8) (“It is well-known that the Supreme Court’s interpretation of the . . . FAA in pivotal cases from the late 20<sup>th</sup> century rendered virtually all arbitration agreements in most contracts governed by federal law.”), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1809005](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1809005); Moses, *supra* note 1, at 99; see also Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1353 (1985) (The FAA “is now definitively established as a substantive federal law, preemptive and binding on the states, and articulating a federal policy extending to issues well beyond its literal terms.”).

<sup>3</sup> 9 U.S.C. § 2 (2006). There is universal agreement that Congress passed the FAA to overcome the unwillingness of federal judges to order specific enforcement of arbitration agreements. *E.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (stating that “[t]he FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements”); Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1228 (2011) (“[T]he FAA was first and foremost a response to the ancient common law hostility toward arbitration . . . .”); Cunningham, *supra* note 2 (manuscript at 2) (observing that Congress reversed the hostility of nineteenth-century judges to arbitration when it passed the FAA in 1925). But beyond that, the consensus breaks down.

where a state-law claim was being asserted and preempted a state statute barring arbitration of disputes between franchisees and franchisors.<sup>4</sup> The majority declared that “the Federal Arbitration Act creates federal substantive law requiring the parties to honor arbitration agreements.”<sup>5</sup> Thus, the Court held that the FAA common law it had previously applied in federal court applied, like all federal substantive law, in state court as well. A principal tenet of that body of law, as one example, was expressed by the Court one year before *Southland*, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*<sup>6</sup> There the Court declared, “Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . . The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .”<sup>7</sup>

Other decisions central to the Court’s consolidation of the FAA as the arbitration law of the land include *Allied-Bruce Terminix Cos., Inc. v. Dobson*, in which the Court held that the FAA’s application to arbitration agreements in “contract[s] evidencing a transaction involving commerce” extended to the full reach of Congress’s power under the Commerce Clause.<sup>8</sup> In a series of cases beginning with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court concluded that the FAA required enforcement of agreements to arbitrate virtually any federal statutory claim.<sup>9</sup> And finally, in *Circuit City Stores, Inc. v. Adams*, the Court held that the FAA’s exclusion from coverage of contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce should be read narrowly, to exclude from the reach of the FAA only arbitration agreements in the employment contracts of “transportation workers.”<sup>10</sup>

Thus, for example, it is settled law that the FAA would apply (1) in an action brought in state court in California by a discharged employee claiming that her discharge was wrongful under state law and (2) in an action by a similar employee in federal court for a

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<sup>4</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 3–17 (1984).

<sup>5</sup> *Id.* at 15 n.9.

<sup>6</sup> 460 U.S. 1 (1983).

<sup>7</sup> *Id.* at 24–25.

<sup>8</sup> 513 U.S. 265, 268 (1995) (quoting 9 U.S.C. § 2).

<sup>9</sup> 473 U.S. 614 (1985) (federal antitrust claim).

<sup>10</sup> 532 U.S. 105, 119 (2001).

violation of Title VII. To be more specific, the federal substantive law of arbitration would apply if the defendant in either case sought a stay of the litigation and an order compelling the plaintiff to arbitrate based on an arbitration provision in her employment contract.<sup>11</sup>

I do not intend to take sides on the question whether the Court has erred in its cases interpreting the FAA to have such wide application. Instead, I want to focus on a surprisingly unexamined provision of § 2 of the FAA—the “savings clause”—which provides an exception to the rule mandating specific enforcement of written arbitration agreements in contracts in interstate commerce. Under the savings clause, such agreements are “enforceable save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>12</sup>

There are at least two notable aspects of the Supreme Court’s interpretation of the savings clause. First, in contrast to its holding in *Southland* and other cases that the FAA authorizes the creation of a federal common law of arbitration, the Court has stated repeatedly that the reference in the savings clause to “such grounds as exist at law or in equity for the revocation of any contract” is a reference to *state* law.<sup>13</sup> Second, that reading of the savings clause is dicta, and it appears that neither the Justices nor the parties to relevant cases before the Court spent much time or energy considering alternative interpretations.<sup>14</sup>

Thus, to return to our hypothetical employment-law disputes, under the prevailing interpretation of the savings clause, the plaintiff in each could argue that the arbitration agreement in the employment contract was not enforceable because it was unconscionable, and that argument would be resolved by reference to California’s common law of contracts. That was the setting for the Supreme Court’s latest FAA case, *AT&T Mobility LLC v. Concepcion*,<sup>15</sup> and that is the state of affairs I want to examine.

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<sup>11</sup> 9 U.S.C. §§ 3, 4 (providing for applications for a stay of proceedings and petitions to enforce arbitration agreements). The Act also provides for judicial enforcement of awards and, under limited circumstances, for modification or vacation of awards. *Id.* §§ 9, 10.

<sup>12</sup> *Id.* § 2.

<sup>13</sup> *See, e.g.*, *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

<sup>14</sup> *See infra* Part I.

<sup>15</sup> 131 S. Ct. 1740 (2011). For a discussion of the reasons for the high incidence of arbitration cases in which unconscionability challenges to enforcement were raised, at least prior to *Concepcion*, see Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420 (2008).

Specifically, in *Concepcion* the Court was asked to determine whether the savings clause authorized a court to apply California contract law to refuse to enforce a class action waiver in an arbitration provision tucked away in a cell phone contract.<sup>16</sup> The Court concluded that although the class action waiver would be deemed unconscionable and unenforceable under California law, state law could not be applied to the agreement under the savings clause because the savings clause does not “preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>17</sup>

How courts determine the enforceability of class action waivers and other provisions in arbitration agreements between businesses and consumers or employees that reduce the likelihood those consumers or employees will successfully enforce state- or federal-law rights is central to the question whether arbitration is an appropriate means of resolving those disputes. And that question turns in part on the meaning of the savings clause.

I will explain that the savings clause should never have been read to require the application of state law to disputes over the enforceability of arbitration agreements covered by the FAA. Instead, it should be read to authorize federal courts to create federal common law to govern the enforcement of covered arbitration agreements. Readers familiar with federal labor law may instantly appreciate the analogy to section 301 of the Labor Management Relations Act

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<sup>16</sup> *Concepcion*, 131 S. Ct. at 1744–45.

<sup>17</sup> *Id.* at 1748. The plaintiffs in *Concepcion* filed a class action in federal district court asserting state-law claims against AT&T for charging sales tax on phones it advertised as free. *Id.* at 1774. AT&T moved to compel arbitration under the terms of its sales and service contract with the *Concepcions*, who contended the arbitration provisions were unconscionable under California law because they did not permit the arbitration to proceed on a class-wide basis. *Id.* at 1744–45. The relevant California common law doctrine provided that a class action waiver in a consumer contract of adhesion in a setting that predictably involved a small amount of damages is unconscionable and unenforceable where “it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.” *Id.* at 1746 (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)). The Court acknowledged that it had previously referred to the state law of unconscionability as a “generally applicable” contract-law doctrine ordinarily applicable under the savings clause, but nevertheless concluded the California doctrine was preempted by the FAA. *Id.* at 1748. Requiring the availability of class-wide arbitration, the Court concluded, “interferes with fundamental attributes of arbitration,” because class-wide arbitration is slower, more formal, more expensive, and riskier for defendants, all of which would make it less likely that parties would enter into arbitration agreements, a result contrary to the purpose of the FAA. *Id.* at 1746–53.

(LMRA),<sup>18</sup> which was famously interpreted by the Court in *Textile Workers Union v. Lincoln Mills* to authorize federal courts to create a federal common law of contracts for collective bargaining agreements covered by the National Labor Relations Act.<sup>19</sup>

I begin by explaining in some detail why I have concluded that the Court's statements that the savings clause refers to state law lack a solid foundation.<sup>20</sup> I will then quickly take stock of the resulting FAA doctrine, a sometimes mystifying mix of federal and state law. The incorporation of state contract law into the FAA enforcement equation through the savings clause results, predictably, in disparate treatment of identical arbitration agreements. Perhaps less predictably, the Court has created complicated and indeterminate rules for identifying which state laws are "saved" by the savings clause, rules that make it difficult to predict outcomes and that therefore lead to litigation over enforcement issues.<sup>21</sup>

Next, I will explain that the 1925 Congress that passed the FAA was sufficiently familiar with federal common law—although it was federal common law of the *Swift v. Tyson*<sup>22</sup> variety—that the reference in the savings clause to "grounds as exist at law or in equity for the revocation of any contract" could have been a reference to federal rather than state law. In that Part, I also show that section 301 of the Labor Management Relations Act is a helpful model for thinking about a more completely federalized Federal Arbitration Act.<sup>23</sup>

I then respond to what I consider to be the two most likely and important critiques of a more fully federalized FAA. First, I evaluate the possible harm to federalism values associated with displacement of state law from the savings clause.<sup>24</sup> In the final Part, I respond to the argument that if state contract law is not available through the savings clause, courts would have no basis for denying enforcement of arbitration agreements that prevent the non-drafting party from vindicating substantive rights.<sup>25</sup> I do so by examining an extant interpretation of the FAA—federal common law—that directs courts

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<sup>18</sup> 29 U.S.C. § 185(a) (2006).

<sup>19</sup> 353 U.S. 448, 456–58 (1957).

<sup>20</sup> See *infra* Part I.

<sup>21</sup> See *infra* Part II.

<sup>22</sup> 41 U.S. (16 Pet.) 1 (1842).

<sup>23</sup> See *infra* Part III.

<sup>24</sup> See *infra* Part IV.

<sup>25</sup> See *infra* Part V.

to refuse to enforce arbitration agreements that so strongly favor one party that they constitute a waiver of the substantive rights of the other. Reliance on and development of that body of federal law would make American arbitration law more coherent without sacrificing the capacity of courts to deny enforcement of agreements that constitute substantive law waivers. Understanding the distinction between this body of federal law and the state law of unconscionability is essential to evaluating the impact of *Concepcion* on the major arbitration issue of our time—the imposition on consumers and employees of arbitration agreements that effectively deprive them of the ability to vindicate their federal- or state-law rights.<sup>26</sup>

## I

### THE SUPREME COURT'S BREEZY INTERPRETATION OF THE SAVINGS CLAUSE IN *PERRY V. THOMAS*

In *Perry v. Thomas*, a stockbroker filed suit against his former employer and two former colleagues in California state court, claiming that their failure to pay him commissions violated California law.<sup>27</sup> The defendants sought orders compelling arbitration under the FAA based on an arbitration provision in the plaintiff's application for securities industry registration.<sup>28</sup> The plaintiff successfully resisted arbitration on the ground that the California Labor Code required a judicial forum for actions to recover wages, regardless of any agreement to the contrary.<sup>29</sup> The California courts determined that the state statute was not preempted by the FAA.<sup>30</sup>

The U.S. Supreme Court reversed.<sup>31</sup> Its holding followed from a fairly simple application of *Southland*, in which the Court had held that the FAA applied in state court and preempted inconsistent state laws.<sup>32</sup> The FAA's clear federal policy of enforcing arbitration

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<sup>26</sup> As Myriam Gilles noted years ago, one particularly potent form of substantive law waiver is the class action waiver in an arbitration agreement, waivers businesses are in a position to impose on consumers, employees, and shareholders. Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 412–25 (2005).

<sup>27</sup> 482 U.S. 483, 484 (1987).

<sup>28</sup> *Id.* at 485.

<sup>29</sup> *Id.* at 486.

<sup>30</sup> *Id.* at 486–89.

<sup>31</sup> *Id.* at 489.

<sup>32</sup> *Id.*



agreements, reasoned the Court in *Perry*, was “in unmistakable conflict with California’s . . . requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way.”<sup>33</sup>

Neither the state courts nor the Supreme Court in *Perry* addressed the plaintiff’s alternative ground for resisting arbitration—that the arbitration agreement was “an unconscionable, unenforceable contract of adhesion.”<sup>34</sup> Nevertheless, the Court “note[d] . . . the choice-of-law issue that arises when defenses such as Thomas’ . . . unconscionability arguments are asserted.”<sup>35</sup> The subsequent importance of the Court’s footnote justifies quoting it at length:

We also decline to address Thomas’ claim that the arbitration agreement in this case constitutes an unconscionable, unenforceable contract of adhesion. This issue was not decided below . . . .

We note, however, the choice-of-law issue that arises when defenses such as Thomas’ . . . unconscionability arguments are asserted. In instances such as these, the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, “save upon such grounds as exist at law or in equity for the revocation of *any* contract.” Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of § 2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot.<sup>36</sup>

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<sup>33</sup> *Id.* at 490–91. The state courts had, the Court explained, misread *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117 (1973), which held that the same California statute was not preempted by an SEC rule promulgated under the 1934 Securities Exchange Act. *Perry*, 482 U.S. at 490. The Court explained that the issue of the preemptive effect of the FAA had not been before it in *Ware*. *Id.* at 491.

<sup>34</sup> *Id.* at 487 n.4, 488 n.6, 492 n.9. Plaintiff was prepared to argue that the denial of meaningful discovery would compromise his claim for relief, and the selection of arbitrators was to be made by the New York Stock Exchange, which he claimed was “presumptively biased in favor of management.” *Id.* at 487 n.4.

<sup>35</sup> *Id.* at 492 n.9.

<sup>36</sup> *Id.* (citations omitted).

This footnote constitutes the Court's entire treatment of the issue, and it has come to stand for the proposition that the reference in the savings clause to "grounds as exist at law or in equity for the revocation of any contract" is a reference to state-law grounds, as distinguished from what the Court referred to as the "principles of federal common law envisioned by the passage of [the FAA]."<sup>37</sup> The subsequent reliance on the Court's *Perry* footnote stands as a paradigmatic example of the perils of reliance on dicta.

The litigants in *Perry* barely addressed the issue of the content of the savings clause in their briefs. The defendants' initial merits brief was silent on the unconscionability issue.<sup>38</sup> The plaintiff raised the unconscionability defense to enforcement of the arbitration agreement in his brief, but he did not address the choice-of-law issue.<sup>39</sup> In their reply brief, the defendants suggested that a choice-of-law issue was presented by Thomas's unconscionability argument, but they stated simply that "state law has no applicability" in cases governed by the FAA.<sup>40</sup> No amicus briefs were filed in the case.<sup>41</sup> Not surprisingly, the choice-of-law issue received little attention during the oral argument. What is surprising is that Thomas's counsel argued, as had the defendants in their brief, that "federal common law" should govern the resolution of the unconscionability defense.<sup>42</sup> The defendants' counsel did not address the issue at argument. Thus, the litigants and the Justices virtually ignored the choice-of-law issue, and

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<sup>37</sup> *Id.*

<sup>38</sup> See Reply Brief of Appellants, *Perry v. Thomas*, 482 U.S. 483 (1987) (No. 86-566), 1987 WL 880214.

<sup>39</sup> Thomas simply cited one California Court of Appeals decision in support of the unconscionability argument, a case to which the Federal Arbitration Act did not even apply. Brief of Appellee on the Merits at 22–24, *Perry v. Thomas*, 482 U.S. 483 (1987) (No. 86-566), 1987 WL 880213 (discussing *Hope v. Superior Court*, 175 Cal. Rptr. 851 (Cal. Ct. App. 1981)).

<sup>40</sup> Reply Brief of Appellants, *supra* note 38, at \*11–12.

<sup>41</sup> Docket Sheet, *Perry v. Thomas*, 482 U.S. 483 (1987) (No. 86-566) (copy on file with author).

<sup>42</sup> See Transcript of Oral Argument, *Perry v. Thomas*, 482 U.S. 483 (1987) (No. 86-566), 1987 U.S. Trans. LEXIS 175, at \*25 ("[I]t fails [sic] upon this Court as a matter of Federal common law to carve out, those exceptions to the Federal Arbitration Act that Congress intended when it enacted the savings clause in Section 2 of the Federal Arbitration Act."); *id.* at \*27 ("Your Honor, we believe that there is a Federal common law that would protect the wage earner on [sic] this case and that Section 2 of the Federal Arbitration Act says that there are exceptions. It does not define what the exceptions are."); *id.* at \*38 ("Well, I believe it falls upon the judiciary to fashion the limitations on the Federal Arbitration Act . . . as a matter of Federal common law, and I believe in so fashioning such a remedy that the Court would draw upon basic senses of fairness and fair play.").

when it did come up, the litigants seemed to agree that federal common law, and not state law, controlled the resolution of disputes about enforceability governed by the savings clause.

The Court's subsequent conclusion to the contrary—that state law applied—was not well reasoned. At oral argument, one Justice remarked, “[W]e don’t have any independent law of contracts here, since *Erie Railroad* against *Tompkins*, it is up to California to decide what a California contract [sic] means.”<sup>43</sup> Perhaps this statement was intended to encourage the parties to more fully develop the argument that Congress had authorized the federal courts to create federal common law in the savings clause; if not, it could reflect a remarkably unsophisticated understanding of *Erie* and its progeny from a Supreme Court Justice. There is no doubt that the federal courts can create federal common law when authorized to do so by Congress in an area where Congress would have had the power to legislate directly.<sup>44</sup>

The reasoning set forth in the Court's footnote in *Perry* is superficial at best. The Court wrote that “the text of § 2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of [the FAA],”<sup>45</sup> but there is nothing in that text, and nothing the Court points to, to support its conclusion that state law applies. Recall that the savings clause provides in its entirety that arbitration agreements are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>46</sup> There are no textual clues that this is a reference to state law.

The only other support the Court offers for the conclusion that the savings clause refers to state law are citations to two previous decisions, neither of which addressed the choice-of-law issue: *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>47</sup> and *Southland*.<sup>48</sup> The question in *Prima Paint* was “whether the federal court or an arbitrator is to resolve a claim of ‘fraud in the

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<sup>43</sup> *Id.* at \*30 (referring to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1937)).

<sup>44</sup> See Jonathan M. Gutoff, *Federal Common Law and Congressional Delegation: A Reconceptualization of Admiralty*, 61 U. PITT. L. REV. 367, 386–89 (2000) (describing several examples of post-*Erie* federal common law and noting the widespread misunderstanding that all federal common law was condemned by the Court in *Erie*).

<sup>45</sup> *Perry*, 482 U.S. at 492 n.9.

<sup>46</sup> 9 U.S.C. § 2 (2006).

<sup>47</sup> 388 U.S. 395 (1967).

<sup>48</sup> 465 U.S. 1 (1984).

inducement,’ under a contract governed by the [FAA].”<sup>49</sup> The Court concluded that the question was for an arbitrator because the claim of fraud was not specifically directed at the arbitration provisions.<sup>50</sup> *Prima Paint* simply lends no support to the Court’s choice-of-law conclusion in *Perry*. Indeed, if one were to try to divine any guidance from *Prima Paint* on the issue, it supports the conclusion that the FAA was intended to authorize federal courts to create a federal common law of arbitration. The Court announced in *Prima Paint* that its “severability” doctrine, under which claims for fraud in the inducement of the arbitration provision itself are treated as separate from claims for fraud in the inducement of the agreement in which an arbitration provision appears, is a creature of federal law that governs notwithstanding state law to the contrary.<sup>51</sup>

The *Perry* Court’s reference to *Southland* is also curious. As already mentioned, the question in *Southland* was whether § 2 of the FAA applied in state court, and the Court concluded that it did because it was passed pursuant to the Commerce Clause.<sup>52</sup> Thus, the Court’s holding in *Southland* does not support reading the savings clause to refer to state law—the Court held that the FAA preempted a state law that would have rendered the parties’ arbitration agreement unenforceable.<sup>53</sup> And the *Perry* Court’s pinpoint citation to *Southland*<sup>54</sup> offers at best only ambiguous support for its reading of the savings clause. In that portion of the *Southland* opinion the

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<sup>49</sup> *Prima Paint*, 388 U.S. at 396–97.

<sup>50</sup> *Id.* at 403–04.

<sup>51</sup> *Id.* at 400 n.3, 402–07; see also *id.* at 411 (Black, J., dissenting) (characterizing the majority’s opinion as approving “the Second Circuit’s fashioning of a federal separability rule which overrides state law to the contrary”); *id.* at 422 (Black, J., dissenting) (“The Court holds that the [FAA] gives federal courts the right to fashion federal law, inconsistent with state law, to determine whether an arbitration agreement was made and what it means.”).

<sup>52</sup> *Southland*, 465 U.S. at 10–15.

<sup>53</sup> *Id.* at 16 n.11. The plaintiffs in *Southland* were class representatives of and individual 7-Eleven franchisees suing the franchisor in state court in California under California state common and statutory law. *Id.* at 3–4. One claim was based on franchisor obligations created by the California Franchise Investment Law, a statute interpreted by the California Supreme Court to require judicial resolution of contested claims. *Id.* at 4–6. The U.S. Supreme Court concluded that, as applied to the parties’ arbitration agreements, the state law conflicted with the FAA and was preempted. *Id.* at 16; see also *id.* at 10 (“In enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”); *id.* at 11–12 (“The Federal Arbitration Act rests on the authority of Congress to enact substantive rules under the Commerce Clause . . . rules that are enforceable in state as well as federal courts.”).

<sup>54</sup> See *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

majority explained that while “a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement,” reading the FAA to allow states to pass statutes forbidding enforcement of arbitration agreements “would permit states to override the declared policy [of the FAA] requiring enforcement of arbitration agreements.”<sup>55</sup> The conclusion that the Court’s reference to “general contract defenses” in *Southland* was to state law is not self-evident.

Finally, just months ago, almost twenty-five years after *Perry v. Thomas*, a Justice finally pointed out that the footnote about the savings clause in *Perry* was dicta. In *AT&T Mobility LLC v. Concepcion*, Justice Thomas wrote that

The statement in *Perry v. Thomas* suggesting that [the savings clause of] § 2 preserves all state-law defenses that “arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,” is dicta. This statement is found in a footnote concerning a claim that the Court “decline[d] to address.”<sup>56</sup>

Justice Thomas insisted in his concurrence that *Perry* would not prohibit interpreting the savings clause to refer to state-law defenses related only to the “making” of the arbitration agreement and not as well to state-law defenses related to the broader “validity, revocability, and enforceability” of the arbitration agreement, including any public policy defense.<sup>57</sup>

Obviously, I agree with Justice Thomas that the Court’s footnote about the savings clause in *Perry* is dicta. But note the bounded nature of the issue Justice Thomas claims remained undecided after *Perry*. He wrote that the Court is free to interpret as an issue of first impression the meaning of the term “revocation” in the savings clause, but he assumed that the savings clause refers to state-law grounds for resisting enforcement of an arbitration agreement: “This Court has never addressed the question,” Justice Thomas wrote, “whether the *state-law* ‘grounds’ referred to in § 2 are narrower than those applicable to any contract.”<sup>58</sup>

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<sup>55</sup> *Southland*, 465 U.S. at 16 n.11.

<sup>56</sup> 131 S. Ct. 1740, 1755 n.\* (2011) (Thomas, J., concurring) (citations omitted) (alteration in original).

<sup>57</sup> *Id.* at 1754–55 & n.\*.

<sup>58</sup> *Id.* at 1755 n.\* (emphasis added).

In this Part, I have tried to show that the Court has offered virtually no support for that assumption<sup>59</sup> and that the scope of the savings clause question remaining unanswered after *Perry* is broader. After stopping to describe current FAA savings clause doctrine and its complex mix of federal and state law, I will try to show that reading the savings clause instead to authorize application of federal law to disputes about agreements covered by the FAA is preferable.

## II

### THE COMPLEXITY OF THE *PERRY V. THOMAS* REGIME

A bad seed was sown in 1987 in *Perry v. Thomas*, and that seed has germinated and flourished. The Supreme Court has repeatedly cited *Perry* for the proposition that the savings clause refers to generally applicable state contract law.<sup>60</sup> The Court has never examined the choice-of-law issue any more closely than it did in *Perry*. Instead, it has tried to integrate state law into a federal statute stating a presumption in favor of enforcement of arbitration agreements, which has resulted in a tangled jurisprudence of arbitration-agreement enforcement.

First, by incorporating state law into the FAA, the Court predictably raised the specter that identical agreements might be treated differently depending upon which state's law applies. That is an ordinarily unremarkable aspect of our federalism, but for the Court to incorporate state laws into a statute that it has held declares a

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<sup>59</sup> The assumption that the law referred to in the savings clause is state law is virtually universal. For example, Professors David Schwartz and Richard Bales, whose comprehensive work on the FAA has been justifiably influential, have written that the "savings clause" makes clear that state law contract defenses apply to arbitration agreements, as to any other contracts," David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 557 (2004) (emphasis added), and that the FAA's "express terms create room for state law," Richard A. Bales, *The Laissez-Faire Arbitration Market and the Need for a Uniform Federal Standard Governing Employment and Consumer Arbitration*, 52 U. KAN. L. REV. 583, 601 (2004) (emphasis added).

<sup>60</sup> E.g., *Concepcion*, 131 S. Ct. at 1746 (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996) and *Perry* and stating that "[t]he question in this case is whether § 2 preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable"); *Rent-A-Center W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (quoting *Casarotto* and assuming Nevada law on unconscionability could render arbitration agreements unenforceable); *Casarotto*, 517 U.S. at 686–87 ("Repeating our observation in *Perry*, the text of § 2 declares that state law may be applied 'if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.'").

national policy favoring arbitration is at least curious.<sup>61</sup> This variability makes it difficult for repeat players to develop common understandings of the provisions of their arbitration agreements. For others, such as consumers or employees who are parties to adhesion contracts with arbitration provisions, their ability to retain the right to sue in court could depend on geography.<sup>62</sup>

But the *Perry* dicta and its progeny have created much more complexity than the variability associated with incorporation of disparate state contract law into the FAA.<sup>63</sup> The Court in *Perry* explained that only a subset of state contract law is applicable under the savings clause. To be applicable, the Court explained, the state law must concern “the validity, revocability, and enforceability of contracts *generally*.”<sup>64</sup> Thus, a state law that construed arbitration agreements in a way that deviated from the way in which other agreements were construed would be preempted and not applicable under the savings clause.<sup>65</sup> The Court expanded on this distinction in subsequent cases, explaining that while “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2[,] . . . Congress precluded states from singling out arbitration provisions for suspect status . . . .”<sup>66</sup>

Determining whether a particular state law threads this needle has proven to be exceedingly difficult. For example, in *Concepcion* the Court acknowledged that

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is

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<sup>61</sup> That tension may well be a product of tension between the two main purposes of the FAA recognized by the Court: (1) to create a national policy favoring arbitration, and (2) to enforce arbitration agreements by putting them on the same footing as other contracts. *Concepcion*, 131 S. Ct. at 1745–46 (The FAA “reflect[s] both a ‘liberal federal policy favoring arbitration’ and the ‘fundamental principle that arbitration is a matter of contract.’ . . . [C]ourts must place arbitration agreements on an equal footing with other contracts . . . .”).

<sup>62</sup> See Bales, *supra* note 59, at 622 (explaining that an arbitration agreement might be unconscionable under California but not Ohio law); G. Richard Shell, *Federal Versus State Law in the Interpretation of Contracts Containing Arbitration Clauses: Reflections on Mastrobuono*, 65 U. CIN. L. REV. 43 (1996) (exploring this phenomenon in the context of securities industry arbitration).

<sup>63</sup> *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

<sup>64</sup> *Id.* (emphasis added).

<sup>65</sup> See *id.*

<sup>66</sup> *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); see also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

displaced by the FAA. But the inquiry becomes more complex when a doctrine thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.<sup>67</sup>

Legal scholars had noted this complexity well before the Court acknowledged it in *Concepcion*. The distinction between state laws that single out arbitration and generally applicable contract law has been called “fundamentally incoherent,”<sup>68</sup> it has been shown to result in wildly contradictory preemption rulings,<sup>69</sup> and the blended federal- and state-law approach of the FAA has been described as “a curious amalgam of federal and state law—a federal duty of fidelity to general state law—that seems to invite trouble.”<sup>70</sup>

This complexity and its associated costs have their origin in the Court’s superficial reasoning in *Perry* that the savings clause refers to state law. With that foundation established, I want to begin to consider in detail an alternative reading—that the reference is to federal common law. In the next Part, I hope to show that such a reading would have been consistent with the prevailing understanding of the relationship between state law and federal common law in 1925, and that the Court has read an analogous federal statute in this way.

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<sup>67</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (citations omitted).

<sup>68</sup> Schwartz, *supra* note 59, at 558–62, 568–70.

<sup>69</sup> Aragaki, *supra* note 3, at 1201 & n.75; *see also* Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233 (2011). Christopher Drahozal had previously noted the particular interpretive problem posed by a state law that applies to arbitration agreements and some other agreements, but not to all contracts, such as a state law prohibiting the enforcement of forum selection clauses. Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 408–11 (2004) (documenting the uncertainty that exists in the courts over whether state law is sufficiently general to avoid preemption and whether a general contract law could, nevertheless, “single out” an arbitration clause and therefore be preempted); *see also* Cunningham, *supra* note 2 (manuscript at 38–40) (criticizing the Court’s “general” versus “singling out” test as inconsistent with the rich and dynamic reality of contract law doctrine).

<sup>70</sup> Bruhl, *supra* note 15, at 1489; *see also id.* at 1449–52 (explaining that it is often nearly impossible to determine whether a court is applying state unconscionability law evenhandedly as required by the FAA because there is often no ready and obvious nonarbitration analogue, and even when there is, the law of unconscionability is too indeterminate to tell whether a particular application discriminates against an arbitration agreement).



## III

THE LEGISLATIVE HISTORY OF THE FAA, SECTION 301 OF THE  
LABOR MANAGEMENT RELATIONS ACT, AND FEDERAL COMMON  
LAW

The FAA was enacted in 1925, and it has never been meaningfully amended.<sup>71</sup> It was modeled on the New York Arbitration Act, which was enacted in 1920.<sup>72</sup> To say that it was copied is more precise—the resemblance between the relevant provisions of the two statutes is striking:

**1920 N.Y. Arbitration Law § 2**

*A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract, or a submission hereafter entered into of an existing controversy to arbitration pursuant to title eight of chapter seventeen of the code of civil procedure, shall be valid, enforceable and irrevocable, save upon such grounds<sup>73</sup> as exist at law or in equity for the revocation of any contract.*

**1925 U.S. Arbitration Act § 2**

*[A] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds<sup>74</sup> as exist at law or in equity for the revocation of any contract.*

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<sup>71</sup> E.g., Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 123 & n.147 (2002).

<sup>72</sup> See, e.g., Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 FORDHAM L. REV. 2035, 2038–39 (2011); Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 182–83 (2002); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 17 (2004).

<sup>73</sup> Arbitration Law of 1920, c. 275, 1920 N.Y. Laws 804 (emphasis added).

<sup>74</sup> U.S. Arbitration Act, Pub. L. No. 25-401, § 2, 42 Stat. 883 (1925) (emphasis added).

There is nothing in the legislative history that sheds light on the question whether the reference in the savings clause to “such grounds as exist at law or in equity for the revocation of any contract” was meant to be a reference to state or federal law.<sup>75</sup> Of course, the identical language in the New York statute was a reference to New York law, but the reference in the savings clause of the FAA must be to something other than New York contract law. There is no definitive, contemporaneous statement of the intent of the 1925 Congress regarding the savings clause, but I am comfortable making the following modest but not unimportant claim: some members of Congress, if they considered whether the reference was to state or federal law, would have likely concluded that it was a reference to federal common law.

Judges and scholars who have considered the legislative history of the FAA have noted that when it was passed in 1925, the regime of *Swift v. Tyson*, which permitted federal courts to create federal common law in diversity cases, had been in place for over seventy-five years.<sup>76</sup> *Erie Railroad Co. v. Tompkins*<sup>77</sup> would not bring the *Swift* regime to an end until 1938.<sup>78</sup> Thus, it would have been unremarkable if a member of Congress had concluded that the FAA directed federal courts to enforce arbitration agreements according to federal common law to be created by those courts, including the grounds that exist at law or in equity for the revocation of any contract.<sup>79</sup> The savings clause seems no less an invitation to create federal common law than the federal diversity statute’s grant of jurisdiction to the district courts, upon which *Swift v. Tyson* stood.

For example, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.* the Court noted “that the Arbitration Act was

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<sup>75</sup> See *Southland Corp. v. Keating*, 465 U.S. 1, 18–19 (1984) (“[I]t is an understatement to say that ‘the legislative history of the . . . Act reveals little awareness on the part of Congress that state law might be affected.’” (Stevens, J., concurring in part and dissenting in part) (omissions in original)); see also Hirshman, *supra* note 2, at 1315 (“Little emerges from the legislative history other than unhappiness with prior law.” (internal footnote omitted)).

<sup>76</sup> See 41 U.S. (16 Pet.) 1 (1842).

<sup>77</sup> 304 U.S. 64 (1938).

<sup>78</sup> E.g., Hirshman, *supra* note 2, at 1314–17.

<sup>79</sup> Perhaps the most anomalous aspect of the FAA, given that it is understood to be a source of substantive federal law, is that it does not create federal question jurisdiction. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983). Under the FAA, a federal court may enter orders in proceedings pending before the court, 9 U.S.C. § 3 (2006), or proceedings over which the court would have jurisdiction absent an arbitration agreement, *id.* § 4.

passed 13 years before [the] decision in *Erie* . . . and that at the time of enactment Congress had reason to believe that it still had power to create federal rules to govern questions of ‘general law’ arising in simple diversity cases.”<sup>80</sup> In a separate opinion in *Southland*, Justice Stevens went further. He acknowledged that because Congress did not define which grounds for revocation of arbitration agreements are permissible in the savings clause, “it would appear that the judiciary must fashion the limitations as a matter of federal common law.”<sup>81</sup> Several legal scholars have also noted that the FAA was passed “[i]n 1925 . . . under the shadow of *Swift v. Tyson*, which had given to the federal courts sitting in diversity the task of creating a general common law . . . . *Swift* was still alive and well.”<sup>82</sup>

To be clear, even if it was the unambiguous understanding of every member of Congress that the reference in the savings clause to “grounds as exist at law or in equity for the revocation of any contract” was to federal common law and not state law, the savings clause they meant to create would not have been the one I am arguing in favor of here—one that creates a uniform body of federal common law governing the enforcement of arbitration agreements in state and federal court. First, the federal common law created under the authority of *Swift* was not supreme. It applied only in federal court in diversity cases.<sup>83</sup> Second, it was not until after 1925 that the Supreme

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<sup>80</sup> 388 U.S. 395, 405 n.13 (1967); *see also Southland*, 465 U.S. at 28 (O’Connor, J., dissenting) (“There are . . . references in the legislative history to . . . Congress’ pre-*Erie* power to prescribe ‘general law’ applicable in all federal courts.”).

<sup>81</sup> *Southland*, 465 U.S. at 19 (Stevens, J., concurring in part and dissenting in part) (citing *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957)).

<sup>82</sup> Hayford & Palmiter, *supra* note 72, at 185 n.38; *see also Bruhl*, *supra* note 15, at 1427 n.19 (“[P]art of the difficulty in fixing the proper application of the FAA stems from the fact that it was enacted in 1925, well before *Erie R.R. v. Tompkins*, meaning that the statute comes from a period of very different expectations regarding the division between state and federal law.” (citations omitted)); Drahozal, *supra* note 71, at 126 (“[T]he FAA . . . was enacted while *Swift v. Tyson* was still good law.” (internal footnote omitted)); Hirshman, *supra* note 2, at 1314 (“When Congress passed the FAA, federal courts, under the regime of *Swift v. Tyson*, had long been creating federal rules of decision for cases within their jurisdiction . . . .” (internal footnote omitted)); Schwartz, *supra* note 72, at 27 n.134 (noting that “it could be argued that the intent of the savings clause, drafted under the *Swift* regime, was to incorporate federal common law”).

<sup>83</sup> However, even by 1925 it had become clear that with respect to one set of arbitration agreements covered by the FAA—“written provision[s] in any maritime transaction,” 9 U.S.C. § 2 (1925)—the reference in the savings clause to “such grounds as exist at law or in equity for the revocation of any contract” could not have been a reference to state law because state law could not have applied to invalidate a maritime contract. In 1917, the Supreme Court held that state law could not apply in a case subject to the federal admiralty jurisdiction. *S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917). And in 1920 the Court ruled that

Court interpreted the Commerce Clause to permit Congress to pass an FAA that could constitutionally govern the enforceability of, for example, an arbitration provision in a contract for home extermination services that contemplated a purely local transaction.<sup>84</sup>

However, when the Court decided *Southland* in 1984, the expanded scope of the commerce power was clear. So too was the power of federal courts to create “real” federal common law—not of the *Swiftian* variety—when authorized to do so by Congress in an area where Congress would have had the power to legislate directly.<sup>85</sup> The existence of this latter power is what made Justice Stevens suggest in *Southland* that the FAA’s savings clause could be read as had section 301 of the Labor Management Relations Act of 1947 in *Lincoln Mills* as authorizing federal courts to fashion a body of federal law for the enforcement of arbitration agreements.<sup>86</sup> His suggestion, which I am arguing in favor of here, never gained any traction. Justice Stevens was correct that section 301, as interpreted in *Textile Workers Union v. Lincoln Mills*, offers a compelling analogy.

In *Lincoln Mills*, a union brought suit in federal district court under section 301 for specific enforcement of the arbitration provision in a collective bargaining agreement.<sup>87</sup> Section 301(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this [Act] . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.<sup>88</sup>

The Supreme Court explained that in section 301 Congress (as it had in the FAA)<sup>89</sup> intended to reject the common law rule against specific

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efforts by Congress to allow state workers’ compensation laws to apply to workers injured within the admiralty jurisdiction were unconstitutional. *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149 (1920).

<sup>84</sup> The Court concluded that such an arbitration agreement was covered by the FAA in *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995). In so doing, Justice Breyer explained that “[t]he pre-New Deal Congress that passed the [Federal Arbitration] Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case.” *Id.* at 275; *see also, e.g.*, Drahozal, *supra* note 71, at 127–29 (outlining the Court’s post-1925 expansion of the commerce power).

<sup>85</sup> *See* Gutoff, *supra* note 44, at 386–89.

<sup>86</sup> *Southland*, 465 U.S. at 19 (Stevens, J., concurring in part and dissenting in part).

<sup>87</sup> 353 U.S. 448, 449 (1957).

<sup>88</sup> 29 U.S.C. § 185(a) (2006).

<sup>89</sup> *See supra* note 2 and accompanying text.

enforcement of executory agreements to arbitrate.<sup>90</sup> And then the Court famously wrote:

[T]he substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws. The Labor Management Relations Act expressly furnishes some substantive law. . . . [But other problems] will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem. Federal interpretation of the federal law will govern, not state law. . . .

It is not uncommon for federal courts to fashion federal law where federal rights are concerned.<sup>91</sup>

Pursuant to the Court's direction in *Lincoln Mills*, the federal courts have indeed created a federal common law of collective bargaining agreements. Two of the best-known principles of that body of law, stated in the Court's *Steelworkers Trilogy* in 1960, include (1) a presumption in favor of specific enforcement of arbitration provisions in collective bargaining agreements<sup>92</sup> and (2) strict limits on the grounds upon which a court can refuse to enforce an arbitration award.<sup>93</sup>

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<sup>90</sup> *Lincoln Mills*, 353 U.S. at 456 (“It seems, therefore, clear to us that Congress adopted a policy which placed sanctions behind agreements to arbitrate grievance disputes, by implication rejecting the common-law rule . . . against enforcement of executory agreements to arbitrate.” (internal footnote and citation omitted)). Of course, the focus of section 301 is arbitration provisions in collective bargaining agreements.

<sup>91</sup> *Id.* at 456–57 (citations omitted).

<sup>92</sup> See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 568 (1960) (holding that the court's inquiry when specific enforcement of the arbitration provision in a collective bargaining agreement is sought is to determine whether the party seeking arbitration “is making a claim which on its face is governed by the contract”); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582–83 (1960) (holding that an order to arbitrate a “particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.”). *American Manufacturing and Warrior & Gulf* are two of the three cases from the trilogy. For the third, see *infra* note 93.

<sup>93</sup> *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 596–98 (1960) (holding that courts may not review the merits of an arbitration award—an award must be enforced unless it is clear the arbitrator did not rely on an interpretation of the collective bargaining agreement). For more detailed discussions of the content of the federal common law of section 301, see Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 *FORDHAM L. REV.* 469 (1993); Stephen L. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 *BAYLOR L. REV.* 781 (2000); Rebecca Hanner White, *Section 301's Preemption of State Law Claims: A Model for Analysis*, 41 *ALA. L. REV.* 377 (1990); James B. Zimarowski,

The former presumption should look familiar. As noted earlier, in *Moses H. Cone*, the Court explained that “[s]ection 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . . The [Federal] Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . .”<sup>94</sup> The substantive similarity of the presumptions in favor of arbitration read by the Court into the FAA and section 301 is patent. The Court’s language in *Moses H. Cone* “about the federal pro-arbitration policy could have been lifted straight from *Lincoln Mills* and the *Steelworkers Trilogy*.”<sup>95</sup> And, like section 301, the grounds upon which a court may refuse to enforce an arbitration award are strictly limited under the FAA.<sup>96</sup>

In addition to these similarities, both statutes are rather skeletal. The federal courts have, almost by necessity, created federal common law to fill in the substantial gaps in section 301 and the FAA. Section 301 of the LMRA simply gives the federal courts jurisdiction to hear suits for violations of collective bargaining agreements, and section 203(d) provides that “[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.”<sup>97</sup> The FAA states simply that written arbitration agreements must be enforced save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>98</sup> And of course, both statutes have been read to preempt

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*Interpreting Collective Bargaining Agreements: Silence, Ambiguity, and NLRA Section 8(d)*, 10 INDUS. REL. L.J. 465 (1989).

<sup>94</sup> 460 U.S. 1, 24–25 (1983). The presumption was not important to resolution of the case, but the Court had occasion to apply the FAA presumption twelve years later in *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995). There the parties’ agreement provided that it would be “governed by the laws of the State of New York.” *Id.* at 53. The defendant stockbrokers argued that this provision was intended to incorporate New York decisional law forbidding arbitrators from awarding punitive damages. *Id.* at 60. The Court concluded that the intent to preclude an award of punitive damages was not clear from the choice-of-law language in the agreement and that under *Moses H. Cone*, doubts were to be resolved in favor of arbitration—here in favor of arbitration of claims for punitive damages. *Id.* at 62.

<sup>95</sup> Schwartz, *supra* note 72, at 43 & n.214; *see also* Bales, *supra* note 59, at 600–01 (observing that the Court’s “affinity for arbitration under the FAA” looks strikingly like its affinity “for arbitration under section 301 of the LMRA”).

<sup>96</sup> *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008) (interpreting 9 U.S.C. §§ 9–11 (2006), the judicial review provisions of the FAA).

<sup>97</sup> 29 U.S.C. § 173(d) (2006).

<sup>98</sup> 9 U.S.C. § 2.

state law that would stand in the way of their primary objectives—uniform interpretation of collective bargaining agreements in the case of section 301,<sup>99</sup> and the “national policy favoring arbitration” in the case of the FAA.<sup>100</sup>

Notwithstanding these similarities,<sup>101</sup> section 301 has been completely federalized, but the FAA has not. I have tried to show that a popular justification for that distinction, the language and intent of the savings clause, is a shaky foundation for the persistent consideration of state law in disputes over the enforceability of arbitration agreements covered by the FAA. I turn now to another possible justification for reserving a role for the operation of state law in the FAA’s savings clause—federalism concerns. Here too I conclude that those concerns do not justify refusing to read the savings clause to authorize the creation of a uniform body of federal common law to govern the enforceability of arbitration agreements covered by the FAA.

#### IV

##### EVALUATING THE THREAT TO FEDERALISM VALUES POSED BY READING THE SAVINGS CLAUSE TO REFER TO FEDERAL COMMON LAW AND NOT STATE CONTRACT LAW

*Southland* has been the target of the most blistering federalism critiques. Justice Scalia has described it as “a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes.”<sup>102</sup> Less specific attention has been paid to

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<sup>99</sup> Local 174, *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962).

<sup>100</sup> *E.g.*, *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

<sup>101</sup> The FAA’s resemblance to section 301 has often had doctrinal implications. For example, litigants relied on the FAA as grounds for seeking specific enforcement of arbitration provisions in collective bargaining agreements before and after the passage of section 301, and “the question . . . [of] the FAA’s applicability to labor arbitration has never been resolved.” Schwartz, *supra* note 72, at 40–41; *see also* *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70, 77 n.1 (1998) (refusing to decide the question); *Int’l Ass’n of Machinists & Aerospace Workers Local Lodge 2121 v. Goodrich Corp.*, 410 F.3d 204, 207 n.2 (5th Cir. 2005) (noting a circuit split on the question). And the Supreme Court has noted, approvingly, that “the federal courts have often looked to the [FAA] for guidance in labor arbitration cases” in which the courts are applying section 301. *United Paperworkers Int’l Union v. Misco, Inc.*, 484 U.S. 29, 40 n.9 (1987).

<sup>102</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting). Professor Schwartz has, like many others, argued that the Court in *Southland* mistakenly attributed to Congress the intent to make the FAA preemptive substantive law. Schwartz, *supra* note 72; *see also* Schwartz, *supra* note 59 (arguing in addition that the FAA, as interpreted in *Southland*, results in unconstitutional federal regulation of state-court procedure).

the separate question of the federalism implications of reading the savings clause to refer to state or federal law. That is perhaps justifiable. Regardless of the resolution of the choice-of-law question posed by the savings clause, under current doctrine the FAA would still preempt all state law that expresses a policy judgment that arbitration is a disfavored means of dispute resolution, even for disputes over state-created rights. Justice Stevens made this point in *Southland*: while Congress can create a federal right and guarantee judicial enforcement regardless of the terms of a written arbitration agreement, the Court's interpretation of the FAA prevents a state legislature from doing the same thing with respect to a state-created right.<sup>103</sup>

The question whether savings clause disputes about the validity of an FAA-covered arbitration agreement are to be governed by state or federal common law seems less important given the tremendous preemptive force of the rest of the FAA. And that is one response to federalism arguments that might be made in favor of reading the savings clause to refer to state law—that all that is at stake there is whether state contract law of general application will be used to resolve disputes about the enforceability of arbitration agreements.<sup>104</sup> Deciding instead to apply a federal common law of arbitration agreements would of course implicate federalism issues, but they are less dramatic than the impact of *Southland*, its ancestors, and its progeny on state lawmaking power.

As noted earlier, reading the savings clause to permit federal courts to create federal common law would be consistent with the Court's interpretation of the rest of § 2, pursuant to which federal courts have already created a substantial body of preemptive federal common law. Lawrence Cunningham has recently examined that body of law in detail, criticizing its content as reflecting the Court's preference for a national policy favoring arbitration as opposed to Congress's intent to require simply that arbitration agreements be placed on equal footing with other contracts.<sup>105</sup>

One of Cunningham's examples of this federal common law is the presumption in favor of arbitration declared by the Court in *Moses H.*

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<sup>103</sup> *Southland*, 465 U.S. at 17–21 (Stevens, J., concurring in part and dissenting in part).

<sup>104</sup> See *supra* Part II.

<sup>105</sup> Cunningham, *supra* note 2 (manuscript at 30) (explaining that the Court has “fashioned a separate federal arbitration law, distinct from the common law of contracts, [because of] the Court's determination that there should be a national policy favoring arbitration”).



*Cone* and discussed above.<sup>106</sup> But he goes on to describe several other FAA federal common law doctrines. For example, as also discussed briefly above, the Court has created a federal rule of “severability” for arbitration agreements, holding that a challenge to the enforceability of a contract containing an arbitration agreement should be determined by the arbitrator.<sup>107</sup> Only challenges to the arbitration agreement itself are reserved for resolution by the court.<sup>108</sup> As Cunningham notes, the Court has been explicit that “the severability rule is a ‘matter of substantive federal arbitration law’ . . . [not] one of state law.”<sup>109</sup>

Another example is the presumption created by the Court in *First Options of Chicago, Inc. v. Kaplan*, reserving for courts (as opposed to arbitrators) the power to decide whether the parties to a contract agreed to arbitrate a particular dispute.<sup>110</sup> Courts should not determine whether the parties agreed to have an arbitrator decide the arbitrability question, explained the Supreme Court, unless there is “‘clear and unmistakable’ evidence” of the parties’ intent to do so.<sup>111</sup> Cunningham is critical of the Court’s rule because it is “alien to contract law”<sup>112</sup> and because the Court relied on section 301 jurisprudence in formulating it.<sup>113</sup>

For purposes of this Article, the important point that emerges from Cunningham’s analysis is that there is already a substantial body of FAA federal common law.<sup>114</sup> Even though the Court continues to follow the dictum in *Perry* that under the savings clause state contract

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<sup>106</sup> *Id.* (manuscript at 3).

<sup>107</sup> *Id.* (manuscript at 17).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* (quoting *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2780 n.4 (2010)).

<sup>110</sup> 514 U.S. 938 (1995).

<sup>111</sup> *Id.* at 944.

<sup>112</sup> Cunningham, *supra* note 2 (manuscript at 15).

<sup>113</sup> *Id.* (manuscript at 15 n.99) (referring to *AT&T Techs., Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643 (1986)). *First Options* is not the only case Cunningham analyzes in which the Court relied in part on section 301 precedents. See Cunningham, *supra* note 2 (manuscript at 20–21) (discussing *Stolt-Nielsen, S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010), in which the Court held that the decision of an arbitration panel that an arbitration could proceed as a class action must be vacated because (1) the arbitrators relied on their own opinions about public policy and not on FAA, maritime, or applicable state law; and (2) where the parties’ agreement is silent on the issue, imposing class arbitration is inconsistent with the FAA).

<sup>114</sup> This point has been made by others. See, e.g., Stephen K. Huber, *Confusion About Class Arbitration*, 7 J. TEX. CONSUMER L. 2, 6 (2003) (stating that the Court’s arbitration jurisprudence “amount[s] to nothing less than a federal common law of arbitration contract interpretation”).

law of general application can be applied to arbitration agreements covered by the FAA, most relevant state law is displaced by a “federal common law of arbitration contract interpretation,”<sup>115</sup> which has been created pursuant to § 2 and the rest of the FAA. My reading of the savings clause, which would oust state contract law of general application, would thus constitute only a minor additional imposition on state lawmaking power.

Nevertheless, federalism arguments have been advanced for preserving a role for state law in the savings clause. For example, dissenting in *Concepcion*, Justice Breyer (joined by Justices Ginsburg, Sotomayor, and Kagan) explained that the savings clause “retained for the States an important role incident to agreements to arbitrate.”<sup>116</sup> The dissenters criticized what they characterized as the majority’s narrow reading of the scope of the savings clause as being inconsistent with the “federalist ideal” of respecting the states as independent sovereigns.<sup>117</sup>

Professor David Schwartz has undoubtedly been the most thorough and among the most articulate of the commentators criticizing the Court’s FAA jurisprudence on federalism grounds, and Schwartz has focused occasionally on the savings clause and the FAA’s relationship to section 301. Schwartz’s general position on FAA preemption, developed in a series of articles, is that there is no important federal interest in favoring enforcement of arbitration agreements, particularly in state-court actions involving state-law claims, and the Court’s interpretation of the FAA to preempt state law related to those agreements interferes with a traditional form of state-law regulation—the law of contracts.<sup>118</sup> He thus argues for a more limited view of the preemptive reach of the FAA.

More specifically, Schwartz supports reading the savings clause to preserve the operation of state common and statutory law that would render arbitration agreements unenforceable so long as that law was based on public policy or general contract law concerns and not the

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<sup>115</sup> *Id.*

<sup>116</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1762 (2011) (Breyer, J., dissenting).

<sup>117</sup> *Id.*

<sup>118</sup> *E.g.*, Schwartz, *supra* note 72; David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act’s Encroachment on State Law*, 16 WASH. U. J.L. & POL’Y 129 (2004); Schwartz, *supra* note 59. In addition, Schwartz argues that the FAA is unconstitutional because Congress lacks the power to regulate procedure in state courts. *See* Schwartz, *supra* note 59. I do not respond separately to that argument here.

judicial hostility to arbitration the FAA was intended to reverse.<sup>119</sup> However, interpreting the savings clause to authorize the creation and application of federal common law and not state law to covered arbitration agreements would not be an unusual affront to the sovereignty of the states.

A fully federalized savings clause is no doubt within Congress's power. The Court has repeatedly declared that the FAA reflects a liberal federal policy favoring arbitration,<sup>120</sup> and it has identified some of the specific federal interests furthered by the FAA's federal policy favoring arbitration. The Court has explained that "[a]rbitration agreements allow parties to avoid the costs of litigation"<sup>121</sup> because arbitration is, by comparison to litigation, simple, informal, and expeditious.<sup>122</sup> The majority in *Concepcion* quoted from a House Report on the bill that became the FAA, which stated that "the costliness and delays of litigation . . . can be largely eliminated by agreements for arbitration."<sup>123</sup> And even Professor Schwartz acknowledges possible federal interests in favoring enforcement of arbitration agreements—"a general dislike of litigation" and "a belief that . . . [enforcement of] arbitration agreements [will help] reduce crowded court dockets."<sup>124</sup> Congress's pursuit of those interests through enactment of a statute that applies to

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<sup>119</sup> Schwartz, *supra* note 72, at 52–53; *see also supra* text accompanying note 3 (explaining that the FAA was passed in order to reverse judicial hostility to arbitration).

<sup>120</sup> *See Concepcion*, 131 S. Ct. at 1749 ("[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration.").

<sup>121</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001).

<sup>122</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

<sup>123</sup> *Concepcion*, 131 S. Ct. at 1749 (alteration in original) (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 220 (1985)). In 1994, the U.S. Departments of Labor and Commerce concluded that the development of private arbitration alternatives for workplace disputes held promise for expanding access to public law rights for lower-wage workers. U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS—FINAL REPORT 56 (1994), available at [http://digitalcommons.ilr.cornell.edu/key\\_workplace/2](http://digitalcommons.ilr.cornell.edu/key_workplace/2). Schwartz also suggests the federal interest in fostering arbitration does not outweigh the interests of the states in regulating arbitration agreements through contract law and otherwise because the Court has consistently stated that the choice to arbitrate does not have predictable substantive consequences—that by agreeing to arbitrate a party "does not forgo [the] substantive rights . . . [it] only submits to their resolution in an arbitral, rather than a judicial, forum." Schwartz, *supra* note 72, at 39. However, that the Court views an arbitration agreement as a type of forum selection clause rather than an agreement to alter or waive substantive rights does not mean Congress would have no interest in encouraging parties to choose the less costly form of dispute resolution.

<sup>124</sup> Schwartz, *supra* note 72, at 30.

written agreements “evidencing a transaction involving commerce” is a constitutional exercise of its commerce power.<sup>125</sup>

Reasonable minds can differ on the question whether Congress *should* exercise its power to require aggressive enforcement of arbitration agreements in interstate commerce, but it is hard to understand why a normative objection to the pursuit of such a policy tells us anything about whether it is an appropriate exercise of that power as a constitutional matter or as a matter of comity. One could, for example, think that Congress did the right thing when it federalized the law of interpretation and enforcement of collective bargaining agreements in section 301, but that it should have refrained from expanding federal diversity jurisdiction over certain types of class actions in the Class Action Fairness Act.<sup>126</sup> But that does not make the former any more appropriate, as a doctrinal matter, than the latter.

For example, Professor Schwartz dismisses as “a false analogy” any attempt to justify the preemptive scope of the FAA by reference to section 301.<sup>127</sup> Only the latter, he asserts, should be understood to articulate a national solution to a national problem—the need for uniform interpretation of collective bargaining agreements in the private sector and particularly aggressive enforcement of arbitration provisions to avoid industrial strife.<sup>128</sup> But noting that section 301 and the FAA address different issues, and that one might conclude that federal intervention was warranted in the case of section 301 and not the FAA, begs the question whether Congress has the power to pursue an interest in aggressive enforcement of arbitration agreements by assuring that, within the bounds of its commerce power, federal enforcement rules apply and inconsistent state law is preempted. And the answer to that question is, I suggest, simply yes. It is a defining feature of our federalism that state contract law will be displaced if it

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<sup>125</sup> 9 U.S.C. § 2 (2006); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995).

<sup>126</sup> Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in various sections of 28 U.S.C.) (authorizing expansion of federal diversity jurisdiction in “nationwide” class actions in order to subject them to the rigorous class certification standards of Federal Rule of Civil Procedure 23).

<sup>127</sup> Schwartz, *supra* note 72, at 7.

<sup>128</sup> *Id.* at 40–41. Schwartz is correct that in its section 301 jurisprudence the Court concluded that arbitration provisions in collective bargaining agreements should be aggressively enforced because they are the quid pro quo for provisions in which the union gives up its right to strike. *Id.* at 43. Enforcing the promises to arbitrate by creating law more solicitous of them than standard state contract law was necessary, the Court reasoned, to further the federal interest in reducing industrial strife. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455–57 (1957).

conflicts with federal law passed within the constitutional limits of Congress's legislative power.<sup>129</sup> That some of the state law displaced is contract law, an area of traditional state regulation,<sup>130</sup> is ultimately of no moment.<sup>131</sup> Congress has the power to regulate written agreements to arbitrate in transactions in interstate commerce, it has the power to delegate some of that power to the federal judiciary, and, under the Supremacy Clause, the law created by federal judges pursuant to that delegation of power displaces inconsistent state law.<sup>132</sup>

I suspect that disagreement with the content of FAA law (particularly its policy favoring enforcement of arbitration agreements) is the real source of many of the federalism critiques of FAA jurisprudence. Many of the academics who criticize the Court's interpretation of the FAA on federalism grounds support, as I do, the "Arbitration Fairness Act,"<sup>133</sup> introduced most recently in Congress in May 2011.<sup>134</sup> However, its central provision would make arbitration agreements unenforceable, as a matter of federal law, if the agreements required arbitration of employment, consumer, or civil-rights claims, including those based on state law.<sup>135</sup> I cannot conceive of a theory of congressional power under which Congress can legitimately forbid states from enforcing agreements to arbitrate disputes over state-created rights but not require states to enforce agreements to arbitrate disputes over state-created rights.

Finally, it is worth noting that while the prevailing interpretation of the savings clause preserves a limited role for state law in enforcement disputes over arbitration agreements, in *Concepcion*, the Court whittled away at that body of state law, which moves § 2 of the

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<sup>129</sup> See, e.g., *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208–09 (1985).

<sup>130</sup> Schwartz, *supra* note 72, at 5.

<sup>131</sup> See *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 102–04 (1962) (state contract law is preempted by federal labor law under section 301 of the Labor Management Relations Act where the subject of the controversy is a collective bargaining agreement).

<sup>132</sup> See Edward A. Purcell, Jr., *Brandeis, Erie, and the New Deal "Constitutional Revolution,"* 26 J. SUP. CT. HIST. 257, 263–76 (2001) (by declaring *Swift v. Tyson* federal common law illegitimate, *Erie* actually charted a course to federal common law based on legitimate sources of federal lawmaking power, a federal common law that is binding on state courts under the Supremacy Clause).

<sup>133</sup> See, e.g., Schwartz, *supra* note 1 (manuscript at 2) ("The Arbitration Fairness Act should be passed because consumer and employment disputes are too important a henhouse to be governed by contracts written by foxes . . .").

<sup>134</sup> See Arbitration Fairness Act of 2011, S. 987, 112th Cong. (1st Sess. 2011).

<sup>135</sup> *Id.* §§ 401–02.

FAA closer to the fully federalized version I am imagining. Recall that in *Concepcion* the plaintiffs claimed that an arbitration agreement with a class action waiver in their cell phone sales and service contracts was unenforceable under California's generally applicable law of unconscionability.<sup>136</sup> Notwithstanding that the state-law doctrine survived the "generally applicable/single-out" test for application under the savings clause,<sup>137</sup> the Court concluded that the state law was preempted.<sup>138</sup> Requiring the availability of class-wide arbitration, the Court concluded, "interferes with fundamental attributes of arbitration"<sup>139</sup> because class-wide arbitration is slower, more formal, more expensive, and riskier for defendants, all of which would make it less likely that parties would enter into arbitration agreements, a result contrary to the purpose of the FAA.<sup>140</sup>

Thus, the Court in *Concepcion* constricted the opening created for state law under the savings clause. After *Concepcion*, to avoid preemption, a state law must be generally applicable and not single out arbitration agreements for suspect treatment, *and* that state law must not alter what the Court determines to be a fundamental attribute of arbitration. As the dissent correctly observed, the majority has now reserved for the Court the right to displace applicable state law any time the Court concludes that application of state law would result in a dispute resolution process the Court determines cannot fairly be characterized as "arbitration."<sup>141</sup> Thus, reading the savings clause to refer to federal common law rather than state law would displace an ever-shrinking body of state law.

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<sup>136</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

<sup>137</sup> *See supra* Part II.

<sup>138</sup> *Concepcion*, 131 S. Ct. at 1753.

<sup>139</sup> *Id.* at 1748.

<sup>140</sup> *Id.* at 1748–53. The Court's conclusion that arbitration is riskier for defendants, as opposed to plaintiffs, whose identical concerns the Court has repeatedly dismissed, is quite troubling. But this is neither the time nor the place to explore that hypocrisy. While we are on the subject of hypocrisy, although in this example congressional hypocrisy, see 10 U.S.C. § 987(e)(3) (2010) (making it unlawful for a creditor to extend consumer credit to certain members of the armed forces or their dependents "with respect to which . . . the creditor requires the borrower to submit to arbitration").

<sup>141</sup> *Concepcion*, 131 S. Ct. at 1756–62 (Breyer, J., dissenting).

## V

A FULLY FEDERALIZED FAA CAN EFFECTIVELY REGULATE  
“LOPSIDED ARBITRATION AGREEMENTS”<sup>142</sup>

In addition to arguing that a prominent role for state law in the savings clause is consistent with respect for state sovereignty, many commentators have argued that state law provides courts applying the FAA the tools necessary to refuse to enforce arbitration agreements that strongly favor the drafting party.<sup>143</sup> I agree that the FAA should not be read to require enforcement of agreements that constitute waivers of the substantive rights of the non-drafting party,<sup>144</sup> but relying on the application of state law through the savings clause is not necessary to accomplish that goal. Displacing state law by federalizing the savings clause would not impair the ability of courts to refuse to enforce those agreements, and it would rationalize arbitration law in this area through the development of a uniform federal standard. Moreover, there is a nascent body of federal law ready to do this work.

In *Gilmer v. Interstate/Johnson Lane Corp.* the Supreme Court held that the FAA required specific enforcement of an agreement to arbitrate claims arising out of the plaintiff’s employment by the defendant, specifically a claim asserted by the plaintiff under the Age Discrimination in Employment Act (ADEA).<sup>145</sup> The majority rejected (1) the plaintiff’s argument that Congress intended for ADEA claims to be asserted only in a judicial forum; (2) the plaintiff’s “generalized attacks” on the adequacy of arbitral procedures, including possible arbitrator bias, limited discovery, the lack of written opinions, and possible limitations on the remedial powers of arbitrators; and (3) the plaintiff’s argument that an inequality of

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<sup>142</sup> Bales, *supra* note 59, at 606 (referring to arbitration agreements in which employers “overreach[] by, for example, giving the employer the unilateral authority to” select the arbitrator).

<sup>143</sup> For example, Professor Schwartz has argued that the grounds for refusing to enforce remedy-stripping provisions in arbitration agreements (such as provisions precluding an award of punitive damages where the applicable law would permit it) and provisions that make the arbitration procedurally unfair (such as provisions imposing significant costs on the non-drafting party) are “purely state law principles.” Schwartz, *supra* note 118, at 143–44. Professor Bruhl has similarly written that “[t]he main channel that remains open to courts skeptical of the increasingly pervasive use of arbitration is a provision of the FAA that allows a court to invalidate an arbitration agreement under generally applicable state contract principles, such as unconscionability.” Bruhl, *supra* note 15, at 1422.

<sup>144</sup> *E.g.*, David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 55–56 (2003).

<sup>145</sup> 500 U.S. 20, 23 (1991).

bargaining power was grounds for refusing to enforce the arbitration agreement.<sup>146</sup>

However, the Court emphasized that “[b]y 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.”<sup>147</sup> Moreover, it explained that while the plaintiff’s generalized attacks on arbitral procedures were out of step with the contemporary perception of the adequacy of arbitration, actual procedural inadequacies could be addressed in specific cases,<sup>148</sup> and “courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds ‘for the revocation of any contract.’”<sup>149</sup>

The issue whether the terms of a particular arbitration agreement were sufficiently unfair to the non-drafting party to bar enforcement was addressed almost ten years later in *Green Tree Financial Corp. v. Randolph*.<sup>150</sup> The plaintiff borrowed money from the defendant to purchase a mobile home and later sued in federal district court alleging violations of the Truth in Lending and Equal Credit Opportunity Acts.<sup>151</sup> The lender moved to compel arbitration pursuant to provisions in the loan documents.<sup>152</sup> The plaintiff resisted on the ground that the arbitration agreement was silent with respect to the payment of filing fees, arbitrator’s costs, and other arbitration expenses and therefore failed to guarantee that she could vindicate her statutory rights in the arbitral forum.<sup>153</sup> The majority acknowledged that “the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum”<sup>154</sup> but concluded that the arbitration agreement’s silence on the subject did not satisfy the plaintiff’s burden of showing that arbitration would be prohibitively expensive.<sup>155</sup>

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<sup>146</sup> *Id.* at 26–33.

<sup>147</sup> *Id.* at 26 (alteration in original) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

<sup>148</sup> *Id.* at 30–33.

<sup>149</sup> *Id.* at 33 (quoting *Mitsubishi*, 473 U.S. at 627).

<sup>150</sup> 531 U.S. 79 (2000).

<sup>151</sup> *Id.* at 82–83.

<sup>152</sup> *Id.* at 83.

<sup>153</sup> *Id.* at 84.

<sup>154</sup> *Id.* at 90.

<sup>155</sup> *Id.* at 90–92. The dissenting Justices agreed that under *Gilmer* an arbitration agreement is unenforceable if the forum it contemplates is not adequate to adjudicate the



*Gilmer* and *Randolph* have been read by courts as requiring, as a matter of federal law that emanates from the FAA and not pursuant to state law under the savings clause, refusal to enforce arbitration agreements if the arbitral forum contemplated by the agreement would not permit the non-drafting party to effectively vindicate her asserted legal rights. The First Circuit has referred to this doctrine as the “vindication of rights analysis.”<sup>156</sup> Other courts of appeals have articulated similar approaches,<sup>157</sup> and legal scholars have noted this aspect of FAA law.<sup>158</sup> Courts have applied this body of FAA

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plaintiff’s claims or if the arbitral forum is not accessible to the party resisting arbitration. *Id.* at 93–94 (Ginsburg, J., concurring in part and dissenting in part). They preferred a rule that required the drafting party to demonstrate that the arbitral forum would be financially accessible to the plaintiff. *Id.* at 94–97.

<sup>156</sup> *Kristian v. Comcast Corp.*, 446 F.3d 25, 37 (1st Cir. 2006).

<sup>157</sup> *E.g.*, *In re Am. Express Merchs.’ Litig.*, No. 06-1871-cv (2d Cir. Feb. 1, 2012) (concluding that a class action waiver in an arbitration agreement would deprive plaintiffs of the rights under the antitrust laws because any individual recovery would be dwarfed by out-of-pocket expert witness fees); *EEOC v. Woodmen of the World Life Ins. Co.*, 479 F.3d 561, 566 (8th Cir. 2007) (stating that *Green Tree* provides a basis for voiding an arbitration agreement beyond that provided by state law); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (proposing that a legitimate reason to deny arbitration may exist if a party would be saddled with prohibitive arbitration costs).

The approach outlined in *Gilmer* and *Randolph* resembles federal law on the enforceability of forum selection clauses, which also focuses on whether the non-drafting party will be able to effectively enforce her rights in the alternative forum. *See Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 540 (1995) (forum selection clause is unenforceable if it operates as “a prospective waiver of a party’s right to pursue statutory remedies”); *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (forum selection clauses in form passage contracts are subject to judicial scrutiny for fundamental fairness, which includes consideration of physical and financial impediments to the plaintiff’s ability to litigate in the alternative forum). And the resemblance seems appropriate, given that the Supreme Court has stated that an arbitration agreement “is effectively a forum selection clause.” *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 295 (2002); *see also Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 (1974) (“An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum selection clause . . .”).

<sup>158</sup> *E.g.*, *Bales*, *supra* note 59, at 614–16 (a group of courts has focused on federal law to justify refusal to enforce “lopsided” arbitration agreements); *Schwartz*, *supra* note 59, at 549 n.30 (“It stands to reason that a substantive claim should be withheld from arbitration if the arbitrator is not authorized to issue a remedy crucial to the claim. This principle follows logically from the Supreme Court’s repeated admonition that “[b]y agreeing to arbitrate . . . a party does not forego . . . substantive rights . . .” (alteration and omissions in original)); *see also Gilles*, *supra* note 26, at 406–08 (referring to challenges based on this body of law as “second-wave,” to distinguish them from challenges based on state unconscionability law). Gilles now uses the more popular “vindication of rights” label to refer to this federal law approach. Myriam Gilles, *AT&T Mobility v. Concepcion: From Unconscionability to Vindication of Rights*, SCOTUSBLOG (Sept. 15, 2011, 4:25 PM), <http://www.scotusblog.com/2011/09/att-mobility-vs-concepcion-from-unconscionability-to-vindication-of-rights>.

common law to provisions in arbitration agreements (1) permitting the drafting party to control the selection of the arbitrator, (2) limiting certain types of damages, (3) imposing filing fees, (4) shortening statutes of limitations, (5) limiting discovery, (6) forbidding class actions, (7) requiring arbitration of claims asserted by the non-drafter against the drafter and not vice-versa, and (8) that give the drafting party the unilateral right to modify the arbitration agreement.<sup>159</sup>

A particularly rich example is the First Circuit's decision in *Kristian v. Comcast Corp.* where subscribers to the defendants' cable television services brought suit in federal district court alleging defendants violated federal and state (Massachusetts) antitrust laws and seeking certification of a class of subscribers.<sup>160</sup> The defendants moved to compel arbitration pursuant to provisions of the subscriber agreements.<sup>161</sup>

The plaintiffs argued that enforcement of the arbitration provisions as written would make it impossible for them to vindicate their federal- and state-law rights and impermissibly shield defendants from antitrust liability.<sup>162</sup> Specifically, the plaintiffs pointed to the following provisions:

- 1) [P]articipating in arbitration may result in limited discovery;<sup>163</sup>
- 2) [Y]ou must contact us within one (1) year of the date of the occurrence of the event or facts giving rise to a dispute . . . or you waive the right to pursue a claim based upon such event, facts or dispute;<sup>164</sup>
- 3) In no event shall we or our employees or agents have any liability for punitive, treble, exemplary, special, indirect, incidental or consequential damages;<sup>165</sup>
- 4) The Company will pay for all reasonable arbitration filing fees and arbitrator's costs and expenses except that you are responsible for all costs that you incur in the arbitration, including, but not limited to, your expert witnesses or attorneys;<sup>166</sup>

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<sup>159</sup> See, e.g., Bales, *supra* note 59, at 585, 607–08, 616–18, 623–27 (collecting cases); Schwartz, *supra* note 144, at 56–59 (collecting cases).

<sup>160</sup> 446 F.3d 25, 29–31 (1st Cir. 2006).

<sup>161</sup> *Id.* at 31.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 42.

<sup>164</sup> *Id.* at 31, 43.

<sup>165</sup> *Id.* at 44.

<sup>166</sup> *Id.* at 50.

- 5) There shall be no right or authority for any claims to be arbitrated on a class action or consolidated basis or on bases involving claims brought in a purported representative capacity on behalf of the general public (such as a private attorney general), other subscribers, or other persons similarly situated . . . .

The court of appeals refused to enforce several of those provisions and ordered the arbitration to proceed on a class-wide basis with treble damages available on the plaintiffs' federal antitrust claims, and attorneys' fees and costs available on all the plaintiffs' claims.<sup>168</sup> It reasoned that the arbitration agreement's ban on an award of attorneys' fees and costs to a prevailing plaintiff conflicted with both federal and state antitrust law, which make such awards mandatory.<sup>169</sup> Given the expense of litigating antitrust actions, "the ban on the recovery of attorney's [sic] fees and costs in the arbitration agreements would burden Plaintiffs here with prohibitive arbitration costs, preventing Plaintiffs from vindicating their statutory rights in arbitration."<sup>170</sup> The court found that the agreement's prohibition on the award of treble damages was inconsistent with federal antitrust law, which makes such an award to a prevailing plaintiff mandatory, and that the right to receive treble damages could not be prospectively waived.<sup>171</sup>

In analyzing the enforceability of the ban on class actions in the arbitration agreement, the court noted that the potential recoveries for individual plaintiffs ranged from a few hundred to a few thousand dollars, while preparing a complex antitrust action would likely require hundreds of thousands of dollars in expert fees and millions of dollars in attorneys' fees.<sup>172</sup> Under those circumstances, the court concluded, "If the class mechanism prohibition here is enforced, Comcast will be essentially shielded from private consumer antitrust enforcement liability, even in cases where it has violated the law. Plaintiffs will be unable to vindicate their statutory rights."<sup>173</sup>

The *Kristian* court's refusal to enforce the arbitration agreement as written was based entirely on its application of federal substantive

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<sup>167</sup> *Id.* at 53.

<sup>168</sup> *Id.* at 64–65.

<sup>169</sup> *Id.* at 46, 50.

<sup>170</sup> *Id.* at 52–53.

<sup>171</sup> *Id.* at 44–48.

<sup>172</sup> *Id.* at 54–55.

<sup>173</sup> *Id.* at 61.

FAA law and not state law applicable under the savings clause. The court made this explicit:

Before the district court, Plaintiffs also challenged the enforceability of the arbitration agreements on the basis of Massachusetts unconscionability law. We have focused on a vindication of statutory rights analysis, which draws on the federal substantive law of arbitrability. . . .

. . . .

As a practical matter, there are striking similarities between the vindication of statutory rights analysis and the unconscionability analysis. In fact, many of Plaintiffs' unconscionability arguments are merely reiterations of their vindication of statutory rights arguments. . . . Thus, we see no need to conduct a separate unconscionability analysis under Massachusetts law.<sup>174</sup>

*Kristian* is just one example of the power the FAA gives courts to refuse to enforce lopsided arbitration agreements, a power that exists apart from state law in the savings clause and would therefore survive a reinterpretation of the savings clause to refer to federal rather than state law.<sup>175</sup>

Regardless of whether the savings clause is reinterpreted in the way I have suggested, appreciating the existence and content of this body of federal common law reveals much about the scope of the *Concepcion* decision and the future of challenges to arbitration agreements that constitute waivers of substantive rights. Much of the post-*Concepcion* commentary focuses on the propriety of what many characterize as the Court's decision to require enforcement of class action waivers in arbitration agreements.<sup>176</sup> But that characterization

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<sup>174</sup> *Id.* at 63–64.

<sup>175</sup> *Id.* A more recent example is *In re American Express Merchants' Litigation*, in which the Second Circuit refused to enforce a class action waiver provision in an arbitration agreement because the cost of a merchant individually arbitrating an antitrust dispute with American Express “would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws.” No. 06-1871-cv, slip op. at 21–22 (2d Cir. Feb. 1, 2012).

A quiet development that could have dramatic consequences is the recent decision by the National Labor Relations Board that an employer violates the NLRA by requiring nonunion employees to agree to arbitrate all claims and to refrain from bringing class claims. *D.R. Horton, Inc.*, 357 N.L.R.B. 184 (2012).

<sup>176</sup> See, e.g., Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012); Brian Fitzpatrick, *Is the End of Class Actions upon Us?*, SCOTUSBLOG (Sept. 14, 2011, 9:55 AM), <http://www.scotusblog.com/2011/09/is-the-end-of-class-actions-upon-us>; Editorial, *Gutting Class Action*, N.Y. TIMES, May 12, 2011, <http://www.nytimes.com/2011/05/13/opinion/13fri1.html>; Ashby Jones, *After AT&T Ruling, Should We Say Goodbye to Consumer Class Actions?*, WALL ST. J. L.

overstates the holding in *Concepcion*. The Court in *Concepcion* decided only that California's common law of unconscionability, as applied to class action waivers, could not be the basis for refusing to enforce a class action waiver in an arbitration agreement covered by the FAA. The Court was explicit that the question it had to decide was "whether [the FAA] preempts California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable,"<sup>177</sup> and it concluded the FAA preempted California law because it interfered with "the accomplishment and execution of the full purposes and objectives of Congress."<sup>178</sup> The question whether a class action waiver might be unenforceable under *Gilmer* and *Randolph* because it would amount to a waiver of the substantive rights asserted by the plaintiff was not presented to or decided by the Court. One might read the relevant *Concepcion* tea leaves in different ways,<sup>179</sup> but the question whether a class action waiver in an arbitration agreement might be unenforceable as a matter of the federal common law of arbitration is undoubtedly an open one.<sup>180</sup>

Another apparently open and important question is whether this federal common law "vindication of rights" analysis applies to state-law claims. In *Stutler v. T.K. Constructors Inc.*, the Sixth Circuit held that in a diversity case the plaintiffs' objection to enforcement of an

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BLOG (Apr. 27, 2011, 12:36 PM), [http://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions/?mod=WSJBlog&utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+wsj%2Fflaw%2Ffeed+%28WSJ.com%3A+Law+Blog%29](http://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions/?mod=WSJBlog&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wsj%2Fflaw%2Ffeed+%28WSJ.com%3A+Law+Blog%29); David Schwartz, *Do-It-Yourself Tort Reform: How the Supreme Court Quietly Killed the Class Action*, SCOTUSBLOG (Sept. 16, 2011, 10:52 AM), <http://www.scotusblog.com/2011/09/do-it-yourself-tort-reform-how-the-supreme-court-quietly-killed-the-class-action>.

<sup>177</sup> *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).

<sup>178</sup> *Id.* at 1753.

<sup>179</sup> *Compare id.* at 1750–53 (finding that class arbitration, unless it is consensual, is inconsistent with the FAA because it requires procedural formality and increased cost and greatly increases risks to defendants, creating a substantial deterrent effect on incentives to arbitrate), *with id.* at 1753 (finding that the individual claims here would most likely not go unresolved absent the availability of a collective action because defendant AT&T has set up an informal dispute resolution system that is quick, easy to use, and likely to result in full or excess payment to the customer without the need for arbitration or litigation).

<sup>180</sup> *E.g.*, *In re Am. Express Merchs.' Litigation*, slip op. at 13 (concluding that *Concepcion* does not address the question whether a class action waiver is enforceable if the plaintiffs are able to demonstrate that enforcement would prevent them from vindicating their federal statutory rights); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950(LBS)(JCF), 2011 WL 2671813, at \*4 (S.D.N.Y. July 7, 2011) (holding that even after *Concepcion* "the federal common law of arbitrability" precludes enforcement of an arbitration clause when doing so would interfere with the substantive federal statutory right to pursue a Title VII pattern and practice case on a class-wide basis).

arbitration agreement on the ground that they would be forced to bear prohibitive costs was to be determined by state “contract defenses . . . rather than those found in federal common law.”<sup>181</sup> The court reasoned that its previous “vindication of rights” cases, in which it had found that prohibitive costs could be a basis for refusing to enforce an arbitration award, involved instances in which the plaintiffs were asserting federal statutory claims, as the plaintiffs did in *Green Tree Financial Corp. v. Randolph*.<sup>182</sup> Moreover, the court continued, applying this “federal common law” where the plaintiff was asserting state-law claims would violate the *Erie* doctrine.<sup>183</sup>

To my knowledge, this is the only opinion discussing this issue in any detail. Many courts have applied a “vindication of rights” analysis to arbitration agreements in instances where the party resisting enforcement was asserting state-law claims,<sup>184</sup> but none have done so after explicitly considering arguments like those deemed convincing by the Sixth Circuit.

However, the *Erie* justification for refusing to apply a “vindication of rights” analysis to state-law claims can be easily dismissed. The *Swift* regime was deemed unconstitutional by the Court in *Erie* because federal courts were creating law that applied only in diversity cases in federal court, they were doing so even as to matters that would have been beyond the legislative power of Congress, and as to matters within that power they were doing so pursuant to the diversity statute and not a statute delegating Congress’s lawmaking power to those courts.<sup>185</sup> Applying the FAA’s common law of “vindication of rights” to state-law claims does not pose any of those problems. At this point, there is no doubt that the Court views the FAA as creating and authorizing the federal courts to create additional federal substantive law governing the interpretation and enforcement of covered arbitration agreements—federal law that applies in both state

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<sup>181</sup> 448 F.3d 343, 346 (6th Cir. 2006).

<sup>182</sup> *Id.* The plaintiff in *Randolph* asserted claims under the Truth in Lending and Equal Credit Opportunity Acts. See also *supra* text accompanying notes 150–55.

<sup>183</sup> *Stutler*, 448 F.3d at 347.

<sup>184</sup> *E.g.*, *Kristian v. Comcast Corp.*, 446 F.3d 25 (1st Cir. 2006) (federal and state antitrust law claims); *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549 (4th Cir. 2001) (ADEA and state contract and wrongful discharge claims); *Pérez v. Hospitality Ventures-Denver LLC*, 245 F. Supp. 2d 1172 (D. Colo. 2003) (federal FMLA and state-law claims); *Rembert v. Ryan’s Family Steak Houses, Inc.*, 596 N.W.2d 208 (Mich. Ct. App. 1999) (state common law and statutory claims); *Pyburn v. Bill Heard Chevrolet*, No. 00C-1143, 2000 WL 35440991 (Tenn. Cir. Ct. Aug. 21, 2000) (class action under state consumer protection law).

<sup>185</sup> *E.g.*, *Guttoff*, *supra* note 44, at 378–86.

and federal courts. That is the point of *Southland*, and that type of federal common law poses no *Erie* problem.<sup>186</sup>

The question whether the Court intended the “vindication of rights” analysis in *Gilmer* and *Randolph* to apply to state-law claims is more complicated. On one hand, in both cases the plaintiffs were asserting only federal statutory claims. And in both cases there is language that suggests the Court was interested in creating a doctrine that would assure that the purposes of those particular federal laws would not be frustrated by enforcing the arbitration agreements in question. In *Gilmer*, the Court characterized its discussion of the plaintiff’s critiques of arbitration as an attempt to determine whether “Congress, in enacting the ADEA, intended to preclude arbitration of claims under that Act.”<sup>187</sup> Similarly, the Court in *Randolph* stated that a question was “whether Congress has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue”<sup>188</sup> and that “the party seeking to avoid arbitration bears the burden of establishing that Congress intended to preclude arbitration of the statutory claims at issue.”<sup>189</sup>

On the other hand, there is no language in *Gilmer* or *Randolph* that explicitly limits the “vindication of rights” analysis to federal statutory claims. The Court identified separate bases for refusing to enforce arbitration agreements, only one of which is limited to federal claims. That approach requires a court to consider whether Congress intended to prevent arbitration of disputes over the rights it created in a particular statute. For example, in *Gilmer* the Court explained that if Congress intended to preclude a waiver of a judicial forum for ADEA claims it would “be discoverable in the text of the ADEA, its legislative history, or an ‘inherent conflict’ between arbitration and the ADEA’s underlying purposes.”<sup>190</sup> That inquiry, to be sure, involves an exploration of the specific statutory scheme the plaintiff is

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<sup>186</sup> *Id.* at 386–89 (explaining the theory of congressional delegation as a justification for federal common law).

<sup>187</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991).

<sup>188</sup> *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000).

<sup>189</sup> *Id.* at 92.

<sup>190</sup> *Gilmer*, 500 U.S. at 26.

invoking.<sup>191</sup> And that inquiry is limited to federal claims under *Southland*.<sup>192</sup>

But that inquiry is separate from the question whether a court asked to enforce an arbitration agreement under the FAA could refuse to do so on the ground that the terms of the agreement effectively diminished the rights, whether created by federal or state law, that the plaintiff is asserting. The Court in *Randolph* recognized that, regardless of the resolution of the question whether Congress intended to guarantee the availability of a judicial forum for disputes over the rights it created in the Truth in Lending and Equal Credit Opportunity Acts, a court should refuse to enforce an arbitration agreement if enforcement of its terms would force a plaintiff to forgo or seriously compromise those substantive law claims.<sup>193</sup>

It is difficult to imagine why this latter defense to enforcement—“vindication of rights” analysis—would be available only in federal question cases. If, for example, an arbitration agreement covered by the FAA required a plaintiff to pay a “filing fee” of \$50,000, did the Court in *Randolph* anticipate that a court could rely on federal common law to refuse to enforce that agreement with respect to federal claims asserted by plaintiff but not state-law claims? A more sensible interpretation would be that when the Court in *Gilmer* wrote, “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,”<sup>194</sup> the Court meant to distinguish between “real” arbitration agreements—those

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<sup>191</sup> *CompuCredit Corp. v. Greenwood*, No. 10-948 (U.S. Jan. 10, 2012) (concluding that there is no “congressional command” in the Credit Repair Organization Act that would override the mandate of the FAA).

<sup>192</sup> *Gilmer*, 500 U.S. at 26–29 (considering the articulated purposes of the statute, its substantive proscriptions, and its remedial scheme, including the role of the EEOC). A similar inquiry, determining whether the state legislature that created a state-law cause of action intended to guarantee a judicial forum for resolution of claims, is prohibited under the Court’s FAA jurisprudence. As Justice Stevens explained in *Southland*, under the Court’s interpretation of the FAA, Congress can create a federal right and guarantee judicial enforcement regardless of a written arbitration agreement, but a state legislature may not do the same thing with respect to a state-created right. *Southland Corp. v. Keating*, 465 U.S. 1, 17–22 (1984) (Stevens, J., concurring in part and dissenting in part); see also *supra* text accompanying note 103.

<sup>193</sup> *Randolph*, 531 U.S. at 90, 92 (plaintiff could successfully resist enforcement of an arbitration agreement by showing that Congress intended to prohibit arbitration of the claims she was asserting or by showing that the costs of an arbitration would be so high as to prevent plaintiff from asserting her claims).

<sup>194</sup> *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)) (alteration in original).



presumptively enforceable under the FAA—and agreements to waive or otherwise compromise substantive rights—agreements that Congress did not intend to require courts to enforce.<sup>195</sup> And in the language of the savings clause, that a contract contains a prospective waiver of substantive-law rights may constitute “grounds as exist at law or in equity for the revocation of any contract.”<sup>196</sup>

Undoubtedly, one effect of federalizing the savings clause would be to draw “vindication of rights” analysis in from the shadows and accelerate the turn away from state unconscionability law, although that will no doubt be one consequence of the Court’s decision in *Concepcion*.<sup>197</sup> The “vindication of rights” analysis is not well developed, so there are other unanswered questions courts will have to confront in applying the doctrine.<sup>198</sup> But the uncertainty about the

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<sup>195</sup> Courts applying the FAA “vindication of rights” approach to a state-law claim might nevertheless need to identify with some specificity the nature of the state right being asserted. For example, if a plaintiff asserting a claim under state law seeks to avoid enforcement of an arbitration agreement that contains a cap on damages, a court would need to determine whether the cap was inconsistent with the remedies that would be available to plaintiff if she asserted the claim in court. If the “vindication of rights” analysis turns on whether enforcement of an arbitration agreement constitutes a prospective waiver of substantive rights, a court might need to determine whether a particular state-law right is waivable. See *Kristian v. Comcast Corp.*, 446 F.3d 25, 49–50 (2006) (considering whether an individual may waive rights under Massachusetts antitrust law).

<sup>196</sup> 9 U.S.C. § 2 (2006).

<sup>197</sup> See *supra* notes 136–41 and accompanying text.

<sup>198</sup> See *Bales*, *supra* note 59, at 624–25 (describing conflicting decisions on whether various provisions justify refusal to enforce arbitration agreements). Other questions are reflected in the First Circuit’s *Kristian* decision, discussed *supra* notes 160–75 and accompanying text. Among the most important is how the Supreme Court’s rulings on allocation of authority between courts and arbitrators will play out in the “vindication of rights” context. For example, in *Kristian*, the court interpreted those cases as reserving for the court the questions whether (1) the limitation on damages in the arbitration agreement interfered with plaintiffs’ rights under federal antitrust laws, and (2) the agreement’s prohibition on an award of costs and attorney’s fees and class arbitration interfered with plaintiffs’ rights under federal and state antitrust laws. *Kristian*, 443 F.3d at 64. By contrast, the court ruled that the arbitrator was to decide the questions whether (1) the statute of limitations set forth in the arbitration agreement must yield to the longer statutes of limitations available under both state and federal law, and (2) the limitation on damages in the arbitration agreement must yield to the treble damages provision of state antitrust law. *Id.* How the Court’s decision in *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), will apply to “vindication of rights” arguments made where an arbitration agreement delegates to the arbitrator the exclusive authority to decide disputes relating to the enforceability of an arbitration agreement likewise remains to be resolved. And finally, although by no means is this an exhaustive list, courts will have to consider, as the court did in *Kristian*, whether offending provisions of an arbitration agreement can be severed and an arbitration should be ordered consistent with the rights established by the

ultimate answer to some of these questions should not deflect attention from the appropriateness of federalizing the savings clause with a “vindication of rights” analysis at its core.<sup>199</sup>

### CONCLUSION

The Federal Arbitration Act now controls the interpretation and enforcement of the vast majority of arbitration agreements executed in the United States. The expansion of the FAA’s scope and the Court’s pursuit of the policy favoring arbitration have been closely scrutinized and much criticized. The prevailing interpretation of the savings clause as referring to state law, on the other hand, has mostly escaped attention and criticism. Some of the satisfaction with the prevailing interpretation can be explained by the perception among those opposed to mandatory arbitration that the availability of state law in the savings clause is the only possible means of relief from the FAA’s unflinching support of arbitration.

But the FAA’s savings clause is worthy of more rigorous inspection. As I have shown, the proper interpretation of the clause is an open question. Under my proposed alternative to the status quo, state law would play no role in savings clause litigation and would be replaced by federal common law. That interpretation is perhaps consistent with legislative intent; it is consistent with section 301 of the LMRA, an analogous federal statute; and it would greatly simplify and unify FAA law by replacing the current mix of federal and state law with a single federal standard. And although there is good reason to think that a federal common law standard would also reflect the current Supreme Court’s preference for arbitration, under existing Supreme Court precedent, arbitration agreements can be and are scrutinized under a federal standard to assure that they do not result in a waiver of the rights proposed to be arbitrated—the so-called “vindication of rights” approach.

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law plaintiff seeks to enforce, or whether to refuse to enforce the arbitration agreement *in toto*. See 443 F.3d at 48, 53, 61–63.

<sup>199</sup> Similarly, there is a body of federal law to which courts could turn in trying to determine whether an arbitration agreement was the product of fraud or duress. For example, the Court has explained that forum selection clauses should not be enforced if their incorporation into a contract was the result of fraud, undue influence, or overwhelming bargaining power. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 591 (1991); *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 12–13 (1972); see also *Rivera v. Centro Medico de Turabo, Inc.*, 575 F.3d 10, 19–20 (1st Cir. 2009) (describing the federal common law of fraud and overreaching in the context of a dispute over the enforceability of a forum selection clause).

The specific contours of this approach remain hazy, in large measure because of the focus of litigants, some courts, and legal scholars on preserving the role of state law, particularly the state law of unconscionability, as the means for resisting enforcement of arbitration agreements. However, the Court continued to close the door to this approach in *Concepcion*, so the scope of the “vindication of rights” doctrine has never been more important.

Even for those who are not persuaded by my arguments about reinterpreting the savings clause, the question of whether there is a robust body of federal law under which lopsided arbitration agreements will not be enforced should be of great interest. And that might be especially so for those interested in the subject of this Scholarship Series, “ADR for the Masses.” How this body of law develops may determine, to a very large extent, whether the courts remain available to adjudicate claims by “the masses”—particularly consumers and employees—against banks, telephone companies, insurers, and others who are in a position to require the waiver of a judicial forum as a condition of employment, a loan, a credit card, telephone service, insurance, and other products and services.

