The relationship between the Federal Arbitration Act (FAA) and state public policy has long been unsettled. According to some judges, scholars, and litigants, the FAA precludes courts from invalidating arbitration clauses under the contract defense of violation of public policy. However, in a practice that is impossible to square with that understanding of FAA preemption, courts have traditionally nullified arbitration clauses to advance a range of state interests, including preserving substantive rights under state law. Nevertheless, in AT&T Mobility LLC v. Concepcion, the U.S. Supreme Court held that the FAA eclipses a rule that deemed class-arbitration waivers to be unconscionable when they prevented plaintiffs from pursuing numerous, low-value state law claims. Both Justice Scalia’s majority opinion and Justice Thomas’s decisive concurrence strongly implied that state public policy is not a permissible basis for striking down an arbitration clause. As a result, lower courts are now compelling arbitration—often through gritted teeth—of lawsuits that are destined to fail.

Counterintuitively, I argue that Concepcion holds the seeds of an approach to FAA preemption that gives judges greater freedom to strike down arbitration provisions to further state interests. FAA preemption stems from its centerpiece, section 2, which makes agreements to arbitrate specifically enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” According to the conventional wisdom, the plain language of this “savings clause” immunizes arbitration clauses from state public policy: few state regulations apply across-the-board to “any contract.” Yet the courts and commentators who embrace this view have not explained why its rigid textualism is appropriate in the context of the FAA, which displaces state law through the purposivist mechanism of obstacle preemption. Concepcion implicitly recognizes this disconnect and breaks new ground by relying not on the statute’s text, but on its “purposes and objectives.”

I show that the purposivism that animates Concepcion is superior to textualist approaches to FAA preemption. The incoherence of the any-contract test and the centrality of context and legislative history to obstacle preemption suggest that purposivism should be the primary technique for mapping the FAA’s dominion over state law. However, this path leads to a starkly different endpoint than the one Concepcion reached. A faithful, full-bore examination of Congress’s goals reveals that the phrase “grounds . . . for the revocation of any contract” encompasses all traditional contract doctrines, including the vener-
able doctrine of violation of public policy. Thus, the public policy defense should only be preempted when it thwarts the FAA’s “purposes and objectives.” I propose a test to determine when this has occurred and apply it to controversial issues now pending in courts, including class arbitration, the unconscionability doctrine, and judicial or legislative rules that prohibit that arbitration of particular claims.

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**INTRODUCTION**

A growing number of lawsuits are doomed without regard to their merits. In Florida, millions of customers allege that their wireless-service provider overcharged them several dollars each month.1 In California, students seek an

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injunction against a bank that purportedly locked them into unsuitable loans. In Massachusetts, a former employee contends that the hospital where she worked systematically discriminated against women. These plaintiffs do not necessarily pursue frivolous legal theories or lack vital evidence. Instead, their claims are stillborn for a simple reason: they arise out of contracts that contain arbitration clauses. As a result, they do not seem to survive a recent sea change in the U.S. Supreme Court’s view of Federal Arbitration Act (FAA) preemption.

The relationship between the FAA and state law has long been unsettled. Congress passed the FAA in 1925 to abolish the ouster and revocability doctrines—principles that reflected “longstanding judicial hostility to arbitration” and made agreements to arbitrate unenforceable. Most courts and commentators believe that Congress intended the statute to be a mere procedural rule for federal courts. Yet three decades ago, in Southland Corp. v. Keating, the Court held that the FAA applies in state court and eclipses contrary state law. The touchstone for FAA preemption is its centerpiece, section 2, which makes arbitration clauses specifically enforceable, “save upon such grounds as exist at law or in equity for the revocation of any contract.” According to the conventional wisdom, the last two words of this savings clause are pivotal, and only permit courts to strike down arbitration provisions under rules that are broad enough to govern “any contract.” Although the precise definition of this phrase

2. Kilgore v. KeyBank, Nat’l Ass’n, 673 F.3d 947, 953–54 (9th Cir. 2012). As this Article entered the editing stage, the Ninth Circuit agreed to reconsider Kilgore en banc. See Kilgore v. KeyBank, Nat’l Ass’n, 697 F.3d 1191 (9th Cir. 2012).
9. Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010) (citing Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996)); see also Southland, 465 U.S. at 16 n.11 (“[A] party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement.”); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159, 166 (5th Cir. 2004) (“[A] matter of federal law, arbitration agreements and clauses are to be enforced unless they are invalid under principles of state law that govern all contracts.”); Carter v. SSC Odin Operating Co., 927 N.E.2d 1207, 1219 (Ill. 2010) (“State laws that are applicable to arbitration contracts and some other types of contracts, but not all contracts, are not grounds for the revocation of any contract.”); Christopher R. Drahozal, Federal Arbitration Act Preemption, 79 Ind. L.J. 393, 409 (2004) (“[S]tate laws that apply to arbitration clauses and some other type of contract clause are preempted.”).
remains unclear,\textsuperscript{10} it generally has been understood to include a handful of context-spanning rules—such as fraud, duress, and mistake—which govern not just consumer or employment agreements, but “government contracts, business-to-business contracts, and automobile rental agreements, to name a few.”\textsuperscript{11}

An important corollary of the any-contract test is that the FAA immunizes arbitration clauses from the contract defense of violation of public policy. This idea, which I will call the “total-preemption theory,” rests on two pillars. First, the public policy defense is a way for courts to implement state legislation that prohibits specific contractual provisions.\textsuperscript{12} But state lawmakers virtually never pass statutes that are inclusive enough to regulate “any contract.”\textsuperscript{13} Rather, they attempt to shield the rights of vulnerable parties through laws that invariably apply to some contracts: those involving consumers,\textsuperscript{14} employees,\textsuperscript{15} franchisees,\textsuperscript{16} construction,\textsuperscript{17} or “contracts of adhesion.”\textsuperscript{18} For instance, many states prohibit the waiver of litigation rights in nursing-home-admission contracts.\textsuperscript{19} But as the Illinois Supreme Court recently held, these laws cannot invalidate an arbitration clause because they only govern “a specific type of contract—those involving nursing care.”\textsuperscript{20}

The second justification for the total-preemption theory relates to the purpose of the FAA. Arguably, giving states authority over the validity of arbitration clauses would create a loophole the size of the statute itself. Under the guise of the public policy defense, state lawmakers could pass regulations that resurrect the very hostility to arbitration that the FAA eradicated.\textsuperscript{21} For these reasons,

\textsuperscript{10} See infra section II.B.
\textsuperscript{12} See, e.g., \textit{Restatement (Second) of Contracts} § 178(1) (1981) (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable . . . .”). Traditionally, courts also invoked policies embodied in state constitutions or supreme court opinions to invalidate a contract that “injure[s] the public or is against the public good or is contrary to sound policy or good morals.” \textit{Westfield-Bonte Co. v. Burnett}, 195 S.W. 477, 479 (Ky. 1917). Today, however, the public policy defense most often arises out of legislation. See, e.g., \textit{Strong v. Superior Court}, 132 Cal. Rptr. 3d 18, 25 (Cal. Ct. App. 2011) (“The Legislature declares state public policy, not the courts.” (citations omitted)).
\textsuperscript{14} See, e.g., \textit{Tex. Civ. Prac. & Rem. Code Ann.} § 171.001(b) (West Supp. 1997) (requiring arbitration clauses in contracts for $50,000 or more to be signed by a consumer’s attorney).
\textsuperscript{15} \textit{Cal. Lab. Code} § 229 (West 2009).
\textsuperscript{18} See, e.g., \textit{Iowa Code Ann.} § 679A.1(2)(a) (West 2008).
\textsuperscript{20} Carter v. \textit{SSC Odin Operating Co.}, 927 N.E.2d 1207, 1219 (Ill. 2010).
judges, scholars, and litigants often contend that the FAA “bar[s] the states from imposing public policy limits on arbitration” and trumps “all state public-policy grounds for finding [an] agreement to arbitrate unenforceable.”

But despite these broad and breezy statements, the role of state policy under the FAA has never been straightforward. For one, the total-preemption theory is at war with another mainstay of the Court’s FAA jurisprudence: the idea that the bare transition from a judicial to an arbitral forum does not alter the ultimate result of a dispute. Again and again, the Court has defended the FAA’s long shadow over the civil justice system by declaring that “[b]y agreeing to arbitrate...a party does not forgo [any] substantive rights.” To carry out this directive, some judges have invoked the doctrine of violation of public policy to annul all or part of a one-sided arbitration clause. Moreover, even when courts do not formally invoke the public policy defense, they have invalidated arbitration clauses to further a range of state interests. For instance, many courts have found one-sided arbitral provisions to be unconscionable. Unconscionability, which weeds out “illegal” or “unfair” terms in adhesion contracts, is “an equitable doctrine rooted in public policy.” Likewise, judges have generally refused to enforce choice-of-law provisions linked to arbitration clauses to protect “fundamental policies” of the forum state. Finally, courts and lawmakers have cited state policy concerns to exempt child custody disputes, foreclosure proceedings, and in rem probate matters from arbitration. Thus, despite abundant rhetoric to the contrary, section 2 has never completely eclipsed state public policy.

Nevertheless, in 2011, the Court seemed to give the total-preemption theory a full-throated endorsement in *AT&T Mobility LLC v. Concepcion*. In a decision that was widely regarded as the “death-knell” for consumer and employment class actions, the Court held that section 2 trumps a California Supreme Court decision.
decision that deemed most class-arbitration waivers in consumer contracts to be unconscionable. Justice Scalia’s majority opinion acknowledged that unconscionability is a “ground[ ]... for the revocation of any contract” and thus falls squarely within section 2’s savings clause. Yet Justice Scalia held that because the state high court’s rule effectively mandated class procedures in arbitration, it made the process slower and more formal, and thus erected a barrier to “the accomplishment and execution of the full purposes and objectives of Congress.”

Then, responding to the argument that class-arbitration waivers shield corporations from numerous, low-value claims—which will either be brought as a class action or not at all—Justice Scalia explained that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.” Likewise, Justice Thomas’s decisive concurrence opined that “courts cannot refuse to enforce arbitration agreements because of a state public policy.”

Now, citing Concepcion, judges are compelling arbitration of claims that are destined to fail. Recall the examples in the first paragraph of this Article. The Eleventh Circuit recently held that even if a class-arbitration waiver in a cell-phone contract “would exculpate [the drafter] from liability under state law,” Concepcion “rejected this public policy argument.” Similarly, in the fraudulent-loan case, the Ninth Circuit declined to follow an established California rule that exempted public injunctive relief from arbitration. Although the Ninth Circuit noted that arbitrators are incapable of supervising public injunctions, it reasoned that it was “not free to ignore Concepcion’s holding that state

**Footnotes:**
31. Concepcion, 131 S. Ct. at 1751–53.
32. Id. at 1747–48 (internal quotation marks omitted).
33. Id. at 1753 (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
34. Id.
35. Id. at 1753 (Thomas, J., concurring); cf. Marinet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201, 1203–04 (2012) (summarily reversing a West Virginia Supreme Court opinion that had deemed the arbitration of personal injury claims to be against public policy).
36. Cruz v. Cingular Wireless, LLC, 648 F.3d 1205, 1212 (11th Cir. 2011).
37. Kilgore v. KeyBank, Nat’l Ass’n, 673 F.3d 947, 963 (9th Cir. 2012).
public policy cannot trump the FAA.’” 38 Finally, some judges, such as the one in the Massachusetts employment dispute, have concluded that Concepcion undercut the vindication of rights doctrine: a federal common law principle that exempts plaintiffs from arbitration if they cannot vindicate their federal statutory rights in the extrajudicial forum. 39 In fact, as this Article entered the editing stage, the Court granted certiorari in American Express Co. v. Italian Colors Restaurant to decide whether Concepcion requires plaintiffs to arbitrate federal antitrust claims individually even though the cost of doing so dwarfs each plaintiff’s potential recovery. 40

This Article challenges the burgeoning consensus that Concepcion bars courts from “apply[ing] state public policy concerns to invalidate an arbitration agreement.” 41 Upon first glance, Concepcion seems like a resounding victory for corporate interests and a body blow to class actions. But the decision also raises fundamental questions about how to conceptualize FAA preemption. In sharp contrast to the textualist any-contract test—which shoehorns the entire preemption inquiry into a sparse and cryptic passage from a ninety-year-old statute—Concepcion is purposivist. That is, Justice Scalia’s opinion looks past the FAA’s plain language to its underlying design and “enforce[s] the ‘spirit’ rather than the ‘letter’ of the law.” 42 And as a judo move turns an aggressor’s own momentum against him, I argue that Concepcion inadvertently reveals that purposivism should be the exclusive tool that courts use to map the FAA’s displacement of state law. After all, the FAA only overshadows state rules that “undermine [its] goals and policies.” 43 Thus, Concepcion is exactly right about one thing: FAA preemption should hinge on what lawmakers wanted to accomplish with the statute, not a hypertechnical parsing of its text.

But unlike Justice Scalia’s cursory analysis in Concepcion, a searching examination of the FAA’s “purposes and objectives” 44 reveals that Congress did not intend to preempt state public policy wholesale. Indeed, a reasonable lawmaker would have understood the public policy defense—a “common law

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38. Id.
44. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).
[rule] of universal application”45—to be a “ground[]... for the revocation of any contract.”46 In fact, Congress debated and passed the statute during the golden age of the public policy doctrine—a time when courts held that a contract violated state public policy more frequently than they invoked garden-variety rules such as mistake, duress, lack of consideration, or the statute of frauds.47 Similarly, the FAA’s legislative record elucidates that lawmakers saw the statute as “no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws”48 and did not wish “to force an individual State into an unwilling submission to arbitration enforcement.”49 Thus, the FAA’s context and legislative record reveals that violation of public policy falls within the plain language of the savings clause.

To be sure, this does not end the preemption inquiry. As Concepcion illustrates, even a traditional contract defense can be preempted if it does violence to Congress’s goals. But the same extratextual evidence that clarifies the meaning of the savings clause also highlights the fact that lawmakers had relatively modest ambitions for the FAA. The statute’s core objective is to abolish the ouster and revocability doctrines: rules that disfavored arbitration for no apparent reason. By extension, the FAA should preempt any state law that exhibits the same unfounded distrust of extrajudicial dispute resolution: for instance, state statutes that treat the mere existence of an arbitration clause as a waiver of a cause of action. By the same token, however, the FAA should not bar all applications of state public policy. Many state rules invalidate arbitration clauses but do not rest on rank suspicion of the arbitral forum. In particular, the FAA should not bar states from nullifying arbitration provisions due to a well-supported determination that doing so is necessary to preserve substantive rights or remedies.

The Article contains three Parts. Part I describes the long-simmering tension between the total-preemption theory and the many ways in which courts regulate arbitration to advance state policy. It then explains how Concepcion appears to have adopted the total-preemption theory by requiring courts to enforce arbitration clauses that thwart a plaintiff’s state law claims. But Part I shows that Concepcion also embraces purposivism, rather than the textualism that dominates FAA preemption cases in the lower courts.

Part II picks up where Concepcion left off. It contends that purposivism is the only sensible way to gauge the ambit of a statute that trumps state law through obstacle preemption. It also reveals that the textualist any-contract test is incoherent and leads to absurd results.

47. See infra section III.A.
49. Id. at 40.
Part III explains how a purposivist understanding of the FAA debunks the total-preemption theory. Drawing on the FAA’s context and legislative history, it argues that the statute preempts state rules that unjustifiably disfavor arbitration: those that echo the ouster and revocability doctrines by simply assuming that the arbitral forum is inadequate. Yet Part III shows that not all applications of state policy suffer from this flaw. It then applies this reading of the statute to some of the most difficult issues pending in the wake of Concepcion.

I. FAA PREEMPTION AND STATE PUBLIC POLICY

This Part traces the evolution of FAA preemption. First, it describes how the Court has described the scope of FAA preemption inconsistently, causing lower courts to fill the gap with the textualist any-contract test. Second, it explains how the any-contract test has helped spawn the total-preemption theory by creating confusion about whether state legislation can nullify an arbitration clause. Third, it reveals that courts often invoke state public policy to invalidate agreements to arbitrate—a practice that is incompatible with the total-preemption theory. Finally, it examines how Concepcion apparently threw its weight behind the total-preemption theory by requiring courts to enforce one-sided arbitration clauses even in the teeth of strong state interests.

A. THE ANY-CONTRACT TEST AND THE TOTAL-PREEMPTION THEORY

Under the total-preemption theory, the FAA forbids courts from annulling arbitration clauses to further state public policy. One commonly given justification for this bold claim is the fact that the plain language of section 2 only preserves state rules that govern “any contract.” In this section, I sketch the basics of FAA preemption and explain how the textualist any-contract test has laid the foundation for the total-preemption theory.

The circumstances surrounding the FAA’s enactment are well known. In seventeenth-century England, judges invented special rules to stunt arbitration’s development. Under the ouster doctrine, they invalidated agreements to arbitrate because mere individuals were “not competent . . . to diminish the statutory juridical power.”50 Likewise, the revocability doctrine allowed either party to retract their assent to arbitrate until the arbitrator ruled.51 Although American courts absorbed these tenets along with the common law, they invoked them “with frequent protest.”52 By the dawn of the twentieth century, the ouster and revocability doctrines were condemned by judges, lawyers, and business groups

51. See, e.g., Vynior’s Case, (1609) 77 Eng. Rep. 597 (K.B. 599 (holding that arbitration contracts were “of [their] own nature countermandable”).
as “anomalous and unjust.”\textsuperscript{53} In 1925, Congress passed the FAA to abolish this “anachronism of our American law”\textsuperscript{54} and make agreements to arbitrate specifically enforceable.\textsuperscript{55}

Although the FAA overruled entrenched principles, it seemed to be just one step toward eradicating the ancient “hostility . . . to arbitration contracts.”\textsuperscript{56} Indeed, by all outward appearances, it was subject to an important limit: it was a procedural rule that governed federal courts and thus neither applied in state court nor preempted conflicting state law. Congress can telegraph its intent to override state law by saying so clearly or regulating so extensively that it occupies a particular sphere.\textsuperscript{57} Yet the FAA neither contains an express preemption clause nor sweeps far enough to “field” preempt state law.\textsuperscript{58} Thus, the FAA can only trump state rules through the mechanism of obstacle preemption.\textsuperscript{59} Under that doctrine, state law must yield if it thwarts Congress’s “purposes and objectives.”\textsuperscript{60} In the context of the FAA, though, courts must place a heavy thumb on the scale against preemption. Because the statute governs contract law—traditionally the province of the states—each jurisdiction’s traditional police powers are “not to be superseded . . . unless that was the clear and manifest purpose of Congress.”\textsuperscript{61}

The FAA seems to fall short of that high threshold. For one, much of the statute’s text governs federal courts exclusively. To be sure, its centerpiece, section 2, contains broad language: “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”\textsuperscript{62} However, half of the FAA’s other sections expressly apply only to federal courts.\textsuperscript{63} Most importantly, sections 3 and 4 establish procedures for petitions to compel arbitration in “the courts of the United States”

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{53} Id.
\item \textsuperscript{54} H.R. REP. NO. 68-96, at 1 (1924).
\item \textsuperscript{55} \textit{See Pub. L. No. 68-401, 43 Stat. 883 (1925).}
\item \textsuperscript{56} U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1007 (S.D.N.Y. 1915).
\item \textsuperscript{58} \textit{See Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 477 (1989) (“The FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.”).}
\item \textsuperscript{59} \textit{See id.} Technically, there is also a fourth kind of preemption: impossibility preemption. This occurs when “compliance with both federal and state regulations is a physical impossibility.” Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963). Yet this doctrine is “vanishingly narrow” because “even when state and federal law contradict each other, it is physically possible to comply with both.” Nelson, \textit{supra} note 57, at 228 & n.15.
\item \textsuperscript{60} Hines v. Davidowitz, 312 U.S. 52, 67 (1941).
\item \textsuperscript{61} Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).
\item \textsuperscript{63} \textit{Id.} §§ 3–4, 7, 9–11.
\end{enumerate}
\end{footnotesize}
and “United States district court.” Likewise, the legislative record repeatedly disavows the idea that the statute creates federal substantive law capable of binding the states. For instance, the House Report on the FAA declares that “[w]hether an agreement for arbitration shall be enforced or not is a question of procedure to be determined by the law [of the] court in which the proceeding is brought and not one of substantive law.”

Nevertheless, in 1984, the Court held in Southland Corp. v. Keating that section 2 of the FAA applies in state court and overrides conflicting state law. 7-Eleven franchisees sued their parent company for violating the California Franchise Investment Law (CFIL). The CFIL prohibits any contract term “purporting to . . . waive compliance with . . . this law.” The California Supreme Court held that this provision nullified the arbitration clauses in the 7-Eleven franchise agreements, reasoning that the CFIL’s “effectiveness . . . is lessened in arbitration as compared to judicial proceedings.” The U.S. Supreme Court reversed. Speaking through Chief Justice Burger, the Court reasoned that section 2 did not explicitly limit its reach to federal courts. In addition, Chief Justice Burger cited the references in the statute’s text and legislative history that linked its ambit to Congress’s Commerce Clause power. Because Congress usually displaces contrary state rules when it invokes its commerce prerogative, Chief Justice Burger declared that section 2 “foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.”

Few modern opinions have weathered as much criticism as Southland. For instance, David Schwartz has explored the anomalies that stem from Southland’s holding, including the fact that it made the FAA the only federal statute that creates substantive law but does not give rise to federal-question jurisdiction.

64. Id. §§ 3–4.
65. H.R. Rep. No. 68-96, at 1 (1924) (“Before [arbitration] contracts could be enforced in the Federal courts, therefore, this law is essential. The bill declares that such agreements shall be recognized and enforced by the courts of the United States.”); see also Hearings, supra note 48, at 38 (“Congress rests solely upon its power to prescribe the jurisdiction and duties of the Federal courts.”).
67. See id. at 3–4.
71. Id. at 10–11.
72. Id. at 12. For instance, the House Report on the bill that became the FAA stated that its purpose was “to make valid and enforceable [sic] agreements for arbitration contained in contracts [1] involving interstate commerce or [2] within the jurisdiction of admiralty, [3] or which may be the subject of litigation in the Federal courts.” H.R. Rep. No. 68-96, 1 (1924) (emphasis added). Arguably, this tripartite structure reveals that Congress intended the statute to govern “contracts involving interstate commerce” even when they were not “the subject of litigation in the Federal courts”—in other words, cases in state court. Id.
74. See Schwartz, supra note 6, at 6.
Likewise, Justice Scalia has called Southland “a permanent, unauthorized eviction of state-court power,” and noted that he “stand[s] ready to join four other Justices in overruling it.” Justice Thomas continues to dissent from decisions that find the FAA to apply in state court—no matter the underlying issue—for the sole purpose of voicing his disapproval of Southland. However, the Court has declined to overrule the case. Ironically, FAA preemption, though widely seen as illegitimate, is “now well-established.”

But despite this firestorm over Southland’s determination that the FAA does preempt state law, another aspect of the case has received less attention: what it says about the scope of FAA preemption. The fact that section 2 binds the states does not necessarily mean that it should have precluded the California Supreme Court from invoking the CFIL antiwaiver provision. After all, the savings clause permits courts to strike down agreements to arbitrate “upon such grounds as exist at law or in equity for the revocation of any contract.” As Justice Stevens noted in his Southland concurrence and dissent, violation of state public policy is a longstanding “ground[]... for the revocation” of contracts. Indeed, for centuries, state courts have refused to enforce agreements that restrain trade, feature exorbitant interest rates, or slash the drafter’s liability. The CFIL antiwaiver provision fit this mold: it stemmed from “the importance to the [s]tate of franchise relationships” and sought to rectify “the relative disparity in the bargaining positions between the franchisor and the franchisee.” Thus, even taking FAA preemption as a given, it would have been possible for section 2 and the CFIL antiwaiver provision to coexist.

Chief Justice Burger briefly addressed this point in a footnote. First, he opined that the CFIL antiwaiver provision was “not a ground that exists at law or in equity ‘for the revocation of arbitration provisions in contracts subject to the [CFIL]’.” At first, this sentence seems like a non sequitur. The CFIL antiwaiver provision is not a rule that “exists for the revocation of arbitration provisions”—it does not mention arbitration at all. Yet what Chief Justice Burger must have meant—and what lower courts would soon conclude—was that the CFIL antiwaiver

77. See, e.g., Preston, 552 U.S. at 352 n.2 (“Adhering to precedent, we do not take up Ferrer’s invitation to overrule Southland.”); Allied-Bruce, 513 U.S. at 272 (refusing a request by twenty state Attorneys General “to overrule Southland” because “private parties have likely written contracts relying upon Southland as authority”).
78. Preston, 552 U.S. at 353 (quoting Allied-Bruce, 513 U.S. at 272).
83. See, e.g., The Kensington, 183 U.S. 263, 268 (1905).
84. Southland, 465 U.S. at 20 (Stevens, J., concurring in part and dissenting in part).
85. Id. at 16 n.11.
provision “was not a ground that exists at law or in equity for the revocation of ‘any’ contract, but rather was specific to franchise agreements.” 86 Second, Chief Justice Burger reasoned that injecting public policy into the mix would allow state legislatures to revive the very hostility to arbitration that the FAA abolished. 87 As he put it, “states could wholly eviscerate Congressional intent to place arbitration agreements ‘upon the same footing as other contracts,’ simply by passing statutes such as the [CFIL].” 88 Then again, he did not explain how the CFIL antiwaiver provision—which applies both to arbitration provisions and to waivers of litigation—was a clandestine assault on the FAA.

Given this analytical imprecision, it is not surprising that, three years after Southland, the Court described the preemption test differently in Perry v. Thomas. 89 A California statute permitted employees to bring claims for unpaid wages in court “without regard to the existence of any private agreement to arbitrate.” 90 Because this state law expressly purported to nullify arbitration clauses, the Court had little trouble deeming it to be “in unmistakable conflict” with section 2’s enforcement mandate. 91 The Court then declined to address the plaintiff’s claim that the arbitration clause he had signed was unconscionable, noting that he had not raised that issue in the proceedings below. 92 However, the Court explained how courts should assess similar issues in the future:

[S]tate law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts 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. . . . 93

This understanding of section 2 preemption diverges from Southland’s. As in Southland, the first stage in Perry’s rubric is to examine whether a state rule falls within the savings clause. 94 But unlike Southland, which did not define

87. Southland, 465 U.S. at 14–16 & n.11.
88. Id. at 16 n.11 (internal citation omitted).
90. CAL. LAB. CODE § 229 (West 1971).
91. Perry, 482 U.S. at 491.
92. Id. at 492 n.9.
94. Id. at 490.
“ground[] . . . for the revocation of any contract,” 95 Perry reasoned that this phrase means traditional contract doctrines: a reading that would include the defense of violation of public policy. For instance, the opinion gives its blessing to judges invalidating arbitration clauses under “state law . . . of legislative . . . origin.” 96 When courts invoke state legislation that prohibits certain terms or transactions, they are employing the public policy defense. 97 Then, however, Perry added a second prong to the analysis by noting that even a fixture in the contracts firmament such as unconscionability can be preempted if it “rel[ies] on the uniqueness of an agreement to arbitrate.” 98 Thus, Perry’s view of section 2 preemption was both broader and narrower than Southland’s. It expanded the savings clause to include the full spectrum of contract doctrines (not just those that govern “any contract”). Yet it also made clear that these rules would be preempted if courts used them to discriminate against arbitration.

Over the next decade, the Court was never forced to clarify the test for FAA preemption. It granted certiorari in two cases that involved state laws that expressly purported to invalidate arbitration clauses. In Allied-Bruce Terminix Cos. v. Dobson, the Court held that the FAA overruled an Alabama statute that barred courts from specifically enforcing agreements to arbitrate. 99 A year later, in Doctor’s Associates, Inc. v. Casarotto, the Court held that the FAA trumped a Montana law that voided arbitration clauses unless the drafter had given conspicuous notice that the contract included an arbitration clause. 100 Even under Perry, these were easy cases. Consistent with the FAA’s antidiscrimination mandate, the Court had already established that states could neither “singl[e] out arbitration provisions for suspect status” 101 nor regulate them under “laws applicable only to arbitration provisions.” 102 But perhaps because the Court did not need to square Southland with Perry, it seemed to give its imprimatur to both cases. Consistent with Southland, it bluntly opined that “courts cannot apply state statutes that invalidate arbitration agreements”; 103 yet, echoing Perry, it also announced that the phrase “grounds . . . for the revocation of any contract” meant “general contract law principles.” 104

This lack of guidance was unfortunate because lower courts were grappling with an issue that straddled the fault line between Southland and Perry. Many state statutes can invalidate arbitration clauses but do not govern them exclu-
For instance, Michigan outlaws any term in a franchise agreement that “requir[es] that arbitration or litigation be conducted outside this state.”

Likewise, several jurisdictions have consumer-protection statutes that forbid “any waiver” of their provisions.

Were these state policies preempted because, as Southland suggested, section 2 denies state legislators the ability to regulate arbitration clauses? Or, following Perry, should courts ask whether these laws expressed hostility to arbitration?

To solve this puzzle, these judges overwhelmingly gravitated back to the text of the FAA. They fixated on the last two words in the savings clause and held that the statute preempts state laws unless they literally govern “any contract”—meaning “all contracts.” For instance, the First, Second, Fifth, and Ninth Circuits held that the FAA trumped state legislation invalidating out-of-state forum-selection provisions in franchise agreements.

According to these courts, these state statutes improperly regulated “one type of provision, venue clauses, in one type of agreement, franchise agreements.”

The court explained that the law “conflicts with the plain language of section 2” because it does not govern “all contracts” and thus is “not grounds for the revocation of any contract.”
In turn, limiting the savings clause to rules that govern “all contracts” effectively precludes courts from using the doctrine of violation of public policy to invalidate an arbitration provision. As noted, state statutes—the springboard for the public policy defense—rarely govern each and every binding agreement; instead, they are a mosaic of subject-matter-specific rules. Thus, in part due to the any-contract test, the Court has declared that the FAA withdraws “the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration” and embodies a “federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.” However, as I explain next, these expansive statements neglect the vigorous role that state public policy has traditionally played in the realm of the FAA.

B. THE ROLE OF STATE PUBLIC POLICY

In sharp contrast to the total-preemption theory, courts often invalidate arbitration clauses to further state interests. This section illustrates why reading the FAA to exclude state public policy is incompatible with entrenched norms.

The point of departure for recognizing the vibrancy of state public policy under section 2 is another cornerstone of the Court’s FAA jurisprudence. The Court often asserts that “[b]y agreeing to arbitrate . . . a party does not forgo [any] substantive rights.” This mantra stems from the Court’s long struggle to harmonize the FAA and other federal statutes. For the first six decades of the FAA’s existence, the Court refused to compel arbitration of federal statutory claims. This bright-line rule, known as the nonarbitrability doctrine, rested on the premise that arbitration was inferior to litigation. Indeed, because arbitration features lay judges, limited appellate rights, and streamlined procedural and evidentiary rules, the Court held that Congress could not have meant for plaintiffs to pursue public-law rights in a forum that “cannot provide an

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113. See supra note 13.
adequate substitute for a judicial trial.”119 But in the mid-1980s, the Court reversed course and concluded that arbitration had matured. As the Court explained, agreeing to arbitrate a federal statutory claim does not necessarily mean surrendering substantive rights, but merely “trad[ing] the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.”120 To this general rule, the Court appended a caveat: judges can strike down an arbitration clause if a plaintiff proves that she cannot effectively vindicate her federal statutory rights in the extrajudicial forum.121 For instance, the Court explained, hefty arbitral costs should not deter plaintiffs from asserting federal statutory claims.122 Because this vindication-of-rights doctrine only applied to federal statutory claims, it did not arise out of section 2’s savings clause; rather, it was a creature of federal common law.123

Yet some courts extended this vindication-of-rights rule to state claims, recognizing a violation of state public policy defense under the savings clause. For instance, the California Consumer Legal Remedies Act and Business and Professions Code authorizes “public injunctions”—permanent equitable decrees against deceptive business practices.124 In Broughton v. Cigna Healthplans of California125 and Cruz v. PacifiCare Health Systems, Inc.,126 the California Supreme Court refused to send public-injunction claims to arbitration, reasoning that arbitrators are poorly situated to supervise that kind of ongoing relief.127 As these courts explained, judges enjoy the perpetual ability to modify their orders, but arbitrators lack “institutional continuity”—they cannot amend their rulings more than thirty days after issuing them.128 Thus, enforcing a public injunction outside of the court system would involve the cumbersome and expensive process of initiating multiple arbitrations.129 Moreover, because arbitrators are not bound by the rulings of prior arbitrators, there would be no guarantee that a victory in arbitration would have any resonance.130 For these reasons, the court cited the judiciary’s “significant institutional advan-

120. Mitsubishi, 473 U.S. at 628.
121. See id. at 637 n.19 (reasoning that if an agreement to arbitrate functions as a “prospective waiver of a party’s right to pursue statutory remedies... we would have little hesitation in condemning the agreement as against public policy”).
122. See Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90 (2000) (“It may well be that the existence of large arbitration costs could preclude a litigant... from effectively vindicating her federal statutory rights in the arbitral forum.”).
123. See, e.g., David Horton, Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine, 60 U. Kan. L. Rev. 723, 744 (2012) (“[T]he vindication of rights doctrine is, at bottom, an attempt to square the FAA with other federal laws.”).
125. 988 P.2d 67 (Cal. 1999).
126. 66 P.3d 1157 (Cal. 2003).
127. See Cruz, 66 P.3d at 1164; Broughton, 988 P.2d at 76.
128. See Cruz, 66 P.3d at 1162.
129. See Broughton, 998 P.2d at 77.
130. See id.
tages” over arbitrators to exempt public injunction claims from the FAA.131

_Broughton_ and _Cruz_ sparked vociferous dissents and intense scholarly criticism. For instance, Justice Chin of the California Supreme Court challenged the majority’s casual reliance on federal vindication-of-rights cases. As he explained, these authorities are inapposite: although the vindication-of-rights doctrine assumes that Congress did not mean for the FAA to ride roughshod over other _federal_ statutes, there is no need to try to square the FAA with inconsistent _state_ laws.132 Instead, under the Supremacy Clause, the conflicting state laws must yield.133 Similarly, Alan Rau claims that he “can’t even begin to understand” _Broughton_ and _Cruz_, which “swallow the teachings of _Southland_.”134

Yet _Broughton_ and _Cruz_ are not outliers.135 Indeed, states have long recognized that private dispute resolution is not suitable in all contexts. For instance, they have exempted custody disputes from arbitration in order to preserve the “court’s traditional power to protect the interests of children.”136 Similarly, many states either expressly prohibit the arbitration of foreclosure proceedings137 or otherwise “mandate that foreclosure must occur through judicial

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131. _Id_. at 78.

132. _Id_. at 86 (Chin, J., concurring in part and dissenting in part) (“_Southland_ told us that the legal principles governing the scope and exercise of Congress’s authority to establish exceptions to the FAA may not serve as the basis for reading into the FAA an exception for _state_ laws that limit enforcement of arbitration agreements.”).

133. _See id._; Thomas A. Manakides, _Note, Arbitration of “Public Injunctions”: Clash Between State Statutory Remedies and the Federal Arbitration Act_, 76 S. CAL. L. REV. 433, 481 (2003) (“A state legislature cannot prevent a valid arbitration clause from being enforced, even if this results in the arbitration of a ‘public injunction.’”).


135. Admittedly, this is particularly true in California, where the state supreme court continues to use the public policy defense to chip away at arbitration clauses. A California statute allows employees with claims for unpaid wages to seek a “Berman hearing”: an informal adjudication before a deputy Labor Commissioner which can be appealed to a superior court. _See_ CAL. LAB. CODE §§ 98–98.8 (West 2011 & Supp. 2013). In _Sonic-Calabasas A, Inc. v. Moreno_, 247 P.3d 130, 143–44 (Cal. 2011), the court held that an arbitration agreement that waived the right to a Berman hearing violated public policy. The court explained that Berman hearings offered employees protections that would not be available in arbitration, including assistance from the presiding officer, the ability to have a translator present, the requirement that employers cannot appeal without first posting a bond in the amount of the judgment, and one-way attorney’s fee shifting in favor of successful employees. _Id_. at 136–37. Given the importance of wage claims to employees, the court concluded that allowing arbitration to supplant the Berman hearing statutes would “thwart the[ir] public purpose.” _Id_. at 141. However, rather than invalidating the arbitration clause, the court held that it would allow the employer to appeal the results of the Berman hearing to an arbitrator, rather than a superior court. _See id._ at 134. The Supreme Court then granted certiorari, reversed, and remanded in light of _Concepcion_. As of this writing, the case is still pending back in the California Supreme Court. _See_ Sonic-Calabasas A, Inc. _v. Moreno_, 132 S. Ct. 496, 496 (2011).


137. _See, e.g._, _IOWA CODE ANN._ § 714F.7 (West 2008); _ME. REV. STAT. ANN._ tit. 32, § 6197 (2009); _N.Y. REAL PROP. LAW_ § 265-a(12) (McKinney 2008); _WASH. REV. CODE ANN._ § 61.34.045 (West 2008); _WISC. STAT. ANN._ § 846.40(7) (West 2011).
The idea here is that judges are better equipped than arbitrators to transfer title, modify the mortgage, and exercise jurisdiction over third parties. And finally, courts have generally refused to allow parties to arbitrate in rem probate cases (such as challenges to the validity of a will). Not only is arbitration unlikely to bind nonsignatories (such as omitted heirs and creditors of the estate), but its primary benefits—speed, informality, and confidentiality—are hard to square with probate’s onerous and time-consuming notice requirements. These carve-outs mirror the logic of Broughton and Cruz: some disputes simply do not lend themselves to arbitration.

Likewise, even when courts do not formally invoke the public policy defense, they employ other rules that nullify arbitration clauses to further state interests. Consider the numerous cases that have found arbitration clauses to be unconscionable. Through the unconscionability defense, judges have refused to enforce arbitral terms that mandate confidentiality, select distant venues, limit discovery, shorten statutes of limitations, saddle plaintiffs with prohibitive costs, and eliminate the right to recover attorney’s fees or substantive remedies. Although the Court has declared that unconscionability is a “generally applicable” rule that satisfies the savings clause, it is shot through with state public policy concerns. The two-pronged doctrine requires both procedural unconscionability (a powerful drafter’s use of a nonnegotiable form contract) and substantive unconscionability (terms that are “grossly unfair”). One way that provisions can be substantively unconscionable is if they are “contrary to

142. See, e.g., Ting v. AT&T, 319 F.3d 1126, 1152 (9th Cir. 2003).
143. See, e.g., Nagrampa v. MailCoup’s, Inc., 469 F.3d 1257, 1285 (9th Cir. 2006) (en banc).
145. See, e.g., Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894–95 (9th Cir. 2002); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 152 (Ct. App. 1997).
147. See, e.g., Kristian v. Comcast Corp., 446 F.3d 25, 45, 52 (1st Cir. 2006).
public policy."\textsuperscript{151} In an era of rampant adhesion contracting—where many consumer, employment, and franchise agreements are procedurally unconscionable—there is little difference between holding that a clause violates state public policy and finding that it is unconscionable. Indeed, there is a pronounced "overlap between these two defenses"\textsuperscript{152} because the fact that an arbitration provision "violates public policy can be subsumed under the theory of substantive unconscionability."\textsuperscript{153}

Another divisive California Supreme Court decision illustrates the thin line between these two doctrines. In \textit{Armendariz v. Foundation Health Psychcare Services, Inc.},\textsuperscript{154} the court held that causes of action under a state employment discrimination statute were arbitrable.\textsuperscript{155} However, citing federal vindication-of-rights cases and state statutes that prohibit the waiver of "law[s] established for a public reason,"\textsuperscript{156} the court set forth several bright-line "minimum requirements" for the arbitration of state antidiscrimination claims. Specifically, the court held that the arbitration clause could not waive the employee’s rights to adequate discovery, a written award, or punitive damages.\textsuperscript{157} In addition, the court declared that the "arbitration process cannot generally require the employee to bear any type of expense that the employee would not be required to bear if he or she were free to bring the action in court."\textsuperscript{158} Because this portion of the opinion did not discuss unconscionability or limit its reach to adhesion contracts, it can only be described as an application of state public policy. Yet many future courts would cite \textit{Armendariz} for the proposition that any arbitration clause that did not meet its baseline standards was substantively unconscionable.\textsuperscript{159}

Similarly, state public policy drives the common practice of courts nullifying choice-of-law provisions linked to unfair arbitration clauses. Drafters often couple arbitration clauses with choice-of-law provisions that opt into the law of a jurisdiction that subscribes to a weak version of the unconscionability doc-

\textsuperscript{152} Sonic-Calabasas A, Inc. v. Moreno, 247 P.3d 130, 146 (Cal. 2011).
\textsuperscript{154} 6 P.3d 669 (Cal. 2000).
\textsuperscript{155} See id. at 674.
\textsuperscript{156} Cal. Civ. Code § 1668 (West 2011) ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for . . . violation of law . . . are against the policy of the law."); Cal. Civ. Code § 3513 (West 2012) ("[A] law established for a public reason cannot be contravened by a private agreement.").
\textsuperscript{157} Armendariz, 6 P.3d at 682–85.
\textsuperscript{158} Id. at 687 (emphasis omitted).
trine.\textsuperscript{160} When a plaintiff files a lawsuit in a state that has a robust unconscionability defense, the choice-of-law and arbitration clauses rise and fall together: only if the court honors the contractual choice of law will the arbitration clause survive under the foreign state’s forgiving approach to unconscionability. Yet the test for the validity of the conjoined choice-of-law and arbitration provisions is whether they violate “a fundamental policy” of the forum state.\textsuperscript{161} This standard allows judges to annul choice-of-law provisions (and thus arbitration clauses) due to the forum state’s “policy in favor of protecting its citizens from enforcement of agreements that do not comport with [its] unconscionability standards.”\textsuperscript{162}

Finally, and most importantly, state public policy played a vital role in the context of class-arbitration waivers. For decades, companies have attempted to use arbitration as a bulwark against class action liability.\textsuperscript{163} By requiring parties not just to arbitrate, but to do so on an individual basis, they sought to vest class action waivers with the full force of the FAA. Yet starting with the California Supreme Court’s 2005 decision in \textit{Discover Bank v. Superior Court},\textsuperscript{164} judges in over a dozen states refused to enforce class-arbitration waivers.\textsuperscript{165} These courts reasoned that without the class action mechanism, plaintiffs have no incentive to pursue low-value claims under state law:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{160} See, e.g., David Horton, \textit{The Shadow Terms: Contract Procedure and Unilateral Amendments}, 57 UCLA L. REV. 605, 638–40 (2010).
\item \textsuperscript{161} \textsc{Restatement (Second) of Conflict of Laws} § 187(2)(b) (1981). In addition, the state nominated in the choice-of-law clause must have a substantial relationship to the parties, and the forum state cannot have a materially greater interest than the chosen state in having its policies followed. See \textit{id}.
\item \textsuperscript{163} See, e.g., Alan S. Kaplinsky & Mark J. Levin, \textit{Excuse Me, but Who’s the Predator? Banks Can Use Arbitration Clauses as a Defense}, 7 BUS. L. TODAY 24, 24 (calling arbitration clauses a “powerful deterrent to class action[s]”).
\item \textsuperscript{164} 113 P.3d 1100, 1107–08 (Cal. 2005).
\end{itemize}
\end{footnotesize}
Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because . . . damages in consumer cases are often small and because ‘[a] company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit’ . . . ‘the class action is often the only effective way to halt and redress such exploitation.’

Some of these courts crafted limited rules that governed harsh terms in adhesion contracts and thus seemed to be refinements of the unconscionability doctrine. For instance, *Discover Bank* prohibited class-arbitration waivers in consumer contracts when the cost of pursuing a claim dwarfed any plaintiff’s possible damages. However, other judges candidly relied on state public policy. For example, in *Picardi v. Eighth Judicial District Court*, the Nevada Supreme Court invalidated a class-arbitration waiver to further a range of state interests, including deterring corporate wrongdoing and resolving claims efficiently. The court saw no friction between its holding and the FAA because under traditional “contract law principles, courts may refuse to enforce a provision of a contract that contravenes the state’s public policy.” Likewise, in *Feeney v. Dell Inc.*, the Massachusetts Supreme Court held that a class-arbitration waiver violated the Commonwealth’s “strong commitment to consumer protection legislation.” The court rejected the defendant’s preemption argument by citing *Perry* and reasoning that “the tenet that a contract may be invalidated on grounds that it violates public policy is a principle of [s]tate contract law that ‘arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.’”

In sum, despite the total-preemption theory, some courts have not shied away from employing state public policy to invalidate an arbitration provision. Nevertheless, as I discuss next, this practice appears not to have survived the Court’s recent opinion in *AT&T Mobility LLC v. Concepcion*.

C. CONCEPCION AND ITS AFTERMATH

After the first round of cases invalidating class-arbitration waivers, corporate lawyers realized that they held the keys to their own salvation. If judges objected to the fact that class-arbitration waivers suppressed low-value claims, then drafters could fix this defect themselves. In a fit of ingenuity, they began to

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167. *Id.* at 1110.
168. 251 P.3d 723, 727–28 (Nev. 2011) ("[T]he realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30." (quoting Carnegie v. Household Int’l, Inc., 376 F.3d 656, 661 (7th Cir. 2004))); see also *Fiser*, 188 P.3d at 1218 ("New Mexico policy strongly supports the resolution of consumer claims, regardless of the amount of damages alleged.").
169. *Picardi*, 251 P.3d at 726.
171. *Id.* at 768 (quoting Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987)).
create elaborate rewards for plaintiffs to arbitrate small grievances against them on an individual basis. The most proactive such company was AT&T, which required its customers to relinquish their class action rights but promised to pay them $7,500 and double their attorney’s fees if they recovered more in individual arbitration than AT&T’s last written settlement offer.\textsuperscript{172} This allowed AT&T to argue that consumers were better off under their regime than if they participated in a class action.\textsuperscript{173}

Most courts continued to invalidate AT&T’s class-arbitration waiver.\textsuperscript{174} Yet in light of the allegedly “pro-consumer” provisions in the contract, it became harder than ever to see these as conventional unconscionability cases. After all, how could it be substantively unconscionable (grossly unfair) for a business to create incentives for its customers to sue it? Instead of unconscionability, what really seemed to be driving these decisions was what the total-preemption theory forbids: a “state law policy concerning the confrontation of the defendant with the full force of class-wide deterrence.”\textsuperscript{175}

The Court took the bait. In \textit{AT&T Mobility LLC v. Concepcion}, consumers brought small-dollar claims under a state consumer-protection statute against AT&T.\textsuperscript{176} The Court held that section 2 preempts courts from deeming class-arbitration waivers to be unconscionable.\textsuperscript{177} Justice Scalia’s majority opinion began by describing FAA preemption in a new way:

\begin{quote}
When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration . . . .
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Although § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.\textsuperscript{178}
\end{quote}

This is not a textualist standard. Indeed, on its face, section 2 says nothing about whether states can “prohibit[] outright the arbitration of a particular type of

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\textsuperscript{172} See, e.g., Laster v. T-Mobile USA, Inc., No. 05CV1167, 2008 WL 5216255, at *2–3 (S.D. Cal. Aug. 11, 2008) (summarizing these provisions).

\textsuperscript{173} See id. at *11 (“[N]early all consumers . . . are very likely to be compensated promptly and in full.”).


\textsuperscript{176} 131 S. Ct. 1740 (2011).

\textsuperscript{177} Id. at 1752–53.

\textsuperscript{178} Id. at 1747–48 (citations omitted).
Likewise, literal adherence to the savings clause would not allow the FAA to preempt a “generally applicable contract defense[]” such as unconscionability. Thus, Justice Scalia clarified what was implicit in *Perry*: FAA preemption does not hinge on a mechanical application of the words of the statute but rather on “accomplish[ing] . . . the FAA’s objectives.”

Justice Scalia then defined “[t]he overarching purpose of the FAA.” Relying on the fact that sections 3 and 4 of the statute require federal district courts to enforce arbitration clauses “in accordance with the terms of the agreement,” Justice Scalia concluded that Congress primarily sought “to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.” He then listed several reasons why a state’s insistence that class procedures be available in arbitration impaired this goal. First, he explained that class arbitration is slower and more formal than two-party arbitration. Second, he cited arbitration’s shortcomings—its limited appellate review and untrained judges—as evidence that arbitration “is poorly suited to the higher stakes of class litigation.” Finally, in a critical passage, he dismissed the argument that the class action device was necessary for consumers to vindicate low-value claims under state law:

[C]lass proceedings [may be] necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons. Moreover, the claim here was most unlikely to go unresolved. As noted earlier, the arbitration agreement provides that AT&T will pay claimants a minimum of $7,500 and twice their attorney’s fees if they obtain an arbitration award greater than AT&T’s last settlement offer.

179. *Id.* at 1747.
180. *Id.* at 1748.
181. *Id.*
182. *Id.*
184. *Concepcion*, 131 S. Ct. at 1748.
185. *Id.* at 1751 (“[T]he switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”).
186. *Id.* at 1752.
187. *Id.* at 1753 (emphasis added). The Court has recently reaffirmed the impotence of state public policy in the arbitration arena. In *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam), it summarily reversed a West Virginia Supreme Court decision that had carved out an exception from the FAA “as a matter of public policy” for personal injury claims arising from arbitration clauses in nursing-home-admission agreements, *id.* at 1203 (quoting Brown *ex rel.* Brown v. Genesis Healthcare Corp., 724 S.E.2d 250, 292 (W. Va. 2011)). The Court cited *Concepcion* for the proposition that “‘[w]hen state law prohibits outright the arbitration of a particular type of claim, the . . . analysis is straightforward: The conflicting rule is displaced by the FAA.’” *Id.* at 275–76 (quoting *Concepcion*, 131 S. Ct. at 1747).
Justice Thomas’s concurrence put the point more succinctly. Basing his analysis entirely on the statute’s text, Justice Thomas determined that “courts cannot refuse to enforce arbitration agreements because of a state public policy.”\footnote{Concepcion, 131 S. Ct. at 1753 (Thomas, J., concurring).} He reached this conclusion by noting that section 2 makes arbitration provisions “valid, irrevocable, and enforceable,” but the savings clause only allows courts to apply “grounds . . . for the revocation of any contract.”\footnote{Id. at 1754 (quoting 9 U.S.C. § 2).} Classifying the omission of “validity” and “enforceability” in the savings clause as an “ambiguity,” he looked to section 4, which requires courts to order arbitration only if they are “satisfied that the making of the agreement for arbitration . . . is not in issue.”\footnote{Id. at 1754 (emphasis added) (quoting 9 U.S.C. § 4).} Reading sections 2 and 4 together, he reasoned that section 2’s “grounds . . . for . . . revocation” “mean[s] grounds related to the making of the agreement.”\footnote{Id. at 1754–55 (first alteration in original) (quoting 9 U.S.C. § 2).} Thus, he concluded that “[c]ontract defenses unrelated to the making of the agreement—such as public policy—could not be the basis for declining to enforce an arbitration clause.”\footnote{Id. at 1755. I have previously explained why this reading of the statute is unpersuasive. See David Horton, Unconscionability Wars, 106 Nw. U. L. Rev. 387, 402–05 (2012). In particular, Justice Thomas manufactures an ambiguity out of whole cloth by neglecting the fact that “invalidity” and “irrevocability” are synonyms. See id. at 403. Moreover, there is a jarring analytical gap between the problem (the savings clause not allowing courts to apply grounds for the “invalidity” of contracts) and Justice Thomas’s solution (limiting the phrase “grounds for the revocation of any contract” to rules that relate to contract formation). See id. at 404. More importantly for my present purposes, Justice Thomas’s contrived analysis is a symptom of a larger problem: the uselessness of textual interpretations of the FAA. See infra section II.B.}

Concepcion is ironic in several respects. First, it features Justices Scalia and Thomas—who firmly believe that Southland is incorrect—dramatically expanding the FAA’s preemptive ambit.\footnote{Because the case arose in federal court, Justice Thomas did not deviate from his oft-expressed view that the FAA does not apply in state court. See supra note 76. But due to his idiosyncratic beliefs, and the fact that he cast the swing vote, it is unclear whether Concepcion governs in state proceedings.} Second, Justice Scalia’s reasoning that arbitration’s “absence of multilayered review” and “[i]nformal procedures” make it unsuitable for class actions seems to revive the defunct nonarbitrability doctrine.\footnote{Concepcion, 131 S. Ct. at 1751–52 (also expressing distrust of arbitrators by opining that “it is at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties’ due process rights are satisfied”).} As noted above, the nonarbitrability rule once exempted federal statutory claims from the FAA because “arbitral processes are [not] commensurate with judicial processes”;\footnote{Alexander v. Gardner-Denver Co., 415 U.S. 36, 56 (1974); see supra notes 117–32 and accompanying text.} today, the Court regards that view as “far out of step.”\footnote{Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991) (quoting Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989)).} But what is even more notable than Justice Scalia’s embrace of this anachronistic logic is how he uses it. The nonarbitrability doctrine allowed judges to ignore arbitration clauses so congressionally created rights could be
litigated, whereas Justice Scalia’s photo-negative version of the rule requires plaintiffs to arbitrate state-law claims even when they cannot be arbitrated. Third, by declaring that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons,” Justice Scalia answered a question that the case did not pose. Indeed, because of the bonuses for individual arbitration in AT&T’s class-arbitration waiver, the Court granted certiorari to decide whether the FAA preempts states from requiring that class action procedures are available in arbitration “when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.” But as other judges soon recognized, the Court’s opinion appeared to stray far beyond this boundary. As the Missouri Supreme Court explained, “post-Concepcion, courts may not apply state public policy concerns to invalidate an arbitration agreement even if the public policy at issue aims to prevent undesirable results to consumers.”

Not surprisingly, Concepcion’s most immediate impact was in the context of consumer and employment class actions. For instance, in Cruz v. Cingular Wireless, LLC, customers alleged that their cell phone service provider violated the Florida Deceptive and Unfair Trade Practices Act by charging them $2.99 per month for a roadside assistance plan they never ordered. In an attempt to distinguish Concepcion, the plaintiffs introduced affidavits by three accomplished trial lawyers who swore that they would not take the case unless it could be brought as a class action. Yet the Eleventh Circuit ordered each plaintiff to arbitrate individually. The court reasoned that the plaintiffs’ declarations merely “substantiat[e] the very public policy arguments that were expressly rejected by the Supreme Court in Concepcion—namely, that the class action waiver will be exculpatory, because most of these small-value claims will go undetected and unprosecuted.” Likewise, courts from several other jurisdictions have read Concepcion to deprive them of the power to annul class-arbitration waivers even “when such waivers preclude effective vindication of statutory rights.”

197. Concepcion, 131 S. Ct. at 1753.
198. AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010).
199. Petition for Writ of Certiorari at i, AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (No. 09-893), 2010 WL 6617833 at *i (emphasis added).
201. 648 F.3d 1205, 1207–08 (11th Cir. 2011).
202. Id. at 1214.
203. Id.
204. Coneff v. AT&T Corp., 673 F.3d 1155, 1158 (9th Cir. 2012); see also Green v. SuperShuttle Int’l, Inc., 653 F.3d 766, 769 (8th Cir. 2011) (compelling individual arbitration of state statutory causes of action); Litman v. Cellco P’ship, 655 F.3d 225, 231 (3d Cir. 2011) (“We understand the holding of Concepcion to be both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration ‘is desirable for unrelated reasons.’” (quoting AT&T Mobility v. Concepcion, 131 S. Ct. 1740, 1753 (2011))). Likewise, some courts had exempted small-value wage and hour claims from class-arbitration waivers. See Gentry v. Superior Court, 165 P.3d 556, 575 (Cal. 2007). There is growing consensus that Concepcion preempts these cases. See, e.g.,
Some judges have followed Concepcion apologetically. In Colorado, plaintiffs brought fraud claims against a for-profit online university. They introduced evidence that they could not pursue their case in individual arbitration because their key witnesses—the defendant’s former employees—"would be forced to testify over 800 times." A federal district court grudgingly rejected that argument:

Plaintiffs’ argument has considerable validity and the Court would likely have found that the Arbitration Agreements at issue here unconscionable . . . if it were issuing this decision pre-Concepcion. But the Court has to take the legal landscape as it lies and cannot ignore the Supreme Court’s clear message. . . . Again, the Court is sympathetic to [Plaintiffs’] argument. There is no doubt that Concepcion was a serious blow to consumer class actions and likely foreclosed the possibility of any recovery for many wronged individuals.

Yet this occasional judicial queasiness has not prevented Concepcion from spilling over into other contexts. For instance, in Kilgore v. KeyBank National Ass’n, the Ninth Circuit held that Concepcion implicitly overruled Broughton and Cruz (the California Supreme Court decisions that exempted public-injunction claims from the FAA). Students alleged that a bank conspired with a “sham” aviation school in order to profit from their loans. They did not seek damages; rather, they asked the court to enjoin the bank from collecting on


206. Id. at 1288.
207. Id. at 1287–88; see also Schnuerle v. Insight Commc’ns., Co., L.P., 376 S.W.3d 561, 568 (Ky. 2012) (noting that because of “the important purpose served by class actions, we would be inclined to join the jurisdictions . . . that have invalidated provisions of consumer adhesion contracts that bar class action[s],” but feeling “constrained” by Concepcion to reach the opposite conclusion). On the other hand, although Concepcion arguably precludes direct attacks on class-arbitration waivers, some courts have hurdled this obstacle by deeming the entire arbitration clause to be permeated with unconscionability and thus unenforceable. For instance, in Brewer v. Mo. Title Loans, 364 S.W.3d 486, 496 (Mo. 2012) (en banc), the Missouri Supreme Court reached that conclusion about an arbitration provision in a loan contract. The state high court noted that the arbitration clause “was difficult for the average consumer to understand,” did not require the drafter to arbitrate claims against its customers, and—most problematically after Concepcion—would deter the prosecution of numerous low-value claims. Id. at 493–96. An incredulous dissenting Justice protested that “[i]t is our role to follow and apply the controlling law, not to engage in intellectual gymnastics to create ‘life after Concepcion.’” Id. at 504 (Price, J., dissenting). A similar California appellate decision is now on appeal to the state supreme court. Sanchez v. Valencia Holding Co., 135 Cal. Rptr. 3d 19, 41 (Ct. App. 2011), review granted, 272 P.3d 976 (Cal. 2012).
208. 673 F.3d 947, 960 (9th Cir. 2012).
209. Id. at 951–52.
their loans or reporting any default to credit agencies.\textsuperscript{210} The court granted the bank’s motion to compel arbitration, reasoning that Broughton and Cruz do not survive Concepcion because they “‘prohibit[] outright the arbitration of a particular type of claim’—claims for broad public injunctive relief.”\textsuperscript{211} Although the appellate panel noted that it was not “blind to the concerns” that Broughton and Cruz were “based upon the sound public policy judgment of the California legislature,” it felt bound by what it perceived as “Concepcion’s holding that state public policy cannot trump the FAA.”\textsuperscript{212}

More generally, Concepcion has sown confusion about the degree to which judges remain free to find arbitration clauses unconscionable. Recall that in Armendariz v. Foundation Health Psychcare Services, Inc., the California Supreme Court deemed any arbitration provision that saddles employees with costs that they would not bear in litigation to be substantively unconscionable.\textsuperscript{213} Several courts have noted that this aspect of Armendariz is likely no longer good law:

The general Armendariz rule is in serious doubt following Concepcion. Armendariz sets categorical, per se requirements specific to arbitration clauses. The Armendariz requirements, though couched in terms of unconscionability, cannot be described as grounds that ‘exist at law or in equity for the revocation of any contract,’ 9 U.S.C. § 2 . . . [T]he policy arguments justifying the [Armendariz] rule, however worthy they may be, can no longer invalidate an otherwise enforceable arbitration agreement.\textsuperscript{214}

In sum, Concepcion has been perceived as a ringing endorsement of the total-preemption theory. But the opinion is also remarkable for something else: the path it took to reach that destination. Concepcion did not find the plain language of the FAA to be controlling.\textsuperscript{215} Instead, it was guided by a holistic assessment of how to “accomplish[] . . . the FAA’s objectives.”\textsuperscript{216} Thus, Concepcion calculated the FAA’s preemptive orbit through the interpretive method known as purposivism.\textsuperscript{217} In the next Part, I argue that Concepcion unintention-
ally highlights the fact that purposivism—not textualism—should define the scope of FAA preemption. However, actually using the teachings of purposivism—rather than gesturing toward them, as Justice Scalia did—leads to a result that is the polar opposite of Concepcion’s current legacy.

II. PURPOSIVISM AND THE FAA

This Part takes the torch from Concepcion and challenges the prevailing textualist approach to FAA preemption. It first lays a foundation for this task by contrasting purposivism with textualism. It then argues that purposivism should be the sole lens through which judges view FAA preemption issues. By doing so, it sets the stage for my argument that a purposivist account of FAA preemption allows courts to nullify arbitration clauses under some strands of the contract defense of violation of public policy.

A. THE CASE FOR FAA PURPOSIVISM

As pioneered by Legal Process scholars Henry Hart and Albert Sacks, purposivism claims that the best way for judges to effectuate Congress’s intent is to discover and adhere to the “general purpose” of a particular law. This does not mean that purposivists attempt to channel some kind of shared, subjective belief among lawmakers; rather, they seek to understand how an objectively reasonable congressperson would have understood a statute’s ambitions. Purposivists acknowledge that a law’s text can be the most potent evidence of its goals. Indeed, as Felix Frankfurter put it, “policy is not drawn, like nitrogen, out of the air; it is evinced in the language of the statute.”

Purposivism dominated statutory interpretation at the Court for a century. In the late 1880s, Congress outlawed bringing “foreigners[] into the United States...
to perform labor or service of any kind.” 225 In *Holy Trinity Church v. United States*, a New York church hired a British citizen as its rector and pastor. 226 The Court concluded that the church had transgressed the statute’s express language, noting that the words “labor or service” were not only inclusive, but swept even further because of the phrase “of any kind.” 227 However, the Court held that the church had not violated the law. As the Court reasoned, “a thing may be within the letter of the statute and yet not within the statute, because not within its spirit nor within the intention of its makers.” 228 Relying heavily on the legislative history, the Court found that “the intent of [C]ongress was simply to stay the influx of . . . cheap, unskilled labor”—a circumstance that did not apply to the church. 229

Purposivism reached its zenith with the Court’s decision in *United States v. American Trucking Ass’ns*. 230 The Motor Carrier Act authorized the Interstate Commerce Commission (ICC) “[t]o regulate common carriers [and] . . . estab-

ish reasonable requirements with respect to . . . qualifications and maximum hours of service of employees.” 231 The issue was whether the ICC had jurisdiction over individuals who worked for transportation companies but whose jobs did not involve safety. 232 Although the statute seemed to speak directly to this matter—it did not distinguish between various “employees”—the Court cited its context and legislative record and held that the ICC did not have power over “[c]lerical, storage and other non-transportation workers.” 233 The Court explained that it was implementing “th[e] purpose, rather than the literal words” of the law, and it dismissed approaches that rely on plain meaning as “with-

hold[ing] from the courts available information for reaching a correct conclu-

sion.” 234 This reasoning christened a three-decade period of “reliance on legislative history and the unapologetic use of such material to ascertain whether the statutory text adequately captured the legislative purpose.” 235

The “strong purposivism” of cases such as *Holy Trinity* and *American Trucking Ass’ns* waned with the resurgence of textualism in the 1980s. So-

called “new textualists,” such as Judge Easterbrook and Justices Scalia and Thomas, argue that a laser-like focus on the statutory language is a more reliable way to implement Congress’s commands. 236 For one, they note that a

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226. 143 U.S. 457, 458 (1892).
227. *Id.* at 459.
228. *Id.* at 465.
229. 310 U.S. 534 (1940).
232. *Id.* at 540.
233. *Id.* at 543–44.
statute’s text, not its legislative record, passes through the constitutionally mandated gauntlet of bicameralism and presentment.\textsuperscript{237} As a result, they look to other textual clues, not legislative history, to clarify an ambiguity.\textsuperscript{238} Also, new textualists assert that the messy legislative process, with its logrolling and unrecorded compromises, makes it hard to synthesize atextual materials into a single, overarching congressional purpose.\textsuperscript{239} Ultimately, though, new textualism is a theory about judicial modesty. For new textualists, purposivism is a license for unelected courts to legislate.\textsuperscript{240} By placing a straitjacket on judges, new textualists ensure that they do not overstep their role as mere “faithful agents” of Congress.\textsuperscript{241} Although most sitting Justices still cite legislative history, commentators agree that the new textualist movement has pushed the entire Court to focus more on statutory language.\textsuperscript{242}

Nevertheless, no matter which theory has the upper hand generally, there are reasons to believe that purposivism is better than textualism for preemption issues.\textsuperscript{243} Preemption cases transcend run-of-the-mill matters of statutory interpretation for two reasons. For one, given the many ways in which federal and state laws can come into conflict, the text of a federal statute alone rarely conveys the extent to which it displaces state law.\textsuperscript{244} Purposivism allows courts to engage in the kind of granular analysis necessary to draw these fine lines. In addition, the presumption against preemption requires “clear and manifest evidence of congressional intent to preempt”: a fact-sensitive query that does

\textsuperscript{237} Thompson v. Thompson, 484 U.S. 174, 192 (1988) (Scalia, J., concurring) (contending that legislative history is a “frail substitute[] for bicameral vote upon the text of a law and its presentment to the President”).

\textsuperscript{238} Justice Thomas’s concurrence in Concepcion provides an excellent example of the lengths to which textualists are willing to go to avoid consulting legislative history. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1754–55 (2011) (Thomas, J., concurring) (looking to the statute’s text to clarify what he deemed to be an ambiguity); see also supra text accompanying notes 188–92.

\textsuperscript{239} See, e.g., Johnson v. United States, 529 U.S. 694, 723 (2000) (Scalia, J., dissenting) (“Our obligation is to go as far in achieving the general congressional purpose as the text of the statute fairly prescribes—and no further.”); Frank H. Easterbrook, Statutes’ Domains, 50 U. Chi. L. Rev. 533, 547 (1983) (“Although legislators have individual lists of desires, priorities, and preferences, it turns out to be difficult, sometimes impossible, to aggregate these lists into a coherent collective choice.”).

\textsuperscript{240} William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 674 (1990) (“According to the new textualists, consideration of legislative history creates greater opportunities for the exercise of judicial discretion.”); Jonathan T. Molot, The Rise and Fall of Textualism, 106 COLUM. L. Rev. 1, 26 (2006) (“Textualists were not content merely to accept the leeway inherent in interpretation, but rather sought to cabin it.”).

\textsuperscript{241} John F. Manning, Textualism and the Equity of the Statute, 101 COLUM. L. Rev. 1, 8 (2001).

\textsuperscript{242} See Molot, supra note 240, at 29–30.


\textsuperscript{244} See Catherine L. Fisk, The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism, 33 HARV. J. ON LEGIS. 35, 96 (1996) (“Unless very detailed, statutory language is often necessarily more of a statement of principle than a specific directive.”).
not lend itself to the blunt instrument of textualism.245 Similarly, preemption issues are especially important because they do not just affect the conduct of parties but also the distribution of power between federal and state governments.246 These arrows point in the same direction: toward relaxing textualism’s bar on considering legislative history and allowing judges to discern Congress’s wishes with greater fidelity.247

But most importantly, when it comes to obstacle preemption—the doctrine through which the FAA supersedes state law—purposivism is the only game in town. After all, the idea that Congress’s “purposes and objectives” can oust state law is purposivist to its core.248 Indeed, whether state law poses an obstacle to its federal counterpart “is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.”249 Obstacle preemption thus “expand[s] the evidence of congressional intent”250 and calls for a searching evaluation that “is untethered [from] statutory text.”251 For instance, Justice Thomas has disavowed obstacle preemption because it is not textualist: it “invalidates state laws based on... legislative history[] or generalized notions of congressional purposes that are not embodied within the text of federal law.”252 Paradoxically, though, the any-contract test—the dominant method of determining FAA preemption before Concepcion—is strictly textualist. This is more than just passing strange. To be sure, even purposivists like Hart and Sacks define Congress’s objectives, in part, by considering a statute’s words.253 But that is just one step in the analysis, not its sum total. Thus, there is a glaring disconnect between the any-contract test and the very mechanism by which the FAA trumps state law.

Moreover, factors unique to the FAA commend purposivism over textualism. The statute requires judges to adapt the legislative blueprint to nine decades’ worth of new developments. To give just one example, before the New Deal, Congress’s Commerce Clause power was dramatically more limited than it is today.254 In 1925, contracts between parties from the same state did not

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245. See Jordan, supra note 243, at 1222–23.
246. See id. at 1215.
247. Id. at 1216 (arguing that by walling off courts from legislative history in preemption cases, textualism “hamper[s] the legislative process by preventing the judiciary from fulfilling a necessary institutional role”).
250. Dinh, supra note 57, at 2104.
253. See supra text accompanying note 220.
“involve commerce” and thus would not have triggered section 2, today, the fact that the FAA governs wholly intrastate transactions has made arbitration “a phenomenon that pervade[s] virtually every corner of the daily economy.” When circumstances have changed since a statute’s enactment, slavish devotion to the text can produce unintended consequences. Yet because purposivism focuses on the more malleable and abstract issue of what lawmakers sought to accomplish, it “allows a statute to evolve to meet new problems,” and thus can bend with the times.

Here one might object that purposivism’s fixation on legislative history is out of keeping with modern FAA jurisprudence, which Justice O’Connor has described as “an edifice of [the Court’s] own creation.” Seen this way, Congress’s intent is irrelevant because the Court has been construing the FAA “dynamically,” jettisoning the statute’s original meaning in favor of a reading that reflects the “present societal, political, and legal context.” As William Eskridge argued in a canonical 1987 law review article, dynamic interpretation is appropriate if “neither the text nor the historical context of the statute clearly resolves the interpretive question, and the societal and legal context of the statute has changed materially.” At first blush, the FAA seems to fit this bill. On paper, the statute is a rickety skeleton. Since it passed, not only has federal regulatory power grown exponentially, but forces such as the alternative dispute resolution movement and the “litigation explosion” have normalized arbitration and underscored the need for a robust arbitral system. Thus, Justice Stevens’s Southland concurrence and dissent—which actually preceded Eskridge’s article by three years—concluded that even though Congress did not design the FAA to preempt state law, “intervening developments . . . compel [that] conclusion.” Perhaps, then, the choice between purposivism and textual-
ism is irrelevant because FAA preemption boils down to the policy preferences of the Justices.

However, I believe that congressional intent has more traction in this arena than is commonly acknowledged. It is easy to dismiss Southland as raw judicial activism. Yet some aspects of the legislative history suggest that the FAA preempts state law. For instance, there is evidence that lawmakers tethered the statute to the scope of the Commerce Clause—a fact that might explain why the FAA did not originally override state law but does so now.263 Likewise, Professor Drahozal notes that a passage in the so-called “Cohen brief”—the essay submitted by the statute’s draftsman, Julius Henry Cohen, and entered into the Congressional Record—declares that the federal government “has ample power to declare that all arbitration agreements connected with interstate commerce . . . shall be recognized as valid and enforceable even by the State courts.”264 Thus, although the Court has unquestionably left its own stamp on the statute, it would be an exaggeration to say that it has manufactured FAA preemption out of whole cloth. In fact, the Justices continue to justify their holdings as extrapolations of what Congress “envisioned . . . when it passed the FAA in 1925.”265 Even if this is just “lip-service,”266 congressional intent remains the language into which claims about the statute’s scope must be translated.

Moreover, the forces that may have pushed the Court to hold that the FAA preempts state law do not suggest that the statute displaces the public policy defense. Recall that Eskridge urged judges to consider contemporary norms when grappling with challenging, ambiguous laws.267 Arguably, this approach is appropriate for the question of whether the FAA preempts state law—a matter on which the statute is “facially silent,”268 and its congressional record is a kind of Rorschach test. Nevertheless, as I will explain, these sources leave little doubt that Congress wanted to preserve some strands of the doctrine of violation of public policy.269 As a result, there is no gap for dynamic interpretation to fill.

For these reasons, purposivism is a better way to gauge the ambit of FAA preemption than textualism. Moreover, as I discuss next, the textualist any-contract test wilts under close inspection.
Focusing on the last two words of the savings clause, many lower courts and scholars believe that the FAA only preserves state laws that govern “any contract.” In this section, I argue that this textualist test cannot be correct.

For starters, members of the any-contract camp define “contract” differently. The most common view is that “ground s...f o rt h e revocation of any contract” means a rule that applies without regard to the “specific type of contract.” Southland, for example, gestured toward the idea that the CFIL antiwaiver provision was preempted because it only applied to franchise contracts. Likewise, several courts have held that the FAA overrides antiwaiver provisions in state statutes that govern agreements “involving nursing care” or are “limited to consumer transaction[s].”

However, other judges and litigants read “contract” to mean a particular term within the overarching deal between the parties. For instance, the Supreme Court once described the FAA as preventing states from “singling out” arbitration clauses—an approach that ignores the classification of the larger contract. Similarly, in Concepcion, AT&T contended that “contract” meant “provision.” Despite the fact that the Discover Bank rule governed class action bans in one species of agreement—“consumer contract[s] of adhesion”—AT&T argued that it improperly regulated specific terms: “the small subset of contracts pertaining to dispute resolution.” And rounding out the confusion, several federal appellate courts have adopted both the “any type of contract” and “any term” interpretations by holding that the FAA preempts state statutes regulating forum-selection clauses in franchise contracts because these laws apply “only to franchise agreements” and “only to forum selection clauses.” Thus, there is vast confusion about what “any contract” even means.

Moreover, both the any-type-of-contract and any-term interpretations are
unpersuasive. First, the any-type-of-contract test would not prevent a state from adopting a law that denied specific enforcement to arbitration clauses without regard to the kind of agreement in which they appear. Such a statute would govern all “type[s] of contract[s].”\footnote{Doctor’s Assocs., 150 F.3d at 163.} Of course, it would be preempted; indeed, the Court squarely held so in \textit{Allied-Bruce Terminix Cos. v. Dobson}.\footnote{See \textit{Allied-Bruce Terminix Cos. v. Dobson}, 513 U.S. 265, 269 (1995) (holding that the FAA preempts an Alabama statute that prohibited the specific enforcement of arbitration clauses).} But this result cannot be explained by the simplistic notion that the FAA requires state rules to govern every variety of binding agreement.

Second, if a rule must govern “all types of contracts” to satisfy the savings clause, then section 2 preempts contract law in its entirety. Given the sprawling universe of private agreement, \textit{no} rule reaches so far. Consider the statute of frauds. The Seventh Circuit has claimed that this well-established doctrine falls within the savings clause, calling it a “ground[] applicable to ‘any contract’” and “a universally applicable legal principle.”\footnote{Kroog v. Mait, 712 F.2d 1148, 1153 n.4 (7th Cir. 1983).} Similarly, courts have invoked the statute of frauds to annul arbitration clauses, and none has even considered a preemption challenge.\footnote{Statute of frauds challenges to contracts containing arbitration clauses are rare because section 2 mandates that arbitration clauses be “written.” 9 U.S.C. § 2 (2006); Seawright v. Am. Gen. Fin. Servs., Inc., 507 F.3d 967, 978 (6th Cir. 2007) (“[A]rbitration agreements under the FAA need to be written, but not necessarily \textit{signed}.”); cf. Nat’l City Golf Fin. v. Higher Ground Country Club Mgmt. Co., 641 F. Supp. 2d 196, 206 (S.D.N.Y. 2009) (acknowledging that the statute of frauds can be a defense to an arbitration clause, but holding that an arbitrator, not a court, should decide whether it applies); Lexington Heights Dev., LLC v. Creadlemore, 92 P.3d 526, 535 (Idaho 2004) (finding arbitration agreement “unenforceable for noncompliance with the statute of frauds”).} Yet the statute of frauds does not come remotely close to governing “all types of contracts.” Instead, it only comes into play with sales of land or performances that cannot occur within a year.\footnote{See, e.g., \textit{Cal. Civ. Code} § 1624(a)(3) (West 2010) (detailing the requirements of the statute of frauds).} Even within this subset, the statute of frauds does not apply to “any type of contract”; instead, it governs agreements that are not signed by the party to be charged.\footnote{See id.} If section 2 trumps state antiwaiver provisions in consumer, franchise, employment, and nursing home statutes because these laws do not cover “all types of contracts,” then it also overrides the statute of frauds.

This is not a glitch. It is a pathology in the any-type-of-contract test. For example, the Court has repeatedly declared that unconscionability is a “generally applicable contract defense[],”\footnote{Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2776 (2010) (quoting \textit{Doctor’s Assocs.}, Inc. v. Casarotto, 517 U.S. 681, 687 (1996)).} which may “invalidate arbitration agreements without contravening § 2.”\footnote{Doctor’s Assocs., 517 U.S. at 687.} And indeed, unconscionability has emerged as the primary vehicle by which courts police arbitration clauses for fairness. But under the any-type-of-contract test, unconscionability is preempted; because it governs adhesion contracts, it does not address negotiated deals be-
tween relative equals. Similarly, judges routinely find arbitration clauses to be unenforceable “material alteration[s]” to offers under Uniform Commercial Code (UCC) section 2-207(2). In fact, the Fourth Circuit has even rejected a preemption challenge to section 2-207, calling it “a general rule of contract formation.” But section 2-207 does not govern “any type of contract”; rather, like every provision in UCC Article 2, it regulates contracts for the sale of goods. Thus, it should be preempted. On the other side of this coin, the entire common law of contracts should also be preempted; it suffers from the reverse infirmity of failing to apply to agreements for the sale of goods.

The design of section 2 also undercuts the idea that the savings clause only includes principles that govern “any type of contract.” Recall that section 2 governs not just contracts in interstate commerce, but “maritime transaction[s].” For centuries, there has been an independent body of contract law in admiralty, which includes “a host of special rights, duties, rules, and procedures.” This field is studded with unique rules like the “wards of admiralty” doctrine (which requires courts to protect sailors’ contractual rights) and strict prohibitions on liability disclaimers. Of course, these tenets do not apply to “any type of contract”; instead, they only cover agreements that “pertain directly to and [are] necessary for commerce or navigation upon navigable waters.” But if section 2 only preserves rules that govern “any

287. See, e.g., U.S. Fibres, Inc. v. Proctor & Schwartz, Inc., 509 F.2d 1043, 1048 (6th Cir. 1975) (“Unconscionability rarely exists in a commercial setting involving parties of equal bargaining power.”). In one of the first cases to apply the any-contract test, an Arizona district court held that a state statute barring unfair forum-selection clauses “conflicted with the FAA’s mandate to enforce arbitration agreements on an equal footing with other contracts.” Alphagraphics Franchising, Inc. v. Whaler Graphics, Inc., 840 F. Supp. 708, 710 (D. Ariz. 1993). The court then opined that “the only defenses available” under the savings clause “are grounds such as fraud, duress, mistake, . . . or adhesion.” Id. at 711 (emphasis added). But “adhesion” (a precursor to the modern unconscionability doctrine) is not a defense to “any contract.” In fact, it is the polar opposite—a description of a particular type of contract.

288. See, e.g., Avedon Eng’g, Inc. v. Seatex, 126 F.3d 1279, 1283–85 (10th Cir. 1997).


290. See U.C.C. § 2-102 (2011); see also Schwartz, supra note 13, at 569 n.113 (noting that the U.C.C. does not apply to “all contracts”).


293. See, e.g., Garrett v. Moore-McCormack Co., 317 U.S. 239, 246 (1942) (noting that under the “wards of the admiralty” rule, “[i]f there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side, which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction, is that the bargain is unjust and unreasonable”); cf. Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148, 1161–62 (9th Cir. 2008) (Noonan, J., dissenting) (arguing that an arbitration clause in a sailor’s contract should be invalid because “[s]he has not stipulated that she saw [it], read it, or understood it, or that her attention was drawn to the federal rights she was waiving”).


295. Inbesa Am., Inc. v. M/V Anglia, 134 F.3d 1035, 1036 (11th Cir. 1998) (citing Ambassador Factors v. Rhein, 105 F.3d 1397, 1399 (11th Cir. 1997)).
type of contract,” courts bizarrely would not be able to apply admiralty law in admiralty cases.296

The any-provision interpretation fares no better. First, it is mutable beyond coherence. Consider again the Discover Bank rule. On the one hand, AT&T is exactly right that the rule only governs “dispute resolution [provisions]”—after all, it has no relevance to, say, price terms or clauses that relate to the termination of the contractual relationship. On the other hand, it merely distills larger principles that apply to all contractual terms. As noted, states have long prohibited exculpatory clauses; in fact, Discover Bank formulated its test by relying on a California statute, passed in 1872, that nullifies “[a]ll contracts which . . . exempt anyone from responsibility for his own fraud . . . or violation of law.”298 Is the Discover Bank rule an impermissible assault on dispute resolution clauses or a benign manifestation of a 125-year-old statute that expressly governs “[a]ll contracts”? The answer depends on nothing more than the specificity with which one describes it.

The any-provision reading is also inconsistent with a wealth of authority. Recall that drafters often seek to launder an arbitration clause that would be unconscionable in the forum state by opting into the law of another jurisdiction.299 Citing the Restatement (Second) of Conflict of Laws, many courts have refused to enforce these choice-of-law provisions and the arbitration clauses with which they are coupled.300 Although the Restatement test nullifies its share of one-sided agreements to arbitrate, it is the antithesis of the any-provision test: it governs a single kind of term—choice-of-law clauses—exclusively. Tellingly, no judge, scholar, or litigant of whom I am aware has even suggested that the FAA overrides the Restatement.

Accordingly, for two reasons—textualism’s incompatibility with obstacle preemption and the illogic of the any-contract test—Concepcion wisely chose to view FAA preemption through the lens of purposivism. The Court’s general analytical framework is spot-on: the glowing question should be whether a state law undercuts the FAA’s “purposes and objectives,” not whether it governs “any

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296. To be sure, the FAA cannot preempt admiralty law. But if “any contract” means “any type of contract” for the purposes of preemption, it means “any type of contract” for the purposes of determining which defenses fall within the savings clause. And if the latter proposition is true, then courts cannot strike down agreements to arbitrate under admiralty law in admiralty cases.
297. Brief for Petitioner, supra note 277.
298. C A L. C I V. C O D E § 1668 (W est 2010).
299. See supra notes 160–62.
300. See id. Admittedly, several such cases nullified a choice-of-law clause in order to avoid enforcing a class-arbitration waiver—a practice that arguably does not survive Concepcion. See, e.g., Homa v. Am. Express Co., 558 F.3d 225, 231 (3d Cir. 2009); Klussman v. Cross Country Bank, 36 Cal. Rptr. 3d 728, 740 (Ct. App. 2005). But this does not change the fact that the Restatement test remains a viable ground for refusing to enforce choice-of-law provisions that seek to launder otherwise unconscionable arbitration provisions. Cf. Coneff v. AT&T Corp., 673 F.3d 1155, 1161 (9th Cir. 2012) (in post-Concepcion decision, remanding to district court to analyze effect of choice-of-law clause on class-arbitration waiver).
contract.” In the next Part, however, I critique the conclusions the Court drew from this insight.

III. FAA PREEMPTION, PURPOSIVISM, AND STATE PUBLIC POLICY

This Part draws three lessons from the FAA’s context and legislative history (the building blocks of purposivism). First, a reasonable member of Congress would have read the savings clause to preserve the doctrine of violation of public policy. Indeed, because lawmakers passed the FAA during the heyday of the public policy defense, this workhorse principle was a “ground[] . . . for the revocation of any contract.” 301 Second, although the Court has not defined the statute’s “purposes and objectives” consistently, its primary aim was to abolish the ouster and revocability doctrines. Third, some strands of the public policy defense are consistent with this goal. Because the ouster and revocability rules made arbitration clauses ineffective for no demonstrable reason, the FAA should only preempt their modern counterparts: state rules that unjustifiably disfavor arbitration. This refined understanding of FAA preemption would not change the outcome in any of the Court’s cases, which feature state rules that exhibit unfounded suspicion of arbitration. But contrary to the prevailing interpretation of Concepcion, it would not forbid state law from invalidating arbitration clauses when necessary to shield substantive rights.

A. THE SAVINGS CLAUSE

There is compelling evidence that a reasonable member of Congress would have understood violation of public policy to be a “ground[] . . . for the revocation of any contract.” 302 For starters, consider the FAA’s historical context—an issue that even textualists acknowledge can illuminate a statute’s language. 303 The public policy defense played an especially vibrant role during the period Congress debated and passed the FAA. Scholars regard the first third of the twentieth century as a high-water mark for untrammeled freedom of contract. 304 In Lochner v. New York, the Court held that contractual autonomy was a protected liberty interest under the Due Process Clause; 305 likewise, lower courts rejected defenses such as lack of assent “in all but the most extraordinary cases.” 306 Yet this pro-enforcement bias did not extend to the public policy defense. To the contrary, courts routinely “introduce[d] regulatory elements into the common law of contracts” by striking down agreements “affecting illegal

302. Id.
303. See, e.g., Manning, supra note 222, at 75.
305. 198 U.S. 45, 56 (1905) (striking down a maximum-hour law for bakers because of its “arbitrary interference with the right of the individual to his personal liberty”).
306. Shell, supra note 22, at 448.
activities, gambling, public and personal service, government, corruption of private citizens, public justice, personal liability, domestic relations, [and] restraints on trade and alienation.”307 Notably, one of the most common triggers for the public policy defense was that a contract purported to exonerate the drafter from liability.308 According to the Lochner Court itself, it was “settled doctrine” that such provisions were “unreasonable and contrary to public policy, and therefore void.”309

Consider some rough figures. Between 1922 and 1924, when Congress debated the FAA, there were about 1,000 reported decisions involving the asserted invalidity of a contract.310 Nearly half of these cases featured allegations of fraud.311 Strikingly, however, the second most commonly invoked defense was violation of public policy.312 The following chart shows this distribution:

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307. Id. at 448, 449 n.82.
308. See, e.g., Hart v. Pa. R.R. Co., 112 U.S. 331, 338 (1884) (“It is the law of this court that a common carrier . . . cannot stipulate for exemption from the consequences of his own negligence or that of his servants.”); Gardner v. S. Ry. Co., 37 S.E. 328, 329 (N.C. 1900) (“It is a well-settled rule of law, practically of universal acceptance, that for reasons of public policy a common carrier is not permitted, even by express stipulation, to exempt itself from loss occasioned by its own negligence.”).
310. These statistics come from a Westlaw search in the ALLCASES database between 1922 and 1924 for opinions in which a traditional contract defense appears in the digest.
311. I found 480 opinions involving fraud (and excluding the statute of frauds) by using the search string: di(contract agreement /20 fraud /20 valid! invalid! unenforceabl! void!) & da(aft 1921 & bef 1925) % “statute of frauds”.
312. Using the same technique as my fraud search, I found 142 decisions involving the public policy defense, 102 involving mistake, 78 involving the statute of frauds, 57 involving lack of consideration, and 48 involving duress.
To get a sense of how often courts actually held that a contract or term violated one of these rules, I examined all such opinions issued between June and December 1923. I found that courts held that an agreement or provision violated public policy twelve times. Comparatively, a mere thirteen cases employed the defenses of mistake, duress, lack of consideration, and statute of frauds combined.

Because violation of public policy loomed so large in the contract landscape, a reasonable member of Congress would have seen it as a “ground...for the revocation of any contract.”

Also, in one way, violation of public policy stakes a stronger claim to falling within the text of the savings clause than any other state rule. Congress passed


the FAA during the reign of *Swift v. Tyson*. Under *Swift*, federal courts did not apply state contract law when sitting in diversity; rather, they “discovered” legal principles as a matter of federal common law. When the FAA took effect, *Swift* had been on the books for three-quarters of a century; only thirteen years later would *Erie Railroad Co. v. Tompkins* usher in our modern era of federal courts deferring to state substantive law in diversity cases. *Swift*’s preeminence in 1925 creates an interpretive headache for the FAA. Although the Court has held that the phrase “grounds . . . for the revocation of any contract” refers to state contract law, several commentators have noted that Congress may have expected federal courts to continue applying federal common law when sitting in diversity. Arguably, this diminished role for state law under the savings clause undercuts the claim that lawmakers wanted states to play an active role in the arbitration arena. But one black-letter contract doctrine is

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318. *See* 304 U.S. 64, 78 (1938) (“Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state.”).


321. Blechschmidt, supra note 30, at 549 (noting that *Swift* “applied general federal common law to the types of commercial contracts that included arbitration provisions”); Yelnosky, supra note 112, at 746 (“[I]t 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 . . . .”).

322. Blechschmidt, supra note 30, at 549 (“Congress may have not had state contract law in mind at the time of enactment . . . .”); Yelnosky, supra note 112, at 746–48 (arguing that the savings clause should not incorporate any state law).
immune from this conundrum: violation of public policy. Swift required federal courts to enforce state statutes (and common law construing state statutes) in diversity. Because violation of public policy is a way of implementing state legislation, it would have bound federal judges in all cases. Thus, when Congress passed the FAA, the only state rule that would unquestionably have been a “ground for the revocation of any contract” was the public policy defense.

The FAA’s legislative history drives this point home. For instance, during the 1923 Senate Judiciary Subcommittee hearing, Senator Walsh expressed his understanding that, under the savings clause, “[t]he court has got to hear and determine whether there is an agreement of arbitration . . . and it is open to all defenses, equitable and legal.” In the same vein, the Chairman of the House Judiciary Committee, Representative George Graham, claimed that the FAA “grants no new rights, except a remedy to enforce an agreement.” These excerpts reveal that a muscular FAA that supersedes the states’ historic police powers and overrides substantive rights would have been completely alien to Congress.

A brief written by the FAA’s draftsman, Julius Henry Cohen, expresses a similar sentiment. Because the brief was republished in its entirety in the Congressional Record, commentators agree that it is “one of the most important aspects of the FAA’s legislative history.” In two portions of the brief, Cohen attempted to assuage concerns about the FAA and federalism:

A Federal statute providing for the enforcement of arbitration agreements does relate solely to procedure of the Federal courts. It is no infringement upon the right of each State to decide for itself what contracts shall or shall not exist under its laws. To be sure whether or not a contract exists is a question of the substantive law of the jurisdiction wherein the contract was made. But whether or not an arbitration agreement is to be enforced is a

323. See Swift v. Tyson, 41 U.S. (16 Pet.) 1, 18 (1842) (“The laws of a state are . . . the rules and enactments promulgated by the legislative authority . . . .”).
324. See, e.g., Hartford Fire Ins. Co. v. Chi., Milwaukee, & St. Paul Ry. Co., 175 U.S. 91, 100 (1899) (noting that the issue of whether a contract violates state policy is “governed by the law of the state”); Frothingham v. Anthony, 69 F.2d 506, 508 (1st Cir. 1934) (“Where questions of public policy are involved, it is the law of the state which controls.”); cf. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 529 (1928) (determining whether an exclusive dealing contract violated public policy as a matter of “general law” because “[n]o provision of state statute . . . is involved”).
327. 65 Cong. Rec. 1931 (1924).
328. MacNeil, supra note 6, at 97; see also Drahozal, supra note 254, at 131 (“[T]he Cohen Brief is an extremely important piece of the FAA’s legislative history . . . .”).
question of the law of procedure and is determined by the law of the jurisdiction wherein the remedy is sought.329

This passage suggests that although states would lose their ability to apply the ouster doctrine, they would otherwise retain their traditional authority over the validity of arbitration clauses. Indeed, “each State” could “decide for itself” the “substantive” question of whether a “contract exists.”330 At the same time, though, once state law had answered this question in the affirmative, the FAA federalized the procedural matter of “whether or not an arbitration agreement is to be enforced.”331 Whereas states could once refuse to specifically enforce valid agreements to arbitrate, they forfeited that right under the FAA. Several pages later, Cohen returned to this theme, stating: “There is no disposition therefore by means of the Federal bludgeon to force an individual State into an unwilling submission to arbitration enforcement. The statute [cannot] have that effect.”332

Cohen also raised the possibility of state regulation of arbitration during his testimony, albeit not directly. Senator Thomas Sterling, the Chairman of the Senate Judiciary Subcommittee, asked Cohen about contracts “between the railroads and the shippers in which there is an agreement to arbitrate, and the representation is made to the shipper, ‘You can take it or leave it,... but unless you sign you [cannot] ship.’”333 Cohen replied by noting that contracts are already subject to extensive regulation:

In the first place, we have the bills of lading act, and the bills of lading act contains the terms of the bill of lading. And that is a protection to the shipper. And then we have the regulation of the Federal Government, through its regularly constituted bodies, and they protect everybody. Railroad contracts and express contracts and insurance contracts are provided for. You [cannot] get a provision into an insurance contract [today] unless it is approved by the insurance department.334

At first, Cohen seems to be speaking about federal laws, such as the Bills of Lading Act335 and the Transportation Act.336 But his mention of governmental restrictions on “insurance contracts” could not have been a reference to federal law. In the 1920s, oversight of the insurance industry was the exclusive prov-

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330. *Id*.
331. *Id.* (emphasis added).
332. *Id.* at 40.
333. *Id.* at 15 (statement of Sen. Thomas Starling, Chairman, Subcomm. of the S. Comm. on the Judiciary).
334. *Id.* (statement of Julius Henry Cohen, Member, Am. Bar Ass’n).
ince of the states. In fact, as recently as 1913, the Supreme Court had affirmed that insurance policies did not “involve commerce” and therefore were beyond Congress’s Commerce Clause power. Thus, by claiming that insurance departments would have the right to “approve” an arbitration provision, Cohen strongly implied that the FAA did not exclude state lawmakers from the table.

For these reasons, a reasonable lawmaker would have read the savings clause to include “all defenses,” including violation of public policy. Of course, this does not end a purposivist preemption inquiry: a state rule might satisfy the statute’s plain language and nevertheless impair Congress’s goals. But as I discuss next, many applications of state public policy do not interfere with the FAA’s ambitions.

B. THE FAA’S “PURPOSES AND OBJECTIVES”

The fact that the public policy defense falls within the savings clause would make no difference if the doctrine is categorically incompatible with the FAA’s “purposes and objectives.” So what are the FAA’s core aspirations? Unfortunately, the Court has not provided a consistent answer to that question. It has sometimes opined that the statute’s “principal purpose” is to ensure “that private arbitration agreements are enforced according to their terms” (the strict-enforcement view). However, Concepcion concluded that “the FAA was designed to promote arbitration” (the promote-arbitration approach). Finally, the Justices have also explained that Congress sought to “overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts” (the same-footing perspective). In this section, I argue that only the same-footing perspective is defensible.

337. See, e.g., Susan Randall, Insurance Regulation in the United States: Regulatory Federalism and the National Association of Insurance Commissioners, 26 FLA. ST. U. L. REV. 625, 631 (1999) (noting that during this time “insurance was not subject to federal oversight”).

338. See N.Y. Life Ins. Co. v. Deer Lodge Cnty., 231 U.S. 495, 510 (1913) (“[C]ontracts of insurance are not commerce at all. . . .”); see also Paul v. Virginia, 75 U.S. (8 Wall.) 168, 170 (1868) (same). Likewise, Cohen was testifying shortly after the failure of a proposed constitutional amendment that would have allowed the federal government to regulate insurance. See Randall, supra note 337, at 631.

339. 1923 Hearings, supra note 326, at 5.


341. Concepcion, 131 S. Ct. at 1749.

The strict-enforcement and promote-arbitration theories are branches of the same tree. Both arise out of sections 3 and 4, which require federal courts to implement a valid arbitration clause by staying litigation and ordering arbitration “in accordance with the terms of the agreement.” Citing this language, the Court first suggested that the FAA requires judges to honor arbitration clauses “according to their terms” in Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University. Concepcion then took the strict-enforcement view one step further. Justice Scalia reasoned that scrupulous adherence to arbitration clauses is not an end in itself, but part of a loftier agenda: a national policy promoting arbitration’s “efficient, streamlined procedures.”

However, neither the strict-enforcement nor the promote-arbitration approaches are persuasive. For one, although some courts interpret Volt as mandating “rigorous[]” enforcement of arbitration clauses—the elevation of arbitration clauses above other terms—it does no such thing. Volt used strict-enforcement language at the end of a paragraph in which it tasked judges with treating agreements to arbitrate like other agreements:

The FAA was designed “to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate” and to place such agreements “upon the same footing as other contracts.” While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage “was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.” . . . “[T]he FAA . . . . simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.”

The thrust of this passage is—as Volt puts it—that Congress intended “to make arbitration agreements as enforceable as other contracts, but not more so.” Yet the strict-enforcement cases misleadingly cite the “ensur[ing] . . . enforce-[ment]” sentence as though it stands for the proposition that judges must honor arbitration clauses under all circumstances.

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343. See, e.g., Concepcion, 131 S. Ct. at 1748 (quoting 9 U.S.C. §§ 3, 4).
349. Concepcion, 131 S. Ct. at 1748 (“The ‘principal purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’” (quoting Volt, 489 U.S. at 478)); see also Schwartz, supra note 13, at 566 (“Language in Volt seems supportive of a broad ‘enforce as written’ rule, but only if taken out of context.”).
In addition, the strict-enforcement and promote-arbitration tropes are flawed because they deduce Congress’s purposes by looking solely at the FAA’s language. As I have argued, that is a clash of methodological styles: obstacle preemption requires courts to look beyond a statute’s bare text.\(^{350}\) Indeed, in the decades since the Court formulated its modern approach to the issue, it has rarely, if ever, invoked obstacle preemption without considering the context and legislative history of the federal law.\(^{351}\) And consistent with obstacle preemption’s purposivism, these extratextual sources often provide potent evidence of Congress’s wishes.\(^{352}\)

Finally, there are reasons that even diehard textualists should reject the strict-enforcement and promote-arbitration perspectives. As noted, these views arise from sections 3 and 4. They thus neglect section 2—the FAA’s centerpiece—which instructs courts to enforce arbitration clauses that satisfy black-letter contract principles.\(^{353}\) Sections 3 and 4 may task judges with “rigorously enforcing” valid arbitration clauses, but they say nothing about the threshold issue of whether an arbitration clause is valid.\(^{354}\) Sections 3 and 4 thus cannot serve as the basis for holding that the FAA preempts a traditional contract defense. Moreover, these provisions expressly apply to federal courts. Section 3 instructs “the courts of the United States” to stay disputes covered by an

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350. See supra section II.A.


352. See, e.g., Arizona, 132 S. Ct. at 2504 (probing “[t]he legislative background” of the Immigration Reform and Control Act of 1986); Wyeth, 555 U.S. at 574 (examining the Federal Food, Drug, and Cosmetic Act’s drafting history and statements from floor debates); Crosby, 530 U.S. at 377 nn.11–13 (relying heavily on floor statements from the sponsors of the Foreign Operations, Export Financing, and Related Programs Appropriations Act).


354. See id. §§ 3–4.
arbitration clause until after the arbitration has been conducted,355 and section 4 allows parties to petition a “United States district court” for an order compelling arbitration.356 Because sections 3 and 4 neither apply in state court nor preempt state rules,357 they cannot be the lodestar for mapping FAA preemption.

Unlike the strict-enforcement and promote-arbitration theories, the same-footing view draws its essence from section 2. By declaring that arbitration clauses are enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract,”358 Congress eliminated the ouster and revocability doctrines and made traditional contract law the sole basis to invalidate an agreement to arbitrate. Of course, abolishing the ouster and revocability rules is not exactly the same as leveling the playing field between arbitration clauses and other contracts. To truly eliminate these ancient principles, the FAA needed to favor arbitration clauses in some respects. For instance, damages are the default remedy for breach of contract.359 However, to close the loophole of the revocability doctrine,360 the FAA requires courts to specifically enforce contracts to arbitrate. Nevertheless, the two concepts are close enough. The ouster and revocability doctrines did not apply to other contracts; by eradicating them, Congress achieved rough parity between agreements to arbitrate and other agreements. Thus, the best understanding of the FAA’s overarching purpose is that Congress “was ‘motivated, first and foremost, by a . . . desire’ to change th[ese] antiarbitration rule[s].”361

As I discuss next, recognizing that the FAA primarily seeks to banish the ouster and revocability doctrines has an important payoff: it gives states the freedom to invalidate arbitration clauses when necessary to preserve substantive rights.

C. RETHINKING THE TEST FOR FAA PREEMPTION

Recall that in Southland, Chief Justice Burger opined that recognizing a state public policy defense under the savings clause would destroy the FAA.362 He reasoned that such an interpretation would give states carte blanche to pass laws that revive the very antiarbitration sentiment that inspired the ouster and revocability doctrines.363 Since then, others have staked out similar terrain. For
instance, Professor Drahozal claims that giving states too much control over the validity of arbitration clauses would allow them to wage guerilla warfare against arbitration.\textsuperscript{364} He offers the example of a state statute “that invalidate[s] all pre-dispute waivers of the right to jury trial.”\textsuperscript{365} This law might seem innocuous, but it “would make arbitration agreements wholly unenforceable.”\textsuperscript{366} These are purposivist arguments. They both assert that the FAA contains a protective curtilage: a buffer that stems not from its text, but from its objectives. And they both leap from the premise that some state policies disfavor arbitration to the conclusion that all such policies must be preempted.

But because Congress only sought to abolish the ouster and revocability doctrines, the total-preemption theory is a drastic overcorrection. To fulfill the FAA’s purposes, the statute need only override state laws that mirror the ancient rules it vanquished. Recall that by the dawn of the twentieth century, there was a burgeoning consensus that these antiarbitration measures were “anomalous and unjust”\textsuperscript{367} and had taken root due to their “antiquity” rather than their “excellence.”\textsuperscript{368} Congress recognized that these rules were flawed not simply because they allowed judges to annul arbitration clauses—after all, so too could the black-letter contract principles that the FAA expressly incorporated. Instead, they were problematic because they were “absurd[],” “irrational,” and “without reason.”\textsuperscript{369}

For instance, the purported rationale for the ouster doctrine—that private parties could not displace the judicial prerogative—made no sense given common practices that did precisely the same thing, such as settlements, releases, and covenants not to sue.\textsuperscript{370} Indeed, the FAA’s draftsman, Julius Henry Cohen, ridiculed the ouster doctrine in his congressional testimony by noting that litigants “oust the courts of jurisdiction every day.”\textsuperscript{371} Similarly, the revocability doctrine “thwart[ed] the agreement of the parties for no substantial reason.”\textsuperscript{372} Thus, the Senate Report on the FAA stated that pure “jealousy” drove judges to “inspir[e] the fear that the arbitration tribunals could not do justice between the parties.”\textsuperscript{373} Likewise, the House Report described the statute as ameliorating “illogical” rules that were “an anachronism of our American law”:

\begin{itemize}
  \item \textsuperscript{364} Drahozal, supra note 9, at 410.
  \item \textsuperscript{365} Id.
  \item \textsuperscript{366} Id.
  \item \textsuperscript{367} Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 292 (N.Y. 1921).
  \item \textsuperscript{368} U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1007 (S.D.N.Y. 1915).
  \item \textsuperscript{369} JULIUS HENRY COHEN, COMMERCIAL ARBITRATION AND THE LAW 51 (1918).
  \item \textsuperscript{370} See Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942); Aragaki, supra note 262, at 1252.
  \item \textsuperscript{371} Hearings, supra note 48, at 15 (testimony of Julius Henry Cohen, Member, Am. Bar Ass’n).
  \item \textsuperscript{372} Wesley A. Sturges & Irving Olds Murphy, Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act, 17 LAW & CONTEMP. PROBS. 580, 597 (1952) (“We have been unable . . . to find any substance for common law revocability and non-enforceability.”).
  \item \textsuperscript{373} S. REP. NO. 68-536, at 2–3 (1924).
\end{itemize}
An arbitration agreement is placed upon the same footing as other contracts, where it belongs.

... Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. [This] bill declares simply that such agreements for arbitration shall be enforced. . . .\textsuperscript{374}

Because Congress perceived that the ouster and revocability doctrines flowed from “sheer anti-arbitration bias rather than on legitimate considerations about jurisdiction or procedure,”\textsuperscript{375} the FAA should preempt state laws that unjustifiably disfavor arbitration.\textsuperscript{376} To avoid preemption, a state rule must differentiate itself from the ouster and revocability doctrines by having a rational policy basis that does not depend on unsupported negative assumptions about the quality of justice available in arbitration. Or, in the Court’s own words, section 2 preempts state rules that “rely on the uniqueness of an agreement to arbitrate,”\textsuperscript{377} or deem a contract to be “fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.”\textsuperscript{378}

But the FAA should not preempt state laws that seek to maintain parity between arbitration and litigation as equally hospitable venues for substantive rights. To be sure, any state law that invalidates an arbitration clause “disfavors arbitration” in a superficial sense.\textsuperscript{379} But Congress did not pass the FAA to stop states from disfavoring arbitration. Instead, Congress sought to abolish the ouster and revocability doctrines, and by extension, to prevent states from unjustifiably disfavoring arbitration. Refusing to enforce an arbitration clause because it has been structured to suppress claims is the very definition of a justifiable burden on arbitration. Accordingly, the FAA should not preempt state laws that nullify arbitration clauses upon concrete proof that the clauses thwart a plaintiff’s substantive rights.

In the next sections, I explain how my proposal is consistent with the Court’s jurisprudence and allows courts to reach sounder and more nuanced conclusions about FAA preemption.

\textsuperscript{375} Aragaki, supra note 262, at 1252. My view owes a significant debt to Professor Aragaki’s path-breaking argument that FAA preemption centers on whether state law “discriminates” against arbitration. \textit{Id.} at 1237. However, it deviates in two main ways. First, Professor Aragaki proposes a burden-shifting regime to detect whether a state law stems from the “same anti-arbitration bias or ‘mistrust’ of the arbitral process that the FAA was designed to abolish.” \textit{Id.} at 1238–39. I propose a simpler (albeit less refined) doctrinal benchmark. Second, Professor Aragaki does not base his antidiscrimination theory on “anything in the FAA’s language or legislative history.” \textit{Id.} at 1283. Conversely, I claim that shifting from textualism to purposivism opens up new vistas regarding Congress’s intent.
\textsuperscript{376} \textit{See} Kulukundis Shipping Co., S/A v. Amtorg Trading Corp., 126 F.2d 978, 983 (2d Cir. 1942).
\textsuperscript{377} Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987) (citations omitted).
\textsuperscript{379} AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1747 (2011).
1. “Bare-Waiver” Rules

Many state laws treat the brute fact that the parties must arbitrate as an intrinsic problem. I will call these “bare-waiver” rules because they assume that the bare existence of an arbitration clause is tantamount to the waiver of a substantive right. As I explain in this subsection, bare-waiver rules—which have dominated the Court’s FAA preemption docket until Concepcion—unjustifiably disfavor arbitration and are thus preempted.

Bare-waiver rules take several forms. The simplest examples are state statutes that single out arbitration clauses for unenforceability. The laws that the Court held to be preempted in Allied-Bruce Terminix Cos. v. Dobson (which provided that arbitration clauses “cannot be specifically enforced”)380 and Perry v. Thomas (which permitted actions for unpaid wages to be “maintained without regard to the existence of any private agreement to arbitrate”)381 fit this mold. These statutes are the ouster and revocability doctrines incarnate: they apply only to arbitration clauses, and they treat arbitration itself as sinister. Likewise, state courts sometimes attempt to mandate a judicial forum for a particular claim for no reason other than rank suspicion of arbitration. Marmet Health Care Center, Inc. v. Brown382 is illustrative. The West Virginia high court had invoked the public policy defense to exempt tort claims against nursing homes from the FAA.383 The Court reversed, reasoning that this “categorical rule prohibiting arbitration of a particular type of claim” was “contrary to the terms and coverage of the FAA.”384 Indeed, the state high court did not explain why this particular personal injury claim—let alone personal injury claims in general—will necessarily fail outside of the judicial system.385

Other bare-waiver rules attempt to prevent parties from unknowingly relinquishing their litigation rights. Although that may be laudable goal, it is at war with the FAA. Consider the Montana statute from Doctor’s Associates, Inc. v. Casarotto, which invalidated any arbitration clause that was not “typed in underlined capital letters on the first page of the contract.”386 Seen through the prism of the FAA, this law is arbitrary: it makes sense only if arbitration is inherently harmful. Likewise, recall Professor Drahozal’s hypothetical state legislation that invalidates all jury-trial waivers.387 Nothing prevents this statute...
from invalidating a jury-trial waiver outside of the arbitration context. But as applied to an arbitration clause, the statute only has a rational basis if parties lose something simply by arbitrating. Because states cannot assign any negative weight to the mere fact that a contract contains an arbitration clause, the legislation attempts to remedy a harm that, as a matter of federal law, does not exist. Thus, the FAA would preclude a court from invoking the state antiwaiver statute to find that an arbitration clause violates the public policy defense.

Finally, *Southland* also involved a bare-waiver rule. Recall that Chief Justice Burger labored mightily to explain why violation of public policy is not a “ground[...] for the revocation of any contract.” 388 But rather than heading down this rabbit hole, he could have asked whether the California Supreme Court’s use of the public policy doctrine arbitrarily disfavored arbitration. For that was exactly what the state high court had done. As noted above, the state statute at issue, the CFIL, bars “waiver[s]” of the substantive rights it confers upon franchisees. 389 The state supreme court had found an arbitration clause to be an illicit “waiver” within the meaning of the CFIL. 390 The court had thus assumed that arbitration is a pale substitute for litigation: that franchisees are worse off when they surrender their access to the judiciary. The FAA overrides state laws that rest on that logic. 391

In sum, the FAA requires state law to treat the fact that the parties must arbitrate as a neutral variable in the calculus of contract enforcement. Bare-waiver rules do not comply with this mandate because they share the ouster and revocability doctrines’ unsupported skepticism of arbitration. As I discuss next, however, a well-supported determination that particular arbitral procedures thwart substantive rights stands on different footing.

2. State Law and Substantive Rights

Unlike the ouster and revocability doctrines or their bare-waiver rule descendants, state principles that preserve substantive claims have a rational basis that does not depend on hollow generalizations about arbitration.

For example, courts have used the unconscionability defense to invalidate “severe restrictions on discovery, high arbitration costs borne by one party,
limitations on remedies, and curtailed judicial review.”392 Traditionally, unconscionability has survived preemption challenges for the breathtakingly simple reason that it is “a generally applicable contract defense” and thus satisfies the text of section 2.393 But as I have argued, this reliance on doctrinal labels is unsatisfying: there is a razor-thin line between substantive unconscionability and state public policy.394 Moreover, by holding that unconscionability principles can be preempted, Concepcion upsets the proverbial apple cart. Nevertheless, the FAA should not preempt this use of the unconscionability doctrine. The critical difference between cases that invoke unconscionability and bare-waiver rules is their level of specificity. These state laws do not assume that arbitrating means surrendering substantive rights; rather, they apply when a plaintiff proves that arbitrating means surrendering substantive rights. And although reasonable minds might differ on when a plaintiff has actually met this burden, states should enjoy broad leeway to make this determination under the presumption against preemption.

Bright-line state regulation of arbitration is more challenging. For instance, recall that in Armendariz v. Foundation Health Psychcare Services, Inc., the California Supreme Court held that employers cannot require antidiscrimination plaintiffs to pay any costs that they would not bear in litigation.395 Rather than allowing courts to adjust the equities in each particular case, Armendariz “sets categorical, per se requirements.”396 Accordingly, after Concepcion, some courts have held that this aspect of Armendariz is rooted in state public policy and thus “cannot be described as grounds that ‘exist at law or in equity for the revocation of any contract.’”397

I disagree. For one, as I have argued, the public policy defense is a “ground[] . . . at law or in equity for the revocation of any contract.”398 As a manifestation of state public policy, Armendariz’s cost-allocation doctrine falls within section 2’s plain language. But the real issue is not whether the rule satisfies the FAA’s text; instead, it is whether the rule comports with Congress’s objectives. In the overwhelming majority of cases, Armendariz’s rule has a rational policy basis unrelated to suspicion of arbitration. Indeed, arbitral costs often deter employment discrimination plaintiffs, and Armendariz merely attempts to solve that problem. To be sure, the state high court’s unbending rule might unjustifiably disfavor arbitration when applied to the wrong set of facts—for instance, when the plaintiff is a wealthy executive who can easily bear arbitral expenses. Yet the mere fact that it might be arbitrary (and thus preempted) in some cases

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393. Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 988 (9th Cir. 2007).
394. See supra notes 148–53; see also Aragaki, supra note 262, at 1285 (“[I]t is entirely possible to apply a facially neutral law in discriminatory ways.”).
397. Id. (quoting 9 U.S.C. § 2 (2006)); see also supra note 214.
398. 9 U.S.C. § 2; see also supra section III.A.
should not mean that it is preempted in all cases.

Finally, should states ever be able to preclude the arbitration of particular causes of action? Consider Broughton and Cruz: the California Supreme Court decisions that exempted public injunction claims from the FAA. These are easy cases under the Court’s cartoonish rhetoric. Even before Concepcion, the Court opined that an arbitration clause’s validity cannot depend on a “state legislature’s judgment concerning the forum for enforcement of [a] state-law cause of action.” Concepcion then announced that any “state law [that] prohibits outright the arbitration of a particular type of claim . . . is displaced.” Accordingly, the Ninth Circuit recently held (subject to pending en banc review) that Broughton and Cruz must yield to the FAA.

Yet the Court’s ruminations cannot be taken at face value. It is one thing to preclude the arbitration of a specific claim due to enmity toward arbitration. It is another thing to preclude the arbitration of a specific claim in light of specific evidence that arbitration will thwart rights. The Court’s statements conflate these very different kinds of state law. In addition, a per se bar on states exempting claims from the FAA would make little sense. Consider the recent firestorm over the National Arbitral Forum (NAF). After allegations surfaced that NAF arbitrators ruled against consumers in 95% of debt collection matters and that NAF had failed to disclose its financial ties to major players in the debt collection industry, NAF agreed to stop administering debt-collection cases. Suppose, however, that NAF made no such concession. Would the FAA really preempt a state statute that invalidated NAF arbitrations in debt collection disputes? Such a law would “prohibit[] outright the arbitration of a particular type of claim,” but hardly exhibits the reflexive hostility to arbitration that drove the ouster and revocability doctrines.

Moreover, it is unrealistic to presume that arbitration is capable of resolving every species of dispute. Recall that some states refuse to submit in rem probate actions to an extrajudicial forum. This approach makes sense: although a judge’s ruling in such a case attaches to the estate and is “binding on the whole world,” an arbitrator’s decision cannot affect nonsignatories to the arbitration

402. Kilgore v. KeyBank, Nat’l Ass’n, 673 F.3d 947, 960 (9th Cir. 2012).
403. For example, Buckeye justified its statement by citing Southland. See Buckeye, 546 U.S. at 446.
Yet as noted above, Southland involved a state rule that exempted specific causes of action from arbitration for no good reason. See supra notes 388–91. Likewise, Concepcion relied on Preston v. Ferrer, 552 U.S. 346 (2008), which did not actually involve a state law that forbade the arbitration of a particular claim. See Concepcion, 131 S. Ct. at 1747; Preston, 552 U.S. at 353; supra note 391 (discussing Preston).
405. Concepcion, 131 S. Ct. at 1747.
406. See supra notes 140–41.
Because arbitrating such a dispute would often be an exercise in futility, states should be able to rope this area off from the FAA. *Broughton* and *Cruz* mirror this logic. They highlight structural differences between arbitration and litigation to conclude that public injunction claims cannot survive their transplant to the arbitral forum. Rather than simply assuming that public injunction claims will flounder in arbitration, they persuasively explain why arbitrators cannot exercise the continuing jurisdiction necessary to implement such a remedy. In the clear-eyed reality that “arbitration is functionally incapable of supervising and administering” certain cases. There is no question that *Broughton* and *Cruz* disfavor arbitration. But that is not, and should not be, the dispositive issue in FAA preemption jurisprudence.

3. The FAA and Class Actions

What, then, about *Concepcion*? As noted, the Court issued far-reaching pronouncements about the FAA and state public policy that seem to contradict my thesis. Indeed, Justice Scalia rejected the argument that “class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.” He reasoned that states cannot require class arbitration—a procedure that is “inconsistent with the FAA”—even if it is “desirable for unrelated reasons.” As a result, many lower courts have read the opinion as adopting the total-preemption theory. However, as I explain below, *Concepcion* lends itself to a less dramatic reading. Indeed, the case can be seen as endorsing the proposition that the FAA merely seeks to abolish unjustified hostility to arbitration.

In the heart of the opinion, Justice Scalia addresses why the fact that the courts below had used the “generally applicable” defense of unconscionability does not end the preemption inquiry. With a series of outlandish examples, he claims that even a well-established contract doctrine can be “applied in a fashion that disfavors arbitration”:

An obvious illustration of this point would be a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery.... A court might reason that... such agreements are exculpatory—restricting discovery

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407. See Horton, supra note 141, at 1036 (quoting Carpenter v. Bailey, 60 P. 162, 163 (Cal. 1900)).
409. Aragaki, supra note 11, at 1251.
411. Id.
412. See supra section I.C.
413. Concepcion, 131 S. Ct. at 1747.
would be of greater benefit to the company than the consumer, since the former is more likely to be sued than to sue. . . .

. . . The same argument might apply to a rule classifying as unconscionable arbitration agreements that fail to abide by the Federal Rules of Evidence, or that disallow an ultimate disposition by a jury . . . . 414

Justice Scalia does not elaborate on why the “horribles” in his parade would be preempted. Yet one answer is that these laws proceed from the generalized premise that arbitration is inferior to litigation. After all, state rules that mandate “judicially monitored discovery,” “the Federal Rules of Evidence,” and “jur[ies]” are frontal assaults on arbitration. 415 The supposed purpose of these fanciful doctrines is that they prevent arbitration clauses from being “exculpatory” because drafters are “more likely to be sued than to sue.” 416 That reasoning operates at a staggering level of abstraction: it is not that a particular arbitration clause will thwart a plaintiff’s rights but that arbitration is itself deficient unless it is remade in litigation’s image. 417

Concepcion’s holding also seeks to prevent state law from arbitrarily disfavoring arbitration. Recall that AT&T provided bells and whistles for consumers to arbitrate small-dollar claims on an individual basis, including a payment of $7,500 and double attorney’s fees for anyone who recovered more than AT&T’s last written settlement offer. 418 As a result, Justice Scalia acknowledged that any such claim “was most unlikely to go unresolved.” 419 Arguably, in light of that finding, it was irrational for state law to deem AT&T’s class-arbitration waiver to be unconscionable. To be sure, that is a debatable point, and it raises esoteric issues about the benefits of class actions and the fact that most consumers will not spend the time and effort necessary to prosecute low-value causes of action. But given the colorable argument that AT&T’s class-arbitration waiver did not dilute its customers’ substantive rights, it is not clear that the courts below invalidated the provision for good reason. Thus, Concepcion’s dicta about the irrelevance of the public policy defense is just that—dicta. The case need not stand for the proposition that courts must compel individual arbitration even when doing so would kill off otherwise viable claims.

414. Id.
415. Id.
416. Id.
417. Moreover, this excerpt from Concepcion suggests that violation of public policy falls under the savings clause. For instance, Justice Scalia asserts that a court might find “unenforceable as against public policy consumer arbitration agreements that fail to provide” for full-blown, litigation-like procedures. Id. According to Justice Scalia, this court would be “appl[yi]ng the general principle of . . . public-policy disapproval of exculpatory agreements.” Id. To be sure, the point of this passage is to illustrate that a court can use a “generally applicable” contract defense in a fashion that flouts Congress’s purposes and objectives. Nevertheless, what Justice Scalia apparently finds objectionable is the way the public policy defense is being applied—not the sheer fact that it is being applied.
418. See supra text accompanying note 172.
419. Concepcion, 131 S. Ct. at 1753.
The relationship between the FAA and state public policy has never been clear. On its face, section 2’s savings clause only permits courts to invalidate arbitration clauses under “such grounds as exist at law or in equity for the revocation of any contract.” Although violation of state public policy is a longstanding contract defense, most courts have held that it does not satisfy the savings clause—and thus is preempted—because it rarely governs “any contract.” Similarly, other judges and scholars have opined that recognizing a public policy defense under the FAA would allow state lawmakers to pass statutes that revive the same hostility to arbitration that the FAA eradicated. At first blush, Concepcion seems to give the Court’s imprimatur to this approach. Because the Court appeared to hold that plaintiffs must arbitrate low-value state law claims on an individual basis—even when the cost of doing so exceeds any possible damage award—judges and commentators have interpreted the opinion as “foreclos[ing] the possibility of any recovery for many wronged individuals” and “wiping out existing and potential consumer and employment class actions.”

Conversely, I have argued that Concepcion adopts an approach to FAA preemption that, if taken seriously, could restore a degree of state autonomy over arbitration. By employing purposivism, Concepcion dislodges the firmly-entrenched notion that FAA preemption is primarily textual. In turn, paying greater attention to the FAA’s context and legislative history reveals that a reasonable member of Congress likely would have understood violation of public policy to be a “ground[]... for the revocation of any contract.” Moreover, an authentic purposivist analysis—not the ipse dixit in Concepcion—reveals that the FAA’s primary ambition was to abolish unjustified hostility to arbitration. To be sure, many applications of the public policy defense depend on unfounded assumptions about the arbitral forum and thus are obstacle preempted. Nevertheless, well-supported determinations that claims cannot survive in arbitration are not incompatible with the FAA’s objectives. Underneath Concepcion’s gloomy atmospherics and dicta is a blueprint for simultaneously accommodating Congress’s goals and permitting states to protect substantive rights.

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422. Sternlight, supra note 30, at 704.