

Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight

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I. INTRODUCTION

Since the mid-1980s, the U.S. Supreme Court has developed a Federal Arbitration Act (“FAA”) jurisprudence that has become increasingly preemptive of state efforts to regulate arbitration.¹ During this same period, however, state legislatures and courts have forcefully sought in a vast array of contexts to regulate and, indeed, to invalidate arbitration agreements that the legislatures or the courts have perceived as threatening the interests of the state, its businesses, its consumers, or its workers.² Much of this state arbitration legislation and case law is curious in that it was so evidently preempted at its inception under the U.S. Supreme Court’s then existing FAA jurisprudence.³ Indeed, Professor Sarah Rudolph Cole has speculated that states may be enacting arbitration legislation that is seemingly preempted by the FAA as a “purely symbolic” gesture or in

1. See, e.g., Thomas J. Stipanowich, *The Third Arbitration Trilogy*, Stolt-Nielsen, Rent-A-Center, Concepcion, and the Future of American Arbitration, 22 AM. REV. INT’L ARB. 323, 325–26 (2011) (commenting that the Supreme Court’s most recent arbitration jurisprudence “reflect[s] the increasingly extreme pro-arbitration slant of recent decades” and “vastly expands the power of companies to impose and control arbitration procedures while tying the hands of state legislatures and courts”).

2. See, e.g., Sarah Rudolph Cole, *Uniform Arbitration: “One Size Fits All” Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 785–87 (2001) (discussing various state statutes that purport to protect certain categories of disputants from compliance with predispute arbitration agreements); *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 278, 292 (W. Va. 2011) (criticizing the U.S. Supreme Court for its “tendentious reasoning” in expansively interpreting the FAA and holding that “as a matter of public policy under West Virginia law, an arbitration clause in a nursing home admission agreement adopted prior to an occurrence of negligence that results in a personal injury or wrongful death, shall not be enforced to compel arbitration of a dispute concerning the negligence”), *vacated*, 132 S. Ct. 1201 (2012).

3. See, e.g., *Marmet Health Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1202–03 (2012) (per curiam opinion rebuking the Supreme Court of Appeals of West Virginia for “misreading and disregarding the precedents of [the U.S. Supreme Court] interpreting the FAA” and noting that “[t]he West Virginia court’s interpretation of the FAA was both incorrect and inconsistent with clear instruction in the precedents of [the] Court”); *Nitro-Lift Techs., LLC v. Howard*, 133 S. Ct. 500, 501, 503, 504 (2012) (per curiam opinion chastising the Oklahoma Supreme Court for “ignor[ing] a basic tenet of the [Federal Arbitration] Act’s substantive arbitration law,” namely the *Prima Paint* doctrine, and adding for good measure that “[t]here is no general-specific exception to the Supremacy Clause”); Cole, *supra* note 2, at 786, 789 (labeling various state legislation disfavoring arbitration agreements relating to certain categories of disputes “interesting in light of the fact that the FAA likely preempts any categorical exclusions from a state uniform arbitration act”); Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L.J. 449, 452 n.11 (2005) (widely-published arbitration scholar stating that he “can’t even begin to understand the California Supreme Court’s decision in *Broughton v. Cigna Healthplans of California*” which held that claims for public injunctive relief under California’s Consumer Legal Remedies Act are not subject to arbitration).

the hope that such legislation might spur Congress to amend the FAA to allow states greater leeway to regulate arbitration.⁴ Then again, state legislatures and courts might simply perceive that the need for certain arbitration regulation is so great that it is best to proceed with arguably preempted regulation until the U.S. Supreme Court rules that the FAA preempts the specific state effort at issue.⁵

Employment arbitration has long been a favorite target of these state legislative and judicial efforts.⁶ California law provides the prime example.⁷ California's legislature and courts have been among the most aggressive in seeking to limit arbitration.⁸ Thus, it is likely more than coincidence that a majority of the U.S. Supreme Court's

4. Cole, *supra* note 2, at 789.

5. See, e.g., Casarotto v. Lombardi, 886 P.2d 931, 940 (Mont. 1994), *rev'd*, 517 U.S. 681 (1996) (Trieweiler, J., specially concurring) (castigating the federal judiciary for an arbitration jurisprudence characterized by a "type of arrogance [that] not only reflects an intellectual detachment from reality, but [also] a self-serving disregard for the purposes for which courts exist"); Truly Nolan of Am. v. Superior Court, 208 145 Cal. Rptr. 3d 432, 434 (Cal. Ct. App. 2012) (stating in dicta that, "Although *Concepcion's* reasoning strongly suggests that *Gentry's* holding is preempted by federal law, the United States Supreme Court did not directly rule on the class arbitration issue in the context of unwaivable statutory rights and the California Supreme Court has not yet revisited *Gentry* [and t]hus, we continue to be bound by *Gentry* under California's stare decisis principles"); Kinecta Alternative Fin. Solutions, Inc. v. Superior Court, 140 Cal. Rptr. 3d 347, 355 (Cal. Ct. App. 2012) (stating in dicta that "[a] question exists about whether *Gentry* survived the overruling of *Discover Bank* in *Concepcion*," but "[s]ince it has not been expressly abrogated or overruled, *Gentry* appears to remain the binding law in California").

6. See, e.g., Cole, *supra* note 2, at 786 (noting that "[a]t least twelve states have specifically exempted non-union employer-employee disputes from coverage of that state's arbitration act"); Howard v. Nitro-Lift Techs., LLC., 273 P.3d 20, 27 (Okla. 2011) (holding "that the existence of an arbitration agreement in an employment contract does not prohibit judicial review of the underlying agreement"), *vacated*, 133 S. Ct. 500 (2012).

7. See, e.g., *infra* notes 79–193 and accompanying text (discussing California's four principal employment arbitration doctrines).

8. See, e.g., Broughton v. Cigna Healthplans of Cal., 988 P.2d 67 (Cal. 1999) (holding that claims for public injunctive relief under the California Consumer Legal Remedies Act designed to protect the public from deceptive business practices are not subject to arbitration); Cruz v. PacifiCare Health Sys., Inc., 66 P.3d 1157 (Cal. 2003) (extending *Broughton's* holding to include claims to enjoin unfair competition under California's Unfair Competition Law and claims to enjoin false advertising under California Business and Professions Code section 17500); Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 41 (2006) (concluding that "California courts are clearly biased against arbitration" and "[t]heir disdain manifests in unique unconscionability requirements applicable solely when arbitration agreements are at issue and in lower standards for demonstrating unconscionability in the arbitration context"); Stipanowich, *supra* note 1, at 353 (noting that California courts "have been considerably more energetic" than other state courts in utilizing unconscionability doctrine to deny enforcement of arbitration agreements).

landmark FAA preemption cases have arisen in the context of challenges to California statutory or case law.⁹ Two of these landmark cases involved successful challenges to California regulation of arbitration in the context of the employment relationship.¹⁰

Nonetheless, especially in the context of employment arbitration agreements, the California courts have remained undeterred by the mere Supremacy Clause in their efforts to protect the public interest and the interests of workers. Specifically, they have prohibited whole categories of employment claims from arbitration imposed by the employer as a condition of employment. Indeed, in a jurisprudence that has been characterized by its creativity if not willful blindness to U.S. Supreme Court precedents, the California Supreme Court has created a series of four employment arbitration doctrines each of which from its inception has been of dubious validity from a preemption standpoint:¹¹ each of these doctrines is grounded on the “effective vindication of unwaivable state statutory rights exception” to FAA preemption (hereinafter state effective-vindication exception) — an arbitration branch of public policy doctrine that has never enjoyed firm support in the U.S. Supreme Court’s FAA jurisprudence.¹²

States aside from California also have long used public policy and the state effective-vindication exception as justification for regulating employment arbitration.¹³ Yet no other state has done so to the

9. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (holding that the FAA preempts California’s judicially-created “*Discover Bank*” rule classifying as unconscionable most consumer contract collective-arbitration waivers); *Preston v. Ferrer*, 552 U.S. 346, 359 (2008) (holding that the FAA preempts the section of the California Talent Agencies Act vesting in the California Labor Commissioner “exclusive original jurisdiction” over claims arising under the act); *Volt Info. Scis., Inc. v. Leland Stanford Univ.*, 489 U.S. 468, 470, 479 (1989) (holding that the FAA does not preempt a provision of the California Arbitration Act allowing a court to stay arbitration pending resolution of related litigation if the parties have agreed that the provision shall govern their arbitration); *Perry v. Thomas*, 482 U.S. 483, 491 (1987) (holding that the FAA preempts the section of the California Labor Code providing that an action to collect wages may proceed notwithstanding an agreement to arbitrate); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (holding that the FAA preempts the section of the California Franchise Investment Law requiring judicial consideration of claims brought under the California statute).

10. See *Preston*, 552 U.S. at 354 (challenge to California regulation of those “who engage[] in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists”); *Perry*, 482 U.S. at 483 (challenge to California Labor Code provision regarding wage disputes).

11. See *infra* notes 79–193 and accompanying text.

12. See *infra* notes 62–68 and accompanying text.

13. See, e.g., *Machado v. System4 LLC*, 989 N.E.2d 464, 470 (Mass. 2013) (extending public-policy-based state effective-vindication exception to arbitration agreement as related to claims by employees under the Massachusetts Wage Act); *Warfield v. Beth Israel Deaconess Med. Ctr., Inc.*, 910 N.E.2d 317, 325, 326 n.16 (Mass. 2009)

extent that California has. Thus, this Article focuses on California's employment arbitration doctrine to demonstrate two critical points of general application. First, California's employment arbitration doctrine illustrates the extent to which state courts have been willing to turn a blind eye to the U.S. Supreme Court's FAA jurisprudence in an effort to further the public policies that ground employment regulation. Second, California's employment arbitration doctrine allows for an exploration of the extent to which the U.S. Supreme Court's most recent FAA jurisprudence impairs the ability of the states to safeguard the public interest and the interests of workers through employment arbitration regulation.¹⁴ Both of these points inform the Article's reform proposal that follows. This discussion demonstrates the urgent need for an amendment to the FAA that will allow states to regulate employment arbitration so as to protect the public interest and the interests of workers. This discussion also demonstrates the need for federal oversight of this state regulation so as to protect

(holding that in light of "an "overriding" statutorily expressed public policy against discrimination" an employment arbitration agreement relating to claims arising under Massachusetts's employment discrimination statute "is enforceable only if such an agreement is stated in clear and unmistakable terms"); *Cardiovascular Surgical Specialists, Corp. v. Mammana*, 61 P.3d 210, 213 (Okla. 2002) (commenting that Oklahoma's statute limiting the enforcement of covenants not to compete "was enacted to protect the people" and, holding therefore that "this public right cannot be waived by the parties' agreement to submit the issue of the validity of a contract provision to arbitration"); *Rembert v. Ryan's Family Steak Houses, Inc.*, 596 N.W.2d 208, 226, 228–30 (Mich. Ct. App. 1999) (holding that "predispute agreements to arbitrate statutory employment claims are valid if [among other things] the arbitration agreement does not waive the substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights" and setting out the arbitration procedures that must be included for such an arbitration agreement to be valid); see also *Sutherland v. Ernst & Young LLP*, 768 F. Supp.2d 547, 549, 554 (S.D.N.Y. 2011), *rev'd*, 726 F.3d 290 (2d Cir. 2013) (applying the federal and state effective-vindication exceptions to invalidate an arbitration agreement as it related to an employee's collective and class action claims for overtime under respectively the Fair Labor Standards Act and New York state law).

14. For examples from outside of California of the U.S. Supreme Court's most recent FAA jurisprudence being used to invalidate state public-policy based employment arbitration regulation, see *Machado v. System4 LLC*, 993 N.E.2d 332, 333 (Mass. 2013) (concluding that the U.S. Supreme Court's holding in *American Express Co. v. Italian Colors Restaurant* "abrogates" the earlier holding of the Massachusetts Supreme Court applying the state effective-vindication exception in the context of claims by employees under the Massachusetts Wage Act); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 292 & n.1 (2d Cir. 2013) (holding in light of the U.S. Supreme Court's holding in *American Express Co. v. Italian Colors Restaurant* that the effective-vindication exception may not be applied to invalidate a class-action waiver provision in an arbitration agreement even if the waiver removes an employee's incentive to bring an overtime claim under New York labor law).

the interest of employers and employees in the efficient resolution of employment disputes.

In light of the U.S. Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*¹⁵ and the Court's 2013 decision in *American Express Co. v. Italian Colors Restaurant*,¹⁶ it is now abundantly clear that in this game of preemption chess, the players have come to checkmate. Neither of these recent Supreme Court cases involved employment arbitration. Moreover, the latter case did not involve FAA preemption whatsoever. Nonetheless, together *Concepcion* and *Italian Colors Restaurant* obliterate the state effective-vindication exception and with it much of the employment arbitration regulation grounded on the exception. Thus, for states that seek to regulate predispute employment arbitration agreements, the time has come to settle upon the most favorable terms of surrender that can be negotiated. This Article proposes, therefore, a tactical retreat for the states pursuant to which a state may continue to regulate predispute employment arbitration agreements only after a federal overseer, such as the U.S. Department of Labor, has preapproved the specific regulation.

Part I of this Article distills from the U.S. Supreme Court's FAA preemption jurisprudence the eight fundamental principles of FAA preemption. Part II considers the status of the state effective-vindication exception to the FAA's application in light of *Concepcion* and *Italian Colors Restaurant*. Part III details how California courts have attempted to skirt the U.S. Supreme Court's FAA jurisprudence to safeguard the public interest and workers' rights and how *Concepcion* and *Italian Colors Restaurant* nullify these efforts. This Part describes California's various employment arbitration doctrines and then applies the fundamental principles of FAA preemption to demonstrate that the FAA, as the U.S. Supreme Court has interpreted it, preempts each of these doctrines. Finally, Part IV suggests a way forward. This Part argues that a state should have the ability to regulate predispute employment arbitration agreements so as to protect the ability of its workers to vindicate their state statutory rights. This Part further argues, however, that a federal overseer with expertise in workplace law matters should have veto power over

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

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

any such proposed regulation so as to maintain an appropriate balance between the public policies that ground state employment regulation on the one hand and a desire promote the FAA's policy in favor of enforcing arbitration agreements as written on the other.

II. A PRIMER ON FAA PREEMPTION

A. *The Eight Fundamental Principles of FAA Preemption*

Section 2 of the FAA of provides that,

A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.¹⁷

The U.S. Supreme Court has interpreted this language in such a way that the FAA preempts a wide range of state efforts to regulate arbitration contracts. From the U.S. Supreme Court's FAA jurisprudence, one is able to distill the following principles that mark the parameters of FAA preemption of state arbitration law: (1) the FAA creates a substantive rule that applies in state courts as well as in federal courts and preempts conflicting state law;¹⁸ (2) the FAA applies to any arbitration agreement that Congress would have the authority to regulate using the full extent of its Commerce Clause power;¹⁹ (3) a state may not invalidate an arbitration agreement under a state law that is "not applicable to contracts generally" even if the state law does not undermine arbitration;²⁰ (4) a state law may not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives" of the FAA;²¹ (5) FAA preemption applies notwithstanding any state substantive or procedural policies to the contrary: the importance of a state public policy is irrelevant to FAA preemption analysis;²² (6) a state may not require a judicial or administrative forum for the resolution of claims that the contracting

17. 9 U.S.C. § 2 (1947).

18. *Southland Corp. v. Keating*, 465 U.S. 1, 12–16 (1984).

19. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 268 (1995).

20. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

21. *Volt Info. Scis., Inc. v. Leland Stanford Univ.*, 489 U.S. 468, 477–78 (1989) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

22. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55, 58 (1995).

parties have agreed to resolve by arbitration;²³ and (7) it is no defense to FAA preemption that the state-mandated forum is but a first stop before arbitration is allowed.²⁴ This Article will more fully discuss these principles below in conjunction with a discussion of how these principles act to preempt California's principal employment arbitration doctrines.

Although the scope of FAA preemption is broad, the statute does allow for some state regulation of arbitration contracts that are within the FAA's purview. Recall section 2's Saving Clause, which provides that a state may regulate an arbitration contract governed by the FAA "upon such grounds as exist at law or in equity for the revocation of any contract." It is accepted that such grounds include fraud, duress, and unconscionability.²⁵

The precise meaning and effect of the Saving Clause, however, remain topics for debate in the courts and in the academic literature.²⁶ To bring this debate into focus, assume for purposes of discussion that a state wishes to invalidate any arbitration agreement that does not allow for class action arbitration. The fundamental principles of FAA preemption set out above make clear that a state legislature may not enact a statute that expressly invalidates any arbitration agreement that does not allow for class action arbitration, for such a statute would both impermissibly single out arbitration contracts and impermissibly stand as an obstacle to the execution of the FAA's objectives. This is so even if the statute is grounded on express legislative findings about the important public policy reasons for the statute. Moreover, the fundamental principles of FAA preemption also make clear that a state court may not announce a rule that expressly invalidates any arbitration agreement that does not

23. *Preston v. Ferrer*, 522 U.S. 346, 349–50 (2008); *Perry v. Thomas*, 482 U.S. 483, 491 (1987).

24. *Preston*, 522 U.S. at 354–58. One might read *Preston* as holding only that a state may not mandate a judicial or administrative forum as a first stop before arbitration where the detour would "hinder speedy resolution of the controversy." *Id.* at 358. This author does not read *Preston* so narrowly.

25. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).

26. *See, e.g., David Horton, Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 *Geo. L.J.* 1217, 1224 (2013) (arguing that the Saving Clause preserves an application of state public policy that nullifies an arbitration provision when such application is grounded on a "well-supported determination that doing so is necessary to preserve substantive rights or remedies"); Michael J. Yelnosky, *Fully Federalizing the Federal Arbitration Act*, 90 *Or. L. Rev.* 729, 734 (2012) (arguing that "the savings clause should never have been read to require the application of state law to disputes over the enforceability of arbitration agreements covered by the FAA [but rather] should be read to authorize federal courts to create federal common law to govern the enforcement of covered arbitration agreements").

allow for class action arbitration: the FAA is indifferent as to whether the state acts through its legislature or its courts.

Given these restrictions, some courts nonetheless have used general contract principles such as unconscionability and public policy to invalidate arbitration contracts that do not allow for class action arbitration.²⁷ The defense of such an approach relies upon the Saving Clause and is two-fold: First, it is argued that unconscionability and public policy can be applied to invalidate any contract.²⁸ Second, the argument is made that these decisions do not single out arbitration given that a contract that purported to preclude class actions in court would also be held to be unconscionable or against public policy.²⁹

If one were to accept that a state may limit arbitration agreements in this way, by means of such “general contract defenses,” might a state also declare unconscionable or against public policy any arbitration agreement that does not allow for all the discovery available in court, the application of the Federal Rules of Evidence, and a unanimous decision by twelve arbitrators chosen from a jury pool assembled by a specified authority and procedure? The Supreme Court’s 2011 decision in *AT&T Mobility LLC v. Concepcion* makes clear that section 2’s Saving Clause is not allowed to swallow up the rest of section 2 in such a way.³⁰ Rather, application of the general contract doctrine must not disadvantage arbitration such that the application stands as an obstacle to the accomplishment of the FAA’s purposes and objectives.³¹ More specifically, *Concepcion* teaches that application of the general contract doctrine must not frustrate “the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”³²

Each of these formulations of the holding in *Concepcion* is largely derivative of several of the seven fundamental principles of FAA preemption set out above. Thus, in one sense, *Concepcion* adds nothing new to the law of FAA preemption. But there are also strong arguments that *Concepcion* in fact adds a great deal. For in applying settled principles to delineate the scope of the Saving Clause,

27. See *Gentry v. Superior Court*, 165 P.3d 556, 563–69 (Cal. 2007); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108–10 (Cal. 2005).

28. See *Gentry*, 165 P.3d at 559; *Discover Bank*, 113 P.3d at 1111–12.

29. See *Gentry*, 165 P.3d at 465; *Discover Bank*, 113 P.3d at 1111–12; cf. *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130, 147–48 (Cal. 2011), *vacated*, 132 S. Ct. 496 (2011).

30. *Concepcion*, 131 S. Ct. at 1747–48.

31. *Id.* at 1748, 1753.

32. *Id.*

Concepcion makes clear an eighth fundamental principle of FAA preemption: state regulation of arbitration agreements pursuant to the Saving Clause is subject to the first seven fundamental principles of FAA preemption.

B. *Section 2's Saving Clause After AT&T Mobility LLC v. Concepcion*

This Article posits that the FAA, as the U.S. Supreme Court has recently interpreted it, imperils the public policies that ground state regulation of the employment relationship. *Concepcion's* holding and its reasoning are central to that argument.³³ It is useful, therefore, to consider more fully *Concepcion's* holding and reasoning before turning to a consideration of the relationship between the FAA and state public-policy-based employment arbitration regulation.

The general issue in *Concepcion* was “whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”³⁴ The more specific issue in the case was whether section 2 preempts California’s “*Discover Bank*” rule.³⁵ That rule classified most collective-arbitration waivers in consumer contracts as unconscionable.³⁶

Discover Bank v. Superior Court was a 2005 California Supreme Court case in which the court held that class action waivers should not be enforced if (1) “the waiver is found in a consumer contract of adhesion [(2)] in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and [(3)] when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”³⁷ The California Supreme Court reasoned that, in such circumstances, “the [class action] waiver becomes in practice the exemption of the party from responsibility for its own fraud, or willful injury to the person or property of

33. Cf. David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 502 (2014) (arguing that *Concepcion* and *Italian Colors Restaurant* have enabled corporations and employers to utilize adhesive consumer and employment arbitration contracts to “displace democratically-created rights”); David Korn & David Rosenberg, *Concepcion's Pro-Defendant Biasing of the Arbitration Process: The Class Counsel Solution*, 46 U. MICH. J.L. REFORM 1151, 1200 (2013) (concluding that “*Concepcion* broke a cardinal rule supported by longstanding precedent: agreements to arbitrate future claims shall not undermine the law’s social objectives by forcing a party to forego effective enforcement of his or her substantive claims of right”).

34. *Concepcion*, 131 S. Ct. at 1744.

35. *Id.* at 1746.

36. *Id.*

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

another [and, thus,] such waivers are unconscionable under California law and should not be enforced.”³⁸ In *Concepcion*, the U.S. Supreme Court held that the FAA preempted California’s *Discover Bank* rule.

The Court in *Concepcion* expressly rejected the argument that the *Discover Bank* rule was compatible with section 2 because it was a ground that existed at law or in equity for the revocation of any contract given its origins in unconscionability doctrine and the public policy against exculpation.³⁹ The Court also expressly rejected the argument that the *Discover Bank* rule was compatible with section 2 because it applied to class action waivers in litigation as well as arbitration.⁴⁰ Thus, *Concepcion* makes clear that these two prerequisites to state invalidation of an arbitration contract under the Saving Clause are necessary but not sufficient to avoid preemption.

Irrespective of whether the *Discover Bank* rule actually satisfied these prerequisites, the FAA preempted the *Discover Bank* rule, the Court held, because the rule stood “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁴¹ Chief among those objectives “is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”⁴² The *Discover Bank* rule was inconsistent with this objective, the Court concluded, in that it required the availability of classwide arbitration.⁴³

The Court made clear that it viewed the *Discover Bank* rule as a categorical rule — as effectively requiring the availability of class actions — even though the California Supreme Court had cast its rule as a multi-factor test: the Court considered each of the three elements of the *Discover Bank* test and concluded that “any” consumer claim would meet the test.⁴⁴ As for the first element — that “the waiver is found in a consumer contract of adhesion” — the Court noted that, “the times in which consumer contracts were anything other than adhesive are long past.”⁴⁵ That is, virtually all consumer contracts today are adhesive. As for the second requirement — that

38. *Id.* (internal quotations omitted).

39. *Concepcion*, 131 S. Ct. at 1746–48.

40. *Id.* at 1750–53.

41. *Id.* at 1753.

42. *Id.* at 1748; *see also id.* at 1749 (quoting *Preston v. Ferrer*, 552 U.S. 346, 357–58 (2008)).

43. *Id.* at 1748, 1750–51.

44. *Id.* at 1750.

45. *Id.*

the waiver is found “in a setting in which disputes between the contracting parties predictably involve small amounts of damages” — the Court concluded that this requirement “is toothless and malleable” and cited a Ninth Circuit holding that damages of \$4000 were sufficiently small to satisfy the test.⁴⁶ Finally, as for the third prerequisite — that “it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money” — the Court reasoned that this limitation was no limitation at all “as all that is required is an allegation.”⁴⁷

The Court went on to explain in detail how requiring the availability of classwide arbitration was inconsistent with the fundamental attributes of arbitration. First, class arbitration involves absent parties and, thus, necessitates greater procedural formality.⁴⁸ For example, in a class arbitration, the arbitrator must decide whether to certify the class, whether the named parties are sufficiently representative and typical to qualify as class representatives, and how discovery should be conducted on behalf of the class. The absent class members must be given notice, an opportunity to be heard, and the right to opt out. These procedures, the Court concluded, make “the [arbitration] process slower, more costly, and more likely to generate procedural morass than final judgment.”⁴⁹

Second, class arbitration involves higher stakes for the respondent: “when damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable” to the respondent in light of the only limited judicial review that might follow an arbitration.⁵⁰ “Faced with even a small chance of a devastating loss,” the Court reasoned, respondents “will be pressured into settling questionable claims.”⁵¹

Thus, the Court concluded, “It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate.”⁵² Because *Discover Bank* required companies either to allow class arbitration or to forego arbitration altogether and because class arbitration is so undesirable from the companies’ perspective, *Discover Bank*

46. *Id.* at 1746, 1750.

47. *Id.*

48. *Id.* at 1751.

49. *Id.*

50. *Id.* at 1752.

51. *Id.*

52. *Id.* at 1752 n.8.

in practice presented companies with only one real option — to forego arbitration. Thus, the *Discover Bank* rule impermissibly disadvantaged arbitration.

It bears emphasis that the Court was utterly indifferent to California's claimed need for the *Discover Bank* rule. The Court rejected the argument that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system."⁵³ In response to this argument, the Court made clear that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."⁵⁴

In sum, *Concepcion* severely limits a state's authority to invalidate an arbitration contract "upon such grounds as exist at law or in equity for the revocation of any contract." Of critical importance to the focus of this Article, *Concepcion* does so in a manner that calls into question the very existence of the state effective-vindication exception, upon which much state employment arbitration regulation is grounded. In Part II, therefore, this Article explicates the state effective-vindication exception and considers the implications of *Concepcion* and *Italian Colors Restaurant* for the exception's survival.

III. THE FEDERAL AND STATE EFFECTIVE-VINDICATION EXCEPTIONS AFTER *AT&T MOBILITY LLC v. CONCEPCION* AND *AMERICAN EXPRESS CO. v. ITALIAN COLORS RESTAURANT*

A. *The State Effective-Vindication Exception Defined*

For the purpose of understanding the state effective-vindication exception and also for the purpose of defining the scope of this Article, it is useful first to distinguish the state effective-vindication exception from the unconscionability defense at issue in *Concepcion*. The two defenses to arbitration contract enforcement share similarities and frequently overlap.⁵⁵ Yet they differ significantly in their focus. As noted earlier, the state effective-vindication exception is a species of public policy defense. The California Supreme Court itself

53. *Id.* at 1753.

54. *Id.*; accord *Marmet Health Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (holding that the FAA preempts West Virginia case law itself holding that a predispute arbitration clause contained in a nursing home contract and relating to a personal-injury or wrongful-death negligence claim was void "as a matter of public policy under West Virginia law").

55. See, e.g., *Chavarria v. Ralph's Grocery Co.*, 733 F.3d 916, 926–27 (9th Cir. 2013) (holding that a certain arbitration agreement was unconscionable under California law and discussing in support of that holding the U.S. Supreme Court's most recent effective-vindication exception case); *In re Poly-America, L.P., Ind.*, 262 S.W.3d 337, 353, 360–61 (Tex. 2008) (holding provisions of an arbitration agreement

has noted the important distinction between the public-policy-based effective-vindication exception and the unconscionability defense and has explained the difference this way:

A public policy defense is concerned with the relationship of the contract to society as a whole, and targets contractual provisions that undermine a clear public policy, such as an unwaivable statutory right designed to accomplish a public purpose. Unconscionability is concerned with the relationship between the contracting parties and one-sided terms such that consent in any real sense appears to be lacking.⁵⁶

This Article is not principally concerned per se with the contractual or statutory employment rights of individual employees. Rather, the primary focus of this Article is on the ability of a state to implement employment arbitration regulation so as to promote the public purposes and safeguard the public interests of society as a whole that ground that state's employment regulation. Thus, the problem that the Article demonstrates below is that the FAA, as the U.S. Supreme Court most recently has interpreted it, obliterates the state effective-vindication exception to arbitration contract enforcement. In doing so, the FAA undermines the ability of a state through employment arbitration regulation to promote the public purposes and safeguard the public interests that ground that state's regulation of the employment relationship. Accordingly, the solution that the Article proposes moves the public purposes and public interests that ground employment regulation back to the center of the analysis of FAA preemption of state employment arbitration regulation.

To better understand the state effective-vindication exception, it is useful to become familiar with the exception's relatively more securely-grounded cousin — the effective vindication of *federal* statutory rights exception (hereinafter federal effective-vindication exception). In particular, to more fully appreciate this Article's argument that the state effective-vindication exception does not exist, it is helpful to consider how the state effective-vindication exception differs from the federal effective-vindication exception in both its genesis and its scope. As the U.S. Supreme Court most recently described the rule in *American Express Co. v. Italian Colors Restaurant*, the federal effective-vindication exception would invalidate an arbitration contract provision that purports to waive prospectively a party's

that would inhibit effective vindication of an employee's retaliatory discharge claim "invalid, as substantively unconscionable and void").

56. *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130, 146 (Cal. 2011), *vacated*, 132 S. Ct. 496 (2011) (internal citations omitted).

right to pursue a federal statutory remedy.⁵⁷ Thus, the exception would invalidate an arbitration contract provision that required an employee to bring any claims against her employer arising from her employment in arbitration but then, for example, also precluded the employee from asserting any claims arising under the Age Discrimination in Employment Act (“ADEA”).⁵⁸ The exception also arguably would invalidate an arbitration contract provision that required the employee to bring her ADEA claims in arbitration but then, for example, also provided for administrative and filing fees relating to the arbitration that were so high that access to the arbitral forum for the employee was impracticable.⁵⁹

The federal effective-vindication exception is, at its root, an inquiry into Congressional intent. Congress has the power to exempt claims arising under any statute from the FAA’s scope.⁶⁰ The U.S. Supreme Court will look in three places for such a Congressional intent to exempt: (1) in the express text of the statute; (2) in the legislative history of the statute; and (3) in an “inherent conflict” between arbitration and the effective vindication of rights arising under the statute.⁶¹ In the case of an inherent conflict, Congressional intent to exempt claims arising under a statute from the scope of the FAA is implied. The federal effective-vindication exception derives from this express or implied Congressional intent.

The theory that grounds the federal effective-vindication exception cannot logically be applied without modification in the context of a state statute.⁶² A state legislature generally does not have the

57. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *cf. Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (suggesting that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute [at issue] will continue to serve both its remedial and deterrent function”).

58. *See Italian Colors Rest.*, 133 S. Ct. at 2310.

59. *See id.* at 2310–11, *cf. Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (suggesting that, “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”).

60. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012); *Mitsubishi Motors Corp.*, 473 U.S. at 627–28.

61. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

62. *See Broughton v. Cigna Healthplans*, 988 P.2d 67, 86 (Cal. 1999) (Chin, J., concurring and dissenting) (arguing that the U.S. Supreme Court’s FAA jurisprudence teaches “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”) (emphasis in the original); Yelnosky, *supra* note 26, at 752 (concluding that “while Congress can create a federal right and guarantee judicial enforcement regardless of the terms of a written arbitration agreement, the Court’s interpretation of the

power to enact exceptions to federal law.⁶³ Thus, arguably it is nonsensical to ask whether an inherent conflict between arbitration and the effective vindication of rights arising under a state statute evidences a state legislature's intent to exempt claims arising under the state statute from the scope of the FAA.⁶⁴ The state effective-vindication exception, if it exists at all, must be grounded in a theory apart from the precise theory that grounds the effective-vindication exception in the context of a federal statute.

One such theory is that Congress, in enacting the FAA, intended to accord some respect to a state's decision to preclude waiver of a judicial forum where such preclusion is grounded in an important state policy.⁶⁵ A version of this theory holds that the state effective-vindication exception is a ground "for the revocation of any contract" within the purview of section 2's Saving Clause.⁶⁶ Absent a federal limitation, a state may refuse, typically on public policy grounds, to enforce a contract that purports to waive an unwaivable statutory right. Proponents of a state effective-vindication exception would argue, therefore, that a state may refuse to enforce even an arbitration contract that waives an unwaivable statutory right or that has the effect of waiving an unwaivable statutory right. Indeed, the California Supreme Court has expressly invoked this "revocation of any contract" theory to justify its application of the state effective-vindication exception so as to impose limits on predispute employment arbitration contracts.⁶⁷

FAA prevents a state legislature from doing the same thing with respect to a state-created right").

63. *Valle v. Lowe's HIW, Inc.*, No. 11-1489 SC, 2011 WL 3667441, at *6 (N.D. Cal. Aug. 22, 2011) (stating that "states may not exempt claims from the FAA").

64. *See Yelnosky, supra* note 26, at 767–68, n.192 (noting that "a similar inquiry, determining whether the state legislature that created a state-law cause of action intended to guarantee a judicial forum for resolution of claims, is prohibited under the Court's FAA jurisprudence").

65. *See Perry v. Thomas*, 482 U.S. 483, 494–95 (1987) (O'Connor, J., dissenting) (arguing that "California's policy choice to preclude waivers of a judicial forum for wage claims is entitled to respect").

66. *See Southland Corp. v. Keating*, 465 U.S. 1, 17–21 (1984) (Stevens, J., concurring in part and dissenting in part) (arguing that the judiciary must fashion grounds for revocation under section 2's Saving Clause as a matter of federal common law and that a state's judgment that a type of arbitration contract is invalid as contrary to public policy may be entitled to respect). *But cf. Yelnosky, supra* note 26, at 748 (noting that Justice Stevens's argument that the Saving Clause authorized federal courts to create federal common law relating to the enforcement of arbitration agreements "never gained any traction").

67. *See Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 988–89 (Cal. 2003) (explaining the theory grounding the *Armendariz* doctrine).

The U.S. Supreme Court has never recognized that a *state* effective-vindication exception exists. In fact, the Court's FAA preemption jurisprudence strongly implies that such an exception does not exist.⁶⁸ Further, the reasoning grounding the Court's decisions in *Concepcion* and in *Italian Colors Restaurant* clearly suggests that even if such an exception does exist, the exception does not exist in the strong form that grounds California's employment arbitration doctrine.

B. *The Effect of Concepcion and Italian Colors Restaurant on the State Effective-Vindication Exception*

Concepcion was not an effective-vindication case. Nonetheless, *Concepcion* makes clear that if application of the state effective-vindication exception frustrates the purposes of the FAA, the exception must give way to the FAA regardless of the state policy at issue. As discussed in Part I, the Court in *Concepcion* held that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons" and, thus, it was irrelevant to FAA preemption that "class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system."⁶⁹ The California Supreme Court has theorized that the state effective-vindication exception derives from section 2's Saving Clause and merely utilizes public policy as a ground "for the revocation of any contract."⁷⁰ *Concepcion* teaches that a state's regulation of an arbitration contract pursuant to section 2 is subject to each of the fundamental principles of FAA preemption. One of those fundamental principles is that the importance of a state policy is irrelevant to FAA preemption analysis. Thus, to the extent that the state effective-vindication exception is grounded in the theory that violation of state public policy is a ground "for the revocation of any contract," *Concepcion* obliterates the exception.

68. See *Southland Corp.*, 465 U.S. at 16 n.11 (labeling "unpersuasive" the analogy between Congress enacting an exception to section 2 of the FAA and a state legislature doing so); *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 935–36 (9th Cir. 2013) (discussing the dissent in *Italian Colors Restaurant* and concluding that "[t]he 'effective vindication' exception, which permits the invalidation of an arbitration agreement when arbitration would prevent the 'effective vindication' of a federal statute, does not extend to state statutes"). *But cf.* Yelnosky, *supra* note 26, at 765–70 (asserting prior to *Italian Colors Restaurant* that whether the state effective-vindication exception exists is an "apparently open and important question" and discussing at length possible bases for its existence).

69. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

70. See *Little*, 63 P.3d at 988–89.

Independent of *Concepcion*, *Italian Colors Restaurant* calls into question the existence of the state effective-vindication exception and suggests that the exception cannot save state employment arbitration regulation grounded in the doctrine. Interestingly, *Italian Colors Restaurant* did not involve a state statutory right. Indeed, *Italian Colors Restaurant* did not involve FAA preemption at all. Nonetheless, the case forebodes ill health for the state effective-vindication exception generally and for state public-policy-based employment arbitration doctrine specifically.

In *Italian Colors Restaurant*, the respondents argued that the federal effective-vindication exception precluded enforcement of their arbitration contract given that the contract contained a contractual waiver of class arbitration and given that the cost of any individual respondent individually arbitrating the federal antitrust claims at issue would greatly exceed the potential recovery for such individual claims.⁷¹ Thus, the respondents argued, “[e]nforcing the waiver of class arbitration bars effective vindication [of their rights under the federal antitrust statute] because they have no economic incentive to pursue their antitrust claims individually in arbitration.”⁷²

The Court rejected the respondents’ argument in such a way as to make clear that the federal effective-vindication exception is quite narrow. The Court reasoned that, “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.”⁷³ Thus, where the arbitration contract allows the claimant to bring a claim in an arbitral forum and where administrative and filing fees arising from the arbitration are not so great as to effectively eliminate the claimant’s *access* to the arbitral forum, the federal effective-vindication exception will not invalidate the arbitration contract even if a class arbitration waiver renders the successful prosecution of that claim in arbitration economically impracticable. The Court also made clear that it was fully aware of the consequences of its narrow interpretation of the federal effective-vindication exception: the Court cited *Concepcion* for the proposition that “the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.”⁷⁴

71. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308, 2310 (2013).

72. *Id.* at 2310.

73. *Id.* at 2311.

74. *Id.* at 2312 n.5.

As more fully developed in Part III of this Article, the majority opinion in *Italian Colors Restaurant* has dire consequences for employment arbitration doctrine grounded in the state effective-vindication exception. Arguably even more problematic, however, are the implications for such employment arbitration doctrine arising from Justice Kagan's dissent in *Italian Colors Restaurant*. In her dissent, which Justices Ginsburg and Breyer joined,⁷⁵ Justice Kagan argued for a broader federal effective-vindication exception pursuant to which "[a]n arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however [the arbitration clause] achieves that result."⁷⁶ Importantly, however, Justice Kagan argued that proof that arbitration was merely a "less convenient or less effective" means of vindication as contrasted with proceeding in court should not suffice to "meet the effective-vindication rule's high bar."⁷⁷

Moreover, and most importantly, in seeking to minimize the importance of *Concepcion*'s holding to the case at hand, Justice Kagan made clear the dissenters' view that the *state* effective-vindication exception simply does not exist:

When a state rule allegedly conflicts with the FAA, we apply standard preemption principles, asking whether the state law frustrates the FAA's purposes and objectives. If the state rule does so — as the Court found in [*Concepcion*] — the Supremacy Clause requires its invalidation. We have no earthly interest (quite the contrary) in vindicating that law. Our effective-vindication rule comes into play only when the FAA is alleged to conflict with another *federal* law, like the Sherman Act here. In that all-federal context, one law does not automatically bow to the other, and the effective-vindication rule serves as a way to reconcile any tension between them."⁷⁸

Given the view of Justices Kagan, Ginsberg, and Breyer that the effective-vindication exception does not apply to *state* statutory rights at all, it is difficult to imagine how five votes in support of the state effective-vindication exception might be found on the current Court. Indeed, this author would predict with great confidence that the current Court would hold that the state effective-vindication exception simply does not exist.

To appreciate more fully the impact of *Italian Colors Restaurant* in conjunction with *Concepcion* on public-policy-based employment

75. Justice Sotomayor did not participate in the *Italian Colors Restaurant* case.

76. *Italian Colors Rest.*, 133 S. Ct. at 2314 (Kagan, J., dissenting).

77. *Id.* at 2318 n.4 (Kagan, J., dissenting).

78. *Id.* at 2320 (Kagan, J., dissenting).

arbitration doctrine, it is useful to consider concrete examples. Thus, in Part III, this Article focuses on California's four principal employment arbitration doctrines. As noted earlier and as more fully-developed below, each of these doctrines ultimately derives from the effective vindication of unwaivable state statutory rights exception to the FAA's application.

IV. AN AUTOPSY OF STATE EMPLOYMENT ARBITRATION DOCTRINE: THE CALIFORNIA EXAMPLE

The California Supreme Court has created four principal employment arbitration doctrines. These doctrines, in the order of their promulgation, are (1) the *Armendariz* doctrine; (2) the *Gentry* doctrine; (3) the unwaivability doctrine respecting the right to a Berman hearing; and (4) the unwaivability doctrine respecting representative Private Attorneys General Act of 2004 ("PAGA") actions. This Part considers each of these doctrines in turn and explains how each of these doctrines fails FAA preemption analysis. This discussion uses the example of California law to make two points of relevance nationwide. First, this discussion demonstrates the extent to which some courts have aggressively sought to use employment arbitration doctrine to safeguard the public policies that ground more general state regulation of the employment relationship. Second, the discussion also demonstrates the extent to which *Concepcion* and *Italian Colors Restaurant* will preclude any state court or legislature from successfully doing so in the future. These two points inform the reform proposal in Part IV.

This Part proceeds along two tracks. First, consistent with the discussion above of *Concepcion* and the dissent in *Italian Colors Restaurant*, this Part assumes that the state effective-vindication exception does not exist. In such a case, the FAA preemption analysis becomes quite simple with respect to each of the principal California employment arbitration doctrines — each of which is grounded on the exception: each must "automatically bow to" the FAA. Thus, the FAA preempts the doctrine to the extent that the doctrine conflicts with the FAA. Second, recognizing that the particular issue of the existence of the state effective-vindication exception was not before the Court in either *Concepcion* or *Italian Colors Restaurant*, this Part assumes for the sake of argument that a state effective-vindication exception does exist and is co-extensive with the federal effective-vindication exception as outlined in the majority opinion in *Italian Colors Restaurant*. Pursuant to this track, the Article considers

whether the state effective-vindication exception protects the California employment arbitration doctrine at issue from FAA preemption.

A. *The Armendariz Doctrine*

1. *The Rule and Its Rationale*

In *Armendariz v. Foundation Health Psychcare Services, Inc.*, the California Supreme Court held that whenever an arbitration agreement that an employer has required as a condition of employment obligates an employee to bring in arbitration a claim arising under an unwaivable statutory right, such as a Fair Employment and Housing Act (“FEHA”) claim, the arbitration agreement must allow the claimant to vindicate her statutory rights.⁷⁹ Accordingly, the court held, the agreement must guarantee certain minimum procedural protections: (1) a neutral arbitrator;⁸⁰ (2) allowance of all types of relief that normally would be available under the statute;⁸¹ (3) discovery sufficient to arbitrate the claimant’s statutory claim, “including access to essential documents and witnesses”;⁸² (4) a written decision and judicial review sufficient to ensure that arbitrators comply with the requirements of the statute — thus, a written opinion that sets out “the essential findings and conclusions on which the award is based”;⁸³ and (5) limitations on the costs of arbitration — specifically, “the arbitration agreement or 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.”⁸⁴

The *Armendariz* court grounded its reasoning on the state effective-vindication exception. The court first concluded that that an employee may not prospectively waive her rights under the FEHA given that the rights the FEHA established are “for a public reason” — namely to promote the public interest in a workplace free of pernicious discrimination.⁸⁵ Any such contract waiving the rights FEHA established, the court argued, “would be contrary to public policy and

79. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 674 (Cal. 2000); *see also* *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 987–89 (Cal. 2003) (extending the *Armendariz* doctrine to employee claims for wrongful termination in violation of public policy).

80. *Armendariz*, 6 P.3d at 682.

81. *Id.* at 682–83.

82. *Id.* at 683–84.

83. *Id.* at 684–85.

84. *Id.* at 685–89.

85. *Id.* at 680.

unlawful.”⁸⁶ The court further concluded that what an employer cannot do directly — namely, require an employee to waive her FEHA rights — it cannot do indirectly by means of an arbitration agreement: “In light of these principles, it is evident that an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA.”⁸⁷ Finally, the court concluded that absent the procedural safeguards it had set out, arbitration would be used to force claimants to forfeit their unwaivable statutory employment rights in violation of public policy.⁸⁸

2. *The Preemption Analysis*

a. *Track 1: The State Effective-Vindication Exception Does Not Exist*

Two of the five *Armendariz* requirements should withstand a post-*Concepcion* post-*Italian Colors Restaurant* preemption challenge because they do not interfere with the fundamental attributes of arbitration. Requiring a neutral arbitrator is fully consistent with the essence of arbitration. Moreover, requiring that the arbitrator have the authority to grant all types of relief available under the statute that gives rise to the claim in no way disadvantages arbitration.⁸⁹

Each of the remaining *Armendariz* factors, however, stands, in the language of *Concepcion*, as an obstacle to “the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”⁹⁰ The FAA, therefore, preempts each of these *Armendariz* factors.⁹¹ *Concepcion*’s discussion of examples of

86. *Id.* at 681.

87. *Id.*

88. *Id.* at 681–89. The court in *Armendariz* also held that with respect to any claim subject to an arbitration agreement required as a condition of employment — not just claims relating to unwaivable statutory rights — it would be unconscionable for an employer to require the employee to arbitrate claims arising out of a series of transactions or occurrences while exempting itself from arbitrating its claims arising out of the same series of transactions or occurrences. *Id.* at 693–94.

89. *But see* Stipanowich, *supra* note 1, at 385–86 (expressing concern that *Concepcion*’s efficiency rationale might prevent a court from finding an arbitration provision denying remedies such as punitive damages to be unconscionable).

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

91. *See* Hwang v. J.P. Morgan Chase Bank, N.A., No. CV 11-10782 PSG (JEMx), 2012 WL 3862338, at *3 n.3 (C.D. Cal. Aug. 16, 2012) (stating in dicta in reference to *Armendariz* that “[w]hether California public policy may invalidate certain sections of arbitration agreements is questionable in light of *Concepcion*”); *Antonelli v. Finish Line, Inc.*, No. 5:11-cv-03874 EJD, 2012 WL 2499930, at *2 (N.D. Cal. June 27, 2012) (stating that if *Armendariz* requires certain minimum procedural protections for an

impermissible uses of the public policy and unconscionability doctrines bolsters this conclusion: the Court cited as one such impermissible use “a case finding unconscionable or unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery.”⁹²

Granted, there is a significant difference between requiring “judicially monitored discovery” and failing to provide for “discovery sufficient to arbitrate the claimant’s statutory claim, including access to essential documents and witnesses.” Still, the principal way in which arbitration has traditionally facilitated streamlined proceedings is by limiting discovery.⁹³ Arbitration has also traditionally streamlined proceedings by not requiring a reasoned opinion and severely limiting judicial review. *Armendariz* increases the costs of employment arbitration by requiring a certain level of discovery and a reasoned opinion by the arbitrator. *Armendariz* then mandates that the employer bear any of these costs and any other costs that an employee incurs in arbitration that she would not have incurred had she litigated her claim against the employer in court. Thus, together and separately, each of these *Armendariz* requirements disadvantages arbitration.⁹⁴

b. *Track 2: The State Effective-Vindication Exception Does Exist*

The state effective-vindication exception does not save these procedural requirements from FAA preemption. Although the absence of these *Armendariz* mandates arguably would make arbitration a less convenient or less effective means for an employee to vindicate her statutory rights, their absence does not eliminate the employee’s right to pursue relief. Indeed, a claimant denied *Armendariz*-mandated discovery would still have the right under section 7 of the FAA to demand the production of witnesses and documents at the arbitration hearing.⁹⁵ Also, a claimant denied an *Armendariz*-mandated reasoned arbitrator opinion would still have the right to appeal the

employment arbitration arising from an arbitration agreement required as a condition of employment and relating to an unwaivable statutory right, “such a requirement would appear to be preempted by the FAA under the Supreme Court’s reasoning in *Concepcion*”).

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

93. See *Armendariz*, 6 P.3d at 684 n.11 (acknowledging “a limitation on discovery is one important component of the ‘simplicity, informality, and expedition of arbitration’) (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991)).

94. Cf. *Lucas v. Hertz Corp.*, 875 F. Supp. 2d 991, 1007 (N.D. Cal. 2012) (reasoning that *Concepcion* “suggests that limitations on arbitral discovery no longer support a finding of substantive unconscionability”).

95. See 9 U.S.C § 7 (1947).

arbitration award on the limited grounds provided in sections 9 and 10 of the FAA or comparable state law.⁹⁶ And while the effective-vindication exception “would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the [arbitral] forum impracticable,”⁹⁷ *Italian Colors Restaurant* makes clear that the doctrine cannot be stretched to allow a state to preclude the assessment of any type of arbitration fee against an employee/claimant regardless of whether the fee would make access to the arbitral forum impractical.

B. *The Gentry Doctrine*

1. *The Rule and Its Rationale*

In *Gentry v. Superior Court*, the California Supreme Court held that in a case asserting an unwaivable statutory right, such as the right to overtime pay under the California Labor Code, class arbitration waivers should not be enforced if a trial court determines, based upon certain specified factors, “that class arbitration would be a significantly more effective way of vindicating the rights of affected employees than individual arbitration.”⁹⁸ The factors that the *Gentry* court specified are (1) “the modest size of the potential individual recovery, [(2)] the potential for retaliation against members of the class, [(3)] the fact that absent members of the class may be ill informed about their rights, and [(4)] other real world obstacles to the vindication of class members’ right to overtime pay through individual arbitration.”⁹⁹ Unlike the typical formulation of the state effective-vindication exception, the *Gentry* Doctrine does not require a finding that the claimant would find it impractical to vindicate the statutory right at issue in arbitration. Rather, the *Gentry* Doctrine requires only that arbitration would be a *significantly less effective* forum for vindicating the statutory right. Moreover, the court made clear that the *Gentry* Doctrine would apply not only when the claimant herself would find individual arbitration less effective but also when any members of the purported class would find arbitration to be so.¹⁰⁰

The California Supreme Court grounded its holding in *Gentry* in part on the reasoning of *Discover Bank*, which the court discussed at length in the *Gentry* opinion.¹⁰¹ The focus of the opinion and of the

96. See 9 U.S.C §§ 9–10 (1947).

97. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310–11 (2013).

98. *Gentry v. Superior Court*, 165 P.3d 556, 559 (2007).

99. *Id.* at 568.

100. *Id.* at 568 n.7.

101. *Id.* at 560–62, 564.

Gentry doctrine, however, is on unwaivable statutory rights, as opposed to unconscionability.¹⁰² The court's reasoning started with the proposition that the rights at issue in *Gentry* — specifically the right to overtime compensation pursuant to section 510 of the California Labor Code and the right to bring a private cause of action to recover overtime wages pursuant to section 1194 of the California Labor Code — are unwaivable.¹⁰³ The court noted that the rights at issue concern not only the interests of the workers themselves “but also the public health and general welfare.”¹⁰⁴ For example, overtime wages foster society's interest in a stable job market by giving employers an incentive to spread employment throughout the work force. Finally, the court concluded that “under some circumstances” a class arbitration waiver would lead to a de facto waiver of statutory rights.¹⁰⁵ In those circumstances, the court held, public policy dictates that such a class arbitration waiver may not be enforced.¹⁰⁶

2. *The Preemption Analysis*

a. *Track 1: The State Effective-Vindication Exception Does Not Exist*

Broadly speaking, *Gentry* does exactly what the U.S. Supreme Court said in *Concepcion* that a state may not do: recall that the Court framed the issue in *Concepcion* as “whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”¹⁰⁷ The Court answered that question in the affirmative, concluding that “[r]equiring the availability of classwide arbitration interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”¹⁰⁸ Thus, *Gentry*, no less

102. See *Kinecta Alternative Fin. Solutions, Inc. v. Superior Court*, 140 Cal. Rptr. 3d 347, 355 (Cal. Ct. App. 2012) (“In contrast to the unconscionability analysis in *Discover Bank*, the rule in *Gentry* concerns the effects of a class action waiver on unwaivable statutory rights *regardless of unconscionability*”) (internal quotations omitted); *Plows v. Rockwell Collins, Inc.*, 812 F. Supp. 2d 1063, 1069 (C.D. Cal. 2011) (same); *Arguelles-Romero v. Superior Court*, 109 Cal. Rptr. 3d 289, 300–02 (Cal. Ct. App. 2010) (same).

103. *Gentry*, 165 P.3d at 562–63.

104. *Id.* at 563.

105. *Id.* at 563–64.

106. *Id.* at 569.

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

108. *Id.* at 1748.

than *Discover Bank*, stands as an obstacle to the accomplishment of the FAA's objectives.¹⁰⁹

The leading case holding that *Concepcion* does not preempt *Gentry* is *Franco v. Arakelian Enterprises, Inc.*¹¹⁰ In *Franco*, the California Court of Appeal for the Second District thought it critical to the U.S. Supreme Court's holding in *Concepcion* that *Discover Bank* established a categorical prohibition on class action waivers in consumer contracts in that *Discover Bank*'s triggering conditions imposed no effective limit on the rule's application because the conditions could be met in nearly every case.¹¹¹ In short, *Franco* held that "*Gentry* is not preempted by the FAA because it is not a categorical rule that invalidates class action waivers — the type of rule that *Concepcion* condemned."¹¹²

109. See *Andrade v. P.F. Chang's China Bistro*, No. 12CV2724 JLS JMA, 2013 WL 5472589, at *5 (S.D. Cal. Aug. 9, 2013) (commenting that "the Court cannot recognize any distinction between *Discover Bank* and *Gentry* that would preserve *Gentry*'s applicability in light of *Concepcion*"); *Fimby-Christensen v. 24 Hour Fitness USA, Inc.*, No. 5:13-cv-01007-EJD, 2013 WL 6158040, at *3–4 (N.D. Cal. Nov. 22, 2013) (reasoning that, although *Concepcion* did not expressly overrule *Gentry*, *Concepcion* effectively overruled *Gentry*); *Velazquez v. Sears, Roebuck & Co.*, No. 13cv680-WQH-DHB, 2013 WL 4525581, at *8 (S.D. Cal. Aug. 26, 2013) (holding that "[i]n light of *Concepcion*, . . . *Gentry* is not a viable basis for invalidating the [class action waiver in an employment arbitration] Agreement" (quoting *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012))); *Cunningham v. Leslie's Poolmart, Inc.*, No. CV 13-2122 CAS (CWx), 2013 WL 3233211, at *4 (C.D. Cal. June 25, 2013) (agreeing "that the rule in *Gentry* is analogous to the *Discover Bank* rule, and therefore is preempted under *Concepcion*"); *Truly Nolen of Am. v. Superior Court*, 145 Cal. Rptr. 3d 432, 445–46 (Cal. Ct. App. 2012) (noting that *Discover Bank*'s "discredited reasoning is the same rationale employed by the *Gentry* court" and, thus, "*Concepcion* implicitly disapproved the reasoning of the *Gentry* court"); *Iskanian v. CLS Transp. Los Angeles, LLC*, 142 Cal. Rptr. 3d 372, 379 (Cal. Ct. App. 2012), *review granted and opinion superseded by* 286 P.3d 147 (Cal. Sep. 19, 2012) (holding that *Concepcion* "conclusively invalidates the *Gentry* test"); *Sanders v. Swift Transp. Co. of Arizona, LLC*, 843 F. Supp. 2d 1033, 1037 (N.D. Cal. 2012) (*Concepcion* effectively overrules *Gentry* because *Gentry* "stand[s] as an obstacle to enforcement of arbitration agreements governed by the FAA"); *Steele v. Am. Mortgage Mgmt. Servs.*, No. 2:12-cv-00085 WBS JFM, 2012 WL 5349511, at *4 n.1 (E.D. Cal. Oct. 26, 2012) (rejecting an argument based on *Gentry* because *Concepcion* overruled *Gentry*); *Valle v. Lowe's HIW, Inc.*, No. 11-1489 SC, 2011 WL 3667441, at *6 (N.D. Cal. Aug. 22, 2011) (noting that *Gentry* relied upon the same precedent and logic as *Discover Bank* and concluding that "in light of *Concepcion*, *Gentry* is no longer good law").

110. *Franco v. Arakelian Enters., Inc.*, 149 Cal. Rptr. 3d 530 (Cal. Ct. App. 2012), *review granted and opinion superseded by* 294 P.3d 74 (Cal. Feb. 13, 2013).

111. *Id.* at 533, 565–67.

112. *Id.* at 568; *see also id.* at 572 (reasoning that, "As required by *Concepcion*, *Gentry* is not a categorical rule against class action waivers but is a multifactor test). *But cf.* *Lewis v. UBS Fin. Servs., Inc.*, 818 F. Supp. 2d 1161, 1167 (N.D. Cal. 2011) (holding that "*Concepcion* effectively overrules *Gentry*" because "[l]ike *Discover Bank*,

It is far from clear, however, that *Concepcion* would have come out any differently had *Discover Bank* not been a categorical rule. *Concepcion*'s reasoning supports the argument that the FAA preempts a state doctrine that is applied *in any given case* to require arbitration to have features that are inconsistent with the parties' agreement and with the nature of arbitration. Indeed, the California Supreme Court has recently interpreted *Concepcion* to have precisely this meaning.¹¹³

Moreover, the *Gentry* factors — whether or not they compose a categorical rule — frame an inquiry into whether enforcement of the arbitration agreement at issue as written would impair *California's* interest in ensuring the effective vindication of an unwaivable statutory right. *Concepcion* makes clear, however, that California's interests are irrelevant to FAA preemption analysis. The critical issue instead is whether application of the *Gentry* doctrine in a given case interferes with the fundamental attributes of arbitration. The *Gentry* factors — whether or not they compose a categorical rule — do not speak at all to that issue. The supposed non-categorical nature of the *Gentry* factors, therefore, cannot provide a sensible basis for distinguishing *Gentry* from *Discover Bank*. Thus, the FAA would preempt *Gentry* in any case in which *Gentry* would be applied to invalidate a class action waiver, even if *Gentry* does not categorically invalidate class action waivers.

In any event, *Gentry's* triggering conditions impose no more effective a limit on the *Gentry* rule's application than did *Discover Bank's* triggering conditions with respect to the *Discover Bank* rule's application.¹¹⁴ *Gentry's* first factor — the modest size of the potential individual recovery — is the same *Discover Bank* factor that the U.S.

Gentry advances a rule of enforcement that applies specifically to arbitration provisions, as opposed to a general rule of contract interpretation”).

113. See *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 201 (Cal. 2013) (holding that “after *Concepcion*, unconscionability remains a valid defense to a petition to compel arbitration” but *Concepcion* clarifies that state unconscionability rules “must not disfavor arbitration *as applied* by imposing procedural requirements that interfere with fundamental attributes of arbitration”) (internal quotations omitted); *Iskanian v. CLS Transp. Los Angeles, LLC.*, 327 P.3d 129, 135–36 (Cal. 2014).

114. See *Reyes v. Liberman Broad., Inc.*, 146 Cal. Rptr. 3d 616, 622–25 (Cal. Ct. App. 2012), *review granted and opinion superseded by* 288 P.3d 1287 (Cal. Dec. 12, 2012) (discussing the similarities between the *Discover Bank* triggering conditions and those of *Gentry*); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1044 (N.D. Cal. 2012) (noting the similarities between the *Discover Bank* triggering conditions and those of *Gentry* and finding “no principled basis to distinguish between the *Discover Bank* rule and the rule in *Gentry*, given the broad language used by the Supreme Court in *Concepcion*”); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 840–41 (N.D. Cal. 2012) (same).

Supreme Court in *Concepcion* found to be “toothless and malleable.”¹¹⁵ Evidencing just how toothless and malleable this factor is, the court in *Gentry* cited approvingly a California Court of Appeal decision rejecting the argument that a \$37,000 award would be ample incentive for an attorney to pursue an individual lawsuit for wage and hour violations.¹¹⁶ With respect to *Gentry*’s second factor — the potential for retaliation against members of the class — the *Gentry* court argued that, “Given that retaliation would cause immediate disruption of the employee’s life and economic injury, and given that the outcome of the complaint process is uncertain, . . . fear of retaliation will often deter employees from individually suing their employers.”¹¹⁷ Yet the potential for retaliation exists in every case where an employer or former employer might impose economic injury on the claimant. Even a former employee might fear a future negative reference from the employer she is suing. Thus, this factor could be found in almost any case. With respect to *Gentry*’s third factor — the fact that absent members of the class may be ill informed about their rights — the court again set the bar low, noting that “even English speaking or better educated employees may not be aware of the nuances of overtime laws with their sometimes complex classifications of exempt and non-exempt employees.”¹¹⁸ Indeed, such nuances frequently escape even sophisticated employers and employment lawyers. If the test is an employee’s lack of understanding of the nuances of American employment law, this factor as well could be found in almost any case. As for *Gentry*’s fourth factor — the presence of other real world obstacles to the vindication of class members’ right to overtime pay through individual arbitration — the factor is sufficiently ambiguous such that it should pose no obstacle to the application of the *Gentry* doctrine in any case.

b. *Track 2: The State Effective-Vindication Exception Does Exist*

The state effective-vindication exception, as cabined by *Italian Colors Restaurant*, does not save the *Gentry* Doctrine from FAA preemption.¹¹⁹ The concern at the heart of *Gentry* is that class arbitration waivers eliminate the most practical means to bring claims that

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

116. *Gentry v. Superior Court*, 165 P.3d 556, 564 (2007).

117. *Id.* at 566.

118. *Id.* at 567.

119. See *Cunningham v. Leslie’s Poolmart, Inc.*, No. CV 13-2122 CAS (CWx), 2013 WL 3233211, at *4–5 (C.D. Cal. June 25, 2013) (citing *Italian Colors Restaurant* in

otherwise would be too small to warrant individual arbitration or litigation.¹²⁰ *Gentry* is also concerned with other potential disincentives to bring claims — such as fear of retaliation and inadequate knowledge of one’s statutory rights.¹²¹ *Italian Colors Restaurant* makes clear, however, that the effective-vindication exception is concerned with the *right to pursue* a remedy, but not with the *incentive to pursue* a remedy and that the FAA is more concerned with enforcing arbitration agreements as written than with facilitating the prosecution of low-value or otherwise unattractive claims.¹²² Finally, Justice Kagan’s dissent suggests that the Court would look with great disfavor upon the *Gentry* Doctrine’s application in cases in which arbitration is a practical but “significantly less effective” forum for vindication of a state statutory right. Recall Justice Kagan’s admonition that proof that arbitration was a “less convenient or less effective” means of vindication would fail to “meet the effective-vindication rule’s high bar.”¹²³

Indeed, in June 2014, the California Supreme Court held in *Iskanian v. CLS Transportation Los Angeles, LLC* that, in light of *Concepcion*, the FAA preempts the *Gentry* doctrine.¹²⁴ The court first rejected the argument that the *Gentry* doctrine might meaningfully be distinguished from the *Discover Bank* rule because the latter but not the former is a categorical rule against class action waivers. “It is . . . incorrect to say the infirmity of *Discover Bank* was that it did not require a case-specific showing that the class waiver was exculpatory,” the court reasoned. “*Concepcion* holds that *even if* a class waiver is exculpatory in a particular case, it is nonetheless preempted by the FAA.”¹²⁵ The court went on to hold quite simply that, under the logic of *Concepcion*, the FAA preempts the *Gentry* doctrine

rejecting the argument that *Gentry* remains good law under the effective-vindication exception); *Andrade v. P.F. Chang’s China Bistro*, No. 12CV2724 JLS JMA, 2013 WL 5472589, at *6 (S.D. Cal. Aug. 9, 2013) (concluding that *Italian Colors Restaurant* supports the argument that the FAA preempts *Gentry*).

120. *Gentry*, 165 P.3d at 565.

121. *Id.* at 565–67.

122. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (clarifying that “the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy”); *id.* at 2312 n.5 (declaring that “the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims”).

123. *Id.* at 2318 n.4 (Kagan J., dissenting).

124. *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 135–37 (2014).

125. *Id.* at 364.

because the *Gentry* doctrine “mandat[es] or promot[es] procedures incompatible with arbitration.”¹²⁶

C. *The Unwaivability Doctrine Respecting the Right to a Berman Hearing*

1. *The Rule and Its Rationale*

A worker with a California state claim for unpaid wages has two routes she can take to recovery. She can file an ordinary civil action against her employer for the wages. In the alternative, she can pursue relief at an administrative hearing commonly referred to as a “Berman hearing” after the surname of its legislative sponsor.¹²⁷

The Berman route begins with a hearing before the Labor Commissioner. If the employee obtains an award at the Berman hearing, the employer may request de novo review in superior court. The Berman route contains several provisions designed to aid the employee and to deter frivolous employer appeals. First, the Labor Commissioner will represent the employee in superior court if the employee is trying to uphold the Labor Commissioner’s award and is unable to afford counsel. Second, to appeal, the employer must post an “undertaking” in the full amount of the award. Finally, an employer who is unsuccessful in the appeal must pay the employee’s attorney’s fees. The employer is “unsuccessful” if the employee receives more than zero after the appeal.¹²⁸

In 2011, the California Supreme Court held in *Sonic-Calabasas A, Inc. v. Moreno* (hereinafter *Sonic I*) that an arbitration agreement that an employee enters into as a condition of employment that requires the employee to bring her wage claims against the employer in arbitration and, therefore, to forego a Berman hearing, is both contrary to public policy and unconscionable.¹²⁹ The court further held, however, that an employer who had entered into an arbitration agreement with its employee could bring an appeal of a Berman hearing award in arbitration.¹³⁰

Notably, the court in *Sonic I* did not hold that the arbitration agreement was against public policy because it prevented vindication of the unwaivable statutory right to wages due. Rather, the court held that the unwaivable statutory right at issue was the right to a

126. *Id.* at 366.

127. *Sonic-Calabasas A, Inc. v. Moreno*, 247 P.3d 130, 133, 135 (Cal. 2011), *vacated*, 132 S. Ct. 496 (2011).

128. *Id.* at 133, 136–37.

129. *Id.* at 139–46.

130. *Id.* at 133, 137–39.

Berman hearing and its related protections and that it would violate public policy for an employer to compel an employee to relinquish that unwaivable right in favor of arbitration.¹³¹ The court grounded this conclusion on its finding of the California legislature's implied intent. In short, the court reasoned that the legislature must have intended to prohibit employers from requiring employees as a condition of employment to waive their right to a Berman hearing since such waivers "would seriously undermine the efficacy of the Berman hearing statutes and hence thwart the public purpose behind the statutes" of ensuring that workers receive wages that are owed them.¹³² Thus, the court held that the arbitration agreement in *Sonic I* violated public policy because it waived the unwaivable statutory right to a Berman hearing.¹³³

On appeal, the U.S. Supreme Court vacated the decision in *Sonic I* and remanded to the California Supreme Court for further consideration in light of *Concepcion*.¹³⁴ In June 2013, still not having issued an opinion on remand, the California Supreme Court called for further briefing in light of *Italian Colors Restaurant*.¹³⁵

2. *The Preemption Analysis*

a. *Track 1: The State Effective-Vindication Exception Does Not Exist*

Sonic I violates the fundamental principle of FAA preemption that a state may not require a judicial or administrative forum for the resolution of claims that the contracting parties have agreed to resolve by arbitration even if the state-mandated forum is but a first stop before arbitration is allowed.¹³⁶ In *Preston v. Ferrer*, the U.S. Supreme Court held that, "When parties agree to arbitrate all questions arising under a contract, the FAA supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative."¹³⁷ *Preston* involved the California Talent Agencies Act

131. *Id.* at 140.

132. *Id.* at 141.

133. The court further found that such a contract was both a contract of adhesion and, thus, was procedurally unconscionable, and "markedly one-sided" in that it could "only benefit the employer at the expense of the employee" and, thus, was substantively unconscionable. *Id.* at 145–46.

134. *Sonic-Calabasas A, Inc. v. Moreno*, 132 S. Ct. 496 (2011).

135. See Docket (Register of Actions), *Sonic-Calabasas A, Inc. v. Moreno*, available at http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=1913305&doc_no=S174475 (noting supplemental briefing ordered).

136. See *Sonic-Calabasas*, 247 P.3d at 161 (Chin, J. dissenting).

137. *Preston v. Ferrer*, 522 U.S. 346, 359 (2008).

(“TAA”), which vested exclusive original jurisdiction over a dispute arising under the TAA in the Labor Commissioner subject to de novo review in superior court following the Labor Commissioner’s determination.¹³⁸

In holding that the FAA preempted the exclusive jurisdiction provisions of the TAA, the Court rejected the argument that the TAA did not offend the FAA because it only postponed arbitration in that a party could seek arbitration rather than de novo review in superior court after the Labor Commissioner issued her ruling. The Court reasoned that, “A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results’”¹³⁹ and that requiring initial reference of an otherwise arbitrable dispute to the Labor Commissioner would frustrate that objective even if arbitration could follow.¹⁴⁰ The Court also rejected the argument that allowing parties to arbitrate in lieu of an administrative hearing process “would undermine the Labor Commissioner’s ability to stay informed of potential illegal activity . . . and would deprive artists protected by the TAA of the Labor Commissioner’s expertise.”¹⁴¹ In sum, the Court held that, when the FAA applies, a state cannot require that an arbitrable claim be heard first in a non-arbitral forum, regardless of the state’s reason for doing so.

b. *Track 2: The State Effective-Vindication Exception Does Exist*

Concepcion reinforces *Preston*’s central holdings and makes clear that these principles apply even when the state seeks to regulate arbitration via the effective-vindication exception by invoking public policy as a ground “for the revocation of any contract.” In the language of *Concepcion*, *Sonic I* “interferes with the fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”¹⁴² As previously noted, *Sonic I* adds a layer of delay and expense to the parties’ arbitration agreement: the parties must first participate in an administrative hearing before they may proceed to arbitration. Moreover, *Sonic I* punishes an employer that enforces its contractual right to arbitrate and in so doing impermissibly “disfavors arbitration.”¹⁴³ To obtain “de novo” review before the arbitrator,

138. *Id.* at 351, 355.

139. *Id.* at 357.

140. *Id.* at 358; see also *Sonic-Calabasas*, 247 P.3d at 161 (Chin, J., dissenting).

141. *Preston*, 552 U.S. at 358–59.

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

143. See *id.* at 1747.

the employer must post an undertaking in the full amount of the Labor Commissioner's award. Also, if the arbitrator awards the employee more than zero following a Berman hearing, the employer must pay the employee's attorney's fees. As did *Preston*, *Concepcion* makes clear that California "cannot require [such] a procedure that is inconsistent with the FAA even if it is desirable for unrelated reasons."¹⁴⁴

The court in *Sonic I* sought to distinguish *Preston* by arguing that the statute in *Preston* "merely lodges primary jurisdiction in the Labor Commissioner, and does not come with the same type of statutory protections as are found in the Berman hearing and posthearing procedures."¹⁴⁵ The fact that the Berman process offers an employee special advantages in her effort to collect wages due her, however, cannot allow the state to obviate *Preston*'s limitations. Indeed, litigation generally also offers claimants certain special advantages such as the rights to comprehensive discovery, certain rules of evidence, and ultimate disposition by a jury. Yet *Concepcion* makes clear that a state may not condition the enforceability of an arbitration agreement on the availability of such special advantages.¹⁴⁶ Moreover, even if waiver of the right to a Berman hearing process outside of arbitration "would seriously undermine the efficacy of the Berman hearing statutes,"¹⁴⁷ such waiver "does not constitute the elimination of the right to pursue" a remedy for wages owed.¹⁴⁸ Thus, *Italian Colors Restaurant* teaches that the effective-vindication exception will not exempt California's efforts to invalidate waivers of the Berman hearing process in favor of arbitration even if arbitration would be a "less convenient or less effective" means of vindication.¹⁴⁹ California cannot escape preemption by labeling the Berman hearing process itself rather than the right to wages owed the "unwaivable statutory right" at issue any more than it could do so by applying that label to a litigation process with the right to comprehensive discovery, certain rules of evidence, and ultimate disposition by a jury.

Indeed, in October 2013, the California Supreme Court conceded in *Sonic II* that the FAA preempts the California doctrine providing for an unwaivable right to a Berman hearing after all.¹⁵⁰ The court

144. *Id.* at 1753.

145. *Sonic-Calabasas*, 247 P.3d at 150.

146. *See Concepcion*, 131 S. Ct. at 1747; *see also Sonic-Calabasas*, 247 P.3d at 162, 166 (Chin, J., dissenting).

147. *Sonic-Calabasas*, 247 P.3d at 141.

148. *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013).

149. *Id.* at 2318 n.4 (Kagan J., dissenting).

150. *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 198 (Cal. 2013).

reasoned in light of *Concepcion* that, “Because a Berman hearing causes arbitration to be substantially delayed, the unwaivability of such a hearing . . . interferes with a fundamental attribute of arbitration — namely, its objective ‘to achieve streamlined proceedings and expeditious results.’”¹⁵¹ The court further acknowledged that the state public policy that grounds the *Sonic I* doctrine does not shield the doctrine from FAA preemption.¹⁵²

D. *The Unwaivability Doctrine Respecting Representative Labor Code Private Attorneys General Act of 2004 (“PAGA”) Actions*

1. *The Rule and Its Rationale*

California’s “Labor Code Private Attorneys General Act of 2004” (“PAGA”) authorizes an employee to bring an action to recover civil penalties for Labor Code violations on her own behalf and on behalf of other current or former employees.¹⁵³ In general, any civil penalties recovered by aggrieved employees under the PAGA are split with seventy-five percent going to the California Labor and Workforce Development Agency and twenty-five percent going to the aggrieved employees — not only to the employee who brought the PAGA action but also to the other employees who suffered the Labor Code violation.¹⁵⁴ Thus, the employee bringing a representative PAGA action acts as a private attorney general to collect penalties from the employer, to punish and deter Labor Code violations, and to protect the public from the employer’s illegal actions. Class action requirements do not apply to PAGA representative actions.¹⁵⁵

When an employee has signed an arbitration agreement agreeing to bring any claim against her employer in arbitration and waiving any right to bring a PAGA *representative* action in arbitration (or in court), two issues arise: whether the employee’s waiver of her right to bring a PAGA representative action is enforceable under California law, and whether, if not, the FAA preempts California law invalidating the waiver.

151. *Id.* at 198 (quoting *Concepcion*, 131 S. Ct. at 1749). The court further held, however, that a contract waiving a Berman hearing in favor of arbitration might still be held unconscionable if the contract “make[s] the resolution of the wage dispute inaccessible and unaffordable.” *Id.* at 204.

152. *Id.* at 199.

153. Cal. Labor Code §§ 2698–2699.5.

154. Cal. Labor Code § 2699(i); *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 148 (Cal. 2014).

155. *Arias v. Superior Court*, 209 P.3d 923, 932 (Cal. 2009).

Brown v. Ralphs Grocery Co. is the seminal California appellate case holding that (1) an arbitration waiver of a representative PAGA action is not enforceable under California law, and (2) the FAA does not preempt California law on this point.¹⁵⁶ With respect to the first holding, the *Brown* court reasoned that a PAGA representative action waiver is not enforceable under California law because such a waiver would defeat the purposes of the PAGA: “[A] single-claimant arbitration under the PAGA for individual penalties will not result in the penalties contemplated under the PAGA to punish and deter employer practices that violate the rights of numerous employees under the Labor Code.”¹⁵⁷

In holding that the FAA does not preempt California’s invalidation of a PAGA representative action waiver, the *Brown* court first distinguished *Concepcion*, reasoning that *Concepcion* dealt with a *private* individual right of a consumer to pursue class action remedies but did not address a cause of action designed to protect the *public* rather than to benefit private parties.¹⁵⁸ The court went on to reason in accord with a state effective-vindication exception that the FAA did not preempt California law because such preemption would defeat the purposes of the state law.¹⁵⁹ “In short, representative actions under the PAGA do not conflict with the purposes of the FAA. If the FAA preempted state law as to the unenforceability of the PAGA representative action waivers, the benefits of private attorney general actions to enforce state labor laws would, in large part, be nullified.”¹⁶⁰ Finally, the court added that because PAGA actions are not

156. See *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Cal. Ct. App. 2011) (extending California’s *Broughton-Cruz* rule to PAGA actions and holding that *Concepcion* does not preempt a state rule regarding the unenforceability of a contractual waiver of an employee’s right to pursue a representative action under the PAGA because “representative actions under the PAGA do not conflict with the purposes of the FAA”).

157. *Id.* at 862; cf. *Urbino v. Orkin Servs. of Cal., Inc.*, 882 F. Supp. 2d 1152, 1164 (C.D. Cal. 2011) (finding that “because the PAGA arbitration waiver contradicts the fundamental purpose of a representative enforcement action under PAGA, it is unconscionable and unenforceable”), *vacated on other grounds*, 726 F.3d 1118 (9th Cir. 2013).

158. *Brown*, 128 Cal. Rptr. 3d at 860–64; accord *Plows v. Rockwell Collins, Inc.* 812 F. Supp. 2d 1063, 1070 (C.D. Cal. 2011) (agreeing with the *Brown* court’s reasoning with respect to this point).

159. *Brown*, 128 Cal. Rptr. 3d at 862–63.

160. *Id.*

subject to class action requirements, a PAGA representative arbitration “would not have the attributes of a class action that the [*Concepcion*] case said conflicted with arbitration, such as class certification, notices, and opt-outs.”¹⁶¹

The California Supreme Court endorsed the unwaivability doctrine respecting representative PAGA actions in its June 2014 *Iskanian* opinion — the same opinion, discussed above, in which the court held that the FAA preempted the *Gentry* doctrine.¹⁶² The court first held that under California law an agreement by an employee to waive her right to bring a representative PAGA action “is against public policy and may not be enforced.”¹⁶³ In so holding, the court reasoned that enforcement of such an agreement would “serve to disable one of the primary mechanisms for enforcing the Labor Code” and, thus, would both impermissibly indirectly exempt an employer from responsibility for its violations of the Labor Code and impermissibly allow a private agreement to contravene a law established for a public reason.¹⁶⁴ The court cited the *Brown* court of appeal in concluding that, even if an employee remains free to bring an individual PAGA claim, the employee’s waiver of her right to bring a representative PAGA action would frustrate the PAGA’s objectives. The court supported this conclusion by reasoning that the arbitration of an individual PAGA claim would not result in the types of penalties that the PAGA contemplates to deter employer violations of the Labor Code and to punish employer violations that do occur.¹⁶⁵

Having concluded that an employee’s waiver of her right to bring a representative PAGA action “is contrary to public policy and unenforceable as a matter of state law”¹⁶⁶ the court next turned to the question of whether the FAA preempted such a state rule. In answering this question, the court did not seriously address *Concepcion* or *Italian Colors Restaurant*. Rather, the court held that the FAA did not apply at all to the unwaivability doctrine respecting representative PAGA actions because the FAA is concerned only with the resolution of private disputes whereas a PAGA action is not a private dispute.¹⁶⁷ “Simply put, a PAGA claim lies outside the FAA’s coverage because it is not a dispute between an employer and an employee

161. *Id.* at 503.

162. *Iskanian v. CLS Transp. Los Angeles, LLC.*, 327 P.3d 129, 145–53, (Cal. 2014).

163. *Id.* at 148.

164. *Id.* at 149.

165. *Id.*

166. *Id.* at 149.

167. *Id.*

arising out of their contractual relationship. It is a dispute between an employer and the *state*” in that the employee’s PAGA action “functions as a substitute for an action brought by the government itself.”¹⁶⁸

To support its novel conclusion that the FAA is concerned only with “private disputes,” the court first cited to the FAA’s text. Specifically, the court focused on language in section 2 referencing a contract “to settle by arbitration a controversy thereafter arising out of such contract or transaction.” This phrase, the court reasoned, “is most naturally read to mean a dispute about the respective rights and obligations of parties in a contractual relationship.”¹⁶⁹ The court also cited to the FAA’s legislative history, which the court found “shows that the FAA’s primary object was the settlement of ordinary commercial disputes.”¹⁷⁰ “There is no indication,” the court concluded, “that the FAA was intended to govern disputes between the government in its law enforcement capacity and private individuals.”¹⁷¹

The California Supreme Court’s reasoning in *Iskanian* might be criticized on several grounds. The court’s interpretation of the FAA’s text is implausible. The touchstone for FAA coverage is a written arbitration provision in “a contract evidencing a transaction involving commerce.”¹⁷² The natural reading of section 2 is that the FAA applies to any such contract regardless of the nature of the dispute to be arbitrated unless another provision of the FAA¹⁷³ or another federal statute¹⁷⁴ provides otherwise. No such other provision of the FAA or federal statute supports the California Supreme Court’s holding.

Moreover, the California Supreme Court’s resort to the FAA’s legislative history to support its interpretation of section 2 is unconvincing. The court cites to the 1924 Congressional testimony of Julius Cohen, the principal drafter of the FAA, and Charles Bernheimer, the Chairman of the Committee on Arbitration of the New York State Chamber of Commerce, for the proposition that the FAA was intended to apply only to disputes between merchants.¹⁷⁵ It is all well and good to cite Cohen and Bernheimer to support the argument that the Supreme Court has gone off track in interpreting the scope of

168. *Id.* at 151 (emphasis in original).

169. *Id.* at 150.

170. *Id.*

171. *Id.*

172. 9 U.S.C. § 2.

173. See 9 U.S.C. § 1 (excluding certain contracts from the FAA’s coverage).

174. See *infra* note 223 (discussing several such statutes).

175. *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 150 (Cal. 2014).

FAA coverage as broadly as it has: unquestionably, the Supreme Court's interpretation of the FAA has betrayed the drafters' original intent. Nonetheless, when faced with a mountain of Supreme Court jurisprudence interpreting the FAA broadly, a state court is not free to side with the ghost of Julius Cohen.

Moreover, even if one were to accept the California Supreme Court's interpretation of the FAA as being concerned only with "ensur[ing] an efficient forum for the resolution of *private* disputes,"¹⁷⁶ one might question the court's characterization of Iskanian's lawsuit as falling outside that scope. Iskanian was a private employee who entered into a contract with his private employer in which he agreed that he would submit "any and all claims" against his employer to private binding arbitration.¹⁷⁷ Iskanian later brought a lawsuit against his employer on his own behalf and on behalf of other private employees of the employer for violations of the Labor Code. Iskanian had standing to bring his PAGA claim only because he was "an aggrieved employee" of the employer as the PAGA defines that term — "any person who was employed by the alleged violator [of the Labor Code] and against whom one or more of the alleged violations was committed."¹⁷⁸ Indeed, Iskanian's complaint alleged that his employer's practices with respect to himself and other private employees violated the Labor Code. Iskanian sought civil penalties for himself and other private employees that would go directly into his own pocket and the pockets of his fellow employees.¹⁷⁹ Even though seventy-five percent of the penalties collected would go to the state, it is difficult to accept the court's conclusion that such "a PAGA claim . . . is not a dispute between an employer and an employee arising out of their contractual relationship."¹⁸⁰ Accordingly, this Article shall proceed to examine whether California's unwaivability doctrine respecting representative PAGA actions can survive FAA preemption analysis assuming that the FAA does apply to such an action.

176. *Id.* at 149.

177. *Id.* at 133 (internal quotation marks omitted).

178. *Id.* at 157 (internal quotation marks omitted); Cal. Lab. Code § 2699(c) (internal quotation marks omitted).

179. *Iskanian v. CLS Transp. Los Angeles, LLC*, 327 P.3d 129, 146 (2014).

180. *Id.* at 146, 151; *see also id.* at 155 (Chin, J., concurring) (arguing that the dispute in this case "arises, first and fundamentally, out of [the employment] relationship" between Iskanian and his employer).

2. *The Preemption Analysis*

a. *Track 1: The State Effective-Vindication Exception Does Not Exist*

Concepcion makes clear that the unwaivability doctrine respecting representative PAGA actions is inconsistent with the FAA.¹⁸¹ Even though a representative PAGA action would not present the class certification, notice, and opt-out issues that are normally considered incompatible with the FAA, requiring the allowance of PAGA representative actions in arbitration would provide employers with a substantial disincentive to arbitrate such that the reasonable employer may forgo arbitration. Arbitration of a representative PAGA action in which penalties relating to multiple employees are aggregated presents the risk of an enormously costly error in arbitration that will go uncorrected in light of the extremely deferential judicial review to which arbitration awards are subject.¹⁸² The Court addressed such a disincentive in *Concepcion*: “We find it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision.”¹⁸³

b. *Track 2: The State Effective-Vindication Exception Does Exist*

The state effective-vindication exception does not save the unwaivability doctrine respecting representative PAGA actions. Central to the holding in *Brown* is the notion that a state public policy preempts the FAA whenever the FAA otherwise would undermine the state public policy. At first blush, this notion would appear to

181. See e.g., *Velazquez v. Sears, Roebuck & Co.*, No. 13cv680-WQH-DHB, 2013 WL 4525581, at *7 (S.D. Cal. Aug. 26, 2013) (discussing *Concepcion* and holding that the FAA preempts the unwaivability doctrine respecting representative PAGA actions); *Andrade v. P.F. Chang’s China Bistro*, No. 12CV2724 JLS JMA, 2013 WL 5472589, at *10 (S.D. Cal. Aug. 9, 2013) (same).

182. See *Quevedo v. Macy’s, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011) (holding that requiring a PAGA representative action in arbitration would conflict with the FAA’s purposes because such an action would “make for a slower, more costly process” and “representative PAGA claims increase risks to defendants by aggregating the claims of many employees”) (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011)) (internal quotation omitted); *Grabowski v. C.H. Robinson Co.*, 817 F. Supp. 2d 1159, 1180–81 (S.D. Cal. 2011) (adopting the reasoning of *Quevedo* and rejecting the reasoning of *Brown*); *Miguel v. J.P. Morgan Chase Bank, N.A.*, No. CV 12-3308 PSG (PLAx), 2013 WL 452418, at *9–10 (C.D. Cal. Feb. 5, 2013) (adopting the reasoning of *Quevedo*).

183. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (footnote omitted).

turn the Supremacy Clause on its head.¹⁸⁴ It is likely, however, that the *Brown* court merely was invoking a blunt formulation of the state effective-vindication exception. Stated more fully, the notion is that *Congress intended* for a state public policy to preempt the FAA whenever the FAA otherwise would undermine the state public policy.

This notion finds no support, however, in the U.S. Supreme Court's FAA preemption jurisprudence. Indeed, the Court has held clearly that the FAA trumps any state public policy that conflicts with the federal policy in favor of arbitration that grounds the FAA. In *Perry v. Thomas*, for example, the Court considered whether the FAA preempted a section of the California Labor Code that provided that an action for the collection of wages may be maintained in court "without regard to the existence of any private agreement to arbitrate."¹⁸⁵ The employee in *Perry* argued that, "the State's interest in protecting wage earners outweighs the federal interest in uniform dispute resolution."¹⁸⁶ In holding that the FAA preempted the California statute, the Court expressly rejected this argument stating, "Section 2 is a congressional declaration of a liberal policy favoring arbitration agreements notwithstanding any state substantive or procedural policies to the contrary."¹⁸⁷ *Concepcion* makes clear that this fundamental principle of FAA preemption applies even when the state purports to act pursuant to section 2's Saving Clause. Rejecting the argument that class proceedings were essential to prosecute small-value claims that otherwise would not be worth pursuing as individual claims, the Court in *Concepcion* reiterated that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."¹⁸⁸

Italian Colors Restaurant also suggests that the state effective-vindication exception, if it exists, does not authorize the state to invalidate an employee's waiver of her right to bring a representative PAGA action in arbitration. Such a waiver "does not constitute the

184. Cf. *Luchini v. Carmax, Inc.*, No. CV F 12-0417 LJO DLB, 2012 WL 3862150, at *8 (E.D. Cal. Sept. 5, 2012) (discussing *Concepcion* and concluding that "[a] PAGA claim is a state-law claim, and states may not exempt claims from the FAA" (citations omitted)).

185. *Perry v. Thomas*, 482 U.S. 483, 484 (1987) (quoting Cal. Lab. Code Ann. § 229) (internal quotation marks omitted).

186. *Id.* at 486.

187. *Id.* at 489, 491 (citations omitted) (internal quotations marks omitted).

188. *Concepcion*, 131 S. Ct. at 1753; see also *Iskanian v. CLS Transp. Los Angeles, LLC*, 142 Cal. Rptr. 3d 372, 384 (Cal. Ct. App. 2012), review granted and opinion superseded by 286 P.3d 147 (Cal. Sep. 19, 2012) (concluding that under *Concepcion* it is "irrelevant" that a PAGA action can effectively promote the public interest only if it takes place outside of arbitration).

elimination of [any employee's] right to pursue" penalties under the PAGA.¹⁸⁹ Each employee remains free to bring an individual claim to enforce the Labor Code and to deter and penalize the employer with respect to Labor Code violations that relate to her personally.¹⁹⁰ Whether or not it is worth the expense for any individual employee to prove her individual case is not of concern under the effective-vindication exception.¹⁹¹ Moreover, Justice Kagan's dissent in *Italian Colors Restaurant* suggests that the fact that an individual PAGA action is "less convenient or less effective" than a representative PAGA action is also not a concern under the effective-vindication exception.¹⁹²

Finally, even assuming a series of Labor Code violations that would not be worth the expense of pursuing on an individual basis, the state retains the right to pursue civil penalties relating to multiple employees to vindicate its interests that would otherwise be vindicated in an employee-brought PAGA representative action. California is not a party to the employment arbitration agreement between the employer and its employee. Moreover, an employment arbitration

189. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (citation omitted).

190. See *Parvataneni v. E*Trade Fin. Corp.*, 967 F. Supp. 2d 1298, 1301 n.1, 1305 (N.D. Cal. 2013) (rejecting the view that PAGA claims cannot be brought on an individual basis and holding that an arbitration agreement may waive an employee's right to bring a representative PAGA claim since the employee "may still attempt to vindicate his rights by arbitrating his PAGA claims individually"). Some courts have held that the PAGA does not authorize an employee to bring a separate individual claim: rather an individual may maintain a PAGA action only as a representative action. See *Brown v. Superior Court*, 157 Cal. Rptr. 3d 779, 791 (Cal. Ct. App. 2013); *Cunningham v. Leslie's Poolmart, Inc.*, No. CV 13-2122 CAS (CWx), 2013 WL 3233211, at *8 (C.D. Cal. June 25, 2013). If that interpretation were correct, a waiver of the right to bring a PAGA representative action would indeed constitute the elimination of the employee's right to pursue a PAGA claim. See *Brown*, 157 Cal. Rptr. 3d at 791; *Cunningham*, 2013 WL 3233211 at *9. Whether or not the FAA would preempt a state doctrine voiding such a waiver would then depend on whether or not the state effective-vindication exception exists. See *Brown*, 157 Cal. Rptr. 3d at 781 (holding, in a case decided two weeks prior to *Italian Colors Restaurant*, that an arbitration agreement waiving the right to bring a representative PAGA claim "is unenforceable because it wholly precludes the exercise of this unwaivable statutory right" (citation omitted)); *Cunningham*, 2013 WL 3233211 at *9 (citing and quoting *Italian Colors Restaurant* in support of the holding that the FAA does not preempt a doctrine voiding an arbitration waiver of a PAGA representative action since such a waiver would wholly preclude the PAGA cause of action and an "arbitration provision need not be enforced to the extent that it forbids the assertion of statutory rights" (internal quotation omitted)).

191. See *Italian Colors Rest.*, 133 S. Ct. at 2311 (citation omitted).

192. See *id.* at 2318 n.4.

agreement between employer and employee cannot foreclose direct enforcement by California.¹⁹³

In sum, each of California's four principal employment arbitration doctrines is grounded on two premises. First, the California employment regulation at issue with respect to the doctrine not only protects the private interests of employees but also serves a compelling public interest. Second, arbitration of claims asserting the statutory right at issue not only impedes the effective vindication of the employee's statutory right at issue but also imperils the compelling public interest.

The FAA, however, as the U.S. Supreme Court has recently interpreted it, is wholly unconcerned with state public interests, no matter how compelling. Consequently, FAA preemption of state employment arbitration doctrine puts at risk the public interests that ground regulation of the employment relationship. This Article next turns to an argument that the FAA should be amended to allow for consideration of the extent to which arbitration threatens the ability of workers to effectively vindicate their statutory employment rights and, relatedly, undermines the ability of those statutory employment rights to serve the public interest.

V. AN ARGUMENTS FOR FEDERAL ALLOWANCE OVERSIGHT

This Part proceeds by first setting out an argument for the special regulation of employment arbitration separate and apart from any regulation of consumer arbitration: unlike consumer arbitration, employment arbitration threatens interacting private and public interests relating to both individual and group identity and equality. Next, this Part identifies several pitfalls facing potential reform proposals and proposes a compromise solution that is premised on restructuring federal oversight of state employment arbitration doctrine.

193. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 279 (2002) (holding that an arbitration agreement between an employer and its employee does not foreclose the EEOC's efforts to obtain in court victim-specific relief relating to the employee).

A. *The Stakes in Employment Arbitration Regulation Distinguished from Those in Consumer Arbitration Regulation: Implications for Individual and Group Identity and Equality*

As demonstrated above, *Concepcion* and *Italian Colors Restaurant* make clear that the FAA preempts any state arbitration regulation that disadvantages arbitration. This is so regardless of the public policy that grounds the regulation and regardless of whether the regulation is necessary to ensure that a claimant may effectively vindicate her state statutory rights. In the employment context specifically, it is irrelevant to FAA preemption whether the state arbitration regulation is necessary to protect the rights of workers or the general public interest.

This Article postulates that *Concepcion* and *Italian Colors Restaurant* also make clear the need for Congress to amend the FAA. As a normative matter, the FAA *should* allow for consideration of the public interest in determining whether an employment arbitration agreement will be enforceable.¹⁹⁴ Specifically, the FAA *should* allow for consideration of the need for a worker to effectively vindicate her state statutory rights and for consideration of her ability to do so in arbitration.

In negotiating the terms of an employment relationship, an employer typically possesses both greater bargaining power and more complete relevant information than its employee.¹⁹⁵ Thus, a dominant rationale for regulation of the employment relationship is the asserted need to guard against the employer's leveraging of these imbalances to exploit its worker.¹⁹⁶ Statutes and regulations governing the payment of a minimum wage and overtime compensation and establishing workplace health and safety standards are the paradigmatic examples.¹⁹⁷ In the context of arbitration agreements required

194. See Maureen A. Weston, *The Accidental Preemption Statute: The Federal Arbitration Act and Displacement of Agency Regulation*, 5 Y.B. ON ARB. & MEDIATION 59, 60 (2013) ("Increasingly, the FAA preemption doctrine is "unworkable" and unnecessarily constrains states' ability to implement public policy.").

195. See e.g., Marion Crain, *Arm's-Length Intimacy: Employment as Relationship*, 35 WASH. U. J.L. & POL'Y 163, 166-67 & n.12 (2011).

196. See Stewart J. Schwab, *Predicting the Future of Employment Law: Reflecting or Refracting Market Forces?*, 76 IND. L.J. 29, 47-48 (2001) (asserting that concerns with the greater bargaining power enjoyed by employers and the possible exploitation of workers arising therefrom are the asserted justification for much employment regulation).

197. See Crain, *supra* note 195, at 182 (citing the Fair Labor Standards Act and the Occupational Safety and Health Act as examples of statutes enacted in response

as a condition of employment, critics of employment arbitration frequently voice the concern that the employer will use its superior bargaining strength and sophistication to impose upon its worker an arbitration agreement that might make it more difficult if not impracticable for the worker to vindicate her rights against the employer.¹⁹⁸ It is indeed troubling and somewhat ironic that an employer might use its superior bargaining position to impose upon its worker an arbitration agreement that would then neuter employment regulation specifically intended to safeguard that worker from abuses made possible by the employer's bargaining power and informational advantages.¹⁹⁹

Critics of consumer arbitration voice similar concerns: a commercial interest may leverage its bargaining and informational advantages to impose upon a consumer a contract of adhesion mandating an arbitral forum with features that render it impracticable for the consumer to vindicate her interests in the arbitral forum.²⁰⁰ As with critics of employment arbitration, a great concern of critics of consumer arbitration is that arbitration agreements that include a waiver of any right to bring a class or collective action may leave the adhering party with no viable means to vindicate small value claims.²⁰¹

to "[t]he potential for the exploitation of less powerful workers in slack labor markets").

198. See Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 *McGEORGE L. REV.* 223, 240 (1998) (discussing the repeat player advantage in selecting an arbitrator); E. Gary Spitko, *Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 *U.C. DAVIS L. REV.* 591, 612–13 (2009) (discussing such concerns). Cf. Paul H. Haagen, *New Wineskins for New Wine: The Need to Encourage Fairness in Mandatory Arbitration*, 40 *ARIZ. L. REV.* 1039, 1059–60 (1998) (arguing that public policy supports requiring a party seeking to impose a "mandatory arbitration" agreement to provide reliable information concerning the choice between arbitration and litigation to the party lacking such information).

199. See *In re Poly-America, L.P., Ind.*, 262 *S.W.3d.* 337, 352 (Tex. 2008) (making essentially this point).

200. See Yelnosky, *supra* note 26, at 736 (asserting that "the major arbitration issue of our time" is "the imposition on consumers and employees of arbitration agreements that effectively deprive them of the ability to vindicate their federal- or state-law rights").

201. See, e.g., David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 *IND. L.J.* 239, 242, 268 (2012) (expressing this concern with respect to the "[t]wo paradigm examples" of consumer and employment claims "that cannot feasibly be brought on an individual basis"); Stipanowich, *supra* note 1, at 336 (opining that "class action waivers have become the single most contentious issue surrounding consumer and employment arbitration agreements"); *id.* at 371; Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent*

Given the many common criticisms, it should not surprise that reform proposals targeting the FAA often lump together consumer arbitration and employment arbitration.²⁰² Most prominently, the proposed so-called Arbitration Fairness Act would void predispute arbitration agreements relating to consumer or employment claims.²⁰³ A compelling case can be made, however, that employment law is special in ways that justify a separate regime of employment arbitration regulation, notwithstanding the merits of arguments for stricter limits on consumer arbitration.

The case for special treatment under the FAA of employment arbitration regulation relies upon interacting private and public interests relating to both individual and group identity and equality. The argument begins with the proposition that the employment relationship is central to the lives of most workers. First, for most workers, their employment is critical to maintaining their standard of living. Moreover, for many workers, their employment is a core aspect of their self-concept, a central source for fostering emotional and social connections, and a key variable influencing their standing in the community.²⁰⁴ Professor Marion Crain has captured well the ways in which work influences self-concept and social standing: “Working confers self-sufficiency, dignity, standing in society, and membership in the social structure. Not to work means dependence, failure, declining social status, insecurity, and shame.”²⁰⁵

Given the centrality of work in the lives of most workers, many workers invest substantial human capital in ways that are specific to their present employer. They specialize within the firm and develop knowledge, skills, and relationships that the employment market

Arbitration Jurisprudence, 48 HOUS. L. REV. 457, 464–71 (2011) (arguing that “the most pressing issue in consumer arbitration, in the wake of recent Supreme Court decisions, is the lack of a viable forum for consumers with low value claims”).

202. See, e.g., Cole, *supra* note 2, at 760, 781–88 (categorizing employment arbitration and consumer arbitration as arbitration “imposed by repeat players on one-shot players” and calling for a separate federal arbitration act that would govern only arbitration agreements between such “parties with disparate negotiating incentives”); Stipanowich, *supra* note 1, at 327 (arguing in favor of “carefully crafted legislation or administrative regulations limiting or regulating the use of arbitration agreements in consumer and employment contracts”).

203. See H.R. 1844, S. 878, 113th Cong. (2013); H.R. 1873, S. 987, 112th Cong. (2011).

204. See, e.g., Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225, 238 (2013) (“For the worker, losing one’s job can cause one to lose the means of making a living and obtaining self-respect and respect from the community.”); Crain, *supra* note 195, at 165, 167, 169, 171–72.

205. Crain, *supra* note 195, at 199.

outside of the firm may not value highly if at all.²⁰⁶ Simultaneously, they and their families set down roots in the community that might make relocation for new employment opportunities impracticable.²⁰⁷ Thus, in making these firm-specific investments of human capital and community-specific personal commitments, workers lock-themselves in to their present employer in ways that ultimately further disempower the worker and further enable employer exploitation.²⁰⁸

Surveying these typical features of the employment relationship, Professor Samuel Bagenstos has concluded that “employment practices are particularly likely to implicate issues of social equality and that, when they do so, the law should presumptively regulate those practices to remove the most significant threats to” social equality.²⁰⁹ Specifically, Professor Bagenstos argues that the centrality of employment to a worker’s life and the power that an employer and its supervisors may have over the worker together threaten to establish and entrench hierarchies of social status separate and apart from inequalities in economic position.²¹⁰ He calls, therefore, for appropriate regulation of the employment relationship to minimize the likelihood that inequalities in economic position will lead to broader hierarchies that prevent some workers from participating as full and equal members in society and, indeed, so as to promote equality in social relations both within and apart from the employment relationship.²¹¹

Turning to the issue of employment arbitration, Professor Bagenstos argues that, in light of the U.S. Supreme Court’s recent arbitration jurisprudence, employment arbitration required as a condition of employment poses a “quite significant threat” to social equality.²¹²

206. *Id.* at 164, 200.

207. *Id.* at 164, 200; *cf.* Naomi Schoenbaum, *Mobility Measures*, 2012 B.Y.U. L. REV. 1169, 1194, 1209 (2012) (arguing that “there are reasons to believe that information deficits and cognitive biases lead individuals and employers to underestimate the costs of mobility under the current regime, limiting their ability to reach welfare-maximizing decisions” and discussing the “underappreciated costs of [worker] mobility”).

208. Crain, *supra* note 195, at 199.

209. Bagenstos, *supra* note 204, at 238; *see also id.* at 243–73 (expounding on this argument).

210. *Id.* at 232, 237, 244.

211. *Id.* at 236, 243–44; *see also* Brishen Rogers, *Justice at Work: Minimum Wage Laws and Social Equality*, 92 TEX. L. REV. 1543, 1597 (2014) (defending minimum wage laws on the ground that they “mitigate work-based class and status distinctions and enhance low-wage workers’ self-respect”).

212. Bagenstos, *supra* note 204, at 267–69.

He points out that a worker's ability to hold her employer accountable for violation of her rights is critical to social equality.²¹³ Yet, the central holdings of *Concepcion*, if extended to the employment arbitration context, would undermine the ability of a worker to have her claims against her employer adjudicated.²¹⁴ Thus, Professor Bagenstos concludes that, "an extension of the Court's analysis [in *Concepcion*] to the employment setting would raise serious social equality concerns."²¹⁵

Aside from the impact of the employment relationship on individual well-being and self-concept, employment practices also have long been critical to the formation and maintenance of social understandings relating to group identities. For example, employment discrimination against African-Americans has long been grounded in and reinforced the notion that, for biologic or cultural reasons, black workers have a lesser capacity for certain employment than white workers.²¹⁶ Similarly, employment discrimination against women has long been grounded in and reinforced the belief that, because of physiological and emotional differences between men and women, women are ill-suited to certain "men's work."²¹⁷ Moreover, much employment discrimination against gay and lesbian workers is grounded in and reinforces the social understanding that gay people are morally and spiritually inferior to straight people and, thus, openly gay people must be excluded from working in certain role model occupations.²¹⁸

Government regulation proscribing such employment discrimination is a critical component of efforts to counter these subordinating narratives.²¹⁹ Anti-discrimination statutes teach that denying a

213. *Id.* at 264, 268; see also Rogers, *supra* note 211, at 1575 (arguing that the statutory "entitlement [to a minimum wage] and its accompanying right of action alter the power dynamics between employer and employee" and that "legal rights, particularly rights against private parties, can be an important social basis of self-respect").

214. See Bagenstos, *supra* note 204, at 268.

215. *Id.* at 269.

216. See NANCY MACLEAN, FREEDOM IS NOT ENOUGH: THE OPENING OF THE AMERICAN WORKPLACE 49, 63, 74, 227 (2006).

217. *Id.* at 125–26, 129.

218. E. Gary Spitko, *Don't Ask, Don't Tell: Employment Discrimination as a Means for Social Cleansing*, 16 EMP. RTS. & EMP. POL'Y. J. 179, 186–91 (2012).

219. See, e.g., SAMUEL ESTREICHER & GILLIAN LESTER, EMPLOYMENT LAW 7 (2008) (making the point that employment regulation is a means for society to implement its values); Robert C. Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 30–31, 40 (2000) (recognizing that "[t]he dominant conception of American antidiscrimination law aspires to suppress categories of

worker an employment opportunity on the basis of a prohibited characteristic is inconsistent with society's core values.²²⁰ Such anti-discrimination statutes are critical as well to efforts to dismantle occupational segregation intrinsic to these narratives.²²¹ An employment arbitration agreement that makes impracticable a worker's efforts to vindicate her rights under such an anti-discrimination prohibition retards the statute's effectiveness at establishing, maintaining, and strengthening the equality norm as well as countering the harmful effects of violations of that norm.

In sum, the centrality of the employment relationship to the lives of workers and the implications of employment practices for social understandings and realities relating to both individual and group identity and equality suggest a need for regulation of employment arbitration quite distinguishable from any need for regulation of consumer arbitration or, for that matter, of franchise arbitration or of securities arbitration, which like employment arbitration and consumer arbitration frequently are concerns of arbitration critics.²²² Thus, one might reasonably call for special treatment under the FAA of employment arbitration regulation that would allow states greater power to ensure that workers may effectively vindicate their unwaivable state statutory rights. This Article turns now to consideration of how such reform should be structured.

social judgment that are deemed likely to be infected with prejudice" and acknowledging that this dominant conception has "driv[en] important and far-reaching changes in the social practices of gender and race" but arguing for a "sociological account" of antidiscrimination law in which antidiscrimination law is understood "as transforming preexisting social practices, such as race or gender, by reconstructing the social identities of persons"); Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1071, 1096 (2009) (discussing the power of civil rights legislation to reshape public values).

220. See Thomas B. Stoddard, *Bleeding Heart: Reflections on Using Law to Make Social Change*, 72 N.Y.U. L. REV. 967, 975 (1997) (arguing that, "At least in part because of the Civil Rights Act of 1964 — the most important statutory embodiment of the ideal of racial justice — American culture, American government, and the American people have absorbed the concepts of equality and integration embodied in the Act as the proper ethical framework for the resolution of issues of race").

221. See Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 839 (2003) (arguing that "[a]ntidiscrimination law is best justified as a policy tool that aims to dismantle patterns of group-based social subordination, and that does so principally by integrating members of previously excluded, socially salient groups throughout important positions in society").

222. See Stipanowich, *supra* note 1, at 418 (noting that "more [foreign] jurisdictions deny enforcement to arbitration agreements in employment contracts than in consumer contracts" and that "[t]his stance reflects, among other things, the perception that employment disputes often implicate fundamental human rights").

B. *The Structure of Federal Allowance Oversight*

1. *Too Much Federal Regulation: A General Ban on Predispute Employment Arbitration Agreements*

One oft-suggested approach to reform would invalidate predispute employment arbitration agreements generally. Indeed, in recent years, a number of bills have been introduced in Congress that to varying degrees would have invalidated predispute employment arbitration agreements. The most extreme of these bills would have invalidated all predispute employment arbitration agreements.²²³ Other bills would have invalidated only predispute arbitration clauses that required arbitration of employment claims arising under the Constitution or federal statutes.²²⁴

None of these bills has proven politically viable.²²⁵ In general, they have been widely criticized as overbroad in their approach to

223. See, e.g., Arbitration Fairness Act of 2013, H.R. 1844, S. 878, 113th Cong. (2013); Arbitration Fairness Act of 2011, H.R. 1873, S. 987, 112th Cong. (2011); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); Arbitration Fairness Act of 2007, H.R. 3010, S. 1782, 110th Cong. (2007). In recent years, Congress has banned non-negotiable arbitration clauses in a variety of contexts. See Motor Vehicles Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2) (2001) (prohibiting motor vehicle manufacturers, importers, and distributors from requiring arbitration under their franchise agreements); Dep't of Def. Appropriations Act, Pub. L. No. 112-10, 125 Stat. 38 § 8102(a)(1)-(2) (2011) (prohibiting government contractors from requiring arbitration of Title VII claims or tort claims arising from a sexual assault or harassment); John Warner Nat'l Def. Authorization Act, 10 U.S.C. § 987(e)(3) (2012) (making it unlawful for a consumer creditor to require an active duty service member, her spouse, child, or dependent to submit to arbitration a claim involving the extension of consumer credit); Food Conservation and Energy Act, 7 U.S.C. § 197c(a)(b) (2012) (allowing an agricultural producer or grower to decline to be bound by an arbitration provision prior to entering into a livestock or poultry contract); The Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 §§ 748, 921, 1028, 1414 (2010) (banning arbitration agreements with respect to whistleblower claims on commodities fraud (§ 748) or securities fraud (§ 921), granting the Consumer Financial Protection Bureau the power to prohibit predispute arbitration provisions in consumer financial products and services contracts (§ 1028), banning predispute arbitration clauses in residential mortgages and home equity loans (§ 1414), and authorizing the SEC to prohibit or limit predispute arbitration agreements between a broker or securities dealer and a customer if the SEC finds that such regulation would be "in the public interest and for the protection of investors" (§ 921(a))).

224. See, e.g., Civil Rights Act of 2008, H.R. 5129, S. 2554, 110th Cong. § 423 (2008); Preservation of Civil Rights Protections Act of 2005, H.R. 2969, 109th Cong. (2005); Civil Rights Act of 2004, H.R. 3809, S. 2088, 108th Cong. § 423 (2004).

225. One might argue, however, that the Department of Defense Appropriations Act prohibiting government contractors from requiring arbitration of Title VII claims or tort claims arising from a sexual assault or harassment, see Pub. L. No. 112-10,

reform.²²⁶ This author has argued elsewhere, for example, that these attempts at reform fail to appreciate that many of the common concerns respecting employment arbitration and many of the benefits of employment arbitration do not have equal force across the spectrum of employees and employers. With respect to enforcement of a predispute employment arbitration agreement, it makes sense to consider, for example, how the general counsel of Apple Inc. is situated differently as an employee than the worker who cleans her office. It makes sense also to consider, for example, how Apple Inc. is situated differently as an employer than the five-person start-up firm down the road. Thus, this author has argued, such reforms should exempt from their scope employment arbitration agreements entered into by certain high-level employees as well as those entered into by relatively smaller employers.²²⁷

More generally, an FAA amendment that would invalidate all predispute employment arbitration agreements or even only a subset of such agreements that relate to claims arising under the Constitution or a federal statute would be far too crude an instrument to address the common concerns with predispute employment arbitration agreements. As contrasted with litigation, employment arbitration offers the potential for a more knowledgeable, cost-effective, expeditious, and private adjudication of an employee-employer dispute.²²⁸ A complete ban on the enforcement of predispute employment arbitration agreements, therefore, would discard the baby with the bathwater. A more thoughtful and flexible approach is called for.

2. *Too Little Federal Regulation: The Reverse Preemption Approach*

The most flexible approach to reform of the relationship between the FAA and state regulation of employment arbitration would amend the FAA to give each state *carte blanche* to determine the extent to which any predispute employment arbitration agreement may

125 Stat. 38 § 8102(a)(1)–(2) (2011), has gone a long way toward implementing the goals of these bills related to employment arbitration.

226. See, e.g., Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 269, 281 (2008) (acknowledging that the arbitration system is flawed but criticizing the Arbitration Fairness Act's "jackhammer approach to arbitration reform"); Stipanowich, *supra* note 1, at 400-404. *But see* Schwartz, *supra* note 201, at 240 (arguing that "[t]he Arbitration Fairness Act should be passed because consumer and employment disputes are too important a henhouse to be governed by contracts written by foxes").

227. See Spitzko, *supra* note 198, at 628-32, 646-49.

228. See *id.* at 605-08 (discussing the virtues of employment arbitration).

be enforced. Federal law already provides for such a “reverse preemption” approach in the context of insurance regulation: the McCarran-Ferguson Act (“MFA”) provides generally that state law preempts federal law with respect to the regulation of “the business of insurance” and the interpretation of insurance contracts. Specifically, the MFA provides that, “No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any state for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance.”²²⁹ The FAA does not specifically relate to the business of insurance. Thus, states are free to regulate arbitration agreements to the extent that the arbitration regulation relates to the business of insurance.²³⁰

In the context of employment arbitration, the reverse preemption approach would empower each state to tailor its regulation of employment arbitration in light of the peculiarities of the state’s employment laws and the specific challenges arbitration might present to a worker seeking to vindicate her statutory rights arising under those employment laws. One might expect that even with this authority some states would take a hands-off approach to the regulation of predispute employment arbitration agreements in an effort to attract arbitration business to their jurisdiction.²³¹ Given that most employment arbitration agreements are drafted by employers and imposed on employees as a condition of employment on an adhesive basis, a state might seek to attract arbitration business by assuring employers that their employment arbitration agreements will be enforced in the jurisdiction.

Other states, however, likely would regulate predispute employment arbitration agreements heavily in an effort to safeguard the public interests that ground their employment laws. The track record of various states regulating arbitration agreements relating to insurance contracts is instructive. Nearly one-third of the states have statutes that purport to invalidate all or nearly all predispute arbitration agreements relating to contracts of insurance.²³² A number of state

229. 15 U.S.C. § 1012(b).

230. Notwithstanding the MFA, the states remain subject to constitutional limits in their regulation of the business of insurance. *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869, 881–83 (1985).

231. See generally Erin O’Hara O’Connor & Peter B. Rutledge, *Arbitration, The Law Market, and the Law of Lawyering*, 38 INT’L REV. L. & ECON. 87 (2014) (seeking to test empirically for effects of jurisdictional competition for domestic arbitration business).

232. See Ark. Code Ann. § 16-108-230; Ga. Code Ann. § 9-9-2; Haw. Rev. Stat. Ann. § 431:10-221; Kan. Stat. Ann. § 5-401; Ky. Rev. Stat. Ann. § 417.050; La. Rev.

and federal courts have held that the MFA allows these states to reverse preempt the FAA to enforce this state statutory law banning insurance arbitration.²³³ Thus, in the employment arbitration context, the concern arises that under the reverse preemption approach a state may give too little weight to the interest of employers and employees in realizing the virtues of employment arbitration. Indeed, California's track record regulating employment arbitration suggests that the likely result of a reverse preemption approach in California, and perhaps in other states, would mirror the outcome under the most extreme legislation that Congress has considered in recent years respecting predispute employment arbitration agreements — a blanket invalidation of such agreements.

3. *A Compromise Approach: Federal Agency Allowance Oversight of State Employment Arbitration Regulation*

The optimal approach to reform would accomplish two goals. First, an optimal approach would provide a meaningful federal safeguard for the interest of employers and employees in realizing the benefits of employment arbitration. Second, such an approach would

Stat. Ann. § 22:629; Mass. Gen. Laws Ann. ch. 175 § 22; Mo. Rev. Stat. § 435.350; Neb. Rev. Stat. Ann. § 25-2602.01; Okla. Stat. Ann. tit. 12, § 1855(D); S.C. Code Ann. § 15-48-10(b)(4); S.D. Codified Laws § 21-25A-3; Vt. Stat. Ann. tit. 12, § 5653; Va. Code. Ann. § 38.2-312; Wash. Rev. Code. Ann. § 48.18.200(1)(b); *see also State Laws Regulating Arbitration in Insurance Contracts*, PUBLIC CITIZEN (visited Jan. 30, 2014) http://www.citizen.org/congress/article_redirect.cfm?ID=6560 (listing and describing various statutes).

233. *See e.g.*, *Dep't of Transp. v. James River Ins. Co.*, 292 P.3d 118, 123–24 (Wash. 2013) (holding that the McCarran-Ferguson Act shields a Washington statute that prohibits arbitration agreements in insurance contracts from FAA preemption); *Love v. Money Tree, Inc.*, 614 S.E.2d 47, 49–50 (Ga. 2005) (holding that the McCarran-Ferguson Act precludes the FAA from preempting a Georgia statute providing that arbitration agreements relating to contracts of insurance are invalid); *Standard Sec. Life Ins. Co. of New York v. West*, 267 F.3d 821, 823 (8th Cir. 2001) (holding that the McCarran-Ferguson Act prevents the FAA from preempting a Missouri statute invalidating arbitration agreements in insurance contracts); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 935 (10th Cir. 1992) (holding that the McCarran-Ferguson Act precludes the FAA's application to a Kansas statute invalidating arbitration agreements in insurance contracts); *Nat'l Home Ins. Co. v. King*, 291 F. Supp. 2d 518, 530 (E.D. Ky. 2003) (holding that a Kentucky statute providing that arbitration agreements in insurance contracts are not enforceable is exempt from FAA preemption because of the McCarran-Ferguson Act); *Am. Health & Life Ins. Co. v. Heyward*, 272 F. Supp. 2d 578, 583 (D. S.C. 2003) (holding that the McCarran-Ferguson Act “precludes the application of the FAA to arbitration clauses contained in insurance policies governed by South Carolina law” which provides that the South Carolina Uniform Arbitration Act shall not apply to “any insured or beneficiary under any insurance policy or annuity contract”).

still allow for full consideration of a state's interest in regulating employment arbitration so as to ensure a worker's ability to effectively vindicate her state statutory rights and, relatedly, to safeguard the public policies that ground the state's regulation of the employment relationship. Accordingly, this Article proposes that Congress amend the FAA to provide for federal agency allowance oversight of state regulation of employment arbitration agreements. Specifically, Congress should limit the FAA's preemptive scope by carving out an exception to section 2 that would allow states to regulate predispute employment arbitration agreements subject to the approval of such regulation by the U.S. Department of Labor or a similar body. Pursuant to this reform, a state would be authorized to propose employment arbitration regulations tailored to the specifics of that state's employment statutes. A federal overseer with expertise in employment law would be charged with evaluating any such proposed employment arbitration regulation by balancing the federal interest in promoting arbitration agreements as written with the state interest in vindicating state statutory employment rights. The federal overseer could approve the proposed regulations, reject them, or condition approval on suggested revisions.²³⁴

A model for such federal oversight of state regulation of employment arbitration already exists in the context of securities arbitration.²³⁵ Pursuant to that scheme, private professional organizations called self-regulating organizations ("SRO") have regulated securities arbitration under the supervision of the Securities and Exchange Commission ("SEC").²³⁶ Previously, multiple SROs maintained their own rules for arbitrations occurring under their auspices.²³⁷ Nonetheless, prior to 2007, the vast majority of SRO arbitrations were administered by either the National Association of Securities Dealers

234. For a broad discussion of the delegation to federal agencies of the power to waive federal statutory requirements, including consideration of the constitutionality and policy implications of such a practice, see David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265 (2013).

235. See Stipanowich, *supra* note 1, at 430 (suggesting that "[t]he history of the evolution of securities arbitration under the auspices of securities self-regulatory organizations . . . demonstrates how a framework that combines active agency oversight of rulemaking and administration with ongoing active debate between advocates for investors and brokerage companies can engender a dynamic process that promotes greater fairness and response to change"); *id.* at 384.

236. See generally Jill I. Gross, *McMahon Turns Twenty: The Regulation of Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 493, 512-17 (2008).

237. Constantine N. Katsoris, *Roadmap to Securities ADR*, 11 FORDHAM J. CORP. & FIN. L. 413, 420 (2006).

(“NASD”) or the New York Stock Exchange (“NYSE”).²³⁸ In 2007, the regulatory functions of the NASD and NYSE, including their arbitration departments, merged into the Financial Industry Regulatory Authority (“FINRA”).²³⁹ Today, FINRA administers nearly all arbitrations of securities disputes in the United States.²⁴⁰

Federal securities law, however, grants the SEC the authority to oversee SRO rulemaking, including SRO arbitration rulemaking. Pursuant to section 19(b) of the Securities and Exchange Act of 1934, the SEC must approve any proposed SRO arbitration rule change before the rule change may go into effect.²⁴¹ An SRO request for a rule change is first published in the Federal Register and becomes subject to public comment. Before approving any such proposed change, the SEC must first determine that the change is consistent with the requirements of the Exchange Act and the rules and regulations enacted thereunder and, accordingly, protects investors and is in the public interest.²⁴² The SEC has often required changes in proposed SRO securities arbitration rules in light of concerns raised in the public comment process.²⁴³

A similar federal allowance oversight scheme relating to state regulation of employment arbitration would moderate the extreme features embedded in the post-*Concepcion*, post-*Italian Colors Restaurant* status quo. Under such a scheme, federal arbitration law would no longer be indifferent to the undermining effects that an arbitration agreement may have on state public policies. Rather, the federal overseer would be specifically charged with considering such state interests. Moreover, under such a scheme, states would have an incentive to craft moderate arbitration doctrines that accommodate rather than foreclose employment arbitration. In sum, compared to the status quo, a federal allowance oversight scheme would be a more flexible and more thoughtful means for protecting the workplace-related interests of the state and the interests of workers and employers who have entered into employment arbitration agreements.

238. See *id.* at 525–34 (setting out the number of arbitrations administered by various SROs for each year from 1980 through 2005); Constantine N. Katsoris, *Securities Arbitrators Do Not Grow on Trees*, 14 *FORDHAM J. CORP. & FIN. L.* 49, 62 (2008) (noting that more than 99 percent of the arbitration cases reported filed by the SROs in 2005 were administered by the NASD or NYSE).

239. Katsoris, *supra* note 238, at 62–63.

240. See *id.* at 64 (noting that “the consolidation of the NASD and NYSE arbitration programs basically left FINRA as the sole provider of an SRO forum for the resolution of securities disputes”)

241. 15 U.S.C. § 78s(b)(1) (2006).

242. *Id.* § 78s(b)(2).

243. Gross, *supra* note 236, at 515–17.

Federal allowance oversight with respect to a state statute that would regulate employment arbitration would begin with a request from the state legislature that the federal overseer authorize the employment arbitration regulation at issue. In the case of a common law judicial doctrine, the request would come from the state high court. In either case, the state would certify the question to the federal overseer in much the same way as a federal court certifies a question of state law to a state high court.²⁴⁴ The request might be made either at the time of the employment arbitration regulation's promulgation or at the time when a court seeks to apply the regulation in such a way that the regulation would impact the enforcement of an employment arbitration agreement.

An existing agency or set of agencies within the U.S. Department of Labor sensibly might serve as the federal overseer. Alternatively, the overseer might be a newly created entity situated within the Department of Labor. The Department of Labor would seem an ideal location for the oversight task given that the department has situated within it expertise with respect to a wide range of workplace rights — from wage and hour law to workers' leave to nondiscrimination mandates.

Once the state legislature or high court seeks allowance from the federal overseer, the overseer would publish the proposed state employment arbitration regulation in the Federal Register and would seek public comment on the regulation. In considering whether to approve the state employment arbitration regulation, the overseer would balance the state's asserted interests in regulating employment arbitration against the federal interest in the enforcement of employment arbitration agreements as written. The overseer would then reject the regulation as applied to arbitration contracts within the FAA's purview, accept the regulation, or condition approval on proposed changes to the regulation.

The federal allowance oversight scheme should be structured to minimize two potential drawbacks. One concern is that the federal allowance oversight scheme might delay the start of arbitration for parties to an employment arbitration contract subject to regulation under the scheme. A second concern is that the federal allowance oversight scheme might result in increased costs to such parties.

244. See, e.g., *Perry v. Schwarzenegger*, 628 F.3d 1191, 1193 (9th Cir. 2011) (certifying a question to the Supreme Court of California); Cal. R. Ct. 8.548 (providing a mechanism for the Supreme Court of California to decide a question of California law upon a request from the United States Supreme Court, a United States Court of Appeals, or a state's court of last resort).

Given that a common motivation for entering into an employment arbitration contract is to realize a more expeditious and less expensive dispute resolution process, delays and costs arising from the scheme should be kept to a minimum.

To minimize delays in the parties getting to arbitration, state legislation impacting employment arbitration should not take effect until the federal overseer has approved the legislation. Thus, when the state employment arbitration regulation at issue arises from a state statute, the federal allowance oversight scheme would not give rise to any delay in getting to arbitration. To minimize delays associated with federal allowance oversight of state employment arbitration regulation arising from common law, the scheme should provide for an aggressive timetable for state submission of the doctrine to the federal overseer for approval, for publication in the Federal Register, for notice and comment, and for final federal overseer action with respect to the doctrine.

As is the case with federal regulation of securities arbitration, the monetary costs of federal allowance oversight of state employment arbitration regulation are likely to be substantial.²⁴⁵ It is critical that the parties to an employment arbitration agreement who become involved with the scheme not be asked to shoulder any of the direct costs. Imposing such costs on the parties to an employment arbitration agreement would significantly disadvantage arbitration. Rather, the state that seeks to safeguard the public interests implicated by its employment regulation and the federal government that seeks to promote the federal interest in the enforcement of employment arbitration agreements should shoulder these costs.

To more fully appreciate how the proposed scheme might work, its potential virtues, and its potential vices, it is useful to consider a concrete example. Recall, for this purpose, the statute at issue in *Perry v. Thomas*.²⁴⁶ The statute at issue there, section 229 of the California Labor Code, provided that a worker could maintain in court an action for the collection of wages due even if the worker had entered into an arbitration agreement the scope of which encompassed the worker's claim.²⁴⁷

245. See Stipanowich, *supra* note 1, at 430 (noting that federal regulation of the securities industry "entail[s] significant costs, much of which today is borne by the securities industry").

246. *Perry v. Thomas*, 482 U.S. 483 (1987).

247. Cal. Lab. Code Ann. § 229.

Federal allowance oversight of section 229 might profitably be contrasted with the Supreme Court's consideration of the same employment arbitration regulation in *Perry*. In holding that the FAA preempted section 229, the Court focused solely on the "liberal policy favoring arbitration agreements."²⁴⁸ The Court gave little consideration to Thomas's argument that California's interest in protecting its workers outweighed the federal interest in the enforcement of arbitration agreements.²⁴⁹ Indeed, one cannot even discern from the Court's opinion in *Perry* what those specific state interests were.²⁵⁰ Under the proposed federal allowance scheme, however, California's interests would be at the center of the preemption analysis.

At the same time, the broad sweep of section 229 suggests that the California legislature gave little consideration in enacting the employment arbitration regulation to the federal interest favoring arbitration agreements. Had it done so, it might have crafted a more narrow exception to the enforcement of employment arbitration agreements. For example, California might have invalidated only arbitration agreements that failed to ensure certain procedural protections to workers bringing claims for wages owed or might have required a judicial forum only for certain small value claims. The proposed federal allowance oversight scheme would give state legislatures an incentive to take a more thoughtful approach to employment arbitration regulation in the hope that the federal overseer would approve the more narrowly tailored exception.

Finally, the federal allowance oversight scheme should promote greater certainty with respect to the enforcement of employment arbitration agreements. Under the proposed scheme, no state regulation of employment arbitration would become operative until the federal overseer had approved its application. Thus, the proposed scheme should go a long way toward ending the game of preemption chess — with the parties to employment arbitration agreements as its pawns — that characterizes the status quo.²⁵¹

248. *Perry*, 482 U.S. at 489.

249. *See id.* at 486, 489.

250. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 131 (1973) (speculating, despite the "sparse" legislative history, that section 229 "was due, apparently, to the legislature's desire to protect the worker from the exploitative employer who would demand that a prospective employee sign away in advance his right to resort to the judicial system for redress of an employment grievance").

251. *Cf. Stipanowich supra* note 1, at 428–29 (arguing that judicial application of unconscionability doctrine in the arbitration context gives rise to uncertainty and that statutory due process standards for arbitration would alleviate this problem).

VI. CONCLUSION

An employer's workplace practices may impact not only its worker's economic well-being but also her self-concept and social standing. Indeed, employment practices may have profound implications for a worker's social equality and, thus, her ability to participate as a full and equal citizen in society. Employment practices also may help form and maintain social understandings and realities relating to group identity and equality. Thus, state regulation of the employment relationship implicates not only private interests but also significant public policies and public interests relating to individual and group identity and equality.

Employment arbitration has the potential to undermine these important public policies and public interests. Employer bargaining power and informational advantages raise the prospect of an employer imposing on its employee as a condition of employment an arbitration agreement that may impair the ability of the worker to vindicate her unwaivable state statutory employment rights. The arbitration agreement that impairs a worker's ability to effectively vindicate her state statutory employment rights simultaneously imperils the state public policies and public interests that ground those rights. Thus, the state has a strong interest in regulating predispute employment arbitration agreements so as to ensure that its workers may effectively vindicate their unwaivable state statutory employment rights.

The U.S. Supreme Court's recent FAA jurisprudence makes clear, however, that a state's public policy reasons for regulating employment arbitration are irrelevant to FAA preemption analysis. Indeed, the Court's most recent FAA jurisprudence obliterates the state effective-vindication exception and with it the state employment arbitration regulation that relies upon the exception. Thus, this jurisprudence impairs the ability of states to regulate employment arbitration so as to safeguard the public policies and public interests that ground state regulation of the employment relationship.

This Article proposes an amendment to the FAA that would place the state public policies and public interests that ground regulation of the employment relationship at the center of FAA preemption analysis. In so doing, however, this Article rejects an approach that would give states *carte blanche* to regulate employment arbitration. Such an approach would likely result in regulation that undervalues the virtues of employment arbitration and, thus, gives insufficient weight

to the interest of employers and employees in the enforcement of employment arbitration agreements. Rather, this Article proposes a middle-of-the-road approach that combines a federal openness to consider state interests in regulating employment arbitration with a federal check on such state regulation focused on protecting the interest of employers and employees in the enforcement of predispute employment arbitration agreements.