

# EQUAL OPPORTUNITY FOR ARBITRATION

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*Despite talk of a “federalism revival,” state law is quietly losing ground in the U.S. Supreme Court, and the arbitration area is no exception. For as currently interpreted by the lower courts, the Federal Arbitration Act (FAA) is on course to preempt a vast array of legislation that serves important public interests but that is only tenuously related to arbitration. The Court has implicitly endorsed this trajectory in AT&T Mobility LLC v. Concepcion (decided as this Article went to press), leading many to abandon hope of a principled judicial response to this mounting problem of overpreemption.*

*In this Article, I offer a new model for thinking about the extent to which the FAA should preempt state laws that do not target arbitration for special regulation but that are also not general enough to escape preemption under settled doctrine. I argue that the current predicament of overpreemption should be understood less as a symptom of the law’s rabid favoritism toward arbitration (as is commonly supposed) and more as a symptom of a basic misapprehension of the FAA’s latent principle of nondiscrimination. Contrary to popular belief, that principle does not demand the impossible feat of placing arbitration agreements on the “same footing” as all other agreements. Instead, it seeks the more modest goal of leveling the playing field between arbitration and litigation—or, as I put it here, equal opportunity for arbitration.*

*I illustrate how a more sophisticated engagement with the logic of equal opportunity can help lower courts fulfill the FAA’s nondiscrimination mandate without inevitably displacing state law just because it adversely impacts arbitration agreements. Considering controversial examples from the recent past, I conclude with concrete guidance for how my proposed model might be implemented in practice.*

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## INTRODUCTION

The state of California protects consumers from adhesive contract provisions that force them to waive their right to bring class actions.<sup>1</sup> A Rhode Island statute voids any clause in a franchise agreement that requires local franchisees to resolve disputes with their franchisors out of state.<sup>2</sup> The common law of West Virginia protects parties from waiving fundamental constitutional rights, such as the right to trial by jury, unless the waiver was "knowing and intelligent."<sup>3</sup> It is not entirely obvious what these laws have to do with arbitration. None expressly targets arbitration, and only the last affects the parties' ability to arbitrate substantive matters. The most that can be said about them

1. See CAL. CIV. CODE §§ 1751, 1781(a) (West 2009), *preempted by* *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003).

2. See R.I. GEN. LAWS § 19-28.1-14 (1956 & Supp. 2010), *preempted by* *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998).

3. *Dunlap v. Berger*, 567 S.E.2d 265, 277 (W. Va. 2002), *preempted by* *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603 (S.D. W. Va. 2004).

is that they will likely render unenforceable, in whole or in part, some arbitration and some nonarbitration agreements alike.

So it is somewhat surprising to learn that lower courts are increasingly finding these and similar laws falling within the states' historic police powers to be in unavoidable conflict with section 2 of the Federal Arbitration Act (FAA).<sup>4</sup> The inevitable result is that these state laws are all displaced under the well-established doctrine of obstacle preemption, leaving arbitration agreements to be enforced as if these state laws were never in place.<sup>5</sup> This means that the California statute, for instance, will continue to prohibit class action waivers but the FAA will render it powerless against class arbitration waivers.<sup>6</sup> If this body of case law gains further traction, it has the potential to change the very meaning of what we know as "arbitration"—from a forum that promotes the voluntary self-governance of disputing parties<sup>7</sup> to a contractual device for evading state governance.

It would be easy to explain these poorly understood developments in terms of broader tectonic movements in the judicial landscape. Erwin Chemerinsky, for example, has observed that conservative judges who have traditionally voted in favor of decentralized government are increasingly voting to preempt state laws perceived as unfriendly to business interests.<sup>8</sup> Cass Sunstein discerns the persistence of *Lochnerian* ideology in far-flung areas of the U.S. Supreme Court's jurisprudence.<sup>9</sup> In a similar vein, critics of mandatory binding arbitration have impugned what they see as "judicial activism"<sup>10</sup> in the arbitration area—not the familiar, Warren-era activism that brought rogue states into line with national values, but rather a new breed of judicial politics that appears increasingly

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4. 9 U.S.C. §§ 1–16 (2006).

5. See *infra* note 30 and accompanying text.

6. See *Ting*, 319 F.3d at 1151–52.

7. See Thomas J. Stipanowich, *Primitive Damages and the Consumerization of Arbitration*, 92 NW. U. L. REV. 1, 1 (1997).

8. See Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313, 1315 (2004) [hereinafter Chemerinsky, *Empowering*]; Erwin Chemerinsky, *An Overview of the October 2007 Supreme Court Term*, 25 TOURO L. REV. 541, 548 (2009) [hereinafter Chemerinsky, *Overview*]; see also Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 429 (2002); Sandra Zellmer, *Preemption by Stealth*, 45 HOUS. L. REV. 1659, 1671 (2009).

9. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 883–902 (1987). See generally G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 433 (1993) (arguing that Sunstein may even underestimate the influence of freedom of contract ideology on the Rehnquist Court's jurisprudence).

10. See Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 830, 837–39 (2002); David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 WASH. U. J.L. & POL'Y 129, 141 (2004).

prepared to undermine state lawmaking in areas such as consumer fraud and unfair competition, all in the name of “rigorously enforc[ing]”<sup>11</sup> private choices regarding how and what to arbitrate. This has led some scholars to suggest that “[i]f we are to have sound arbitration law, there is no place to look for it except in the halls of Congress.”<sup>12</sup> But the turn to federal legislative intervention has so far yielded few results.<sup>13</sup>

I offer a different account of these developments and correspondingly different ways forward. Against the dominant interpretation of the Court’s FAA preemption jurisprudence as designed to promote unfettered freedom of contract, I argue that this jurisprudence at its core is organized around a principle of equal opportunity—one that has often been expressed in terms of “plac[ing] arbitration agreements on equal footing with all other contracts.”<sup>14</sup> From this vantage point, the problem is not so much that courts have rigorously enforced arbitration agreements at the expense of contrary state law or policy. Instead, it is that they have taken what one court described as a principle of “rigorous equality”<sup>15</sup> for arbitration to quixotic extremes, by allowing only laws that (purportedly) apply to *all* contracts to withstand FAA preemption.<sup>16</sup> Thus, the California consumer statute with which we began<sup>17</sup> was held preempted because it spoke only to class action waivers in contracts that involved the “sale or lease of goods or services to any consumer,”<sup>18</sup> and for that reason did not apply in the same way to a wide range of other contracts—government contracts, business-to-business contracts, and automobile rental agreements, to name a few.<sup>19</sup> This perfectionist conception of equality ensures the preemption

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11. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985).

12. Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 402.

13. For example, the highly ambitious Arbitration Fairness Acts of 2009 and 2007 both languished in Congress and were never put to a vote. See H.R. 1020, S. 931, 111th Cong. (2009); H.R. 3010, S. 1782, 110th Cong. (2007). About the time this Article went to press, Senators Al Franken and Richard Blumenthal and Representative Hank Johnson introduced the Arbitration Fairness Act of 2011 in Congress. H.R. 1873, S. 987, 112th Cong. (2011). Not all congressional initiatives have met with the same fate, however. See, e.g., Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409, 3454-55 (2009); 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 11028, 116 Stat. 1835 (2006).

14. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); accord *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); GEORGE S. GRAHAM, TO VALIDATE CERTAIN AGREEMENTS FOR ARBITRATION, H.R. REP. NO. 68-96, at 1 (1924).

15. *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1119 (1st Cir. 1989).

16. See Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1246-47 (2011); *infra* note 39 and accompanying text.

17. See *supra* note 1.

18. CAL. CIV. CODE § 1770(a) (West 2009).

19. See *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003).

not just of arbitration-related state law, but of virtually any state law that happens to result in the nonenforcement (in whole or in part) of arbitration agreements.

If the problem is not unprincipled judicial excess but rather, as I argue, an excess of principle, the solution may not require a “showdown”<sup>20</sup> between the Court and Congress. For if I am correct that the latent intuitions behind the Court’s FAA preemption jurisprudence are more consistent with disciplined equality rather than dotting “favoritism,”<sup>21</sup> then it would seem possible to find in this jurisprudence the seeds of its own deliverance. And if critics are right that this jurisprudence has been systematically co-opted toward “pro-arbitration” ends,<sup>22</sup> all the more reason to begin holding courts to the inexorable logic that I contend underpins their own published precedents.

In this Article, I develop a new theoretical framework for thinking about the deep structure of FAA preemption and the acceptable limits that might be placed on it. I take as my point of departure the argument developed in this Article’s predecessor, *Arbitration’s Suspect Status*,<sup>23</sup> that the Court’s FAA preemption jurisprudence is animated by a principle of nondiscrimination for arbitration.<sup>24</sup> As such, the FAA should preempt only state laws that can be said to discriminate improperly against arbitration—or, as I put it here, laws that deny equal opportunity for arbitration. Countless judges and scholars have likewise grasped the antidiscrimination foundations of FAA preemption,<sup>25</sup> but none has built on these foundations to offer any proposals for reform. Together with *Arbitration’s Suspect Status*, this Article fills that gap.

In Part I, I provide a brief summary of the argument as elaborated up to this point in my prior work. In Part II, I explain the developments with which we began<sup>26</sup> in terms of a fundamental misunderstanding of the equal opportunity logic that drives the Court’s FAA preemption jurisprudence. I then illustrate

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20. Marcia Coyle, *Arbitration Showdown Looms Between Congress, Supreme Court*, NAT’L L.J., June 14, 2010, <http://www.law.com/jsp/article.jsp?id=1202462660962&slreturn=1&hbxlogin=1#>.

21. See, e.g., *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

22. See, e.g., Schwartz, *supra* note 10, at 153; Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?* 57 STAN. L. REV. 1631, 1643–46 (2005).

23. Aragaki, *supra* note 16.

24. This will undoubtedly strike some as a surprising claim. See *infra* note 29.

25. See, e.g., *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 431–32 (5th Cir. 2004); *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venez.*, 991 F.2d 42, 46 (2d Cir. 1993); *Gentry v. Superior Court*, 165 P.3d 556, 569 (Cal. 2007); 2 MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 16.6.2.1, at 16:116–17 (1999) (“[S]tate law that limits federal arbitration law in a discriminatory manner . . . is plainly and simply preempted.”); Alan Scott Rau, *Does State Arbitration Law Matter at All? Part I: Federal Preemption*, ADR CURRENTS, June 1998, at 19, 19 (arguing that the FAA prevents states from “discriminat[ing] against [arbitration agreements]”). See generally Aragaki, *supra* note 16, at 1265–66 (collecting other authorities).

26. See *supra* notes 1–7 and accompanying text.

the doctrinal ambiguities this misunderstanding has generated and the lower courts' patchwork solutions to them.

In the remainder of the Article, I focus on the solution settled on by the majority of lower courts and argue that its insistence on perfect equality is fundamentally inconsistent with equal opportunity for arbitration. In Part III, I illustrate the complexity of equality-based arguments in order to show that, far from insisting on equal treatment for all things, equal opportunity tolerates—some would say even fosters—a great deal of *inequality*. In Part IV, I revisit the history of modern arbitration law. I debunk the widely held assumption that the FAA's primary purpose is to achieve parity between arbitration *agreements* and other agreements. I argue instead that this purpose is better understood in terms of putting the arbitration *process* on par with its main public sector competitor: litigation.

These insights make possible the development of a more nuanced, meaningful approach to FAA preemption. In Part V, I conclude by illustrating the operation of this approach in three problematic FAA preemption contexts that have been the subject of debate in recent years.

## I. SUMMARY OF THE ANTIDISCRIMINATION MODEL OF FEDERAL ARBITRATION ACT (FAA) PREEMPTION

In order to throw into sharp relief the problem that this Article addresses, I need first to recapitulate the antidiscrimination theory of FAA preemption that I developed in *Arbitration's Suspect Status*.<sup>27</sup> To that end, I begin this Part with a brief summary of the Court's doctrinal test for determining when state law is preempted by section 2 of the FAA.<sup>28</sup> I refer to this test and its associated jurisprudence as the "Paradigm." I then review the basic argument for understanding the Paradigm as an antidiscrimination principle and set the stage for the remainder of this Article.<sup>29</sup>

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27. See Aragaki, *supra* note 16.

28. As in my prior work, I take no position here on the possible preemptive effect of sections of the FAA other than section 2. See *id.* at 1233 & n.42.

29. This is a complex argument that considerations of space prohibit me from rehearsing in detail here. I therefore ask readers who seek further explanation to consult my prior work. See *id.* at 1248–67.

To be clear, I am not making an empirical claim about the existence of discrimination against arbitration. In the age of mandatory binding arbitration, such a claim would be difficult (but not impossible) to defend. Nor am I claiming that the FAA was originally intended to be an antidiscrimination statute. The text of the FAA is simply too indeterminate, and the congressional record leading to its enactment too sparse, to draw any firm conclusions about the statute's original meaning. What is uncontroversial, however, is that courts routinely deploy antidiscrimination rhetoric to justify the FAA's displacement of state law. My approach has been to decode and render explicit the

### A. The Existing FAA Section 2 Preemption Paradigm

FAA section 2 preemption is a species of implied obstacle preemption, which calls for the displacement of any state law that “stands as an obstacle to the accomplishment and execution of [a federal law’s] full purposes and objectives.”<sup>30</sup> Under existing doctrine, the FAA’s ability to preempt state law in this way turns on two factors.<sup>31</sup>

The first is whether the state law is what I have referred to as “enforcement neutral” or “enforcement impeding.”<sup>32</sup> I have defined an enforcement-neutral law as one that does not materially impede the enforceability of either the substantive or procedural aspects of the arbitration clause at issue.<sup>33</sup> As such, the law cannot stand in any meaningful sense as an obstacle to FAA section 2’s mandate that arbitration clauses “shall be valid, irrevocable, and enforceable”<sup>34</sup> and is therefore never preempted.<sup>35</sup> By contrast, I define an

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assumptions behind that rhetoric—flawed as they may be in this context—in order to hold courts to the full implications of their own FAA preemption jurisprudence. Antidiscrimination law and theory help me do this because they provide sophisticated analytic frameworks, not because they furnish governing law.

30. See *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). It is well settled that the FAA does not contain an explicit statement of preemption or evince an intention to “occupy the entire field of arbitration.” See *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477 (1989). Thus, obstacle preemption is the only vehicle of preemption at play. See *id.*

31. Because they are tangential to my argument, I set aside cases in which the parties have specifically selected state law to govern their arbitration agreement. In these circumstances, the chosen state law is generally saved from FAA preemption. See *Volt*, 489 U.S. at 479. But see *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63–64 (1995) (holding that the parties’ choice of New York law did not permit application of New York law prohibiting punitive damage awards in arbitration).

32. For a fuller description of these terms, see Aragaki, *supra* note 16, at 1242–45.

33. An example would be a state law that treats an order to compel arbitration as immediately appealable. See, e.g., *Wells v. Chevy Chase Bank, F.S.B.*, 768 A.2d 620 (Md. 2001). Such a law may burden the arbitration process by creating further opportunities for delay, but it does not stand as an obstacle to the enforceability of arbitration agreements. See *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 688 (1996) (holding that delay alone is insufficient to trigger FAA preemption concerns).

34. 9 U.S.C. § 2 (2006) (emphasis added).

35. Thus, there is widespread doctrinal consensus that FAA section 2 does not preempt rules of court procedure that regulate the arbitral process without impacting the enforceability of arbitration agreements. See, e.g., *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 327 (2d Cir. 2004) (holding that a rule allowing stays of arbitration was not preempted because it did not affect enforceability); *Siegel v. Prudential Ins. Co. of Am.*, 79 Cal. Rptr. 2d 726, 735 (Ct. App. 1999) (holding that a state rule denying a right to a jury for hearings to compel arbitration did not conflict with the substantive rights created by FAA section 2); *Simmons Co. v. Deutsche Fin. Servs. Corp.*, 532 S.E.2d 436, 439–40 (Ga. 2000) (holding that a rule allowing appeals from an order compelling arbitration was not preempted because it did not “undermine enforceability”); *American Gen’l Fin. Servs. v. Vereen*, 639 S.E.2d 598, 666 (Ga. Ct. App. 2007) (holding that a rule denying appeals from an order refusing to compel arbitration was not preempted because the rule was not “tantamount to the failure to enforce valid arbitration agreements”).

enforcement-impeding law as one that at least partially impairs the “provision . . . to settle by arbitration a controversy thereafter arising,”<sup>36</sup> which includes not just the promise to arbitrate per se but also promises about the time, place, or manner of arbitration.<sup>37</sup>

The second factor is whether the law “singles out” arbitration or is instead “generally applicable.”<sup>38</sup> Although there is some controversy as to the precise definition of these terms, I have argued that a state law singles out arbitration if it applies on its face to arbitration and only arbitration, while it is generally applicable if it applies in principle to all contracts.<sup>39</sup> State laws that seek specifically to regulate arbitration fall into the former category. General rules of state contract law (such as the doctrine of unconscionability) fall into the latter.

According to the Paradigm, enforcement-impeding state laws that single out arbitration are always preempted while those that are completely general are not preempted.<sup>40</sup> For the sake of simplicity, in this Article I refer to the former as “Type 1” laws and the latter as “Type 2” laws. As to this basic model, summarized in the following figure, there is widespread (if imperfect) doctrinal agreement.<sup>41</sup>

FIGURE 1. Summary of the Paradigm

|   | ... singles out arbitration      | ... is completely general     |
|---|----------------------------------|-------------------------------|
| Enforcement-impeding state law that . . . | Always preempted<br>(Type 1 law) | Not preempted<br>(Type 2 law) |
| Enforcement-neutral state law that . . .  | Not preempted                    | Not preempted                 |

36. 9 U.S.C. § 2 (emphasis added).

37. See Aragaki, *supra* note 16, at 1244–45. This is how my concept of an enforcement-impeding law differs from what Christopher Drahozal has referred to as a “first generation” law. See *infra* notes 58–81 and accompanying text.

38. Casarotto, 517 U.S. at 687.

39. See Aragaki, *supra* note 16, at 1246–47; cf. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 477 (2006) (“Section 2 . . . places arbitration agreements on equal footing with all other contracts . . .”).

40. See Aragaki, *supra* note 16, at 1245, 1247–48.

41. It was in this spirit, I submit, that Stephen Ware referred to Type 1 and Type 2 laws as presenting the “easy [preemption] cases.” See Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F.L. REV. 39, 46–47 (2003).

## B. Reinterpreting the Paradigm as an Antidiscrimination Principle

What is the logic behind preempting a Type 1 law but not a Type 2 law? It is one of antidiscrimination: of eradicating unfounded “suspicion[s]”<sup>42</sup> and “prejudices”<sup>43</sup> against arbitration. On the traditional account, English judges had concocted various “antiarbitration rule[s]”<sup>44</sup> in order to prevent the “ouster” of their own jurisdiction by private dispute resolution alternatives.<sup>45</sup> According to the Court, the FAA’s function is to reverse this legacy of ingrained “hostility toward arbitration”<sup>46</sup> so that agreements to arbitrate are enforced like agreements to do just about anything else.<sup>47</sup>

To that end, the Court’s single out/general test functions as a sorting mechanism for distinguishing between state laws that discriminate against arbitration and those that do not. The reason why the Paradigm preempts Type 1 laws is that they place special burdens on arbitration agreements that do not apply to other agreements.<sup>48</sup> To the Paradigm, this is unmistakable evidence of the same antiarbitration hostility that the FAA was designed to abolish.<sup>49</sup> By the same token, the reason why the Paradigm does *not* preempt Type 2 laws is that they are considered arbitration-blind: They result in “arbitration agreements [being] neither favored nor disfavored, but simply placed on an equal footing with other contracts.”<sup>50</sup>

42. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985).

43. See, e.g., Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV 1420, 1435–36 (2008); Thomas E. Carbonneau, “Arbitracide”: *The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT’L ARB. 233, 242 (2007); see also Transcript of Oral Argument at 44, *Hall St. Assocs. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008) (No. 06-989) (Stevens, J.) (“[T]he whole premise of the [FAA] at the time it was enacted was that there was not a state remedy, because there was a bias against arbitration.”).

44. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272–73 (1995) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985)).

45. See *Byrd*, 470 U.S. at 220 n.6.

46. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)); see also *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 210–11 (1956) (Frankfurter, J., concurring) (referring to the “traditional judicial hostility against ousting courts . . . of their jurisdiction”).

47. See *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989); accord *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

48. See *Allied-Bruce*, 513 U.S. at 281; *Mitchell v. Am. Fair Credit Ass’n*, 122 Cal. Rptr. 2d 193, 200 (Ct. App. 2002); *Palm Harbor Homes, Inc. v. McCoy*, 944 S.W.2d 716, 721 (Tex. App. 1997).

49. See *Jevne v. Superior Court*, 6 Cal. Rptr. 3d 542, 551 (Ct. App. 2004) (“[S]tate laws that single out arbitration agreements for special scrutiny or suspect status are viewed as inhospitable to arbitration . . . [and] have been routinely found preempted by the FAA.”); cf. *Allied-Bruce*, 513 U.S. at 272–73 (holding that the FAA preempts any state “antiarbitration law or policy”).

50. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 698 (Cal. 2000); see also *Prima Paint*, 388 U.S. at 404 n.12 (holding that general contract laws are not preempted because they

My goal in *Arbitration's Suspect Status* was to interrogate the baseline doctrinal consensus reflected in Figure 1 by holding the Court to the full implications of its own antidiscrimination theory of the FAA. If we take that theory seriously, I argued, the mere fact that a state law singles out arbitration or is completely general should not be the end but rather the beginning of the analysis. Mature antidiscrimination regimes generally do not consider laws that single out a historically oppressed group to be absolutely forbidden but rather only suspect—that is, problematic only if it is further established that the law is tainted by bad motives or otherwise unjustified in light of countervailing values.<sup>51</sup> At the same time, such regimes are attuned to the way that facially neutral laws can be used to disguise discriminatory motive or application.<sup>52</sup>

From an antidiscrimination standpoint, therefore, the Paradigm as reflected in Figure 1 is too simplistic because it is both over- and under-preemptive: It is not necessary for *all* Type 1 laws to be preempted, and it is not clear that *all* Type 2 laws should be spared from preemption.

### C. The Open Question of Type 3 Preemption

In this Article, I move beyond the critique of the Type 1 and Type 2 preemption to underscore a potentially much larger problem with the Paradigm. That problem becomes apparent when one considers that there is a vast expanse separating the categories “single out” and “general”—an expanse populated by laws that target *more* than just arbitration and yet are *less* general than laws applicable to all contracts. Take a law such as the California statute with which we began,<sup>53</sup> which renders ineffective any waiver by a consumer of the right to bring a collective action claim. Such a law does not single out arbitration because it forbids both class arbitration *and* class action waivers. But it also does not apply to “any contract” in the way that, say, the unconscionability defense does. I refer to enforcement-impeding laws in this middle category as Type 3 laws.

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do not “elevate [arbitration agreements] over other forms of contract”); *see also* Caley v. Gulfstream Aerospace Corp., 428 F.3d 1359, 1377–78 (11th Cir. 2005); *Johnnie's Homes, Inc. v. Holt*, 790 So. 2d 956, 963 (Ala. 2001); 1 MACNEIL ET AL., *supra* note 25, § 10.7.1, at 10:51 (describing the “general” prong of the single out/general test in terms of a norm of equal treatment); Margaret L. Moses, *Privatized “Justice,”* 36 LOY. U. CHI. L.J. 535, 540–41 (2005) (describing the “general” test as designed to “treat arbitration the same as [all] other contracts”).

51. *See* Aragaki, *supra* note 16, at 1275–79.

52. *See id.* at 1285–88.

53. *See supra* note 1.

The figure below summarizes the antidiscrimination alternative to Type 1 and Type 2 preemption that I proposed in *Arbitration’s Suspect Status* and situates the problem of Type 3 preemption within that alternative approach.

FIGURE 2. The Antidiscrimination Model of FAA Preemption and the Open Question of Type 3 Preemption

|   | ... singles out arbitration  | ... lies between “single out” and “general” | ... is completely general  |
|---|--|---|--|
| Enforcement-impeding state law that ... | Should generally be preempted unless discrimination is justified<br>(Type 1 law) | ?<br>(Type 3 law)                           | Should generally not be preempted unless discrimination in application<br>(Type 2 law) |
| Enforcement-neutral state law that ...  | Not preempted  | Not preempted                               | Not preempted  |

Type 3 laws point to a gaping hole in FAA preemption jurisprudence. Ian Macneil described that conceptual void in the following terms: “[A]t what point will enough other subjects be singled out . . . to render [the] treatment [of arbitration] part of the general law of the state?”<sup>54</sup> In the same vein, Christopher Drahozal asks: “[H]ow general must [a] state law [that does not single out arbitration] be to avoid preemption?”<sup>55</sup> Stephen Ware, in turn, thinks of Type 3 preemption cases as the “hard case[s].”<sup>56</sup>

The Court has not yet given any clear guidance as to whether Type 3 laws should be preempted, forcing lower courts to extrapolate from the Court’s more dated Type 1 precedents.<sup>57</sup> But as I argue in the following Part, these lower court approaches have largely been unsatisfactory.

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54. 1 MACNEIL ET AL., *supra* note 25, § 10.7.2, at 10:52.  
 55. Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 408, 425 (2004) (stating that the question remains “unsettled, even after twenty years”).  
 56. See Ware, *supra* note 41, at 47–48.  
 57. With two exceptions, the Court’s seminal FAA preemption decisions have all involved Type 1 laws. Those exceptions are *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and *Preston v. Ferrer*, 552 U.S. 346 (2008). Although both involved Type 3 laws, neither explained how the single out/general

## II. TYPE 3 PREEMPTION AND THE PROBLEM OF EQUALITY

In a seminal treatment of FAA preemption, Christopher Drahozal raised the specter of what he called “second generation” state laws—laws that “regulate the arbitration *process* rather than invalidate the arbitration *agreement*.”<sup>58</sup> Drahozal predicted that second generation preemption cases would proliferate as more states adopt the Revised Uniform Arbitration Act,<sup>59</sup> which contains numerous provisions regulating procedural issues in arbitration.<sup>60</sup> In large part due to the influence of Drahozal’s article, second generation cases have come to be seen as the next uncharted frontier of FAA preemption law.<sup>61</sup>

I begin this Part with a brief pitch for redrawing this frontier to include not just questions of second generation but also Type 3 preemption. This somewhat technical discussion is intended for subject matter specialists who will likely wish to know how the two concepts relate to one another. I then describe what some have characterized as a “deep conflict”<sup>62</sup> in the lower courts’ approaches to Type 3 preemption. I show these conflicting approaches to be fundamentally misconceived and conclude by arguing for a more sophisticated model of Type 3 preemption.

### A. Reconceiving the FAA Preemption Frontier

As Drahozal defines it, a first generation law is one that at least partially invalidates an agreement to arbitrate a substantive matter—that is, one that results in the parties litigating, rather than arbitrating, that matter.<sup>63</sup> By contrast, a second generation law does not regulate the promise to arbitrate per se but

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test applied to such laws—*Southland* because it was decided at a time when the Court had not even formulated the single out/general test, see *infra* notes 289–294 and accompanying text, and *Preston* because the Court took as dispositive the fact that the law vested exclusive jurisdiction to hear all relevant disputes in an administrative tribunal, see *infra* notes 111–115 and accompanying text.

58. Drahozal, *supra* note 55, at 416 (emphasis added); see also Christopher R. Drahozal, *Revisiting Southland*, DISP. RESOL. MAG. 23, 29 (2004).

59. REV. UNIF. ARBITRATION ACT (2000), available at <http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm>.

60. See Drahozal, *supra* note 55, at 416.

61. See Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1157 (2009); Merrick T. Rossein & Jennifer Hope, *Disclosure and Disqualification Standards for Neutral Arbitrators: How Far to Cast the Net and What Is Sufficient to Vacate Award*, 81 ST. JOHN’S L. REV. 203, 231 n.169 (2007); Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 40; Alicia J. Surdyk, Note, *On the Continued Vitality of Securities Arbitration: Why Reform Efforts Must Not Preclude Pre-dispute Arbitration Clauses*, 54 N.Y.L. SCH. L. REV. 1131, 1151–52 (2009–10).

62. See Petition for Writ of Certiorari at 15, *Gentry v. Superior Court*, 128 S. Ct. 1743 (2008) (No. 07-998); see also *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344, 358 (Minn. 2003) (describing “[a] certain tension [that] exists in this area of the law”).

63. See Drahozal, *supra* note 55, at 415, 419.

rather only procedural matters such as where and how to arbitrate.<sup>64</sup> Although “courts now routinely hold [first generation] laws preempted,”<sup>65</sup> Drahozal suggests that their approach to the newer phenomenon of second generation laws remains unsettled, in part because the Supreme Court has not yet provided any concrete doctrinal guidance<sup>66</sup> and because there has been “surprisingly little” commentary on the subject.<sup>67</sup>

The first/second generation distinction roughly tracks the distinction I draw between enforcement-impeding and enforcement-neutral laws. The main difference is that in Drahozal’s framework, a law may be procedural and still also impinge on the enforceability of an arbitration clause.<sup>68</sup> For example, Drahozal considers laws that regulate arbitral venue or the availability of class arbitration to be procedural<sup>69</sup> even though such laws plainly have the potential to upset the parties’ agreements about the time, place, or manner of arbitration. What places such laws in the second rather than first generation category is that they do not go to questions of substantive arbitrability.

There is no doubt that open questions remain about the extent to which the Paradigm preempts (or should preempt) a law that merely regulates procedural matters.<sup>70</sup> But FAA preemption also turns on another important but very different question: whether the law singles out arbitration or is completely general. These two sets of questions are not reducible to each other because there is no *a priori* reason why, say, a Type 1 law should be first rather than second generation. It may be either. The first/second generation distinction therefore

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64. See *id.* at 395.

65. *Id.* at 393–94.

66. See *id.* at 425.

67. *Id.* at 395.

68. By contrast, a law is enforcement neutral in my terminology if it does not impinge on any aspect of the arbitration clause, which includes more than just the promise to arbitrate itself. See *supra* note 37 and accompanying text. Thus, California’s rules of ethics for arbitrators, see CAL. CIV. PROC. CODE § 1281.85 (West 2009); CAL. RULES OF CONDUCT app. at div. VI (2003), are second generation because they regulate the arbitral process. But a second generation law may be enforcement impeding or enforcement neutral. The California ethics rules are enforcement impeding because their violation results in vacatur of the arbitral award. See CAL. CIV. PROC. CODE § 1286.2; see also Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 75; Brian T. Burns, Note, *Freedom, Finality, and Federal Preemption: Seeking Expanded Judicial Review of Arbitration Awards Under State Law After Hall Street*, 78 FORDHAM L. REV. 1813, 1884–85 (2010) (arguing that state vacatur standards offend section 2’s enforceability mandate). But see *Ovitz v. Schulman*, 35 Cal. Rptr. 3d 117, 134–35 (Ct. App. 2005). But the ethics rules would be enforcement neutral if, for instance, they only resulted in discipline for the offending arbitrator.

69. See Drahozal, *supra* note 55, at 421–23.

70. In the wake of *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010), one good example of such a law would be a state rule of contract construction or other gap-filling rule that might be deemed antiarbitration, such as a rule that allows class arbitration where the parties’ agreement is silent on the issue.

cannot capture doctrinal gaps or ambiguities that arise along the single out/general axis, such as the open question of Type 3 preemption.<sup>71</sup> To illustrate, consider the preemption questions raised by (1) a first generation Type 3 law and (2) a second generation Type 3 law.

A good example of the former is the Illinois Nursing Home Care Act,<sup>72</sup> which makes the right to a jury trial nonwaivable in nursing home contracts.<sup>73</sup> Within a little over one year, two different divisions of the Illinois Appellate Court recently reached contradictory conclusions regarding whether the FAA preempts the Act.<sup>74</sup> But because the Act and others like it are first rather than second generation (they not only restrict but entirely invalidate the agreement to arbitrate), Drahozal's distinction does not capture why such laws continue to vex the lower courts.<sup>75</sup> The antidiscrimination model, by contrast, accounts for these seemingly irreconcilable cases by framing the issue as a disagreement about whether and why the Paradigm should preempt a law that does not facially single out arbitration and yet is also not completely general—in other words, a Type 3 law.<sup>76</sup>

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71. The Type 3 category has by no means escaped Drahozal's attention, however. Drahozal is perfectly aware of the ambiguity surrounding "whether the FAA preempts state laws that apply to arbitration agreements and to some other contract clauses, but not to contracts generally." Drahozal, *supra* note 55, at 425; *accord id.* at 408–09.

72. 210 ILL. COMP. STAT. ANN. 45 (West 2008).

73. *Id.* 45/3-606 to -607.

74. Compare *Fosler v. Midwest Care Ctr. II, Inc.*, 928 N.E.2d 1 (Ill. App. Ct. 2010), with *Carter v. SSC Odin Operating Co.*, 885 N.E.2d 1204 (Ill. App. Ct. 2008), *rev'd*, 927 N.E.2d 1207 (Ill. 2010). The *Fosler* court originally reached the same conclusion in 2009, but that opinion was superseded in 2010. See *Fosler v. Midwest Care Ctr. II, Inc.*, 911 N.E.2d 1003 (Ill. App. Ct. 2009), *modified and superseded by Fosler*, 928 N.E.2d 1.

75. Other examples of contradictory first generation preemption rulings on the same Type 3 law include: (1) two cases from the District of the Virgin Islands regarding a Virgin Islands statute that requires waivers of federal constitutional rights to be knowing and voluntary, compare *Fitz v. Islands Mech. Contractor, Inc.*, No. 08-cv-00060, 2010 WL 2384585, at \*6 (D.V.I. 2010) (finding the statute preempted, and describing the "apparent split in this district"), with *Foy v. Ambient Techs., Inc.*, No. 08-77, 2009 WL 1766718, at \*2 (D.V.I. 2009) (applying the statute without discussion of FAA preemption); and (2) two rulings from California regarding a statute that prohibits collective action waivers, compare *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003) (holding that the statute "[did] not apply to commercial or government contracts, or to contracts formed by nonprofit organizations and other non-commercial groups" and thus was not generally applicable), with *Fisher v. DCH Temecula Imports LLC*, 114 Cal. Rptr. 3d 24, 34 (Ct. App. 2002) (describing the statute as a "generally available contract defense" that "applies to all contracts"). I thank David Horton for alerting me to the second example.

76. This was precisely the disagreement between the Illinois appellate courts. See *Fosler*, 928 N.E.2d at 12; *id.* at 11 (describing the Act as "pro-judicial forum" and "the functional equivalent of 'anti-arbitration' legislation"); *Carter*, 885 N.E.2d at 1208–09 (describing the Act as "apply[ing] equally to all [nursing home] contracts . . . regardless of whether the contract involves arbitration").

An example of a second generation Type 3 law is one that voids any agreement by a franchisee or consumer to resolve disputes (whether by arbitration or otherwise) outside her home state—what I henceforth refer to generically as an “anti–forum selection law.”<sup>77</sup> Another example is a state court precedent declaring collective action waivers to be unconscionable in certain circumstances, such as the *Discover Bank* standard<sup>78</sup> recently held preempted in *AT&T Mobility LLC v. Concepcion*.<sup>79</sup> By and large, courts faced with FAA preemption challenges to these second generation laws do not pause to consider whether novel or different preemption considerations are implicated because the laws do not affect substantive arbitrability.<sup>80</sup> The dispute in *Concepcion*, for instance, did not turn on whether the FAA should preempt a law that was merely procedural. Instead, it turned on whether a particular iteration of the generic unconscionability defense was “general” enough to count as a Type 2 law or whether it was a Type 1 law in disguise—in the words of the parties, whether it “discriminated” against arbitration.<sup>81</sup>

In short, the distinctive challenges that Type 3 laws pose for the Paradigm are not adequately captured by the second generation category. This, in turn, suggests the need to expand our conception of the FAA preemption frontier to include the problem of Type 3 laws.

## B. Cracks in the Paradigm

Type 1 and Type 2 laws have presented little challenge to the Paradigm because, in each case, both prongs of the single out/general test point in the

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77. See, e.g., CAL. BUS. & PROF. CODE § 20040.5 (West 2009).

78. See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005); *infra* note 326 and accompanying text. The *Discover Bank* standard is a “second generation” law because it does not affect the arbitrability of any substantive matter, just whether the arbitration proceeds on an individual or a classwide basis. See Drahozal, *supra* note 55, at 395, 422–23 (describing as “procedural” laws that regulate the availability of classwide arbitration).

79. 131 S. Ct. 1740 (2011).

80. Instead, they apply the same analysis they have always used in first generation cases. See, e.g., *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890 (9th Cir. 2001); *KKW Enters., Inc. v. Gloria Jean’s Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 52 (1st Cir. 1999); *Doctor’s Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998). *But see* *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240, 1245 (Mont. 1998); *infra* note 105.

81. See, e.g., Brief for Petitioner at 26–31, *Concepcion*, 131 S. Ct. 1740 (No. 09-893); Brief for Respondents at 32–35, *Concepcion*, 131 S. Ct. 1740 (No. 09-893); Brief for Arbitration Professors as Amici Curiae Supporting Respondent at 3–18, *Concepcion*, 131 S. Ct. 1740 (No. 09-893); Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioner at 20–27, *Concepcion*, 131 S. Ct. 1740 (No. 09-893); Brief for Distinguished Law Professors as Amici Curiae Supporting Petitioner at 19–24, *Concepcion*, 131 S. Ct. 1740 (No. 09-893); Brief of the National Academy of Arbitrators as Amicus Curiae in Support of Respondents at 18–21, *Concepcion*, 131 S. Ct. 1740 (No. 09-893).

direction of the same answer. Type 1 laws are preempted *both* because they single out arbitration and because they are (for this reason) not completely general. The converse is true for Type 2 laws. These laws therefore bypass the dilemma presented by Type 3 laws, as to which the single out/general test points in two diametrically opposite directions.

Instead of recognizing the need for a distinctive set of criteria for the preemption of Type 3 laws, however, courts have largely sought to fit such laws into the Type 1 or Type 2 category. Accordingly, two competing approaches to Type 3 preemption have emerged: a majority view and a minority view.

### 1. Majority View: State Law Preempted Unless It Is Completely General

The vast majority of lower courts take the “general” prong of the single out/general test to be dispositive: In other words, enforcement-impeding laws are preempted unless they apply in principle to all contracts.<sup>82</sup> Because Type 3 laws apply by definition to some but not all contracts, on this logic they are *always* preempted.

Take Type 3 anti–forum selection laws.<sup>83</sup> The purpose of such legislation is to protect weaker parties from the expense and burden of pressing claims in a distant forum.<sup>84</sup> Many such laws target only discrete problem areas or industries, such as consumer contracts<sup>85</sup> or franchise contracts.<sup>86</sup> Under the majority view, anti–forum selection laws are preempted because they do not apply to all contracts but rather (1) only to forum selection clauses in (2) only one type of contract (for example, consumer, franchise, etc.).<sup>87</sup>

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82. See, e.g., *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001); *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 725–26 (4th Cir. 1990); *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1120–21 (1st Cir. 1989); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 880 (Pa. Super. Ct. 2006); cf. *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 443 (2006) (“Section 2 . . . places arbitration agreements on equal footing with *all* other contracts . . .” (emphasis added)).

83. The Rhode Island statute with which we began falls into this category. See *supra* note 2.

84. See, e.g., James Zimmerman, Note, *Restrictions on Forum-Selection Clauses in Franchise Agreements and the Federal Arbitration Act: Is State Law Preempted?*, 51 VAND. L. REV. 759, 776–77 (1998).

85. See, e.g., TENN. CODE ANN. § 47-18-113 (2009), preempted by *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 362 (Tenn. Ct. App. 2001).

86. See, e.g., CAL. BUS. & PROF. CODE § 20040.5 (West 2009), preempted by *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890 (9th Cir. 2001).

87. See, e.g., *Bradley*, 275 F.3d at 890; *KKW Enters., Inc. v. Gloria Jean’s Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 52 (1st Cir. 1999). The same rationale has been applied to similar Type 3 laws outside the anti–forum selection context. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 11, 16 n.11 (1984); *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003); *Ticknor*, 265 F.3d at 937; *Saturn*, 905 F.2d at 725–26; *Omstead v. Dell, Inc.*, 533 F. Supp. 2d 1012, 1026 (N.D. Cal. 2008).

A number of scholars have aligned themselves with the majority view.<sup>88</sup> For instance, Drahozal has claimed that “only . . . general contract defenses [such] as lack of assent, fraud, duress, and so forth . . . truly can apply to any contract.”<sup>89</sup> Similarly, Stephen Hayford contends that the “only” type of state law that can “moot contractual agreements to arbitrate” without offending the FAA is “the common law of contracts.”<sup>90</sup> Like many courts, these commentators typically find authority for the majority view in the plain language of FAA section 2, which provides that arbitration agreements “shall be . . . enforced” unless nonenforcement is required by a “ground . . . for the revocation of any contract.”<sup>91</sup> As Stephen Ware put it, “If we are to take the statutory language seriously, then I think . . . [Type 3 laws are] preempted unless there is a way around that word ‘any.’”<sup>92</sup> But this textualist line of argument does not explain why a law *should* have to apply to all contracts in order to avoid preemption. Instead, it merely defers to what it takes as the unambiguous imperative of the statute. I suggest that the deeper logic behind the majority view is that nothing short of universal applicability can fulfill the FAA’s mission to “place arbitration agreements on an equal footing with other contracts.”<sup>93</sup>

There are several problems with the majority view. To begin with, it is far from clear that the only way to “accord equal dignity to an arbitration contract [and] other contracts”<sup>94</sup> is to preempt enforcement-impeding laws unless they impose the same requirement on arbitration agreements as they do on every other type of agreement. It is not even clear that a given law can apply to

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88. In addition to those noted below, numerous other scholars and practitioners fall into this category. See, e.g., Brief of the Chamber of Commerce of the United States as Amicus Curiae in Support of Petitioner, *supra* note 81, at 25 (arguing for the preemption of a state unconscionability standard because it is “applicable only to dispute-resolution agreements” and did not “apply universally to ‘any’ and every contract”); Brief for Distinguished Law Professors as Amici Curiae Supporting Petitioner, *supra* note 81, at 8.

89. Drahozal, *supra* note 55, at 409 (“In my view, the courts should hold that state laws that apply to arbitration clauses and some other type of contract clause are preempted.”).

90. Hayford, *supra* note 68, at 73–74; accord Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL’Y 477, 484 (2009).

91. 9 U.S.C. § 2 (2006) (emphasis added).

92. Ware, *supra* note 41, at 47.

93. EEOC v. Waffle House, Inc., 534 U.S. 279, 293 (2002); see *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 726 (4th Cir. 1990) (inferring a “singular hostility to the formation of arbitration agreements” from the mere fact that the state law at issue did not apply to “all contracts”); see also *Century Indem. Co. v. Certain Underwriters at Lloyd’s, London*, 584 F.3d 513, 532 (3d Cir. 2009); *Bettencourt v. Brookdale Senior Living Cmty., Inc.*, No. 09-CV-1200-BR, 2010 WL 274331, at \*5–6 (D. Or. 2010); *Cardenas v. Chase Manhattan Bank USA, N.A.*, No. G033939, 2006 WL 1454778, at \*4 (Cal. App. 2006); Ware, *supra* note 41, at 48.

94. *Cardenas*, 2006 WL 1454778, at \*4.

literally all contracts without vitiating the entire endeavor of contract law, which plainly requires regulating different types of agreements differently.<sup>95</sup>

Moreover, as to some laws, it simply makes no sense to ask whether they apply to all contracts because they do not apply to contracts in the first place.<sup>96</sup> Take Ian Macneil's discussion of a Virgin Islands joinder rule requiring landlords to join any subtenant in an action against a tenant for possession of real property.<sup>97</sup> Macneil argues that if the rule were construed to apply not just to litigation but also arbitration proceedings, it would "constitute[] general, not arbitration, law."<sup>98</sup> But it is difficult to appreciate how a rule of procedure can be described as part of the general law of contracts. The majority view forces Macneil to fit a square peg into a round hole.

Finally, because legislatures so rarely legislate in terms applicable to all contracts, the majority view has the effect of preempting practically any enforcement-impeding law.<sup>99</sup> This results in de facto field preemption—something the Supreme Court has explicitly rejected in the arbitration area.<sup>100</sup> These and other perceived shortcomings have led a small but vocal group of courts and commentators to resist the majority view's insistence on perfect equality.

## 2. Minority View: State Law Not Preempted Unless It Singles Out Arbitration

On the minority view, it is not necessary for an enforcement-impeding law to treat all contracts the same; instead, it is sufficient if the law avoids

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95. Although contracts all share common elements, even contract law makes distinctions among them. See *infra* Part III.B.

96. Accord David S. Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 OR. L. REV. 541, 559, 568–70 (2004).

97. See 28 V.I. CODE ANN. § 281 (2010).

98. 1 MACNEIL ET AL., *supra* note 25, § 10.7.2, at 10:52. For other examples, see *W.M. Schlosser Co. v. Sch. Bd.*, 980 F.2d 253 (4th Cir. 1992) (reasoning that a statute that defined the ultra vires acts of local governing bodies was part of the general law of contracts); *infra* notes 303–306 and accompanying text.

99. See, e.g., Hayford, *supra* note 68, at 71; David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 15 (2004); Schwartz, *supra* note 96, at 559; Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 38 (2003).

100. See, e.g., *Volt Info. Scis., Inc. v. Bd. of Trs.*, 489 U.S. 468, 477 (1989); *Southland Corp. v. Keating*, 465 U.S. 1, 18 (1984) (Stevens, J., concurring in part and dissenting in part); *Drahozal*, *supra* note 55, at 405; Schwartz, *supra* note 10, at 137–38. But see Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 195 (2002) (arguing, solely with regard to what the authors call front- and back-end issues, that "as fashioned by the Supreme Court, the FAA reflects 'a clear and manifest purpose of Congress' to preempt a field traditionally occupied by state law" (quoting *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 157–61 (1978))).

singling out arbitration.<sup>101</sup> Because Type 3 laws apply by definition to more than just arbitration clauses, however, on this logic they are *never* preempted.

A good example of the minority approach in the anti–forum selection area can be found in *Keystone, Inc. v. Triad Systems Corp.*,<sup>102</sup> which involved a Type 3 Montana law that voided any agreement to resolve disputes (whether by arbitration or litigation) out of state.<sup>103</sup> There, the Montana Supreme Court noted that state laws singling out arbitration “manifest the kind of unequal treatment that [the Supreme Court] prohibits.”<sup>104</sup> But it incorrectly reasoned from this that because the Type 3 law at issue did *not* single out arbitration, it thereby posed no danger of discrimination.<sup>105</sup>

A number of commentators have endorsed the minority view. For example, David Schwartz has persuasively argued that Type 3 anti–forum selection laws are consistent with the FAA because they are not aimed at arbitration *per se* but rather at the “analytically separate” issue of venue.<sup>106</sup> Similarly, Jean Sternlight has argued that because a “knowing and intelligent” standard for waivers of the jury trial right do not specifically “target[ ] . . . the elimination of arbitration,” they do not “relegat[e] it to an inferior position” and thus should not be preempted.<sup>107</sup>

Although I agree with some of the results advocated by these critics, I disagree that the minority view is the only or best way to reach those results. First, from an antidiscrimination perspective, it is not necessary for a law to facially single out a protected group in order to discriminate against that

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101. *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002).

102. 971 P.2d 1240 (Mont. 1998).

103. *Keystone* involved not one but two statutes. See MONT. CODE ANN. §§ 27-5-323, 28-2-708 (2005). Even though one of the statutes plainly singled out arbitration, *see id.* § 27-5-323, the court reasoned that, when taken together, the statutory scheme was arbitration neutral because it applied the same restriction to forum selection clauses in litigation.

104. *Keystone*, 971 P.2d at 1245; *see also* *Am. Airlines, Inc. v. Louisville & Jefferson Cnty. Air Bd.*, 269 F.2d 811, 816 (6th Cir. 1959) (observing that the FAA preempts only state laws “apposite to arbitration in particular, such as ousting the courts of jurisdiction”); *District of Columbia v. Greene*, 806 A.2d 216, 220, 222 (D.C. 2002) (sparing from preemption a statute vesting exclusive jurisdiction in an administrative agency for all disputes between D.C. and its contractors on the ground that the statute did not “singl[e] out arbitration provisions for suspect status,” but rather also defeated agreements to use any other form of dispute resolution (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)) (internal quotation marks omitted)).

105. A “further” basis for the court’s refusal to preempt the law was that it did not “nullify” either party’s obligation to arbitrate their dispute, but rather only their obligation to arbitrate in a particular location. *See Keystone*, 971 P.2d at 1245. Drahozal emphasizes this alternative rationale as dispositive and refers to it as the “*Keystone* theory.” *See* Drahozal, *supra* note 55, at 417.

106. Schwartz, *supra* note 10, at 133–34, 146.

107. Sternlight, *supra* note 99, at 37–38; *see also* Zimmerman, *supra* note 84, at 780–81.

group.<sup>108</sup> Indeed, some of the worst forms of discrimination from our own nation's history have been underwritten by laws that appear evenhanded on their face.<sup>109</sup>

Second, the minority view leads to intolerable results. Consider a statute that broadly prohibits parties from waiving their right to a trial by jury. Because it does not single out arbitration, under the minority view such a law would not be preempted by the FAA even though its effect is to impose a blanket ban on practically all arbitration agreements.<sup>110</sup>

Third, the minority view is impossible to reconcile with the Court's recent decision in *Preston v. Ferrer*,<sup>111</sup> which involved a provision of the California Talent Agency Act (TAA)<sup>112</sup> that vested "exclusive original jurisdiction" in an administrative tribunal to decide certain types of disputes.<sup>113</sup> Even though the statute did not single out arbitration, the Court held it preempted by the FAA.<sup>114</sup> The holding makes eminent sense: If the TAA had purported to require a *judicial* (rather than an administrative) forum for the resolution of all talent agency disputes, it would most certainly have been preempted under the Court's existing precedent.<sup>115</sup>

### C. Toward a More Sophisticated Model of Type 3 Preemption

The following figure summarizes the Paradigm's majority and minority approaches to Type 3 preemption.

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108. See Paul Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 13–14 (1976).

109. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

110. See Drahozal, *supra* note 55, at 410; see also *id.* at 408–10 (advancing further persuasive arguments against the minority view).

111. 552 U.S. 346 (2008).

112. CAL. LAB. CODE § 1700 (West 2003).

113. See *id.* § 1700.44(a).

114. *Preston*, 552 U.S. at 355–56, 359. Note, however, that in addition to this Type 3 provision, the TAA also contained a Type 1 provision that imposed specific requirements on agreements to arbitrate in lieu of proceedings before the Labor Commissioner. The Court held the Type 1 and Type 3 provisions to be independently preempted by the FAA; in other words, the existence of a Type 1 provision singling out arbitration did not affect the Court's ruling on the Type 3 provision. *Accord Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1218 n.2 (Ill. 2010).

115. See *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984). *Preston* therefore extends *Southland* to the administrative context, clarifying that "state laws lodging primary jurisdiction in another forum, whether *judicial or administrative*," are preempted by the FAA. See *Preston*, 552 U.S. at 355–56, 359 (emphasis added).

FIGURE 3. Majority and Minority Approaches to Type 3 Preemption

|               | Type 1 Law<br>(singles out arbitration) | Type 3 Law<br>(does not single out and not completely general) | Type 2 Law<br>(completely general) |
|---------------|---|--|------------------------------------|
| Majority view | Always preempted                        |  | Never preempted                    |
| Minority view | Always preempted                        | Never preempted  |                                    |

What is striking about the majority and minority approaches is that they fail to draw any nuanced distinctions within the Type 3 category. All Type 3 laws stand or fall based on which prong of the single out/general test the court takes to be dispositive. To put it in antidiscrimination terms, the assumption is that all Type 3 laws are either equally discriminatory or nondiscriminatory toward arbitration.

But surely the same preemption outcome should not attach to all Type 3 laws regardless of their purpose or effect. It seems clear, for example, that unless a Type 3 law banning all jury trial waivers is preempted, the states could do an end run around the FAA by passing just such a law. At the same time, there is at least a plausible argument that Type 3 anti-forum selection laws should escape preemption.<sup>116</sup>

In the remainder of this Article, I seek to develop a more sophisticated framework for distinguishing between Type 3 laws that warrant preemption and those that do not—a framework that both reflects (1) a coherent theory of the FAA and (2) sound policy judgments in the mandatory binding arbitration area. I do this by grappling with the Paradigm’s latent structure, which I continue to contend is deeply anchored in concepts of antidiscrimination and equality.<sup>117</sup> Because the majority view has largely eclipsed the minority view, in

116. See *supra* notes 106–107 and accompanying text. Similarly, Drahozal concludes that three of the five FAA preemption theories considered in his “step four” would save Type 3 anti-forum selection laws from FAA preemption. See Drahozal, *supra* note 55, at 421.

117. Ware himself turns to something approaching the antidiscrimination rationale when he is forced to distinguish between an anti-jury trial waiver law and a law requiring all technical terms in a contract to be put in plain English. He insightfully suggests that the latter would not be preempted because it is only “slightly related to the *attack* on arbitration,” rather than for the simple reason that it singles out arbitration or is completely general. Ware, *supra* note 41, at 48 (emphasis added).

the remainder of this Article I focus solely on the former, which I equate with the Paradigm for the sake of convenience.

### III. DIALECTICS OF EQUALITY AND INEQUALITY

The Paradigm's "equal footing" rule betrays an unusually simplistic conception of equality. But equality is neither a monolithic nor a static concept. There are many different types of equality, and they are not necessarily compatible with each other because equality of one type invariably creates inequality of another.<sup>118</sup> Equality and inequality are therefore in a constant dialectical relationship: One cannot exist without the other unless everything is to be identical. Rather than the expungement of all traces of inequality, therefore, theories of equality have settled for the more modest goal of achieving workable equality in conditions of unavoidable difference.

In this Part, I highlight two problems in the Paradigm's assumptions about equality. First, the Paradigm perceives inequality in the mere fact that a Type 3 law affects arbitration agreements differently from the way it affects other agreements. In doing so, it commits itself to a particular conception of equality that is at odds with both the history and purpose of the FAA and with sound arbitration policy. Second, it assumes that the only way for a state law to guarantee equality for arbitration agreements is to impose the same limitation on *all* other agreements. In the vast literature on equality, however, few have defended such an exacting standard. Instead, equality has largely been understood as requiring only that things that are alike be treated alike.

#### A. Formal Equality of Opportunity and the Requirement of Discriminatory Purpose

One way to begin to comprehend the multifaceted nature of equality is to distinguish between equality of opportunity and equality of results.<sup>119</sup> Equal

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118. RONALD DWORKIN, SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY 2 (2000); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 18 (1983). Even when we can agree upon a measure of equality, two things may appear simultaneously equal and unequal depending on the criteria relative to which the things are being compared. See Michel Rosenfeld, *Substantive Equality and Equal Opportunity: A Jurisprudential Appraisal*, 74 CALIF. L. REV. 1687, 1688, 1700 (1986). This has led some, like Peter Westen, to conceive of equality in terms of a particular *relationship* rather than a general state of affairs. See Peter Westen, *The Concept of Equal Opportunity*, 95 ETHICS 837, 843–45 (1985) [hereinafter Westen, *Equal Opportunity*]; Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 630–31 (1983) [hereinafter Westen, *Meaning of Equality*].

119. See, e.g., Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 237 (1971) (distinguishing between equal treatment and equal achievement); Michel Rosenfeld, *Affirmative*

opportunity requires equal *treatment* regardless of whether such treatment actually results in equal outcomes. If there are ten applicants for one job, as long as the potential employer treats all of them the same in relevant respects—for example, by evaluating them against the same hiring criteria—she has arguably afforded each an equal opportunity to obtain the job even though she will plainly deny them equal outcomes by hiring only one. Equality of results, by contrast, is a far more ambitious program. It holds that different outcomes cannot be justified by the existence of de facto differences between us, such as differences in natural talent, motivation, or need.<sup>120</sup> Thus, in the unlikely event that our employer were charged with achieving equal results in hiring, she would be required either to create enough positions for all applicants or to deny employment to all.

The Paradigm's "equal footing" rule is better understood as a norm of equal opportunity than one of equal results.<sup>121</sup> It acknowledges that contracts, like people, are irreducibly heterogeneous and complex. Rather than seeking to level all differences among them—for example, by ensuring that arbitration agreements are enforced at the same rate as other contracts—the Paradigm recognizes that there are legitimate reasons to distinguish between arbitration agreements and other agreements. Its goal is simply to ensure that arbitration agreements are *treated* equally despite those differences.<sup>122</sup>

To call the Paradigm a regime of equal opportunity, however, begs the further question of what type of equal opportunity we are speaking of. Most treatments of the subject recognize at least two types: formal and fair equality of opportunity.

Formal equality of opportunity stakes a position that is closely allied with libertarianism and laissez faire economics.<sup>123</sup> According to one formulation, it is the ideal of "careers open to talent"—open, that is, to all based on merit rather

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*Action, Justice, and Equalities: A Philosophical and Constitutional Appraisal*, 46 OHIO ST. L.J. 845, 855–57 (1985). Others have disputed the persuasiveness of this distinction. See, e.g., David A. Strauss, *The Illusory Distinction Between Equality of Opportunity and Equality of Result*, in REDEFINING EQUALITY 51, 56 (Neal Devins & Davison M. Douglas eds., 1998).

120. See, e.g., FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 85–86 (1960).

121. The "equal footing" metaphor itself suggests equalizing the starting points in a footrace, not the outcome of the race. See, e.g., JOHN H. SCHAAR, *LEGITIMACY IN THE MODERN STATE* 174–75 (1981); Fiss, *supra* note 119, at 237.

122. This is consistent with what I have been arguing to be the Paradigm's antidiscrimination mandate, for equal opportunity—more so than equal results—has been the dominant ideal animating both statutory and constitutional antidiscrimination law. See, e.g., *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 579 (1978); J. Harvie Wilkinson III, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945, 976–98 (1975).

123. See, e.g., ROBERT L. HAYMAN, JR., *THE SMART CULTURE: SOCIETY, INTELLIGENCE, AND LAW* 181–83 (1998); Rosenfeld, *supra* note 118, at 1698.

than on arbitrary factors such as gender or race.<sup>124</sup> According to another, it denotes “the absence of a specified obstacle or set of obstacles, the absence of which leaves no insurmountable obstacles explicitly in the way of X’s attaining Y.”<sup>125</sup> The obstacle to be removed is typically conceived in terms of wrongful or malicious conduct, such as discrete acts of intentional discrimination.<sup>126</sup> The formal perspective therefore conceives of equal opportunity as a form of negative liberty—as freedom *from* some obstacle such as intentional discrimination.<sup>127</sup>

The pursuit of formal equal opportunity is nicely illustrated by the practice of U.S. orchestras to audition musicians behind translucent screens.<sup>128</sup> By obscuring the musicians’ identity, the screen removes the fetter of intentional gender-based discrimination: Male and female candidates are placed on an equal footing in the sense that gender becomes irrelevant to success in the audition.<sup>129</sup> But the screen necessarily also treats the candidates unequally because it seeks to reveal and enforce other differences, such as differences in technical skill, musicianship, and preparation. A male candidate who displays more of such qualities will fare better in the audition—and therefore receive better treatment—than a female candidate who displays less of them.<sup>130</sup> Formal equality of opportunity tolerates these merit-based inequalities as long as they do not result from intentional bad acts.

But what if the possession or lack of merit is less a function of hard work but rather of contingencies beyond the candidates’ control? This might be the case, for instance, if background social conditions are such that male musicians enjoy far greater access to superior instruments or an elite conservatory training than their female counterparts. From the quite different perspective of *fair* equality of opportunity, the orchestra screen effectively legitimizes and even magnifies these systemic disparities—disparities that may not be traceable to discrete acts of purposeful wrongdoing but that nonetheless affect the candidates’

124. See, e.g., MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 128, 131–32 (1980); JOHN RAWLS, *A THEORY OF JUSTICE* 72 (1971).

125. Westen, *Equal Opportunity*, *supra* note 118, at 841; see also FRIEDMAN & FRIEDMAN, *supra* note 124.

126. See, e.g., HAYMAN, *supra* note 123, at 181–84; Julie Chi-hye Suk, *Antidiscrimination Law in the Administrative State*, 2006 U. ILL. L. REV. 405, 412–14.

127. See THOMAS NAGEL, *CONCEALMENT AND EXPOSURE: AND OTHER ESSAYS* 93 (2002); DOUGLAS W. RAE ET AL., *EQUALITIES* 66 (1981); JOHN E. ROEMER, *EQUALITY OF OPPORTUNITY* 84 (1998). For a classic statement of the distinction between positive and negative liberty, see Isaiah Berlin, *Two Concepts of Liberty*, reprinted in ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* 118 (1969).

128. I borrow this example, with slight modifications, from Robert Post. See ROBERT C. POST ET AL., *PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW* 18–19 (2001).

129. *Id.* at 18.

130. Far from guaranteeing perfect equality between men and women, therefore, formal equality of opportunity in this case merely underscores the dialectical nature of equality. In the words of Douglas Rae, it “giv[es] everyone an *equal* chance to become *unequal*.” RAE ET AL., *supra* note 127.

prospects of success in morally arbitrary ways.<sup>131</sup> Meaningful equal opportunity might then require something more than just freedom from intentional discrimination;<sup>132</sup> it might imply a positive duty to redistribute the advantages that, through the accident of gender assignment, some enjoy but others do not.<sup>133</sup> If the mere absence of intentional discrimination is no longer the *sine qua non* of what it means for opportunities to be equal, then proof of intentional discrimination is unnecessary to find a violation of fair equality of opportunity.<sup>134</sup>

To the extent the Paradigm can be understood as a principle of equal opportunity, it is undeniably one of formal rather than fair equal opportunity. The FAA sought merely to “eliminat[e] erroneously constructed barriers to, or prejudices toward, arbitration.”<sup>135</sup> Chief among these was the old revocability doctrine, which had for so long allowed parties to revoke their promises to arbitrate with relative impunity.<sup>136</sup> This is why FAA section 2 makes arbitration

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131. For example, John Rawls argued that our prospects for achievement are largely determined by the economic, cultural, and family circumstances into which we are born and over which we have little control. RAWLS, *supra* note 124, at 74–75. Because we do not “deserve” our initial starting points in any profound sense, the differences in prospects they engender, Rawls argued, must be correspondingly arbitrary. *Id.* As against the ideal of formal equality of opportunity (typically described in terms of equal *means* of competition), Rawls advanced a conception of fair equality of opportunity, which he described in terms of equal “prospects” of competitive success for those with similar talents and a similar willingness to use them. *Id.* at 73. For an illuminating discussion of the distinction between means-regarding and prospect-regarding equality of opportunity, see RAE ET AL., *supra* note 127, at 65–76.

132. See, e.g., HAYMAN, *supra* note 123, at 180–84; Richard Delgado, *Recasting the American Race Problem*, 79 CALIF. L. REV. 1389, 1395–96 (1991) (reviewing ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* (1990)); Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 530 (1991); Bernard Williams, *The Idea of Equality*, in *PHILOSOPHY, POLITICS & SOCIETY* 110, 126 (Peter Laslett & W.G. Runciman eds., 2d ser. 1962).

133. See Fiss, *supra* note 119, at 244–45; Rosenfeld, *supra* note 118, at 1692–94. Fair equality of opportunity has accordingly been described as a theory of positive freedom. See, e.g., NAGEL, *supra* note 127, at 102.

134. Thus, the disparate impact theory of liability available under Title VII, see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and the ADEA, see *Smith v. City of Jackson*, 544 U.S. 228 (2005), does not require proof of intentional discrimination. See Suk, *supra* note 126, at 416–17 (equating fair equality of opportunity with disparate impact theory).

135. Jeffrey W. Stempel, *Bootstrapping and Slouching Toward Gomorrah: Arbitral Infatuation and the Decline of Consent*, 62 BROOK. L. REV. 1381, 1386 (1996).

136. See *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 7, 25 (1924) [hereinafter *Hearings*] (statement of Alexander Rose, Rep., Arbitration Society of America); IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION-NATIONALIZATION-INTERNATIONALIZATION* 36 (1992).

The revocability doctrine allowed parties to revoke their promise to arbitrate disputes at any time until the arbitrators issued their award. This legal loophole effectively made it impossible to order specific performance of an arbitration agreement, for, once so ordered, the breaching party could simply turn around and revoke the agreement. See Aragaki, *supra* note 16, at 1250–51.

agreements “valid, *irrevocable*, and enforceable . . . .”<sup>137</sup> The revocability doctrine, moreover, was widely understood in terms of de jure discrimination—as motivated by the “hostility,”<sup>138</sup> “enmity,”<sup>139</sup> and “jealousy”<sup>140</sup> of the common law courts toward arbitration. Because the FAA was designed to rectify this intentional disparate treatment of arbitration, it has been understood as “pre-emptive [only] of state laws hostile to arbitration,”<sup>141</sup> not state laws that merely treat arbitration agreements differently from other agreements. If this is correct, the touchstone for FAA preemption analysis should be whether the state law in question can be said purposefully to discriminate against arbitration.<sup>142</sup>

Prior to the rise of Type 3 preemption cases, this was a relatively straightforward inquiry that was almost perfectly executed by the single out/general

137. 9 U.S.C. § 2 (2006) (emphasis added); see also Note, Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy, 69 YALE L.J. 847, 854–56 (1960) (explaining the meaning of the phrase “valid, irrevocable, and enforceable” in FAA section 2 terms of overturning the “revocability” and “ouster” doctrines).

138. See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 13–14 (1984); *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982–83 (2d Cir. 1942).

139. See, e.g., *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1120 (1st Cir. 1989).

140. See, e.g., *Park Constr. Co. v. Indep. Sch. Dist. No. 32*, 296 N.W. 475, 477 (Minn. 1941); H.R. REP. NO. 68-96, at 1–2 (1924); STERLING, TO MAKE VALID AND ENFORCEABLE CERTAIN AGREEMENTS FOR ARBITRATION, S. REP. NO. 68-536, at 2–3 (1924); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 283 (1926).

141. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001); see also *Strausbaugh v. H&R Block Fin. Advisors, Inc.*, No. 2005-CA-001083-MR, 2007 WL 3122257, at \*4 (Ky. Ct. App. Oct. 26, 2007); Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 466 n.447 (1998); Jack Wilson, “No-Class-Action Arbitration Clauses,” *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 813 (2005).

142. Cf. *Hayford & Palmiter*, *supra* note 100, at 206 (arguing that state arbitration rules will survive preemption if, among other things, their “intent is pro-arbitration”). Some will undoubtedly question the wisdom of advocating, as I do here, an intent-based antidiscrimination framework for resolving FAA preemption cases. One objection might be that divining legislative intent is an exercise fraught with complexity. This may be true, but it only means that courts will not often be entitled to conclude that a particular Type 3 law was in fact motivated by a discriminatory purpose. Given what I have argued to be the FAA’s overpreemption of state law, this may be less a problem than a possible solution. See Aragaki, *supra* note 16, at 1269–74. It surely does not establish that the inquiry into discriminatory intent should be abandoned altogether. See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 138 (1980) (making the same argument in the equal protection context).

Another objection might be that, even if an inquiry into legislative intent is feasible, it should be eschewed as a matter of practice. See Aragaki, *supra* note 16, at 1280–81 (discussing the objection in more detail). Although this rejoinder is more persuasive, it begs the question of what other criterion should be used to distinguish between discriminatory and nondiscriminatory Type 3 laws. If all Type 3 laws are deemed discriminatory (the majority view), FAA preemption will begin to resemble a much stronger antidiscrimination regime—one in which discrimination is presumed just because a state law has the effect of disadvantaging arbitration agreements. See *infra* notes 153–163 and accompanying text. On the other hand, if all Type 3 laws are considered not to discriminate, we approach the minority view and all of its shortcomings. See *supra* Part II.B.2. Neither solution appears satisfactory.

test. Type 1 laws are prima facie evidence of purposeful discrimination because they single out arbitration on their face.<sup>143</sup> On the other hand, it is difficult to imagine how Type 2 laws intentionally discriminate against arbitration when, by definition, they “arose to govern issues concerning the . . . enforceability of contracts generally.”<sup>144</sup> Neither the Type 1 nor the Type 2 law therefore requires a hard look at whether the law was motivated by a discriminatory purpose.<sup>145</sup> By contrast, it is more difficult to state with confidence whether or not a given Type 3 law intentionally discriminates against arbitration. This difficulty may explain why most courts faced with Type 3 preemption cases entirely overlook the need to grapple with this question and, in turn, why the Paradigm has not developed any doctrinal tools to assist in this endeavor.

To be sure, the occasional court bucks the trend, suggesting that an independent investigation into legislative intent is both feasible and supported by existing FAA preemption doctrine.<sup>146</sup> For example, in *Mitchell v. American Fair Credit Association*,<sup>147</sup> the California Court of Appeal considered whether the FAA preempted a state law requiring that any modification to a credit services agreement be signed by the borrower. The Paradigm would preempt this Type 3 law because the law applies only to agreements between consumers and credit services organizations, not to “all” contracts.<sup>148</sup> But the court wisely resisted this conclusion, reasoning that the preemption question ultimately

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143. This, at least, is the rule in the equal protection area. See *Wayte v. United States*, 470 U.S. 598, 608 n.10 (1985). As I have explained elsewhere, however, laws that single out arbitration do not necessarily express the same unjustified hostility toward arbitration that the FAA was designed to reverse. See Aragaki, *supra* note 16, at 1275–79.

144. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Of course, it is always possible for such laws to be applied in ways that intentionally discriminate against arbitration. See Aragaki, *supra* note 16, at 1286–87.

145. But see *supra* notes 51–52 and accompanying text.

146. See *Mitchell v. Am. Fair Credit Ass’n*, 122 Cal. Rptr. 2d 193, 202–03 (Ct. App. 2002); *Carter v. Odin Operating Co.*, 885 N.E.2d 1204 (Ill. App. Ct. 2008), *rev’d*, 927 N.E.2d 1207 (Ill. 2010); cf. *Gray v. Conesco, Inc.*, No. SA CV 00-322DOC(EEX), 2000 WL 1480273, at \*7 (C.D. Cal. Sept. 29, 2000).

In *Carter*, the court denied an FAA preemption challenge to a Type 3 law that provided that “any waiver [by a nursing home resident] of the right to [a trial by jury] . . . prior to the commencement of an action, shall be null and void, and without legal force or effect.” 210 ILL. COMP. STAT. ANN. 45 / 3-607 (West 2008); see also *id.* at 45 / 101, 45 / 3-606. In finding the law not preempted, the court took as persuasive the lack of any evidence to suggest that the “primary purpose” of the statute was to “specifically target arbitration agreements.” *Carter*, 885 N.E.2d at 1209. Instead, the statute’s adverse impact on arbitration, if any, was at most an “incidental, tangential effect.” *Id.* Although there are reasons to question whether a law that nullifies jury trial waivers can be anything but purposefully discriminatory toward arbitration, *Carter* and cases like it illustrate that some courts are pushing against the Paradigm, looking behind its wooden tests toward the real issue of legislative purpose.

147. 122 Cal. Rptr. 2d 193.

148. See *id.* at 202–03.

turns on whether the law intentionally discriminates against arbitration.<sup>149</sup> After a thorough examination, the court concluded that “[n]either the language of the [law] nor its legislative history even hints that the signature requirement was imposed to affect arbitration.”<sup>150</sup> Instead, the law’s overriding purpose was merely to equip prospective credit customers with “information necessary to make an intelligent decision” and “to protect the public from unfair or deceptive advertising and business practices.”<sup>151</sup> The statute, in short, betrayed no necessary purpose to discriminate improperly against arbitration.<sup>152</sup>

*Mitchell* and similar cases, however, are more the exception than the rule. In the normal course, the Paradigm has been content to infer discriminatory intent from the mere fact that something other than a Type 2 law is involved. Consider the Paradigm’s treatment of a law that prohibited the inclusion of a wide range of nonnegotiable clauses in motor vehicle dealership contracts, including a clause denying automobile dealers “access to the procedures, forums, or remedies” provided by the state.<sup>153</sup> The law nowhere singled out arbitration, even though the impact of the law was to render any nonnegotiable arbitration clauses unenforceable.<sup>154</sup> In *Saturn Distribution Corp. v. Williams*,<sup>155</sup> the Fourth Circuit presumed that this Type 3 law expressed a “singular hostility to the formation of arbitration agreements”<sup>156</sup> simply because it failed to prohibit *all* nonnegotiable provisions in *all* standardized contracts.<sup>157</sup> But it does not follow from the mere fact that a facially neutral law “imposes burdens on arbitration agreements”<sup>158</sup> but not other agreements that those burdens were *intended* to discriminate against arbitration. To return to our example, the formal equal opportunity represented by the audition screen will treat female candidates differently from their male counterparts if they happen to be less talented or less prepared. But this would not entitle us to conclude that the screen intentionally discriminates against female candidates. By holding the state law to be preempted by the FAA without conducting an independent

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149. See *id.* at 203 (noting that the “touchstone for interpreting the FAA should be its purpose,” which is to reverse hostility toward arbitration agreements).

150. *Id.* at 202.

151. *Id.* at 197.

152. *Id.* at 202–03.

153. *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 724 (4th Cir. 1990) (quoting VA. CODE ANN. § 46.1-550.5:27 (1989) (repealed 1990)).

154. Its primary purpose, moreover, was broadly to mitigate the “manifest disparity in bargaining power . . . between automobile dealers and their manufacturers.” *Id.* at 730 (Widener, J., dissenting).

155. 905 F.2d 719.

156. See *id.* at 726.

157. *Id.*

158. *Id.* at 725.

investigation into the existence of a discriminatory purpose, the *Saturn* court effectively held the law to the benchmark of fair equality of opportunity.

As we saw, fair equality of opportunity is a far more robust norm of equality. It is not only inconsistent with the FAA's historical concern with laws hostile to arbitration,<sup>159</sup> it also makes little sense from a policy standpoint. To begin with, it would result in the preemption of a wide array of state laws simply because they had the effect of interfering with the enforceability of an arbitration agreement.<sup>160</sup> Moreover, none of the remedial and redistributive concerns that have traditionally been offered in defense of fair equality of opportunity apply when deciding whether an enforcement-impeding law should be preempted by the FAA.<sup>161</sup> If anything, it is just the reverse: The rights that inhere in arbitration agreements are rights of a commercial rather than a dignitary nature.<sup>162</sup> Moreover, arbitration is typically associated with corporate behemoths that possess both the resources to influence the legislative process and the bargaining power to dictate contractual terms on a take-it-or-leave-it basis.<sup>163</sup> Given these counterbalancing equities, as a policy matter the Paradigm should stand for a much weaker norm of formal equal opportunity, one that

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159. See Aragaki, *supra* note 16, at 1250–55; *supra* notes 42–47 and accompanying text. Nonetheless, it is sometimes evident in misguided statements from the Court to the effect that any “state legislative attempts to undercut the enforceability of arbitration agreements” would “eviscerate congressional intent to place arbitration agreements ‘upon the same footing as other contracts.’” *Southland Corp. v. Keating*, 465 U.S. 1, 16 & n.11 (1984) (quoting H.R. REP. NO. 68-96, at 1 (1924)); accord Brief for Distinguished Law Professors as Amici Curiae Supporting Petitioner, *supra* note 81, at 3 (“[S]tate law may not be employed in a manner that disfavors—*de jure* or *de facto*—arbitration agreements . . .”). It explains why so many critics of arbitration perceive the Paradigm as a conspiracy to “favor” arbitration at all costs. See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 661 (1996); David H. Taylor & Sara M. Cliffe, *Civil Procedure by Contract: A Convoluting Confluence of Private Contract and Public Procedure in Need of Congressional Control*, 35 U. RICH. L. REV. 1085, 1088 (2002).

160. In the equal protection context, this is one consideration that led the Court to reject an effects-based test for proving discriminatory treatment. Such a test, the Court held, “would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.” *Washington v. Davis*, 426 U.S. 229, 248 (1976).

161. See, e.g., Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147–70 (1976); David A. Strauss, *Discriminatory Intent and the Taming of Brown*, 56 U. CHI. L. REV. 935, 941–45 (1989).

162. Likewise, market-based nondiscrimination regimes, such as the regime of free trade made possible by GATT, generally guarantee only formal equality of opportunity between trading partners. See, e.g., Frank J. Garcia, *Building a Just Trade Order for a New Millennium*, 33 GEO. WASH. INT’L L. REV. 1015, 1053 (2001) (critiquing the prevailing view of free trade as guaranteeing only formal equal opportunity, and advocating a fair equality of opportunity approach).

163. See Cheryl Miller, *Still Dead*, RECORDER, June 6, 2006, at 10 (describing how a proposed bill in the California legislature to ban mandatory arbitration clauses in employment agreements failed because “wavering Democrats . . . were pushed by business interests eager to keep arbitration requirements intact”).

simply seeks to remove the old common law obstacle of intentional discrimination against arbitration.

B. Situated Equality and the Problematic Distinction Between Type 2 and Type 3 Laws

A related problem with the Paradigm's approach to Type 3 preemption is its insistence that a law apply to *all* contracts in order to avoid the taint of purposeful discrimination.<sup>164</sup> This may be thought of as a rule of "simple equality"<sup>165</sup>—one that recognizes no normatively relevant distinctions within a particular class of things (in this case, the universe of all contracts).

In the political sphere, simple equality has long been recognized as an impossible ideal, except perhaps in the narrow context of fundamental rights.<sup>166</sup> Virtually any effort at lawmaking results in some persons being treated unequally from others in at least some respects.<sup>167</sup> Even something as basic as the criminal law treats offenders and nonoffenders unequally.<sup>168</sup> In their pathbreaking article on equal protection, Joseph Tussman and Jacobus tenBroek illuminated this point in a way that speaks to the Paradigm's binary categories. After distinguishing between what they called "general' legislation," which "applies without qualification to 'all persons,'" and "special" legislation, which singles out a "limited class of persons," they concluded:

It is clear that the demand for equal protection cannot be a demand that laws apply universally to all persons. The legislature, if it is to act at all, must impose special burdens upon or grant special benefits to special groups or classes of individuals.<sup>169</sup>

Simple equality is not just empirically implausible, it is also unpersuasive as a normative ideal. It might help explain why, for example, women are entitled to equal employment opportunities alongside men. But it cannot explain why the legal profession may exclude those who flunk the bar exam, why a trucking

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164. See *supra* notes 82–100 and accompanying text.

165. See, e.g., RAE ET AL., *supra* note 127, at 20; WALZER, *supra* note 118, at 14.

166. See Rosenfeld, *supra* note 119, at 882. Michael Walzer, for example, eschews what he calls a "regime of simple equality" in favor of a system of complex equality that recognizes different spheres of equality and inequality. See WALZER, *supra* note 118, at 6–20. Even if simple equality could be achieved across society, he argues, market exchanges and differences in individual needs and merit will invariably produce inequality. See *id.* at 21–26.

167. See Westen, *Meaning of Equality*, *supra* note 118, at 620.

168. See Fiss, *supra* note 161, at 109; Antony Flew, *Three Concepts of Racism*, 68 INT'L SOC. SCI. REV. 99, 101 (1993).

169. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343 (1949). David Schwartz has made a similar point in the FAA preemption context. See Schwartz, *supra* note 96, at 559.

company may deny employment to blind truck drivers, or why an airline may refuse to hire morbidly obese flight attendants.<sup>170</sup> In each case, the unequal treatment of some persons is not only justified but necessary in order to defend other important values or to secure other types of equality.

For these reasons, antidiscrimination theory has long abandoned the pursuit of simple equality in favor of a more context-dependent notion that focuses only on whether persons who are similarly situated are treated similarly—what I refer to as a norm of “situated” equality. The “injustice” of discrimination, writes Anthony Flew, consists “not in treating people in different ways, . . . but in treating differently . . . people who are themselves, in all relevant respects, the same.”<sup>171</sup> Consistent with this intuition, the Court has interpreted the Equal Protection Clause as “essentially a direction that all persons similarly situated should be treated alike.”<sup>172</sup> By the same token, it has held that “things which are different in fact” need not “be treated in law as though they were the same.”<sup>173</sup>

On what grounds are some persons deemed similarly or differently situated? Antidiscrimination law answers this question by focusing on whether persons are similarly or differently situated in relation to the stated purpose of the law or measure in question.<sup>174</sup> For example, men and women are similarly situated in terms of their ability to be office managers, dentists, and firefighters. But they are not necessarily similarly situated for employment as guards in a maximum security male prison<sup>175</sup> or as counselors for victims of physical abuse by men.<sup>176</sup> A law that treats men and women unequally for purposes of the former class of occupations is therefore likely to strike us as more problematic than one that treats them unequally with respect to the latter.<sup>177</sup> The

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170. See Larry Alexander, *What Makes Wrongful Discrimination Wrong?: Biases, Preferences, Stereotypes and Proxies*, 141 U. PA. L. REV. 149, 151 (1993); Brest, *supra* note 108, at 6–7.

171. Flew, *supra* note 168, at 101 (emphasis omitted); see also Westen, *Meaning of Equality*, *supra* note 118, at 633.

172. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985); see also Tussman & tenBroek, *supra* note 169, at 344–45.

173. *Tigner v. Texas*, 310 U.S. 141, 147 (1940); see also *Eisenstadt v. Baird*, 405 U.S. 438, 446–47 (1972); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15-2, at 1306–07 (2d ed. 1988).

174. See, e.g., *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). The question of what counts as similar or different, however, is one that a purely formal principle of nondiscrimination cannot answer without reference to substantive norms. See, e.g., WILLIAM E. NELSON, *THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE* 139 (1988); Rosenfeld, *supra* note 118, at 1700.

175. See *Dothard v. Rawlinson*, 433 U.S. 321, 334–35 (1977).

176. See *Torres v. Wis. Dep’t of Health & Soc. Servs.*, 859 F.2d 1523, 1530–31 (7th Cir. 1988).

177. For here “the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated.” *Michael M. v. Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion); accord *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981) (“The Constitution requires that Congress treat similarly situated persons similarly, not that it engage in gestures of superficial equality.”).

rationale is that if there are legitimate differences between men and women in these particular contexts, it is at least as likely that their disparate treatment is a function of those differences as it is a result of unjustified factors such as “old boy” networks or negative stereotypes about women.<sup>178</sup>

If simple equality has proven unworkable in the antidiscrimination area generally, it is no more workable or persuasive in the context of FAA preemption. Contracts are by definition heterogeneous. Consider the endless variety of standards for contract enforcement that prevail in most jurisdictions: Gambling, bribery, and usurious contracts are generally unenforceable as contrary to public policy.<sup>179</sup> Noncompete, exculpatory, assignment, forum selection, and choice-of-law clauses are enforceable, but only within reason.<sup>180</sup> Marriage contracts, suretyship agreements, and contracts for the sale of securities are enforceable only if in writing.<sup>181</sup> Real estate, adoption, and insurance contracts are typically enforceable through the remedy of specific performance, while contracts for personal services or the sale of goods generally are not.<sup>182</sup>

The upshot is that there is no uniform standard of contract enforceability to which arbitration agreements could possibly aspire. Nor would such a standard be desirable, as having different enforcement rules for different types of contracts helps further other public policies, such as promoting free markets, policing fraud and sharp dealing, and deterring tortious and antisocial behavior. The FAA’s purpose could not possibly have been to level all of those differences; rather, it was simply to ensure that arbitration agreements were not denied enforcement because of unjustified considerations such as the historic “mistrust” or “suspicion” of the arbitral process—considerations that did not inure to the detriment of contracts generally.<sup>183</sup>

Contrary to popular orthodoxy in this area, not even Type 2 laws succeed in placing all contracts on the same footing. Take the unconscionability

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178. See, e.g., *Michael M.*, 450 U.S. at 469–71 (finding that a statutory rape law applying only to men did not violate equal protection because men and women are not similarly situated in their ability to become pregnant).

179. 7 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS §§ 16:1, 17:1 (4th ed. 2009); 9 *id.* § 20:38 (4th ed. 1999).

180. See RESTATEMENT (SECOND) OF CONTRACTS §§ 186–88, 195, 317 (1981); RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 80, 187 (1971).

181. See RESTATEMENT (SECOND) OF CONTRACTS §§ 112, 124; U.C.C. § 8-319 (2010).

182. See RESTATEMENT (SECOND) OF CONTRACTS § 367; 25 WILLISTON & LORD, *supra* note 179, §§ 67:61, 67:87, 67:94 (4th ed. 2002).

183. See Aragaki, *supra* note 16, at 1255–63; see also *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 231–32 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627–28 (1985).

This is consistent with the argument I develop in Part IV, *infra*, that the true meaning of the FAA’s “equal footing” mandate is to ensure the evenhanded treatment of arbitration and litigation, not arbitration agreements and all other agreements.

defense: Even in its pure form, the defense only affects the enforceability of agreements tainted by indicia of unconscionability. It is irrelevant to, and therefore does not in any meaningful sense apply to, all other conscionable agreements. The same is true for other defenses such as duress, fraud, and mistake: Each only governs *some* contracts—specifically, contracts compromised by the type of conduct that the defense is intended to regulate. All other contracts remain untouched.

For this reason, Type 2 laws quite clearly fail to “place[] arbitration agreements on equal footing with *all* other contracts.”<sup>184</sup> In fact, their very purpose is to enforce *inequalities* among contracts based on the existence of certain impermissible factors such as compulsion, deception, or mistake.<sup>185</sup> Thus, if the only way the Paradigm justifies preempting Type 3 laws but not Type 2 laws is to say that only the former treats all contracts equally, the distinction itself is specious. For neither type of law achieves simple equality across all contracts. FAA preemption simply cannot, therefore, turn on whether the state law is “generally applicable.”<sup>186</sup>

Here it is often retorted that Type 2 laws apply to all contracts in the sense that they regulate only *procedural* issues of contract formation—that is, they are agnostic about the particular subject matter of the contract.<sup>187</sup> But consider that the unconscionability defense depends at least in part on proving that the substance of the agreement (not just the process of its formation) “shocks the conscience.”<sup>188</sup> So, too, the statute of frauds applies only to agreements relating to certain subject matters—for example, land contracts or contracts for the sale of goods worth more than \$500.<sup>189</sup> Neither of these defenses is limited to regulating procedural issues, yet each is undoubtedly part of a state’s “generally applicable” contract law and thus saved from preemption by the Paradigm.<sup>190</sup>

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184. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (emphasis added).

185. Type 2 laws do not even manage to place all *arbitration* agreements on the same footing because they properly refuse enforcement to some arbitration agreements but grant it to others. And given any pair of agreements—one arbitration and one nonarbitration—generic contract law defenses have no qualms treating them unequally depending on the presence of defects in contract formation.

186. Instead, as I have argued, it should turn on the question of discriminatory purpose and the absence of a sound justification. See Aragaki, *supra* note 16, at 1283; *supra* Part III.A. See generally *infra* Part V.

187. See, e.g., Brief of Amici Curiae American Bankers Association et al. in Support of Petitioner at 7–9, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893).

188. 2A LARY LAWRENCE, *ANDERSON ON THE UNIFORM COMMERCIAL CODE* § 2-302:27 (3d ed. 2008).

189. See *RESTATEMENT (SECOND) OF CONTRACTS* § 110 (1981).

190. See *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996) (describing unconscionability as a “generally applicable contract defense[]” that does not “contraven[e] [FAA] § 2”); *Kroog v. Mait*, 712 F.2d 1148, 1153 n.4 (7th Cir. 1983) (describing the statute of frauds as a “universally applicable

Generic contract law defenses such as unconscionability seem as if they have universal application because they are *potentially* relevant to any contract regardless of subject matter: Any and all contracts, no matter what their content, must pass the unconscionability test. But virtually any law can be redescribed so as to be potentially applicable to all contracts.<sup>191</sup> Consider a hypothetical state statute of the following form: “Any and all contracts that contain an arbitration clause must so indicate in underlined capital letters on the front page of the contract.” Or a law that provides: “No contract in this state may require disputes to be settled in a manner other than courtroom adjudication.” Would we consider these to be Type 2 laws simply because they are worded in such a way that all contracts, regardless of subject matter, must comply with them? Not unless we are prepared to sacrifice substance for form. The first hypothetical law is in substance a Type 1 law: It is scarcely distinguishable from the state law at issue in *Doctor’s Associates v. Casarotto*,<sup>192</sup> which the Court held preempted by the FAA because it “singl[ed] out arbitration provisions for suspect status.”<sup>193</sup> The second is just a more sweeping version of the statute at issue in *Southland Corp. v. Keating*,<sup>194</sup> which was held preempted by the FAA because it “require[d] a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”<sup>195</sup>

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legal principle” that may be used to void an arbitration clause without offending section 2); *Treadway v. Damon Corp.*, No. 03-72650, 2003 WL 24091983, at \*5 (E.D. Mich. Dec. 23, 2003) (applying the statute of frauds to refuse enforcement of arbitration clause); *Mitchell v. Am. Fair Credit Ass’n*, 122 Cal. Rptr. 2d 193, 202 (Ct. App. 2002) (describing the statute of fraud’s signature requirement as a “general” rule or “neutral contract principle”). *But see Concepcion*, 131 S. Ct. at 1753 (holding that California’s unconscionability standard for collective action waivers was preempted by the FAA); *id.* at 1745–55 (Thomas, J., concurring) (developing the argument that, according to the plain text of the FAA, only state rules that govern the *formation* of contracts fall within section 2’s savings clause).

191. Examples of this abound. In their brief opposing certiorari in *Circuit City Stores, Inc. v. Gentry*, Dennis Riordan and his colleagues described the following California statute as a “generally applicable” Type 2 law: “All contracts which have for their object . . . to exempt anyone from responsibility for his own . . . willful injury to the person or property of another . . . are against the policy of the law.” Brief in Opposition at 3, *Circuit City Stores, Inc. v. Gentry*, 128 S. Ct. 1743 (2008) (No. 07-998) (emphasis omitted) (quoting CAL. CIV. CODE § 1668 (West 2007)). In substance, however, the statute applies only to certain types of exculpatory clauses. Similarly, concurring in *Fosler v. Midwest Care Center II, Inc.*, Justice Jack O’Malley imagined a hypothetical Type 1 law that “universally bars enforcement of arbitration provisions.” 928 N.E.2d 1, 17 (Ill. App. Ct. 2010) (O’Malley, J., concurring). The justice erroneously reasoned that, like the defense of fraud, the hypothetical law “appl[ie]d to all contracts” just because it did not contain any industry-specific limitation. *Id.* Likewise, the California Supreme Court characterized a Type 1 law requiring “employers [to] . . . pay all types of costs that are unique to arbitration” in certain statutory cases as a generally applicable law. *Little v. Auto Stiegler*, 63 P.3d 979, 987–89 (Cal. 2003) (quoting *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 689 (Cal. 2000)).

192. 517 U.S. 681.

193. *Id.* at 687.

194. 465 U.S. 1 (1984).

195. *Id.* at 10.

Potential applicability, however, is not the same as *actual* applicability. No matter how they are reworded, we know that these hypothetical laws do not actually extend to all contracts. This is not just because they are irrelevant to all contracts lacking arbitration clauses, but more importantly because it is easily discernible whether or not a contract does in fact contain such a clause. The same is not true for contract defenses such as unconscionability. Here, it is rarely immediately obvious that a given agreement will be found unconscionable or that facts extrinsic to the agreement will not later be discovered that reveal other defects in contract formation, such as fraud in the inducement. This explains why generic contract defenses often *appear* applicable, in principle, to any contract. But like all laws, those defenses unavoidably classify according to the type of misconduct (fraud, duress, etc.) they seek to police.<sup>196</sup> Therefore, they actually apply only to contracts tainted by such misconduct and have no actual applicability to all other contracts.

The real reason why Type 2 laws typically avoid preemption is that they “arose to govern issues concerning the . . . enforceability of contracts generally”<sup>197</sup>—not arbitration clauses in particular—and hence could not possibly have been motivated by improper discrimination. In other words, the law’s lack of hostility against arbitration is the dispositive issue, not whether it applies to all or just some contracts. By the same token, the question of whether a Type 3 law discriminates against arbitration cannot turn on whether it achieves simple equality among all contracts. Instead, it should turn on the more sensible standard of situated equality.

If so, to what other agreements should arbitration agreements be considered similarly situated? This question is far more complex than it appears at first glance. In the next Part, I attempt some answers.

#### IV. THE DEEP STRUCTURE OF THE PARADIGM’S EQUAL OPPORTUNITY LOGIC

The Paradigm’s majority and minority views reflect a difference over whether the injunction to place arbitration clauses on the same footing as other agreements literally means all other agreements or merely some subset thereof. Both views, however, are united in assuming that the relevant comparison is between arbitration agreements and other agreements.

In this Part, I challenge this common assumption. I argue that the FAA’s purpose to make arbitration *agreements* as enforceable as any other contract,

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196. See *Clements v. Fashing*, 457 U.S. 957, 967 (1982).

197. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

while surely important, is a means to an end rather than an end in itself. That end has always been to enable the arbitration *process* to compete on a level playing field with litigation, free of the artificial legal impediments that had once stood in its way.<sup>198</sup>

#### A. Revisiting the Decline of the Nonarbitrability Doctrine

An undeniable aspect of the ancient hostility to arbitration was the notion that arbitration was inferior to adjudication by a court of law.<sup>199</sup> Eminent jurists such as Joseph Story, for example, harbored deep doubts about arbitration's institutional competence to handle certain types of disputes. In the celebrated case of *Tobey v. Bristol*,<sup>200</sup> Story famously declined to order specific performance of a postdispute arbitration agreement on the ground that, unlike courts, arbitral tribunals do not "possess full, adequate, and complete means . . . to investigate the merits of the case, and to administer justice."<sup>201</sup> He was convinced that an otherwise valid agreement to arbitrate disputes "furnishes *no reason*" to deprive a reluctant party of his day in court.<sup>202</sup>

The advantages and disadvantages of arbitration relative to litigation would eventually become the central theme in the rise and fall of the nonarbitrability doctrine. Pursuant to that doctrine, agreements to arbitrate claims under certain federal statutes will, in principle, be set aside if it can be shown that Congress had intended to exempt them from arbitration.<sup>203</sup> Because there is typically no clear statement of congressional intention, courts infer that intention where "legal constraints external to the parties' agreement" make the arbitral process fundamentally incompatible with those claims.<sup>204</sup>

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198. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (noting the "unmistakably clear congressional purpose" behind the FAA to ensure that "the arbitration procedure, when selected by the parties to a contract, be speedy and *not subject to delay and obstruction in the courts*" (emphasis added)). For a discussion of some of these legal impediments, see Aragaki, *supra* note 16, at 1250–63.

199. See, e.g., Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1947 (1996).

200. 23 F. Cas. 1313 (C.C.D. Mass. 1845) (No. 14,065).

201. *Id.* at 1320; see also S. REP. NO. 68-536, at 2 (1924) (describing the English courts' ancient "jealousy" toward arbitration).

202. *Id.* (emphasis added).

203. As Macneil describes it, such statutes typically fall into one of two categories: They either (1) serve to protect a weaker party from fraud, discrimination, or exploitation by a stronger party or (2) serve to protect the rights of third parties or "broader public interests." See 2 MACNEIL ET AL., *supra* note 25, § 16.1.2, at 16:10. Good examples are Title VII, the Securities Act of 1933, the Securities Exchange Act of 1934, RICO, and the Sherman Antitrust Act.

204. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).

In its early nonarbitrability cases, the Court uniformly held that arbitration provided “less than adequate protection” for the vindication of important federal statutory rights.<sup>205</sup> Take *Alexander v. Gardner-Denver*,<sup>206</sup> a case in which a unionized employee brought a claim under Title VII of the Civil Rights Act<sup>207</sup> in federal court after having already lost the same claim in a grievance arbitration. The employer argued that the district court should have deferred to the arbitrator’s adverse determination on the Title VII claim.<sup>208</sup> The Court found no need for deference, however, because it rejected the employer’s basic premise that “arbitral processes are commensurate with judicial processes.”<sup>209</sup> Similarly, in *McDonald v. City of West Branch, Michigan*,<sup>210</sup> the Court declined to give preclusive effect to an arbitrator’s decision denying a police officer’s section 1983 claim. To do so, the Court held, would be to presume an apples-to-apples comparability between arbitration and litigation, when in fact arbitration “could not provide an adequate substitute for a judicial proceeding” for resolving section 1983 claims.<sup>211</sup>

The rationale of these early cases could have come straight out of Justice Story’s mouth: Arbitration and litigation are not similarly situated, at least for purposes of resolving certain federal statutory claims. The same qualities that made arbitration “efficient, inexpensive, and expeditious”<sup>212</sup> for merchants rendered it inappropriate to adjudicate rights under protective federal statutes that embody important public values.<sup>213</sup> As compared with a judicial forum, it was argued, arbitration affords a less robust factfinding process.<sup>214</sup> Without legal training, arbitrators are prone to misinterpret and

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205. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 131 (1973).

206. 415 U.S. 36 (1974).

207. 42 U.S.C. §§ 2000e to 2000e-17 (2009).

208. *Gardner-Denver*, 415 U.S. at 55–56.

209. *Id.* at 56.

210. 466 U.S. 284 (1984).

211. *Id.* at 290.

212. *Gardner-Denver*, 415 U.S. at 58.

213. See, e.g., *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 744 (1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware*, 414 U.S. 117, 131 (1973); *Wilko v. Swan*, 346 U.S. 427, 437 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989); *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 825 (2d Cir. 1968); cf. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 657 (1985) (Stevens, J., dissenting).

214. See *Gardner-Denver*, 415 U.S. at 57–58 (“[D]iscovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.”).

misapply governing law.<sup>215</sup> For these and other reasons, arbitration was not considered to be just another “form of trial”;<sup>216</sup> instead, it was deemed “inferior to judicial processes.”<sup>217</sup>

By the mid-1980s, however, the Court began to chart a dramatically different course. It came to see arbitration as an “adequate substitute for [courtroom] adjudication.”<sup>218</sup> On closer inspection, it found little evidence that arbitrators were “[in]capable of handling the factual and legal complexities” of claims under Title VII, the Securities Act of 1933, and a host of similar federal statutes.<sup>219</sup> Whereas the Court had previously viewed the election to arbitrate as a substantive waiver of “the parcel of rights behind a cause of action,”<sup>220</sup> it now came to see it as a mere tradeoff between comparable procedural forums.<sup>221</sup>

From this vantage point, the early nonarbitrability cases appeared patently discriminatory—not toward arbitration clauses but toward arbitration itself. Thus, when the Court first broke from its early precedents, it warned that “we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals’ should inhibit” the enforcement of arbitration clauses in statutory cases.<sup>222</sup> And just four years later, the Court repudiated its own earlier “characterization of the arbitration process” as “pervaded by . . . ‘the old judicial hostility to arbitration.’”<sup>223</sup> The Court’s later nonarbitrability jurisprudence stands for the more enlightened proposition that lower courts may no longer treat arbitration as inferior to litigation based on “outmoded presumptions,” “mistrust,” and “generalized attacks” that were now “far out of step” with modern realities.<sup>224</sup>

215. See *Barrentine*, 450 U.S. at 743; *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 532 (1974) (Douglas, J., dissenting); cf. *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967) (Black, J., dissenting) (considering it “fantastic” that arbitrators could “decide legal issues”).

216. *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198, 202 (1956) (quoting *Murray Oil Prods. Co. v. Mitsui & Co.*, 146 F.2d 381, 383 (2d Cir. 1944)).

217. *Gardner-Denver*, 415 U.S. at 57; accord *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986).

218. *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 229 (1987).

219. *Id.* at 232; cf. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30–31 (1991); *Scherk*, 417 U.S. at 519.

220. *Bernhardt*, 350 U.S. at 203.

221. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 630 (1985) (“An agreement to arbitrate . . . [is little more than] a specialized kind of forum-selection clause.” (quoting *Scherk*, 417 U.S. at 519)).

222. *McMahon*, 482 U.S. at 226 (quoting *Mitsubishi*, 473 U.S. at 626–27).

223. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)); accord *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470 n.9 (2009); see also *Aragaki*, *supra* note 16, at 1258–61.

224. See *Gilmer*, 500 U.S. at 30; *Rodriguez de Quijas*, 490 U.S. at 481; *McMahon*, 482 U.S. at 231–32.

The eventual eclipse of the nonarbitrability doctrine should not be confused with a broad empirical claim about the identity of arbitration and litigation. Important structural and procedural differences between the two remain.<sup>225</sup> Nobody doubts, for instance, that there is generally no right of appellate review in an arbitral proceeding, and therefore that it is more likely for errors of law to stand uncorrected.<sup>226</sup> Nor do the Court's later nonarbitrability cases foreclose treating arbitration and litigation differently in situations in which they are, in fact, differently situated. The cases only forbid differential treatment predicated on unwarranted biases and stereotypes about the arbitral process.<sup>227</sup> If a signatory to an arbitration agreement can prove that it would be unable "effectively [to] vindicate its statutory cause of action in the arbitral forum"<sup>228</sup> for a reason that is demonstrably nondiscriminatory (unlike the reasons offered in the early nonarbitrability cases), there is nothing in the Court's interpretation of FAA section 2 that precludes such a party from litigating the claim before a judge.<sup>229</sup>

The Court's more recent nonarbitrability jurisprudence is therefore better understood as predicated on a normative rather than an empirical claim: Despite undeniable differences between the two, arbitration may no longer be assumed inherently "inferior" to litigation but rather presumptively equal to it.<sup>230</sup> The claim is informed by facts and experience to be sure, but it is more in the nature of a policy choice regarding the baseline assumptions about arbitration

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225. See, e.g., *infra* Part V.C.

226. Nonetheless, parties have sometimes provided for merits review in their arbitration agreements. See Aragaki, *supra* note 16, at 1257 n.127.

227. Thus, for example, federal arbitration law properly treats judicial forums *more* favorably than arbitral forums for purposes of resolving disputes about arbitrability. Here, courts must apply a higher, "clear and unmistakable" evidence standard to determine the existence of an agreement to arbitrate arbitrability. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (citing *AT&T Techs., Inc. v. Commc'ns Workers*, 475 U.S. 643, 649 (1986)). This judicial favoritism is not based on "outmoded presumption[s]," *Rodriguez de Quijas*, 490 U.S. at 481, about arbitration. Instead, it is grounded in a legitimate concern that "contracting parties would likely have expected a court," rather than an arbitral tribunal, to decide so-called "gateway" issues of arbitrability. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002).

228. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985); accord *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000); *McMahon*, 482 U.S. at 239.

229. See *Randolph*, 531 U.S. at 90; *Gilmer*, 500 U.S. at 26 (noting that "all statutory claims may not be appropriate for arbitration," and suggesting that this determination be conducted on a case-by-case basis); *Mitsubishi*, 473 U.S. at 627; Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 644.

230. See Schwartz, *supra* note 99, at 31 (criticizing the Court for deeming "the choice between court and arbitration . . . [as] a choice between two *presumptively* neutral and fair fora" (emphasis added)); accord Katherine van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 949-50 (1999).

that courts are entitled to indulge.<sup>231</sup> It is what Thomas Carbonneau astutely described as a type of “political correctness doctrine,”<sup>232</sup> pursuant to which the law deems arbitration and litigation to be similarly situated for purposes of resolving the vast majority of civil disputes.

#### B. Arbitration, the “Other” Litigation

In the nonarbitrability context, the FAA’s antidiscrimination principle has been interpreted as an injunction to treat arbitration as a legitimate substitute for litigation. In the preemption context, by contrast, this principle has largely been understood as requiring that arbitration contracts be placed on the “same footing as other *contracts*.”<sup>233</sup> Which is correct?

The answer is that there is truth to both rationales, for the simple reason that arbitration is not reducible purely to a matter of process or contract alone. But the contract of arbitration itself was never the object of the law’s disdain; as such, the FAA was first and foremost a response to the ancient common law hostility toward arbitration *qua* process, not *qua* contract.<sup>234</sup> To the extent there was any hostility toward the latter, it has always been parasitic on hostility toward the former.

The historical background of the FAA confirms as much. The traditional account is that English judges had crafted artificial common law rules that impaired the enforceability of arbitration agreements because they were jealous of competing dispute resolution forums that tended to “oust” them of their jurisdiction, not because they had an interest in privileging other agreements over arbitration agreements.<sup>235</sup> Early twentieth century commercial reformers

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231. The same is true in antidiscrimination law and theory more generally. See, e.g., POST ET AL., *supra* note 128, at 27–28; SCHAAR, *supra* note 121, at 175; Williams, *supra* note 132, at 110–11.

232. See Carbonneau, *supra* note 43, at 237 n.10.

233. Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985) (quoting H.R. REP. NO. 68-96, at 1 (1924)) (emphasis added).

234. See *supra* notes 199–202; see also Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480 (1989) (referring to the “old judicial hostility to arbitration” (quoting Kulukundis Shipping Co. v. Amtorg Trading Corp., 126 F.2d 978, 985 (2d Cir. 1942))); Scott v. Avery, (1856) 10 Eng. Rep. 1135 (H.L.) 1138 (tracing the law’s refusal to enforce arbitration agreements to the English courts’ “great jealousy of arbitration[s]”); Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 148 (1921) (“The jealousy of judicial jurisdiction has led to a [negative] historical attitude of the Courts toward arbitration agreements.” (internal quotation marks omitted)); cf. Schwartz, *supra* note 99, at 52 (arguing that the “old judicial hostility” to which the FAA was responding was antiarbitration insofar as it steered cases away from arbitration and toward courtroom adjudication, not because it disfavored arbitration agreements *per se*).

235. See *supra* note 136 and accompanying text; see also U.S. Asphalt Ref. Co. v. Trin. Lake Petroleum Co., 222 F. 1006, 1007 (S.D.N.Y. 1915) (“[T]he hostility of English-speaking courts to arbitration contracts probably originated . . . [in the fact that the courts were uniformly] opposed to anything that would altogether deprive every one of them of jurisdiction.” (quoting Scott, 10 Eng.

likewise did not lobby for the FAA because they believed there was something intrinsically unfair about enforcing arbitration agreements with less vigor than, say, plumbing contracts or noncompete clauses. Rather, they did so because they sought a viable alternative to the perceived “evils” of litigation.<sup>236</sup> And if critics of the Paradigm are correct that arbitration clauses were historically used only between merchant peers—and thus that drafters of the FAA never contemplated its application to modern-day contracts of adhesion<sup>237</sup>—it suggests that the “ancient judicial hostility” to which the FAA was responding originated in concerns about arbitration as a process, not as a contract.<sup>238</sup>

This corroborates several key features of the FAA. First, the statute guarantees specific performance for breaches of arbitration agreements—a special remedy denied to the vast majority of other contracts.<sup>239</sup> Second, it provides an expedited procedure whereby arbitration agreements and arbitral awards may be enforced in court on a motion, without the need to initiate a separate cause of action for breach of the arbitration agreement.<sup>240</sup> Third, because the Court has interpreted the FAA as preempting any state legislation that “singl[es] out arbitration provisions for suspect status,”<sup>241</sup> the statute effectively immunizes arbitration agreements from the contract defense of public policy—a defense that may be invoked to deny enforcement of most (if not all) other

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Rep. 1135) (internal quotation marks omitted)); Aragaki, *supra* note 16, at 1250–55; see also Comm. on Commerce, Trade & Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A. J. 153, 155 (1925) [hereinafter A.B.A. Comm.].

236. See *Hearings*, *supra* note 136 (brief of Julius Henry Cohen); *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 8–9, 14 (1923) (statement of W.H.H. Piatt, Chairman, A.B.A. Comm. on Commerce, Trade & Commercial Law) (describing one of the benefits of the FAA as “reduc[ing] . . . litigation,” but nowhere mentioning the goal of treating arbitration agreements the same as other agreements); S. REP. NO. 68-536, at 3 (1924) (describing FAA section 2’s purpose in terms of enforcing arbitration agreements like any contract, but acknowledging the fundamental business interest driving this purpose as a “desire to avoid the delay and expense of litigation”); 66 CONG. REC. 984 (1924) (describing the underlying reason for making arbitration agreements as enforceable as other contracts in terms of advancing “business interests [in avoiding] . . . so much delay attending the trial of lawsuits in courts”).

237. See, e.g., *Sternlight*, *supra* note 159, at 647; *van Wezel Stone*, *supra* note 230, at 969–1014.

238. See Aragaki, *supra* note 16, at 1250–55.

239. See 9 U.S.C. § 4 (2006); see also RESTATEMENT (SECOND) OF CONTRACTS § 359 (1981) (noting that specific performance is available only where remedies at law are inadequate); 25 WILLISTON & LORD, *supra* note 179, § 67:1 (4th ed. 2002).

240. See 9 U.S.C. § 4 (setting forth streamlined procedure for specific enforcement of arbitration agreements); *id.* § 9 (setting forth streamlined procedure for enforcement of arbitral awards); *id.* § 16 (denying interlocutory appeal of orders to compel arbitration while granting the same for refusals to compel arbitration). These provisions would help give arbitral awards “the same force and effect . . . as judgments in an action.” A.B.A. Comm., *supra* note 235, at 154.

241. *Doctor’s Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996).

agreements.<sup>242</sup> Finally, a fundamental tenet of domestic and international arbitration law—the so-called separability doctrine—applies to arbitration agreements alone.<sup>243</sup> Far from securing equal footing among contracts, these features of the FAA unabashedly favor arbitration agreements.<sup>244</sup>

The special solicitude that the FAA expresses toward agreements to arbitrate is, however, consistent with “rais[ing] arbitration to the status and dignity of judicial process.”<sup>245</sup> According to the FAA’s leading proponent, Julius Henry Cohen, the pre-FAA legal climate had strongly “support[ed] the jurisdiction of courts of law” and “encourage[d] litigation.”<sup>246</sup> The FAA would therefore need to make arbitration agreements robustly enforceable—perhaps even more than other contracts—in order to reverse the law’s discriminatory treatment of arbitration and enable the arbitral process to compete on an equal footing with courtroom adjudication.<sup>247</sup>

In the modern era, the Court’s antidiscrimination reading of the FAA has increasingly helped arbitration evolve into something of a “civil court of general jurisdiction.”<sup>248</sup> In the face of a broad arbitration agreement that was otherwise silent on the arbitrability of a given issue, lower courts filled gaps in ways consistent with promoting formal equality of opportunity between

242. RESTATEMENT (SECOND) OF CONTRACTS § 178; 5 WILLISTON & LORD, *supra* note 179, § 12:1 (4th ed. 2009).

243. See, e.g., 9 U.S.C. § 4; Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1010 (1996). This doctrine indulges the fiction that arbitration clauses are “separable” from the container contract, such that even when the latter has been shown to be the product of duress or fraud in the inducement, the former remains enforceable in principle. See *Preston v. Ferrer*, 552 U.S. 346, 354 (2008).

244. Many others have made this point. See, e.g., Kenneth F. Dunham, *Sailing Around Erie: The Emergence of a Federal General Common Law of Arbitration*, 6 PEPP. DISP. RESOL. L.J. 197, 210 (2006); Shell, *supra* note 9, at 456.

245. Joseph Wheless, *Arbitration as a Judicial Process of Law*, 30 W. VA. L.Q. 210, 216 (1924); see *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989) (describing the FAA’s purpose to “legitimate” arbitration and “make it more readily useful to disputants”). Similarly, the purpose of the Revised Uniform Arbitration Act has been described as encouraging the conditions under which arbitration will become a “credibl[e]” and “true” alternative to litigation. See REV. UNIF. ARBITRATION ACT, *supra* note 59, §§ 6 cmt., 23 cmt. B (2000).

246. JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 15 (1918).

247. See Joshua Ratner & Christian Turner, *Origin, Scope, and Irrevocability of the Manifest Disregard of the Law Doctrine: Second Circuit Views*, 24 QUINNIPIAC L. REV. 795, 798 (2006). Note that privileging arbitration agreements relative to other agreements does not necessarily imply a violation of formal equality of opportunity between arbitration and litigation. Moreover, in the equal protection context, Michel Rosenfeld has argued that affirmative action programs designed to compensate for the accreted effects of past discrimination are not necessarily inconsistent with formal equality of opportunity. See Michel Rosenfeld, *Decoding Richmond: Affirmative Action and the Elusive Meaning of Constitutional Equality*, 87 MICH. L. REV. 1729, 1779, 1785, 1790 (1989).

248. *Stipanowich*, *supra* note 7, at 8; see also *Reynolds v. Credit Solutions, Inc.*, 541 F. Supp. 2d 1248, 1259–60 (N.D. Ala. 2008), *vacated by Picard v. Credit Solutions, Inc.*, 564 F.3d 1249 (11th Cir. 2009); Hayford, *supra* note 68, at 69; Schwartz, *supra* note 96, at 547–48.

arbitration and litigation.<sup>249</sup> Thus, if arbitrators were once entitled to hear only contract actions, now they could resolve “any dispute that would otherwise be settled in a court.”<sup>250</sup> If judges were entitled to award certain forms of relief such as punitive damages, so, too, should arbitrators.<sup>251</sup> Arbitration, in short, would claim its place as litigation’s rightful “private sector competitor.”<sup>252</sup>

The theme of equal opportunity between arbitration and litigation has even managed to permeate the preemption area in one important respect. After *Southland*’s teaching that the FAA is not a procedural statute applicable only in federal court but rather a substantive law enacted pursuant to Congress’s Commerce Clause power, the preemptive message of the FAA was that states could no longer require a judicial forum when federal law allowed the parties to contract for judicial alternatives.<sup>253</sup> In other words, from a federalism perspective, the trouble with the states was that they were pro-litigation while the federal government was proarbitration, not that they privileged other contracts at the expense of arbitration agreements.<sup>254</sup> Even

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249. One possible exception here is that most lower courts refused to order consolidation in cases where the arbitral agreement was silent on the issue. See, e.g., *Champ v. Siegel Trading Co.*, 55 F.3d 269, 274–75 (7th Cir. 1995); *Gov’t of the U.K. v. Boeing Co.*, 998 F.2d 68, 74 (2d Cir. 1993); *Weyerhaeuser Co. v. W. Seas Shipping Co.*, 743 F.2d 635, 637 (9th Cir. 1984). But see *New Eng. Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 5 (1st Cir. 1988). The Court recently endorsed this approach, reasoning that class arbitration “changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010); see also *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1751 (2011) (describing the ways in which class arbitration is inconsistent with the type of arbitration envisioned by the FAA).

250. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61 n.7 (1995); see also 2 MACNEIL ET AL., *supra* note 25, § 20.2.2.1, at 20:17. The later nonarbitrability cases extended this rule by empowering arbitrators to hear tort claims of a public character, such as employment discrimination claims under Title VII. See *Aragaki*, *supra* note 16, at 1258–60; see also *supra* notes 218–221 and accompanying text.

251. See *Mastrobuono*, 514 U.S. at 61 n.7 (quoting *Raytheon Co. v. Automated Bus. Sys., Inc.*, 882 F.2d 6, 10 (1st Cir. 1989)). In a similar vein, the Consumer Due Process Protocol and the Revised Uniform Arbitration Act both specifically recognize the power of arbitrators to award punitive damages if the same were available in a civil action. See REV. UNIF. ARBITRATION ACT, *supra* note 59, § 21(a) & cmt. 1 (2000); Nat’l Consumer Disputes Advisory Comm., *Consumer Due Process Protocol*, princ. 14 & cmt., available at <http://www.adr.org/sp.asp?id=22019>.

252. Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government’s Role in Punishment and Federal Preemption of State Law*, 63 *FORDHAM L. REV.* 529, 571 (1994). See generally *Stipanowich*, *supra* note 61.

253. See *Preston v. Ferrer*, 552 U.S. 346, 346 (2008); *Perry v. Thomas*, 482 U.S. 483, 489 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

254. The California Court of Appeal put this point best when it observed that “[t]he common chord in [FAA preemption cases] is that state laws treating arbitration as a disfavored *method of resolving disputes* are preempted,” even though the preemption test has traditionally been expressed in terms of preventing arbitration agreements from being disfavored relative to other contracts. *Mitchell v. Am. Fair Credit Ass’n*, 122 Cal. Rptr. 2d 193, 201 (Ct. App. 2002) (emphasis added); see also *Fosler v. Midwest Care Ctr. II, Inc.*, 911 N.E.2d 1003, 1012 (Ill. App. Ct. 2009) (holding that any

arbitration federalists who criticize the so-called “national policy favoring arbitration” do so more because they oppose federal intrusion on the states’ prerogative to “allocat[e] . . . power between alternative tribunals” than because they oppose federal interference with the states’ regulation of contracts.<sup>255</sup>

My claim that the FAA’s purpose, function, or both is to provide equal opportunity for arbitration rather than arbitration agreements does not require settling the age-old (and unhelpful) question of whether arbitration is more of a process or a contract.<sup>256</sup> For it is inescapably and equally both. The point is simply that insofar as the Paradigm can be understood as an antidiscrimination principle, it is a principle that insists on equal opportunity between arbitration and litigation, not arbitration and other contracts.

To be sure, enforcing arbitration agreements with the same enthusiasm as other contracts is certainly an important step toward leveling the dispute resolution playing field. If arbitration agreements continued to be saddled with legal restrictions such as the ancient ouster and revocability doctrines—doctrines that did not burden contracts generally—the arbitral process could scarcely aspire to compete on comparable terms with litigation.<sup>257</sup> But that is not to say that the FAA’s mission begins and ends with making arbitration agreements literally “as enforceable as other contracts, but not more so.”<sup>258</sup>

Nor does equal opportunity for arbitration imply a license to encumber arbitration with all the trappings of litigation, such as full-blown discovery, a jury of one’s peers, published opinions, and so forth.<sup>259</sup> I agree wholeheartedly

“pro-judicial forum” state legislation is necessarily “anti-arbitration” and therefore preempted by the FAA); Harding, *supra* note 141, at 476 (arguing that the states’ power to regulate arbitration agreements “implicates the ultimate question of whether arbitration is an appropriate method of dispute resolution”). In a similar vein, Stephen Ware describes the Alabama courts’ historical resistance to federal arbitration policy in terms of a provincial preference for courtroom adjudication over the more modern “outsider” justice represented by arbitration. See Stephen J. Ware, *The Alabama Story*, 7 DISP. RESOL. MAG. 24, 27 (2001).

255. See Schwartz, *supra* note 96, at 547–48 (quoting *Mastrobuono*, 514 U.S. at 60).

256. See, e.g., Joshua P. Davis, *Arbitration: Trial by Other Means or Settlement by Other Means?* 38 U.S.F. L. REV. 7, 12 (2003). See generally Nathan Isaacs, *Two Views of Commercial Arbitration*, 40 HARV. L. REV. 929 (1927) (arguing that there are two distinct “philosophies” of arbitration—arbitration as “a mode of trial or a substitute that is not a trial”).

257. See MACNEIL, *supra* note 136, at 20 (describing *arbitration’s* chief institutional “weakness” in terms of “the relative lack of enforceability of [arbitral] agreements” (emphasis added)); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974).

258. *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

259. This issue produced considerable confusion in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which was decided as this Article went to press. There, AT&T Mobility erroneously argued that if the FAA’s purpose were to place arbitration on an equal footing with litigation, nothing would stop the states from passing legislation requiring arbitration proceedings to follow the federal rules of civil procedure, to use juries, and so forth. See Brief for Petitioner, *supra* note 81, at 21, 28–31, 49–52; Petition for Writ of Certiorari at 30, 32, *Concepcion*, 131 S. Ct. 1740 (No. 09-893). The

with Carbonneau that “[j]udicial and arbitral proceedings are two very different forms of achieving justice” and that “[i]t is simply nonsense to equate them” in the sense of expecting one to operate like (or even to produce the same results as) the other.<sup>260</sup> Those differences are precisely what many argue to be arbitration’s chief virtues.<sup>261</sup> But the Paradigm’s equal opportunity logic does not seek to conform arbitration to litigation any more than the audition screen seeks to erase what makes men different from women.

The operative distinction here is between equality at the level of opportunities and equality at the level of results. As we saw earlier, equal opportunity does not require all persons or things to be treated exactly the same in all ways.<sup>262</sup> Title VII, for example, prohibits discrimination on the basis of religion but also requires employers to “reasonably accommodate” religious differences.<sup>263</sup> In certain circumstances, Title IX of the Educational Amendments of 1972<sup>264</sup> and the Equal Protection Clause not only permit, but may also require, government-funded educational institutions to offer athletic teams segregated by gender.<sup>265</sup> The point of a formal equal opportunity–based antidiscrimination regime is not to erase all “[i]nherent differences,” for some may be “cause for celebration.”<sup>266</sup> Rather, it is to ensure that those differences are not used to “create or perpetuate the legal, social, and economic inferiority” of certain persons or things.<sup>267</sup> The challenge is therefore to determine how

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Court appears to have endorsed this argument by holding that if states could require the availability of class arbitration, they would also be entitled to require arbitration using the Federal Rules of Evidence or judicially monitored discovery. See *Concepcion*, 131 S. Ct. at 1747–48. It is still too early to draw any definitive conclusions about the meaning of this holding, however. The holding is arguably consistent with the antidiscrimination model I develop because it recognizes that things that are differently situated do not need to be treated the same. Cf. *supra* note 173 and accompanying text. It is inconsistent only insofar as the Court considers arbitration and litigation to be differently situated in relation to the class mechanism. But see *infra* Part V.A. Thus, the Court does not necessarily reject the Paradigm’s formal equal opportunity logic because the question of what counts as similarly or differently situated is not one that can be answered by a theory of antidiscrimination alone. The answer requires input from substantive norms. See *supra* note 174.

260. Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231, 265 (1990); accord *Harding*, *supra* note 141, at 446 & n.319.

261. See, e.g., 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1471 (2009); *Mitsubishi*, 473 U.S. at 628.

262. See *supra* notes 119–122 and accompanying text.

263. See *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 614 (9th Cir. 1988); accord 42 U.S.C. § 2000e-2(j) (2006).

264. 20 U.S.C. § 1681 (2009).

265. See, e.g., *Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131–32 (9th Cir. 1982); *O’Connor v. Bd. of Educ.*, 645 F.2d 578, 582 (7th Cir. 1981).

266. *United States v. Virginia*, 518 U.S. 515, 533 (1996); see also *TRIBE*, *supra* note 173, § 16-1, at 1437 (arguing that the “right to equal treatment” guaranteed by the Equal Protection Clause is not a “universal demand for sameness” (emphasis omitted)).

267. *Virginia*, 518 U.S. at 534.

people who find themselves unlike one another in a multitude of ways—and, moreover, who are entitled to unequal outcomes based on those differences—can still be treated in ways that are considered equal.<sup>268</sup>

Similarly, the basic antidiscrimination message of the Court's nonarbitrability jurisprudence is that arbitration and litigation are similarly situated in their capacity to resolve adequately the vast majority of civil disputes.<sup>269</sup> But arbitration and litigation are generally *not* similarly situated in terms of the availability of juries, published opinions, or extensive discovery. For these are the very "evils" of litigation that the FAA was designed to help merchants avoid.<sup>270</sup> Imposing them on arbitration would treat similarly two dispute resolution processes that are differently situated with respect to those "evils." This is no less an instance of discrimination.<sup>271</sup>

A final objection here is that the Court's recent decision in *Preston v. Ferrer*<sup>272</sup> "forecloses" interpreting the Paradigm so as to require arbitration to be placed on the same footing as litigation (rather than all contracts).<sup>273</sup> The Type 3 law in *Preston* vested exclusive jurisdiction in an administrative tribunal to decide disputes involving talent agents and their clients—even those disputes the parties had agreed to arbitrate.<sup>274</sup> Because the law thereby withheld jurisdiction equally from both arbitration *and* courts of law, but the Court nonetheless held the law preempted by FAA section 2, it has been argued that

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268. See John H. Schaar, *Some Ways of Thinking About Equality*, 26 J. POL. 867, 867–69 (1964).

269. See Aragaki, *supra* note 16, at 1260; *supra* notes 218–232 and accompanying text. This does not necessarily mean they will process disputes in the same way or produce the same outcomes. One forum may enjoy certain substantive or procedural advantages that the other does not, and vice versa. As I explain above, the nonarbitrability cases are based on a normative rather than an empirical claim. See *supra* notes 225–232 and accompanying text.

270. See *Hearings*, *supra* note 136, at 34–35 (identifying among such "evils": expense, procedural delay caused by motions and "other steps taken by litigants," and the jury's lack of familiarity with business realities); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 615 (1928); Wheeler, *supra* note 245, at 210–11, 225–27.

271. See *Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . ."); see also *United States v. Booker*, 543 U.S. 220, 252–53 (2005) (Breyer, J., delivering the opinion of the Court in part) (describing why different types of criminal conduct should not trigger the same punishment under U.S. Sentencing Guidelines); Appellate Body Report, UNITED STATES—IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS, ¶ 164, WT/DS58/AB/R (Oct. 12, 1998) (finding a violation of GATT art. XX's nondiscrimination principle where the U.S. required all shrimp exporting countries to adopt "essentially the same" measures for the protection of sea turtles "without taking into consideration different conditions which may" prevail in those countries).

272. 522 U.S. 346 (2008).

273. See Petition for Writ of Certiorari, *supra* note 259, at 28–29.

274. For further background on the law at issue in *Preston*, see *supra* notes 111–115 and accompanying text.

FAA preemption cannot turn on whether arbitration and litigation are treated unequally.<sup>275</sup>

The objection hinges on drawing a sharp distinction between judicial and administrative proceedings—a distinction whose salience is questionable for at least two reasons. First, both the administrative and judicial forums in *Preston* were state sponsored. The danger that states would discriminate in favor of their own public dispute resolution processes is no less salient in the administrative than in the judicial context. Second, even though the state law gave the California Labor Commissioner exclusive jurisdiction to hear talent agent disputes, it provided a right of de novo review solely to the Superior Court.<sup>276</sup> The administrative forum in *Preston* was therefore intimately linked to the judicial system—so much so that the Court explicitly “disapprove[d] the distinction between judicial and administrative proceedings.”<sup>277</sup> Instead, it held that “state laws lodging primary jurisdiction in another forum, *whether judicial or administrative*,” are preempted by the FAA.<sup>278</sup> Consistent with *Preston*, therefore, I employ the term “litigation” broadly to denote both types of forum.<sup>279</sup>

### C. The Detour From Process to Contract

Over time, the Court came to conflate arbitration as process with arbitration as contract by investing undue importance in the following critical passage from a House Report issued during congressional debates over the FAA:

Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. He can no longer refuse to perform his contract when it becomes disadvantageous to him. *An arbitration agreement is placed upon the same footing as other contracts, where it belongs.*<sup>280</sup>

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275. See Petition for Writ of Certiorari, *supra* note 259, at 28–29.

276. See *Preston*, 522 U.S. at 355, 357 n.6.

277. *Id.* at 359.

278. *Id.* at 346 (emphasis added).

279. This is also consistent with lower court precedents. See, e.g., *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1120 n.4 (1st Cir. 1989); *Gutierrez v. Autowest, Inc.*, 7 Cal. Rptr. 3d 267, 274 n.6 (Ct. App. 2003).

280. H.R. REP. NO. 68-96, at 1 (1924) (emphasis added). This is the sole reference in both the House Report and the accompanying Senate Report to putting arbitration agreements on a par with other *contracts*. Cf. S. REP. NO. 68-536, at 3 (1924). Instead, the bulk of these reports discusses the importance of making arbitration agreements enforceable so that merchants would be able to avoid the inefficiencies of litigation. See H.R. REP. NO. 68-96, at 1–2; S. REP. NO. 68-536, at 2.

The first misstep occurred in 1974, in the seminal nonarbitrability case of *Scherk v. Alberto-Culver Co.*<sup>281</sup> There, the Court mistook the last sentence of the quoted passage as a statement of the FAA's overarching purpose rather than as something of an afterthought—that is, rather than as a mere consequence of the FAA's more important objective of providing a viable alternative to litigation. It accordingly declared that the FAA was (1) not just “designed to allow parties to avoid ‘the costliness and delays of litigation,’” but also (2) intended “to place arbitration agreements ‘upon the same footing as other contracts.’”<sup>282</sup>

Later nonarbitrability cases helped to congeal the error.<sup>283</sup> By the time the Court decided *Dean Witter Reynolds, Inc. v. Byrd*<sup>284</sup> some ten years later, it elided the first purpose identified in *Scherk* and described the FAA's mission solely in terms of (1) putting arbitration on a par with other contracts and (2) “enforc[ing] agreements into which parties had entered.”<sup>285</sup> In *Shearson/American Express, Inc. v. McMahon*,<sup>286</sup> the Court assembled these purposes into a means–end relationship: The FAA makes arbitration agreements “valid, irrevocable, and enforceable” *in order* to place them on the same rung as other contracts.<sup>287</sup>

281. 417 U.S. 506 (1974). Significantly, none of the Court's nonarbitrability cases prior to *Scherk* describes the purpose of the FAA in terms of placing arbitration agreements on the same footing as other contracts. Many of those cases either failed to consider the FAA's purpose or did so in the rather different context of determining whether the FAA was a substantive statute applicable in state courts—an issue for which the FAA's antidiscrimination rationale is not important. See, e.g., *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974); *U.S. Bulk Carriers, Inc. v. Arguelles*, 400 U.S. 351 (1971); *Prima Paint v. Flood & Conklin Mfg. Co.*, 338 U.S. 395, 404 n.12 (1967); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). The earliest of these cases describes the FAA's purpose as furthering “the need for avoiding the delay and expense of litigation” and does not mention the “equal footing” rule at all. See *Wilko v. Swan*, 346 U.S. 427, 431 (1953).

The first suggestion from the pages of the U.S. Reporter to the effect that the FAA's *raison d'être* was to make arbitration agreements equal with other agreements appears to have been Justice Black's dissent in *Prima Paint*: “The avowed purpose of the [Federal Arbitration] Act was to place arbitration agreements ‘upon the same footing as other contracts.’” *Prima Paint*, 338 U.S. at 423 (Black, J., dissenting) (quoting H.R. REP. NO. 68-96).

282. *Scherk*, 417 U.S. at 510–11. This error notwithstanding, the bulk of the opinion is predicated on the Court's interpretation of the FAA's purpose as mandating a kind of equal opportunity between arbitration and litigation. For instance, the Court observed that the FAA “reflect[ed] a legislative recognition of the ‘desirability of arbitration as an alternative to the complications of litigation.’” *Id.* at 511. And it famously held that arbitration clauses were little more than a “specialized kind of forum-selection clause,” *id.* at 519, and that denying enforcement of the arbitration clause would “reflect a ‘parochial concept that all disputes must be resolved under our laws and in our courts,’” *id.* (quoting *Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972)).

283. This is ironic, for, despite what they say about the FAA's purpose, the underlying rationale of these nonarbitrability cases is unavoidably dependent on comparing arbitration with litigation rather than arbitration contracts with other contracts. See *supra* notes 199–232 and accompanying text.

284. 470 U.S. 213 (1985).

285. *Id.* at 220. This elision had in fact been completed one year earlier, in *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

286. 482 U.S. 220 (1987).

287. *Id.* at 225–26 (quoting 9 U.S.C. § 2 (2006)).

But *McMahon* also did something far more significant: It explained this relationship as central to the FAA's antidiscrimination mandate. The FAA, we were told, "was intended to 'revers[e] centuries of judicial hostility to arbitration agreements' . . . by 'plac[ing] arbitration agreements 'upon the same footing as other contracts.'"<sup>288</sup>

It is no accident that the Paradigm's doctrinal foundations were laid in the same period as these nonarbitrability cases. In *Southland*, the Court took the unfortunate cue from *Scherk* to divine a clear congressional "intent" that states treat arbitration agreements no different from any other contract.<sup>289</sup> And just one week after *McMahon* was handed down, the Court held in *Perry v. Thomas*<sup>290</sup> that FAA preemption should turn on whether state law thwarts that basic intent.<sup>291</sup> In now famous words, the Court explained that "a state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue" or that requires arbitration agreements to be construed "in a manner different from . . . nonarbitration agreements" is preempted by the FAA.<sup>292</sup> By contrast, state law that "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally" is not preempted.<sup>293</sup> In *Doctor's Associates, Inc. v. Casarotto*,<sup>294</sup> these propositions would eventually crystallize into the single out/general test.

Fusing the FAA's antidiscrimination mandate with the goal of treating arbitration agreements equally with other agreements proved so intuitively irresistible that it eventually stuck. Even those (like me) who interpret the Paradigm as an antidiscrimination principle have sometimes been led to misapprehend exactly how and why this is so. Joshua Ratner and Christian Turner, for example, suggest that the FAA "is perhaps best understood as an antidiscrimination statute, as its primary goal was to place arbitration agreements on the same footing as other contractual provisions."<sup>295</sup> Jack Wilson argues that "the FAA's 'equal protection' component" requires states not to violate the rule that arbitration agreements should be placed "upon the same footing as other contracts."<sup>296</sup> And Henry Paul Monaghan interprets the FAA as "a kind of

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288. *Id.* (emphasis added) (quoting *Scherk*, 417 U.S. 506, 510 (1974); H.R. REP. NO. 68-96 (1924)).

289. *Southland*, 465 U.S. at 16 n.11.

290. 482 U.S. 483 (1987).

291. *See id.* at 492 n.9.

292. *Id.*

293. *Id.*

294. 517 U.S. 681 (1996).

295. Ratner & Turner, *supra* note 247, at 797–98.

296. Wilson, *supra* note 141, at 793, 795 (internal quotation marks omitted).

equal protection clause” that bids courts “to place arbitration agreements on equal footing with other contracts.”<sup>297</sup>

To be sure, other courts and commentators appear to understand that the relevant comparison is between arbitration and litigation. But they, too, dutifully invoke the Paradigm’s credo of equality with all other contracts. For example, the Ninth Circuit recently held that California’s *Discover Bank* standard for determining whether consumer class action or class arbitration waivers are unconscionable<sup>298</sup> was not preempted by the FAA because it merely “places arbitration agreements on equal footing with all other contracts.”<sup>299</sup> But the court failed to explain how an unconscionability rule that only applies to certain collective action waivers in consumer contracts could possibly place arbitration agreements on the same footing as all other contracts. What really motivated the court’s holding was the quite sensible observation that the *Discover Bank* rule promotes “‘equal footing’ between arbitration and other forms of dispute resolution.”<sup>300</sup>

Writing for the Seventh Circuit, Judge Frank Easterbrook likewise reasoned that a general contract defense such as unconscionability might be preempted by the FAA if it were applied in a way that discriminated against the arbitral process. The “cry of ‘unconscionable,’” he explained, may not be used to “disparage[ ] . . . [arbitration] as second-class adjudication.”<sup>301</sup> Nonetheless, in the same breath Easterbrook invoked the Paradigm’s misleading mantra: “It is precisely to still such cries that the Federal Arbitration Act equates arbitration with other contractual terms.”<sup>302</sup>

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297. Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1955 & n.171 (2003) (quoting *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002)) (internal quotation marks omitted). For other examples, see Aragaki, *supra* note 16, at 1265–66; *supra* note 25.

298. See *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005); see also *infra* note 326 and accompanying text.

299. *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213, 1222 (9th Cir. 2008) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)) (internal quotation marks omitted).

300. *Id.*; see also *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 990 (9th Cir. 2007) (holding that the *Discover Bank* rule was not preempted by the FAA because it placed “on the exact same footing” class action waivers in arbitration and in litigation, not class action waivers and all other agreements); *Mitchell v. Am. Fair Credit Ass’n*, 122 Cal. Rptr. 2d 193, 201 (Ct. App. 2002).

301. *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004).

302. *Id.* (emphasis added). Courts other than the Seventh and Ninth Circuits have also refused to preempt similar consumer collective action unconscionability rules on the quite sensible ground that such rules do not treat arbitration any differently from the way they treat litigation. Nonetheless, those courts continue to describe this in terms of placing arbitration agreements on the same footing as other agreements. See, e.g., *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 134 (2d Cir. 2010); *Homa v. Am. Express Co.*, 558 F.3d 225, 230 (3d Cir. 2009); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004). For further discussion of these cases, see Brief for Arbitration Professors as Amici Curiae Supporting Respondent, *supra* note 81, at 14–18.

Ian Macneil betrayed a similar confusion in his consideration of a Florida law requiring that sixty percent of any punitive damages award obtained in “any civil action . . . based on personal injury or wrongful death” be paid directly to the state, not the plaintiff.<sup>303</sup> Assuming that the term “civil action” includes arbitral proceedings, Macneil argued unconvincingly that the law should not be preempted by the FAA because it is “part of the state’s general [contract] law.”<sup>304</sup> But this cannot be correct, for the law has nothing to do with contracts at all.<sup>305</sup> As Macneil himself let slip, the real reason behind this conclusion is that the law “treats arbitration outcomes” equally with “litigation outcomes.”<sup>306</sup>

So, too, Stephen Ware has argued that if clauses waiving punitive damages in court are generally not unconscionable, similar waivers in arbitration may not be held unconscionable without raising FAA preemption concerns.<sup>307</sup> In other words, Ware believes that the FAA requires *arbitration and litigation* to be treated equally when it comes to punitive damage waivers. Nonetheless, the Paradigm’s rudimentary vocabulary forces him to articulate this in terms of “placing arbitration agreements upon the same footing as other contracts,”<sup>308</sup> even though an unconscionability standard that only applies to punitive damage waiver clauses hardly satisfies the Paradigm’s “all contracts” requirement.

In these and other examples involving Type 3 laws that test the Paradigm’s limits, judges and commentators reveal a consistent (if inchoate) understanding of the Paradigm as ensuring “equal footing” between arbitration and litigation, even though, following the Court’s lead, they have continued to describe this in terms of “plac[ing] arbitration agreements on equal footing with all other contracts.”<sup>309</sup>

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303. See *Miele v. Prudential Bache Sec.*, 986 F.2d 459, 460 (11th Cir. 1993) (quoting FLA. STAT. ANN. § 768.73(2) (West Supp. 1991), *repealed by* 1997 Fla. Laws, ch. 97–94, § 16).

304. I MACNEIL ET AL., *supra* note 25, § 10.8.2, at 10:83.

305. The law was entitled “Punitive damages, limitation” and formed part of Florida’s “Tort Reform and Insurance Act.” See FLA. STAT. ANN. § 768.73, *repealed by* 1997 Fla. Laws, ch. 97–94, § 16.

306. I MACNEIL ET AL., *supra* note 25, § 10.8.2, at 10:83; see also *id.* § 10.7.2, at 10:52 (arguing that a law is “general” for purposes of the single out/general test if it “applie[s] equally to judicial and arbitral proceedings”).

307. See Ware, *supra* note 243, at 1026.

308. *Id.*; see also Jane VanLare, Comment, *From Protection to Favoritism? The Federal Policy Toward Arbitration Vis-à-Vis Competing State Policies*, 11 HARV. NEGOT. L. REV. 473, 490–91 (2006) (describing the FAA’s purpose on the one hand as “mak[ing] arbitration agreements equal in strength to other contractual provisions” and on the other as placing “arbitration on an equal footing with litigation”).

309. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

## V. EQUAL OPPORTUNITY FOR ARBITRATION

In this Part, I synthesize the insights from Parts III and IV and apply them to examples of Type 3 laws whose preemption (or lack thereof) by the FAA has been the subject of recent controversy. In order to set the stage for this analysis, I briefly sketch what I propose as a doctrinal test for Type 3 preemption.<sup>310</sup>

The first line of inquiry is whether arbitration and litigation are similarly situated given the purpose sought to be accomplished by the Type 3 law and whether the law treats them similarly for that purpose. If arbitration and litigation are similarly situated and treated similarly, there is no cognizable discrimination and thus, on the theory I propose, no question of FAA section 2 preemption.<sup>311</sup> Because many Type 3 laws regulate both litigation and arbitration, this step will likely be dispositive of a wide range of Type 3 preemption cases.

If arbitration and litigation are similarly situated with respect to the purpose of the Type 3 law but the law treats them differently, the second question is whether the differential treatment is purposeful.<sup>312</sup> Antidiscrimination law formulates this in terms of whether discrimination against a protected group was “a motivating factor” behind the law,<sup>313</sup> in the sense that the law was designed at least in part “because of, not merely in spite of,” its impact against the group.<sup>314</sup> The party claiming discrimination typically raises an inference of

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310. See generally Aragaki, *supra* note 16.

311. This, at least, has been the law in the equal protection context. See *Michael M. v. Superior Court*, 450 U.S. 464, 478 (1981) (Stewart, J., concurring). If there is no equal protection violation for these reasons, there is no need to ask the next question, which is whether the discrimination can be justified. See, e.g., *Hunter ex rel. Brandt v. Regents of the Univ. of Cal.*, 971 F. Supp. 1316, 1321–22 (C.D. Cal. 1997); *Wright v. Iowa Dep’t of Corr.*, 747 N.W.2d 213, 216 (Iowa 2008).

312. See, e.g., *Engquist v. Or. Dep’t of Agric.*, 553 U.S. 591, 601–03 (2008).

313. This is the standard that prevails in “mixed motive” cases. There, equal protection jurisprudence has required only that the discriminatory purpose be one of several “motivating factor[s].” *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265–66 (1977). Thus, if it can be proven that the law would have been passed even if the protected characteristic had not been considered, that characteristic could not have been a “motivating factor.” The rule is similar in the Title VII context, except that a defendant who establishes this so-called “same decision” defense is still deemed to have violated the statute. The difference is that the plaintiff’s remedies will be limited to declaratory and injunctive relief, attorneys’ fees, and costs. See 42 U.S.C. §§ 2000e-2(m), e-5(g)(2)(B) (2006).

314. See *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (internal quotation marks omitted); accord 42 U.S.C. § 2000e-2(a)(1), (2) (prohibiting discrimination in employment “because of” race, color, religion, sex, or national origin). It is generally not sufficient for this purpose that legislators knew or could have foreseen that a protected group would be adversely affected. See, e.g., *Frazier v. Garrison*, 980 F.2d 1514, 1526–27 (5th Cir. 1993). Nor is it generally considered necessary for the discriminatory motive to have been a “substantial factor” in the law’s passage. See, e.g., Civil Rights Act of 1991, Pub. L. No. 102-166, § 107(a), 105 Stat. 1071, 1075 (overturning the “substantial factor” test articulated in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271–88 (1989)).

purposeful discrimination by pointing to the totality of the relevant facts.<sup>315</sup> The inference, in turn, may be rebutted by showing that discrimination was not “a motivating factor” in the law’s passage—in effect, that the law would have been enacted even if the characteristic in question had not been taken into account.<sup>316</sup>

Any Type 3 law that “allocat[es] . . . power between alternative tribunals”<sup>317</sup> will likely raise a strong inference that it was passed at least in part “because of, not merely in spite of,” concerns about arbitration. After all, arbitration is one of the oldest and most widely used methods of alternative dispute resolution<sup>318</sup> and the one that has traditionally been viewed as litigation’s chief “private sector competitor.”<sup>319</sup> On the other hand, if a Type 3 law bears only a tenuous relationship to dispute resolution matters, an independent inquiry into legislative intent (of the sort undertaken by the court in *Mitchell v. American Fair Credit Association*)<sup>320</sup> will be critical in order for the preemption analysis to advance to the next stage.

Even if it is established that an intention to regulate arbitration was a motivating factor behind the law, the third question is whether the law can be justified based on the strength of the state’s interest in the law and the fit between that interest and the means chosen to further it.<sup>321</sup> Only if it is not so justified should the law be preempted by the FAA.

In the following, I use this framework to illustrate an antidiscrimination approach to the preemption of laws for which arbitration and litigation are (1) similarly situated and treated similarly; (2) similarly situated but treated differently; and (3) differently situated and treated differently.

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315. *Arlington Heights*, 429 U.S. at 265–68. This might include the legislative history, the sociohistorical context of the law or decision, procedural or substantive departures from the ordinary course, and any other circumstances that might “spark suspicion” that the law was motivated by a discriminatory purpose. See *id.* at 267–69.

316. See, e.g., *id.* at 270 n.21.

317. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63–64 (1995).

318. See, e.g., Robert A. Baruch Bush, *Substituting Mediation for Arbitration: The Growing Market for Evaluative Mediation, and What It Means for the ADR Field*, 3 PEPP. DISP. RESOL. L.J. 111, 118–21 (2002).

319. *Ware*, *supra* note 252, at 571; see *Aragaki*, *supra* note 16, at 1251–53.

320. 122 Cal. Rptr. 2d 193, 202–03 (Ct. App. 2002); see *supra* notes 147–152 and accompanying text.

321. This is the same analysis I proposed in *Arbitration’s Suspect Status* for Type 1 laws that single out arbitration. See *Aragaki*, *supra* note 16, at 1283–85. It is also the same thought process followed in the antidiscrimination area more generally. See *R.I. Minority Caucus, Inc. v. Baronian*, 590 F.2d 372, 376 (1st Cir. 1979) (holding that upon un rebutted proof of discriminatory intent, the defendant still has the opportunity to show that the classification satisfies the requirements of heightened scrutiny); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1037 & n.70 (1979).

### A. Similarly Situated and Treated Similarly: Forum Selection Clauses and Class Action Waivers

As we have already seen, many Type 3 statutes prohibit the use of clauses that require the nondrafting party to resolve disputes in an out-of-state forum.<sup>322</sup> To date, only a fraction of such statutes have been challenged on FAA preemption grounds. But when they are, the Paradigm ensures those challenges near certain success. For Type 3 anti-forum selection statutes are almost universally perceived as hostile to arbitration because they apply only to one type of provision (a forum selection clause) in only one class of contract (for example, franchise agreements).<sup>323</sup>

Likewise, some states have passed laws regulating collective action waivers (whether in arbitration or litigation) in discrete problem areas, such as consumer contracts.<sup>324</sup> Such legislative efforts are typically preempted by the Paradigm because, like anti-forum selection laws, they do not apply to all contracts.<sup>325</sup> The same argument has been made against state unconscionability standards specific to collective action waivers. California's *Discover Bank* standard, for instance, deems collective action waivers unconscionable if they are:

found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and 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.<sup>326</sup>

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322. See *supra* notes 83–87 and accompanying text.

323. See, e.g., *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890 (9th Cir. 2001); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 51–52 (1st Cir. 1999).

324. For examples of such statutes, see CONN. GEN. STAT. ANN. § 36-746c(6) (West 2010); ME. REV. STAT. ANN. tit. 9-A, § 10-310(2)(E)(7) (West 2010); MINN. STAT. ANN. § 47.601 subd. 2(a)(3) (2011); N.M. STAT. ANN. §§ 44-7A-1(b)(4)(f), 44-7A-5 (West 2010).

325. See *Ting v. AT&T*, 319 F.3d 1126, 1148 (9th Cir. 2003); see also *Carideo v. Dell, Inc.*, 492 F. Supp. 2d 1283, 1288 (W.D. Wash. 2007) (dictum), *vacated*, No. C06-1772JLR, 2009 WL 3485933 (W.D. Wash. Oct. 29, 2009); *Pyburn v. Bill Heard Chevrolet*, 63 S.W.3d 351, 365 (Tenn. Ct. App. 2001) (dictum); Alan S. Kaplinsky, *Scorecard on Where Federal and State Appellate Courts and Statutes Stand on Enforcing Class Action Waivers in Pre-Dispute Consumer Arbitration Agreements*, 1789 PLI/Corp 559, 591–92 (2010) (opining that Type 3 anti-class action waiver laws recently passed in New Mexico and Oklahoma would be preempted by the FAA). *But see* *Feeney v. Dell, Inc.*, 908 N.E.2d 753, 768–69 (Mass. 2009); *Wis. Auto Title Loans, Inc. v. Jones*, 714 N.W.2d 155, 177–78 (Wis. 2006) (following the minority view on Type 3 preemption).

326. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005). Unlike state statutory efforts to regulate collective action waivers, state court precedents holding class action waivers unconscionable have generally been held to survive preemption by the FAA. Moreover, they do so using the basic antidiscrimination rationale I offer in this Article. See *supra* notes 298–302.

In *AT&T Mobility LLC v. Concepcion*,<sup>327</sup> which was decided as this Article went to press, the petitioner's side argued that this common law unconscionability rule—which nowhere mentions arbitration—should be preempted because it does not “apply universally to ‘any’ and every contract.”<sup>328</sup>

Unlike the Paradigm, the antidiscrimination model would save these laws from preemption for the simple reason that they place arbitration and litigation on the same footing.<sup>329</sup> Arbitration and litigation are similarly situated with respect to the general purpose behind these laws, which is to protect weaker parties from unfair hardship and to prevent stronger parties from insulating themselves from liability for wrongful conduct.<sup>330</sup> It makes sense, therefore, that the law should treat them similarly in order to achieve this purpose. Doing so presents little danger that the law unthinkingly reenacts the “ancient judicial hostility” toward arbitration.<sup>331</sup> Because arbitration and litigation are similarly situated and treated similarly, there is no unequal treatment and so no need to inquire into the intention behind any such treatment.<sup>332</sup>

One consequence of the Paradigm's approach to these laws is that states will continue to regulate oppressive provisions in contracts that contemplate litigation for the resolution of disputes, FAA section 2 preemption notwithstanding. But where the contract drafter has been clever enough to insert an arbitration clause, the FAA will step in to displace the state regulation.<sup>333</sup> The same

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327. 131 S. Ct. 1740 (2011).

328. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner, *supra* note 81, at 25 (emphasis added); *accord* Brief for Petitioner, *supra* note 81, at 17, 40. *But see infra* note 329.

329. This has been the dominant rationale followed in the unconscionability context. There, courts and commentators have typically concluded that, as long as the law deems class action waivers and forum selection clauses equally unconscionable (or not) in the arbitration and litigation contexts, there is no FAA preemption problem even though the law at issue applies only to a finite set of contracts. *See supra* notes 298–302 and accompanying text; *see also* F. Paul Bland, Jr. & Claire Prestel, *Challenging Class Action Bans in Mandatory Arbitration Clauses*, 10 CARDOZO J. CONFLICT RESOL. 369, 390–91 (2009); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 495 (2006); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 209–18 (2004).

330. *See, e.g.*, Nina Yadava, *Can You Hear Me Now? The Courts Send a Stronger Signal Regarding Arbitration Class Action Waivers in Consumer Telecommunications Contracts*, 41 COLUM. J.L. & SOC. PROBS. 547, 555 (2008); Zimmerman, *supra* note 84, at 777–78. The Court has effectively rejected this argument, however. *See Concepcion*, 131 S. Ct. at 1748 (holding that arbitration and litigation are not similarly situated with respect to their ability to process collective action claims because class arbitration “interferes with fundamental attributes of arbitration”).

331. In addition, any possible threat that such a law poses to arbitration practice would appear to be outweighed by the considerable public good that those laws accomplish.

332. *See supra* note 311 and accompanying text.

333. Thus, the *Discover Bank* standard will continue to protect consumers from class action waivers, but it will be preempted as to class arbitration waivers.

will be true of virtually any other law as to which arbitration and litigation are similarly situated and treated similarly, such as a law that gives franchisees a nonwaivable right to collect attorneys' fees in certain disputes with franchisors,<sup>334</sup> legislation that protects borrowers from waiving their right to punitive damages in lending agreements,<sup>335</sup> or a statute that voids any provision in construction-related contracts requiring in-state adherents to bring "[any] suit or arbitration proceeding" in an out-of-state forum.<sup>336</sup> These laws will achieve their intended effect with respect to agreements that anticipate litigation, but the FAA will render them nugatory as to agreements that provide for arbitration.

As a consequence, contract drafters will be able to use the FAA as an opt-out from these measures simply by including an arbitration clause.<sup>337</sup> This will only exacerbate the perception of arbitration as a forum in which the usual rules do not apply—a dubious version of litigation rigged in favor of corporate interests. It will defeat the overriding mission of all good arbitration law and policy—the FAA included—which is to enable arbitration to stand on its own two feet as a "legitimate," "credibl[e]," and "true" alternative to litigation.<sup>338</sup> What this suggests is that the FAA's formal equal opportunity mandate must be seen not only as removing the impediments that once hindered arbitration, but also as enforcing the same restrictions that are otherwise legitimately imposed on litigation in circumstances in which the two can be considered similarly situated.<sup>339</sup>

#### B. Similarly Situated but Treated Differently: Jury Trial Waivers

The majority of courts hold that the FAA preempts state laws prohibiting waivers of the right to a trial by jury.<sup>340</sup> This conclusion makes eminent sense: If states were free to outlaw such waivers, binding arbitration would

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334. See CAL. CORP. CODE §§ 31302.5, 31512 (West 2010).

335. See N.M. STAT. ANN. § 58-15-34(L)(4) (2010).

336. See LA. REV. STAT. ANN. § 9:2779 (2010).

337. Given that an arbitration clause is essentially a type of forum selection clause, this arguably encourages the same strategic forum shopping that the Court sought to prevent. See *Southland Corp. v. Keating*, 465 U.S. 1, 15 (1984).

338. *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989); REV. UNIF. ARBITRATION ACT, *supra* note 59, §§ 6 cmt., 23 cmt. B (2000).

339. Cf. *Stefano Berizzi Co. v. Krausz*, 146 N.E. 436, 437 (N.Y. 1925).

340. See, e.g., *OPE Int'l, LP v. Chet Morrison Contractors, Inc.*, 258 F.3d 443, 445 (5th Cir. 2001); *Rainbow Health Care Ctr., Inc. v. Crutcher*, No. 07-CV-194JHP, 2008 WL 268321, at \*8 (N.D. Okla. Jan. 29, 2008); *Carter v. SSC Odin Operating Co.*, 927 N.E.2d 1207, 1220 (Ill. 2010); *Patterson v. Piano Craft Guild Assocs., L.P.*, No. 01-4376, 2002 WL 31931580, at \*8 (Mass. Dec. 30, 2002); *Johnson v. Chase Manhattan Bank USA, N.A.*, No. 603101, 2004 WL 413213, at \*10 (N.Y. Sup. Ct. Feb. 27, 2004).

soon become an endangered species in the world of dispute resolution.<sup>341</sup> But consider the senselessness of the Paradigm's rationale for it: Anti-jury trial waiver laws warrant preemption because they do not apply to all contracts.<sup>342</sup>

The antidiscrimination model offers a more persuasive explanation for the same conclusion. The purpose of laws banning jury trial waivers in a given class of disputes is to ensure that such disputes are resolved in a forum that is "preferable to any other" in terms of procedural fairness and legitimacy.<sup>343</sup> But the Court's nonarbitrability cases stand for the proposition that arbitration and litigation are similarly situated in relation to that purpose.<sup>344</sup> Anti-jury trial waiver laws treat them differently by practically outlawing arbitration while making jury trials—arguably the archetypal form of litigation<sup>345</sup>—the preferred method of resolving disputes.

Given that arbitration and litigation are similarly situated but treated differently, the next step in the antidiscrimination analysis is to inquire whether their differential treatment was purposeful.<sup>346</sup> Because any law allocating power between alternative dispute resolution processes will raise a strong inference that it was enacted at least partly because of (and not merely in spite of) arbitration,<sup>347</sup> so, too, will a Type 3 law that specifically prohibits waivers of the jury trial right. Moreover, anti-jury trial waiver laws are near-perfect proxies for Type 1 laws because they ensnare practically all arbitration clauses<sup>348</sup> but little else other than agreements for bench trials.<sup>349</sup> In the equal protection context, the Court has not hesitated to strike down facially neutral laws whose "inevitable effect" was "obviously [to] discriminate" against suspect or

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341. See Drahozal, *supra* note 55, at 402; Drahozal, *supra* note 58, at 29.

342. See *supra* note 340.

343. See VA. CONST. art. I, § 11; accord N.C. CONST. art. 1, § 25 ("[T]he ancient mode of trial by jury is one of the best securities of the rights of the people . . ."); *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 12–13 (Mont. 2002); Stipanowich, *supra* note 61, at 37–39 (describing how "Americans exalt the jury system to a level unparalleled anywhere else in the world").

344. See Aragaki, *supra* note 16, at 1260; *supra* notes 218–232 and accompanying text.

345. See Samuel R. Gross & Kent D. Syverud, *Don't Try: Civil Jury Verdicts in a System Geared to Settlement*, 44 UCLA L. REV. 1, 3 (1996).

346. See *supra* text accompanying note 312.

347. See *supra* notes 317–320.

348. I say "practically all" rather than "all" in recognition of the fact that not all claims will trigger a state right to a trial by jury. See, e.g., Stephen J. Ware, *Arbitration Clauses, Jury-Waiver Clauses, and Other Contractual Waivers of Constitutional Rights*, 67 LAW & CONTEMP. PROBS. 167, 168, 169 & n.14 (2004).

349. Courts have employed this rationale to preempt Type 3 laws imposing heightened consent standards for jury trial waivers. See *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603, 615 (S.D. W. Va. 2004); see also *Am. Gen. Life & Accident Ins. Co. v. Wood*, 429 F.3d 83, 91 n.6 (4th Cir. 2005); *Schultz v. AT&T Wireless Servs., Inc.*, 376 F. Supp. 2d 685, 691 (N.D. W. Va. 2005).

quasi-suspect classes.<sup>350</sup> As David Strauss has argued, “If explicit . . . classifications are unlawful, it makes little sense to allow a government that is subtle enough to use an ostensibly neutral surrogate for [the classification] to get away with maintaining [discrimination].”<sup>351</sup> Laws banning the waiver of a jury trial, in other words, are tantamount to laws that single out arbitration.

The final step is to determine whether the intentional discrimination against arbitration is a function of improper motives or whether it can be justified by countervailing values.<sup>352</sup> The mere fact that arbitration lacks appellate review, invasive discovery, or other procedural protections afforded in litigation is not a valid justification for treating arbitration differently.<sup>353</sup> Moreover, there are many other ways to guarantee such protections short of requiring all cases to be tried before a jury. These considerations strongly suggest that the discrimination is unjustified—based on little other than the antiquated hostility to arbitration that the FAA was designed to reverse.<sup>354</sup>

In a related vein, consider the Paradigm’s treatment of Type 3 laws that require a judicial forum (with or without a jury) for the resolution of a given class of disputes. Perhaps the best known example of such a Type 3 law is the California Franchise Investment Law (CFIL) at issue in *Southland v. Keating Corp.*<sup>355</sup> The California Supreme Court interpreted the CFIL to “require judicial consideration of claims brought under [it].”<sup>356</sup> As so interpreted, the CFIL defeats all agreements to arbitrate franchise disputes yet preserves the ability of franchisees to prosecute or defend claims in court. The court held the CFIL to be preempted by the FAA because it was “not a ground that exists at law or in equity ‘for the revocation of *any* contract’ but merely a ground that exists for the revocation of arbitration provisions in contracts subject to the [CFIL].”<sup>357</sup>

The antidiscrimination model would reach the same conclusion using a more convincing rationale. First, the CFIL is problematic because it treats

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350. *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960).

351. Strauss, *supra* note 161, at 947–48.

352. See *supra* note 321 and accompanying text.

353. This is the lesson of the Court’s nonarbitrability jurisprudence. See Aragaki, *supra* note 16, at 1255–63; *supra* notes 218–232 and accompanying text.

354. See *supra* notes 42–50 and accompanying text.

355. 465 U.S. 1 (1984). The CFIL is a Type 3 law because it does not explicitly single out arbitration.

356. *Id.* at 10; see also CAL. CORP. CODE § 31512 (West 2010) (“Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void.”).

357. *Southland*, 465 U.S. at 16 n.11; accord *Preston v. Ferrer*, 552 U.S. 346, 359–60 (2008) (extending *Southland* to laws that vest sole jurisdiction in an administrative forum); *Perry v. Thomas*, 482 U.S. 483, 489 (1987).

arbitration and litigation differently even though the two are similarly situated in relation to the law's purpose to "protect[] investors."<sup>358</sup> The second step in the analysis is to determine whether the disparate treatment is purposeful. The CFIL does not just attempt to regulate the allocation of power between alternative tribunals: Its requirement of a judicial forum for a certain class of cases is tantamount to the negation of an arbitral forum for such cases. The CFIL therefore raises a strong inference of intentional discriminatory treatment.<sup>359</sup> Absent a credible countervailing justification for that treatment, therefore, the CFIL would fail the third step and would therefore be preempted for the same reason that anti-jury trial waiver laws are.

A more challenging set of questions is presented by laws that do not outlaw jury trial waivers as such but merely impose higher knowledge standards for perfecting the waiver.<sup>360</sup> According to Jean Sternlight, "most state courts" already require the waiver of state constitutional jury trial rights to be "knowing, voluntary, and intelligent."<sup>361</sup> In cases in which the agreement to arbitrate constitutes such a waiver by definition,<sup>362</sup> Sternlight argues compellingly that the mutual assent necessary to form an arbitration agreement should likewise adhere to this higher standard.<sup>363</sup>

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358. *Keating v. Superior Court*, 645 P.2d 1192, 1199 (Cal. 1982), *rev'd on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984). To be sure, there is considerable debate as to whether this is accurate as an empirical matter. See generally Peter B. Rutledge, *Common Ground in the Arbitration Debate*, 1 Y.B. ARB. & MEDIATION 1 (2009) (describing both sides of the debate); Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267 (2008). Nonetheless, the Court's nonarbitrability cases make it clear that, as a normative matter, arbitration and litigation must be considered similarly situated for this purpose. See *supra* note 344 and accompanying text.

359. This is precisely the motive that the California Supreme Court attributed to the California legislature when it interpreted the CFIL's purpose to require a judicial forum. The California high court found the "evidence [to be] persuasive that in drafting the [CFIL], California legislators looked to the Securities Act of 1933 as their model." *Keating*, 645 P.2d at 1199. Thus, in divining the intent behind the CFIL, the court relied on the U.S. Supreme Court's conclusion in *Wilko v. Swan*, 346 U.S. 427 (1953), that the 1933 Act had been designed to protect investors from the arbitral forum. Notably, *Wilko* was later overturned by the Court because it was deemed "pervaded by . . . 'the old judicial hostility to arbitration.'" *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)); see also 2 MACNEIL ET AL., *supra* note 25, § 16.2.4, at 16:33.

360. Drahozal would consider such laws "first generation" because the failure to comply with them would mean litigating, rather than arbitrating, the dispute in question. But because Drahozal considers questions of first generation preemption to be largely settled, his first/second generation distinction does not explain why there should be continued disagreement and uncertainty about the preemption of these Type 3 first generation laws. See *supra* notes 63–81 and accompanying text.

361. See Sternlight, *supra* note 99, at 25.

362. See *supra* note 348.

363. See Sternlight, *supra* note 99, at 25; Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 716–18 (2001).

But the Paradigm hardly provides Sternlight with sophisticated analytical tools to develop this argument. Under the majority view, any legislative or judicial effort to impose stricter standards of mutual assent for arbitration agreements is preempted<sup>364</sup> for the simple reason that such efforts plainly do not apply to all agreements.<sup>365</sup> This forces Sternlight to rest her case on one or both of the following unsatisfactory arguments: Extending the constitutional waiver standard to arbitration agreements should escape preemption (1) just because it does not single out arbitration;<sup>366</sup> and/or (2) because it “simply keeps arbitration on the same footing as other contracts, rather than relegating [it] to an inferior position.”<sup>367</sup> The first commits her to the Paradigm’s minority view, which is not just contrary to the great weight of precedent but also problematic for other reasons discussed above.<sup>368</sup> The second is difficult to square with the very point of higher consent standards: namely, to treat certain types of contracts differently from other contracts because they trigger special concerns about the surrender of fundamental rights.<sup>369</sup>

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By contrast, some have argued that there is no inconsistency between higher consent standards for jury trial waivers and the contractual standard of consent for arbitration clauses. See, e.g., Ware, *supra* note 348, at 205 (arguing that, if anything, jury trial waivers should be harmonized with contract law’s objective consent standard); Andrew M. Kepper, Note, *Constitutional Waiver of Seventh Amendment Rights: Using the Public Rights Doctrine to Justify a Higher Standard of Waiver for Jury-Waiver Clauses Than for Arbitration Clauses*, 91 IOWA L. REV. 1345 (2006) (arguing the point using the public rights doctrine). I set this complex set of arguments aside to engage Sternlight’s thesis more fully.

364. See, e.g., *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 n.2 (4th Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 18–19 (1st Cir. 1999); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 183–84 n.2 (3d Cir. 1998); *Woolfs v. Superior Court*, 25 Cal. Rptr. 3d 426 (Ct. App. 2005); Ware, *supra* note 348, at 205.

365. See, e.g., *Fitz v. Islands Mech. Contractor, Inc.*, No. 08-cv-00060, 2010 WL 2384585, at \*7 (D.V.I. June 9, 2010); *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 679, 685–86 (N.D. W. Va. 2010); *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277, 1285 n.4 (N.D. Ga. 2008). Sternlight herself is forced to concede that the standard does not apply to all contracts. See Sternlight, *supra* note 99, at 38.

Another common rationale for preemption is that laws restricting the ability to waive jury trial rights are tantamount to laws restricting arbitration. See *supra* note 349. Because there are countervailing reasons to impose heightened consent standards for jury trial waivers that have nothing to do with suspicion of arbitration, and because such standards do not completely outlaw arbitration, they may nonetheless be justified under the antidiscrimination model. See *supra* note 321 and accompanying text; *infra* notes 370–375 and accompanying text.

366. Sternlight, *supra* note 99, at 37–38.

367. *Id.* at 37; accord *Kortum-Managhan v. Herbergers NBGL*, 204 P.3d 693, 697 (Mont. 2010); *Moses*, *supra* note 50, at 546–47.

368. See *supra* notes 108–115 and accompanying text.

369. As Margaret Moses observes, such standards derive their meaning in part from their uniqueness. If all agreements required knowing and voluntary assent, jury trial waivers would be scarcely distinguishable from ordinary contract terms. See *Moses*, *supra* note 50, at 546.

The antidiscrimination approach may help Sternlight construct more persuasive arguments that go to the heart of why she believes that a “knowing, voluntary, and intelligent” standard for arbitration agreements is justified in certain circumstances. The first argument would be that such a standard betrays no necessary hostility or purposeful discrimination against arbitration. Sternlight’s principal concern is with harmonizing existing state constitutional jury trial waiver standards with the degree of mutual assent required to form arbitration agreements.<sup>370</sup> Sternlight herself concedes that higher consent standards should be applied to arbitration agreements only if state law already demands them for contractual jury trial waivers generally.<sup>371</sup> Such a proposal to rationalize the law does not appear to be premised on unwarranted assumptions about the inferiority of arbitration relative to litigation and, as such, is not tainted with the “familiar ring [of] . . . distrust” that pervaded the Court’s early nonarbitrability cases.<sup>372</sup>

The second argument would be that even if the law purposefully discriminates against arbitration, the discrimination may nonetheless be justified in light of the interests served by the law and the fit between those interests and

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370. See Sternlight, *supra* note 99, at 23 (arguing that the only “intellectually honest” approach is to apply heightened jury trial waiver standards to arbitration clauses or abandon them altogether); see also Ware, *supra* note 348, at 205 (agreeing that Sternlight’s goal of harmonizing the law is legitimate, but arguing that the law should be harmonized in the opposite direction—toward eliminating higher consent standards for waivers of civil constitutional rights).

371. See Sternlight, *supra* note 99, at 34.

372. THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 230 (2000). Others, like Stephen Ware, have argued that the “knowing and voluntary” standard for waivers of constitutional rights generally, and for the right to a jury trial specifically, is of much more recent provenance. See Ware, *supra* note 348, at 197–204. If this is true, it raises the possibility that courts may be imposing the standard in part “because of, not merely in spite of,” growing concerns about mandatory binding arbitration. See *supra* notes 312–316 and accompanying text. Take the Montana Supreme Court’s holding that, insofar as an arbitration agreement is tantamount to a waiver of the constitutional jury trial right, it must have been executed “voluntarily, knowingly, and intelligently.” *Kloss v. Edward D. Jones & Co.*, 54 P.3d 1, 15–17 (Mont. 2002). Although the court noted that Montana has long subscribed to “the rule that contractual waivers of constitutional rights” must be intelligent and voluntary, *id.* at 16 (emphasis added), it conspicuously failed to mention that this rule had never before been applied to jury trial waivers. Indeed, the court’s own precedents had explicitly held that access to the courts was *not* a fundamental right, and thus implicitly that agreements waiving the right to a jury trial did not warrant anything other than the objective standard of mutual assent that prevails in contract law. *Id.* at 13. In *Kloss*, the court overturned these precedents. *Id.* at 14. It is certainly possible that the overriding purpose of this holding was simply to harmonize the standards for waiver of constitutional rights with those for the waiver of the jury trial right and for the formation of arbitration agreements. But it is also possible that the decision was motivated by improper discrimination. See, e.g., Bryan L. Quick, Note, *Keystone, Inc. v. Triad Systems Corporation: Is the Montana Supreme Court Undermining the Federal Arbitration Act?*, 63 MONT. L. REV. 445, 472 (2002); cf. Bruhl, *supra* note 43, at 1459–60. See generally Carroll E. Neesemann, *Montana Court Continues Its Hostility to Mandatory Arbitration*, 58 DISP. RESOL. J. 22 (2003).

the law as drafted.<sup>373</sup> Higher knowledge standards for arbitration agreements reflect a legitimate concern that weaker parties are being forced to give up something that, rightly or wrongly, they do not expect to waive just by signing a form contract.<sup>374</sup> Moreover, they represent a relatively modest incursion on arbitration because they do not necessarily invalidate arbitration agreements, only those that are entered into without adequate notice.<sup>375</sup> These, I submit, are the real concerns at stake in the debate on whether heightened consent standards for jury trial waivers should be preempted by the FAA.

### C. Differently Situated and Treated Differently: Public Injunctions

Are arbitration and litigation ever situated differently for purposes of resolving certain types of civil claims? This question will become increasingly relevant as tension builds between protective state legislation and the prevalence of form contracts that make use of arbitration clauses.<sup>376</sup>

One way in which arbitration and litigation are not similarly situated is in their institutional capacity to issue, enforce, and monitor public injunctions. This issue was squarely presented in the controversial case of *Broughton v. CIGNA Healthplans of California*,<sup>377</sup> in which a plaintiff and his mother

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373. See *supra* note 321 and accompanying text.

374. Many have argued that promoting knowing and voluntary consent to arbitration should also be a legitimate concern of the FAA. See Edward Brunet, *The Appropriate Role of State Law in the Federal Arbitration System: Choice and Preemption*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 63, 71 (Edward Brunet ed., 2006); Moses, *supra* note 50, at 542; Sternlight, *supra* note 159, at 667–68.

375. Consistent with this result, I have elsewhere argued that similar enforcement-impeding laws requiring contract drafters to bring arbitration clauses to the attention of the nondrafting party, such as the law at issue in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), need not be preempted by the FAA under the antidiscrimination approach. See Aragaki, *supra* note 16, at 1284–85.

376. In addition to public injunctions, foreclosure is an area in which arbitration and litigation are arguably differently situated. Among other things, courts and arbitrators differ in their ability to exercise jurisdiction over third parties with an interest in the property to be foreclosed, to hold and distribute sale proceeds, to reform lending documents, to enforce statutory bonding requirements, and to appoint and supervise rent receivers. See Donald Lee Rome & David M.S. Shaiken, *Arbitration Carve-Out Clauses in Commercial and Consumer Secured Loan Transactions*, 61 DISP. RESOL. J. 43, 44 (2006). But see generally R. Wilson Freyermuth, *Foreclosure by Arbitration?*, 37 PEPP. L. REV. 459 (2010) (arguing that arbitration does not differ from litigation in these respects). Given the sheer number of state foreclosure laws that adversely affect the enforceability of arbitration agreements, the question of whether such laws are preempted by the FAA is one that is likely to arise in the future but that has so far received little attention (if any). Maine and Washington, for example, recently went as far as to enact legislation that specifically voids any agreement to arbitrate foreclosure actions. See Foreclosure Purchasers Act, ch. 596, 2007 Me. Laws 1st Spec. Sess. 1979, 1982 (codified at ME. REV. STAT. ANN. tit. 32, § 6197 (2009)); Property Conveyances Act, ch. 278, 2008 Wash. Sess. Laws 1460 (codified at REV. CODE WASH. ANN. § 61.34.045 (West 2008)).

377. 988 P.2d 67 (Cal. 1999).

brought a medical malpractice claim against CIGNA for injuries sustained during childbirth. Under the California Legal Remedies Act (CLRA),<sup>378</sup> the plaintiffs were entitled to both money damages and injunctive relief to prevent further “deceptive methods, acts, and practices” by the defendant.<sup>379</sup> The issue was whether CLRA section 1751, which makes these remedies nonwaivable by consumers,<sup>380</sup> should be preempted by the FAA.

The California Supreme Court held that the CLRA was preempted insofar as it required the plaintiffs to litigate their *damage* claim in a court of law. But it held that the statute was not preempted to the extent that it compelled them to bring their *public injunction* claim in a judicial forum.

The court’s core rationale for this holding was that, unlike litigation, arbitration is functionally incapable of supervising and administering public injunctions.<sup>381</sup> Although a superior court may exercise continuing jurisdiction over such a remedy, private arbitrators have no such extended jurisdiction and are therefore comparatively ill-suited to monitor on an ongoing basis “the balance between the public interest and private rights as changing circumstances dictate.”<sup>382</sup> In addition, arbitral awards do not have collateral estoppel effect under California law.<sup>383</sup> Thus, if the original plaintiffs were to craft the injunction too narrowly or fail to enforce it vigorously, third party beneficiaries seeking to modify the injunction would be required to re prosecute the underlying claim. Finally, judges are “publicly accountable” in a way that arbitrators are not: They are locally elected, subject to discipline and appellate review, and their courtrooms are open to the public.<sup>384</sup> For all of these reasons, the court effectively held that arbitration and litigation are not similarly situated for purposes of awarding the public injunction remedy.<sup>385</sup>

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378. CAL. CIV. CODE § 1750 (West 2009).

379. *Broughton*, 988 P.2d at 71 (internal quotation marks omitted).

380. See CAL. CIV. CODE § 1751.

381. *Broughton*, 988 P.2d. at 78.

382. *Id.* at 77.

383. See *Vandenberg v. Superior Court*, 982 P.2d 229, 240 (Cal. 1999).

384. *Broughton*, 988 P.2d at 77–78.

385. This rationale is scarcely distinguishable from the U.S. Supreme Court’s recent explanation for why California’s *Discover Bank* standard, see *supra* note 326 and accompanying text, is preempted by the FAA. In *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), the Court essentially held that arbitration and litigation are differently situated in their capacity to process collective action claims: Unlike courts, arbitrators cannot “ensur[e] that third parties’ due process rights are satisfied”; “[c]onfidentiality becomes more difficult”; and the informality of arbitration makes it ill-equipped to deal with the “often-dominant procedural aspects of [class] certification.” *Id.* at 1750–52. A law that does not treat arbitration and litigation differently in light of these “structural” differences, *id.* at 1750, the argument goes, runs afoul of the FAA’s formal equal opportunity mandate and is preempted.

Many judges and commentators have criticized *Broughton*, arguing that the CLRA should have been preempted because it “exhibit[s] the exact same hostility to arbitration that the U.S. Supreme Court has found objectionable in its FAA preemption cases to date.”<sup>386</sup> There are at least two possible reasons for this conclusion, but neither survives closer scrutiny.

The first tracks the Paradigm’s majority view: CLRA section 1751 expresses hostility to arbitration simply because it does not apply to all contracts.<sup>387</sup> But as I have demonstrated, this explanation cannot be correct.<sup>388</sup>

The second is that hostility toward arbitration is independently inferable from the mere fact that the CLRA treats arbitration and litigation differently with respect to public injunction claims. But the Court has never held that arbitration and litigation must be treated in the same way in *all* respects.<sup>389</sup> That would make them identical—an outcome that opponents and proponents of arbitration alike would vigorously resist.<sup>390</sup> Moreover, differential treatment in itself is less probative than the reason behind it, and in *Broughton* these reasons are largely benign. Unlike the Court’s early nonarbitrability cases, *Broughton* does not stand for the sweeping proposition that *no* CLRA claim is amenable to arbitration.<sup>391</sup> Instead, *Broughton* was predicated on a particularized determination that there are real and unavoidable discontinuities between arbitration and litigation that make them differently situated in their capacity to issue, enforce, and monitor public injunctions.<sup>392</sup> In these circumstances,

386. Drahozal, *supra* note 55, at 416; accord *Broughton*, 988 P.2d at 90 (Chin, J., dissenting); Bruhl, *supra* note 43, at 1469; Thomas A. Manakides, Note, *Arbitration of “Public Injunctions”: Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. CAL. L. REV. 433, 479–80 (2003).

387. *Broughton*, 988 P.2d at 83–84 (Chin, J., dissenting).

388. See *supra* Part III.B.

389. See *supra* notes 225–232 and accompanying text.

390. See *supra* notes 260–261 and accompanying text.

391. The *Broughton* court directed the plaintiffs to proceed to arbitration on all of their other claims for monetary relief under the CLRA. See *Broughton*, 988 P.2d at 79–80, 82. The outcome in *Broughton* did not turn on a supposed incompatibility between private dispute resolution forums and claims brought by parties “playing the role of a bona fide private attorney general” to rectify “public wrong[s].” *Id.* at 76–77. As the California Supreme Court clarified in a subsequent case, “public benefit is only *one* of the factors . . . weighing in favor of . . . inarbitrability.” *Cruz v. Pacificare Health Sys., Inc.*, 66 P.3d 1157, 1166 (Cal. 2003).

392. Cf. David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 72 n.105 (2003). Similarly, in the nonarbitrability context, Ian Macneil has recognized that other federal statutes may trump the FAA when enforcing an arbitration agreement would adversely affect the rights of third parties. See 2 MACNEIL ET AL., *supra* note 25, § 16.1.2, at 16:10. Macneil drew on the work of Stewart Sterk, who argued in a somewhat different context that “[o]nly . . . where legal rules are designed to protect the interests of third parties or the public at large, and thus foster ends other than fairly resolving the dispute between the parties[,] should public policy prevent enforcement of arbitration agreements.” Stewart E. Sterk, *Enforceability of Agreements to Arbitrate: An Examination of the Public Policy Defense*, 2 CARDOZO L. REV. 481, 492–93 (1981). Because the rights of third parties are arguably directly compromised when public injunction claims are arbitrated rather than

treating arbitration and litigation differently represents not a “suspicion of arbitration . . . out of step with [the Supreme Court’s] current strong endorsement of federal statutes’ . . . [but rather] a recognition that arbitration cannot necessarily afford all the advantages of adjudication in the area of private attorney general actions, [and] that in a narrow class of such actions arbitration is inappropriate.”<sup>393</sup> In other words, treating arbitration and litigation differently in light of basic architectural differences between them does not necessarily express hostility toward arbitration.<sup>394</sup> The underlying calculus of *Broughton* is therefore of a piece with the antidiscrimination logic that I have argued is immanent in the Paradigm.<sup>395</sup>

It is commonly assumed that *Broughton* confused two distinct lines of analysis by applying the Court’s nonarbitrability test to a question of federal preemption.<sup>396</sup> Recall that when the FAA and another *federal* statute conflict,

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litigated, Macneil’s and Sterk’s arguments would support *Broughton*’s differential treatment of arbitration and litigation.

393. *Broughton*, 988 P.2d at 79 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991)). The other reason offered by the court was that the arbitration of truly public claims does not fall within the purview of the FAA, which was primarily directed toward “resolving ordinary commercial disputes.” *Id.* In that case, the FAA would not apply, and there would be no ground for displacing the CLRA’s antiwaiver provision. *Id.*

394. There are other indications that the holding in *Broughton* was not borne of hostility toward arbitration. The plaintiffs advanced several reasons why their CLRA damages claim should also be held nonarbitrable. *See id.* at 80–82. But the court rejected all of them, reaffirming the “strong public policy in favor of enforcing arbitration agreements.” *Id.* at 72. And in a subsequent case, the court declined to extend its *Broughton* ruling to claims for disgorgement and restitution, even though, like a public injunction, such claims are brought “primarily for the public benefit.” *Cruz*, 66 P.3d at 1166. The rationale was that “the establishment of [a fluid recovery disgorgement] fund and the distribution of its proceeds does not present the same order of institutional difficulty as does the maintenance of a permanent statewide injunction requiring judicial supervision.” *Id.*

Even prior to *Cruz*, a federal district court likewise concluded that arbitration and litigation were not necessarily differently situated in their capacity to order disgorgement: “Unlike a public injunction, disgorgement of funds does not need to be continuously monitored because its object is limited in time and scope.” *Arriaga v. Cross Country Bank*, 163 F. Supp. 2d 1189, 1196–97 (S.D. Cal. 2001), *overruled on other grounds* by *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003). These cases suggest that there are definite limits to the circumstances in which arbitration and litigation can be considered differently situated with respect to a statute’s purposes.

395. *See supra* Part I. Although *Broughton* has attracted its share of criticism from academics and practitioners, to date, only two courts have declined to follow *Broughton*. *See Lozano v. AT&T Wireless*, 216 F. Supp. 2d 1071, 1076 (C.D. Cal. 2002), *overruled on other grounds* by *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165 (9th Cir. 2003); *Arriaga*, 163 F. Supp. 2d at 1196. The California Supreme Court and the Ninth Circuit continue to adhere to the rule of *Broughton*. *See Davis v. O’Melveny & Myers*, 485 F.3d 1066, 1080–82 (9th Cir. 2007); *Cruz*, 66 P.3d at 1161–65. Courts have also applied *Broughton*’s rationale to claims under other state statutes. *See, e.g., Pyburn v. Chevrolet*, No. 00C-1143, 2000 WL 35440991 (Tenn. Cir. Ct. Aug. 21, 2000), *aff’d in part, rev’d in part*, 63 S.W.3d 351 (Tenn. Ct. App. 2008).

396. *See, e.g., Arriaga*, 163 F. Supp. 2d at 1197 n.12, 1198–99; *Broughton*, 988 P.2d at 84 (Chin, J., dissenting); Alan S. Kaplinsky & Mark J. Levin, *Consumer Financial Services Arbitration: The Millennium Edition*, 56 BUS. LAW. 1219, 1228–29 (2001); Alan Scott Rau, *The Culture of American Arbitration and the Lessons of ADR*, 40 TEX. INT’L L.J. 449, 452 n.11 (2005); Manakides, *supra* note 386, at 463–66.

the question is whether there is an “inherent conflict” between arbitration and the right guaranteed by the other statute. The *Broughton* court appears erroneously to have transposed this test to the preemption context when it deduced an “inherent conflict” between arbitration and the underlying purposes of the CLRA in order to hold that the FAA did not preempt the CLRA’s public injunction provision.<sup>397</sup>

But *Broughton* made no such mistake. Writing for the majority, Justice Stanley Mosk clearly understood that the nonarbitrability cases on which he drew were dispositive only of conflicts between the FAA and other federal statutes.<sup>398</sup> The point of Justice Mosk’s “inherent conflict” analysis was not to divine a contrary state interest that somehow trumped the FAA; rather, it was to demonstrate that certain structural features of the arbitral process were in unavoidable tension with the CLRA’s goal of providing a nonwaivable public injunction remedy.<sup>399</sup> This, in turn, showed that the California legislature had legitimate, nondiscriminatory reasons for withdrawing that remedy from arbitration. In other words, the “inherent conflict” between the CLRA’s public injunction provision and arbitration—and the corresponding lack of such a conflict as to litigation—demonstrated that arbitration and litigation were differently situated, and thus that treating them differently posed little danger of unjustified discrimination.

### CONCLUSION

“Jurispathic” is a term Robert Cover coined to describe the power of courts to do violence—to “kill[] the law of the insular communities that dot our normative landscape.”<sup>400</sup> The Paradigm is jurispathic because it kills off not just state laws specifically regulating arbitration but practically any state law that happens to interfere with the enforceability of an arbitration agreement, unless

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397. *Broughton*, 988 P.2d at 78–79.

398. See, e.g., *id.* at 78 (“The discussion in *Gilmer* and the other cases cited above, it is true, occurred in the context of an inquiry into whether Congress had intended federal statutory claims to be exempt from arbitration.”).

399. Otherwise put, in the nonarbitrability context, the existence of an inherent conflict is a proxy for Congressional intent, which in turn is dispositive of the arbitrability issue. In the preemption context, the inherent conflict is itself dispositive of whether arbitration and litigation should be deemed similarly situated. As a result, in the *Broughton* line of cases it is technically unnecessary to conclude that the state intended for the public injunction remedy to be inarbitrable. Nonetheless, most courts seem to go this extra step, which may account for why they have been accused of confusing nonarbitrability and preemption. See, e.g., *Arriaga*, 163 F. Supp. 2d at 1197–99, *overruled on other grounds by* *Ting v. AT&T*, 319 F.3d 1126 (9th Cir. 2003).

400. Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 53–54, 60 (1983).

the law is part of the common law of contracts.<sup>401</sup> Each time the FAA preempts state law in this manner, the states' role as laboratories in the great experiment of democracy diminishes.<sup>402</sup> And the balance of power shifts away from local needs and interests toward a centralized government whose legislative expertise has traditionally laid elsewhere.

In this Article, I have argued that the Court's FAA preemption jurisprudence is not and need not represent a philosophy of jurispithos—a principle that favors arbitration agreements at all costs, even if it means displacing countless state laws that serve important public interests. Instead, it is at root a philosophy of equality, one that seeks the more modest guarantee of what I have referred to as “equal opportunity for arbitration.” By harnessing this core insight and guiding it toward its logical end points, I have suggested a way to salvage that jurisprudence and thereby to steer a middle path between the states' legitimate regulatory interests and the so-called “national policy favoring arbitration.”<sup>403</sup>

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401. Parties may of course contract out of the FAA, but, for reasons I have already explained, these cases fall outside the scope of my argument. See *supra* note 31.

402. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”); JAMES T. O'REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW* 38 (2006).

403. *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).