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## Arbitration and the Federal Balance

Alyssa King

Queen's University, Faculty of Law, [alyssa.king@queensu.ca](mailto:alyssa.king@queensu.ca)

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# ARBITRATION AND THE FEDERAL BALANCE

ALYSSA S. KING\*

*Mandatory arbitration of statutory rights in contracts between parties of unequal bargaining power has drawn political attention at both the federal and state level. The importance of such reforms has only been heightened by the Supreme Court's expansion of preemption under the FAA and of arbitral authority. This case law creates incentives for courts at all levels to prefer expansive readings of an arbitration clause. As attempts at federal regulation have stalled, state legislatures and regulatory agencies can expect to be subject to renewed focus. If state legislatures cannot easily limit arbitrability, an alternative is to try reforms that seek to make arbitration more closely resemble judging. Some common reforms that have been proposed or adopted at the state level include conflict-of-interest rules for arbitrators, default process rules, and publication requirements. These proposals might bring arbitration more in line with the processes and outcomes one might expect from a state court.*

*Reform along these lines is worth pursuing, but faces two significant problems. The first is federal preemption. Most prior cases have focused on state law controls before an arbitration gets started. State laws implemented during and after arbitration may avoid the same fate. A less obvious problem comes from the degree certain state reforms aim to treat arbitration as a substitute for court. Arbitrators lack the authority that judges have to develop the law, creating a further due process problem for parties who expect to be operating in a common law system. Accommodating arbitration may mean moving further from a model of common law adjudication.*

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#### INTRODUCTION

Although it did not always do so, the Supreme Court now treats the Federal Arbitration Act (FAA) as preempting nearly any limits state courts can impose before granting a motion to compel arbitration. Moreover, the Court has given arbitrators significant powers subject to little federal review, including the ability to rule on their own jurisdiction in many cases. This expansion in arbitral power has been subject to fierce critique.<sup>1</sup> Consumer and employment arbitration have drawn special objections as plaintiffs often have little bargaining power and face capacious clauses requiring them to arbitrate federal and state statutory rights.<sup>2</sup> In some areas,

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1. See, e.g., Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1237–38 (2011) [hereinafter Aragaki, *Suspect Status*] (first of two papers approaching FAA preemption from an antidiscrimination perspective); Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1193 (2011) [hereinafter Aragaki, *Equal Opportunity*] (second in same series); David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1224 (2013) (arguing that Congress's purpose was simply to stop state courts that wanted to ban all arbitration); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931 (1999) (legislative history supports more limited reading of preemption under FAA savings clause); Imre S. Szalai, *DirectTV, Inc. v. Imburgia: How the Supreme Court Used a Jedi Mind Trick to Turn Arbitration Law Upside Down*, 32 OHIO ST. J. ON DISP. RESOL. 75, 77 (2017) (“The Court overrides and alters . . . the intent of Congress in enacting the FAA.”).

2. Such cases are typified by plaintiffs who have signed contracts that include agreements to arbitrate as a condition of accessing a good or service or of employment. The contracts are presented on a take-it-or-leave-it basis. See KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE ARBITRATION EPIDEMIC* 14–17 (2015), <http://www.epi.org/publication/the-arbitration-epidemic> [https://perma.cc/6AKN-83C6]; Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2893–914 (2015) [hereinafter Resnik, *Diffusing Disputes*]; E. Gary Spitko, *Federal Arbitration Act Preemption of State Public-Policy-Based Employment Arbitration Doctrine: An Autopsy and an Argument for Federal Agency Oversight*, 20 HARV. NEGOT. L. REV. 1, 4–5 (2015) (“Employment arbitration has long been a favorite target of these state legislative and judicial efforts [at regulation.]”); *Advocacy: Forced Arbitration*, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, <https://www.nela.org/index.cfm?pg=mandarbitration> [https://perma.cc/AJ6Q-NRHJ] (cataloguing bills introduced in Congress aimed at curbing employment and consumer arbitration); Sonia Gill & Amanda Werner, *End Forced Arbitration*, POLITICO (Apr. 26, 2016, 5:28 AM), <https://www.politico.com/agenda/story/2016/04/end-forced-arbitration-cfpb-000110> [https://perma.cc/XDL6-FSF7] (“For more than a quarter century, Big Business has engaged in a stealth campaign to block consumers, employees and small businesses harmed by corporate lawbreakers from finding justice in a court of law.”).

Employment issues have become especially salient in the “#MeToo” era. See Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts*

arbitration clauses are ubiquitous and unavoidable. Agreements to arbitrate may facilitate attempts by private actors to displace state and federal legislation.<sup>3</sup> The expansion of arbitral authority also threatens a model of regulatory enforcement that often uses private litigation in court.<sup>4</sup>

Supreme Court majorities also seem to have a specific model of arbitration in mind. Although the Court has repeatedly affirmed broad, courtlike powers for arbitrators on matters like jurisdiction and statutory interpretation, it has resisted the idea that going to arbitration should mirror going to court.<sup>5</sup> In *Epic Systems v. Lewis*, the majority described arbitration as “traditionally individualized and informal [in] nature” and asserted that it was that “traditional arbitration process” the FAA meant to protect.<sup>6</sup> Defenders of the use of arbitration, as well as its critics, can easily find something to dislike in this vision of the phenomenon, which is alternately broad and narrow. The question is whether they can do anything about it. State law may provide an unlikely answer.

Federal action to alter the status quo seems unlikely in the near to medium term. Despite some recent rumblings and carve outs for certain industries, a divided Congress is not poised to change the FAA.<sup>7</sup> Clashes between the Supreme Court and state supreme courts may have helped make the case for agency rulemaking in the Obama administration. Those rules have now been rolled back.<sup>8</sup> Should a future

*and Arbitrations*, 96 N.C. L. REV. 605, 613 (2018). In February 2018, the attorneys general or chief legal officers of every state, territory, and the District of Columbia signed a letter asking Congress to ban arbitration of workplace sexual harassment claims. Letter from Nat'l Ass'n of Attorneys Gen. to Paul Ryan, Speaker of the House, Nancy Pelosi, House Minority Leader, Mitch McConnell, Senate Majority Leader, Charles E. Schumer, Senate Minority Leader, Kevin McCarthy, House Majority Leader, Steny Hoyer, House Minority Whip, John Cornyn, Senate Majority Whip, and Richard J. Durbin, Senate Minority Whip 1, 1–2 (Feb. 12, 2018), [http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/\\$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf](http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf) [https://perma.cc/4WR2-E7WQ]. For an overview of the politics of reform proposals see Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711 (2016).

3. See PETER B. RUTLEDGE, *ARBITRATION AND THE CONSTITUTION* 87–88 (2012); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 437 (2011).

4. See Arbitration Agreements, 82 Fed. Reg. 33,210 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040); Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326, 339 (2007); Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer’s Experience, 67 L. & CONTEMP. PROBS. 55, 56 (2004); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3075 (2015).

5. See Pamela K. Bookman, *The Arbitration-Litigation Paradox*, VAND. L. REV. (forthcoming 2019) (manuscript at 26–29); Daniel Markovits, *Arbitration’s Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 480 (2010).

6. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018).

7. See Emily Birnbaum, *Google Employees Join Lawmakers Pushing Bills to End Forced Arbitration*, HILL (Feb. 28, 2019, 2:14 PM) <https://thehill.com/policy/technology/432065-lawmakers-introduce-bills-to-end-forced-arbitration> [https://perma.cc/626W-ZXR9]; see also Arbitration Agreements, 82 Fed. Reg. at 33,217–18; Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 59.

8. Jim Puzzanghera, *Senate Votes to Kill New Rule Allowing Class-Action Lawsuits Against Banks; Pence Casts Deciding Vote*, L.A. TIMES (Oct. 25, 2017, 3:20 PM),

administration want to regulate again, the Supreme Court's decision in *Epic Systems* that the FAA trumped the agency's interpretation of a statute suggests that agencies will need specific statutory authorization to regulate arbitration.<sup>9</sup> State courts can do little to back up state legislatures by barring arbitration—such decisions are largely preempted. Even state judges hostile to arbitration as the Supreme Court conceives of it have reasons to endorse broad arbitral authority as allowing arbitrators to make more decisions at least deprives the Court of the ability to make more undesirable precedent.

In the face of expanded arbitral powers and limited ability to protect access to courts, state legislatures may instead choose to regulate what happens in arbitration and what happens afterwards. Some have done so. These regulations are not primarily implemented by state courts deciding whether to allow arbitration. State courts that try to do so will likely run afoul of the FAA, and many rule violations would not be visible until the arbitration has taken place. Instead, arbitrators and arbitration organizations are responsible for following the state legislation, with the courts stepping in only if arbitrators do not. Existing and proposed state laws address conflicts of interest, procedural fairness, and public information about arbitration outcomes. Such reforms have in common a model of arbitration as third-party adjudication, or as Mark Weidemaier has described it, “judging lite.”<sup>10</sup> This adjudication needs the same types of legitimating features—such as adjudicator independence or notice and opportunity to be heard—characteristic of court rules.<sup>11</sup>

These state reform efforts face two main hurdles. The first is that reforms may be preempted by the FAA. The question of whether an arbitrator followed state rules by doing things like disclosing conflicts or correctly apportioning fees will likely arise after the arbitration is over, with a request to vacate the award. The Court may expand FAA preemption to cover state court decisions on vacating awards, despite statutory language that would suggest the FAA is more limited. State legislators may be able to skirt preemption issues by finding other means of enforcement, but these work-arounds could still face preemption challenges. Proponents of state rules will face the Supreme Court's tendency to define arbitration against litigation in court. In essence, they will be attempting to use the Court's broad conception of arbitral power as a shield against its narrow view of traditional arbitration. State courts cannot refuse to allow arbitration that follows certain procedure. Arbitrators might be able to implement those same rules, but it is not clear if state courts can vacate their awards if arbitrators refuse.

Even in a best-case scenario in which the reforms are not preempted and most arbitrators voluntarily comply, however, a problem would remain. Under existing Supreme Court precedent, arbitration is not quite judging, or not just judging, but also often treated as contract. The Supreme Court has stated that arbitrators cannot

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<http://www.latimes.com/business/la-fi-arbitration-rule-senate-20171024-story.html> [https://perma.cc/793B-DEGW]; see Lydia Wheeler, *Fight Over Right to Sue Nursing Homes Heats Up*, HILL (Aug. 6, 2017, 8:30 AM), <https://thehill.com/regulation/healthcare/345411-fight-over-right-to-sue-nursing-homes-heats-up> [https://perma.cc/9MMM-EDVD].

9. *Epic Systems*, 138 S. Ct. at 1612.

10. See generally W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091 (2012) (treating arbitrators as akin to judges).

11. See Markovits, *supra* note 5, at 433.

rely on prior arbitrations or on public policy in making their decisions because arbitrators are agents of the parties designated to resolve a contract dispute.<sup>12</sup> Parties and arbitrators still must adapt to a situation that does not conform to common law expectations. Even if they succeed in putting in place the key elements of adjudication in court, state legislatures may fail to make the deep structural changes that would be necessary to accommodate a system that does not create common law style precedent.

A trend toward more elaborate procedural rules in response to arbitrators' widening mandates cuts across jurisdictions and types of arbitration.<sup>13</sup> It takes on an added dimension in the United States because of its implications for federalism.<sup>14</sup> The Supreme Court's jurisprudence has tied diminished state regulatory authority to expanded arbitral jurisdiction.<sup>15</sup> With arbitration seemingly here to stay, it is worth thinking about ways in which actors at the state level might regulate arbitration and ways in which it might be made less hostile to their ends.

In seeking to control arbitration and arbitrators, state legislators might be responding to a wide variety of complaints, only some of which can be adequately addressed through this means. A debate exists about the extent and nature of any arbitrator bias, and it is hard to resolve when full information about arbitral awards is not available.<sup>16</sup> In consumer and employment arbitrations, the fear is that repeat

12. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 683–85 (2010).

13. See Deborah R. Hensler & Damira Khatam, *Re-Inventing Arbitration: How Expanding the Scope of Arbitration Is Re-Shaping Its Form and Blurring the Line Between Private and Public Adjudication*, 18 *NEV. L.J.* 381, 393–411 (2018) (tracing history of judicialization in U.S. domestic arbitration, international commercial arbitration, and international investment arbitration).

14. This Article relies on a dynamic approach to federalism. On how such an account works in a U.S. context, see ROBERT A SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* 95–96 (2009) (arguing that federalism is best understood as a dynamic interaction between central and local institutions); Heather K. Gerken, *Forward: Federalism All the Way Down*, 124 *HARV. L. REV.* 4, 19–20 (2010) (comparing her account of cooperation and conflict between federal, state, and local institutions with Schapiro's view of federalism). These accounts bear considerable similarities to pluralist accounts of the European Union. See, e.g., NICO KRISCH, *BEYOND CONSTITUTIONALISM: THE PLURALIST STRUCTURE OF POSTNATIONAL LAW* 69 (2010) (pluralism "is based on the heterarchical interplay of these layers according to the rules ultimately set by each layer for itself.").

15. See Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 *N.Y.U. L. REV.* 1420, 1479 (2008) (arguing that federal courts have increasingly determined that initial questions of unconscionability are not gateway questions in order to prevent state courts from using unconscionability as a way around FAA preemption); Karen Halverson Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 *OHIO ST. J. ON DISP. RESOL.* 1, 44–60 (2011) (cataloguing ways in which federal courts have delegated questions of whether a contract is unconscionable to the arbitrator).

16. Recent work by David Horton and Andrea Cann Chandrasekher suggests that repeat players are advantaged in consumer and employment arbitration. David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 *GEO. L.J.* 57, 116 (2015) [hereinafter Horton & Chandraseker, *Consumer*]; David Horton & Andrea Cann Chandrasekher, *Employment Arbitration After the Revolution*, 65 *DEPAUL L.*

player defendants will select a favorite arbitrator. State legislation can require disclosure of this relationship, giving plaintiffs the information to raise concerns about bias. A New York proposal would have taken the further step of banning partisan arbitrators, something some providers do already.<sup>17</sup> Other proposals are

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REV. 457, 462 (2016) [hereinafter Horton & Chandraseker, *Employment*]. A repeat player effect suggests that arbitration, like litigation, favors those familiar with the system. If arbitral processes are routinized in large organizations, one would expect to see this effect to some extent. A repeat-pairing effect, in which certain defendants routinely do better in front of certain individual arbitrators, would be more troubling as it would suggest that arbitrators might be changing their rulings in order to get repeat business. Some earlier studies reported such an effect. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 213 (1997); Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 2 (2011). However, Horton and Chandraseker's work suggests that this effect vanishes when one distinguishes the frequency of "repeat play" by defendants. Repeat pairings happen more frequently with what Horton and Chandraseker call "super repeat players." What others saw as a repeat-pairing effect is an artifact of the super repeat player effect. When one looks specifically at groups of super repeat players, medium repeat players, and infrequent repeat players, no repeat-pairing effect is present. Horton & Chandraseker, *Consumer*, *supra*, at 121; Horton & Chandraseker, *Employment*, *supra*, at 487.

Christopher Drahozal and Samantha Zyontz did not find evidence of bias in favor of the contract drafter in debt collection arbitrations administered by the American Arbitration Association (AAA). In those arbitrations, the drafter was the plaintiff-creditor. The authors found that arbitration was "associated with a decreased likelihood of a creditor win" when compared with debt collections in Oklahoma and Virginia state courts and in federal student loan cases. Christopher R. Drahozal & Samantha Zyontz, *Creditor Claims in Arbitration and in Court*, 7 HASTINGS BUS. L.J. 77, 100 (2011). As the authors acknowledge, cases brought in arbitration and in state or federal court may differ in important ways, and the practices of one arbitration provider are not necessarily comparable to another. *Id.* at 82–83. Still, their findings are a useful corrective to the expectation that contract drafters will always prefer arbitration and tend to win there. In some debt collection cases, getting a default court judgment may be easier.

17. Assemb. 10393, 241st Leg., Reg. Sess. § 7504 (N.Y. 2018); COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES R–18(a) (AM. ARBITRATION ASS'N 2013) [hereinafter AAA COMMERCIAL ARBITRATION RULES], [https://www.adr.org/sites/default/files/CommercialRules\\_Web.pdf](https://www.adr.org/sites/default/files/CommercialRules_Web.pdf) [<https://perma.cc/49HR-FEH6>]; CONSTR. INDUSTRY ARBITRATION RULES & MEDIATION PROCEDURES R–20(a) (AM. ARBITRATION ASS'N 2015) [hereinafter AAA CONSTRUCTION INDUSTRY ARBITRATION RULES], <https://www.adr.org/sites/default/files/Construction%20Rules.pdf> [<https://perma.cc/6JEZ-8YRY>]; CONSUMER ARBITRATION RULES R–19(a) (AM. ARBITRATION ASS'N 2014) [hereinafter AAA CONSUMER ARBITRATION RULES], <https://www.adr.org/sites/default/files/Consumer%20Rules.pdf> [<https://perma.cc/9S8G-BR67>]; EMP'T ARBITRATION RULES & MEDIATION PROCEDURES R–16(a) (AM. ARBITRATION ASS'N 2009) [hereinafter AAA EMPLOYMENT ARBITRATION RULES], [https://www.adr.org/sites/default/files/document\\_repository/Employment%20Rules.pdf](https://www.adr.org/sites/default/files/document_repository/Employment%20Rules.pdf) [<https://perma.cc/JNB4-QNCV>]; ADMIN. ARBITRATION RULES Rule 7.1 (INT'L INST. FOR CONFLICT RESOLUTION & PREVENTION (CPR) 2013), <https://www.cpradr.org/resource-center/rules/arbitration/administered-arbitration-rules> [<https://perma.cc/EF3E-7XZ8>]; JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES Rule 7 (JAMS 2014), [https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_comprehensive\\_arbitration\\_rules-2014.pdf](https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf) [<https://perma.cc/SE4P-2YK4>].

aimed at procedural fairness, notably including limits on how much a plaintiff will have to pay.

The state laws described here are not a panacea. Proposals aimed at arbitrators or arbitration providers only improve matters if arbitrations take place. The question of whether they take place has been a matter of some controversy.<sup>18</sup> Contract drafters, typically defendants, write the rules,<sup>19</sup> although arbitration providers may limit their ability to impose them.<sup>20</sup> The state rules discussed here only help those who attempt to arbitrate and are aware, or have lawyers who are aware, of their state rights.

Further, scholars have raised the specter of substantive law being swallowed up by arbitration.<sup>21</sup> Arbitrators are asked not only to determine the terms of the parties' contract, but also to apply mandatory state and federal law. With incomplete information from parties and arbitration providers, scholars, advocates, and politicians do not have a clear sense of how closely arbitrators follow the law. Some

18. For instance, data collected by the *Times* suggested that few people use arbitration or small claims court. Jessica Silver-Greenbert & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [https://perma.cc/P3QA-BR5W]. The Consumer Financial Protection Bureau found evidence of this approach in the arbitration clauses of financial institutions. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) §§ 2.3, 5.5 (2015). Chandrasekher and Horton have made the case the picture is more nuanced. The pair studied consumer, employment, and medical malpractice claims in several major arbitration fora. They found that plaintiffs do have problems of access, but that in some instances plaintiffs' lawyers are successfully filling large numbers of connected claims. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 9, 53–55 (2019).

19. See IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA 197–98* (2013).

20. See AAA CONSUMER ARBITRATION RULES, *supra* note 17, R–18; AAA EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES, *supra* note 17, R–20–21; JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE ARBITRATION CLAUSES MINIMUM STANDARDS OF PROCEDURAL FAIRNESS 3 (JAMS 2009), [https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Consumer\\_Min\\_Std-2009.pdf](https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Std-2009.pdf) [https://perma.cc/6HUC-WWWP]; JAMS POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARDS OF PROCEDURAL FAIRNESS 3 (JAMS 2009), [https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Employment\\_Min\\_Std-2009.pdf](https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Employment_Min_Std-2009.pdf) [https://perma.cc/Z3XH-3VH4]. However, market forces limit what providers can do. Carrie Menkel-Meadow describes how the plaintiff's side employment bar threatened to boycott arbitration organizations over the use of mandatory arbitration clauses in employment contracts. Although the employees' lawyers won some additional procedural protections in arbitration, they were unable to get employers to stop requiring arbitrations or to get the AAA, the largest administrator of employment arbitrations, to stop administering them. Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 41–42 (1999).

21. Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 409–11 (imagining an end to the development of doctrine as whole areas of law become the domain of arbitrators); Glover, *supra* note 4, at 3075; Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 807 (2009).



states have sought to gather information on arbitration outcomes, which would leave legislators in a better position to respond to de facto legal changes worked by arbitration. Information rules can respond to some of these concerns, but legislatures cannot create a body of precedent out of arbitrated cases even if they wanted to.

State legislatures can do significantly more to regulate the conduct of arbitration and increase transparency. However, legislatures will also have to accommodate adjudicators with less power to shape the law than common law courts. Part I of this Article explains why state legislatures might want to regulate what happens in arbitration—because arbitrators wield significant power and attempts to prevent arbitration are likely to be preempted. Part II describes proposed and existing state legislation aimed at controlling arbitral processes and outcomes. This Part does not address certain avenues, such as private attorney general suits or limits on an employer's ability to require arbitration, that are aimed at keeping certain matters in state court, rather than turning arbitration into something that resembles court.<sup>22</sup> Part III argues that these reforms may have a better chance of surviving Supreme Court review than an approach that focuses on barring certain arbitrations. Unlike rules that bar access to arbitration, these state rules would be implemented in the first instance by arbitrators and in the second instance by a court reviewing the arbitral award. Even if the reforms work perfectly, however, Part IV argues that a due process problem may remain. U.S. domestic arbitration requires argument and offers decisions in a format that may not match the parties' expectations, making it difficult for them to argue their cases effectively.

#### I. JURISDICTION STRIPPING THROUGH ARBITRATION AND THE PROBLEM FOR STATE LAW

State courts have limited ability to enact arbitration bans or impose limits on arbitration process before allowing an arbitration to go forward. Indeed, state judges who disagree with the Supreme Court's approach to arbitration have incentives to do the opposite, handing more decisions to arbitrators to avoid seeing their decisions overturned and more negative federal precedent created. These pressures are likely to create a situation in which many issues of importance to the enforcement of state laws are arbitrated. State legislatures then have a strong interest in regulating arbitration process and outcomes so as to exert some control over how the law is applied.

Since the 1980s, the Supreme Court has paired expanded competence for arbitrators under federal law with reduced competence for state judges. This

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22. For work on private attorney generals, see Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion*, 46 U. MICH. J.L. REFORM 1203 (2013) (explaining how California courts had determined that parties acting under the state's Private Attorney Generals Act could not be required to arbitrate and that the Supreme Court has so far declined to rule on whether this approach violates the FAA). At least three states, Kentucky, Maryland, and New York, have laws preventing employers from making agreements to arbitrate certain matters a condition of employment. KY. REV. STAT. ANN. § 336.700 (LexisNexis 2011 & Supp. 2018); MD. CODE ANN., LAB. & EMPL. § 3-715 (LexisNexis 2016 & Supp. 2018); N.Y. C.P.L.R. 7515 (McKINNEY Supp. 2019). As discussed in Section I.A, these laws may be preempted.

expansion has proceeded along several fronts. Most obviously, the Court's approach to preemption under section 2 of the FAA has limited the ability of state courts to enforce arbitration bans either based on subject matter or based on the courts' assessment that certain terms render an arbitration clause automatically unconscionable. More subtly, the Court's understanding of arbitrator authority in its treatment of competence-competence and separability has led to reduced space for state courts to decide initial gateway issues as it has empowered arbitrators to do so instead.

At the same time, state courts may also find it congenial to empower arbitrators. State courts face a situation in which even indirect confrontation with the Supreme Court has resulted in ever-wider federal preemption claims. Yet some state legislatures have continued to pass laws suggesting that they want the courts to control the use of arbitration.<sup>23</sup> State judges who want to avoid continued confrontation, and avoid overruling the state legislature's choices, have the option of shifting decision-making from themselves to the arbitrators. This approach is the mirror image of the Supreme Court's own choices to expand arbitrator jurisdiction to avoid undesirable state law.

#### *A. Section 2 and FAA Preemption*

Under section 2 of the FAA, the Supreme Court has repeatedly narrowed the scope of state court jurisdiction and expanded that of arbitrators. Section 2 states that an agreement to arbitrate: "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>24</sup> The section applies to state court decisions about whether to grant a motion to compel arbitration.

The Court's current approach to this provision rests on the 1984 case *Southland Corporation v. Keating*, which invalidated the California Supreme Court's determination that claims under the state's Franchise Investment Law were not arbitrable.<sup>25</sup> Writing for the majority, Chief Justice Burger argued that Congress used the FAA to enact a "national policy favoring arbitration" under the Commerce Clause.<sup>26</sup> Over a decade later, states continued to contest this outcome, buoyed by negative academic reaction to *Southland*.<sup>27</sup> However, the Supreme Court upheld *Southland* in *Allied-Bruce Terminix Companies v. Dodson*, striking down a state court's refusal to compel arbitration because the defendant had not complied with a state law requiring notice that its contract contained an arbitration clause.<sup>28</sup> The Court also determined that state laws that create even small barriers to arbitration could violate section 2 of the FAA.<sup>29</sup>

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23. Sarah Rudolph Cole, *Uniform Arbitration: "One Size Fits All" Does Not Fit*, 16 OHIO ST. J. ON DISP. RESOL. 759, 789 (2001).

24. 9 U.S.C. § 2 (2012).

25. 465 U.S. 1, 16 (1984).

26. *Id.* at 10.

27. See RUTLEDGE, *supra* note 3, at 84.

28. 513 U.S. 265, 272 (1995).

29. See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (striking down a state court's refusal to compel arbitration because the defendant had not complied with a state

Unconscionability is a state law ground for decision, which should provide insulation from Supreme Court review. State courts relying on the argument that a given agreement is unconscionable might thus hope to sidestep the preemption issue.<sup>30</sup> The problem with this approach comes from the doctrine of separability. The issue of whether some part of a contract is unconscionable belongs to the arbitrators unless the alleged unconscionability is in the arbitration clause itself. By definition, many decisions will turn on some characteristic of the agreement to arbitrate that itself is unconscionable. Anything that would make an agreement to arbitrate unconscionable is likely to be a problem specific to arbitration, the kind of reason a state court may not rely on in turning down a motion to compel arbitration.<sup>31</sup> With *AT&T Mobility v. Concepcion*, the Supreme Court signaled that applying state rules of unconscionability was not a way to avoid review.<sup>32</sup>

The decision abrogated a California rule, found in both statute and common law, barring class action waivers if they would prevent consumers from pursuing their claims.<sup>33</sup> The Court held that the FAA preempted applications of general contract rules that had particular effects on arbitration, here allowing the court to declare an agreement to arbitrate unconscionable because it barred class arbitration.<sup>34</sup> State courts could not “discriminate” against arbitration by placing extra conditions on agreements to arbitrate.<sup>35</sup> Writing for the majority, Justice Scalia argued that California’s requirement that a class mechanism be available, whether in court or

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law requiring notice that its contract contained an arbitration clause).

30. See Bruhl, *supra* note 15, at 1442–43. *Marmet Health Care v. Brown* exemplifies the merger of unconscionability with arguments that directly attack Supreme Court doctrine. In rejecting a motion to compel arbitration, the West Virginia Supreme Court of Appeals ultimately relied on the claim that the contract was unconscionable under state law, but its opinion reads as if it was building up to a direct attack on the Supreme Court’s view of the FAA. *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 292–95 (W. Va. 2011), *cert. granted, vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 530 (2012). First the state court argued that certain contracts, such as a contract to enter a nursing home, should be accompanied by enhanced protections for consumers. *Id.* at 269–71. The state court then indicated fundamental disagreement with Supreme Court case law, insisting that the FAA was a procedural statute and attacking the doctrine of separability as a doctrine that forced state courts to enforce illegal contracts. *Id.* at 278–79. A state court’s use of unconscionability also has particular rhetorical bite. Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609, 628 (2009) (“By invoking the rhetoric of unconscionability, these judges are not merely acting tactically in a game of legal chess . . . they are sending a message, not just to the U.S. Supreme Court, but to the other officials and institutions that collectively make up our legal system.”).

31. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (“A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport” with section 2 of the FAA.).

32. See David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 394 (2012).

33. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 (2011).

34. *Id.* at 341–42.

35. Aragaki, *Suspect Status*, *supra* note 1, at 1237. Hiro Aragaki argues that the Court’s arbitration jurisprudence should be seen as enacting an antidiscrimination rule under which even reasonable state regulation of arbitration is suspect due to historical biases against allowing it. *Id.* at 1263.

arbitration, “interferes with fundamental attributes of arbitration.”<sup>36</sup> Because class mechanisms so fundamentally altered arbitration, requiring class arbitration as a condition of granting a motion to compel arbitration was changing the contract’s terms.

*Concepcion* removed state court control, but left arbitrators’ powers intact. Justice Scalia noted that the majority “[found] it unlikely that in passing the FAA Congress meant to leave the disposition of these procedural requirements to an arbitrator.”<sup>37</sup> However, *Concepcion* did not resolve the substantive issue of whether and when class arbitration was allowed. The Court held that a state court could not require access to class arbitration as a condition of granting a motion to compel arbitration.<sup>38</sup> As a result, the majority did not need to engage with the reasons the California courts and the state legislature had judged class arbitration to be an important process protection. Two years later, a unanimous Court declined to vacate an award in which the arbitrators, rather than a judge, had ordered class arbitration.<sup>39</sup>

*Concepcion* involved a federal application of state law.<sup>40</sup> Nonetheless, Justice Scalia’s opinion focused squarely on state courts, presenting their use of unconscionability as a thinly veiled attack on its pro-arbitration precedents and on its own supremacy. The opinion imagined the many ways in which a state court might use the doctrine of unconscionability to place onerous conditions on arbitration, such as requiring full, court-monitored discovery or the use of the Federal Rules of Evidence.<sup>41</sup> Justice Scalia then cited evidence that state courts were using the doctrine of unconscionability to thwart national policy favoring arbitration.<sup>42</sup>

California was not the only state that saw legislation on arbitration struck down when that legislation gave state courts power to reject arbitration clauses as unconscionable. The West Virginia Supreme Court of Appeals rejected an arbitration clause on the basis that requiring nursing home patients to arbitrate was unconscionable under the West Virginia Nursing Home Act.<sup>43</sup> The Supreme Court issued a brief per curiam opinion rejecting this approach as “incorrect and inconsistent with clear instruction in the precedents of this Court.”<sup>44</sup>

The most recent preemption decisions evince suspicion toward the state courts’ reasons for refusing to compel arbitration. The majority opinions in *DirectTV v.*

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36. *Concepcion*, 563 U.S. at 344.

37. *Id.* at 349.

38. *Id.* at 351.

39. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013).

40. *Concepcion*, 563 U.S. at 337–38. The federal courts may have mangled the application of state law because the contract in question allowed for individual arbitration that was relatively easy to access. See Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1124 (2011); Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 20 (contending that “the ATTM clause was almost certainly not exculpatory, and therefore should not have been found unconscionable”).

41. *Concepcion*, 563 U.S. at 342.

42. *Id.* at 342–43.

43. *Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250, 292–95 (W. Va. 2011), cert. granted, vacated sub nom. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012).

44. *Marmet Health Care Ctr.*, 565 U.S. at 532.

*Imburgia* and *Kindred Nursing Centers*, both cases in which state courts refused to compel arbitration, contain suggestions that the state judges involved were less than candid in their claims that they are not singling out arbitration.<sup>45</sup> Such suspicion may lead the Court to apply *Concepcion* broadly rather than narrowly, leaving less room for state courts and applications of state law than would otherwise be the case.

In *DirecTV*, a California appellate court read the relevant contract as directing it to apply a state statute requiring class arbitration. The majority refused to accept the state court's holding on the content of state contract law<sup>46</sup> and instead saw a challenge to the federal Supreme Court's authority.<sup>47</sup> Justice Breyer's majority opinion lectured the state court on the "elementary point of law"—that lower courts are bound by Supreme Court decisions.<sup>48</sup>

The *Kindred* majority also accused the state court of having an anti-arbitration agenda. There, the Kentucky Supreme Court had held that the general language in the powers of attorney did not allow the attorney-in-fact to enter into arbitration agreements.<sup>49</sup> Giving up rights to jury trial would require a specific provision because of the special nature of the right to a jury as enshrined in the state constitution.<sup>50</sup> The state court might have been swayed by the context of the case—wrongful death suits against a nursing home.<sup>51</sup>

Justice Kagan dismissed the Kentucky Supreme Court's view with a touch of sarcasm. Among the dubious claims of the Kentucky Supreme Court, she quoted its assertion that the framers of the state constitution treated the jury trial right "and that right alone as a divine God-given right."<sup>52</sup> Such a rule was "too tailor-made" for arbitration.<sup>53</sup> The other examples of contracts the court offered were the equivalent of making a rule "applicable to arbitration agreements and black swans."<sup>54</sup>

*DirecTV* and *Kindred* might be exceptional. *DirecTV* was another salvo in the long fight between the California courts and legislature and the Supreme Court over class arbitration. The *Kindred* court's praise of the jury trial not only issued a challenge to the Supreme Court, but also seems disconnected from the strong likelihood that such a case would settle. However, both cases showed majorities on the Court suspicious of state court motives and committed to defending the status quo of broad FAA preemption. Moreover, the majority opinions leave unclear how a state court would demonstrate its sincerity in a decision refusing to compel arbitration. These recent cases suggest that dialogue between the state high courts and the Supreme Court is unlikely to change the Justices' minds.

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45. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1425–26 (2017); *DirecTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466–67 (2015).

46. *DirecTV*, 136 S. Ct. at 473 (Thomas, J., dissenting).

47. *Id.* at 467–68.

48. *Id.* at 468.

49. *Kindred*, 137 S. Ct. at 1423.

50. *Id.* at 1424.

51. *Id.* at 1423.

52. *Id.* at 1427 (quoting *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 328–29 (Ky. 2015)).

53. *Id.*

54. *Id.* at 1428.

The specifics of an individual agreement to arbitrate may still render it unconscionable.<sup>55</sup> The *Brown* court in West Virginia took this route on remand. It defended the “common law factors” it set out for determining unconscionability as sound and undisturbed by the Supreme Court ruling, before remanding to allow lower courts to develop evidence of unconscionability in the individual cases.<sup>56</sup> The Court has declined to disturb state court rulings that agreements to arbitrate lacking mutuality of obligation may be unconscionable.<sup>57</sup> The Court also left alone a New Jersey decision rejecting arbitration when the contract did not indicate that arbitration meant waiving rights to court<sup>58</sup> and a North Carolina ruling rejecting a poorly drafted clause signed that the drafter had a fiduciary relationship with the plaintiff.<sup>59</sup> Still, *Concepcion* makes it difficult to conceive of how unconscionability might be used to regulate the conduct of an arbitration.<sup>60</sup> Any rule specific to the process of arbitration would likely relate to questions only arising in the context of arbitration—which is not the case with mutuality of obligation.

State judges might explore other elements of state contract law, such as rules against contracts made under duress.<sup>61</sup> In some cases they have also found reason to limit the scope of an arbitration agreement, but these cases are highly fact-specific.<sup>62</sup>

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55. For instance, the California courts consider whether a given arbitration clause preserves the parties’ access to “specific protections in order to mitigate the risks and costs of pursuing certain types of claims.” If it does not, this factor weighs against it in an unconscionability analysis. *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 207–08 (Cal. 2013); see also James Dawson, Comment, *Contract After Concepcion: Some Lessons from the State Courts*, 124 YALE L.J. 233, 237 (2014). Susan Landrum notes that state appellate courts were more likely to remand unconscionability claims having to do with arbitration rather than reject them outright. This result is consistent with state courts treating the unconscionability of an arbitration clause as a fact-specific inquiry. Susan Landrum, *Much Ado About Nothing?: What the Numbers Tell Us About How State Courts Apply the Unconscionability Doctrine to Arbitration Agreements*, 97 MARQ. L. REV. 751, 780, 795 (2014).

56. *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217, 226–31 (W. Va. 2012).

57. *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 495 (Mo. 2012), *cert. denied*, 568 U.S. 822 (2012); *Figueroa v. THI of New Mexico at Casa Arena Blanca, LLC*, 306 P.3d 480, 491 (N.M. Ct. App. 2012), *cert. denied*, 569 U.S. 1004 (2013).

58. *Atalese v. U.S. Legal Servs. Grp., L.P.*, 99 A.3d 306, 313–16 (N.J. 2014) (detailing New Jersey law requirements for valid waiver across a number of different contexts and concluding that they were not met in the specific case), *cert. denied*, 135 S. Ct. 2804 (2015).

59. *King v. Bryant*, 795 S.E.2d 340, 344–45, 350–52 (N.C. 2017), *cert. denied*, 138 S. Ct. 314 (2017).

60. The California Supreme Court agreed, writing that “*Concepcion* holds that *even if* a class waiver is exculpatory in a particular case, it is nonetheless preempted by the FAA.” *Iskanian v. CLS Transp. L. A., LLC*, 327 P.3d 129, 136 (Cal. 2014).

61. Dawson, *supra* note 55, at 244–46.

62. See, e.g., *Stephan v. Millennium Nursing & Rehab Ctr., Inc.*, No. 1170524, 2018 WL 4846501, at \*13 (Ala. Oct. 5, 2018) (declining to enforce arbitration clause signed by relative who did not have power of attorney for patient with dementia); *Keyes v. Dollar Gen. Corp.*, 240 So. 3d 373, 373 (Miss. 2018) (discussing some tort claims, including false imprisonment and malicious prosecution, outside the scope of claims contemplated by agreement to arbitrate claims “arising out of” “employment” or “termination of employment”); *Doe v. Hallmark Partners, LP*, 277 So. 3d 1052, 1057 (Miss. 2017) (concluding that claims related to failure to stop a rape were not within scope of rental complex arbitration clause).

Should it be taken up widely, the doctrine of duress is unlikely to fare any better than unconscionability. Any general rules that courts use routinely to declare arbitration clauses are signed under duress are likely to be rules specific to arbitration.

State legislatures are in a bind. They cannot simply tell state courts not to enforce contracts to arbitrate. Limits on the parties' ability to contract for arbitration, such as an employer's ability to require consent to arbitration as a condition of employment, may face a similar preemption problem. Some states have attempted to pass such provisions, but in others preemption concerns seem to be winning out.<sup>63</sup>

With dialogue with the Supreme Court unlikely, and few tools for general rulings on arbitration, state courts are not in the best institutional position to challenge FAA preemption. State legislatures cannot simply give them more power to prevent abuses of the arbitration process.

### B. Arbitrability

To understand the full impact of the Court's FAA section 2 jurisprudence, one must pair it with the Court's arbitrability jurisprudence. The Court has expanded the subject matter of arbitration, allowing arbitrators to interpret statutes and insisting that doing so does not compromise statutory rights.<sup>64</sup> It has also increased the ability of arbitrators to rule on their own jurisdiction. American arbitrators do not automatically have the authority to decide arbitrability. Issues go to arbitration if there is "clear and unmistakable" evidence that the parties meant to arbitrate them instead of asking a court to decide.<sup>65</sup> However, this rule should be read in light of the

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63. In the wake of #MeToo scandals, New York and Maryland passed statutes that prevent employers from requiring employees to arbitrate sexual harassment claims. MD. CODE ANN., LAB. & EMPL. § 3-715 (LexisNexis 2016 & Supp. 2018); N.Y. C.P.L.R. 7515 (McKinney Supp. 2018); PRACTICAL LAW LABOR & EMP'T, EMPLOYMENT ARBITRATION AGREEMENTS (US) (2019), Westlaw w-015-2380. Kentucky had a law prohibiting an employer from making agreement to arbitrate a condition of employment. KY. REV. STAT. ANN. § 336.700 (LexisNexis 2011 & Supp. 2018). The Kentucky Supreme Court upheld it, arguing that doing so did not "single out arbitration" because the law merely prevented employers from requiring any sort of waiver of the employee's rights. *N. Ky. Area Dev. Dist. v. Snyder*, No. 2017-SC-000277-DG, 2018 WL 4628143, at \*4-5 (Ky. Sept. 27, 2018). However, the legislature recently amended the law to allow employers to require arbitration. S.B. 720, engrossed, 2019 Reg. Sess. (Ky. 2019); Henry Allen Blair, *Kentucky Legislature Reaffirms the Right of Employers to Require Employees to Arbitrate*, ARBITRATION NATION (Mar. 28, 2019), [https://www.arbitrationnation.com/kentucky-legislature-reaffirms-the-right-of-employers-to-require-employees-to-arbitrate/?utm\\_source=Allen+Blair+-+Arbitration+Nation&utm\\_campaign=7ce817b7c8-RSS\\_EMAIL\\_CAMPAIGN&utm\\_medium=email&utm\\_term=0\\_3c40c240d0-7ce817b7c8-73366081](https://www.arbitrationnation.com/kentucky-legislature-reaffirms-the-right-of-employers-to-require-employees-to-arbitrate/?utm_source=Allen+Blair+-+Arbitration+Nation&utm_campaign=7ce817b7c8-RSS_EMAIL_CAMPAIGN&utm_medium=email&utm_term=0_3c40c240d0-7ce817b7c8-73366081) [<https://perma.cc/2L3W-HZJ3>]. A bill that would have had an effect similar to Kentucky's—preventing employers from requiring consent to arbitration as a condition of employment, passed the state legislature, but was vetoed. Assemb. B. 3080, 2017-18 Leg., Reg. Sess. (Cal. 2018).

64. See *Mitsubishi Motors Corp.*, 473 U.S. at 637.

65. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995) (alterations in original). In describing these issues, the Court used the term "arbitrability," which authors use a number of ways. George A. Bermann, *The "Gateway Problem" in International Commercial Arbitration*, 37 YALE J. INT'L L. 1, 11-12 (2012). If the issue is whether the claim

doctrines of competence-competence and separability. These doctrines give arbitrators broad power to determine arbitrability.

Sending matters to be arbitrated can reduce federal-state conflict by reducing either set of courts' ability to decide an issue, routinely handing it to arbitrators for resolution. Doctrines that expand arbitrability might thus be attractive to state judges wary of clashing with federal ones or who wish to allow arbitral decisions that differ from the Supreme Court's desired outcome.

### 1. Expansion by the Supreme Court

Under the doctrine of competence-competence, the arbitrator can decide on the extent of her own jurisdiction unless the arbitration clause says otherwise.<sup>66</sup> The doctrine of separability holds that "any contract that contains an arbitration clause is, in fact, two contracts: (1) a contract to arbitrate disputes and (2) the overarching container contract."<sup>67</sup> The doctrine allows an arbitral tribunal to declare a contract invalid or unenforceable without "destroying the basis of its authority to make that very ruling."<sup>68</sup> Since the agreement to arbitrate is a separate agreement, it can provide a basis for arbitral authority even if the main contract fails.<sup>69</sup> This proposition is relatively uncontroversial, but its application to decisions about arbitrability is more fraught.<sup>70</sup> The Court relied on the doctrine of separability to allow courts to hear challenges to the existence of a contract<sup>71</sup> and challenges that go to the validity of the arbitration clause, but not challenges that go to the validity of "the contract as a whole."<sup>72</sup>

The Court has further separated delegation clauses, which give arbitrators the power to determine the validity of the agreement to arbitrate, from the rest of the arbitration clause. If a contract contains a delegation clause, challenges in court must be only to that delegation clause and not to the arbitration in general.<sup>73</sup> Thus, the Court determined that the plaintiff's challenges to the arbitration agreement's fee-splitting arrangement and limitations on discovery were challenges to the arbitration agreement, but not to the delegation agreement, and should be before an arbitrator.<sup>74</sup> Delegation clauses are relatively common in consumer and employment contracts.<sup>75</sup>

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can be decided in arbitration as a matter of statutory or common law, rather than contract, the issue belongs in court. *Id.* at 29. If the issue is what the *contract* lets arbitrators decide, the doctrine is less clear. *Id.*

66. Bermann, *supra* note 65, at 13–14; *see* *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010).

67. Horton, *supra* note 3, at 449.

68. Bermann, *supra* note 65, at 22.

69. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 406–07 (1967).

70. *See* Bermann, *supra* note 65, at 22.

71. *Id.* at 31 (noting that, in *Granite Rock Co. v. International Brotherhood of Teamsters*, 561 U.S. 287 (2010), the Court treated the existence of the main contract as a matter for a court to decide prior to allowing arbitration).

72. *Id.* at 23.

73. *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 72 (2010).

74. *Id.* at 73–74.

75. Horton, *supra* note 3, at 491.



Moreover, nearly all circuits to decide the issue have held that reference to specific provider rules that contain a delegation clause, such as the rules of frequently used providers like JAMS and AAA, demonstrates the parties' intent to let the arbitrator decide arbitrability.<sup>76</sup> Before the Court's intervention, some state courts had rejected allowing the arbitrator to decide arbitrability in this way, reasoning that arbitrators have a financial interest in finding that a matter is arbitrable.<sup>77</sup> The Court rejected this approach, assuming parity between arbitration and litigation.<sup>78</sup>

The Court finally seems to have found the limits of this approach in *New Prime Inc. v. Oliveira*.<sup>79</sup> *New Prime*, which drafted the delegation clause at issue in the case, specified arbitration according to AAA rules, under which arbitrators may rule on questions of arbitrability.<sup>80</sup> *New Prime* argued that this clause meant that the arbitrator, not a court, should decide if *Oliveira* was an employee within the meaning of section 1 of the FAA.<sup>81</sup> If *Oliveira* was an employee within the meaning of section 1, the statute would bar arbitration.<sup>82</sup> The Court rejected this invitation to have the arbitrator determine the statutory limits of his or her authority.<sup>83</sup> Instead, *New Prime* holds that the statutory interpretation question must be decided in court.<sup>84</sup> Around the same time, however, the Court issued its decision in *Henry Schein v. Archer & White*, rejecting the doctrine under which some courts rejected motions to compel arbitration that they found to be "wholly groundless."<sup>85</sup> Both decisions were unanimous.

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76. *Simply Wireless, Inc. v. T-Mobile U.S., Inc.*, 877 F.3d 522, 527–28 (4th Cir. 2017) (collecting cases from the First, Second, Fifth, Eighth, Ninth, Tenth, Eleventh, D.C., and Federal Circuits); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1284 (10th Cir. 2017) (announcing that, contrary to the view of some commentators the circuit does not "deviate[] from this consensus"). The Fourth Circuit limited its holding to sophisticated commercial parties. *Simply Wireless, Inc.*, 877 F.3d at 528. Other circuits have allowed provider rules as evidence of delegation even when one party was unsophisticated. *Fallo v. High-Tech Inst.*, 559 F.3d 874, 878 (8th Cir. 2009); *Awuah v. Coverall North America, Inc.*, 554 F.3d 7, 11 (1st Cir. 2009). *But see Chesapeake Appalachia, LLC v. Scout Petroleum, LLC*, 809 F.3d 746 (3d Cir. 2016) (rejecting this approach and determining that reference to AAA rules does not delegate all questions of arbitrability to the arbitrators). Some courts also treat adhesive contracts differently. David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 414–16 (2018).

77. David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L.J. (forthcoming 2019) (manuscript at 19).

78. *Id.* at 20–21.

79. 139 S. Ct. 532 (2019).

80. *Id.* at 536–37.

81. *Id.* at 538.

82. *Id.* at 539.

83. *Id.* at 538.

84. *Id.* at 544; Ronald Mann, *Argument Analysis: Justices Dubious About Enforcing Arbitration Agreements for Transportation Workers*, SCOTUSBLOG (Oct. 3, 2018, 6:26 PM), <http://www.scotusblog.com/2018/10/argument-analysis-justices-dubious-about-enforcing-arbitration-agreements-for-transportation-workers> [<https://perma.cc/88CZ-9P82>].

85. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 528 (2019). *Henry Schein* left open the question of whether the delegation clause at issue, which was found in AAA rules rather than the contract, would delegate the matter to the arbitrator. *Id.* at 531. See Brief of Amicus Curiae Professor George A. Bermann in Support of Respondent at 7, *Henry*

The distinction between challenges to the contract, the arbitration clause, and the delegation clause is “logically dubious.”<sup>86</sup> For every situation in which line drawing is relatively easy—between an argument that an employment contract is unconscionable because of the fee-splitting arrangement versus an argument that it offers the employee an unconscionably low wage, for instance—there are other situations in which line drawing is hard, as with the claim the contract suffers from fraud in the inducement.<sup>87</sup> The Court’s approach makes more sense when read from a policy perspective as an effort to move more cases into arbitration.

## 2. Expansion by State Courts

State courts face a situation in which even indirect confrontation with the Supreme Court has resulted in ever-wider federal preemption claims. Yet some state legislatures have continued to pass laws suggesting that they want the courts to control the use of arbitration.<sup>88</sup> State judges who want to avoid continued confrontation, and avoid overruling the state legislature’s choices, might also find it convenient to shift decision-making from themselves to the arbitrators. This approach is the mirror image of the Supreme Court’s own choices to expand arbitrator jurisdiction.

State courts may not set out to engage in strategic judging, but some observers have seen evidence of it in relation to arbitration.<sup>89</sup> The Supreme Court’s harsh response to recent unconscionability decisions also suggests that at least some justices suspect some state courts of trying to enforce a view of arbitration that differs from the Court’s. Arbitrators given broad, judicial powers may also have a different view of what such powers entail than the Supreme Court does. The dual nature of arbitrators’ mandate in federal arbitration law makes it possible for arbitrators’ views to prevail. Like judges, they may be masters of their own competence. However, if an arbitrator’s decision on this issue is subject to review only as a contract term, then federal courts cannot do much about a decision they disagree with. As result, state courts may have incentives to take arbitrability even further than the Supreme Court has.

*Sandquist v. Lebo Automotive* offers one example of how an expansive approach by a state court might create space for arbitrators to act. In *Sandquist*, the California Supreme Court confronted a discrimination claim for hostile work environment in which the employee had signed a contract with an arbitration clause.<sup>90</sup> The trial court sent the matter to arbitration, but believed that the U.S. Supreme Court’s decisions required it to rule on whether class arbitration was available and to rule that it was not.<sup>91</sup> The appellate court sent this question to the arbitrator, and the California Supreme Court affirmed.<sup>92</sup>

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Shein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524 (2019).

86. Bermann, *supra* note 65, at 23; *see also* Horton, *supra* note 76, at 424.

87. *See* Rent-A-Center, West, Inc. v. Jackson, 561 U.S. 63, 70–71 (2010).

88. Cole, *supra* note 23, at 789.

89. Bruhl, *supra* note 15, at 1434–37.

90. *Sandquist v. Lebo Auto., Inc.*, 376 P.3d 506, 510 (Cal. 2016).

91. *Id.* at 511.

92. *Id.*

During his employment, the employee signed several arbitration agreements, all with language requiring that “any claim, dispute, and/or controversy” be arbitrated.<sup>93</sup> The court found that such language easily included the issue of whether class mechanisms were allowed.<sup>94</sup> The arbitration clause also invoked the FAA, requiring the California court to interpret federal law. Determining that no prior precedents controlled, the court then asked whether the availability of class was something the parties had agreed to arbitrate.<sup>95</sup> Under state contract law, the court ruled that the parties had agreed to arbitrate the matter and the FAA presented no obstacle.<sup>96</sup> In doing so, it explicitly likened arbitrators to judges: “We may not presume categorically that arbitrators are ill-equipped to disregard . . . institutional incentives and rule fairly and equitably; the FAA requires that we treat arbitration as a coequal forum for dispute resolution.”<sup>97</sup>

Some elements of *Sandquist* might have drawn U.S. Supreme Court scrutiny. *Sandquist* interpreted the FAA in a provocative manner. The California court refused to apply *Concepcion*'s dicta arguing in favor of courts deciding whether an arbitration clause allows for class procedures.<sup>98</sup> Instead of agreeing that the FAA require courts to decide on the availability of class as a gateway matter, the California Supreme Court held that the FAA was silent. Although its decision ultimately relied on state law, the court carefully explained why it did not accept a line of federal cases holding that the FAA requires courts to decide the issue of whether class arbitration is allowed.<sup>99</sup>

The California court's decision leaves space for arbitrators to pursue an approach to arbitral procedure at odds with the vision of arbitration that the Court seems to adopt in cases like *Epic Systems*. FAA preemption cases often center around state courts' ability to limit or mandate procedures and to decide which legal claims could be arbitrated. One of the biggest problems in this area has been the one raised in *Sandquist*—the use of arbitration clauses in combination with class action waivers. Plaintiffs in very low value cases tend not to pursue individual arbitration.<sup>100</sup> Costs may outweigh the value of any relief to which they are entitled.<sup>101</sup> Pursuing a case on an individual basis takes time that many people do not have. It also requires the potential plaintiff to recognize that he or she has a claim to pursue.

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93. *Id.* at 512. The agreement had a few exceptions not relevant to an employment discrimination claim. *Id.* at 513.

94. *Id.* at 514.

95. *Id.* at 516.

96. *Id.* at 514, 516–18.

97. *Id.* at 522.

98. *Id.* at 519–20; see *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348–50 (2011).

99. *Sandquist*, 376 P.3d at 519–20.

100. Resnik, *Diffusing Disputes*, *supra* note 2, at 2893–94. One telecommunications provider, AT&T, designates AAA to administer consumer arbitrations. When Judith Resnik set out to identify filings against the company, she found that consumers filed only about twenty-seven claims per year. *Id.* at 2894. It is possible that AT&T is settling a huge mass of claims through its internal customer service process. See Rory Van Loo, *The Corporation as Courthouse*, 33 YALE J. ON REG. 547, 559–60 (2016).

101. W. Mark C. Weidemaier, *Arbitration and the Individuation Critique*, 49 ARIZ. L. REV. 69, 83 (2007).

California courts ordering class proceedings directly would run into trouble. In *Lamps Plus, Inc. v. Varela*, the Ninth Circuit upheld a district court decision ordering class arbitration based on California state law.<sup>102</sup> The U.S. Supreme Court reversed, stating that “[c]ourts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.”<sup>103</sup> The FAA preempted any state law to the contrary.<sup>104</sup> Arbitrators face fewer constraints. The Court upheld an arbitration tribunal’s decision allowing class arbitration in *Oxford Health* despite its evident disagreement with the tribunal’s reasoning.<sup>105</sup> Before the Supreme Court’s decision in *Epic Systems*, a district court even upheld an arbitrator’s decision to interpret the National Labor Relations Act (NLRA) as instructing him to ignore a class waiver in a contract and allow class arbitration.<sup>106</sup> Still, the case underscores just how far arbitrators may go in asserting their power under mandatory rules of law and how little they may see themselves as beholden to the words of the contract.

Although the *Sandquist* court may not have known it, its decision is likely to substantially increase the chances that California plaintiffs have access to class arbitration. Recent empirical work demonstrates that arbitrators are far more likely to order class arbitration than are federal courts faced with similar contractual language. State court decisions and state statutes favorable to collective litigation seem to factor into arbitrators’ decisions on whether to allow class arbitration.<sup>107</sup>

Ironically, a maximalist approach to delegation clauses could enable arbitrators to determine that certain contract terms, such as reductions to statutes of limitations or limits on punitive damages, cannot be applied. Class arbitration is the rare case in which some state courts and legislatures have sought to expand arbitral power beyond what the Court favors. In situations in which state legislation or precedent places limits on arbitrators, arbitrators may quickly declare it preempted by the FAA. Yet matters are not so simple. Some types of arbitration routinely involve elements the Court has not viewed as characteristic of arbitration, such as public, reasoned decisions.<sup>108</sup> Certain arbitrators and arbitration organizations also have an interest in

102. *Varela v. Lamps Plus, Inc. v. Varela*, 701 F. App’x. 670, 673 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 1697 (2018), *rev’d and remanded*, 139 S. Ct. 1407 (2019).

103. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1419 (2019).

104. *Id.* at 1418.

105. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 572–573 (2013).

106. *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318 at \*8 (W.D. Wis. 2012).

107. Horton, *supra* note 77, at 8, 36–37; see Alyssa S. King, *Too Much Power and Not Enough: Arbitrators Face the Class Dilemma*, 21 LEWIS & CLARK L. REV. 1031, 1056–59 (2017). California courts are not alone in arguing that in some situations, plaintiffs must have a way to pursue redress collectively in order to get any redress at all. Nor does this policy preference track a partisan political divide. Prior to *Concepcion*, appellate courts in Alabama, Florida, Illinois, Missouri, Nevada, and Washington all came to conclusions similar to the California Supreme Court’s. *Leonard v. Terminix Int’l Co.*, 854 So. 2d 529, 539 (Ala. 2002); *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So. 2d 600, 606 (Fla. Dist. Ct. App. 2007); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 271–73 (Ill. 2006) (collecting cases); *Whitney v. Alltel Commc’ns, Inc.*, 173 S.W.3d 300, 314 (Mo. Ct. App. 2005); *Picardi v. Eighth Judicial Dist. Court of Nevada*, 251 P.3d 723, 726 (Nev. 2011) (collecting cases); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007) (en banc).

108. See Weidemaier, *supra* note 10, at 1101–04.

promoting a view of the arbitrator as a quasi-judge as doing so leaves greater market share for the established organizations, as opposed to less experienced or nonlegally trained arbitrators.<sup>109</sup> Furthermore, disclaiming jurisdiction in a specific case may be prudent if it avoids conflict with state courts or legislators. AAA already refuses to administer healthcare tort arbitrations like those at issue in *Brown* and *Kindred* unless ordered to do so by a court.<sup>110</sup> An arbitrator acting under a broad delegation clause and AAA rules might thus sever such issues from an arbitration.

Even if arbitrators are as unfriendly to state law as federal courts, state judges may have reason to prefer to let them decide. The possibility that arbitrators will be favorable to similar policy goals, combined with a desire to avoid a run-in with either the Supreme Court or the state legislature on preemption is reason enough for state courts to allow arbitrators to decide more. To do so, they can rely on the Court's analogies between arbitral power and judicial power.

State regulation of arbitral process matters because other avenues for controlling the use and conduct of arbitration are not available. On matters like class arbitration, the Court has used an expansive reading of the FAA to displace the judgment of current state legislative majorities in favor of contract drafters.<sup>111</sup> It also matters because both federal and state courts have reason to favor expansive readings of contracts to arbitrate that allow arbitrators to be the first to decide a wide range of issues. This broad arbitral authority may in turn save some state rules from preemption if the rules are applied by arbitrators in the course of proceedings rather than by state courts determining whether to allow arbitration.

## II. RESPONDING THROUGH STATE LEVEL ARBITRATION REFORM

The Supreme Court's jurisprudence has closed the most direct route to regulate undesirable arbitrations—an arbitration ban or a ban on arbitrations that do not offer certain procedures—and made regulation of the arbitration itself more important because more issues are decided by the arbitrator. State legislatures still occasionally

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109. Arbitrators have done so in the international context. See YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 57–61 (1996); Emmanuel Gaillard, *Sociology of International Arbitration*, 31 *ARB. INT'L* 1, 5–6 (2015). Arbitrators in the types of cases that state courts have been concerned with are of a different professional class than those involved in international arbitration. Weidemaier, *supra* note 101, at 83–84 (observing that domestic bilateral arbitrations might not offer enough returns to draw expert lawyers or arbitrators); accord DEZALAY & GARTH, *supra*, at 124–25 (“Domestic arbitration . . . is much closer to the pole of business than to that of law.”). Yet they too might seek the increased professional respect that comes with deploying greater technical skill to comply with state law. W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 *WM. & MARY L. REV.* 1895, 1919 (2010) (“[A]rbitrators often operate in a competitive market in which future purchasers will choose an arbitrator based on perceptions about the arbitrator's diligence, expertise, and impartiality.”).

110. See *AAA Healthcare Policy Statement*, AM. ARB. ASS'N, [https://www.adr.org/sites/default/files/document\\_repository/AAA\\_Healthcare\\_Policy\\_Statement.pdf](https://www.adr.org/sites/default/files/document_repository/AAA_Healthcare_Policy_Statement.pdf) [<https://perma.cc/P9MK-C6F4>].

111. See Horton, *supra* note 3, at 480 (discussing arbitration as delegation of lawmaking authority).

contemplate blanket arbitration bans for certain subject matter, but state courts likely cannot enact these bans without falling afoul of the FAA.<sup>112</sup>

One route that remains open to arbitration critics is to seek regulations at the state level that do not limit arbitration, but rather turn it into something more palatable by making arbitration more like court. Such reforms help respond to fears of arbitrator bias and to the critique that arbitration procedures do not protect rights under state and federal statutes and amount to a backdoor waiver of those rights. As Daniel Markovits argues, a model of arbitration as contractual bargaining, rather than adjudication, may founder if the arbitrator must apply mandatory law.<sup>113</sup> If arbitration is asking an agent to fill gaps in a contract, then arbitration of statutory rights amounts to waiver of those rights.<sup>114</sup> If the parties intend not to waive their legal rights, but to have the arbitrator adjudicate them, then courtlike due process rules are necessary in order for the arbitrator to have adequate authority to decide.<sup>115</sup> If arbitration is private court and arbitrators are private judges, then similar conflict of interest rules should apply. As arbitrators adjudicate matters of public rights, the state also has an interest in basic due process guarantees and in reporting rules that allow the legislature to see how the law is being applied. Regulation of issues such as arbitral independence, procedure, and reporting of information related to arbitrations better fit a model of arbitration as third-party adjudication than they do the contract model. Doing so makes sense from the position that state legislatures are currently in, in which they cannot limit the Supreme Court's expansions of arbitrator authority or the subject matter of arbitration.

That state legislatures are likely to have to learn to live with arbitration has not escaped notice. Andrea Cann Chandrasekar and David Horton have recently proposed that legislatures create “a bonus for plaintiffs’ lawyers who prevail in arbitration” to encourage lawyers to represent employees and consumers in arbitral fora.<sup>116</sup> This proposal is based on their empirical research, which has shown that lawyers familiar with arbitration achieve better outcomes for their clients.<sup>117</sup> An “arbitration multiplier,” as Chandrasekher and Horton refer to their scheme,<sup>118</sup> might be particularly attractive if there are specific issues, such as class arbitration, on which arbitrators differ from federal judges in a manner the state legislature would

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112. For instance, the New York State Senate recently passed a bill banning arbitration clauses in sexual harassment settlement agreements. Josefa Velasquez, *NY Senate Passes Bill Prohibiting Mandatory Arbitration Clauses in Sex Harassment Settlements*, N.Y. L.J. (Mar. 12, 2018, 6:12 PM), <https://www.law.com/newyorklawjournal/2018/03/12/ny-senate-passes-bill-prohibiting-mandatory-arbitration-clauses-in-sex-harassment-settlements> [https://perma.cc/7HUR-T45B].

113. Markovits, *supra* note 5, at 483 (allowing arbitration of statutory rights does not encroach on adjudication, but rather on legislation).

114. *Id.* at 482.

115. *Id.* at 473. Although Markovits believes that process rules will create adequate authority for the arbitrator's decision, he takes no position on whether that authority *should* be wielded by an arbitrator. *See id.*

116. Horton & Chandrasekher, *supra* note 16, at 62.

117. *Id.*

118. *Id.* at 62–64

endorse.<sup>119</sup> Encouraging arbitration of gateway issues might also slow the creation of a federal common law of arbitration that would cut off further avenues for reform. Policies encouraging arbitration would be a lot more palatable if state legislatures take greater control over the conduct of arbitration. State legislatures have undertaken reforms that would align with this model, and more have been proposed.<sup>120</sup> States have regulated arbitrator conflicts of interest and created default due process rules. Additionally, states can regulate what arbitration providers disclose, requiring publication of statistics, or even of the awards themselves. Such regulation is not a panacea. To the extent that certain clauses effectively prevent an arbitration from ever getting off the ground, sending matters to an arbitrator may not be enough to allow it to launch.<sup>121</sup> Careful drafters may design their contracts so that state law does not apply to the arbitration. Still, state legislatures may prefer a partial solution to none at all. Discussion of reform may also prod arbitration providers, which may adopt mandatory rules for arbitration clauses and refuse to hear disputes under nonconforming clauses.<sup>122</sup> States might also be able to regulate in other ways,

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119. Horton, *supra* note 77, at 19.

120. State legislators are not always likely innovators. Local politicians who hope to rise in status may be particularly risk averse and unlikely to innovate for fear that something could go wrong. State politicians will also have an incentive to wait for other states to run an experiment first. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 611 (1980). However, other forces may overcome these incentives. States start out with variations in their legal systems that may limit their ability to simply wait for another state to innovate and copy its choices. See Brian Galle & Joseph Leahy, *Laboratories of Democracy? Policy Innovation in Decentralized Governments*, 58 EMORY L.J. 1333, 1347 (2009). A choice that voters in one state might view as risky and novel might be seen as preserving the status quo in a different state. Moreover, U.S. politicians remain connected across state lines through a national political party and to advocacy organizations, which may have adopted a program calling for change that relies on the states and may push its members to enact that program. *But see* Rose-Ackerman, *supra*, at 615 (noting that such effects are “rather weak”). State legislatures might be more inclined to change their laws with respect to arbitration because change has already been forced on them by the U.S. Supreme Court. The Court will not allow them to restore an earlier status quo by simply barring access to arbitration. State legislatures will now have to find new ways to accomplish some of the goals they hoped to accomplish through private rights of action in state court.

121. An example of such an exculpatory arbitration clause is the use of class action waivers in scenarios in which plaintiffs are likely to have negative value cases. A negative value case is one in which the cost of litigating or arbitrating on an individual basis exceeds the plaintiff’s expected recovery. In such scenarios, aggregation provides the only feasible way to plaintiffs to pursue redress. If they do not have access to it, existing evidence suggests that plaintiffs simply forgo bringing their claims at all. Resnik, *Diffusing Disputes*, *supra* note 2, at 2905–08.

122. See, e.g., CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES (AM. ARBITRATION ASS’N 1998), [https://www.adr.org/sites/default/files/document\\_repository/Consumer%20Due%20Process%20Protocol%20\(1\).pdf](https://www.adr.org/sites/default/files/document_repository/Consumer%20Due%20Process%20Protocol%20(1).pdf) [<https://perma.cc/6GY5-88J4>]; EMPLOYMENT DUE PROCESS PROTOCOL (AM. ARBITRATION ASS’N 1995), [https://www.adr.org/sites/default/files/document\\_repository/Employment%20Due%20Process%20Protocol\\_0.pdf](https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf) [<https://perma.cc/P5XM-WX7Q>]; JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES, *supra* note 17.

by focusing on the contracting parties or by creating new rights of action, but those reforms do not fall under the category of reforms to arbitration itself.<sup>123</sup>

Along with the Revised Uniform Arbitration Act states, important just for their number, this Part pays special attention to California, New York, and Texas. California and New York are high-volume jurisdictions sometimes presented as taking opposite approaches to arbitration, with California treating it skeptically and New York embracing it. Despite their dissimilarity, both have undertaken or are considering reforms. Texas is simply a jurisdiction in which courts have been relatively active, especially when it comes to the law of vacatur. Academics and advocacy organizations have proposed additional reforms in the same vein as existing or proposed legislation. If enacted, these reforms would not make arbitration operate exactly like a state court but would provide procedural protections and help guarantee the adjudicator's neutrality.

Delaware, the home jurisdiction of many of the businesses that draft consumer and employment contracts, has generally not pursued reforms that treat arbitration as similar to litigation in court. Delaware uses the original 1956 Uniform Arbitration Act, which was not concerned with matters like conflicts of interest.<sup>124</sup> The broad use of arbitration in ordinary consumer and employment scenarios did not then exist.<sup>125</sup> Delaware has since updated portions of its arbitration law, but these changes are designed to serve corporate clients.<sup>126</sup> The Delaware Rapid Arbitration Act, a procedural alternative to provider rules, explicitly excludes consumers and other “vulnerable parties.”<sup>127</sup>

Along with the trans-substantive rules that are the focus of this Part, some states have other sets of arbitration rules for international arbitration<sup>128</sup> and a variety of arbitrations administered by state agencies.<sup>129</sup> At least twelve states have laws on the books related to health care arbitration.<sup>130</sup> Some of these laws refer to state-administered or court-ordered arbitration.<sup>131</sup> Others apply to all healthcare or medical

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123. See *supra* note 22 and accompanying text.

124. See *Legislative Fact Sheet—Arbitration Act (1956)*, UNIFORM L. COMMISSION, [https://web.archive.org/web/20180530203049/http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20\(1956\)](https://web.archive.org/web/20180530203049/http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20(1956)) [<https://perma.cc/XJD3-3Y AQ>].

125. Glover, *supra* note 4, at 3059–62.

126. See Christopher R. Drahozal, *Innovation in Arbitration Law: The Case of Delaware*, 43 PEPP. L. REV. 493, 496–99 (2016).

127. *Id.* at 501–02.

128. *E.g.*, GA. CODE ANN. § 9-9-21 (LexisNexis Supp. 2018).

129. *E.g.*, MO. ANN. STAT. § 290.250 (West 2005 & Supp. 2018).

130. ALA. CODE § 6-5-485 (LexisNexis 2014); ALASKA STAT. § 09.55.535 (2016); CAL. HEALTH & SAFETY CODE § 1373.19 (West 2018); GA. CODE ANN. § 9-9-61 (2007); 710 ILL. COMP. STAT. ANN. 15/3 (West 2018); LA. STAT. ANN. §§ 9:4230–36 (2009 & Supp. 2019) (no procedural differences with other arbitrations, the statute provides for standard expiry date of agreements); MD. CODE ANN., CTS. & JUD. PROC. §§ 3-2A-01–10 (LexisNexis 2013 & Supp. 2018); N.Y. PUB. HEALTH LAW § 4406 (MCKINNEY 2018) (health maintenance organization contracts); N.C. GEN. STAT. ANN. § 90-21.60 (West 2008); S.D. CODIFIED LAWS § 21-25B-4 (2004); VT. STAT. ANN. tit. 12, § 7002 (2017); WIS. STAT. ANN. § 788.04 (West 2001 & Supp. 2018).

131. *E.g.*, N.C. GEN. STAT. ANN. § 90-21.60 (West 2008) (all parties must agree to state administered arbitration process); S.D. CODIFIED LAWS §§ 21-25B-4, 6 (state court administers



malpractice claims.<sup>132</sup> The portions of these laws that purport to require certain terms or that require that agreements to arbitrate end after a certain time period would be preempted under the Supreme Court's FAA rulings.<sup>133</sup> Other sections, such as those which offer a standard method of selecting arbitrators,<sup>134</sup> fit the mold of the laws discussed here. Like general state arbitration laws, health care rules would be problematic if applied proactively to block arbitration. Arbitrators themselves might still follow them. As the next Part discusses, a stronger argument exists that they could be referenced in order to vacate an award.

#### *A. Ethics, Conflicts, and Competence*

Arbitration bans make sense from a perspective that treats arbitration as a contract to waive rights otherwise protected in court. Yet the Court has struck down these bans and insisted that agreeing to arbitrate a statutory right does not amount to waiving it. If arbitration is not to be a waiver of rights, then the parties will need a neutral adjudicator along with other procedural protections.<sup>135</sup> If state legislatures are unlikely to be able to ban arbitration as a waiver of rights, perhaps they can regulate it as adjudication.

Several states have conflict of interest rules, and new proposals would target perceived conflicts in consumer and employment arbitration. In cases of extreme bias that has prejudiced decisions, the state attorney general's office may be able to act.<sup>136</sup> For more ordinary concerns, states might pass more robust disclosure rules for conflicts of interest.<sup>137</sup> In a change from the 1956 Uniform Arbitration Act, the 2000 Revised Uniform Arbitration Act (RUAA) includes conflicts rules.<sup>138</sup> The revisions

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arbitration for malpractice claims using arbitrators designated in part by state medical providers).

132. *E.g.*, 710 ILL. COMP. STAT. ANN. 15/8 (West 2018) (purporting to regulate agreements to arbitrate in healthcare settings).

133. *See, e.g.*, *Fosler v. Midwest Care Ctr. II, Inc.*, 928 N.E.2d 1, 16 (Ill. App. Ct. 2010) (holding that the FAA preempts the section of the state's Health Care Arbitration Act providing that contracts to arbitrate will no longer be valid more than two years after execution).

134. *E.g.*, ALASKA STAT. § 09.55.535(f) (2016) (providing for three-member board with two party-appointed arbitrators and one neutral appointed by the other two arbitrators).

135. Markovits, *supra* note 5, at 481–83.

136. In one egregious case of abuse, the National Arbitration Forum (NAF), previously the largest provider of arbitration in consumer debt disputes, was accused of hiding its financial relationships to the debt collection firms bringing consumers to arbitration. After the Minnesota Attorney General sued, the NAF entered a consent decree under which it agreed to stop administering consumer arbitrations. Consent Judgment at 1–2, *Minnesota v. Nat'l Arbitration Forum, Inc.*, No. 27-CV-09-18550 (Minn. Dist. Ct. July 17, 2009), <http://pubcit.typepad.com/files/nafconsentdecree.pdf> [<https://perma.cc/VWB7-V8DN>].

137. *See* Stephen K. Huber, *State Regulation of Arbitration Proceedings: Judicial Review of Arbitration Awards by State Courts*, 10 CARDOZO J. CONFLICT RESOL. 509, 545–48 (2009).

138. Alaska, Arizona, Arkansas, Colorado, Connecticut, the District of Columbia, Florida, Hawaii, Kansas, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, Utah, Washington, and West Virginia have adopted the RUAA. It has been introduced in Massachusetts and Vermont. Legislative Fact

in the Act were driven in part by mounting concern for consumers and employees.<sup>139</sup> Section 11(b) states that an individual who has a “known, existing, and substantial relationship with a party” may not serve as a neutral arbitrator.<sup>140</sup> Section 12 creates a continuing obligation to disclose “any known facts that a reasonable person would consider likely to affect” the arbitrator’s impartiality.<sup>141</sup> It specifically enumerates “financial or personal interest” in the outcome, “existing or past relationship” with the parties, their counsel, witnesses, or the other arbitrators.<sup>142</sup> The rules have potential bite because failure to disclose creates a ground for vacating an award.<sup>143</sup> However, provider rules on disclosures can supersede this section.<sup>144</sup>

Few state courts have had occasion to discuss this part of the RUAA in depth. The Hawaii Supreme Court takes a strict approach to violations of disclosure rules. Such violations create a presumption of evident partiality, and “if a neutral arbitrator demonstrates evident partiality, the arbitration award *shall* be vacated.”<sup>145</sup> Similarly, Texas appellate courts have treated an arbitrator’s failure to disclose that a lawyer for one side had previously appeared in front of him or her as creating “evident partiality” requiring that the award be vacated under the FAA and Texas Arbitration Act.<sup>146</sup>

The California Arbitration Act goes further in giving the parties the ability to investigate and disqualify arbitrators. The Act states that if a person is “to serve as a neutral arbitrator” under an arbitration agreement, the neutral “shall disclose all matters that could cause a person aware of the facts to reasonably entertain a doubt that the proposed neutral arbitrator would be able to be impartial.”<sup>147</sup> It then offers a non-exhaustive list, including whether one party has appeared before the arbitrator or otherwise used his or her services in the last two years or is in discussions to use the arbitrator’s services in another case, is in any attorney-client relationship with a

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Sheet—Arbitration Act (2000), UNIFORM L. COMMISSION, [https://web.archive.org/web/20170108233429/http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20\(2000\)](https://web.archive.org/web/20170108233429/http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20(2000)) [https://perma.cc/5WCV-P3JH]. Delaware, Georgia, Idaho, Indiana, Iowa, Kentucky, Maine, Missouri, Montana, Nebraska, South Carolina, South Dakota, and Virginia follow the 1956 Uniform Arbitration Act. Legislative Fact Sheet—Arbitration Act (1956), UNIFORM L. COMMISSION, [https://web.archive.org/web/20180530203049/http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20\(1956\)](https://web.archive.org/web/20180530203049/http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Arbitration%20Act%20(1956)) [https://perma.cc/3WKR-ZJ8F].

139. Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 KAN. L. REV. 985, 1008 (2012).

140. UNIF. ARBITRATION ACT (2000) § 11(b), 7 U.L.A. 44 (2009).

141. *Id.* § 12(a).

142. *Id.*

143. *Id.* § 12(c)–(e).

144. *See id.* § 12(f).

145. Noel Madamba Contracting LLC v. Romero, 364 P.3d 518, 533 (Haw. 2015) (alteration to the original); *see* 9 U.S.C. § 10 (2009).

146. Builders First Source-S. Tex., LP v. Ortiz, 515 S.W.3d 451, 458 (Tex. App. 2017), *review denied* (June 2, 2017); Alim v. KBR (Kellogg, Brown & Root)—Halliburton, 331 S.W.3d 178, 182 (Tex. App. 2011).

147. CAL. CIV. PROC. CODE § 1281.9(a) (West 2007).

party, or is in any personal relationship with a party.<sup>148</sup> The arbitrator must also disclose all parties who are not natural persons involved in “all prior or pending noncollective bargaining cases in which the proposed neutral arbitrator served or is serving” as neutral arbitrator, partisan arbitrator, or lawyer.<sup>149</sup> In keeping with the idea of arbitrators as judge-like independent neutrals, the Act gives ongoing rulemaking power to the California Judicial Council.<sup>150</sup> Additionally, California bars arbitration providers with a financial interest in the outcome from administering consumer arbitrations.<sup>151</sup> California courts do not treat these rules as preempted by the FAA.<sup>152</sup>

A bill in the last New York State legislative session would have followed California’s lead and required a “neutral third-party arbitrator.”<sup>153</sup> For appointment to “reasonably ensure the personal objectivity of the arbitrator,” the arbitrator should disclose to the parties and other arbitrators “any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration

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148. *Id.* § 1281.9(a)(1), (5)–(6).

149. *Id.* § 1281.9(a)(3)–(4).

150. *Id.* § 1281.9(a)(2).

151. *Id.* § 1281.92(b). The Northern District of California refused to set aside an award from the National Association of Securities Dealers on the basis of this state law because it determined that the rule was preempted in an unreported case. However, the reasoning in this decision is not terribly convincing. The court states that the FAA does not occupy the field, then seemed to reference section 2 preemption, which had to do with enforcement of an arbitration clause in the context of deciding whether to vacate an award under section 10 of the FAA. Section 10 arguably has a narrower scope because it is directed specifically at federal courts, but the district court did not address this issue. *See In re Arbitration between Lemoine Skinner III v. Donaldson, Lufkin & Jenrette Sec. Corp.*, No. C 03–2625 VRW, 2003 WL 23174478, at \*8 (N.D. Cal. Dec. 29, 2003).

152. The U.S. District Court for the Northern District of California decided that the rules were preempted by the Securities and Exchange Act and section 2 of the FAA, when a plaintiff asked that court to apply them in a dispute with a broker. However, in that case the plaintiff had explicitly agreed to standards that followed federal securities law and conceded to the court that he was not entitled to California standards. *Mayo v. Dean Witter Reynolds, Inc.*, 258 F. Supp. 2d 1097, 1114–16 (N.D. Cal. 2003). California state appellate courts have continued to apply the California standards after the northern district decision and even after *Concepcion*. *Gray v. Chiu*, 151 Cal. Rptr. 3d 791, 798–99 (Cal. Ct. App. 2013) (noting arbitrator’s failure to comply with disclosure rules requires trial court to vacate the award); *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP*, 162 Cal. Rptr. 3d 597, 607–08 (Cal. Ct. App. 2013) (noting that the arbitrator failed to disclose that he listed defendant attorney in legal malpractice arbitration as a reference, thus his award was void); *Advantage Med. Servs., LLC v. Hoffman*, 72 Cal. Rptr. 3d 935, 947 (Cal. Ct. App. 2008) (noting that a party has right to vacate award because arbitrator failed to disclose business relationship); *Azteca Constr., Inc. v. ADR Consulting, Inc.*, 18 Cal. Rptr. 3d 142, 148–51 (Cal. Ct. App. 2004) (noting that neutrality of arbitrators is “of such crucial importance” that parties do not waive rights to California standards by agreeing to AAA rules). However, they do not treat any violation of the standards as voiding an arbitral award. *United Health Ctrs. of San Joaquin Valley, Inc. v. Superior Court*, 177 Cal. Rptr. 3d 214, 230 (Cal. Ct. App. 2014) (noting that the arbitrator failed to comply with disclosure obligations and award may be voidable if one party was unaware of this failure).

153. Assemb. 10393, 241th Leg., Reg. Sess. § 7504 (N.Y. 2018).

proceeding” before being appointed and has a continuing obligation to disclose such facts.<sup>154</sup> The bill specifically singled out financial interests and prior legal work by the arbitrator.<sup>155</sup> Awards could be vacated if the arbitrator failed to disclose material facts or continues to act over a party’s objection.<sup>156</sup> If an arbitrator failed to disclose a “known, direct and material interest in the outcome of the arbitration” or a “known, existing and substantial relationship with a party” the award would be presumptively void due to the arbitrator’s “evident partiality.”<sup>157</sup>

Academics have proposed further reforms. Jeffrey Stempel suggested that states license arbitrators deemed to be “sufficiently independent” and likely to recuse themselves when doing so was proper.<sup>158</sup> Arbitration providers would also be licensed on the basis of their rosters of licensed arbitrators.<sup>159</sup> Stempel proposed licensing as an opportunity to screen out arbitrators who were unlikely to have the ability to correctly identify and apply mandatory law.<sup>160</sup> Parties could then complain to a licensing agency if something went wrong, rather than undertaking the cost of investigating the arbitrator up front.<sup>161</sup> Stempel’s argument is driven by his view that arbitration stands in for court: “Because arbitration is a substitute for adjudication by litigation, the logical default rule for assessing an arbitrator’s neutrality should be the neutrality norms found in the litigation system.”<sup>162</sup> Kristen Blankley reached for a similar rationale in arguing that states should amend perjury and evidence tampering laws to apply explicitly to arbitration.<sup>163</sup>

State courts would not be able to enforce a licensing requirement when ordering arbitration. However, state legislatures could offer incentives for certification such as licensing for arbitrators and provider organizations,<sup>164</sup> access to state contracts,<sup>165</sup> certification to a list of “approved” organizations that businesses are encouraged to use, tax incentives, and access to business from regulated industries.<sup>166</sup>

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154. *Id.* § 7504(b)–(c).

155. *Id.* § 7504(c)(1)(i)–(ii).

156. *Id.* § 7504(c)(3)–(4).

157. *Id.* § 7504(c)(5).

158. Jeffrey W. Stempel, *Keeping Arbitrations from Becoming Kangaroo Courts*, 8 NEV. L.J. 251, 262 (2007).

159. *Id.* at 263.

160. *Id.*

161. *Id.*

162. *Id.* at 260.

163. Kristen M. Blankley, *Taming the Wild West of Arbitration Ethics*, 60 U. KAN. L. REV. 925, 960 (2012) (using the heading “Arbitration Is Simply an Alternate Forum, Providing the Same Rights as a Court”).

164. Huber, *supra* note 137, at 545–46. In designing a licensing scheme, regulators need not work off a blank slate, but rather could draw on ethics rules and best practices developed by the ABA Section on Dispute Resolution and College of Commercial Arbitrators.

165. For instance, some state governments have outsourced adjudications to AAA. *See The American Arbitration Association: A Long History of Working with Government*, AM. ARB. ASS’N 1, [https://www.adr.org/sites/default/files/document\\_repository/AAA%20Government%20Services.pdf](https://www.adr.org/sites/default/files/document_repository/AAA%20Government%20Services.pdf) [<https://perma.cc/M69K-6NWT>].

166. Federal regulation of arbitration follows this pattern; for instance, SEC regulations mean that securities industry arbitration for investors avoids many of the abuses seen in other areas of consumer arbitration. Jill I. Gross, *The End of Mandatory Securities Arbitration*, 30

*B. Due Process Rules*

Along with designating arbitrators as independent neutrals, several states have adopted due process rules. Some state legislatures or state courts have drawn a specific consequence for failure to comply with conflict of interest rules: a presumption of evident partiality that allows the award to be vacated. The consequences of failing to comply with some or all of the state's due process rules are more nebulous. Failure to comply with the rules is not a bar to arbitration, but procedural factors can weigh in a fact-specific unconscionability analysis.<sup>167</sup> State courts have the option to sever problematic provisions rather than refuse to compel arbitration and set up an FAA preemption fight.<sup>168</sup> Their ability to do so is enhanced if they know how the arbitration will be conducted. State process rules serve as defaults.

The RUAA's requirements are quite basic; all parties have the right to hire a lawyer and have notice of hearings.<sup>169</sup> Summary disposition is only allowed if the nonmoving side has notice and an opportunity to respond.<sup>170</sup> The arbitrator must also have adequate tools to help the parties pursue a case, such as the power to issue subpoenas and oversee discovery.<sup>171</sup> Likewise, the arbitrator must be able to order punitive damages and apply statutory rules on fee shifting.<sup>172</sup>

Texas sets some default process rules including notice<sup>173</sup> and basic rights to be heard, to present evidence, and to cross-examine witnesses.<sup>174</sup> Additionally, parties have a right to an attorney and cannot waive that right prior to the arbitration.<sup>175</sup> Any award must be in writing, which may be useful for allowing more meaningful review.<sup>176</sup> Texas also allows the parties to go to court to ask for an order setting a time limit by which the arbitrator must produce the award.<sup>177</sup>

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PACE L. REV. 1174, 1186–87 (2010).

167. However, the likelihood that these factors will add up to a refusal to compel arbitration is slim. *See Sanchez v. CarMax Auto Superstores Cal. LLC*, 168 Cal. Rptr. 3d 473, 478, 480, 482 (Cal. Ct. App. 2014) (considering several procedural defects including secrecy and lack of discovery but determining that they nonetheless did not render the agreement unconscionable).

168. *Burgoon v. Narconon*, No. 15-CV-01381-EMC, 2016 WL 192536, at \*7–8 (N.D. Cal. Jan. 15, 2016) (severing provisions unconscionable under California law).

169. UNIF. ARBITRATION ACT (2000) §§ 16–17(c), 7 U.L.A. 44 (2009). Although it has not adopted the Act, Maryland has similar rules. MD. CODE ANN., CTS. & JUD. PROC. § 3-216 (LexisNexis 2013).

170. UNIF. ARBITRATION ACT (2000) § 15(b) cmt. 3.

171. *Id.* § 17(a)–(e).

172. *Id.* § 21(a)–(c).

173. TEX. CIV. PRAC. & REM. CODE ANN. § 171.044 (West 2011).

174. *Id.* § 171.047. Other states have similar rules. GA. CODE ANN. § 9-9-8 (2007); MD. CODE ANN., CTS. & JUD. PROC. § 3-214 (LexisNexis 2013).

175. TEX. CIV. PRAC. & REM. § 171.048.

176. *Id.* § 171.053. Other states are similar to Texas on this matter. GA. CODE ANN. § 9-9-10 (2007); LA. STAT. ANN. § 9:4208 (2009); MD. CODE ANN., CTS. & JUD. PROC. § 3-219 (LexisNexis 2013); WIS. STAT. ANN. § 788.08 (West 2001).

177. TEX. CIV. PRAC. & REM. § 171.053.

Incorporated into the state civil procedure code, California's arbitration rules also reflect minimum due process standards. The rules create defaults the parties must explicitly contract around. The rules include basic elements of procedural fairness, such as access to a lawyer and to the information before the adjudicator.<sup>178</sup> Arbitrators must issue a written award determining "all questions . . . the decision of which is necessary in order to determine the controversy" and allow court reporters.<sup>179</sup> Both these elements make it easier to challenge an award. However, courts mainly use the first provision to determine whether they are, in fact, faced with an arbitration award when asked to confirm or vacate an arbitrator's decision.<sup>180</sup> Parties to tort arbitrations also have specific discovery rights.<sup>181</sup>

Additionally, California limits awards of fees and costs for cases under a certain value.<sup>182</sup> The provision applies to all arbitrations in the state, even if they are not conducted under California law.<sup>183</sup> State and federal courts have used the provision to bolster their conclusion that arbitration clauses that would involve high fees are substantively unconscionable.<sup>184</sup> The provision has avoided a fatal collision with section 2 because of the way it has been read down. The Supreme Court of California treats the fee rule as a provision that must be applied on a "case-by-case" basis to determine unconscionability.<sup>185</sup>

New York has had few procedural rules for arbitration. Proposed legislation would have added a specific rule on adjournments and required notice by a party who

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178. CAL. CIV. PROC. CODE § 1282.2(g) (West 2007) ("If a neutral arbitrator intends to base an award upon information not obtained at the hearing, he shall disclose the information to all parties to the arbitration and give the parties an opportunity to meet it."); CIV. PROC. § 1282.4 (noting that parties have a right to an attorney and if one side hires an attorney at any point in the proceedings, the other side has the right to seek one as well before continuing).

179. CIV. PROC. § 1283.4 (requiring written, signed award determining all issues that must be determined to dispose of arbitration); *id.* § 1282.5 (creating right to transcription by a "certified shorthand reporter").

180. *See, e.g.,* Judge v. Superior Court, No. B267694, 2016 WL 4272030, at \*1 (Cal. Ct. App. Aug. 15, 2016), *cert. denied, sub nom. Nijjar Realty, Inc. v. Judge*, 138 S. Ct. 68 (2017) ("When is an arbitration award not an arbitration award? When it does not 'include a determination of all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy,' as required by Code of Civil Procedure section 1283.4."); *Cinel v. Christopher*, 136 Cal. Rptr. 3d 763, 769 (Cal. Ct. App. 2012) (noting that the trial court could not confirm award because "there was no substantive award").

181. CIV. PROC. §§ 1283.05, 1283.1.

182. California requires that cost and fees in consumer arbitrations be waived for those within 300% of the federal poverty line (in 2016, this amount was around \$35,000 for a single person and \$73,000 for a family of four). CIV. PROC. § 1284.3(b)(1). To make consumers aware of the rule, California regulates provider organizations in addition to individual arbitrators. Arbitration providers must provide notice of the right to a fee waiver and cannot demand evidence beyond the consumer's declaration under oath of his monthly income and household size. *Id.* § 1284.3(b)(2)–(3).

183. CIV. PROC. § 1284.3(c).

184. *See, e.g.,* Penilla v. Westmont Corp., 207 Cal. Rptr. 3d 473, 487 (Cal. Ct. App. 2016); *Gentry v. Empire Med. Training*, No. 13-CV-02254-WHO, 2013 WL 4647530, at \*5 (N.D. Cal. Aug. 29, 2013).

185. *Sanchez v. Valencia Holding Co.*, 353 P.3d 741, 754 (Cal. 2015).

intends to call a witness.<sup>186</sup> The bill would also have required that written awards “state the issues in dispute and contain the arbitrator’s findings of fact and conclusions of law” for all issues submitted and be “executed under oath.”<sup>187</sup>

Political pressure on states to regulate process may be reduced because pressure on arbitration providers themselves has proven partially successful.<sup>188</sup> The companies most likely to draft their contracts to get around any unfavorable state rules are those with the largest number of disputes. Those companies may also be also the least able to change arbitration providers because they have come to rely on a given provider’s capacity and processes and because choosing a new and unproven provider exposes them to greater risk. Thus, targeting large providers might be a more effective way to protect large numbers of arbitration users. For instance, the Consumer Financial Protection Bureau (CFPB) took the approach of regulating providers directly in its arbitration rule. Had the rule not been overturned under the Congressional Review Act, it would have required the parties to follow provider rules, such as consumer due process protocol.<sup>189</sup>

### C. Information Rules

Some arbitrations are confidential, meaning that the arbitration clause specifically prohibits disclosure; others are merely private, in that the public is not invited in and an award may not be easily accessible.<sup>190</sup> Neither confidentiality nor privacy have to be defaults. Information rules do not necessarily require legislators to view arbitrators as judges. Such rules might reflect a model of arbitration providers as a regulated industry, but not as courts. However, rules such as requiring published decisions would make it easier to see arbitrators as third-party adjudicators. Proposed and existing rules involve everything from collecting anonymized statistics, to requiring published decisions, to allowing observers to an arbitration.

California enacted a law requiring arbitration organizations to publish quarterly statistics on outcomes in consumer arbitrations that can be used to assess how consumers are using the system and what kind of relief they are getting.<sup>191</sup> The District of Columbia, Maryland, and Maine have followed with similar laws.<sup>192</sup>

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186. S.B. A10393, 241th Leg., Reg. Sess. (N.Y. 2017).

187. *Id.*

188. See Jeffrey W. Stempel, *Mandating Minimum Quality in Mass Arbitration*, 76 U. CIN. L. REV. 383, 417 (2008) (arguing that protocols are consistently implemented, pointed to need for government guarantee); Stipanowich, *supra* note 139, at 993.

189. 12 C.F.R. § 1040.4(b)(1).

190. See Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ON ARB. & MEDIATION 28, 30 (2015) (“[A]rbitration is a private process, not a confidential one.”).

191. *But see* Resnik, *Diffusing Disputes*, *supra* note 2, at 2894–2900 (describing difficulties in obtaining reliable data on consumer arbitration).

192. KEVIN G. BAKER, CAL. STATE ASSEMBLY JUDICIARY COMM., MANDATORY CONSUMER ARBITRATION: HAS COMPLIANCE WITH CALIFORNIA’S LANDMARK DATA TRANSPARENCY LAW BEEN SUFFICIENT TO ACCOMPLISH THE LEGISLATURE’S GOALS? 9 (Mar. 18, 2013) <http://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/Arbitration%20Data%20Background%20paper.pdf> [<https://perma.cc/HQD8-RHQB>].

California has run into trouble getting arbitration providers to comply with its law. Several studies have found missing and incomplete data.<sup>193</sup> The District of Columbia has created an express private right of action aimed at solving this problem.<sup>194</sup> The National Consumer Law Center has proposed still more extensive disclosure requirements, which would include party names and information about the conduct of the arbitration.<sup>195</sup>

Proposals by Sarah Rudolph Cole and Teresa Verges would go further, requiring accessible and reasoned awards as a default matter.<sup>196</sup> The CFPB's rule would have required all arbitration documents to be available in a public, searchable database.<sup>197</sup> Publishing awards would subject arbitrators to greater scrutiny, which can control for bias and serve as an incentive to produce awards that conform with the law. Public awards also reduce the power of repeat parties by giving parties new to an arbitration system more information about how arbitrators will decide.<sup>198</sup> In some contexts, public awards are already available, but the public does not necessarily know how to access them.<sup>199</sup> Reporting rules vary by provider and can change. State reporting guidelines would create a clear baseline for what is available and apply across providers, making public access easier.

Although state legislatures might want to require statistical reporting that encompasses all arbitrations of a certain type, publication should be more selective. State legislatures may want to set rules for when reasoned awards are required.<sup>200</sup> Court systems control the direction of precedent by choosing which opinions to report. Unreasoned decisions are common in both federal and state court.<sup>201</sup> Published opinions require greater judicial resources and create a risk of

193. *Id.* at 7–8; Resnik, *A2J*, *supra* note 2, at 645.

194. BAKER, *supra* note 192, at 9.

195. DAVID SELIGMAN, NAT'L CONSUMER LAW CTR., THE MODEL STATE CONSUMER & EMPLOYEE JUSTICE ENFORCEMENT ACT 51–54 (2015).

196. Sarah Rudolph Cole, *The Lost Promise of Arbitration*, 70 SMU L. REV. 849, 868 (2017). *See generally* Teresa J. Verges, *Evolution of the Arbitration Forum as a Response to Mandatory Arbitration*, 18 NEV. L.J. 437 (arguing that the rise of mandatory arbitration requires a more public, regularized system similar to FINRA's).

197. 12 C.F.R. §1040.4(b).

198. *See Pokorny v. Quixtar, Inc.*, 601 F.3d 987, 1001–03 (9th Cir. 2010) (discussing benefits of publication for evening the playing field and helping alert plaintiffs to like cases); W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1923 (2010).

199. Cole, *supra* note 196, at 867–68.

200. New York's criteria offer a good starting point for when reasoning might be required. *See New York Official Reports: Selection of Opinions for Publication*, N.Y. STATE L. REPORTING BUREAU, <http://www.nycourts.gov/reporter/selection.shtml> [<https://perma.cc/AD7T-56UD>] (listing precedential significance, novelty, public importance, practical significance, subject matter diversity, geographic diversity, and author diversity). Arbitrators may, of course, apply these criteria imperfectly, just as judges do. *See* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940, 954 (1989). Moreover, any unpublished awards may be perceived as unfair, particularly by less sophisticated parties. *See* Gross, *supra* note 166, at 1186.

201. Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634 (1995).



inconsistency or bad precedent.<sup>202</sup> To publish more opinions with the same resources, quality must go down. For this reason, state court systems do not publish most of their opinions. Some may be available and even citable despite being unreported; others are not available at all.<sup>203</sup>

Existing arbitration systems provide several additional models, suggesting that large providers are capable of administering a publication scheme. AAA publishes redacted versions of its consumer and employment arbitration awards with both Lexis and Westlaw. AAA commonly redacts party names, a practice states may want to disallow. Verges's publication proposal is inspired by the Financial Industry Regulatory Authority (FINRA)'s arbitration scheme.<sup>204</sup> FINRA administers arbitrations involving investors and industry parties, such as brokers and brokerage firms, as well as arbitrations between industry parties.<sup>205</sup> Most arbitrations settle, but FINRA reports outcomes for those its arbitrators resolve.<sup>206</sup> Arbitrators must issue written decisions that are publicly available, but need not explain their reasoning unless they choose to do so or the parties jointly request it.<sup>207</sup> State legislatures could also refer to the detailed requirements for public awards in the CFPB's former rule.<sup>208</sup>

Finally, some state legislators and scholars have raised the issue of public access to arbitration proceedings themselves. A New York Assembly Bill would not have created a right of access but would have given arbitrators discretion to admit third parties to observe the arbitration.<sup>209</sup> Judith Resnik has argued that procedurally legitimate arbitration would include open access to the proceedings, resembling public access to federal court.<sup>210</sup> Resnik is not only concerned with the public's right

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202. Robel, *supra* note 200, at 961 (describing prudential reasons behind judges' support for limiting publication).

203. See generally Melissa M. Serfass & Jessie Wallace Cranford, *Federal and State Court Rules Governing Publication and Citation of Opinions: An Update*, 6 J. APP. PRAC. & PROCESS 349 (2004) (collecting rules by circuit, district, and state). As dockets grew, nonprecedential opinions became more common even in the federal circuit courts. Stephen B. Burbank, *The Politics of the Federal Judiciary: Tiered Appellate Decisionmaking*, 89 JUDICATURE 20, 20–21 (2005).

204. See Verges, *supra* note 196, at 439.

205. See Stipanowich, *supra* note 139, at 1022; Weidemaier, *supra* note 198, at 1918–20. Arbitration in FINRA or through other providers has been the dominant mode of dispute resolution in the industry for over twenty years. Gross, *supra* note 166, at 1179. The SEC's regulatory authority extends to regulating the content of arbitration clauses in contracts and FINRA's code of arbitration procedure includes basic procedural protections. *Id.*

206. *Dispute Resolution Statistics*, FINRA, <http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics> [<https://perma.cc/6G8H-PXV2>]. FINRA maintains a database of its awards as well as awards from pre-FINRA securities arbitrators. *Arbitration Awards Online*, FINRA, <https://www.finra.org/arbitration-and-mediation/arbitration-awards> [<https://perma.cc/4EEV-WM59>].

207. FINRA MANUAL § 12904, [http://finra.complinet.com/en/display/display.html?rbid=2403&element\\_id=4192](http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4192) [<https://perma.cc/J9SL-AZTG>]; *id.* § 13904, [http://finra.complinet.com/en/display/display.html?rbid=2403&element\\_id=4292](http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4292) [<https://perma.cc/B4HY-7M5Q>].

208. 12 C.F.R. § 1040.4.

209. S.B. A10393, § 2(e) 241th Leg., Reg. Sess. (N.Y. 2017).

210. See Resnik, *A2J*, *supra* note 2, at 622–29 (discussing open access to courts).

to know, but also views access rights as rights for the parties to the dispute. In her view, the threat of public observation is necessary to maintain effective due process.<sup>211</sup> Public access would then be a due process right that protects the parties to the arbitration. Discretionary access, such as that in the New York proposal, suggests that access is instead about the rights of third parties, those with related cases or select press or public interest groups in an arbitration with public implications.

States could adapt to the Supreme Court's expansion of arbitral authority by imposing ethics rules, due process rules, and information rules. These rules could help ensure that arbitrations conducted in the state meet minimum standards of adjudicator independence, fairness, and transparency. Some arbitration providers and the arbitrators that work with them might have an interest in voluntarily complying. Moreover, a strong argument exists that state courts can vacate awards on grounds not covered by the FAA. Fear of being overturned might push arbitrators to comply.

Imposing these rules represents a choice to view arbitrators as third-party adjudicators. If arbitration were instead viewed as bargaining over a contract, arbitrators would be the parties' agents. Subjecting arbitrators to rules aimed at ensuring their neutrality and constraining the approach that the parties use in resolving their dispute would not make sense under that paradigm. Nor would making the results of that process or the process itself public be necessary. State legislators have good reason to make the choice to view arbitration as adjudication, namely the power that arbitrators have over the extent of their own jurisdiction and over mandatory law, as well as the lack of other regulatory options, such as banning the arbitration of certain types of disputes. This choice, however, may open their legislation to attack as being preempted by federal arbitration law, particularly if the Supreme Court conceptualizes arbitration differently. It also raises questions about the limits of an analogy between arbitration and common law judging.

### III. FEDERAL PREEMPTION DURING AND AFTER ARBITRATION

The state rules discussed above could end up preempted by federal law in two ways. First, the Supreme Court might treat FAA sections 9, 10, and 11, which have to do with award enforcement, just as expansively as section 2, limiting the ability of state courts to reject nonconforming awards. Second, the Court might create a sort of penumbra to section 2, reading it to protect a certain ideal of arbitration that the state reforms violate with their judicial model.<sup>212</sup>

Such an extension of FAA preemption is not a foregone conclusion. The text of the FAA suggests that its provisions related to vacatur apply only to federal court. Moreover, the posture of any preemption challenge will be different from section 2 challenges in which a state judge has refused to allow arbitration. Instead, those claiming that state laws are preempted will in most cases be making their arguments to arbitrators first. Given the wide discretion arbitrators have under the FAA, parties may find it harder to get an arbitrator's decision applying state law overturned in federal court. If the arbitrator does not apply the state rules and a state court rejects

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211. *See id.* at 615–18.

212. Thanks to David Horton for suggesting this wording.

the award, the posture of the case may still make a federal law challenge harder to mount.

*A. Preemption and the Rules of Award Enforcement*

An arbitral award might be subject to review in court in one of two ways. If the loser of the arbitration seeks to challenge the result, he or she can ask a court to vacate the award. The loser can also simply refuse to comply. In that case, the winner will have to go to court to seek confirmation of the award and an order requiring enforcement. Under section 9 of the FAA, any party seeking to confirm an award can go to federal district court and the district court “must grant” confirmation unless the award is vacated under section 10.<sup>213</sup>

The FAA allows vacatur of awards for a short list of reasons related to arbitrator misconduct or excess of power.<sup>214</sup> In several circuits “manifest disregard of the law” provides an additional ground for vacatur, although its status is contested and the contours of review for manifest disregard are narrowly drawn.<sup>215</sup> The Court’s decision in *Oxford Health Plans v. Sutter* helps illustrate just how narrow federal review is.<sup>216</sup> Before and after *Oxford Health Plans*, Supreme Court majorities made clear that they viewed class arbitration procedures as deeply problematic and likely never something arbitrators could order if the parties did not expressly agree to it.<sup>217</sup> However, in *Oxford Health Plans*, a unanimous Court refused to vacate an arbitral award that read a contract as allowing class arbitration even though the Court found such a reading implausible.<sup>218</sup>

If the party seeking to vacate an award gets to state court before the party seeking to confirm it gets to federal court, state courts may have a wider scope to review arbitral decisions. Both the text of the FAA and the Court’s current approach suggest that enforcement decisions remain a matter of state law.<sup>219</sup> Section 9 of the FAA,

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213. 9 U.S.C. § 9 (2012).

214. 9 U.S.C. § 10 (2012).

215. See Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-arbitration*, 77 U. CHI. L. REV. 1013, 1014–16 (2010) (describing review of arbitral awards for manifest disregard of law and explaining its limited scope). The Second Circuit has connected its manifest disregard analysis under the FAA to the Supreme Court’s willingness to vacate labor arbitration awards for violation of public policy. *Schwartz v. Merrill Lynch & Co.*, 665 F.3d 444, 452 (2d Cir. 2011). The Supreme Court’s reason for doing so, that the arbitration award represents a contract and is subject to the “doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy” would seem to support the Second Circuit’s approach. *United Paperworkers Int’l Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987).

216. 569 U.S. 564 (2013).

217. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418–19 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1623 (2018); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010).

218. 569 U.S. at 572–73.

219. Jill I. Gross, *Over-Preemption of State Vacatur Law: State Courts and the FAA*, 3 J. AM. ARB. 1, 30–31 (2004). The Court has treated FAA preemption as conflict, rather than field preemption, so state law is preempted only to the extent that it conflicts with federal law. *Id.*; see also Huber, *supra* note 137, at 522–31 (acknowledging that several leading arbitration

which governs confirmation of arbitral awards, states that: “If no court is specified in the agreement of the parties, then such application [for confirmation] may be made to the United States court in and for the district within which such award was made.”<sup>220</sup> Unlike section 2, section 9 explicitly contemplates action by the federal courts. Sections 10 and 11, which govern vacatur of awards, similarly refer to “[t]he United States district court for the district wherein an award was made.”<sup>221</sup> Several state supreme courts and the Supreme Court of the Virgin Islands have ruled that the FAA’s provisions on confirmation and vacatur do not preempt state law.<sup>222</sup>

The U.S. Supreme Court’s decision in *Hall Street Associates v. Mattel* provides additional support for this view.<sup>223</sup> There, the Court held that the FAA created an exclusive list of reasons for a court to refuse to enforce an award and that the parties could not contract for more searching judicial review.<sup>224</sup> However, the Court stated that “[t]he FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope” might be allowed.<sup>225</sup>

Both the Uniform Arbitration Act and the Revised Uniform Arbitration Act have vacatur rules resembling those in the FAA.<sup>226</sup> State actors could go further; in some cases, they have done so. Georgia’s arbitration statute allows courts to vacate awards for manifest disregard of law.<sup>227</sup> New Hampshire allows courts to vacate awards for “plain mistake.”<sup>228</sup> District of Columbia courts will vacate an award that conflicts with public policy.<sup>229</sup> None of these standards are to be found in the FAA. State courts may also give different content to state rules that do track the FAA. As discussed above, state courts may read arbitrator disclosure rules into the idea of “evident partiality” under the FAA or RUAA.<sup>230</sup> The California Supreme Court

scholars assume preemption of state law on award enforcement, but arguing that the text of the FAA does not support this view).

220. 9 U.S.C. § 9 (2012).

221. 9 U.S.C. §§ 10–11 (2012).

222. *Gov’t of Virgin Islands, Dep’t of Educ. v. St. Tomas/St. John Educ. Administrators’ Ass’n*, Local 101, o.b.o. Forde, No. 2016-0105, 2017 WL 3141829, at \*4 (V.I. July 20, 2017) (collecting cases from Alabama, California, Minnesota, New Hampshire, Pennsylvania, and Texas). Although the Texas appellate case cited by the Virgin Island’s court is no longer good law, the Texas Supreme Court has ruled that the Texas Arbitration Act, which has different language from the FAA, can be used to vacate an award and that the parties can also contract for greater review in state court. *Hoskins v. Hoskins*, 497 S.W.3d 490, 494 (Tex. 2016).

223. Huber, *supra* note 137 at 535–36.

224. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008).

225. *Id.* at 590.

226. REVISED UNIF. ARBITRATION ACT §§ 22–23 (UNIF. LAW COMM’N 2000); UNIF. ARBITRATION ACT §§ 11–12 (UNIF. LAW COMM’N 1955) (amended 1956).

227. GA. CODE ANN. § 9-9-13(b)(5) (2007).

228. *Finn v. Ballentine Partners, LLC*, 143 A.3d 859, 872 (N.H. 2016).

229. *A1 Team USA Holdings, LLC v. Bingham McCutchen, LLP*, 998 A.2d 320, 327 (D.C. 2010).

230. *See supra* Section II.A.

recently reaffirmed its ruling that arbitrators exceed their powers under the California Arbitration Act if they issue an award that violated California public policy.<sup>231</sup>

Additionally, California and New Jersey allow parties to contract for more judicial review.<sup>232</sup> Parties might want review if the arbitrators must apply mandatory rules of law and it is important to the parties that the law be applied predictably. Antitrust or employment might be areas where a contract drafter would choose greater court oversight, as the statutes and case law are complex and the defendant could be exposed to high damages.

Although the text of the FAA suggests that state vacatur rules should not be preempted, one might argue that stricter standards of review impinge on the parties' ability to arbitrate and thus would be preempted. The drafters of the Revised Uniform Arbitration Act were concerned enough about this possibility that they decided that the RUAA's criteria for vacatur should mirror the FAA.<sup>233</sup> Some state courts have taken this view.<sup>234</sup> The U.S. Supreme Court has also stated that limited review "substantiat[es] a national policy favoring arbitration" in the FAA.<sup>235</sup> The Court might view the possibility of more stringent review under state law as interference with arbitration. However, dicta in *Hall Street* suggest that it may not do so. There, the Court stated that parties "may contemplate enforcement under state statutory or common law . . . where judicial review of different scope is arguable."<sup>236</sup> The state rules the Court has viewed as interfering with arbitration have thus far been rules that state courts applied ex ante through section 2—invoked at the point at which the state court is deciding whether to enforce a contract to arbitrate and placing conditions on that enforcement.

Decisions about award enforcement do not invoke the same contract logic as decisions on a motion to compel. Rather, they more easily put the arbitrator in the posture of being a third-party neutral. At this point, the court is not concerned only with the content of the contract, but also with the decision rendered and the conduct of the arbitration.<sup>237</sup> However, this decision still involves reviewing the arbitrator's decision about the contract. The standard of review may be generous, but the posture of the case resembles situations in which courts review the result of an agency's or lower court's adjudication. When the logic of arbitrator as third-party adjudicator operates, and the arbitrator's authority can be analogized to judicial authority, then it can be regulated in the same way, through appellate review and process standards.<sup>238</sup>

Another question is whether the parties would end up in state or federal court seeking to enforce state rules. Under the FAA, parties do not have the ability to go to federal court to bring interlocutory challenges to arbitration procedure.<sup>239</sup> State

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231. Sheppard, Mullin, Richter & Hampton, LLP v. J-M Mfg. Co., 425 P.3d 1, 8 (Cal. 2018) (citing *Loving & Evans v. Blick*, 204 P.2d 23 (Cal. 1949)).

232. Huber, *supra* note 137, at 539–42.

233. REVISED UNIF. ARBITRATION ACT, Prefatory Note (UNIF. LAW COMM'N 2000).

234. Gross, *supra* note 219, at 20–27.

235. *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008).

236. *Id.* at 590.

237. 9 U.S.C. § 10 (2012).

238. See Jeffrey W. Stempel, *Asymmetric Dynamism and Acceptable Judicial Review of Arbitration Awards*, 5 Y.B. ON ARB. & MEDIATION 1, 53 (2013).

239. Parties may go to court to compel arbitration, 9 U.S.C. § 4, appoint an arbitrator, 9

rules could differ. The FAA gives parties the option of going to federal court to confirm or challenge an award.<sup>240</sup> The winner in an arbitration that did not follow state rules could race to the federal courthouse before the other party can get to state court. Still, the possibility of either interlocutory review in state court or having the award invalidated in state court first may be enough to encourage most arbitrators to comply.

### B. The FAA Section 2 Jurisprudence

The Court's existing FAA section 2 jurisprudence relies in part on a contrast between litigation in court and arbitration. The state rules discussed here would blur it. If applied by state courts to reject arbitrations, they would clearly be preempted. The question then becomes whether the rules would apply in arbitration. Section 2 of the FAA is addressed to courts and not to arbitrators, but the Court's essentialist treatment of arbitration, much of it under section 2, provides a hook for rejecting the application of state laws that make arbitration look more like court.<sup>241</sup> So too does *Preston v. Ferrer*, under which the FAA "supplies not simply a procedural framework applicable in federal courts; it also calls for the application, in state as well as federal courts, of federal substantive law regarding arbitration."<sup>242</sup> Section 2 arguments could both be a justification for reducing state courts' range of motion with respect to vacatur and striking down state laws or regulations designed to incentivize arbitration providers to adopt certain rules.

*Preston* limits the impact of state procedural rules because it calls into question the Supreme Court's earlier *Volt Information Sciences* opinion. In *Volt*, the Court affirmed that state courts were the interpreters of state law, including whether a contract incorporated state law on arbitration procedures.<sup>243</sup> Later, in *Mastrobuono* and again in *Preston*, the parties' choice of a specific set of arbitration rules overrode state defaults.<sup>244</sup> The *Preston* court did not defer to the state courts and limited the agreement's choice-of-law clause to choice of substantive, and not procedural, state law.<sup>245</sup> The Court distinguished *Mastrobuono* from *Volt* by characterizing the state rules in *Volt* as facilitating arbitration and the rule at issue in *Mastrobuono*, a rule that arbitrators could not award punitive damages, as constraining arbitration.<sup>246</sup> It was possible then to argue that states could provide default rules to facilitate arbitration.<sup>247</sup>

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U.S.C. § 5, compel a witness to testify at an arbitration, 9 U.S.C. § 7, or confirm or vacate an award, 9 U.S.C. §§ 9–11.

240. 9 U.S.C. §§ 9–11 (2012).

241. See Bookman, *supra* note 5, at 28.

242. 552 U.S. 346, 349 (2008).

243. *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 474 (1989).

244. *Preston*, 552 U.S. at 362–63; *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63–64 (1995).

245. *Preston*, 552 U.S. at 363.

246. See Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 199 (2002).

247. *Id.* at 204, 206–07.

The drafters of the RUAA contrasted procedural rules with “front end” and “back end” limits on arbitration imposed by state court. They believed preemption “unlikely” because rules for arbitral procedure “do not go to the essence of the agreement to arbitrate or effectuation of the arbitral result.”<sup>248</sup> After *Preston*, the distinction between rules that inhibit and rules that facilitate arbitration may be less significant. Moreover, the Court’s view of whether the state rules discussed above facilitate arbitration will turn on whether it believes arbitration to be closer to a contract-based bargaining process or a process of adjudication. The state rules would facilitate adjudication by an independent neutral, but might frustrate informal bargaining.

The U.S. Supreme Court’s concept of preemption under section 2 of the FAA extends to any state law that “interferes with fundamental attributes of arbitration.”<sup>249</sup> Those fundamental attributes have sometimes been defined in dicta as the opposite of litigation in court.<sup>250</sup> If court process is slow and expensive, arbitration is quick and cheap. Litigation in court can allow extensive discovery in order to get at truth, while arbitration offers rough, commercial justice. In *Hall Street*, the Court cited arbitration’s “essential virtue of resolving disputes straightaway” as a reason not to allow parties to contract for greater judicial review.<sup>251</sup> In *Stolt-Nielsen v. AnimalFeeds*, the one decision in which the Court has held that arbitrators exceeded their powers, the majority rejected a decision by arbitrators to allow class arbitration.<sup>252</sup> It described class arbitration as failing to deliver attributes of arbitration such as “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators.”<sup>253</sup> The Court has also treated confidentiality as standard in arbitration settings, an attitude that may pose an obstacle to reforms relying on reporting requirements.<sup>254</sup>

The saga of Supreme Court class arbitration cases may give a flavor of things to come. Throughout this saga, the dissenters have argued that arbitration procedure can or should offer the same procedures available to parties in court by allowing class proceedings. For instance, Justice Ginsburg analogized New York state or federal court and arbitration in her *Stolt-Nielsen* dissent.<sup>255</sup> The majority has insisted on arbitration as a bargaining process that resolves disputes without formalized, procedural justice and maintained that class actions are inconsistent with such an ideal.<sup>256</sup> *Epic Systems Corporation v. Lewis* described “individualized” proceedings along with “speed and simplicity and inexpensiveness” as all among arbitration’s “fundamental attributes.”<sup>257</sup> Most recently, Justice Robert’s majority opinion in

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248. REVISED UNIF. ARBITRATION ACT, Prefatory Note, (UNIF. LAW COMM’N 2000).

249. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

250. *See Bookman*, *supra* note 5, at 18–33.

251. *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2007).

252. *See Bookman*, *supra* note 5, at 29–30.

253. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010).

254. *See Resnik*, *A2J*, *supra* note 2, at 645.

255. *Stolt-Nielsen*, 559 U.S. at 698 (Ginsburg, J., dissenting) (“There is little question that the designated court, state or federal, would have authority to conduct claims like *AnimalFeeds*’ on a class basis.”).

256. *See id.* at 685–86.

257. 138 S. Ct. 1612, 1622–23 (2018).

*Lamps Plus v. Varela* extended this analysis, suggesting that the differences between individual and class arbitration were reason to doubt any claims that a party consented to the latter.<sup>258</sup> Roberts treated even the doctrine of *contra proferentum*, undeniably “a neutral [state law] rule,” as preempted by the FAA when a district court used it to order class arbitration.<sup>259</sup> Arbitration’s basis in party consent made it resistant shaping through state law.<sup>260</sup>

The majority’s suspicion of class arbitration may or may not transfer into other areas. Rules that make procedure more elaborate or that allow parties to halt proceedings to investigate an arbitrator’s conflicts of interest might interfere with “simplicity and inexpensiveness.” On the other hand, one might argue that such rules promote confidence in arbitration and that, as one state court put it, “[n]othing in the FAA says that an arbitration must be conducted or an arbitration award must be confirmed in the fastest way possible.”<sup>261</sup> Opponents might have more difficulty arguing that information rules interfere with fundamental attributes of arbitration. Data collection and reporting rules do not interfere with how arbitrations are conducted or change the grounds on which courts can refuse to enforce arbitral decisions. They may open providers and individual arbitrators to greater scrutiny, but claims that such scrutiny amounts to interference are both abstract and at odds with present practice. Arbitration providers already put awards online or send them to the two major reporting services. Limits on confidentiality or public access rules present harder cases. Significant confusion exists around the difference between confidential and private arbitration.<sup>262</sup> To the extent that courts believe that confidentiality comes standard, they may view access to the arbitration as impermissible interference.

However, the posture of any challenge to state law arbitration rules could make a difference. Along with the subject matter of the arbitration and arbitrators’ own actions, timing matters to the role that courts assign to arbitration. When faced with a motion to compel, courts are faced with arbitration as part of a contract. The relevant question is how much authority the parties gave to their agent, the arbitrator. Arbitrators are much more easily understood as third-party adjudicators when the question is whether to enforce an award. Then, a court may consider the sources of authority an arbitrator drew on and scrutinize the process in a specific arbitration. Some aspects of this review, such as review for excess of power, still invite the court to return to the contract.<sup>263</sup> This approach would judge the fundamental attributes of arbitration based on its view of what the parties expected (i.e., a quicker, cheaper process). On the other hand, review for conflicts of interest, bias, procedural irregularities, and manifest disregard of law invite the court to treat arbitration like

258. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019).

259. *Id.*

260. *See id.* at 1417.

261. *Weinar v. Lex*, 176 A.3d 907, 923 (Pa. Super. Ct. 2017), *cert. denied*, 189 A.3d 994 (Pa. 2018).

262. *See Resnik, Diffusing Disputes*, *supra* note 2, at 2894–96 (describing view that confidentiality of proceedings is common and expected in arbitration).

263. 9 U.S.C. § 10(a)(4) (2012); *see Stolt-Nielsen*, 559 U.S. at 676, 684 (providing arbitrators exceeded their power by making their decision based on considerations extraneous to the contract).



litigation in court.<sup>264</sup> This analogy might put the parties' expectations in a different light and allow a view of fundamental attributes less hostile to state rules. The Court gives arbitrators more leeway to interpret a contract to allow class arbitration than they give state courts or federal regulatory agencies leeway to impose it ahead of time.<sup>265</sup>

Section 2 challenges involve courts that have refused motions to compel arbitration, but that is not how the state rules discussed in this section would be implemented. They would be implemented in the first instance by arbitrators or provider organizations.<sup>266</sup> A party challenging these rules in court would thus be in the position of arguing that the arbitrator violated the FAA and exceeded his powers by applying provider rules or state law. This argument would have to decouple the fundamental attributes test from section 2. With *Stolt-Nielsen*, it became evident that some on the Court would go so far, but the Court also stepped back from that decision in *Oxford Health*.<sup>267</sup>

A Supreme Court that believes the FAA protects a certain ideal of arbitration as different from court will likely view the sorts of reforms described in Part II as a threat to federal law. Notwithstanding explicit reference to federal district court in the FAA's provisions on award enforcement, the Court could expand them to affect state court too. It might also read state reforms as interfering with the fundamental attributes of arbitration protected by section 2 of the FAA. Preemption through either of these methods is a serious threat to reform. However, that threat may be reduced by the way state rules get enforced. Many of the state rules discussed above would be enforced in the first instance in the arbitration itself. Arbitrators, or the large arbitration providers they depend on for assignments,<sup>268</sup> might decide that it is easier

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264. 9 U.S.C. § 10 (2012). Manifest disregard is a common law, rather than statutory, doctrine. Its continued viability is subject to a circuit split after the Supreme Court referred to section 10 and section 11 of the FAA as the "exclusive" grounds for vacatur in federal court. *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576, 584 (2007). The Fifth, Seventh, Eighth, and Eleventh Circuits declared the standard defunct. *Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 284–85 (7th Cir. 2011); *Medicine Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1323–24 (11th Cir. 2010); *Citigroup Glob. Mkts, Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009). The Second, Fourth, Sixth, and Ninth Circuits continue to use it. *Schafer v. Multiband Corp.*, 551 F. App'x 814, 819 n.1 (6th Cir. 2014); *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012); *Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 414 (9th Cir. 2011); *T.Co Metals, LLC v. Dempsey Pipe & Supply, Inc.*, 592 F.3d 329, 339–40 (2d Cir. 2010).

265. Compare *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 570–72 (2013), with *Epic Systems*, 138 S. Ct. at 1622–23, *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 (2013), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 347–52 (2011).

266. See *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84–85 (2002) (discussing that procedural matters should normally be decided in arbitration). Arbitration providers have also altered rules in response to state law. For instance, JAMS consumer rules do not allow fee shifting in California. JUDICIAL ARBITRATION & MEDIATION SERVICES, INC., JAMS POLICY ON CONSUMER ARBITRATIONS PURSUANT TO PRE-DISPUTE CLAUSES MINIMUM STANDARDS OF PROCEDURAL FAIRNESS 3 (2009).

267. Bookman, *supra* note 5, at 31.

268. Even when arbitrators are party-appointed, they are often selected off a list created by

to adopt state rules rather than find out which ones might become fodder for attempts to vacate an award. In some instances, a party might be able to go to state court to challenge a procedural decision by an arbitrator.<sup>269</sup> In other situations, the complaining party would have to wait until after a final decision and then decide whether to seek to have it vacated. Other rules, notably those that fall into the category of requiring information, would likely be enforced first by state regulatory agencies. Significant questions remain about whether FAA sections 9, 10, and 11 would preempt state law used to vacate an award on grounds not available in the Act. Some of the Supreme Court's section 2 jurisprudence might affect the willingness of arbitrators and judges to apply state law in, during, and after the arbitration.

States might also take a creative approach to implementation. The private rights of action discussed above are one example. States could offer tax incentives to providers that adopted state conflicts and process rules or made case information and decisions public. They could also adopt a policy of preferring compliant providers through tax incentives or when awarding state contracts. Providers who did not get the tax breaks or contracts might conceivably challenge the state's decision as inconsistent with federal law, but would have a harder case to make given the state legislature's discretion in those areas.

#### IV. THE PROBLEM OF ARBITRATORS' CASE-SPECIFIC MANDATES<sup>270</sup>

In theory, embracing a judicial role for arbitrators and regulating accordingly could respond to many of the objections scholars have raised to giving arbitrators the power to interpret mandatory law.<sup>271</sup> Still, a due process objection would remain. Arbitrators are not common law judges; they may neither create precedent, nor rely on previous arbitral decisions.<sup>272</sup> Arbitrators also cannot base their decisions on references to public policy, for instance to fill in terms of a contract.<sup>273</sup> This limit on arbitral mandates may be required to maintain democratic control over the

the arbitration provider specified by the arbitration clause. See David McLean, *Selecting a Party-Appointed Arbitrator in the US*, LEXISPSL ARB. (Nov. 3, 2014), <https://www.lw.com/thoughtLeadership/us-arbitration-primer-lexis-latham-series> [https://perma.cc/N94N-H4YV].

269. An interim award on an issue such as arbitrator disqualification or the tribunal's jurisdiction cannot be challenged in court because the decision is not final. However, arbitrators may issue partial final awards on these matters that may then be subject to immediate court challenge.

270. I borrow a term first used in relation to investment arbitration. W. Michael Reisman, *'Case Specific Mandates' versus 'Systemic Implications': How Should Investment Tribunals Decide? The Freshfields Arbitration Lecture*, 29 ARB. INT'L 131 (2013).

271. See Horton, *supra* note 3, at 480–81; Markovits, *supra* note 5, at 482–83 (allowing arbitration of statutory rights does not encroach on adjudication, but rather on legislation). Although Markovits believes that process rules will create adequate authority for the arbitrator's decision, he takes no position on whether that authority *should* be wielded by an arbitrator.

272. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 673–74 (2010) (“[T]he panel proceeded as if it had the authority of a common law court to develop what it viewed as the best rule to be applied in such a situation.”).

273. *Id.* at 672.

development of the law. Judges are elected or appointed through public processes and arbitrators are not. However, this limit on arbitral power is problematic if arbitrators are expected to take the place of judges in a common law system. Parties and arbitrators may not have enough of a system of precedent to draw on to interpret the law in a consistent and well-reasoned manner.

The objection is not that arbitrators could not or would not comply with state requirements. Arbitrators are likely to be up to the task of complying with conflicts rules, enforcing procedural rules, and writing adequate awards. Arbitration organizations would also have incentives to make sure that arbitrators on their lists did so.<sup>274</sup> Some of the same reasons judges avoid conflict with each other—such conflict can cost their reputations—apply to arbitrators as well.

Cooperation, rather than conflict, is often the path of least resistance and the path to expanded powers for a court in a subordinate position.<sup>275</sup> This dynamic is likely to hold for arbitration tribunals as well. Parties that appear in front of arbitrators are unlikely to urge them openly to defy state mandates. If arbitrators do so, these parties may find themselves in messy follow-on litigation. Parties may also fear that arbitrators will rule against them rather than write an award that is open to challenge in state court. It would be much better to show the arbitrator that she or he can rule for them in a manner consistent with state law. Moreover, resource-poor institutions can rely on the comparatively resource-rich ones to do much of the work of developing and defending a specific approach. “Lockstep” interpretations of state constitutions are one example. State courts faced with state constitutional provisions similar to those in the Federal Constitution often interpret them in the same manner as the Supreme Court has interpreted the Federal Constitution. Although some have decried the lost opportunity for state experimentation,<sup>276</sup> from the state court’s perspective, lockstep interpretation makes sense. Unless the state court believes there is a strong reason the state’s approach should diverge from the federal one, relying on the federal approach is a useful heuristic that saves scarce judicial resources.

Whether their awards are subjected to greater scrutiny or not, arbitrators have little reason to depart from a state court’s interpretation. Doing so creates more work and increases the possibility that the losing party will seek to have the award vacated, especially if the arbitrator has to provide a reasoned award. Even if arbitrators’ decisions were public, they cannot rely on them as precedent. Thus, arbitrators have

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274. See Joshua Karton, *A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards*, 28 *ARB. INT’L* 447, 458, 461 (2012).

275. By “subordinate position” I refer to a court that may ultimately have to defer to another institution’s judgment through a mechanism like federal preemption. However, state courts are not technically subordinate courts, indeed federal courts have to defer to them on matters of state law and so in that situation would be the “subordinate” court.

276. See, e.g., James A. Gardner, *Justice Brennan and the Foundations of Human Rights Federalism*, 77 *OHIO ST. L.J.* 355 (2016) (tracing the long history of the debate over the degree to which state constitutional interpretation should be independent of the federal constitution); Ann M. Lousin, *Justice Brennan’s Call to Arms—What Has Happened Since 1977?*, 77 *OHIO ST. L.J.* 387, 395 (2016); Timothy P. O’Neill, *Escape from Freedom: Why “Limited Lockstep” Betrays Our System of Federalism*, 48 *J. MARSHALL L. REV.* 325, 333 (2014) (asserting that the Illinois Supreme Court’s practice of interpreting state provisions in “lockstep” with federal ones is “intellectually lazy”).

less professional incentive to depart from a state court's approach and fewer tools that could back them up in doing so.

Cooperation can also be a path to expanded powers for subordinate courts. It signals membership in a professional elite, as local judges seeking to establish their credentials can show they share the values and approaches of a respected central court. It also allows them to exert power over legislators, or in the case of arbitrators, contract drafters. Arbitrators in the types of cases that state courts have been concerned with are of a different professional class than those involved in international arbitration.<sup>277</sup> Yet, they too might seek the increased professional respect that comes with deploying greater technical skill to comply with state law or issue reasoned, public decisions.<sup>278</sup>

More complex state rules favor organizations that can put in place procedures to follow the rules. Complexity also favors the appointment of lawyers as arbitrators, favors repeat arbitrators, and potentially increases their professional prestige. Adopting the approach to state law advocated by state courts is also the easiest choice for an arbitrator to make. Otherwise, the arbitrator must explain why a different approach is warranted on pain of having the award vacated. Having awards one has rendered vacated is a highly visible signal, because it happens in court, and is probably bad for business. If the issue involves a potential conflict between federal and state law, the cautious arbitrator would have more reason to side with state courts in states with more searching standards of review than with federal courts likely to accept any sufficiently motivated decision. If there are instances of noncooperation, as with incomplete statistical reporting, state legislators will have to decide how coercive they want to be in response. That legislators have been relatively restrained thus far should not be confused for an absence of power.

Arbitrators in some domestic settings might be analogous to state judges in first instance courts. In consumer and employment arbitration, arbitrators are often lawyers with experience resembling that of a state judge.<sup>279</sup> AAA requires that its arbitrators in certain areas be retired judges, academics, or lawyers with significant practice experience.<sup>280</sup> JAMS suggests that the parties specify similar levels of

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277. See Weidemaier, *supra* note 101, at 83–84 (observing that domestic bilateral arbitrations might not offer enough returns to draw expert lawyers or arbitrators); accord DEZALAY & GARTH, *supra* note 109, at 124–25 (“Domestic arbitration . . . is much closer to the pole of business than to that of law.”).

278. Weidemaier, *supra* note 198, at 1919 (“[A]rbitrators often operate in a competitive market in which future purchasers will choose an arbitrator based on perceptions about the arbitrator’s diligence, expertise, and impartiality.”).

279. See Cole, *supra* note 196, at 876 (“[T]he vast majority of commercial, employment, and consumer arbitrators are legally trained and typically have fifteen or more years of legal practice in the area in which they specialize.”).

280. *Qualification Criteria and Responsibilities for Members of the AAA Panel of Construction Arbitrators*, AM. ARB. ASSOC., [https://www.adr.org/sites/default/files/document\\_repository/Qualification%20Criteria%20and%20Responsibilites%20for%20Members%20of%20the%20AAA%20Panel%20of%20Construction%20Arbitrators.pdf](https://www.adr.org/sites/default/files/document_repository/Qualification%20Criteria%20and%20Responsibilites%20for%20Members%20of%20the%20AAA%20Panel%20of%20Construction%20Arbitrators.pdf) [https://perma.cc/2E3F-UC8E]; *Qualification Criteria and Responsibilities for Members of the AAA Panel of Employment Arbitrators*, AM. ARB. ASSOC., [https://www.adr.org/sites/default/files/document\\_repository/Employment%20Arbitrators%20Qualification%20Criteria.pdf](https://www.adr.org/sites/default/files/document_repository/Employment%20Arbitrators%20Qualification%20Criteria.pdf) [https://perma.cc/5V8D-9WAG].

experience.<sup>281</sup> Arbitrators might be expected to be able to use the same level of skill in managing the arbitral process and in writing their awards as state judges use in managing the trial process and writing their opinions and orders. Moreover, if states make greater procedural demands or enforce transparency rules, arbitration providers may alter their lists to include different sorts of arbitrators.

Some organizations already provide more transparency and process protections than the law requires. They assert that they are doing so because of their view of what their professional role should be.<sup>282</sup> Several providers have adopted due process protocols, the oldest of which is the Employment Due Process Protocol, adopted in 1995.<sup>283</sup> It was the work of an American Bar Association taskforce, which included AAA, the ACLU, and the National Employment Lawyers Association, as well as several organizations representing professional arbitrators.<sup>284</sup> In developing its Consumer Due Process Protocol two years later, AAA convened an advisory commission with consumer and seller representatives, state and federal agencies, and academics.<sup>285</sup> AAA's Health Care Protocol followed a similar process.<sup>286</sup> Today, AAA and JAMS have similar consumer and employment rules. Two other large providers claim that they meet a similar standard.<sup>287</sup> Providers were driven to adopt the protocols specifically because they were being asked to step into a role closer to that of judging by deciding statutory claims.<sup>288</sup> The processes of convening stakeholders and adopting a consensus report certainly resembles the sort of rulemaking a public adjudicator might undertake. However, the arbitration providers' compliance with their own rules is not subject to outside monitoring.<sup>289</sup> This lack of monitoring represents a limit to the extent providers see themselves as taking on the same roles and responsibilities as judicial administrative offices. Other providers, sometimes even other parts of the same organization, may not even make a pretense of meeting internal or external standards.

The problem is thus not that arbitrators cannot or will not cooperate. The problem is rather that, in the Supreme Court's conception, arbitrators exceed their powers

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281. JUDICIAL ARB. & MEDIATION SERVS., INC., JAMS CLAUSE WORKBOOK (2018).

282. For instance, AAA provides online, searchable class arbitration case dockets. It does so in part because of concerns about whether the parties and the public will view class arbitration outcomes as legitimate. Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662 (2010) (No. 08-1198), 2009 WL 2896309. In another very different example, Wikipedia has a detailed arbitration process to resolve disputes among editors culminating in public, reasoned awards. *Wikipedia: Dispute Resolution*, [https://en.wikipedia.org/wiki/Wikipedia:Dispute\\_resolution](https://en.wikipedia.org/wiki/Wikipedia:Dispute_resolution) [<https://perma.cc/3V8E-6UKU>].

283. Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 369 (2004).

284. *Id.* at 390.

285. *Id.* at 405.

286. *Id.* at 407.

287. *Id.* at 404 n.196.

288. *See id.* at 382–84. One of the principal architects of the employment rules, the then president of the National Academy of Arbitrators, expressed the view that due process rules were needed because arbitration was supposed to substitute for judicial and administrative adjudication. *Id.* at 395.

289. *Id.* at 427.

when they relate to the law as judges do. Dicta in *Stolt-Nielsen* suggests that tribunals that act as “common-law court[s]” and base their decisions on what other arbitrators have done or on public policy will see their awards vacated.<sup>290</sup> The more that a combination of federal and state legislation puts arbitrators in the position of performing a judicial role, the greater the tension with the limits on the reasons they can give for their decisions.

In *Stolt-Nielsen*, the Court held that an arbitral tribunal exceeded its powers by ordering class arbitration when the parties had not agreed to class procedures.<sup>291</sup> The case itself involved antitrust claims under the Sherman Act, which are often brought in court on a class basis because of the expense involved in proving them.<sup>292</sup> Given the nature of the case and the statutory rights at stake, the tribunal had decided that public policy dictated that class proceedings be allowed, citing several similar prior arbitrations.<sup>293</sup> In deciding that the tribunal exceeded its powers, the majority relied on the slippage between contract and adjudication. The arbitrators were not judges and therefore could not develop their own rules, but their role was judicial enough that it demanded fidelity to the law and the contract as written, rather than freewheeling gap filling.<sup>294</sup>

The Justices’ fear of arbitral precedent might be well-founded. The international commercial arbitrators in *Stolt-Nielsen* were appointed by the parties to resolve one dispute. U.S. judges are either elected or appointed through public vetting processes that, ideally, serve to justify their authority. They will resolve many disputes and might be expected to have some investment in the judiciary as an institution. If arbitrators began to spin off their own interpretations of statutes, and apply them in future cases, they would lack such a public mandate.<sup>295</sup> The argument that arbitrators have done just that in the international investment arena has led to calls to end its use.<sup>296</sup>

Domestic arbitral tribunals might have a more modest view of their own role. Although some cited the decisions of previous tribunals as persuasive authority, the arbitrators Mark Weidemaier studied relied only on relevant statutes and case law as

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290. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010). Some conservatives on the Court were skeptical of such approaches generally. Antonin Scalia argued that judges should abandon what he saw as an overly pragmatic “common-law” approach in favor of one he saw as more bound by statutory text. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 12–14 (1997).

291. *Stolt-Nielsen*, 559 U.S. at 684.

292. *See id.* at 689 n.3 (Ginsburg, J., dissenting).

293. *Id.* at 675.

294. *See id.* at 674–75.

295. The Court has taken this view in contexts beyond the facts of *Stolt-Nielsen*. *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 263 (2009) (citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974)); *MacDonald v. City of West Branch*, 466 U.S. 284, 285, 290 (1984); *Barrentine v. Arkansas-Best Freight Syst., Inc.*, 450 U.S. 728, 729–30, 744 (1981).

296. *See* Charles N. Brower & Stephan W. Schill, *Is Arbitration a Threat or a Boon to the Legitimacy of International Investment Law?*, 9 CHI. J. INT’L L. 471, 473–76 (2009) (describing critiques of investment arbitration); Weidemaier, *supra* note 198, at 1956–57 (raising questions about the development of precedent in arbitration and comparing domestic systems with investor state arbitration).

controlling.<sup>297</sup> Arbitral precedent has since become more problematic. As discussed above, AAA arbitral tribunals have diverged markedly from federal courts in their view of the law of class arbitration.<sup>298</sup> That divergence comes from the decisions of arbitrators who have greater experience with class arbitration and seem to be more comfortable ordering it despite the Supreme Court's warnings.<sup>299</sup> The experienced arbitrators may be following approaches from their previous (uncited) opinions.

Common law judging is not the only way for adjudicators to make and to explain decisions recognized as legitimate in their legal systems. In the French legal tradition, for instance, judges issue short, syllogistic opinions. To do otherwise would be considered an affront to the proper judicial role.<sup>300</sup> Lawyers look to additional sources, such as semiofficial case commentary. Courts in other traditions also relate to previous decisions in a way that deviates from the way common law courts relate to precedent.<sup>301</sup> The difficulty is that, outside certain exceptions, the American legal system assumes a certain type of adjudicator. This adjudicator is expected to invoke precedent, including persuasive precedents from the same court, and public policy in making decisions. If arbitrators cannot use their own precedents or refer to public policy as the basis for their decisions, then argument about legal issues in arbitration cannot take place on the terms it does in court.

Procedural changes and reporting of arbitral awards, elements that make arbitration more courtlike, might encourage parties and their lawyers to treat arbitration like court. Particularly in areas in which arbitration is common and judicial precedents correspondingly scarce, the temptation will be to rely on previous arbitral decisions. If arguments do revert to familiar forms, then arbitrators may not be able to be honest about having relied on them to come to a decision. Asking lawyers to put aside a portion of their training in arriving at a decision about a legal issue in a case may be hard; asking them to omit an explanation is easier. Even when arbitration clauses are written with broad and vague strokes, arbitrators may believe themselves compelled to argue that their decisions come from the clauses themselves.<sup>302</sup> They may be encouraged to make large leaps of logic in contract interpretation for want of other tools.<sup>303</sup>

There are thus two dangers to asking those involved in an arbitration to set aside the normal order of things from litigation in court. If parties are not able to do so, and arbitrators are, the parties' arguments will not form the basis for the arbitrator's decision. The other danger is that the parties will set aside references to prior

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297. See Weidemaier, *supra* note 10, at 1133, 1140.

298. See Horton, *supra* note 77, at 19–21.

299. King, *supra* note 107, at 1067–70.

300. See MITCHEL DE S.-O.-I'É. LASSER, *JUDICIAL DELIBERATIONS: A COMPARATIVE ANALYSIS OF JUDICIAL TRANSPARENCY AND LEGITIMACY* 303–11 (2004).

301. See generally Jan Komárek, *Reasoning with Previous Decisions: Beyond the Doctrine of Precedent*, 61 AM. J. COMP. L. 149 (2013) (identifying differences between precedential reasoning by analogy in common law systems and “legislative” use of previous decisions in continental European legal systems).

302. See Alan Scott Rau, “Gap Filling” by Arbitrators, ICCA Congress Series No. 18, 935, 998–1001 (May 9, 2014) (presentation prepared for the International Council for Commercial Arbitration).

303. See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 684 (2010).

arbitrations, but arbitrators will not. These prior arbitrations will then have a significant but unspoken influence on the outcome. As a result, the parties will not have truly participated in the arbitration.<sup>304</sup> They will have been treated with bad faith—offered what they believed was a chance to influence the decision, but in fact denied that opportunity.<sup>305</sup>

Although these scenarios are possible with any adjudicator, *Stolt-Nielsen's* demand that arbitrators not be common law judges, combined with the training many received as common law lawyers, may make it more likely with arbitration. One-shot players, such as the consumers and employees, may face special disadvantages in a system that is more alien than they realize. Moreover, the low standard of review for arbitral awards means that parties are unlikely to successfully challenge decisions that depart from longstanding interpretations of the law or of similar contracts.<sup>306</sup> When parties have tried to rely on previous arbitral decisions to prove manifest disregard of law, courts have rebuffed them.<sup>307</sup>

A third version of the scenario I contemplate is that third parties may not be able to discern what is going on. The parties and arbitrator may understand each other, and the decision not reflect that understanding. This situation would not necessarily present the same due process problem.<sup>308</sup> However, it would create significant problems for state legislatures as they would not necessarily be able to determine the state of the law or predict the effect of any change to it.

State legislatures, arbitration providers, and individual arbitrators can act in ways that account for a line between arbitration and court. The difficulty will be to ensure adequate vigilance and specificity on the part of state legislatures and courts if they cannot rely on arbitrators to develop the law on their own.<sup>309</sup> Legislatures might have to be prepared to create more detailed statutes and update them more often. Arbitrators might want to explicitly avoid writing in the style of common law courts. Restrictive reporting might also be useful. A public entity, perhaps even a part of the state court system, that vetted awards might do much to alleviate the danger of hidden persuasive precedent that does not reflect the views of public bodies like the legislature or the courts (assuming those views are somewhat congruent). Legislatures might repeat the rule that arbitral decisions are not precedent in any statute requiring reporting.

Courts may also approach commonly arbitrated statutes from the point of view that common law judges will not be applying them. In departing from the idea that the statutes are codes that will seldom be elaborated by judicial decision, legislatures may need to offer more details and more frequent updates. If a given decision will be the only precedent the parties can refer to for a very long time, a judge may need

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304. See Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 388, 390–91 (1978).

305. See *id.* at 390–91.

306. See Rau, *supra* note 302, at 992–93.

307. See, e.g., *Sotheby's Int'l Realty, Inc. v. Relocation Grp.*, 588 F. App'x 64, 66 (2d Cir. 2015) (rejecting attempt to argue that arbitrator's ruling should be set aside due to inconsistency with all prior rulings provided to the court).

308. See Fuller, *supra* note 304, at 387–88.

309. For instance, the rise of FINRA arbitration may be to blame for the lack of developed doctrine on broker-dealer duties. Gilles, *supra* note 21, at 421–22.



to offer more detailed and encompassing holdings. Doing so goes against the typical rule that the judge should decide only what is necessary to resolve the case. That rule, however, assumes a common law system, with common law judges building on the precedent.

The state reform proposals outlined above bring arbitration closer to judging, but they do not and cannot go all the way there. Arbitrators, unlike common law judges, cannot create precedent or respond to arguments from public policy. The danger is that the parties, faced with a figure very similar to a judge, will expect arbitrators to have these interpretive tools. Along with parties and their lawyers, state legal systems will also have to adapt to arbitration's limits, even if arbitral process and transparency is improved. State lawmakers who seek greater control of arbitration may find that the choices arbitrators make may influence their own decisions and those of state judges. Some of the proposals above would give arbitrators unprecedented access to means with which to influence state law, such as issuing public, reasoned decisions. That influence should be limited by an awareness of the nature of arbitrators' mandates.

#### CONCLUSION

The Supreme Court has paired a broad view of arbitral power with decisions that prevent state courts from enforcing state laws by refusing to allow arbitration in most cases. In response to this situation, state courts may find it congenial to expand arbitral power as well. Doing so at least avoids more negative federal precedent. Meanwhile, some state legislatures, academics, and advocates have sought to make arbitration more like judging. Proposed and enacted rules that fit this mold aim to ensure arbitrator independence, minimal standards of process, and adequate information about what arbitrators decide. One of the paradoxes of privatization is that as the private has colonized the public space of courts, public regulation may enter the private space of arbitration.

If state rules regulating what happens during and after arbitration are applied in the first instance in arbitration or are used to vacate awards, these reforms stand a better chance of surviving preemption than rules applied to refuse arbitration to begin with. However, state lawmakers are not entirely in the clear. The Supreme Court has sometimes seemed to define the fundamental attributes of arbitration as being the opposite of litigation in court. When state rules suggest a similarity between arbitration and court, the Court may object that they are inappropriate.

Even if an arbitration meets standards of due process in every other respect, the problem of what reasons an arbitrator may give for their decision would remain. An arbitration tribunal is not a common law court but is supposed to adjudicate statutory rights of vulnerable parties in a common law legal system. The danger is that arbitrations that resemble court proceedings and resolve the types of questions resolved in court in fact either resolve them on a different basis or pretend to. The matters that arbitral tribunals are permitted to decide are at odds both with lax procedural controls and with the reasons tribunals are permitted to give. Other solutions, such as amending the Federal Arbitration Act, are surely more straightforward than adapting to a situation in which disputes can move out of and into a common law system. Still, state legislatures that pay attention to arbitration's

specificities may succeed in developing a system that provides significantly better process than what is on offer today.

Fully enacting this approach requires a new view of arbitrators that treats arbitration as somewhere between the public and private spheres rather than as purely private. It thus raises at the domestic level questions scholars of international and comparative law have been raising with respect to public and private international legal orders. Domestically, as well as internationally, “law-making is happening alongside the state.”<sup>310</sup> Yet the state “is still a central player, its centrality lying in the way the state organizes its own decentering.”<sup>311</sup> State governments can play a constructive role in this process, challenging federal assumptions and developing a new relationship to arbitration.

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310. Anna Di Robilant, *Genealogies of Soft Law*, 54 AM. J. COMP. L. 499, 551 (2006).

311. *Id.*