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ARBITRATION'S SUSPECT STATUS

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INTRODUCTION	1234
I. THE EXISTING FAA PREEMPTION PARADIGM	1241
A. <i>Enforcement-Neutral and Enforcement-Impeding Laws</i>	1242
B. <i>The Single-Out/General Test</i>	1245
II. REINTERPRETING THE PARADIGM AS AN ANTI-DISCRIMINATION	
PRINCIPLE	1248
A. <i>Unjustified Hostility Toward Arbitration: Origins to 1925</i> ...	1250

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B.	<i>Hostility in the Form of Suspicious Generalizations About Arbitration: 1925 to the Present</i>	1255
C.	<i>The Anti-discrimination Logic of the Single-Out/General Test</i>	1263
D.	<i>Rethinking the Paradigm</i>	1267
III.	OVERPREEMPTION AND THE PROBLEM OF JUSTIFIED DISCRIMINATION.....	1269
A.	<i>The Tension Between Anti-discrimination and Government Regulation</i>	1270
B.	<i>Justified Discrimination</i>	1275
C.	<i>Potential Objections</i>	1279
D.	<i>Application</i>	1283
IV.	UNDERPREEMPTION AND THE PROBLEM OF PRETEXT	1285
A.	<i>Unconscionability and the “New Judicial Hostility”</i>	1286
B.	<i>“As Applied” Challenges and the Limits of the Single-Out/General Test</i>	1289
C.	<i>Proving Pretextual Discrimination</i>	1293
D.	<i>Application</i>	1299
	CONCLUSION.....	1303

By enacting § 2 [of the Federal Arbitration Act] . . . Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed “upon the same footing as other contracts.”¹

INTRODUCTION

Jamie Leigh Jones, a Halliburton employee working in Iraq, was drugged and gang-raped by her coworkers.² When she sought justice in court, Halliburton argued that her sexual assault claims had to be arbitrated pursuant to a clause in her employment contract.³

African American consumers alleging racial discrimination against a car dealership discover that they are each required to pay some \$14,000 in fees up front just to have their less-than-\$180,000 claims

¹ *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

² James Risen, *Limbo for U.S. Women Reporting Iraq Assaults*, N.Y. TIMES, Feb. 13, 2008, at A1.

³ *Id.* at A10. The Fifth Circuit recently held that Jones may bring her sexual harassment claims in court despite the agreement. *Jones v. Halliburton Co.*, 583 F.3d 228, 242 (5th Cir. 2009).

heard in arbitration.⁴ Filing the same action in federal court would have cost them each \$350.⁵

The National Arbitration Forum (NAF), which until recently arbitrated debt-collection disputes between financial institutions and consumers, earned “at least \$5 million in fees between 1998 and 2000” from one such financial institution alone.⁶ In the same period, that financial institution allegedly won 99.6% of its 50,000 NAF cases.⁷

These and other “arbitration horror stories”⁸ have fueled a polarizing debate within academia, in legislatures, and among ordinary individuals—individuals who increasingly find themselves surrendering their right to trial by jury just to obtain a job or basic services like a credit card or health care. Some see in this development the ugly specter of predatory corporations herding the unwary into secret trials and “kangaroo court[s].”⁹ Others worry that latent prejudices about arbitration have produced exaggerated suspicions that are belied by a more complex and balanced reality.¹⁰

In response to real or perceived abuses, state lawmakers have increased their efforts to regulate arbitration. After all, arbitration is a “creature of contract,”¹¹ and states have been the primary stewards of contract law. Thus, Nebraska requires form contracts containing a binding arbitration clause to provide a prominent disclosure of the

⁴ JOHN O'DONNELL, PUBLIC CITIZEN, *THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS* 35 (2007), available at <http://www.citizen.org/documents/ArbitrationTrap.pdf>. These figures do not include attorneys' fees.

⁵ *Id.* at 36.

⁶ *Arbitration or “Arbitrary”: The Misuse of Mandatory Arbitration to Collect Consumer Debts: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 4 (2009) (statement of F. Paul Bland, Jr., Staff Attorney, Public Justice), available at <http://oversight.house.gov/images/stories/Hearings/pdfs/20090722Bland.pdf>.

⁷ *Id.* In July 2009, the Minnesota Attorney General's Office filed a civil action against the NAF for fraud and deceptive practices, alleging that the NAF had a financial interest in some of these institutions, as well as in the law firms that represented them. See Complaint at 1-2, *Minnesota v. Nat'l Arbitration Forum, Inc.*, No. 09-18550 (Minn. Dist. Ct. July 14, 2009), available at <http://www.ag.state.mn.us/PDF/PressReleases/SignedFiledComplaintArbitrationCompany.pdf> (describing the NAF's affiliations).

⁸ See generally *ARBITRATION HORROR STORIES*, <http://arbitrationhorrorstories.wordpress.com> (last visited Feb. 15, 2011) (cataloguing similar incidents). A casual perusal of the Internet reveals no shortage of similar forums.

⁹ See *In re Soto*, 165 N.E.2d 855, 857 (N.Y. 1960) (Froessel, J., dissenting); John Vail, *Big Business Acts the Bully*, NAT'L L.J., Aug. 4, 2008, at 22.

¹⁰ See, e.g., Thomas E. Carbonneau, “Arbitracide”: *The Story of Anti-Arbitration Sentiment in the U.S. Congress*, 18 AM. REV. INT'L ARB. 233, 253, 261-62 (2007).

¹¹ *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates*, S.A.S., 269 F.3d 187, 194 (3d Cir. 2001).

clause in capitalized, underlined letters.¹² California refuses to enforce awards rendered by arbitrators who fail to disclose certain conflicts of interest.¹³ Kansas forbids predispute arbitration agreements between employers and employees.¹⁴ To some, these seem like reasonable measures that help level the playing field and protect vulnerable parties.

According to the Supreme Court's current jurisprudence, however, the Federal Arbitration Act (FAA)¹⁵ displaces almost all of these state initiatives under the doctrine of implied obstacle preemption.¹⁶ The dominant explanation for this result is that the FAA's purpose is to further the parties' freedom of contract, by "rigorously enforc[ing]" arbitration clauses according to their terms.¹⁷ Given the supremacy of federal law, this interpretation of the FAA leaves state legislatures with precious little wiggle room to regulate such clauses, particularly in the "mandatory" binding arbitration area. It results in the overpreemption of state law, which cynics attribute to "the Court's

¹² NEB. REV. STAT. § 25-2602.02 (2008).

¹³ CAL. CIV. PROC. CODE §§ 1281.9, 1286.2(a)(6)(A) (West 2007).

¹⁴ KAN. STAT. ANN. § 5-401(c)(2) (2001).

¹⁵ 9 U.S.C. §§ 1-16 (2006).

¹⁶ According to David Schwartz, from January 2002 to April 2004, courts held that the FAA preempted almost fifty different state laws. See David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 WASH. U. J.L. & POL'Y 129 app. A (2004) [hereinafter Schwartz, *State Judges*]. Schwartz estimates that, due to the effect of precedent, "[t]his [statistic] suggests that hundreds of state laws are held preempted each year." David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 549 n.29 (2004) [hereinafter Schwartz, *Power of Congress*].

¹⁷ *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 220-21 (1985); see also Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 277-78 (1926) ("The primary purpose of the [FAA] is to make enforceable in the Federal courts such agreements for arbitration . . ."); Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 102 (2002) ("In *Southland*, the Court effectively 'federalized' United States arbitration law, 'restrict[ing] state legislative rights' so as 'to guarantee the unobstructed enforcement of arbitration agreements.'" (quoting THOMAS E. CARBONNEAU, CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION 162 (2d ed. 2000)) (internal quotation marks omitted)); Stephen L. Hayford, *Federal Preemption and Vacatur: The Bookend Issues Under the Revised Uniform Arbitration Act*, 2001 J. DISP. RESOL. 67, 71 (explaining that "the enforcement of contractual agreements to arbitrate" is the "seminal purpose of the FAA"); Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government's Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 571 (1994) ("A state law that limits freedom of contract with respect to arbitration agreements conflicts with the FAA and is preempted by it.").

own self-interested goal of reducing the number of cases pending in the federal courts.”¹⁸

At the same time, the dominant view leaves the door ajar for judges to police arbitration agreements through standard contract law defenses to enforceability. For this reason, state courts have been viewed as “guardians” against the FAA’s relentless colonization of state law domains.¹⁹ But empirical and anecdotal evidence increasingly suggests that those courts may have started taking the offensive, by distorting easily manipulable rules such as the unconscionability doctrine in order to accomplish the very same regulation of arbitration agreements that the FAA appears to have declared off-limits to state legislatures.²⁰ Because the prevailing view is that established rules of contract do not offend the FAA as long as they “arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,”²¹ such judicial maneuvering has largely managed to fly under the radar. Ironically, this leaves existing FAA preemption jurisprudence prone to the opposite charge of underpreemption.

In this Article, I seek to inject a fresh perspective on these problems. Rather than a “broad principle of enforceability”²² for arbitration clauses, I argue that the Court’s FAA preemption jurisprudence reflects a core principle of *nondiscrimination* in enforcement. On this view, the central purpose of FAA preemption is to reverse what is perceived to be the law’s longstanding yet irrational hostility toward arbitration. That hostility manifested itself—and, according to the Court, continues to manifest itself—in legal rules that deny arbitration agreements the equal opportunity of enforcement enjoyed by other contracts.²³ Countless lower courts and commentators have likewise grasped the anti-discrimination logic of FAA preemption.²⁴ But none

¹⁸ Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court’s Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 830 (2002); see also Casarotto v. Lombardi (*Lombardi I*), 886 P.2d 931, 941 (Mont. 1994) (Trieweiler, J., specially concurring), *vacated*, 515 U.S. 1129 (1995); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 661 (1996).

¹⁹ See, e.g., Schwartz, *State Judges*, *supra* note 16, at 143-47.

²⁰ See *infra* notes 207-09 and accompanying text.

²¹ Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

²² Southland Corp. v. Keating, 465 U.S. 1, 11 (1984).

²³ See H.R. REP. NO. 68-96, at 1 (1924); see also *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (“To overcome judicial resistance to *arbitration*, Congress enacted the Federal Arbitration Act . . . [which] places *arbitration agreements* on equal footing with all other contracts . . .” (emphasis added) (citation omitted)).

²⁴ See *infra* notes 177-85 and accompanying text.

has ventured beyond the occasional, one-line reference to the FAA as an “anti-discrimination statute”²⁵ or as a “a sort of ‘equal protection’ clause for arbitration provisions”²⁶ in order to explain the meaning behind that logic.

This is the first of two articles in which I attempt to fill this void.²⁷ To be clear, the anti-discrimination theory of FAA preemption that I seek to defend is grounded primarily in the Court’s jurisprudence rather than in the FAA itself. Although anti-discrimination themes are certainly evident in the text and history of the statute, the language of the FAA is simply too indeterminate, and the congressional record leading to its enactment too sparse, to draw any firm conclusions about its original meaning. There is also considerable doubt as to whether Congress ever intended the FAA to preempt state substantive law (rather than simply to provide rules for the streamlined enforcement of arbitration agreements in federal court).²⁸ What is undeniable, however, is that courts routinely deploy the rhetoric of anti-discrimination when justifying the FAA’s displacement of state law. My approach is therefore to interrogate those justifications and to question whether they necessitate the outcomes the Court tells us they do.

Unlike the dominant view, an anti-discrimination approach would not require the preemption of all state legislation restricting the use of arbitration agreements. From an anti-discrimination perspective, even laws that facially discriminate against certain historically oppressed groups are not always problematic. This is captured by the well-known concept of a “suspect” or “quasi-suspect” classification in equal protection law. Such classifications are suspicious because we have good reason to fear the persistence of hostility and prejudice. But the fact that they are “suspect” rather than “forbidden” means that those classifications may sometimes be tolerated where necessary to serve overriding public interests. Similarly, an anti-discrimination-inspired model of FAA preemption would displace state law only if the law could be said to discriminate improperly against arbitration—that

²⁵ Joshua Ratner & Christian Turner, *Origin, Scope, and Irrevocability of the Manifest Disregard of the Law Doctrine: Second Circuit Views*, 24 QUINNIPIAC L. REV. 795, 797-98 (2006).

²⁶ David Ling, *Preserving Fairness in Arbitration Agreements: States’ Options after Casarotto*, 2 HARV. NEGOT. L. REV. 193, 193 (1997).

²⁷ The companion piece is Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 U.C.L.A. L. REV. (forthcoming 2011) (on file with author).

²⁸ See *infra* notes 210-13 and accompanying text.

is, if it betrayed the same anti-arbitration bias or “mistrust” of the arbitral process that the FAA was designed to abolish.²⁹

But anti-discrimination law also understands that discrimination operates in subtle ways; just because a law is general on its face does not mean it cannot do harm as applied. Anti-discrimination law has accordingly developed a number of evidentiary frameworks to distinguish between the legitimate and pretextual applications of facially neutral laws. I argue that similar frameworks, when adapted to the FAA context, may help address the concerns of those who fear the advent of a “new judicial hostility”³⁰ in the way that some courts seem to use the unconscionability defense against arbitration agreements.

Disillusionment with the Court's strong pro-arbitration leanings has understandably led some to elide the anti-discrimination underpinnings of FAA preemption. But it leads me rather to highlight those underpinnings for two reasons. First, as a descriptive matter, anti-discrimination is the organizing principle that best explains the Court's FAA preemption jurisprudence over the past twenty-five years. We are stuck with this jurisprudence; instead of fighting it or wishing it away, advocates on both ends of the political spectrum would do better to lay bare its true meaning. Second, even if the assumptions behind the principle are no longer appropriate, the Court and lower courts continue to rely on a norm of anti-discrimination to legitimize the FAA's preemptive compass. I argue that a more sophisticated engagement with that norm offers a way to lend integrity to the law of FAA preemption, by holding courts to the full implications of their own pronouncements.

This Article proceeds as follows: In Part I, I offer an account of certain basic features of the Court's FAA preemption jurisprudence to set the stage for my broader normative claims. In Part II, I argue that the deeper logic of the Court's FAA jurisprudence (including its FAA preemption jurisprudence) is not one of enforcing arbitration agreements as written, but rather of ensuring that state laws do not improperly discriminate against arbitration. I explain why that jurisprudence implicitly regards any classification that disadvantages

²⁹ Cf. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 231-32 (1987); Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 194-95 (2002).

³⁰ See Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 483.

arbitration as “suspect,” and thus why arbitration itself deserves a kind of “suspect” status.³¹

When viewed through an anti-discrimination lens, the Court’s FAA preemption jurisprudence appears both too restrictive and too permissive. I argue in Part III that it is too restrictive because it assumes that a state law impermissibly discriminates simply because it singles out arbitration on its face. In Part IV, I argue that it is too permissive: it does not go far enough to protect arbitration because it is too aloof to the problem of discrimination in application.

My contention emphatically is not that arbitration agreements should be considered a “suspect” or “quasi-suspect” class under equal protection law. Nor is it my purpose to vindicate an independent descriptive claim about the existence of discrimination against arbitration or to develop substantive rules for remedying any such discrimination. Rather, it is to borrow from the more refined conceptual resources developed in the anti-discrimination area to introduce a more sophisticated way of thinking about FAA preemption. In doing so, I hope to lay the foundations for an alternative approach, one that helps restore a balance between the states’ legitimate regulatory interests and the so-called “national policy favoring arbitration.”³²

³¹ In using the term “suspect,” I do not intend to suggest a particular correspondence with the notion of a “suspect” class or a “quasi-suspect” class, or with the degree of suspicion (or scrutiny) that they trigger.

Note also that my use of the term “suspect” is slightly different from the term “suspect status” in the quotation from the Court’s seminal *Doctor’s Associates, Inc. v. Casarotto* opinion with which this Article began. See *supra* note 1 and accompanying text. The Court in that case appears to say that state judges and legislatures should not regard arbitration *agreements* as suspicious simply because they are arbitration agreements. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996). By contrast, I use the phrase to suggest that we should regard any state *law* to be suspicious if it purposefully disadvantages arbitration agreements. Although this does not appear to be the way most courts and commentators have understood the Court’s phrase, some have also used the term “suspect” in this way. See, e.g., 2 IAN R. MACNEIL ET AL., FEDERAL ARBITRATION LAW § 16.2.4 (Supp. 1999) (referring to the Court’s anti-arbitration holding in *Wilko v. Swan*, 346 U.S. 427, 438 (1953), as “suspect” because it rested on “outmoded hostility”); Thomas H. Riske, *No Exceptions: How the Legitimate Business Justification for Unconscionability Only Further Demonstrates California Courts’ Disdain for Arbitration Agreements*, 2008 J. DISP. RESOL. 591, 603 (describing a court’s unconscionability finding against an arbitration agreement as “suspect” because it betrayed a “general prejudice against arbitration”).

³² *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

I. THE EXISTING FAA PREEMPTION PARADIGM

The Court's FAA preemption jurisprudence is based entirely on section 2 of the FAA,³³ which provides, in pertinent part: "A written provision . . . to submit [specified disputes] to arbitration . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."³⁴ In a series of decisions culminating in *Southland Corp. v. Keating*, the Court crystallized its interpretation of section 2 as a substantive provision falling within Congress's broad power to regulate interstate commerce.³⁵

As substantive federal legislation, section 2 has the potential to displace state law in one of several ways. Under the doctrine of federal preemption, section 2 would preclude the states from legislating in a particular area if (a) Congress had made this intention explicit in the text of the FAA or (b) Congress's intention to occupy the field could be inferred from a comprehensive scheme of federal legislation that leaves little room for concurrent state lawmaking.³⁶ Neither, however, is the case for section 2.³⁷ The only remaining ground for displacing state law is therefore the Supremacy Clause,³⁸ pursuant to which federal law trumps any state provision that conflicts with or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."³⁹ Technically speaking, this displacement is not a species of preemption at all but rather of supremacy.⁴⁰ Nonetheless, it is colloquially referred to as "conflict" or "obstacle" preemption, and it is also the way in which the Court finds FAA section 2 to "preempt" state law.

The Court has developed an analytical framework for determining when FAA section 2 preempts conflicting state laws. I shall refer to this framework as the "Paradigm." Christopher Drahozal has provided

³³ See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006) (describing FAA section 2 as "the only [FAA] provision that we have applied in state court").

³⁴ United States Arbitration Act § 2, 9 U.S.C. § 2 (2006).

³⁵ See *Southland*, 465 U.S. at 11; see also *Moses H. Cone Mem'l Hosp. v. Mercury Contr. Corp.*, 460 U.S. 1, 24 (1983); *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967).

³⁶ See *Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 606-07 (1991); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 775 (1994).

³⁷ See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

³⁸ U.S. CONST. art. VI.

³⁹ *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁴⁰ See Gardbaum, *supra* note 36, at 768-69.

perhaps the most comprehensive account of the Paradigm to date.⁴¹ My goal in this Part is to present an abbreviated account of the Paradigm that serves less as an alternative to Drahozal's than as a foundation for this Article's broader normative argument.

My account of the Paradigm is subject to the following simplifying assumptions. First, I define the Paradigm as limited to section 2 preemption, thereby excluding consideration of other substantive provisions of the FAA that the Court may later find to have preemptive force.⁴² Second, because they are tangential to my argument, I set aside cases in which the parties have specifically selected state law to govern their arbitration agreement.⁴³ Third, in order to focus on the Paradigm's foundational building blocks, I assume that the universe of state laws consists only of those that unproblematically fit into one of the Paradigm's binary categories: laws that either single out arbitration or apply to "any contract."⁴⁴ Finally, in this Part only, I intend my account of the Paradigm to be a descriptive explanation of how I believe most courts (following the Supreme Court's lead) construe and apply FAA preemption doctrine, rather than to suggest how the Paradigm *should* operate.

A. *Enforcement-Neutral and Enforcement-Impeding Laws*

FAA section 2 provides that any arbitration agreement falling within its jurisdictional purview "*shall* be valid, irrevocable, and enforceable."⁴⁵ A threshold requirement for preemption based on section 2, therefore, is that the state law frustrate this imperative of enforceability, either in whole or in part.⁴⁶ I refer to such laws as

⁴¹ See Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 407-19 (2004) (providing a four-step analysis for FAA preemption).

⁴² Thus, when I say that the FAA preempts a state law, I mean that FAA section 2 preempts the law.

⁴³ In these circumstances, the chosen state law is generally saved from FAA preemption. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989). But see *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995) (holding that the parties' choice of New York law did include that state's law prohibiting punitive damage awards in arbitration).

⁴⁴ 9 U.S.C. § 2 (2006). This is a crucial limiting assumption of the Article. State laws that do *not* fit into those categories have posed some of the most perplexing FAA preemption problems. Accord Drahozal, *supra* note 41, at 425. Precisely how an anti-discrimination model of FAA preemption would contend with such state laws is an important question that I take up in *Equal Opportunity for Arbitration*, *supra* note 27.

⁴⁵ 9 U.S.C. § 2 (emphasis added).

⁴⁶ See, e.g., *Preston v. Ferrer*, 552 U.S. 346, 356 (2008) (noting that a state law is in conflict with the FAA even when it merely "imposes prerequisites to enforcement of an

“enforcement impeding.”⁴⁷ By contrast, a state law that does not stand as an obstacle to the enforceability of arbitration agreements is never preempted by section 2, even if the law encumbers arbitration in other ways.⁴⁸ I refer to such laws as “enforcement neutral.”

Many—but not all—procedural and ethical rules regulating the practice of arbitration (as opposed to contracts of arbitration) are enforcement neutral.⁴⁹ For example, a state law that provides for the immediate appeal of an order to compel arbitration may burden the arbitration process by creating further opportunities for delay. But delay alone has been insufficient to trigger FAA preemption concerns.⁵⁰ Because such a law does not frustrate (wholly or partially) the enforceability of an otherwise valid arbitration agreement, it is enforcement neutral and therefore not subject to preemption by the FAA.⁵¹ On the other hand, a state procedural rule that requires arbitrators to disclose conflicts of interest would be enforcement

arbitration agreement”); Drahozal, *supra* note 41, at 408 (arguing that a state law that “invalidate[s] the parties’ arbitration agreement, in whole or in part, conditionally or unconditionally” is preempted); Stephen J. Ware, “Opt-In” for Judicial Review of Errors of Law Under the Revised Uniform Arbitration Act, 8 AM. REV. INT’L ARB. 263, 269 (1997) (“If one cannot imagine an arbitration agreement that might be rendered unenforceable by the state law, then one can be nearly certain that the state law safely avoids preemption.”).

⁴⁷ This definition includes state laws that restrict the enforceability of arbitral awards beyond the standards for vacatur contained in FAA section 10. Such laws are enforcement impeding because they provide an indirect avenue for limiting FAA section 2. See *infra* note 52 and accompanying text.

⁴⁸ See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 688 (1996) (explaining that a state law that “d[oes] not affect the enforceability of the arbitration agreement itself” would be consistent with the FAA). But see *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1121 (1st Cir. 1989) (holding that the FAA preempted a state statute that did not restrict the enforceability of arbitration clauses in securities contracts but only imposed sanctions upon broker-dealers).

⁴⁹ See, e.g., *New Eng. Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 4-7 (1st Cir. 1988) (finding no preemption of a state law providing for consolidation of related arbitration proceedings); *St. Fleur v. WPI Cable Sys./Mutron*, 879 N.E.2d 27, 33-34 (Mass. 2008) (finding no preemption of a procedural rule withholding the right to a jury for factual determinations on a motion to compel arbitration); *Wells v. Chevy Chase Bank*, F.S.B., 768 A.2d 620, 629 (Md. 2001) (finding no preemption of a general appeals statute that provided a right of immediate appeal from an order compelling arbitration).

⁵⁰ See, e.g., *Casarotto*, 517 U.S. at 688; *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (“We . . . reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.”).

⁵¹ Note, however, that such a state law may conflict with FAA section 16, which provides that an appeal may not be taken from an order granting a motion to compel arbitration. To reiterate, I take no position on the preemption of state law by FAA sections other than section 2. See *supra* note 42 and accompanying text.

impeding, and hence a candidate for preemption, if it provides that awards rendered in violation of the rule are unenforceable.⁵²

Enforcement-impeding laws can take one of several forms. The first is a statute that unconditionally invalidates an arbitration agreement or some part thereof, such as an Alabama statute that makes all written predispute arbitration agreements unenforceable⁵³ or the so-called *Garrity* rule in New York, which prohibits arbitrators from awarding punitive damages.⁵⁴

The second is a law that makes the validity of an arbitration agreement contingent on compliance with certain requirements. Prime examples are laws that render arbitration clauses unenforceable unless the clause is somehow brought to the nondrafting party's attention—for instance, by requiring the clause to be written in capital letters next to the signature block of the container contract.⁵⁵ Such statutes do not necessarily invalidate arbitration agreements, only those that do not comply with the statute's requirements.

The third type of enforcement-impeding law is one that merely impairs agreements as to the time, place, or manner of arbitration.⁵⁶ For example, many states have enacted statutes voiding out-of-state forum selection clauses or class action waivers, whether in arbitration or litigation.⁵⁷ Assuming severability, such laws do not prevent the arbitration itself from going forward. Even though they may not

⁵² See *Skinner v. Donaldson, Lufkin & Jenrette Sec. Corp.*, No. 03-2625, 2003 WL 23174478, at *8 (N.D. Cal. Dec. 29, 2003) (observing that state laws “allow[ing] the court to vacate arbitral awards entered upon the agreements of the parties is preempted by the FAA”); Richard C. Reuben, *Personal Autonomy and Vacatur After Hall Street*, 113 PENN. ST. L. REV. 1103, 1156 (2009) (observing that state procedural rules, such as those relating to vacatur of arbitral awards, would survive preemption so long as they do not “contravene the enforcement provisions of Section 2 of the FAA”). But see *Ovitz v. Schulman*, 35 Cal. Rptr. 3d 117, 134-35 (Ct. App. 2005) (holding that California's arbitrator disclosure rules do not affect enforceability because “[i]f an award is vacated, the result is not a preclusion of further arbitration, but rather a new arbitration held in accordance with the disclosure requirements”).

⁵³ ALA. CODE § 8-1-41(3) (1993), *preemption recognized by Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 278-81 (1995).

⁵⁴ See *Garrity v. Lyle Stuart, Inc.*, 353 N.E.2d 793, 795-96 (N.Y. 1976), *superseded by statute as recognized in Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59-60 (1995).

⁵⁵ See, e.g., NEB. REV. STAT. § 25-2602.02 (2008), *preemption recognized by Affiliated Foods Midwest Coop., Inc. v. Integrated Distrib. Solutions, LLC*, 460 F. Supp. 2d 1068, 1073-74 (D. Neb. 2006).

⁵⁶ Drahozal refers to such laws as “second generation” state laws. See Drahozal, *supra* note 41, at 416.

⁵⁷ See, e.g., CAL. BUS. & PROF. CODE § 20040.5 (West Supp. 2009); R.I. GEN. LAWS § 19-28.1-14 (1998).

directly conflict with the imperative of enforceability contained in FAA section 2, such laws have nonetheless been deemed a sufficient “obstacle” to that imperative so as to warrant preemption by the FAA.⁵⁸

B. *The Single-Out/General Test*

Assuming an enforcement-impeding law, the next step in the preemption analysis is to inquire into the manner in which arbitration is treated on the face of the statute. The Court has developed a binary, on/off framework for this analysis. At one pole are “grounds as exist at law or in equity for the revocation of any contract.”⁵⁹ Good examples are rules of contract formation,⁶⁰ established contract defenses such as unconscionability, and other “generally applicable”⁶¹ principles such as estoppel.⁶² Under current FAA preemption jurisprudence, such laws generally survive preemption.⁶³

⁵⁸ See *Ting v. AT&T*, 319 F.3d 1126, 1136, 1148 (9th Cir. 2003); *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890 (9th Cir. 2001); cf. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 458-60 (2003) (Rehnquist, C.J., dissenting) (arguing that a state court rule imposing class arbitration where the agreement was silent on the issue should be preempted).

⁵⁹ 9 U.S.C. § 2 (2006).

⁶⁰ See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

⁶¹ *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686-87 (1996).

⁶² See, e.g., *Levitan v. Fanfare Media Works, Inc.*, No. B156337, 2003 WL 21028339, at *8 (Cal. Ct. App. May 8, 2003).

⁶³ The Court has stated that “if [a] law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,” it is not preempted. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). And as I explain in Section IV.A, lower courts routinely deny preemption challenges predicated on the allegedly more stringent application of general contract law doctrines to arbitration agreements. See *infra* notes 312-15 and accompanying text. Only a handful of courts have found the FAA to preempt certain applications of the unconscionability defense. See, e.g., *Wince v. Easterbrooke Cellular Corp.*, 681 F. Supp. 2d 679, 685-86 (N.D. W. Va. 2010); *Shubert v. Wells Fargo Auto Fin., Inc.*, No. 08-3754, 2008 WL 5451021, at *7 (D.N.J. Dec. 31, 2008); *Weinstein v. AT&T Mobility Corp.*, No. 07-2880, 2008 WL 1914754, at *5 (E.D. Pa. Apr. 30, 2008); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603, 615 (S.D. W. Va. 2004); *Discover Bank v. Superior Court*, 129 Cal. Rptr. 2d 393, 407-08 (Ct. App. 2003), *rev'd*, 113 P.3d 1100 (2005). After *Homa v. American Express Co.*, 558 F.3d 225 (3d Cir. 2009), the foregoing decisions from within the Third Circuit are no longer good law.

There is some debate as to whether the Paradigm actually preempts (or would preempt) the “hostile” application of general contract laws. The Court has suggested, for instance, that lower courts may not “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.” *Perry*, 482 U.S. at 492 n.9; see also *Casarotto*, 517 U.S. at 687 n.3 (emphasizing the principle from *Perry*). This statement, however, is dictum because the issue in *Perry* was whether the FAA preempted a state statute, not the unconscionability defense. *Perry*, 482 U.S. at 489-91. The Court has also stated that judges may not “decide that a con-

There has been some uncertainty as to how “general” a law must be in order to escape preemption under this standard. Many commentators have taken the position that the state rule must apply to “all” contracts.⁶⁴ According to this view, only state contract law would appear to avoid preemption. Others have wondered whether a law would be considered general enough as long as it applied on its face to arbitration agreements and at least one other type of agreement.⁶⁵

Although the Court may soon address this issue,⁶⁶ the majority view in the lower courts is that to avoid preemption, the state law must be basic enough that it extends to literally “all contracts.”⁶⁷ Thus, state

tract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.” *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995). But this, too, was dictum because *Allied-Bruce* did not involve a preemption challenge to a contract defense but rather to a statute that singled out arbitration. *Id.* at 281-82. This leads me to conclude that, in its current form, the Paradigm does not clearly require the preemption of native contract law when the law is applied in a manner that discriminates against arbitration.

The Court may change this landscape in *AT&T Mobility v. Concepcion*, which was argued in November 2010. See *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), cert. granted sub nom. *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010) (No. 09-0893).

⁶⁴ See, e.g., Drahozal, *supra* note 41, at 408-09 (highlighting the problem of forum-selection laws that neither single out arbitration nor apply generally to “all contracts”); Hayford, *supra* note 17, at 78 (observing that the FAA preempts state laws “that do not apply equally to all contracts”); Hayford & Palmiter, *supra* note 29, at 213-14 (observing that the FAA does not preempt “state law standards applied in determining the validity of all contracts”); Margaret L. Moses, *Privatized “Justice,”* 36 LOY. U. CHI. L.J. 535, 541 (2005) (“[T]he Court’s position is that for grounds to be available to render an arbitration provision unenforceable, such grounds must be . . . potentially applicable to all contracts.”); Stephen J. Ware, *Contractual Arbitration, Mandatory Arbitration, and State Constitutional Jury-Trial Rights*, 38 U.S.F. L. REV. 39, 47 (2003) (rescinding the author’s earlier claim that a law would not have to apply “literally, [to] all contracts” to be deemed “general”). But see IAN R. MACNEIL ET AL., *FEDERAL ARBITRATION LAW* § 10.7.2 (Supp. 1999) (defining “general contract law” as anything that is not state *arbitration* law); Schwartz, *Power of Congress*, *supra* note 16, at 570 n.114 (“Clearly, it is overselling the point to suggest that ‘any contract’ plainly means ‘all contracts.’”); Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U.S.F. L. REV. 17, 36-37 (2003) (arguing that a law is “general” enough to be protected from preemption even if it “do[es] not apply generally to all kinds of contracts in a given state”).

⁶⁵ See IAN R. MACNEIL ET AL., *supra* note 64, § 10.7.2.

⁶⁶ In *Concepcion*, the petitioner argued that California’s unconscionability test for collective action waivers should be preempted because it does not literally apply to *all* clauses, just clauses relating to dispute resolution. Brief for Petitioner at 3, 17, 31, 40, *AT&T Mobility LLC v. Concepcion*, No. 09-0893 (U.S. Aug. 2, 2010).

⁶⁷ See, e.g., *Ticknor v. Choice Hotels Int’l, Inc.*, 265 F.3d 931, 937 (9th Cir. 2001) (holding state contract law defenses not preempted “as long as . . . [they] are generally applied to all contracts”); *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 725-26 (4th Cir. 1990) (reasoning that a state law is preempted unless it “declare[s] all contracts of

laws prohibiting the selection of an out-of-state dispute resolution forum in franchise or construction contracts routinely fail the “general” test on the ground that they apply only to contracts within certain sectors (e.g., franchise, construction, etc.) and then only to contracts containing forum-selection clauses.⁶⁸ Therefore, I interpret the Paradigm as requiring that a state law is “generally applicable” only if it applies in principle to all contracts.⁶⁹

At the other extreme from a general law is a law that applies solely to arbitration agreements. Consider a Montana law that required all arbitration clauses to be “typed in underlined capital letters on the first page of the contract.”⁷⁰ In *Doctor's Associates, Inc. v. Casarotto*, the Court held that this law impermissibly “singl[ed] out arbitration”⁷¹ by placing special conditions on arbitration agreements that did not apply to all other contracts: “[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2. Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”⁷² Enforcement-impeding laws that “single out” arbitration, in other words, are always preempted.⁷³

adhesion to be presumptively unenforceable”); *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1121 (1st Cir. 1989) (holding that the FAA does not preempt state rules that apply to “all” contracts); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 880 (Pa. Super. Ct. 2006) (“[T]he FAA does not preempt the application of state law that applies equally to all contracts.”); *cf.* *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) (“Section 2 . . . places arbitration agreements on equal footing with *all* other contracts . . .” (emphasis added)).

For a more detailed discussion of the majority view in the lower courts, to the effect that the FAA preempts a state law unless the state law literally applies to “all” contracts, *see* Aragaki, *supra* note 27 (manuscript subsection II.B.1).

⁶⁸ *See, e.g.,* *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890 (9th Cir. 2001); *KKW Enters., Inc. v. Gloria Jean's Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 52 (1st Cir. 1999).

⁶⁹ Elsewhere, I have explained why this requirement is ultimately incoherent. *See* Aragaki, *supra* note 27 (manuscript Section II.B); *see also* Brief of Arbitration Professors as *Amici Curiae* in Support of Respondents at 25-29, *AT&T Mobility LLC v. Concepcion*, No. 09-0893 (U.S. Oct. 6, 2010).

⁷⁰ *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (quoting MONT. CODE ANN. § 27-5-114(4) (1995)). The law was enforcement impeding insofar as it denied enforcement to nonconforming arbitration clauses.

⁷¹ *Casarotto*, 517 U.S. at 687.

⁷² *Id.* (citations omitted). Lower courts appear to have entertained some version of the “single out test” prior to *Casarotto*. *See, e.g., Connolly*, 883 F.2d at 1120 (“[A]ny *separate* regulatory action or sanction singling out arbitration agreements from contracts generally would be preempted.”).

⁷³ *See* Hayford & Palmiter, *supra* note 29, at 204 (arguing that the Paradigm “forbids any state law (statutory or judicial) that singles out arbitration for suspect treat-

Unlike those falling in the “general” category, such laws are easy to spot: they apply on their face to arbitration and only arbitration.

The following table summarizes the Paradigm as I have so far described it:

Figure 1: Summary of the Paradigm

	... singles out arbitration	... is completely general
Enforcement-impeding state law that . . .	Always preempted	Not preempted
Enforcement-neutral state law that . . .	Not preempted	Not preempted

One remarkable aspect of the Paradigm is its formalism: it does not matter *why* a state statute singles out arbitration, just that it does so. Likewise, it is irrelevant what consequences the state law portends for a given arbitration agreement. The Paradigm sees no difference between a law that denies legal effect to all predispute arbitration agreements statewide and one that merely precludes arbitrators from awarding certain types of remedies in a narrow class of disputes.

II. REINTERPRETING THE PARADIGM AS AN ANTI-DISCRIMINATION PRINCIPLE

What makes the Paradigm tick? Why should the FAA preempt an enforcement-impeding law that singles out arbitration but not one that is completely general on its face? In this Part, I argue that the Paradigm is animated by a principle of nondiscrimination—a principle whose purpose is to dispel stubborn prejudices about arbitration’s inferiority as a method of resolving disputes. In Sections II.A through II.C, I elaborate on the meaning of this principle by looking at three

ment”); Stephen J. Ware, *Arbitration and Unconscionability After Doctor’s Associates, Inc. v. Casarotto*, 31 WAKE FOREST L. REV. 1001, 1012 (1996) (“Any law that singles out arbitration agreements by making them less enforceable than other contracts is preempted by the FAA.”).

contexts in which it manifests itself most clearly: (1) the FAA's response to the historic common law "hostility" to arbitration, (2) the Court's more recent FAA jurisprudence outside the preemption area, and (3) the Court's current doctrinal test for FAA preemption. In Section II.D, I offer some observations about how well the Paradigm lives up to its anti-discrimination pedigree.

My thesis that the Paradigm expresses an anti-discrimination principle begs the question of what exactly I mean by "anti-discrimination," as the term itself has been interpreted in many different, sometimes contradictory, ways. Some conceive of anti-discrimination as a principle of "anti-differentiation"—one that merely seeks to eliminate distinctions between people or things based on irrelevant differences.⁷⁴ At the other extreme, progressive scholars have argued that the true task of anti-discrimination is to overhaul the structural dominance of certain groups over others. On this "anti-subordination" view, even laws or measures that inadvertently perpetuate historical patterns of power and privilege constitute impermissible discrimination.⁷⁵ Between the two extremes lies what some have identified as an "anti-oppression" theory, which registers the wrongfulness of discrimination in terms of *purposeful* conduct motivated by improper considerations, such as prejudice toward traditionally oppressed groups.⁷⁶

Of the three models of anti-discrimination described above, the one that comports best with the Paradigm is the anti-oppression view. This claim may strike some readers as rather surprising. It is difficult, for instance, to appreciate how arbitration could possibly have endured the type of oppression normally associated with minorities and women, and thus why the Paradigm should be interpreted as anything more than an anti-differentiation principle. To this I have three responses.

First, the central argument of this Article—that the Paradigm regards arbitration as having a kind of "suspect" status—only makes

⁷⁴ See John Hasnas, *Equal Opportunity, Affirmative Action, and the Anti-Discrimination Principle: The Philosophical Basis for the Legal Prohibition of Discrimination*, 71 *FORDHAM L. REV.* 423, 431-33 (2002) (providing examples of the anti-differentiation principle).

⁷⁵ See Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 *PHIL. & PUB. AFF.* 107, 157 (1976); see also Cass R. Sunstein, *The Anticaste Principle*, 92 *MICH. L. REV.* 2410, 2422-24 (1994).

⁷⁶ Hasnas, *supra* note 74, at 434-36. I recognize that the anti-oppression view is generally considered to be a species of the anti-subordination view rather than as something separate from it. See *id.* at 437. In treating the two as separate, I seek merely to distinguish the anti-oppression view from other, more robust variants of the anti-subordination view.

sense on the anti-oppression or anti-subordination view.⁷⁷ The anti-differentiation theory can be ruled out on the further ground that situations in which state law favors arbitration agreements over other agreements do not offend the Paradigm.⁷⁸ Second, as between the anti-oppression and the anti-subordination theories, the former is more consistent with the Paradigm's emphasis on reversing unjustified "hostility" toward arbitration, which in turn suggests intentional—more so than structural—discrimination. Moreover, as a policy matter, the strong redistributive and remedial rationales typically associated with the anti-subordination view are unpersuasive in the arbitration context.⁷⁹ Finally, keep in mind that I am not making an empirical claim about the existence or nature of "oppression" against arbitration. Nor am I claiming that the FAA was originally intended to be an anti-oppression statute.⁸⁰ Instead, I simply seek to decode and render explicit claims that the Court has made on the subject and to use them to critique existing FAA preemption jurisprudence. Anti-discrimination law and theory help my analysis because they provide sophisticated analytical frameworks, not because they furnish governing law.

A. *Unjustified Hostility Toward Arbitration: Origins to 1925*

For at least two centuries prior to the advent of modern arbitration statutes in the United States, executory arbitration agreements were unenforceable for all practical purposes. First, according to the

⁷⁷ See Reginald C. Oh, *A Critical Linguistic Analysis of Equal Protection Doctrine: Are Whites a Suspect Class?*, 13 TEMP. POL. & CIV. RTS. L. REV. 583, 588 (2004) (describing the "law of suspect classes" as being more consistent with the anti-subordination than the anti-differentiation view); see also Michael Selmi, *Proving Intentional Discrimination: The Reality of Supreme Court Rhetoric*, 86 GEO. L.J. 279, 297, 305 (1997).

⁷⁸ Section 2 of the FAA does not preempt state laws that privilege arbitration agreements over other agreements. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 & n.5 (1989). Instead, it is only concerned with what I have defined as enforcement-impeding laws—that is, laws that adversely affect the enforceability of arbitration agreements. See *supra* Section I.A. Indeed, the FAA as a whole favors arbitration agreements by providing an elaborate mechanism for enforcing such agreements (but no other agreement). See Aragaki, *supra* note 27 (manuscript Section IV.B); *infra* notes 184-89 and accompanying text.

⁷⁹ See *infra* notes 335-47 and accompanying text. As compared with the anti-subordination view, what I am referring to as the anti-oppression theory represents a weaker anti-discrimination regime, which in turn should make it more palatable to those who are uncomfortable with the anti-discrimination analogy to begin with. I explain in greater detail why the anti-subordination view is inconsistent with the Paradigm in the companion piece to this Article. See Aragaki, *supra* note 27 (manuscript Section III.A).

⁸⁰ See *supra* text accompanying note 28.

common law “revocability doctrine,” parties to such agreements were entitled to revoke their promise to arbitrate at any time until the arbitrators issued their award.⁸¹ This legal loophole effectively made it impossible to order specific performance of an executory arbitration agreement, for once so ordered, the breaching party could simply turn around and revoke her promise.⁸² Without the remedy of specific performance, the nonbreaching party could obtain only money damages for breach,⁸³ which were considered nominal at best.⁸⁴ Second, there was no legal mechanism for pleading an executory arbitration agreement as a complete bar to an action at law.⁸⁵ Third, courts would not even stay a legal action pending a determination of arbitrability,⁸⁶ thus giving plaintiffs intent on evading arbitration a considerable tactical advantage. In this legal climate, arbitration agreements were simply not “regarded in the same light as other contractual obligations”—so much so that a party reneging on such a promise “frequently [did] not [even] realize that he [wa]s violating his plighted word.”⁸⁷

Early twentieth-century merchants who lobbied for the FAA’s passage explained the common law’s unfavorable treatment of arbitration agreements as the product of a long history of judicial “hostility” toward arbitration.⁸⁸ The ostensible justification for this hostility was that it was against public policy to “oust[]” the courts of

⁸¹ See S. REP. NO. 68-536, at 2 (1924); IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 20 (1992). This so-called “revocability doctrine” originated at English common law but became widely accepted by U.S. courts throughout the nineteenth century. See Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 974-75 (1999).

⁸² See S. REP. NO. 68-536, at 2 (1924); see also *Tobey v. Cnty. of Bristol*, 23 F. Cas. 1313, 1320-21 (C.C. Mass. 1845) (No. 14,065) (Story, J.).

⁸³ See *Doleman & Sons v. Ossett Corp.*, [1912] 3 K.B. 257 at 269-71 (Eng.).

⁸⁴ See 1 MACNEIL ET AL., *supra* note 64, § 4.3.2.2 (“[D]amages were generally impossible to prove.”).

⁸⁵ See *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1010 (S.D.N.Y. 1915); WESLEY A. STURGES, *A TREATISE ON COMMERCIAL ARBITRATIONS AND AWARDS* § 15 (1930).

⁸⁶ See *Hurst v. Litchfield*, 39 N.Y. 377, 379 (1868); S. REP. NO. 68-536, at 2 (1924); JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 226-41 (1918).

⁸⁷ Cohen & Dayton, *supra* note 17, at 270.

⁸⁸ Although this hostility has often been described as directed at arbitration agreements, it was first and foremost a hostility toward the arbitral process. See *Kulkundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 982-83 (2d Cir. 1942) (criticizing judicial hostility toward the arbitration process); see also *Southland Corp. v. Keating*, 465 U.S. 1, 13-14 (1984) (linking the courts’ refusals to enforce arbitration agreements to the “old common-law hostility toward arbitration”); Aragaki, *supra* note 27 (manuscript Part IV).

their jurisdiction to hear cases, even by agreement of the parties.⁸⁹ But it was difficult to square this so-called “ouster” rule with the fact that judges were perfectly content to cede their jurisdiction in the face of a valid settlement agreement, release, covenant not to sue, or arbitral award.⁹⁰ Each, no less than executory arbitration agreements, invaded the courts’ prerogative to hear cases.

These unexplained inconsistencies fed the perception that the law’s hostility was based on sheer anti-arbitration bias rather than on legitimate considerations about jurisdiction or procedure. According to Julius Henry Cohen, the chief architect of the FAA, this bias originated in English judges, who were compensated based on the number of cases they heard and had accordingly developed a “great jealousy of arbitrations whereby Westminster Hall was robbed of [its] cases.”⁹¹ This, in turn, led them to manufacture a “fear that arbitration tribunals could not do justice between the parties.”⁹² Arbitrators thus came to be portrayed as “caricatures of their judicial siblings—‘pie splitters,’ who lacked requisite pedigree and cultivation.”⁹³ Although they could be entrusted with incidental matters, such as whether a party’s obligations were adequately performed or when they came due,

⁸⁹ See H.R. REP. NO. 68-96, at 1-2 (1924); S. REP. NO. 68-536, at 2 (1924).

⁹⁰ This point was perhaps most forcefully made in *Kulukundis*, 126 F.2d at 983-84, an opinion that Judge Learned Hand joined. See also *Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong. 14-15 (1924) [hereinafter *1924 Hearings*] (statement of Julius Henry Cohen); COHEN, *supra* note 86, at 12, 55, 160, 205, 278.

⁹¹ See COHEN, *supra* note 86, at 254 (citing *Scott v. Avery*, (1856) 10 Eng. Rep. 1121 (H.L.) 1126); see also Heinrich Kronstein, *Business Arbitration—Instrument of Private Government*, 54 YALE L.J. 36, 62-63 (1944) (claiming that the financial interests of judges drove early English opposition to arbitration). But see *Kulukundis*, 126 F.2d at 983-84 nn.14-16 (collecting authorities on both sides of the debate).

⁹² S. REP. NO. 68-536, at 2-3 (1924); see also *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959) (observing that English judges were willing to “resort[] to a great variety of devices . . . [to preserve] their monopoly of the administration of justice”); *U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co.*, 222 F. 1006, 1007-08 (S.D.N.Y. 1915) (speculating that “the hostility of English-speaking courts to arbitration contracts probably originated . . . ‘in the contests of the courts of ancient times for extension of jurisdiction’” (citing *Scott*, 10 Eng. Rep. at 1138)); A.B.A. Com. on Commerce, Trade & Commercial Law, *The United States Arbitration Law and Its Application*, 11 A.B.A.J. 153, 155 (1925).

⁹³ Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1947 (1996); cf. *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 7 (1923) [hereinafter *1923 Hearings*] (statement of Charles L. Bernheimer) (describing a case in which a shipper who had held preconceived notions about arbitration changed his mind after familiarizing himself with the process).

they were considered incompetent to decide “question[s] of liability on the whole contract.”⁹⁴ Even commercial lawyers, having reason to oppose more efficient litigation alternatives that would threaten their fees, initially disparaged arbitration as a ““crude and imperfect. . . method of settling disputes.””⁹⁵

Enacted in 1925, the FAA was intended to bring reason and modernity to bear on what the business community increasingly viewed as the law’s “unjust,”⁹⁶ irrational,⁹⁷ and “anachronis[ti]c”⁹⁸ treatment of arbitration. The new arbitration law sought to “revers[e]”⁹⁹ this discriminatory treatment by dissolving the arbitrary common law doctrines that had stood in the way of enforcing executory arbitration agreements.¹⁰⁰ No longer would a disgruntled trading partner be entitled to “refuse to perform [a valid arbitration] contract when it bec[ame] disadvantageous to him.”¹⁰¹ At long last, valid agreements to arbitrate would receive the law’s full backing, just like valid agreements to do anything else.¹⁰²

Critics such as Katherine Van Wezel Stone have persuasively argued that the law’s hostility toward arbitration during this period may not have been uniformly unjustified—that it was informed at least in part by valid concerns about the lack of procedural safeguards in arbitration or about vulnerable parties being pressured to bargain

⁹⁴ 1924 Hearings, *supra* note 90, at 25 (statement of Alexander Rose); *see also* Tobey v. Cnty. of Bristol, 23 F. Cas. 1313, 1321 (C.C. Mass. 1845) (No. 14,065) (Story, J.) (“[I]t has often been said, that the judgment of arbitrators is but *rusticum iudicium*.”).

⁹⁵ Sabra A. Jones, *Historical Development of Commercial Arbitration in the United States*, 12 MINN. L. REV. 240, 256 (1928) (quoting 13 CENT. L.J. 101, 101 (1881)); *see also* Cohen & Dayton, *supra* note 17, at 281-83.

⁹⁶ Berkovitz v. Arbib & Houlberg, Inc., 130 N.E. 288, 292 (N.Y. 1921) (Cardozo, J.); *see also* Joseph Wheless, *Arbitration as a Judicial Process of Law*, 30 W. VA. L.Q. 209, 213 (1924).

⁹⁷ *See* COHEN, *supra* note 86, at 47; Wesley A. Sturges & Irving Olds Murphy, *Some Confusing Matters Relating to Arbitration Under the United States Arbitration Act*, 17 LAW & CONTEMP. PROBS. 580, 597 (1952).

⁹⁸ 1924 Hearings, *supra* note 90, at 16 (statement of Julius Henry Cohen); H.R. REP. NO. 68-96, at 1-2 (1924).

⁹⁹ Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 (1974).

¹⁰⁰ *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 225-26 (1987); H.R. REP. NO. 68-96, at 1-2 (1924) (recognizing that legislative action was required because anti-arbitration bias was so “firmly embedded in the . . . common law”).

¹⁰¹ H.R. REP. NO. 68-96, at 1 (1924).

¹⁰² *See id.*; *see also* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 n.12 (1967) (describing FAA’s purpose “to make arbitration agreements as enforceable as other contracts, but not more so”).

away their recourse to the courts.¹⁰³ Be that as it may, the important point is that the FAA sought to rectify only the law's unthinking, reflexive hostility toward arbitration—a hostility that, for no apparent reason, prevented parties who “[stood] upon an equal footing . . . [from] intelligently and deliberately” choosing to arbitrate their disputes.¹⁰⁴ This is amply illustrated in congressional debates over the FAA, during which concerns were raised about the FAA's liberalization of arbitration clauses in contexts such as employment and insurance, where contracts were typically presented on a take-it-or-leave-it basis.¹⁰⁵ Supporters of the FAA were readily capable of distinguishing these legitimate concerns from the less discerning “jealousy” of the early common law courts.¹⁰⁶ Thus, W.H.H. Piatt, the chairman of the ABA committee that had proposed the FAA to Congress, declared that he would “not favor any kind of legislation that would permit the forcing [of] a man to sign” an arbitration clause and, moreover, that the FAA was not intended to apply to employment and insurance contracts.¹⁰⁷ Congress accordingly amended Section 1 to exclude “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”¹⁰⁸

To be sure, it is unlikely that drafters of the FAA conceived of the statute's purpose in terms of remedying “discrimination” against arbitration. Nonetheless, the historical record is replete with anti-discrimination themes. In the years following the FAA's passage, the Court would eventually organize those themes into a much more coherent norm of anti-discrimination.

¹⁰³ See, e.g., Van Wezel Stone, *supra* note 81, at 969-94.

¹⁰⁴ COHEN, *supra* note 86, at 228 (quoting *Del. & H. Canal Co. v. Pa. Coal Co.*, 50 N.Y. 250, 258 (1872)) (internal quotation marks omitted). Even Van Wezel Stone would agree with this statement insofar as she argues that the FAA should not necessarily preempt state laws that fail to reflect this unjustified hostility toward arbitration. See Van Wezel Stone, *supra* note 81, at 1024-30. And if Van Wezel Stone is correct that arbitration was generally used at the turn of the century only between members of a self-regulating body or between parties with relatively equal bargaining power, Congress could hardly have intended the FAA as an unqualified endorsement of all the ways in which arbitration agreements are used today. See *id.* at 969-1014; accord Sternlight, *supra* note 18, at 647.

¹⁰⁵ See *1923 Hearings*, *supra* note 93, at 11 (statement of W.H.H. Piatt).

¹⁰⁶ *Park Constr. Co. v. Indep. Sch. Dist. No. 32 Carver Cnty.*, 296 N.W. 475, 477 (Minn. 1941).

¹⁰⁷ *1923 Hearings*, *supra* note 93, at 10 (statement of W.H.H. Piatt).

¹⁰⁸ *Id.* at 14 (reprinting Letter from Herbert Hoover, Sec'y of Commerce, to Thomas Sterling, Senator (Jan. 31, 1923)); see also *id.* at 9 (statement of W.H.H. Piatt).

B. *Hostility in the Form of Suspicious Generalizations About Arbitration: 1925 to the Present*

In his discussion of what makes discrimination “wrong,” Larry Alexander draws a useful distinction between biases and generalizations.¹⁰⁹ Alexander describes biases as categorical preferences that apply regardless of context.¹¹⁰ They reflect a judgment that persons with a certain trait “are morally less worthy than others merely by virtue of possessing that trait.”¹¹¹ For example, the antimiscegenation law challenged in *Loving v. Virginia*¹¹² reflected a bias because it prohibited marriage between certain individuals solely because of their race; that is, it targeted race “for its own sake.”¹¹³

By contrast, generalizations, proxies, and stereotypes reflect judgments that persons with a certain trait (the proxy trait) are likely to possess a further trait (the material trait) that, in turn, is a perfectly “proper bas[is] for attributing differential moral worth.”¹¹⁴ For example, the government’s World War II–era decision to relocate Japanese Americans living on the West Coast is better described as a generalization than a bias because it used race as a proxy for a further trait (national loyalty), which in turn was a legitimate trait to consider in making decisions about national security.¹¹⁵ To be sure, the generalization that most Japanese Americans would be disloyal to the United States may itself mask a bias against Japanese Americans. But because generalizations and proxy judgments are also frequently accurate and possess a certain heuristic value,¹¹⁶ it is not always easy to differentiate between problematic and unproblematic ones.

¹⁰⁹ See Larry Alexander, *What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies*, 141 U. PA. L. REV. 149, 158-76 (1992).

¹¹⁰ *Id.* at 158.

¹¹¹ *Id.* at 161; *cf.* *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985) (“[L]aws grounded in [race, alienage, or national origin] considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.”).

¹¹² 388 U.S. 1 (1967).

¹¹³ Mary Ann Case, “*The Very Stereotype the Law Condemns*”: *Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1454 (2000).

¹¹⁴ Alexander, *supra* note 109, at 161; *see also* Paul Brest, *The Supreme Court, 1975 Term—Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 10 (1976).

¹¹⁵ *See* Case, *supra* note 113, at 1452-53.

¹¹⁶ *See* Alexander, *supra* note 109, at 167 (“We could not function [in society] without proxies and the stereotypes on which they are based.”); *see also* Brest, *supra* note 114, at 6 (“Regulations and decisions based on statistical generalizations are commonplace in all developed societies and essential to their functioning.”).

The prevailing account of anti-arbitration hostility during the pre-FAA years suggests a categorical bias rather than a proxy judgment insofar as the ouster doctrine was directed at arbitration per se, regardless of considerations such as the nature of the dispute to be arbitrated or the existence of any power imbalance between the parties. Scholars such as Ian Macneil have rightly questioned whether this narrative of hostility has not been greatly exaggerated as a matter of historical fact.¹¹⁷ Even if Macneil is correct, however, the narrative remains consistent with the existence of subtler forms of hostility in the guise of problematic generalizations and stereotypes about arbitration. For instead of dismissing arbitration wholesale, more sophisticated opponents have typically claimed that certain process dangers are inextricably associated with arbitration to argue that the problem lies with those dangers rather than with arbitration itself.¹¹⁸ The evolution of the Court's nonarbitrability doctrine—which has to do with whether claims under selected *federal* statutes are immune from arbitration despite the existence of a valid agreement to arbitrate—provides a case in point.

Beginning in the 1950s, plaintiffs seeking redress under federal statutes such as the Securities Exchange Act of 1934 and Title VII of the Civil Rights Act brought their claims in court despite having signed valid predispute arbitration clauses covering those claims.¹¹⁹ The Court initially permitted this practice. It considered certain issues such as securities fraud and employment discrimination simply “too important” to be entrusted to arbitration.¹²⁰ It observed that arbitration generally does not afford a robust factfinding process.¹²¹ And although arbitrators might be “competent to resolve many preliminary factual ques-

¹¹⁷ See MACNEIL, *supra* note 81, at 19-21; see also *Atl. Fruit Co. v. Red Cross Line*, 276 F. 319, 321 (S.D.N.Y. 1921); Michael H. LeRoy & Peter Feuille, *Judicial Enforcement of Predispute Arbitration Agreements: Back to the Future*, 18 OHIO ST. J. ON DISP. RESOL. 249, 272-77 (2003).

¹¹⁸ See Carbonneau, *supra* note 93, at 1947-48 (arguing that, in the international context, most civil law codes did not “directly repudiate arbitration” but rather “quietly undermined” it).

¹¹⁹ The theory was that such plaintiffs were not simply seeking compensation for private injury; instead, they were attempting to vindicate important public values safeguarded by the relevant statute. In some cases, moreover, these plaintiffs were proceeding in the capacity of a private attorney general. See 2 MACNEIL ET AL., *supra* note 31, § 16.1.2.

¹²⁰ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 632 (1985) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 723 F.2d 155, 162 (1st Cir. 1983)) (internal quotation marks omitted).

¹²¹ See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974).

tions, such as whether the employee 'punched in' when he said he did,"¹²² they were "wholly unqualified to decide legal issues"¹²³ or issues of "great public interest."¹²⁴ Moreover, any errors they made would be virtually impervious to correction, as there is no meaningful appellate review of arbitral awards.¹²⁵ This, in turn, would frustrate the proper interpretation and development of federal statutory law.¹²⁶

It is difficult to quarrel with many of these generalizations. For instance, it is typically (but not always) true that judicial review of arbitral awards is extremely limited.¹²⁷ Indeed, many often tout this aspect of arbitration as one of its chief advantages over litigation.¹²⁸ Similarly, for a long time it was not unreasonable to surmise that most labor arbitrators did not possess legal training.¹²⁹ From these widely held observations, it was not preposterous for the Court to conclude that arbitration

¹²² *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981).

¹²³ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 407 (1967) (Black, J., dissenting); see also *Barrentine*, 450 U.S. at 743-44.

¹²⁴ *Am. Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 827 (2d Cir. 1968).

¹²⁵ See *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 203 (1956); *Wilko v. Swan*, 346 U.S. 427, 436-47 (1953).

¹²⁶ See *Gardner-Denver*, 415 U.S. at 57; *Wilko*, 346 U.S. at 436-47.

¹²⁷ See 9 U.S.C. §§ 9, 10, 11 (2006). But even this uncontroversial statement requires some qualification. First, until recently, several circuits had allowed parties to include a provision for de novo judicial review of the arbitrators' award. *E.g.*, *P.R. Tel. Co. v. U.S. Phone Mfg. Corp.*, 427 F.3d 21, 30-31 (1st Cir. 2005). The Court put an end to this practice—at least insofar as the FAA is concerned—in *Hall St. Assocs. v. Matel, Inc.*, 552 U.S. 576, 588 (2008).

Second, some parties may be contracting for second-tier review in the form of appellate arbitration. Arbitration providers have drafted sample appellate arbitration provisions and rules of appellate arbitration, suggesting that the practice is not altogether uncommon. See, *e.g.*, AM. ARBITRATION ASS'N, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE 37 (2007), available at <http://www.adr.org/si.asp?id=4125>; JAMS FOUND., OPTIONAL ARBITRATION APPEAL PROCEDURE 2-5 (2003), available at http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf.

¹²⁸ A defining credo of the modern arbitration movement was that arbitrators' errors of law should not be reviewed by a court, lest arbitration remain a mere prelude to judicial proceedings. See MACNEIL, *supra* note 81, at 15-16.

¹²⁹ See *Gardner-Denver*, 415 U.S. at 57 n.18 (referring to a survey finding that "a substantial portion of labor arbitrators" had no law degree). Richard Shell suggests that there might have been "marginally more lawyers acting as arbitrators in commercial . . . arbitration[s]." G. Richard Shell, *ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an "Adequate Substitute" for the Courts?*, 68 TEX. L. REV. 509, 531 n.153 (1990); see also *id.* at 520 n.58 (collecting statistics on the percentage of labor arbitrators who possess law degrees).

was generally not an “adequate substitute for a judicial proceeding,”¹³⁰ at least with regard to a special class of federal statutory claims.

Nonetheless, the outcome of these early nonarbitrability cases was difficult to reconcile with the undeniable fact that courts routinely enforced both (1) postdispute agreements to arbitrate such claims and (2) all such agreements where both parties were members of the securities industry.¹³¹ If the arbitration *process* lacked the necessary machinery to protect public values enshrined in federal statutes or to ensure the proper evolution of legal doctrine, this should be the case regardless of whether the parties struck the agreement after the dispute arose or whether the parties were members of the same regulated profession—that is, regardless of the nature of the *agreement* to arbitrate.¹³²

In hindsight, this unexplained inconsistency rendered the early nonarbitrability cases suspect. The Court came to fear that some of the generalizations on which it had relied were in fact “pervaded by . . . the old judicial hostility to arbitration.”¹³³ Accordingly, the Court began to demand empirical evidence before concluding that a chosen arbitration procedure was incapable of vindicating important federal rights. Thus, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court refused to accept the bare assertion that the “*potential complexity*” of antitrust claims made them inappropriate for arbitra-

¹³⁰ Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 222-23 (1985).

¹³¹ See 2 MACNEIL ET AL., *supra* note 31, § 16.2.1 (noting that the nonarbitrability defense did not apply to the arbitration of existing, as opposed to future, disputes); see also Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 233 (1987); C. Edward Fletcher, III, *Privatizing Securities Disputes Through the Enforcement of Arbitration Agreements*, 71 MINN. L. REV. 393, 420-27 (1987).

¹³² The agreement may certainly be relevant to other concerns, such as whether the parties had (or should have) voluntarily and knowingly chosen arbitration. But that is a separate matter. As Ian Macneil has argued in the antitrust context, the “essence of the [nonarbitrability doctrine] . . . is the appropriateness of arbitration to decide matters of public importance, not a policy against coerced arbitration agreements.” 2 MACNEIL ET AL., *supra* note 31, § 16.6.3; see also *McMahon*, 482 U.S. at 228-31; Robert B. von Mehren, *From Vynior’s Case to Mitsubishi: The Future of Arbitration and Public Law*, 12 BROOK. J. INT’L L. 583, 618 (1986). *But see Sternlight*, *supra* note 18, at 647-48 (arguing that the outcome of the earliest nonarbitrability cases was primarily driven by a concern for unwary consumers who may not have voluntarily or intelligently consented to arbitration).

¹³³ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (quoting *Kulukundis Shipping Co. v. Armtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)) (internal quotation marks omitted); see also *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1470 (2009).

tion.¹³⁴ To the contrary, it observed that arbitrators may be selected based on their subject-matter expertise and, if not, that experts may be appointed to assist them.¹³⁵ In *Gilmer v. Interstate/Johnson Lane Corp.*, the Court dispensed with mere “*speculat[ion]*” that arbitration panels will be biased.¹³⁶ And in *Shearson/American Express, Inc. v. McMahon*, the Court condemned the law’s “general suspicion of the desirability of arbitration,” finding no reason “to *assume* at the outset that arbitrators will not follow the law.”¹³⁷

By interrogating otherwise reasonable generalizations about arbitration, the Court unveiled the FAA’s anti-discrimination bona fides. As Paul Brest has explained in the context of race:

The antidiscrimination principle fills a special need because—as even a glance at history indicates—race-dependent decisions that are rational and purport to be based solely on legitimate considerations are likely in fact to rest on assumptions of the differential worth of racial groups or on the related phenomenon of racially selective sympathy and indifference.¹³⁸

Rationality presents a low bar. The government’s generalizations about Japanese American loyalties during World War II, for instance, were not necessarily irrational.¹³⁹ We scrutinize such race-based proxies more carefully, however, because we have reason to suspect that they might mask “displaced biases” about the inferiority of one group to another,¹⁴⁰ or because they might tacitly perpetuate existing stereotypes

¹³⁴ 473 U.S. 614, 632-34 (1985) (emphasis added); *see also McMahon*, 482 U.S. at 232 (observing that arbitral tribunals are “readily capable of handling the factual and legal complexities of antitrust claims”).

¹³⁵ *Mitsubishi*, 473 U.S. at 633.

¹³⁶ 500 U.S. 20, 30 (1991).

¹³⁷ 482 U.S. 220, 232 (1987) (emphasis added).

¹³⁸ Brest, *supra* note 114, at 7.

¹³⁹ *Id.* at 6-7; *see also* 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-18, at 966 (3d ed. 2000); Sanford Levinson, Response, *The Deepening Crisis of American Constitutionalism*, 40 GA. L. REV. 889, 911 (2006); *cf.* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 31 (1980) (noting that apartheid could be considered “a rational, if misguided, means of avoiding racial strife” (emphasis omitted)).

¹⁴⁰ *See* Alexander, *supra* note 109, at 169-70; Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 COLUM. L. REV. 1023, 1052 (1979) (“[T]here is the difficulty of determining whether a particular gender-dependent law is predicated on a factual generalization or, instead, on the illicit view of women as morally subordinate and inferior.”).

or inequalities between groups.¹⁴¹ That extra scrutiny is a hallmark of the (anti-oppression-based) anti-discrimination principle.¹⁴²

The Court's later nonarbitrability cases evince this same anti-discrimination impulse by holding generalizations about arbitration to the fire. Those cases stand for the proposition that courts may not "assum[e] the [arbitral] forum inadequate or its selection unfair."¹⁴³ Judges must not issue sweeping pronouncements about the "essential characteristics"¹⁴⁴ of arbitration that purportedly make it an "inferior system of justice."¹⁴⁵ And they may no longer refuse to enforce otherwise valid predispute arbitration agreements based on "outmoded presumption[s]" that are "far out of step" with the FAA's more forward-looking view of arbitration.¹⁴⁶ Instead, they must examine specific features of the arbitral process contemplated by the parties to determine whether they are sufficient to protect the statutory rights at issue.¹⁴⁷

To be clear, there were (and continue to be) valid, nondiscriminatory reasons for treating arbitration differently from courtroom adjudication. The trouble with the early nonarbitrability cases was never the simple fact that the Court withheld certain federal statutory claims from arbitration, for courts may still do so if a signatory to an arbitration agreement can prove she will be unable "effectively [to] vindicate [her] statutory cause of action in the arbitral forum"¹⁴⁸—in other words, if she can prove that there are justifiable grounds for discriminating against arbitration. Instead, the trouble was that the Court did so too dismiss-

¹⁴¹ See *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003); *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 139-40 (1994).

¹⁴² It is, of course, also a hallmark of the anti-subordination view more generally. See *supra* note 76.

¹⁴³ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 633 (1985).

¹⁴⁴ *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 259 (1987) (Blackmun, J., concurring in part and dissenting in part).

¹⁴⁵ *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 n.12 (8th Cir. 1986); see also *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974) (calling the arbitration process "inferior" to the judicial process).

¹⁴⁶ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989). Compare these statements with the Court's declaration just four years earlier that gender-based classifications trigger heightened scrutiny because they "very likely reflect outmoded notions of the relative capabilities of men and women." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 441 (1985).

¹⁴⁷ See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32 (1991).

¹⁴⁸ *Mitsubishi*, 473 U.S. at 637; accord *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90-91 (2000); *McMahon*, 482 U.S. at 239-42.

sively, based on a “general suspicion of the desirability of arbitration and the competence of arbitral tribunals.”¹⁴⁹

To the extent the Court and others maintain that arbitration continues to suffer unjustified discrimination,¹⁵⁰ the discrimination likely takes the form of these seemingly innocuous generalizations rather than wholesale anti-arbitration bias—what Peter B. Rutledge characterizes as “irresistible melodies tempting the listener to oppose arbitration.”¹⁵¹ They are irresistible because, as critics of arbitration point out, they are frequently perfectly reasonable.

Consider the following “finding” of the Arbitration Fairness Act currently pending before Congress: “Many corporations add to their arbitration clauses unfair provisions that deliberately tilt the systems against individuals, including provisions that strip individuals of substantive statutory rights, ban class actions, and force people to arbitrate their claims hundreds of miles from their homes.”¹⁵² Depending on how one understands “many,” existing empirical research is quite consistent with—and certainly does not contradict—this claim. For example, in their study of fifty-two arbitration clauses in consumer contracts, Linda Demaine and Deborah Hensler found that 30.8% contained class action bans and 7.7% contained explicit limitations on damages.¹⁵³ Similarly, the Searle Civil Justice Institute recently found that 24.3% of arbitration clauses surveyed contained a limitation on punitive damages,¹⁵⁴ while 36.5% of arbitration clauses

¹⁴⁹ *McMahon*, 482 U.S. at 231.

¹⁵⁰ See Carbonneau, *supra* note 10, at 233, 253, 261, 262 (contending that arbitration continues to be the object of “demonization” and “hatred,” based either on sheer ignorance of the arbitral process or a chauvinistic view of litigation as the “one true religion”); *infra* Section IV.A.

¹⁵¹ Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267, 267 (2008).

¹⁵² Arbitration Fairness Act of 2009, H.R. 1020, S. 931, 111th Cong. § 2(7) (2009); see also Kenneth F. Dunham, *Binding Arbitration and Specific Performance Under the FAA: Will This Marriage of Convenience Survive?*, 3 J. AM. ARB. 187, 238 (2004); cf. Jean R. Sternlight, *Fixing the Mandatory Arbitration Problem: We Need the Arbitration Fairness Act of 2009*, DISP. RESOL. MAG., Fall 2009, at 5, 5.

¹⁵³ Linda J. Demaine & Deborah R. Hensler, “Volunteering” to Arbitrate Through Pre-dispute Arbitration Clauses: *The Average Consumer's Experience*, LAW & CONTEMP. PROBS., Winter–Spring 2004, at 55, 65, 71.

¹⁵⁴ SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION 85 (2009) (on file with author). According to this report, the incidence of class arbitration waiver provisions appears to differ from industry to industry. For example, 100% of the cellular telephone contracts that the report surveyed, but 0% of the insurance or real estate contracts, contained class action bans. *Id.* at 103.

from another sample contained class arbitration waivers.¹⁵⁵ True, these percentages are no ringing endorsement for the charge of widespread abuse.¹⁵⁶ But the use of class action bans and damage waivers does not need to reach pandemic levels before the state is justified in taking action against them.

Consider also the widely expressed view that corporate repeat players “will likely select arbitrators who are at least unconsciously biased toward [them]”¹⁵⁷ and that “[a]lthough such an individual may well do her best to decide the case fairly, she will probably be able to see the company’s position more easily than the little guy’s position.”¹⁵⁸ Because arbitration is a market-based dispute resolution mechanism, it is at the very least plausible that arbitrators are prone to be biased in favor of “repeat player” clients.¹⁵⁹ Again, there is very little conclusive evidence that arbitrators actually *are* biased.¹⁶⁰ But it is not unreasonable for a state legislature to rely on even “weak” and “dubious” generalizations about arbitration when passing legislation or crafting legal rules, any more than it is for an airline to refuse to employ overweight persons based on the real but statistically unsupported fear that they will suffer a heart attack on the job.¹⁶¹

What makes these generalizations problematic to the Court and others is not so much that they are irrational or unsupported by empirical data (they are not). Rather, the problem is that they are *suspect* in light of the perceived historic “hostility” against arbitration. These generalizations all share what Thomas Carbonneau has described as the “familiar ring [of] . . . distrust” toward arbitration that the FAA

¹⁵⁵ *Id.*

¹⁵⁶ See Peter B. Rutledge, *Common Ground in the Arbitration Debate*, 1 Y.B. ARB. & MEDIATION 1, 1-6 (2009); cf. Rutledge, *supra* note 151, at 268 (acknowledging that the U.S. arbitration system is not “flawless, but it has largely worked well”).

¹⁵⁷ Sternlight, *supra* note 18, at 684.

¹⁵⁸ *Id.*

¹⁵⁹ O’DONNELL, *supra* note 4, at 2. The Public Citizen report notes that arbitrators have “a strong financial incentive to rule in favor of the companies that file cases against consumers because they can make hundreds of thousands of dollars a year conducting arbitrations.” *Id.* Rutledge observes that extant empirical research has established a repeat player phenomenon and that the existence of this phenomenon—but not its cause—serves as “common ground” between arbitration’s supporters and detractors. Rutledge, *supra* note 156, at 4 tbl.2.

¹⁶⁰ See, e.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1658 (2005) (conceding the difficulties in gathering empirical evidence about arbitration).

¹⁶¹ Brest, *supra* note 114, at 6-7.

seeks to reverse.¹⁶² In form, they are not unlike stereotyped judgments that frequently lead to litigation in the employment context: “older employees have problems adapting to changes”;¹⁶³ “women . . . are too ‘emotional’”;¹⁶⁴ Asian Americans are “unassertive.”¹⁶⁵ In both contexts, existing law demands particularized facts in place of generalizations based on anecdotal evidence. This is the way in which the Court regards any classification that disadvantages arbitration (like those that disadvantage women or racial minorities) to be suspect. It is also the sense in which I argue that the Court endows arbitration with a kind of “suspect” status.

Critics of the Paradigm, such as Jean Sternlight, contend that the Court’s demands for particularized facts are little more than a “rhetorical game” that quietly shifts the burden to *them* to come up with all the empirical evidence to demonstrate that arbitration is inadequate for certain types of disputes.¹⁶⁶ What Sternlight perceives as a mere ploy, however, is actually the Paradigm’s anti-discrimination principle at work. The lesson of the Court’s later nonarbitrability cases is that imperfect generalizations, which would be sufficient to justify legislative intervention in other areas, are potentially problematic in the arbitration context because they are likely to disguise improper motives or perhaps reinforce the widely held perception of arbitration as “second-class adjudication.”¹⁶⁷ For this reason, the Court forces us to presume that arbitration and courtroom adjudication are equal and requires those who insist otherwise to defend their chain of reasoning in the clear light of day.

C. *The Anti-discrimination Logic of the Single-Out/General Test*

In the age of “mandatory” binding arbitration, the claim that arbitration continues to suffer something like discrimination is scarcely believable—perhaps even perverse. This perception has understand-

¹⁶² THOMAS E. CARBONNEAU, *CASES AND MATERIALS ON THE LAW AND PRACTICE OF ARBITRATION* 230 (2d ed. 2000).

¹⁶³ *Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991).

¹⁶⁴ *Lindahl v. Air Fr.*, 930 F.2d 1434, 1439 (9th Cir. 1991).

¹⁶⁵ *Chin v. Runnels*, 343 F. Supp. 2d 891, 907 (N.D. Cal. 2004).

¹⁶⁶ Sternlight, *supra* note 152, at 5.

¹⁶⁷ *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004) (Easterbrook, J.); *cf.* Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1046 (1996) (noting the “significant and growing sentiment” that “arbitration relegates workers to second-class justice”).

ably led many skeptics to reject an anti-discrimination interpretation of the Paradigm.¹⁶⁸ In sharp contrast, I argue that we should take that interpretation quite seriously—not because it best reflects empirical truths or sound policy judgments in the arbitration area, but because it best captures the rhetoric that courts invoke to justify what amounts to “overrid[ing] the will of [a] democratically elected state legislature.”¹⁶⁹ Understanding the anti-discrimination logic behind that rhetoric will help us to better critique the Paradigm and the extraordinary displacement of state law that it makes possible.

Take the Paradigm’s doctrinal test for preemption. The “single-out/general” test is a proxy for determining whether a state law impermissibly discriminates against arbitration agreements. Just as equal protection law presumes that laws singling out a protected class do so based on improper motives (thus triggering heightened scrutiny), the Paradigm perceives any law that targets arbitration on its face as decidedly anti-arbitration: redolent of the “old common-law hostility.”¹⁷⁰ The association between singling out arbitration and invidious treatment is so powerful that the Paradigm—unlike anti-discrimination law—can scarcely imagine a law that both singles out arbitration and expresses none of the trademark hostility toward it. Thus, when securities investors argued that a state regulation was not “inhospitable” or “unfriendl[y]” to arbitration (and therefore not preempted) simply because it imposed special requirements solely on arbitration agreements, the First Circuit rejected the argument as sheer “casuistry.”¹⁷¹ On the court’s view, any law that singles out arbitration “revivif[ies] the ancient jurisdictional antagonism toward arbitration”¹⁷² by definition.

Similarly, drawing on the plain text of FAA section 2, the Court has held that when states invalidate arbitration clauses “upon such grounds as exist at law or in equity for the revocation of any con-

¹⁶⁸ See, e.g., Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1454-55 (2008); Michael Schneiderei, *A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements*, 55 HASTINGS L.J. 987, 999 (2004).

¹⁶⁹ Schwartz, *State Judges*, *supra* note 16, at 141.

¹⁷⁰ *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984); see also *Stirlen v. Supercuts, Inc.*, 60 Cal. Rptr. 2d 138, 153 (Ct. App. 1997) (“State laws held preempted by the FAA . . . reflect the traditional antiarbitration bias.”); Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 474 (1998) (“The FAA does not permit unequal treatment; it does not permit the states to single out arbitration agreements . . .”).

¹⁷¹ *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1117, 1120, 1124 (1st Cir. 1989).

¹⁷² *Id.* at 1120.

tract,”¹⁷³ they do not violate the FAA’s anti-discrimination mandate.¹⁷⁴ As Macneil put it, “the concept of general contract law is intended to prevent states from treating agreements to arbitrate differently from other contracts.”¹⁷⁵ The Paradigm sees no need for preemption in this case because “arbitration agreements are neither favored nor disfavored, but simply placed upon an equal footing with other contracts.”¹⁷⁶ Here the Paradigm suffers from the opposite problem: it has trouble imagining how a law that applies across the board to all contracts could possibly be described as anti-arbitration.

Several courts and commentators are keenly attuned to the way in which the Paradigm functions as an anti-discrimination principle, even though they have stopped short of exploring the nature of that principle in any depth. The California Supreme Court, for example, has on several occasions described the FAA as preempting state laws that “discriminate against arbitration clauses.”¹⁷⁷ Other courts have likewise held state law preempted *because* it “discriminat[ed]” against arbitration.¹⁷⁸ And more than one commentator has, in passing, characterized the FAA as an “anti-discrimination statute”¹⁷⁹ or as “a sort of ‘equal protection’ clause for arbitration provisions.”¹⁸⁰ For

¹⁷³ 9 U.S.C. § 2 (2006).

¹⁷⁴ See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281 (1995); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

¹⁷⁵ 1 MACNEIL ET AL., *supra* note 64, § 10.7.2 (emphasis omitted).

¹⁷⁶ *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 698 (Cal. 2000).

¹⁷⁷ *E.g.*, *Discover Bank v. Superior Court*, 113 P.3d 1100, 1113 (Cal. 2005).

¹⁷⁸ *Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venez.*, 991 F.2d 42, 46 (2d Cir. 1993); see also *Allen v. World Inspection Network Int’l, Inc.*, 911 A.2d 484, 493 (N.J. Super. Ct. App. Div. 2006); cf. *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 432 (5th Cir. 2004) (holding state law not preempted because it failed to “discriminate[] against arbitration”); *Wells v. Chevy Chase Bank*, F.S.B., 768 A.2d 620, 629 (Md. 2001) (same).

¹⁷⁹ *Ratner & Turner*, *supra* note 25, at 797-98; see also *Harding*, *supra* note 170, at 457 (suggesting that the FAA preempts state laws that “discriminate against arbitration”).

¹⁸⁰ *Ling*, *supra* note 26, at 193; see also Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 43 (2006); Michael G. McGuinness & Adam J. Karr, *California’s “Unique” Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61, 78 n.145; Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1955 & n.171 (2003); Jack Wilson, “No-Class-Action Arbitration Clauses,” *State-Law Unconscionability, and the Federal Arbitration Act: A Case For Federal Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 793 (2004).

Recently, both parties in *AT&T Mobility LLC v. Concepcion* argued to the Court that the so-called “savings clause” in section 2 is best understood as an anti-discrimination principle, and thus that the FAA should preempt state laws when they discriminate

example, Alan Rau has argued that the FAA prohibits states from “discriminat[ing] against [arbitration agreements] by treating them more harshly than other contractual terms.”¹⁸¹ To Ian Macneil, “state law that limits federal arbitration law in a discriminatory manner . . . is plainly and simply preempted.”¹⁸² Similarly, Jeffrey Stempel reasons that higher standards of consent for arbitration agreements would be preempted because they “discriminat[e] against arbitration.”¹⁸³

Here one could argue that, far from an anti-discrimination policy, the Paradigm represents “a national policy favoring arbitration.”¹⁸⁴ There are two ways to understand this objection. The first is that the Paradigm is better described as a norm of favoritism than one of anti-discrimination. The problem with this line of argument is that favoritism and anti-discrimination are not necessarily inconsistent with each other. From the anti-oppression perspective, for instance, granting preferences to historically oppressed groups can play an important role in furthering nondiscrimination.¹⁸⁵ Similarly, to the extent the Paradigm favors arbitration, it does so only in the service of reversing the anti-arbitration hostility that the Court so fears.¹⁸⁶ It does not

against arbitration. See Brief for Petitioner at 28, No. 09-0893 (U.S. Aug. 2, 2010) (referring to the “fundamental nondiscrimination principle” in section 2); Brief for Respondents at 9-10, No. 09-0893 (U.S. Sept. 29, 2010) (arguing that “Section 2 establishes a rule of nondiscrimination toward arbitration”).

¹⁸¹ Alan Scott Rau, *Does State Arbitration Law Matter at All? Part I: Federal Preemption*, ADR CURRENTS, June 1998, at 19, 19 (internal quotation marks omitted); see also Bruhl, *supra* note 168, at 1451, 1454-55 (describing as a principle of nondiscrimination the FAA’s requirement that state courts apply the unconscionability doctrine in a way that does not single out arbitration agreements); Burton, *supra* note 30, at 483 (same); Harding, *supra* note 170, at 457 (criticizing the Court for preempting state contract rules “even though those rules did not discriminate against arbitration”).

¹⁸² 2 MACNEIL ET AL., *supra* note 31, § 16.6.2.1.

¹⁸³ Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 799 (2004).

¹⁸⁴ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (emphasis added). Kenneth Dunham, for instance, argues that in cases preceding *Southland*, the Court set the stage for giving elevated status to arbitration agreements. Dunham, *supra* note 152, at 210; see also Sternlight, *supra* note 18, at 661-62.

¹⁸⁵ See Brest, *supra* note 114, at 16-19.

¹⁸⁶ See *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2859 (2010) (explaining the federal policy favoring arbitration as “merely an acknowledgment of the FAA’s commitment to ‘overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts’” (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989))).

force arbitration on unwilling parties, nor does it prioritize arbitration over other forms of dispute resolution.¹⁸⁷

The second interpretation of the objection is that even if the Paradigm expresses a norm of nondiscrimination, in practice courts flout that norm by reaching consistently pro-arbitration outcomes. But a disjunct between fact and norm does not necessitate the conclusion that the norm itself is flawed.¹⁸⁸ In fact, it is equally compatible with the anti-discrimination approach I develop, which sees in this disjunct an even greater reason to enforce the norm rather than retreat from it.

D. *Rethinking the Paradigm*

From an anti-discrimination perspective, it is a mistake to think that *all* enforcement-impeding laws that single out arbitration impermissibly discriminate and that *all* generally applicable enforcement-impeding laws do not. Enforcement-impeding laws are not anti-arbitration simply because they target arbitration clauses, but rather because they do so out of unjustified hostility toward arbitration.¹⁸⁹ On the other hand, a law cannot be cleared from the taint of discrimination simply because it is general in form: hostility can be expressed in subtle ways, not just through facial classifications. An anti-discrimination model of FAA preemption would incorporate these insights, as represented in Figure 2 below.

¹⁸⁷ See *Volt*, 489 U.S. at 476 (holding that parties are free to place limits on their arbitration process). In absolute terms, therefore, “[t]here is no federal policy favoring arbitration.” *Id.*; see also *Ware*, *supra* note 17, at 538 (describing the presumption in favor of arbitration as merely a “tie-breaker” for resolving doubts about the scope of an existing arbitration agreement).

¹⁸⁸ The Paradigm’s most vocal critics typically draw this very conclusion, which leads many of them to seek solutions in Congress rather than in the Court’s own jurisprudence. See *infra* notes 214-17 and accompanying text.

¹⁸⁹ See, e.g., *Jevne v. Superior Court*, 6 Cal. Rptr. 3d 542, 552 (Ct. App. 2003) (“[S]tate laws that are not anti-arbitration or antagonistic to the process are not automatically preempted by the FAA even though the state law relates only to arbitration agreements.”).

Figure 2: An Anti-discrimination-Based Model of FAA Preemption

	. . . singles out arbitration	. . . is completely general
Enforcement-impeding state law that . . .	Should generally be preempted unless discrimination is justified	Should generally not be preempted unless discrimination in application
Enforcement-neutral state law that . . .	Not preempted	Not preempted

The touchstone for obstacle-preemption analysis is whether a state law or rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”¹⁹⁰ I argue that the FAA’s purpose must be understood as displacing only state laws that *unjustifiably* discriminate against arbitration agreements—that is, laws motivated by arbitrary hostility, mistrust, or suspicious generalizations about arbitration itself.¹⁹¹ Only state laws that offend this anti-discrimination principle should be displaced by the Supremacy Clause.¹⁹²

In Parts III and IV, I will attempt to defend an alternative preemption model based on Figure 2. I suggest that such a model would be useful for both critics *and* proponents of arbitration alike. By proposing ways to scale back the Paradigm’s preemptive reach, I hope to address the concerns of those who claim that arbitration agreements are fundamentally unjust in certain contexts. On the other hand, by offering ways of adapting the Paradigm to capture discrimination in the application of general contract defenses, I hope to allay the concerns of those who fear that a new anti-arbitration crusade is afoot.

¹⁹⁰ *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)) (internal quotation marks omitted).

¹⁹¹ See Hayford & Palmiter, *supra* note 29, at 195 (“At the core, the Court’s preemption analysis merely aims at cleaning away any lingering anti-arbitration sentiment found in state statutes and case law.”).

¹⁹² To reiterate, this Article is limited to FAA preemption based on section 2. See *supra* note 42 and accompanying text.

In advancing these arguments, I shall draw upon the conceptual resources of other anti-discrimination regimes such as the Equal Protection Clause, Title VII, and the General Agreement on Tariffs and Trade. To be sure, there are important differences among these regimes.¹⁹³ In the discussion that follows, I intentionally elide some of these key differences in order to focus on the basic anti-discrimination principles that the regimes all share.

Some will undoubtedly question whether the Court's Dormant Commerce Clause jurisprudence would not provide a better point of comparison. After all, arbitration agreements are not persons, and the claims that inhere in them seem more economic than dignitary in nature. The objection would have more force if my aim were to articulate a substantive law of anti-discrimination for the right to enforce arbitration agreements. But my purpose is instead to use basic anti-discrimination concepts—concepts common to most established anti-discrimination regimes—to help refine existing FAA preemption analysis. In this Part, I have attempted to show that this analysis presupposes a theory of arbitration's "suspect" status. The Court's equal protection (and, to a lesser extent, Civil Rights Acts) jurisprudence is simply the most sophisticated model for understanding, indentifying, and addressing the problem of suspect, status-based discrimination.

III. OVERPREEMPTION AND THE PROBLEM OF JUSTIFIED DISCRIMINATION

In this Part, I focus exclusively on enforcement-impeding laws that single out arbitration. It is fair to assume that any law targeting arbitration (and only arbitration) on its face does so intentionally.¹⁹⁴ My aim here is to challenge the Paradigm's assumption that if a state law purposefully disfavors arbitration, then the law is necessarily problematic from an anti-discrimination perspective. This faulty assumption, I argue, has led to the overpreemption of state law.

¹⁹³ Others have argued that some of these differences are "artificial" and "can obscure our ability to understand the broader issues governing the Court's limited antidiscrimination vision." Selmi, *supra* note 77, at 285; see also Hasnas, *supra* note 74, at 485 n.231.

¹⁹⁴ Similarly, in the equal protection context, the Court has held that no showing of discriminatory intent is necessary when the law is "overtly discriminatory" on its face. *Wayte v. United States*, 470 U.S. 598, 608 n.10 (1985).

A. *The Tension Between Anti-discrimination and Government Regulation*

Like any principle that seeks to address the problem of discrimination, the Paradigm confronts a tension: regulation for the public good is an unavoidable fact of modern societies, yet any attempt to legislate in a given area will single out some groups and not others.¹⁹⁵ As the Court once famously put it, “[c]lassification is the essence of all legislation”¹⁹⁶ A child-labor law, for example, singles out employers of children below a certain age rather than all employers generally. Likewise, a statutory speed limit treats speeding vehicles differently from slower ones.

In the arbitration area, the Paradigm resolves this tension in favor of a principle of strict equality: only laws that apply across the board to “any contract” will survive preemptive scrutiny.¹⁹⁷ The Paradigm thereby takes the anti-discrimination injunction quite literally, as a strong anti-differentiation principle. It permits states to regulate arbitration only so long as they do so in the image of Lady Justice—in a way that is utterly blind to the very object of legislation.¹⁹⁸ Not unlike the “separate but equal” rationale of *Plessy v. Ferguson*,¹⁹⁹ the Paradigm privileges formal over substantive equality.²⁰⁰ As more than one frustrated state judge has observed, this has enabled the Paradigm to maintain “an intellectual detachment from reality.”²⁰¹

But in its zeal to place arbitration on an equal “footing” with all other contracts, the Paradigm ignores the inequalities inherent in the use of arbitration agreements by big business against the proverbial “little guy”—victims of predatory lending, employment discrimination, and the like. Many state laws that the FAA currently preempts are

¹⁹⁵ See Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 343 (1949); see also Peter Westen, *The Meaning of Equality in Law, Science, Math, and Morals: A Reply*, 81 MICH. L. REV. 604, 620 (1983).

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

¹⁹⁷ See *supra* notes 59-69 and accompanying text.

¹⁹⁸ See *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (“A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law.”); cf. McGuinness & Karr, *supra* note 180, at 84 (arguing that in order to be consistent with the FAA, a court “may not even consider the fact that a contract to arbitrate is at issue in assessing whether the agreement is unconscionable”).

¹⁹⁹ 163 U.S. 537 (1896).

²⁰⁰ See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 386 (3d ed. 2005) (describing the *Plessy* decision as betraying a “studied ignorance (or disregard) of the realities of life in the South”).

²⁰¹ *Lombardi I*, 886 P.2d 931, 940 (Mont. 1994) (Trieweiler, J., specially concurring), *vacated*, 515 U.S. 1129 (1995).

seeking to address precisely these concerns, not by banning arbitration outright but by targeting discrete problem areas. For example, some states outlaw arbitration clauses only when imposed on especially vulnerable parties such as wage laborers and small business owners.²⁰² Others require arbitration clauses to be typed in bold or capitalized letters in order to promote knowing and voluntary assent.²⁰³ Still others have attempted to police the arbitration *process*: for example, some states have required arbitration providers to disclose conflicts of interest or otherwise to comply with state ethical standards.²⁰⁴ The Paradigm is fundamentally incapable of distinguishing between these laws and cruder variants such as an Alabama law that imposed a statewide restriction on all predispute arbitration agreements.²⁰⁵ The Paradigm has no analytical apparatus with which to weigh the gravity and sincerity of a state's regulatory interest against the strength of its own anti-discrimination mandate. And in applying the single-out/general test, the Court has shown little inclination to think outside the zero-sum box—to consider whether and how constraining arbitration might actually restore its legitimacy in the eyes of the public and thereby further, rather than foil, any so-called “national policy favoring arbitration.”²⁰⁶

Instead, the Paradigm effectuates what Justice Scalia has described as “a permanent, unauthorized eviction of state-court power” to legislate in the arbitration area.²⁰⁷ States may not so much as “*attempt*[] to undercut the enforceability of arbitration agreements.”²⁰⁸ This has understandably led consumer advocates, reformers, and other

²⁰² See, e.g., CAL. CIV. PROC. CODE § 1298.7 (West 2007) (voiding certain arbitration provisions in construction contracts); GA. CODE ANN. § 9-9-2(c)(8) (2007) (voiding arbitration clauses in residential real estate agreements unless all signatories initial the clauses); MONT. CODE ANN. § 27-5-114(2)(c) (2007) (voiding arbitration agreements in insurance and annuity contracts except between insurance companies); TEX. CIV. PRAC. & REM. CODE ANN. §§ 171.002(a)–(b) (West 2005) (voiding arbitration clauses in contracts for the sale of goods worth less than \$50,000 unless the parties agree in writing and their attorneys sign the agreement).

²⁰³ E.g., CAL. BUS. & PROF. CODE § 7191 (West 1995); MO. ANN. STAT. § 435.460 (West 1992); NEB. REV. STAT. § 25-2602.02 (2008).

²⁰⁴ E.g., CAL. CIV. PROC. CODE §§ 1281.85(a), 1281.92(b) (West 2007).

²⁰⁵ ALA. CODE § 8-1-41(3) (1993), *preemption recognized by Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 278-81 (1995).

²⁰⁶ *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

²⁰⁷ *Allied-Bruce*, 513 U.S. at 285 (Scalia, J., dissenting).

²⁰⁸ *Southland*, 465 U.S. at 16 (emphasis added); see also *id.* at 11 (“We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.”).

opponents of arbitration to abandon hope in the Paradigm.²⁰⁹ Rather than ask whether there might be principled ways to limit or salvage the Paradigm, they have largely looked to other strategies.

One such strategy has been to argue that the FAA should not preempt any state law. For example, the weight of scholarly opinion is that Congress originally intended the FAA as a set of procedural rules to govern the enforcement of arbitration agreements in federal court, not as an exercise of Congress's substantive lawmaking power under the Commerce Clause.²¹⁰ This has led scholars such as David Schwartz to contend that "FAA preemption is unconstitutional"²¹¹ and thus that the Court should forthwith jettison the better part of its existing FAA preemption jurisprudence.²¹² Not surprisingly, the Court has shown little receptivity to this suggestion.²¹³

Another strategy has been to attempt to shrink the FAA's preemptive shadow—either through congressional amendment or through parallel federal legislation that would supersede the FAA in certain industry-specific contexts. In 2009 alone, numerous bills to this effect were introduced and reintroduced in Congress.²¹⁴ The most ambitious and recent of these was the highly controversial

²⁰⁹ See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 402 ("If we are to have sound arbitration law, there is no place to look for it except in the halls of Congress.").

²¹⁰ See, e.g., MACNEIL, *supra* note 81, at 87-147; David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, LAW & CONTEMP. PROBS., Winter-Spring 2004, at 5, 18. But see Drahozal, *supra* note 17, at 105 (noting that "there are 'strong indications' in the legislative history that the drafters of the FAA intended it to apply in state court").

²¹¹ Schwartz, *Power of Congress*, *supra* note 16, at 542.

²¹² See Schwartz, *supra* note 210, at 7, 54.

²¹³ In amicus briefs to the Court, Schwartz and others have advocated overruling the seminal *Southland* decision, which paved the way for FAA preemption. See *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272 (1995) (describing the amicus brief filed by some twenty state attorneys general); Brief for Law Professors as Amici Curiae in Support of Respondents at 1, *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02-6034). The Court rejected this argument in *Allied-Bruce* but did not reach the issue in *Bazzle*.

²¹⁴ See, e.g., Department of Defense Appropriations Act, 2010, H.R. 3326, 111th Cong. § 8116 (2009) (enacted); Predatory Mortgage Lending Practices Reduction Act, H.R. 2108, 111th Cong. § 5 (2009); Mortgage Reform and Anti-Predatory Lending Act, H.R. 1728, 111th Cong. § 206(a) (2009); Servicemembers Access to Justice Act of 2009, S. 263, 111th Cong. § 3; Servicemembers Access to Justice Act of 2009, H.R. 1474, 111th Cong. § 3; Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. § 3 (2009); Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. § 2; Arbitration Fairness Act of 2009, S. 931, 111th Cong. § 3; Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4; Consumer Fairness Act of 2009, H.R. 991, 111th Cong. § 2.

Arbitration Fairness Act of 2009 (AFA).²¹⁵ With one or two notable exceptions,²¹⁶ however, these congressional initiatives have all languished in committee without coming close to a formal vote.

Perhaps one explanation for why these proposed solutions have failed to gain traction is that they threaten to send the pendulum swinging to the opposite extreme. Rather than seek a careful balancing of state and federal interests,²¹⁷ for example, Schwartz seeks nothing less than to “correct” the Court’s “federalism mistakes” by returning to an originalist interpretation of the FAA.²¹⁸ And although congressional efforts have not sought quite the same overhaul of FAA preemption law, legislative intervention by its nature paints in broad strokes. The AFA, for instance, purported to invalidate *all* predispute agreements to arbitrate (1) employment, consumer, or franchise disputes and (2) disputes “arising under any statute intended to protect civil rights.”²¹⁹ There are surely reasons to be especially concerned about the use and abuse of arbitration agreements in these contexts. But a complete ban on such broadly worded subject areas takes what Rutledge has described as a “meat cleaver” approach to “an issue that requires a scalpel.”²²⁰ As but one example, consider that when the employee is a sought-after, high-level executive or the employer is a struggling start-

²¹⁵ See S. 931, 111th Cong. § 3 (proposing a ban on arbitration of employment, consumer, franchise, and civil rights disputes); see also Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4 (same).

²¹⁶ See, e.g., 15 U.S.C. § 1226 (2006) (permitting only postdispute arbitration agreements in the context of motor vehicle franchise contracts); Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409, 3454-55 (2009) (prohibiting contractors who receive funds under the Act from requiring employees and independent contractors to arbitrate Title VII, sexual harassment, and similar disputes).

²¹⁷ Justice Stevens sketched out an example of such an approach in his dissent from *Southland*. See *infra* notes 223-24 and accompanying text. Stevens argued that because legality of object is an essential element of any valid contract, states should retain at least some ability to regulate arbitration agreements through legislation. See *Southland Corp. v. Keating*, 465 U.S. 1, 20 (1984) (Stevens, J., concurring in part and dissenting in part). In his view, preserving some state authority was particularly warranted in *Southland* given (1) the importance of franchise relationships to the state, (2) the power imbalance between franchisors and franchisees, and (3) the state law’s legitimate remedial goals. *Id.* Schwartz rejects this mediative approach, however, because it “assum[es] that the FAA creates a substantive right enforceable in state court.” Schwartz, *supra* note 210, at 50.

²¹⁸ Schwartz, *supra* note 210, at 16; see also Pittman, *supra* note 18, at 798.

²¹⁹ Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. § 4.

²²⁰ Peter B. Rutledge, *The Case Against the Arbitration Fairness Act*, DISP. RESOL. MAG., Fall 2009, at 4, 7. Like me, Rutledge urges a more “calibrated solution” to the problem of overpreemption. *Id.*

up, a complete ban on arbitration clauses in employment contracts may wreak the same type of unfairness that the AFA seeks to undo.²²¹ In these situations, the so-called “Arbitration Fairness Act” begins to look less like a remedial bill and more like an unfair burden on freedom of contract.²²²

In contrast to these approaches, judges are increasingly searching for equilibrium. For his part, Justice Stevens has advocated applying a certain degree of “scrutin[ing]” and independent “judgment” to the FAA preemption analysis, especially where state remedial statutes are involved.²²³ Rather than relying on “sterile generalization,” he stressed the importance of considering factors such as the state’s regulatory interests and “the substance of the transaction at issue,” not just its form.²²⁴ Similarly, Justice O’Connor has faulted the Court’s rigid preemption tests for unnecessarily “displac[ing] many state statutes carefully calibrated to protect consumers.”²²⁵ For these and other jurists, the FAA’s anti-discrimination ambitions do not necessarily preclude regulating arbitration in the service of other, more pressing public values.

These concerns have so far found little voice in the Paradigm, however. The current framework is woefully indifferent to the states’ regulatory interests—let alone the need for a balance between those interests and the costs they impose on arbitration. Is there a better way to reconcile the federal and state interests at stake in FAA preemption, one that facilitates careful analysis in the form of case-by-case judicial scrutiny? The accumulated learning in the anti-discrimination area suggests an answer.

²²¹ See E. Gary Spitko, *Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 652-53 (2009).

²²² Similarly, although it has been noted that franchisees have less bargaining power than franchisors, it is difficult to appreciate why this alone should require validly negotiated arbitration agreements between such parties to be voided in all cases. Unlike employees and consumers, franchisees tend to be businesses—businesses that in turn employ individuals and provide services to consumers. See Note, *Arbitration—Congress Considers Bill to Invalidate Pre-Dispute Arbitration Clauses for Consumers, Employees, and Franchisees*, 121 HARV. L. REV. 2262, 2267-68 (2008).

²²³ See *Southland Corp. v. Keating*, 465 U.S. 1, 20 (1984) (Stevens, J., concurring in part and dissenting in part).

²²⁴ *Id.*

²²⁵ *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 282 (1995) (O’Connor, J., concurring). Other courts have taken into consideration the gravity of state interests when analyzing complex preemption cases that are not straightforwardly resolvable under current FAA jurisprudence. See, e.g., *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 728 (4th Cir. 1990) (Widener, J., dissenting); *Flores v. Superior Court*, No. B168327, 2003 WL 22963075, at *7 (Cal. Ct. App. Dec. 17, 2003).

B. *Justified Discrimination*

As we saw, the Paradigm resolves the tension between equal opportunity for arbitration and regulation for the public good by choosing the former over the latter. By contrast, anti-discrimination law takes a more balanced approach, one that distinguishes between discrimination simpliciter and unjustified discrimination. It understands that, without a threshold tolerance for some forms of de jure discrimination, “effective regulation in the public interest could not be provided, however essential that regulation might be.”²²⁶ Perfect equality, in other words, is almost certainly dystopic.²²⁷

Anti-discrimination law therefore wisely resists a blanket rule against classification. In the equal protection context, this is captured in the well-known concepts of “suspect” and “quasi-suspect” classifications. To say that a distinction drawn on the face of a statute is “suspect” rather than “forbidden” serves to remind us that the real issue is not whether a law singles out a particular class but rather *why* it does so.²²⁸ This leaves open the possibility that the classification might be justified—for instance, where it is not the result of invidious motives or where it serves a weighty public purpose.

For example, even while applying heightened scrutiny, the Court has upheld a variety of statutes in the gender context that single out women for differential treatment.²²⁹ In *Califano v. Webster*, the Court upheld a Social Security Act provision that calculated benefits for men and women differently because the provision did not reflect “‘traditional [and inaccurate] way[s] of thinking about females’”²³⁰ but rather sought to compensate for the “long history of discrimination against women.”²³¹ Similarly, in *Schlesinger v. Ballard*, the Court denied

²²⁶ *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 556 (1947).

²²⁷ See Brest, *supra* note 114, at 15 (“A flat prohibition of race-dependent decisions provides as much assurance as possible against discrimination, but at the cost of precluding what may be thought to be desirable uses of race . . .”).

²²⁸ See, e.g., Perry, *supra* note 140, at 1046.

²²⁹ See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (California statutory rape law that only applied to males); *Califano v. Webster*, 430 U.S. 313 (1977) (Social Security Act provision for calculating wages, partially based on gender); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (law treating male and female Navy officers differently); *Kahn v. Shevin*, 416 U.S. 351 (1974) (Florida property tax statute that treated widows and widowers differently).

²³⁰ 430 U.S. at 320 (quoting *Califano v. Goldfarb*, 430 U.S. 199, 223 (1977)); see also *Rostker v. Goldberg*, 453 U.S. 57, 71-72 (1981) (upholding a gender-based classification that was not “unthinking[]” but instead the product of “studied choice”).

²³¹ *Califano v. Webster*, 430 U.S. at 317.

an equal protection challenge to a naval discharge statute that applied different termination criteria to males and females.²³² Rather than “archaic and overbroad generalizations” about women, the statute was grounded in the “demonstrable fact” that female officers had fewer opportunities than their male counterparts to compile favorable service records.²³³ The plain import of these cases and others like them is that gender-based classifications may sometimes be justified if they are not based on odious assumptions about a woman’s place in society.

In the Title VII context, the “bona fide occupational qualification” (BFOQ) defense serves as a functional analog to the “quasi-suspect” classification standard. The defense allows private employers to discriminate on the basis of a protected characteristic other than race if they can prove that possession of the protected trait is “reasonably necessary to the normal operation of that particular business or enterprise.”²³⁴ In *Dothard v. Rawlinson*, the Court used the BFOQ defense to uphold an explicit restriction on hiring women as guards in an all-male maximum security prison.²³⁵ The Court reasoned that the hiring policy did not represent an “artificial, arbitrary, and unnecessary barrier[] to employment”²³⁶ predicated on “stereotypical assumptions” about a woman’s ability to perform on the job.²³⁷ Instead, the policy merely reflected the perils of life in the prison, supported by testimony that (1) twenty percent of prisoners had been sex offenders, (2) “rampant violence” was commonplace, and (3) female guards would not physically be able to maintain order as effectively as their male counterparts.²³⁸ Considerations of safety and effective job performance, in other words, trumped a rule of absolute equal treatment.²³⁹

²³² 419 U.S. at 510.

²³³ *Id.* at 508.

²³⁴ 42 U.S.C. § 2000e-2(e)(1) (2006).

²³⁵ *See* 433 U.S. 321, 366-37 (1977).

²³⁶ *Id.* at 328 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

²³⁷ *Id.* at 334.

²³⁸ *Id.* at 334-35.

²³⁹ One can quibble with whether these exceptions should ever (and do ever) succeed in practice, especially in contexts such as race or gender. But this objection has more to do with the factual context at issue than with the basic theoretical apparatus. In theory, each of the anti-discrimination frameworks I discuss unmistakably recognizes that classifications along otherwise impermissible lines must sometimes be tolerated in order to achieve more pressing public interests. The fact that some contexts rarely present any reasons to tolerate discrimination does not invalidate that theory. Nor does it necessarily cast doubt on the soundness of such reasons in the arbitration context.

The General Agreement on Tariffs and Trade (GATT), which endeavors among other things to eliminate discrimination in world trade, takes a similar approach.²⁴⁰ GATT Article XX permits intentional discrimination by member states against the goods of other contracting states in a finite set of circumstances.²⁴¹ These circumstances all have to do with regulation in the public interest—for example, to “protect public morals”; “to protect human, animal, or plant life”; or “to secure compliance with [other] laws or regulations” not inconsistent with GATT.²⁴² Moreover, the so-called “chapeau” of Article XX makes clear that the exceptions may not be invoked to shield “arbitrary or unjustifiable discrimination.”²⁴³ In other words, the exceptions apply only when the discrimination is defensible in light of competing values.²⁴⁴

Unlike these anti-discrimination regimes, the Paradigm’s “single out” rule assumes there is *never* a reason to discriminate purposefully against arbitration. To use the vocabulary of equal protection, this effectively makes arbitration not just a “suspect” class but rather a “forbidden” class—a class about which no distinctions may be drawn.²⁴⁵ To call this a “hyper-demanding”²⁴⁶ standard, as some scholars have, seems almost an understatement. For as a standard of nondiscrimination, the Paradigm provides more protection to arbitration than the Equal Protection Clause and the Civil Rights Acts afford to gender and to some degree even race. Gerald Gunther once said of the strict scrutiny test that it is “‘strict’ in theory and fatal in fact.”²⁴⁷ The Para-

²⁴⁰ See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, A11, 55 U.N.T.S. 194, 196 [hereinafter GATT].

²⁴¹ See *id.* art. XX.

²⁴² *Id.* art. XX(a), (b), (d). Some GATT side agreements contain similar public policy exceptions. See Agreement on the Application of Sanitary and Phytosanitary Measures, art. 2.1, Apr. 15, 1994, 1867 U.N.T.S. 493, 494 (permitting countries to take measures that protect human life and health); Agreement on Technical Barriers to Trade, art. 2.2, Apr. 15, 1994, 1868 U.N.T.S. 120, 121 (identifying countervailing values such as the protection of human health or the environment as legitimate grounds for discrimination).

²⁴³ See GATT, *supra* note 240, art. XX.

²⁴⁴ See *id.*

²⁴⁵ See Tussman & tenBroek, *supra* note 195, at 354.

²⁴⁶ Edward Brunet, *The Appropriate Role of State Law in the Federal Arbitration System: Choice and Preemption*, in *ARBITRATION LAW IN AMERICA* 63, 69 (Edward Brunet et al. eds., 2006). Brunet notes further that the “singling out” test “has no place in the normal arsenal of preemption inquiries.” *Id.*

²⁴⁷ Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

digm topples this standard in the preemption context by making discrimination against arbitration both fatal in theory and fatal in fact.

For these reasons, and consistent with what I have explained to be arbitration's "suspect" status, I argue that the Paradigm should no longer preempt all enforcement-impeding state laws that target arbitration on their face. Instead, at the upper limit it should consider such laws as suspect—as only potentially tainted by the type of unjustified discrimination that the FAA was designed to remedy.²⁴⁸ But arbitration's "suspect" status also means that such laws must be scrutinized more than laws that seek to regulate other types of agreements—what one judge tellingly described as "unprotected" contracts.²⁴⁹ For no matter how rational, even arbitration-neutral state laws are suspicious because the Court fears that they might rest on negative stereotypes of the sort that continue to invoke a parade of horrors in the legal and popular imagination.²⁵⁰ The Court's own about-face in the nonarbitrability area suggests "how tightly impulses hostile to arbitration must be constrained in order to remain faithful to Congress's mandate."²⁵¹

The approach I advocate would enable states to honor the FAA's anti-discrimination mandate without abandoning all initiatives that single out arbitration. It would open up a precious foothold for restoring the federal/state balance in the arbitration area where one has seemed impossible for quite some time.²⁵² This foothold, moreover, would not depend on potentially disastrous amendments to the FAA²⁵³ or on rolling back the Court's FAA jurisprudence to the status quo prior to 1967, the year in which the Court vested FAA section 2 with substantive preemptive power.²⁵⁴ My suggested approach also offers a way for those who believe that the Court erred in *Southland* to find in the anti-discrimination model a certain critical moment—a way of

²⁴⁸ See also Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 NEV. L.J. 326, 328 (2007) (arguing that in determining whether the FAA preempts state law, "courts should look for suspect state laws that prevent the fulfillment of the core policies underlying federal arbitration law").

²⁴⁹ See *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1120 (1st Cir. 1989).

²⁵⁰ See *supra* notes 2-9 and accompanying text.

²⁵¹ *Connolly*, 883 F.2d at 1119 n.2.

²⁵² Even those like Stephen Hayford and Alan Palmiter, who argue that state arbitration law has an interstitial role to play in the Court's ambitious preemption program, would agree that the Paradigm almost completely forecloses state regulation of both "front end" and "back end" issues. See, e.g., Hayford & Palmiter, *supra* note 29, at 205; Hayford, *supra* note 17, at 75.

²⁵³ See *supra* notes 219-22 and accompanying text.

²⁵⁴ See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 405 (1967).

holding the Court to the full implications of its own (arguably mistaken) interpretation of the FAA.

Finally, my approach is not inconsistent with the basic thrust of the Court's existing FAA jurisprudence. The Court's core concern has always been with laws or legal principles that "take[] [their] meaning precisely from the fact that a contract to arbitrate is at issue"²⁵⁵—that is, laws that can be traced back to unfounded biases against arbitration qua arbitration.²⁵⁶ Although the Court has sometimes warned that the FAA categorically "foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements,"²⁵⁷ at other times it has spoken in less sweeping terms, suggesting that the true problem lies with state laws that discriminate against arbitration *for no good reason*:

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the [FAA]'s language and Congress' intent.²⁵⁸

If I am correct that the Court's FAA jurisprudence accords arbitration agreements more than the baseline constitutional protection afforded to all contracts, but something less than the absolute protection that would be accorded to a forbidden class, what level of "scrutiny" should be used to determine whether discrimination against arbitration agreements is consistent with the FAA? My purpose in this Article is not to argue for a precise standard of FAA scrutiny. Rather, it is to suggest that any level of scrutiny is better than the current state of no scrutiny at all. For now, the important point is that whether a law "singles out" arbitration should not be the end but rather the beginning of the analysis—an analysis that should balance the Paradigm's anti-discrimination mandate against competing state interests.

C. *Potential Objections*

Before illustrating how these insights could be used to resolve concrete preemption issues, I pause here to address three common critiques of the anti-discrimination model that I have so far developed.

²⁵⁵ Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

²⁵⁶ See *supra* Section II.A. As I explained in Section II.B, the Court has more recently scrutinized even perfectly reasonable generalizations about arbitration on the theory that they, too, might conceal a bias against arbitration.

²⁵⁷ Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

²⁵⁸ Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 281 (1995).

The first is that, even if the FAA's purpose is to reverse only unjustified hostility toward arbitration, there are good policy grounds to adopt a bright-line rule of preemption for all state laws that single out arbitration. By contrast, a case-by-case approach of the sort I advocate would make the FAA preemption analysis unnecessarily complicated and time consuming, thereby inviting abuse.

Policy considerations, however, actually militate in the opposite direction: toward more nuance and refinement in the preemption analysis. Obstacle preemption is not a question capable of being resolved "in the abstract,"²⁵⁹ based on the form rather than the substance of the state law at issue; instead, it requires a careful consideration of "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written."²⁶⁰ Moreover, in practice,

[o]bstacle-preemption claims are among the most difficult defenses for the person claiming that an obstacle exists. The challenger must show the specific federal objective was selected by Congress and that the particular state law was inconsistent with it. Very persuasive advocates who assert the preemption defense must enlist the judge to discern the purposes of the state law and the federal law in the same manner in which the advocate sees those purposes.²⁶¹

From this perspective, the single-out/general test dramatically simplifies the ordinarily complex obstacle-preemption analysis. My approach merely restores a baseline sophistication to that analysis in the arbitration context.

The second type of critique is to question the practicality of an intent-based FAA preemption test.²⁶² But obstacle-preemption analysis already requires considering the intention behind a state statute and whether it conflicts with the purpose of the related federal statute.²⁶³ Moreover, scholars have advocated precisely this type of inquiry in the FAA preemption context.²⁶⁴ Judges frustrated with the limitations of

²⁵⁹ *Time Warner Entm't Co. v. FCC*, 56 F.3d 151, 195 (D.C. Cir. 1995) (quoting *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1220 (D.C. Cir. 1984)) (internal quotation marks omitted).

²⁶⁰ *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977).

²⁶¹ JAMES T. O'REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW* 75 (2006) (footnotes omitted).

²⁶² I address this criticism in more detail elsewhere. See Aragaki, *supra* note 27 (manuscript Section III.A).

²⁶³ See, e.g., ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* § 5.2.5 at 414, 415-16 (3d ed. 2006); O'REILLY, *supra* note 261, at 75.

²⁶⁴ Consider the seminal case of *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), in which the Court held that the FAA preempted a Montana law requiring arbitration clauses to be printed in underlined capital letters on the contract's front

the Paradigm have also pointed to the countervailing values embodied in state legislation as a reason to avoid preemption.²⁶⁵ And because arbitration is a “matter of consent, not coercion,” in certain circumstances it is well established that the intent of the contracting parties determines whether the FAA preempts state law.²⁶⁶

The third and strongest objection is that the plain language of the FAA mandates a rule of absolute nondiscrimination. Recall that section 2 provides for arbitration agreements to be “valid, irrevocable, and enforceable” unless there are “grounds as exist at law or in equity for the revocation of any contract.”²⁶⁷ Enforcement-impeding laws that single out arbitration do not, by definition, fit within this so-called “savings clause.” Thus, regardless of whether they justifiably discriminate against arbitration, *all* such laws appear inconsistent with the text of the FAA. Although this textual argument has a certain appeal, it does not provide the best interpretation of section 2 for the following reasons.

First, the well-established public policy defense to contract formation²⁶⁸ constitutes a ground for the revocation of “any contract.” It follows that courts should be entitled to apply this defense without offending the FAA.²⁶⁹ For instance, if a state statute makes it illegal to print arbitration clauses in anything other than underlined capital letters, nothing in the plain language of section 2 should prevent courts from using the public policy defense to deny enforcement of non-conforming clauses. The bare words of section 2, therefore, do not unmistakably require the preemption of enforcement-impeding laws that single out arbitration.

Nonetheless, as a practical matter, this creates a loophole that would allow states to use the letter of section 2 to do an end run around the FAA. As the Court explained in its watershed *Southland* opinion, if

page. Many scholars have criticized *Casarotto* on the ground that the Court should have factored in the purpose of the Montana notice provision, which was merely to “make sure that its citizens knew when an arbitration provision was included in a contract.” Moses, *supra* note 64, at 542. Because the interests served by the Montana law were consistent with the FAA, they argued, the law should not have been preempted. See, e.g., Brunet, *supra* note 246, at 71; Moses, *supra* note 64, at 542; Sternlight, *supra* note 18, at 667.

²⁶⁵ See *supra* note 225 and accompanying text.

²⁶⁶ See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63-64 (1995).

²⁶⁷ 9 U.S.C. § 2 (2006).

²⁶⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 178 (1981); 5 RICHARD A. LORD, WILLISTON ON CONTRACTS § 12:1 (4th ed. 2009).

²⁶⁹ See, e.g., *Feeny v. Dell Inc.*, 908 N.E.2d 753, 768 (Mass. 2009).

the public policy defense were left intact, “states could wholly eviscerate [the] congressional intent to place arbitration agreements ‘upon the same footing as other contracts,’ simply by passing statutes” targeting arbitration for unfavorable treatment.²⁷⁰ Thus, the real reason the FAA preempts state law has more to do with considerations of policy and purpose than with fealty to the statutory text. And as explained above, in *Southland*, the Court described those purposes using a textbook metaphor for equal opportunity, suggesting that the anti-discrimination model is consistent with the basic foundations of FAA preemption.

Second, the historical record suggests that proponents of the FAA never intended to preclude all manner of laws that singled out arbitration. Thus, even while it sought to make arbitrable “every other possible subject of controversy in contract and tort,”²⁷¹ the New York arbitration law on which the FAA was based prohibited the submission to arbitration of any “controversy [that] arises respecting a claim to an estate in real property, in fee or for life.”²⁷² Similarly, the Pennsylvania arbitration statute in effect in 1924 prohibited arbitration of disputes arising out of a “contract for personal services.”²⁷³ Likewise, many state arbitration statutes patterned after the New York arbitration law excluded labor arbitrations from within their scope.²⁷⁴ These provisions were undoubtedly known to the reformers, yet there is no indication in the historical record that the reformers perceived them as antithetical to the FAA.²⁷⁵ In short, the history of the FAA, like its text,

²⁷⁰ *Southland Corp. v. Keating*, 465 U.S. 1, 16 n.11 (1984) (citation omitted) (quoting H.R. REP. NO. 68-96, at 1 (1924)).

²⁷¹ Wheless, *supra* note 96, at 222.

²⁷² New York Civil Practice Act § 1448, cl. 2 (1928), reprinted in CLEVENGER'S PRACTICE MANUAL OF NEW YORK 682-83 (Joseph R. Clevenger ed., 1928); see also WIS. STAT. § 298.01(1)(b) (1927) (proscribing arbitration in cases relating to real estate); STURGES, *supra* note 85, §§ 88-140 (reprinting relevant portions of state statutes in effect as of 1930).

²⁷³ PA. CONS. STAT. §§ 606a-1 to -2 (Supp. 1928).

²⁷⁴ See, e.g., ARIZ. REV. STAT. ANN. §§ 4294-4301 (1928); CAL. CIV. PROC. CODE §§ 1280-1293 (1927); LA. REV. STAT. ANN. §§ 405-422 (1932); An Act to Make Enforceable Agreements for the Arbitration of Disputes, 1929 N.H. Laws 172, 172-74; An Act to Make Valid and Enforceable Written Provisions or Agreements for the Arbitration of Disputes, 1929 R.I. Pub. Laws 292, 292-98. The New York statute did not, however, provide such an exception.

²⁷⁵ Indeed, they were challenged—albeit unsuccessfully—as arbitrary and unreasonable classifications in violation of the Equal Protection Clause. See, e.g., *Pac. Indem. Co. v. Ins. Co. of N. Am.*, 25 F.2d 930, 932 (9th Cir. 1928); *Katakura & Co. v. Vogue Silk Hosiery Co.*, 15 Pa. D. & C. 389, 393 (Ct. Com. Pl. 1931), *aff'd*, 161 A. 529, 530 (Pa. 1932). Even after such statutes were upheld, reformers did not appear to have sought state legislative amendment.

is not unavoidably inconsistent with the proposition that states may single out arbitration agreements in certain contexts.

Finally, bear in mind that my overall argument is built on the *Court's* FAA preemption jurisprudence rather than on the FAA itself. As noted above, that jurisprudence does not necessarily follow from anything in the FAA's language or legislative history.

D. Application

Given a statute that singles out a suspect or quasi-suspect class, equal protection jurisprudence applies heightened scrutiny to determine whether the facial classification is justifiable. That justification turns on (1) the gravity of the state interests favoring discrimination and (2) the fit between those interests and the means chosen to further them. A similar inquiry obtains in the Title VII context. Pursuant to the BFOQ defense, an employer may discriminate on the basis of national origin or gender (but not race) if (1) the reason for the discrimination is important enough to touch the "essence of the business"²⁷⁶ and (2) the regulation is "reasonably necessary" for that purpose.²⁷⁷ By the same token, signatories to GATT are entitled to override the treaty's nondiscrimination principle as long as any discriminatory measure both (1) serves substantial regulatory interests such as the protection of human or animal life and (2) is "necessary" to achieve those interests.²⁷⁸

Distilling these precedents, I propose the following inquiry for determining whether the FAA preempts a state law that singles out arbitration: First, the Paradigm should consider the gravity of the state interest behind the law.²⁷⁹ Second, it should inquire into the means/ends fit between those interests and the law as drafted.²⁸⁰

As an example, consider the seminal case of *Doctor's Associates, Inc. v. Casarotto*,²⁸¹ in which franchisees sued the franchisor of a Subway chain for breach of contract and fraud. The franchise agreement's arbitration clause required the Montana-based franchisees to arbitrate

²⁷⁶ *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971).

²⁷⁷ 42 U.S.C. § 2000e-2(e)(1) (2006).

²⁷⁸ GATT, *supra* note 240, art. XX(b).

²⁷⁹ This is also consistent with Edward Brunet's argument that FAA preemption should involve a consideration of both federal *and* state interests at stake. *See* Brunet, *supra* note 248, at 328-29.

²⁸⁰ Again, the precise standard of scrutiny to be applied in these inquiries is an issue that I defer to another day. *See supra* text following note 258.

²⁸¹ 517 U.S. 681 (1996).

their claims in the franchisor's home state of Connecticut.²⁸² The franchisees were also required to pay half of the arbitration expenses (including the arbitrators' fees and travel expenses), administrative charges of \$150 per day, and a filing fee of up to \$4,000.²⁸³

At the time, Montana law imposed a statewide requirement that arbitration clauses be "typed in underlined capital letters on the first page of the contract,"²⁸⁴ regardless of the subject matter of the contract or the relationship between the contracting parties. Because the parties' agreement did not comply with this law, the franchisees argued that their promise to arbitrate was unenforceable.²⁸⁵ The Court held that the FAA preempted the Montana law because the law "singl[ed] out arbitration provisions for suspect status"²⁸⁶ and thereby placed them "on an unequal 'footing'" relative to other agreements.²⁸⁷

The Court was literally correct that Montana did not require other clauses in the contract likewise to be typed in underlined, capital letters in order to be enforceable.²⁸⁸ But is this the type of unequal treatment about which the FAA is (or should be) concerned? Does it suggest any hostility or lingering anti-arbitration bias of the kind that the Court seeks to reverse?²⁸⁹ The Paradigm has no occasion to consider these questions because the fact that the law is enforcement impeding and singles out arbitration brings the inquiry to a screeching halt.

An anti-discrimination approach would not necessarily arrive at the same conclusion. To be sure, the classification drawn on the face of the statute would trigger a suspicion that the statute is singling out arbitration clauses because of problematic biases or generalizations about the arbitration process. But there are arguably legitimate state interests behind the Montana law—interests that may have little to do with discrimination and more to do with protecting the unwary from unknowingly waiving constitutional rights that they do not expect

²⁸² See *Lombardi I*, 886 P.2d 931, 935 (Mont. 1994), *vacated*, 515 U.S. 1129 (1995).

²⁸³ *Id.* In addition, because Connecticut law governed the franchise agreement, the franchisees would have had to hire Connecticut counsel. See *id.*

²⁸⁴ *Casarotto*, 517 U.S. at 683 (quoting MONT. CODE ANN. § 27-5-114(4) (1995)) (internal quotation marks omitted).

²⁸⁵ *Lombardi I*, 886 P.2d at 933.

²⁸⁶ *Casarotto*, 517 U.S. at 687.

²⁸⁷ *Id.* at 686 (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995)) (internal quotation marks omitted).

²⁸⁸ See *id.* at 687.

²⁸⁹ David Schwartz raises this same question when distinguishing between hostility toward arbitration based on considerations of "jurisdiction and judicial administration" and of contract validity. See Schwartz, *supra* note 210, at 52.

(and might not wish) to waive in this context.²⁹⁰ Moreover, the means chosen to further those interests do not appear excessive: instead of invalidating all arbitration clauses, the law simply voids those that do not comply with relatively trivial notice requirements.²⁹¹

Alternatively, one might argue that the means chosen by the state legislature were in fact ill-fitting and overinclusive, for the law also voids nonconforming arbitration clauses between sophisticated parties—parties who, unlike the franchisees in *Casarotto*, would not need the benefit of the law and might very well use the inadvertent failure to comply with it as an excuse to avoid arbitration *ex post*. From this perspective, the law as drafted appears more suspicious than it otherwise would have if, for instance, it had been limited in scope to franchise agreements or other transactions known to involve pronounced disparities in bargaining power. Whether these considerations are sufficient to suggest unjustified discrimination will ultimately depend on how closely the law is scrutinized under the test I propose.²⁹²

IV. UNDERPREEMPTION AND THE PROBLEM OF PRETEXT

If the Paradigm applies an unyielding standard to state laws that single out arbitration, it retreats to the other extreme when it comes to generally applicable laws. By and large, the Paradigm presumes that a state law or rule regulating contracts as a group does not express any hostility toward arbitration and for that reason is not preempted by the FAA.²⁹³ But as any student of anti-discrimination law will appreciate, it is entirely possible to apply a facially neutral law in discriminatory ways. This introduces the problem of pretext: the possibility that courts may be concealing lingering anti-arbitration bias behind the mask of “general” contract defenses.²⁹⁴ Preemption concerns are just as salient here as they were in the case of statutes that single out arbitration. Traditional conflict-preemption analysis re-

²⁹⁰ See *Casarotto v. Lombardi (Lombardi II)*, 901 P.2d 596, 599 (Mont. 1995) (Leaphart, J., concurring), *rev'd*, 517 U.S. 681 (1996); *Lombardi I*, 886 P.2d at 935, 939, *vacated*, 515 U.S. 1129 (1995).

²⁹¹ Similarly, some have offered the law's arguably slight impact on arbitration as a reason why the law should not have been preempted. See, e.g., Hayford, *supra* note 17, at 71; Sternlight, *supra* note 18, at 667.

²⁹² Again, for reasons of economy I leave questions regarding the level of scrutiny for another day.

²⁹³ See Figure 1, *supra* Section I.B.

²⁹⁴ See, e.g., Rau, *supra* note 181, at 20, 21-22; Ware, *supra* note 73, at 1034.

quires courts to consider the relevant state and federal laws not just as they are written but also “as they are interpreted and applied.”²⁹⁵

In this Part, I focus on enforcement-impeding laws that apply to all or substantially all contracts—in particular, the unconscionability defense. My aim here is to challenge the inverse of the assumption considered in Part III, namely: “[I]f [a state] law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,” it is necessarily unproblematic from an anti-discrimination perspective.²⁹⁶

A. Unconscionability and the “New Judicial Hostility”

For some time, unconscionability functioned like a safety valve on FAA preemption, giving judges the flexibility to invalidate problematic arbitration agreements that legislatures could not regulate without running afoul of the single-out/general test.²⁹⁷ In recent years, however, academics and practitioners alike have suggested that the doctrine may be operating less as a shield against the Paradigm’s relentless preemptive effect and more as a sword in the service of a new but stealthful “judicial hostility” to arbitration.²⁹⁸

In her study of unconscionability cases, for example, Susan Randall reports a tangible increase both in the frequency with which litigants raise unconscionability challenges against arbitration agreements and in the rate at which courts hold those agreements to be unconscionable.²⁹⁹ In the 2002 to 2003 period, Randall reports that 68.5% of all unconscionability cases involved arbitration agreements, compared with just 14.8% twenty years earlier.³⁰⁰ In the same period, courts found 50.3% of the arbitration agreements to be unconscionable but only 25.6% of the nonarbitration agreements—a rate two

²⁹⁵ Jones v. Rath Packing Co., 430 U.S. 519, 526 (1977).

²⁹⁶ Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

²⁹⁷ See, e.g., Bruhl, *supra* note 168, at 1422; McGuinness & Karr, *supra* note 180, at 61; Stempel, *supra* note 183, at 765-66.

²⁹⁸ See Burton, *supra* note 30, at 489-500; Riske, *supra* note 31, at 600-01; Stempel, *supra* note 183, at 773-75. See generally McGuinness & Karr, *supra* note 180, at 62 (arguing that the FAA allows courts to apply general contract principles in a manner hostile to arbitration agreements); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 186 (2004) (arguing that judges perpetuate the historic hostility toward arbitration by “expand[ing] the doctrine of unconscionability . . . to revoke arbitration agreements”).

²⁹⁹ See Randall, *supra* note 298, at 194-96.

³⁰⁰ *Id.*

times higher for arbitration agreements.³⁰¹ In a similar study, Aaron-Andrew Bruhl observes that unconscionability-related arbitration cases increased year over year from less than 1% of all arbitration cases in 1994 to more than 18% in 2007.³⁰²

To be sure, a spike in numbers standing alone is hardly conclusive evidence of discriminatory treatment. But there are other indications that anti-arbitration bias within the judiciary is alive and well. Practitioners have begun to accuse judges of “creat[ing] a new brand of unconscionability” that is “far more demanding” and “unique to arbitration.”³⁰³ Judges, too, have noted that their colleagues’ unconscionability decisions are sometimes “written ostensibly to apply general principles of contract law, [but] they hold that an agreement to arbitrate may be unconscionable simply because it is an agreement to arbitrate.”³⁰⁴ The empirical data, together with this qualitative evidence, have led some to suggest quite persuasively that “[m]any courts . . . seize upon the unconscionability doctrine as a pretext to refuse enforcement” of arbitration agreements.³⁰⁵ I shall refer to such critics as the “pretextualists.”

The problem of pretext has been a central theme in anti-discrimination law. In the equal protection context, for example, courts are keenly attuned to the danger that state actors might apply benign laws or rules in ways that betray “enmity or prejudice . . . and other improper influences and motives easy of concealment.”³⁰⁶ Likewise, GATT provides that the Article XX exceptions should not be “*applied* in a manner which would constitute a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.”³⁰⁷

By comparison, the Paradigm is naïve to these dangers.³⁰⁸ It cannot discern discrimination in the case-by-case application of unconscio-

³⁰¹ *Id.* at 194.

³⁰² Bruhl, *supra* note 168, at 1440.

³⁰³ McGuinness & Karr, *supra* note 180, at 62.

³⁰⁴ *Gay v. CreditInform*, 511 F.3d 369, 395 (3d Cir. 2007).

³⁰⁵ Burton, *supra* note 30, at 500.

³⁰⁶ *Yick Wo v. Hopkins*, 118 U.S. 356, 373 (1886).

³⁰⁷ GATT, *supra* note 240, art. XX (emphasis added).

³⁰⁸ *See* Burton, *supra* note 30, at 483 (observing that “[e]xisting case law does not resolve this tension”); Drahozal, *supra* note 41, at 411 (observing that “[l]ower courts generally have rejected” FAA preemption challenges to the application of a contract defense and that the Supreme Court “so far has not addressed the issue”); J. Maria Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1756-57 (2006) (considering claims that courts are apply-

nability doctrine because the analysis stops at the question of whether the law is general or arbitration-specific; that is, the Paradigm's single-out/general test fails to pierce through the form of the law to consider how the law is being applied in substance.³⁰⁹ Thus, general contract defenses such as unconscionability are immunized from further risk of preemption in the very first step of Drahozal's four-step model of FAA preemption.³¹⁰ Drahozal's test accurately reflects the Paradigm's (inaccurate) assumption that "[i]f the law applies to contracts generally, it is not preempted."³¹¹

Even where one party explicitly argues that the lower court used unconscionability "in a manner 'inherently hostile' to arbitration,"³¹² reviewing courts have been content to deflect the preemption challenge solely on the ground that unconscionability is part of the law of contracts.³¹³ And while a few courts have been astute enough to observe that they may not "employ . . . general doctrines in ways that subject arbitration clauses to special scrutiny,"³¹⁴ none has provided a meaningful test for discerning precisely when such scrutiny has been employed. If the pretextualists are correct that the old judicial hostility is now masquerading behind the unconscionability doctrine, the Paradigm does not appear to be effective at unclocking it.³¹⁵

ing unconscionability doctrine more strictly to class action waivers in arbitration agreements but concluding that FAA preemption is not "foolproof" and does not forbid the practice).

³⁰⁹ See *supra* note 63.

³¹⁰ See Drahozal, *supra* note 41, at 407-08.

³¹¹ *Id.* Drahozal himself is more skeptical of this proposition. He eventually asks whether, "as applied," general contract law defenses might nonetheless be considered to single out arbitration. *Id.* at 411.

³¹² *Ting v. AT&T*, 319 F.3d 1126, 1152 (9th Cir. 2003).

³¹³ See, e.g., *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009) (holding that "because unconscionability is a generally applicable contract defense," it is never preempted (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 988 (9th Cir. 2007))), *cert. granted sub nom.* *AT&T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2010) (No. 09-0893); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1170 n.3 (9th Cir. 2003) (rejecting as "plainly without merit" an argument that California unconscionability precedents "impose[] a heightened standard for enforcement of arbitration agreements"); *Hall v. AT&T Mobility LLC*, 608 F. Supp. 2d 592, 597 (D.N.J. 2009) (denying preemption challenge to unconscionability defense on the ground that courts have "routinely" held the defense to be generally applicable).

³¹⁴ *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 167 (5th Cir. 2004).

³¹⁵ Aaron-Andrew Bruhl offers another explanation for why reviewing courts have not scrutinized adverse unconscionability findings in the lower courts more aggressively. He argues that such courts might entertain "expressive" concerns about accusing a trial judge of misinterpreting, or perhaps even manipulating, the unconscionability doctrine

B. “As Applied” Challenges and the Limits of the Single-Out/General Test

In response to the Paradigm’s lackadaisical approach to these problems, pretextualists have sought more aggressively to infer judicial hostility toward arbitration by refocusing the single-out/general test at the level of application.³¹⁶ From an anti-discrimination perspective, however, the test proves no more effective here than it did in the context of the statutes considered in Part IV. It makes no sense to say, for example, that courts may not “rely on the uniqueness of an agreement to arbitrate” when determining whether the agreement is unconscionable.³¹⁷ Or, to take a more extreme iteration, that “courts may not even consider the fact that a contract to arbitrate is at issue.”³¹⁸ Unconscionability requires precisely the type of case-by-case determination about particular arbitration clauses that these rules purport to forbid.³¹⁹ It eschews standardized tests and instead requires courts to weigh individualized factors such as “the commercial setting, purpose, and effect

out of hostility toward arbitration. See Bruhl, *supra* note 168, at 1454-55. From a judicial federalism perspective, Bruhl notes that these “expressive” concerns may be most pronounced when the Court is asked to review state supreme court decisions. *Id.*

³¹⁶ See, e.g., Burton, *supra* note 30, at 483-85; McGuinness & Karr, *supra* note 180, at 84.

³¹⁷ Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987); *accord* Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 n.3 (1996). As noted above, these statements are dicta. See *supra* note 63.

The recent case of *Gay v. CreditInform*, 511 F.3d 369 (3d Cir. 2007), illustrates the absurdity of insisting that courts may not apply the unconscionability doctrine in a way that singles out arbitration contracts. The consumer in that case, Mary Gay, credibly argued that her arbitration agreement was substantively unconscionable because it contained a class action ban that, for all practical purposes, rendered her small consumer claim nonactionable. *Id.* at 393. But because this argument necessarily “relied on the uniqueness of the arbitration provision”—namely, the fact that it contained a class action ban—the Third Circuit held that the FAA would preempt an unconscionability determination based on such an argument. *Id.* at 395.

³¹⁸ McGuinness & Karr, *supra* note 180, at 84; see also Petition for Writ of Certiorari at 4, *Circuit City Stores, Inc. v. Gentry*, 552 U.S. 1296 (2008) (No. 07-0998) (cert. denied) (arguing that the FAA should preempt a state court unconscionability finding because it “depend[s] on the fact that an arbitration agreement is at issue”). To be sure, McGuinness and Karr recognize the tension inherent in this proposition and conclude, more or less consistent with the argument I seek to develop here, that “[t]he only apparent means of reconciling” the tension is to return to the fundamental anti-discrimination purpose of the FAA: “to ‘reverse centuries of judicial hostility to arbitration agreements by placing them on equal footing with other contracts.’” McGuinness & Karr, *supra* note 180, at 78 (quoting *Shearson/Am. Express Inc. v. McMahon*, 482 U.S. 220, 225-26 (1987)).

³¹⁹ See, e.g., 2A LARY LAWRENCE, ANDERSON ON THE UNIFORM COMMERCIAL CODE § 2-302:27 (3d ed. 2008).

of the particular clause or contract” in question.³²⁰ Thus, if FAA preemption of a general contract defense were to hinge on whether application of the defense to an arbitration clause singles out *that* clause, no possible application would survive preemptive scrutiny.³²¹

A more promising approach may be to follow the Court’s admonition that judges may not “decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.”³²² Some pretextualists have taken this as a cue to compare the *outcome* of unconscionability challenges in arbitration cases and in otherwise identical nonarbitration cases. Thus, when a court finds unconscionable an arbitration clause that requires the consumer or employee to resolve disputes in a distant forum, but the same court “reach[es] a different conclusion” with regard to a contract that does not call for arbitration,³²³ some infer hostility from the bare fact of these disparate outcomes.

But this line of inquiry, too, is fraught with complexity, because unconscionability analysis is itself notoriously opaque and vests a great deal of discretion in the trial judge. This lack of transparency is precisely what led scholars such as Arthur Leff to warn that the unconscionability doctrine “make[s] the true bases of decisions more hidden” and allows a court “to be nondisclosive about the basis of its decision even to itself.”³²⁴ Moreover, persuasive “apples-to-apples”³²⁵ comparisons between unconscionability determinations in arbitration and nonarbitration contexts are few and far between.³²⁶ Indeed, sometimes there is simply no relevant nonarbitration comparison point at all.³²⁷

³²⁰ 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18:11 (4th ed. 2010); *see also* U.C.C. § 2-302(2) (2001); 2A LAWRENCE, *supra* note 319, § 2-302:104.

³²¹ Others before me have argued this point better than space permits me to do here. *See, e.g.*, Schwartz, *supra* note 210, at 51.

³²² Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 281 (1995). Like the statements in *Perry*, 482 U.S. at 492 n.9, and *Casarotto*, 517 U.S. at 687 n.3, this, too, is dictum. *See supra* note 63. Regardless, it is nonsensical. As David Schwartz has observed, it is entirely in keeping with the purpose of the unconscionability doctrine to decide that a particular arbitration clause is unfair (and to reform or void just that clause) even though remaining clauses in the container contract are not. *See Schwartz, supra* note 210, at 51.

³²³ *See* Randall, *supra* note 298, at 216; *see also* Burton, *supra* note 30, at 495.

³²⁴ Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 557 (1967).

³²⁵ Bruhl, *supra* note 168, at 1450.

³²⁶ I refer the reader to Bruhl’s more extended treatment of this point. *See id.* at 1449-52.

³²⁷ *See id.* (“[S]ome contractual issues arise exclusively or nearly exclusively in the arbitration context, which means that there is no ready and obvious nonarbitration baseline . . .”); Randall, *supra* note 298, at 218-20 (noting that the confidential nature

Nor would we necessarily wish to insist on parity in outcomes. The advantage of unconscionability is its context-specific policing of unfairness: its ability to serve as a “safety net”³²⁸ in circumstances where unfairness would escape detection by more predictable bright-line rules. A test of outcome equivalence would not only be difficult to administer in practice, it would also straightjacket judges in a way that threatens to defeat the benefits of the unconscionability rule.

Moreover, even if we were to agree that courts reach different conclusions about unconscionability in arbitration and nonarbitration cases, there may be perfectly reasonable explanations for these discrepancies that have little to do with unjustified hostility. For instance, Randall takes issue with California courts that find forum-selection clauses unconscionable in arbitration agreements but not in other agreements.³²⁹ But a closer look at these cases reveals a much more complex picture. Both the arbitration and nonarbitration cases cited by Randall acknowledged that forum-selection clauses are prima facie valid and must be enforced unless unreasonable under the circumstances.³³⁰ Although it is possible to speculate that courts nonetheless applied this rule more rigorously to arbitration agreements, the unique facts of each case are quite consistent with the opposite conclusion. Consider that Randall's arbitration cases generally involved extremely small claims when compared to the cost of traveling to the distant forum, together with other indicia of substantive unconscionability.³³¹ By contrast, in Randall's nonarbitration examples,

of arbitration, which might be a factor in the unconscionability analysis, “has no exact analogue” in litigation).

³²⁸ See generally Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006) (arguing that flexibility and the lack of clear rules are strengths, not weaknesses, of the unconscionability doctrine).

³²⁹ Randall, *supra* note 298, at 214-16.

³³⁰ Although the standards employed in the arbitration and nonarbitration cases are similar, they are not identical. In the arbitration cases Randall cites, the issue was always whether the forum-selection clause was substantively and procedurally unconscionable. See, e.g., *Wilmot v. McNabb*, 269 F. Supp. 2d 1203, 1210 (N.D. Cal. 2003). In the nonarbitration cases, the question was whether the forum-selection clause was “unreasonable” under the test articulated in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10 (1972). This is not necessarily a problem for Randall's analysis, however, if it is just as difficult (or more difficult) to prove unconscionability as it is to prove unreasonableness under the *Bremen* test.

³³¹ See *Wilmot*, 269 F. Supp. 2d at 1211 (finding unconscionable an arbitration clause that required an infirm elderly couple to arbitrate their claims in Colorado, even though they lived in California and the defendant had offices throughout the country); *Comb v. Paypal, Inc.*, 218 F. Supp. 2d 1165, 1177 (N.D. Cal. 2002) (holding unconscionable an arbitration clause that required nationwide customers to arbitrate in “PayPal's backyard” and that also exhibited other indicia of one-sidedness); GMAC

the plaintiff either failed to adduce evidence that the forum-selection clause was substantively unconscionable or did not bother to argue the point.³³²

These observations suggest that the single-out/general test is at best an imperfect surrogate for the real issue that troubles the pretextualists. That issue, to quote the California Supreme Court, is whether lower court judges are “us[ing] . . . such defenses [improperly] to discriminate against arbitration clauses.”³³³ The pretextualists have similarly framed the issue in terms of discrimination, but they stop short of building on this insight.³³⁴

In the next section, I pick up where the pretextualists leave off. Continuing with unconscionability as an example, I ask whether looking to the anti-discrimination paradigm can help us articulate a more cogent standard for determining when and why the FAA should preempt certain applications of general contract defenses.

Commercial Fin. LLC v. Superior Court, No. B166070, 2003 WL 21398319, at *4 (Cal. Ct. App. June 18, 2003) (holding “[t]he combination of the New York forum selection clause and the New York choice of law provision” contained in an arbitration clause to be unconscionable as to a California clothing manufacturer); Stone v. Memberworks Inc., No. G030740, 2003 WL 21246771, at *6 (Cal. Ct. App. May 30, 2003) (“To require a consumer in California, alleging a claim under California law, to arbitrate a dispute in Connecticut concerning one or two hundred dollars . . . is ‘overly harsh’ and ‘one-sided.’”); Bolter v. Superior Court, 104 Cal. Rptr. 2d 888, 894 (Ct. App. 2001) (holding unconscionable a forum-selection provision that a “large international corporation” imposed on “small ‘Mom and Pop’ franchisees” as a condition of continuing their almost twenty-year-old franchise).

³³² See generally *Net2Phone, Inc. v. Superior Court*, 135 Cal. Rptr. 2d 149, 153 (Ct. App. 2003) (holding that a New Jersey venue clause in a national company’s license agreement was not unreasonable simply because the agreement was presented on a “take it or leave it” basis); *Intershop Commc’ns AG v. Superior Court*, 127 Cal. Rptr. 2d 847, 854 (Ct. App. 2002) (holding that a clause selecting Germany as the dispute resolution forum was not unreasonable where the plaintiff made no showing that “substantial justice could not be achieved” in Germany or that the clause was otherwise substantively unconscionable). In one case, the court understandably rejected a Canadian plaintiff’s claim that his Canadian insurance policy’s requirement to resolve disputes in Canada was unreasonable. See generally *Shepherd v. Dominion of Can. Gen. Ins. Co.*, No. D039718, 2003 WL 21388251 (Cal. Ct. App. June 17, 2003).

³³³ *Discover Bank v. Superior Court*, 113 P.3d 1100, 1112-13 (Cal. 2005); accord *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 432 (5th Cir. 2004); Bruhl, *supra* note 168, at 1451, 1454-55.

³³⁴ McGuinness and Karr, for example, draw an explicit analogy between their critique of California courts’ unconscionability decisions—which they claim ought to be preempted by the FAA—and an “as applied” challenge to a facially neutral law under the Equal Protection Clause. See McGuinness & Karr, *supra* note 180, at 78 n.145; see also Burton, *supra* note 30, at 483; Randall, *supra* note 298, at 194; Riske, *supra* note 31, at 600-02.

C. Proving Pretextual Discrimination

Anti-discrimination law offers a helpful framework for approaching the problem of underpreemption in part because it disaggregates two distinct paths to proving discriminatory treatment that the pretextualists have sometimes managed to conflate: establishing invidious motives and establishing disproportionate outcomes. Statutory anti-discrimination law captures this distinction through the concepts of “disparate treatment” and “disparate impact” claims, respectively.³³⁵

A claim of disparate treatment amounts to a claim of purposeful, unjustified discrimination. Disparate impact, by contrast, represents a much more capacious view of discrimination that takes into account the accreted effects of unconscious prejudice and historical subordination that are beyond the control of any one actor. In other words, disparate impact theory recognizes that unequal treatment may occur in the absence of purposeful or conscious misconduct—indeed, that sometimes the unintended and seemingly benign forms of discrimination are most in need of correction.³³⁶ Disparate impact theory therefore allows the trier of fact to infer discriminatory treatment from suspiciously unequal outcomes alone, regardless of the defendant’s motivation.³³⁷

It is certainly possible to understand the pretextualists to be arguing that there is something inherently problematic when arbitration agreements are overrepresented year after year in the set of contracts that courts deem unconscionable. But such an argument would be seriously misconceived for a number of reasons. First, it presupposes a more robust anti-discrimination agenda for the FAA—something approaching an anti-subordination principle of the sort

³³⁵ See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (explaining the difference between the two types of claims). Many anti-discrimination scholars have questioned the salience of the treatment/impact distinction. See, e.g., Sheila R. Foster, *Causation in Antidiscrimination Law: Beyond Intent Versus Impact*, 41 HOUS. L. REV. 1469, 1474-76, 1547-48 (2005); George Rutherglen, *Disparate Impact, Discrimination, and the Essentially Contested Concept of Equality*, 74 FORDHAM L. REV. 2313, 2314-22 (2006).

³³⁶ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 430, 432 (1971) (holding in the Title VII context that “good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as ‘built-in headwinds’ for minority groups” or that “operate to ‘freeze’ the status quo of prior discriminatory employment practices”).

³³⁷ Note that the disparate impact claim does not seek to rectify inequality in the outcomes themselves; rather, like the disparate treatment claim, it is at bottom a theory of unequal treatment. See, e.g., Pamela L. Perry, *Two Faces of Disparate Impact Discrimination*, 59 FORDHAM L. REV. 523, 540-41 (1991).

used to justify disparate impact claims in the employment context.³³⁸ Outside that context, not even racial minorities are entitled in the normal course to a finding of discrimination based solely on evidence of outcome disparities.³³⁹ Second, the default presumption in the employment discrimination area is that, in a world with no discrimination, the “work force [will be] more or less representative of the racial[, gender,] and ethnic composition of the population in the community from which employees are hired.”³⁴⁰ The same is not quite true with respect to arbitration agreements and the set of all unconscionable agreements. There are real disparities in bargaining power that frequently attend arbitration clauses held to be unconscionable—disparities that serve as a compelling alternative explanation for the outcome discrepancies identified by Randall and others.³⁴¹ Third, the FAA was designed to reverse the “hostility,”³⁴² “enmity,”³⁴³ and “jealousy”³⁴⁴ of the common law courts toward arbitration, not their unintended failure to enforce predispute arbitration agreements with the same vigor they applied to other agreements. It has therefore been understood as only “pre-emptive of state laws hostile to arbitration,”³⁴⁵ as opposed to just any law that happens to impede the enforceability of arbitration agreements. This, too, is consistent with my earlier description of the Paradigm as more akin to an “anti-oppression” rather than an “anti-subordination” principle.³⁴⁶

For these reasons, the pretextualists would do better to direct their arguments toward a claim of disparate treatment: a claim that judges applying the unconscionability defense sometimes *intentionally* discriminate against arbitration.³⁴⁷ In the anti-discrimination area, a

³³⁸ See Hasnas, *supra* note 74, at 475-77.

³³⁹ See *Washington v. Davis*, 426 U.S. 229, 242 (1976).

³⁴⁰ *Teamsters*, 431 U.S. at 339 n.20.

³⁴¹ See *supra* notes 299-02 and accompanying text.

³⁴² *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 272 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984).

³⁴³ *Sec. Indus. Ass'n v. Connolly*, 883 F.2d 1114, 1120 (1st Cir. 1989).

³⁴⁴ S. REP. NO. 68-536, at 2 (1924); *Cohen & Dayton*, *supra* note 17, at 283.

³⁴⁵ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001); see also *Strausbaugh v. H & R Block Fin. Advisors, Inc.*, No. 05-001083, 2007 WL 3122257, at *4 (Ky. Ct. App. Oct. 26, 2007) (interpreting *Circuit City* as holding that the FAA preempts only state laws hostile to arbitration); *Wilson*, *supra* note 180, at 813.

³⁴⁶ See *supra* notes 74-79 and accompanying text.

³⁴⁷ This is furthermore consistent with the pretextualists' own suspicion of “hostility” and “disdain” in the way judges apply the unconscionability defense against arbitration. See *McGuinness & Karr*, *supra* note 180, at 61; *Randall*, *supra* note 298, at 186; *Riske*, *supra* note 31, at 591.

plaintiff seeking to prove either an equal protection claim or a statutory claim of disparate treatment need only establish intentional, unjustified discrimination on the basis of the prohibited characteristic and adverse consequences resulting from it. Proof of disparate outcomes is, strictly speaking, neither necessary nor sufficient for this purpose.³⁴⁸ The upshot for pretextualists is that the disparate treatment framework can help them avoid some of the problems inherent in making persuasive apples-to-apples comparisons between unconscionability outcomes in arbitration and nonarbitration cases.

The challenge, of course, is how to prove purposeful discrimination. Sometimes, a judge can scarcely conceal her distaste for arbitration. In one case, Montana Supreme Court Justice Trieweler went out of his way to describe the “total lack of procedural safeguards” in arbitration and to accuse the Paradigm of “subvert[ing] our system of justice as we have come to know it.”³⁴⁹ In another, a state judge described an arbitration clause between a consumer and a large national bank as “yet another vignette in the timeless and constant effort by the *haves* to squeeze from the *have nots* even the last drop” and to “design new devices and definitions to . . . [satisfy] their unquenchable thirst for profits.”³⁵⁰ These statements raise a strong presumption of hostility toward arbitration, as several pretextualists have already noted.³⁵¹ In most cases, however, there is no smoking gun evidence of purposeful discrimination.

This is precisely where conceptual resources developed in the anti-discrimination area, again, prove helpful. Anti-discrimination law is keenly attuned to the historical realities of prejudice and the difficul-

³⁴⁸ See *supra* note 339 and accompanying text; *infra* note 367.

³⁴⁹ *Lombardi I*, 886 P.2d 931, 940-41 (Mont. 1994) (Trieweler, J., specially concurring), *vacated*, 515 U.S. 1129 (1995).

³⁵⁰ *Lytle v. Citifinancial Servs., Inc.*, 810 A.2d 643, 658 n.8 (Pa. Super. Ct. 2002), *overruled on other grounds by* *Salley v. Option One Mortg. Corp.*, 925 A.2d 115, 129 (Pa. 2007); see also *Knepp v. Credit Acceptance Corp. (In re Knepp)*, 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999) (“The reality that the average consumer frequently loses his/her constitutional rights and right of access to the court . . . rises as a putrid odor which is overwhelming to the body politic.”).

³⁵¹ Randall and Bruhl have both made this point with reference to Justice Trieweler’s remarks. See Bruhl, *supra* note 168, at 1459-60; Randall, *supra* note 298, at 220-21. In other contexts, such obvious declarations of bias have been sufficient to prove purposeful discrimination on the part of a trial court judge. For example, the Fourth Circuit found an equal protection violation where a district court judge stated during criminal sentencing that, although he was not supposed to sentence female defendants more leniently than male defendants, “I’m old fashioned enough I just don’t believe in punishing women who participate in a crime with the men on the same basis as a man.” *United States v. Maples*, 501 F.2d 985, 986 (4th Cir. 1974).

ties inherent in proving discriminatory purpose.³⁵² It has accordingly devised helpful evidentiary and burden-shifting frameworks that facilitate the inference of status-based discrimination.³⁵³

Thus, the *McDonnell Douglas/Burdine* test in the statutory discrimination area raises a presumption of intentional discrimination in cases where all status-independent explanations for an adverse employment decision (such as the lack of job-related qualifications) can be ruled out.³⁵⁴ Similarly, in the equal protection context, the factors set forth in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*³⁵⁵ help focus the factfinder's inquiry on what the Court deems to be telltale indicia of intentional discrimination. Examples of such factors include governmental decisions that (1) wreak extreme disproportionate impact on a particular group, (2) are preceded by an unusual sequence of events, or (3) are reached through departures from normal procedures or substantive rules.³⁵⁶ None of these factors, alone or in combination, suggests intentional discrimination based on suspect or quasi-suspect group membership any more than it suggests disorganization, neglect, or an aversion to rules.³⁵⁷ But the *Arlington Heights* framework permits the factfinder to infer intent nonetheless, in turn triggering heightened scrutiny, which has itself been described as an heuristic for "flushing out" improper motives capable of concealment behind ostensibly valid reasons.³⁵⁸

³⁵² See, e.g., *Johnson v. California*, 543 U.S. 499, 505-06 (2005); Foster, *supra* note 335, at 1496-97.

³⁵³ See Foster, *supra* note 335, at 1479 (discussing the role of historical context in the Court's approach to disparate impact); Selmi, *supra* note 77, at 295 ("[D]iscrimination law has long been treated as a unique area of civil litigation that requires proof structures and rules that are distinct from the rules and procedures that govern other civil disputes.").

³⁵⁴ See *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981) (citing *McDonnell Douglas Corp. v. Greene*, 411 U.S. 792, 802 (1973)). The burden of production then shifts to the defendant to disprove the inference by offering a legitimate, nondiscriminatory reason. If the defendant discharges this burden, the plaintiff has an opportunity to prove that the defendant's explanation is a pretext. See *id.* at 256; see also *McDonnell Douglas*, 411 U.S. at 804-05.

³⁵⁵ 429 U.S. 252 (1977).

³⁵⁶ See *id.* at 266-67 (identifying additional factors).

³⁵⁷ See Selmi, *supra* note 77, at 304-05; cf. Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1181 (1995) (making the same point in the statutory discrimination context).

³⁵⁸ See ELY, *supra* note 139, at 146; see also *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . .").

The rationale for the inference of intentional discrimination made possible by these frameworks is that, given our collective history and expectations, erratic, arbitrary, or unexplained behavior that tends to disadvantage certain groups of persons is immediately suspicious.³⁵⁹ Only with the force of this normative presumption—a presumption that makes sense only in connection with “suspect” or “quasi-suspect” classes—does proof of discriminatory purpose become an attainable goal. To be sure, in the anti-discrimination area these frameworks have been partially undermined by subsequent legal developments and thus may not function in practice in quite the same way as they do in theory. Nonetheless, the basic theory behind them is sound and can still be applied in helpful ways in the FAA preemption context.

Distilling these insights, I propose the following test for determining whether a court has applied a general contract defense in a way that stands as an obstacle to the Paradigm's anti-discrimination mandate: First, the defense must be of a type that “provid[es] ‘the opportunity for discrimination.’”³⁶⁰ More than any other general contract defense, unconscionability meets this test. Second, the court's unconscionability decision must rest on generalizations about arbitration's inadequacy as a dispute resolution process,³⁶¹ or must otherwise permit the inference that the decision, “‘if otherwise unexplained, [is] more likely than not based on the consideration of impermissible factors.’”³⁶²

The opponent may defend the decision below either by disproving one of these preliminary factors (thereby denying the trial judge's intent to discriminate) or by conceding intentional discrimination but offering a sound justification for it.³⁶³ In doing so, she may not simply “presume that arbitration in and of itself is inferior to a court proceeding”³⁶⁴ or otherwise rely on generalizations about arbitration.

³⁵⁹ See Foster, *supra* note 335, at 1500, 1539-40; Selmi, *supra* note 77, at 297, 305-06.

³⁶⁰ *Batson v. Kentucky*, 476 U.S. 79, 95 (1986) (quoting *Whitus v. Georgia*, 385 U.S. 545, 552 (1967)); see also *id.* at 96 (observing that the practice must “permit[] ‘those to discriminate who are of a mind to discriminate’” (quoting *Avery v. Georgia*, 345 U.S. 559, 562 (1953))).

³⁶¹ See *supra* notes 119-49 and accompanying text.

³⁶² *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)); see also *Batson*, 476 U.S. at 93-96; *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-67 (1977) (identifying numerous circumstantial factors from which a purpose to discriminate might be inferred).

³⁶³ See *supra* notes 276-80 and accompanying text.

³⁶⁴ *McGuinness & Karr*, *supra* note 180, at 78; cf. *Batson*, 476 U.S. at 97-98 (holding that a prosecutor may not rely on “assumptions, which arise solely from the jurors' race” or on “general assertions” to the effect that she acted in good faith).

Instead, she must point to objective facts about the particular arbitration agreement at issue (or the arbitral process contemplated by it) to demonstrate unconscionability. If the opponent fails to proffer the required explanation or to offer a sound justification, the reviewing court would be required to conclude that hostility toward arbitration motivated the application of the contract defense.

In developing this test, I was influenced in part by the framework for proving intentional discrimination that the Court developed in *Batson v. Kentucky*.³⁶⁵ The context of *Batson*—discrimination by a prosecutor in the use of peremptory challenges—may seem far removed from disputes over arbitration clauses. But because lower courts have applied the *Batson* framework to equal protection claims brought against *judges*, who in many states are responsible for the selection of grand juries,³⁶⁶ this line of cases represents the closest functional analog to the situation here, in which the issue is whether a trial judge has discriminated against arbitration in the application of a general rule of contract.

In addition, *Batson* recognized that a “single invidiously discriminatory governmental act” is sufficient to trigger an equal protection violation; thus, the party claiming discrimination need not provide evidence of “other comparable decisions” and may instead “rely[] solely on the facts concerning [juror] selection *in his case*.”³⁶⁷ This innovation helps steer the FAA preemption inquiry away from outcome-based comparisons to the real issue of the true (rather than pretextual) reasons why a court reaches a particular unconscionability

³⁶⁵ See 476 U.S. at 96-98. In the equal protection area, *McClesky v. Kemp* appears to have significantly undercut *Batson*. See 481 U.S. 279, 319 (1987). Nonetheless, *Batson* still provides a useful model for decoding pretextual discrimination against arbitration in the unconscionability context.

³⁶⁶ See, e.g., *Ramseur v. Beyer*, 983 F.2d 1215, 1222-23 (3d Cir. 1992) (describing the process of grand jury selection by a New Jersey judge).

³⁶⁷ *Batson*, 476 U.S. at 95 (quoting *Arlington Heights*, 429 U.S. at 266 n.14). This was *Batson*'s chief innovation. It effectively relieved criminal defendants of the burden to prove that “in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be,” the prosecutor had systematically struck jurors based on their protected-class status. *Id.* at 91-92 (quoting *Swain v. Alabama*, 380 U.S. 202, 223 (1965)).

In a related vein, the Second Circuit has held that a female employee could prevail on a gender-based § 1983 claim even though she had failed to produce evidence that similarly situated male employees were treated differently. See *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004). “[T]he ultimate issue,” the court explained, “is the reasons for *the individual plaintiff's* treatment, not the relative treatment of different *groups* within the workplace.” *Id.* (quoting *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001)).

decision. Finally, *Batson* involved discretionary decisionmaking (peremptory challenges) that, like the unconscionability doctrine, carries a potential for abuse.

Several qualifications are in order. First, the test should set a high bar. If it is difficult to establish discriminatory intent in the context of race, it should be equally, if not more so, in the arbitration context. The stakes here are not nearly as high as they are in cases of invidious discrimination based on suspect or quasi-suspect classifications. And although race “correlates so weakly with the legitimate characteristics for which it might be used as a proxy,”³⁶⁸ the same is not necessarily true for arbitration.³⁶⁹

Second, because it would not be feasible or desirable to hold an evidentiary hearing or to voir dire the trial judge who made the initial unconscionability determination, the issue of whether the trial court applied a general contract defense against arbitration in a discriminatory fashion should be treated as a question of law that may be decided de novo based on the trial court record alone.³⁷⁰

Reasonable minds can certainly disagree about the lines I have drawn. As with the test put forward in Part III, I offer this test as a conversation starter rather than as a finished product. For my purposes, the content of any proposed rule is less important than the latent considerations that the rule helps bring to the surface.

D. Application

Several courts have held arbitration clauses presumptively unconscionable when they do not evince a “modicum of bilaterality”³⁷¹ or

³⁶⁸ Brest, *supra* note 114, at 11.

³⁶⁹ See *supra* notes 329-34 and accompanying text.

³⁷⁰ This is consistent with well-settled law to the effect that de novo review is appropriate for federal preemption questions and for the interpretation of the intent behind legal instruments such as statutes or contracts. See, e.g., *City of Auburn v. Qwest Corp.*, 247 F.3d 966, 977 (9th Cir. 2001) (observing that because preemption is a question of law, “[n]o further factual record would narrow or clarify that issue”), *rev'd on other grounds*, 260 F.3d 1160 (9th Cir. 2001); *Parks v. State*, 247 P.3d 857, 859 (Wyo. 2011) (“Statutory interpretation is a question of law. Our paramount consideration is the legislature’s intent as reflected in the plain and ordinary meaning of the words used in the statute.” (quoting *Sorensen v. State Farm Auto. Ins. Co.*, 234 P.3d 1233, 1237 (Wyo. 2010))).

³⁷¹ *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 692 (Cal. 2000); see also *Ting v. AT&T*, 319 F.3d 1126, 1149-50 (9th Cir. 2003). The party defending the agreement may rebut the *Armendariz* presumption if it can prove a “business real[ity]” necessitating nonmutual terms. See *Armendariz*, 6 P.3d at 692.

“mutuality of obligation.”³⁷² A typical example is a clause that requires the adherent to arbitrate her claims but does not impose the same requirement on the drafter. Pretextualists argue that the requirement of mutuality is a ruse behind which judges hide their continuing hostility toward arbitration. They reason that nonmutual bargains are generally not considered unconscionable outside the arbitration context and, moreover, that this fact standing alone proves discrimination against arbitration.³⁷³

But there may be perfectly good reasons why nonmutual dispute resolution agreements should be deemed more unconscionable than nonmutual agreements about, say, sales terms. For example, an arbitration clause that provides for one party to select two out of three neutrals is much more likely to strike us as unfair than a sales term that provides for one party to shoulder two-thirds of the costs. Unlike existing approaches, therefore, the anti-discrimination model would require the pretextualists to make a threshold showing of intentional hostility toward arbitration—aided, of course, by an evidentiary framework of the sort I have proposed that would allow them to infer intentional disparate treatment from unexplained, inaccurate, or unusual aspects of the court’s unconscionability ruling.

As an illustration of how the anti-discrimination model might work in this context, consider the California Supreme Court’s decision in *Armendariz v. Foundation Health Psychcare Services*,³⁷⁴ a decision that remains controversial today. In *Armendariz*, the court announced that “an arbitration agreement imposed in an adhesive context lacks basic fairness and mutuality if it requires one contracting party, but not the other, to arbitrate all claims.”³⁷⁵ It accordingly upheld the lower court’s unconscionability determination and refused to find the determination preempted by the FAA, reasoning that unconscionability is part of the general law of contracts. How would *Armendariz* be decided under a test of the sort I propose?

The proponent—here, the employer-defendant—would have little trouble establishing the first prong of my test because unconscio-

³⁷² *Doctor’s Assocs., Inc. v. Distajo*, 66 F.3d 438, 451 (2d Cir. 1995); see also *Lytle v. Citifinancial Servs., Inc.*, 810 A.2d 643, 663 (Pa. Super. Ct. 2002), *overruled on other grounds by* *Salley v. Option One Mortg. Corp.*, 925 A.2d 115, 129 (Pa. 2007); *Iwen v. U.S. W. Direct*, 977 P.2d 989, 996 (Mont. 1999).

³⁷³ See *McGuinness & Karr*, *supra* note 180, at 82; *Randall*, *supra* note 298, at 207.

³⁷⁴ 6 P.3d 669 (Cal. 2000).

³⁷⁵ *Id.* at 694.

nability is susceptible to discriminatory application.³⁷⁶ Thus, the issue turns on whether the court's decision was based on biases or generalizations about arbitration, or whether there is something else about the totality of the circumstances that warrants an inference of unjustified discrimination.³⁷⁷

One indication of bias is the court's characterization of the arbitration clause as "requir[ing]" or "obligat[ing]" the employees to arbitrate but relieving the employer from the same constraints.³⁷⁸ This characterization appears to mask a value judgment, for although the arbitration clause required the employees to arbitrate their claims, it also denied that same option to the employer. Like the employees, the employer had no choice of dispute resolution options because the employees never agreed to arbitrate the *employer's* claims, only their own. Where each side has no option but to use one form of dispute resolution, the employer is no less "requir[ed]" or "obligat[ed]" to litigate than the employees are to arbitrate—unless, of course, one presumes that arbitration is inherently undesirable or inadequate compared with litigation. As the pretextualists have noted, the holding in *Armendariz* appears to be based almost entirely assumptions about arbitration's inferiority as a dispute resolution forum.³⁷⁹

Moreover, there are other telltale signs of hostility in the court's opinion. For example, the court did not bother to look at whether the parties' particular arbitration clause was so one-sided as to "shock[] the conscience."³⁸⁰ Instead, the court relied on what it perceived as "the inherent shortcomings of arbitration—limited discov-

³⁷⁶ See *supra* note 360 and accompanying text.

³⁷⁷ See *supra* note 362 and accompanying text.

³⁷⁸ *Armendariz*, 6 P.3d at 691-92, 694; see also *Ticknor v. Choice Hotels Int'l, Inc.*, 265 F.3d 931, 940 (9th Cir. 2001) ("The arbitration clause in this case *allowed* Choice to bring its claims against Ticknor into state or federal court, yet *forced* Ticknor to submit all claims to binding arbitration at Choice's headquarters in Maryland." (emphasis added)); *Iwen*, 977 P.2d at 996 ("[I]t makes no sense for one party . . . to have the *freedom* to seek the remedy before a court of law, while the other party . . . is *forced* to seek the same remedy only through arbitration." (emphasis added)).

³⁷⁹ See Broome, *supra* note 180, at 41 (arguing that California courts are biased against arbitration); Burton, *supra* note 30, at 488-90 (arguing that *Armendariz* and other cases show bias against arbitration).

³⁸⁰ 2A LAWRENCE, *supra* note 319, § 2-302:27; see also RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. b (1981) (describing an unconscionable contract as one "such as no man in his senses and not under delusion would make" (quoting *Hume v. United States*, 132 U.S. 406, 411 (1889))). Although the court went on to consider the limitation-on-damages provision in the arbitration clause, it noted that this provision merely "compounded" the unconscionability of the clause. *Armendariz*, 6 P.3d at 694.

ery, limited judicial review, limited procedural protections.”³⁸¹ As we have seen, although it is a fair generalization that discovery and appellate review are not available in arbitration as they are in litigation, it would be a mistake to conclude that these shortcomings are necessarily “inherent” in arbitration, or indeed that they are “shortcomings” at all.³⁸² These common features of arbitration can be, and often have been, varied by agreement.³⁸³ Moreover, there is significant dissensus as to whether full-blown discovery is in fact so essential to fair and effective dispute resolution such that its unavailability should be considered a shortcoming rather than a virtue.³⁸⁴ The decision in *Armendariz* was based solely on these and other suspect assumptions—assumptions that the court frankly conceded were “disadvantages that may exist” for plaintiffs in arbitration.³⁸⁵

At this point in the test, the opponent-employee would have the opportunity to refer to specific aspects of the *Armendariz* opinion or to facts in the record that tend either to dispel the biased assumptions implicit in the court’s reasoning, or otherwise to justify the court’s unconscionability decision. It is not sufficient simply to declare, as did the *Armendariz* court, that “[t]he application of [the unconscionability] principle to arbitration does not disfavor arbitration.”³⁸⁶ Nor would it be adequate to rely on generalized denials or conclusory statements. Given the facts of *Armendariz*, it appears unlikely that the opponent could successfully rebut the presumption of intentional discrimination.

Under the test I propose, the result in *Armendariz* would not compel the same outcome in another controversial case from the California

³⁸¹ *Armendariz*, 6 P.3d at 691. The court also relied on anecdotal evidence for the proposition that “courts and juries are viewed as more likely to adhere to the law and less likely than arbitrators to ‘split the difference’ between the two sides, thereby lowering damages awards for plaintiffs.” *Id.* at 693.

³⁸² See *supra* notes 143-49.

³⁸³ See *supra* note 127.

³⁸⁴ See, e.g., Javier H. Rubinstein, *International Commercial Arbitration: Reflections at the Crossroads of the Common Law and Civil Law Traditions*, 5 CHI. J. INT’L L. 303, 304 (2004) (“It is difficult to overstate the horror with which parties and counsel outside the United States view the prospect of American-style discovery”); Edward F. Sherman, *Transnational Perspectives Regarding the Federal Rules of Civil Procedure*, 56 J. LEGAL EDUC. 510, 517-18 (2006) (discussing weaknesses of the American discovery process); Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 264, 275-78 (1992) (discussing the need for and benefits of discovery reform). See generally Wayne D. Brazil, *The Adversary Character of Civil Discovery: A Critique and Proposals for Change*, 31 VAND. L. REV. 1295 (1978) (criticizing abusive discovery practices as costly and counterproductive to the search for truth in litigation).

³⁸⁵ *Armendariz*, 6 P.3d at 692 (emphasis added).

³⁸⁶ *Id.* at 693.

courts. Like *Armendariz, Stirlen v. Supercuts, Inc.* involved a nonmutual arbitration clause.³⁸⁷ Although the court found the clause to be unconscionable, it did so for reasons that were not necessarily predicated on arbitration's inferiority to litigation. For example, the court found several other features of the arbitration clause problematic, such as a limitation on remedies, a shortened statute of limitations, and a waiver of defective service.³⁸⁸ It concluded that the clause was "unconscionably one-sided and unfair in numerous respects," not just in the way it reserved access to the courts for only one party.³⁸⁹ Without more, these facts would be insufficient to raise a durable inference of discrimination.

A variant of the nonmutual arbitration clause in *Armendariz* and *Stirlen* is one that gives the drafting party a choice of forums (arbitration or litigation) but restricts the adherent to only one (typically arbitration).³⁹⁰ Here one might argue that the unilateral right to choose a forum after a dispute arises gives one party an unfair tactical advantage over the other—an advantage that is so one-sided as to shock the conscience. An unconscionability finding based on this rationale would not "necessarily express the impermissible view that arbitration is inferior to litigation."³⁹¹ Absent other facts, therefore, it too would not be preempted.

CONCLUSION

The Court's FAA preemption jurisprudence is undeniably organized around an anti-discrimination principle—a principle that only requires the preemption of state laws that intentionally and unjustifiably discriminate against arbitration agreements. The best interpretation of that principle is that state laws singling out arbitration on their

³⁸⁷ 60 Cal. Rptr. 2d 138, 152 (Ct. App. 1997).

³⁸⁸ *Id.* at 142-43.

³⁸⁹ *Id.* at 159.

³⁹⁰ *See, e.g., Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004) ("The cases do not necessarily express the impermissible view that arbitration is inferior to litigation, for a choice of remedies is better than being limited to one forum."); *E-Z Cash Advance, Inc. v. Harris*, 60 S.W.3d 436, 442 (Ark. 2001) (refusing to uphold an arbitration clause giving the drafter, but not the adherent, the option to sue in court or arbitration); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 284 (W. Va. 2002) (refusing to uphold a contract where defendant "[t]he defendant [t] substantively unconscionable exculpatory and limitation of liability provisions in a form contract of adhesion").

³⁹¹ *Iberia Credit*, 379 F.3d at 170. Nonetheless, preemption might be proper if the unconscionability finding were shown to be based largely on negative assumptions about arbitration or were tainted with other indications of bias. *See, e.g., Dunlap*, 567 S.E.2d at 271, 280 n.12 (presuming that a sole arbitrator selected by an employer would be biased).

face trigger at most a suspicion that they are based on improper preconceptions about arbitration's inferiority compared to litigation. Applications of general contract rules that rely on biases or generalizations about arbitration and that render arbitration agreements unenforceable are suspect for the same reason. These are the ways in which I claim that arbitration deserves "suspect" status.

Understanding arbitration's "suspect" status makes possible a new, more robust approach to FAA preemption. In this Article, I have attempted to sketch the foundations of such an approach and to use it both to critique and offer solutions to two important problems in the Court's existing preemption paradigm: over- and underpreemption. But many questions remain to be answered and many more details need to be embellished before such an approach can earn a place in the pantheon of FAA preemption theories.³⁹² This is just one of many possible starting points for what I hope will become a fertile avenue of scholarship and debate.

³⁹² I pursue some of these questions in my forthcoming article. See Aragaki, *supra* note 27.