Arbitration or Exculpation?

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Over the past two decades, the Supreme Court has issued a series of decisions construing the Federal Arbitration Act. The practical effect of these has been to functionally preclude meritorious, yet economically powerless, individual claimants from asserting their claims in arbitration. The primary mechanism for this has been an ad hoc canon of construction imposed on lower courts that requires that they construe agreements to arbitrate as implicitly disallowing classwide arbitration. By preventing this means of cost-sharing, the Court has insulated powerful defendants from liability for their unlawful activity. I call the worst of these arbitration-cum-class-waiver provisions "functionally exculpatory clauses," because in some circumstances they make it impossible for plaintiffs to obtain meaningful relief. This Note argues that the Court should recognize functionally exculpatory clauses as such and direct lower courts to exclude them from the Federal Arbitration Act's mandatory enforcement. If the Federal Arbitration Act does not apply to functionally exculpatory clauses, then state contract law will control their disposition.

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Introduction

Imagine that you get a letter in the mail informing you that your cellular-service provider has been acquired by a larger corporation. The terms of your preexisting agreement with your provider won't be affected, so you file the notice away without thinking too much about it. Then you begin to detect problems with your service—problems that never arose before the acquisition. Almost every phone conversation is interrupted by cutouts; sometimes you have no service for hours. When you contact your now-integrated provider, you're told that there's a special "chip" that can solve these problems. But to get the chip, you have to switch plans. Your cellphone bill will be higher, and the subscription won't terminate until well after your current one is set to. Without much of a choice, you agree.

You and thousands of other customers suspect that the new company intentionally degraded the quality of phone service to induce its customers to switch plans. You send a copy of the electronic form contract that you signed to your lawyer. Your lawyer says you have a strong legal claim, but one that would be expensive to prove. Discovery and expert testimony costs alone would exceed your damages by a lot. The only way to recover your losses is to combine with other customers and share these expenses. You ask whether you or another customer could do this through a class action. Your lawyer advises that the contract you signed has an arbitration clause, and a recent Supreme Court decision held that arbitration clauses implicitly disallow class actions. This is the case even though courts in your state wouldn't enforce a class-action waiver like this one in a regular contract because it's unconscionable.

You ask whether your lawyer or another plaintiff's lawyer is willing to privately coordinate among the plaintiffs to share expenses in arbitration instead. But arbitrators in your area are wildly unpredictable when it comes to adhering to previously decided issues. The lawyer would have no assurance that a win for the first plaintiff would translate to a win for the second. No serious lawyers think it's even worth bothering with. So, you're left with a more expensive, longer plan, and your new service provider has a binding individual-arbitration agreement to avoid liability.

This is the effect of the Court's recent Federal Arbitration Act (FAA) decisions. The hypothetical is loosely based on a 2007 dispute between Cingular, a company that merged with AT&T, and a subscriber in California.[1] The Ninth Circuit held that the class-action waiver was unconscionable, relying on the then-recent California Supreme Court

1. *See* Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 979–81 (9th Cir. 2007) (describing the dispute between Cingular and the subscriber).

decision *Discover Bank v. Superior Court*.[2] In 2011, however, the United States Supreme Court held that the FAA preempted California's so-called *Discover Bank* rule.[3] And the Court held in two other cases that an arbitration agreement's silence on,[4] or ambiguity with respect to,[5] classwide arbitration is an implicit waiver of the right to arbitrate on a classwide basis. The upshot of these decisions and others is that companies can include arbitration agreements in their standard-form contracts with customers that have the practical effect of insulating the companies from any sort of liability. I call these *functionally exculpatory clauses*.[6] A *formal* exculpatory clause—or just an *exculpatory clause*, as it's conventionally used—is a "contractual provision relieving a party from liability resulting from a negligent or wrongful act."[7] Formal exculpatory clauses are disfavored by courts and often held unenforceable for being unconscionable or violating public policy. But functionally exculpatory clauses might slide under the radar, especially when arbitration is involved. The Court has construed the FAA as announcing a liberal policy in favor of arbitration.[8] Arbitration clauses must be enforced unless they're covered by one of the narrowly construed exceptions to the Act.[9] Unfortunately for our hypothetical cellphone user, the new agreement's arbitration clause probably does not qualify under either of the exceptions.

This Note argues that the Court should recognize functionally exculpatory agreements to arbitrate as exculpatory clauses that fall outside of the FAA's enforcement requirement. The argument proceeds as follows: Part I gives a background on the FAA and on some of the Court's decisions and argues that two of those decisions take a functionalist approach to arbitration-agreement construction, a functionalist approach that benefits

2. *Id.* at 981 (citing Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005), *abrogated by* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011)).

3. *Concepcion*, 563 U.S. at 352.

4. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010) ("We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . that parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.").

5. *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.").

6. Generally, and as it's used here, *functionalism* refers to the "methodological approach to law focusing on the effects of rules in practice . . . rather than on the precise statements of the rules themselves." *Functionalism*, BLACK'S LAW DICTIONARY (10th ed. 2014). *Formalism* means "[d]ecision-making on the basis of form rather than substance; specif[ically], an interpretive method whereby the judge adheres to the words rather than . . . evaluating [the text's] consequences." *Formalism*, BLACK'S LAW DICTIONARY (10th ed. 2014).

7. *Exculpatory Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014).

8. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U. S. 1, 24 (1983).

9. 9 U.S.C. § 2; *see, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235 (2013) (holding that an arbitration agreement that fell outside of the "effective vindication" exception must be enforced).

defendant corporations at the expense of individuals and smaller businesses. It also includes a brief discussion of the debate between the Justices over the exceptions to the FAA. Part II gives a case study of a Vermont state-court decision, which inspired and exemplifies the approach argued for in this Note. Part III argues that the Court should supplement its defendant-friendly functionalist construction of arbitration agreements with an analytical step that considers whether an arbitration agreement functionally exculpates the defendant; if it does, the Court should consider it not to be an arbitration agreement within the meaning of the FAA. Part III also suggests that the existing lines of debate, discussed in the previous Part, are too narrowly focused and miss the point. It then offers a procedural framework for the extra step.

I. The Federal Arbitration Act

This Part contains an account of the passage of the Federal Arbitration Act and some of the important Supreme Court decisions applying it. Because this Note's thesis involves the construction of arbitration agreements, subpart I(B) describes in detail the Court's two recent decisions on the topic—*Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[10] and *Lamps Plus, Inc. v. Varela*.[11] The purpose of that subpart is to illustrate the extratextuality and one-sidedness of the Court's construction of arbitration agreements that aren't explicitly clear about whether class arbitration is allowed. Subpart I(C) builds on the foregoing discussion and highlights the key points of debate between the two camps of Justices.

A. Background

Congress enacted the Federal Arbitration Act in 1925 against a backdrop of judicial hostility toward arbitration agreements.[12] Inherited from English common law,[13] this hostility derived from the view that private agreements to arbitrate were "an effort to divest the ordinary jurisdiction of the common tribunals of justice."[14] In *Insurance Company v. Morse*,[15] for example, the Supreme Court struck down a Wisconsin statute and invalidated a private agreement to arbitrate, citing "the general principle that parties

10. 559 U.S. 662 (2010).

11. 139 S. Ct. 1407 (2019).

12. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011).

13. James E. Berger & Charlene Sun, *The Evolution of Judicial Review Under the Federal Arbitration Act*, 5 N.Y.U. J.L. & BUS. 745, 747 (2009).

14. Ins. Co. v. Morse, 87 U.S. (20 Wall.) 445, 452 (1874) (quoting JOSEPH STORY, 1 COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA § 670 (1st ed. 1836)).

15. 87 U.S. (20 Wall.) 445 (1874).

cannot by contract oust the ordinary courts of their jurisdiction."[16] This notion of *ouster* embodied the concern that "[t]he regular administration of justice might be greatly impeded or interfered with by [arbitration agreements] if they were specifically enforced."[17]

In particular, two doctrines prevented arbitration clauses from being effective in many jurisdictions.[18] The "revocability" doctrine allowed either party, at any time before final resolution of the dispute, to unilaterally revoke its agreement to arbitrate.[19] The "invalidity," or "unenforceability," doctrine allowed courts to refuse to enforce an arbitration agreement without providing any remedy to the party seeking enforcement.[20] Even final arbitral awards lacked efficacy: parties could challenge the decisions, and courts could intervene and deny enforcement.[21] Although many states had adopted legislation aimed at giving effect to arbitration agreements, courts resisted.[22] But economic circumstances were changing. Commerce flourished, and disputes between merchants proliferated.[23] This, naturally, led to severe congestion in the courts.[24] Some of the disputes were time-sensitive;[25] even for the disputes that weren't, however, the "three-year backlog" prevented efficient resolution.[26] Consequently, merchants preferred the quicker, less formal arbitration option.[27]

In response, New York enacted the first modern arbitration statute in 1920.[28] Five years later, Congress mirrored New York and enacted the United States Arbitration Act,[29] now referred to as the Federal Arbitration Act

16. *Id.* at 451, 458 (quoting Scott v. Avery (1856) 10 Eng. Rep. 1121, 1121; 5 HL 811, 811.).

17. *Id.* at 452 (quoting STORY, *supra* note 14, at § 670 (1st ed. 1836)).

18. Southland Corp. v. Keating, 465 U.S. 1, 32 (1984) (O'Connor, J., dissenting).

19. Berger & Sun, *supra* note 13, at 747; *see also Southland*, 465 U.S. at 32 (O'Connor, J., dissenting) (explaining that revocability "allowed parties to repudiate arbitration agreements at any time before the arbitrator's award was made").

20. *Southland*, 465 U.S. at 32 (O'Connor, J., dissenting).

21. Berger & Sun, *supra* note 13, at 748.

22. *See id.* at 749–50 (describing early arbitration statutes and their lack of success in Massachusetts, Pennsylvania, and New York).

23. *Id.* at 748.

24. Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEXAS L. REV. 265, 303 (2015).

25. *See id.* at 304 ("A man ships a carload of potatoes in and a creditor attaches it, and the potatoes stand there on a side track and freeze or rot." (quoting *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. 11 (1923) (statement of W.H.H. Piatt))).

26. *Id.* at 303.

27. *See* Berger & Sun, *supra* note 13, at 748 ("A growing number of American businessmen chose to engage in arbitration in order to avoid lengthy and expensive proceedings in courts already crowded with commercial disputes.").

28. *Id.* at 750.

29. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14).

(FAA).[30] Similar to the New York statute, the FAA aimed to "ensure judicial enforcement of privately made agreements to arbitrate" by placing those agreements "upon the same footing as other contracts."[31] Efficient dispute resolution was a desirable byproduct of the Act but arguably not its main goal.[32] Section 2 did away with revocability and judicial discretion to refuse enforcement:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, . . . *shall* be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[33]

The two most important parts of the New York statute—its irrevocability provision and its enforceability mandate—appear almost verbatim in the FAA.[34] The Supreme Court construed the language "contract evidencing a transaction involving commerce" to reach the outer bounds of Congress's power under the Commerce Clause,[35] and thus, the FAA applies when the transaction "in fact" involves interstate commerce.[36] Section 4 provides for federal district court enforcement of arbitration agreements;[37] this also applies to actions initially brought in state courts involving only state law, as long as "some . . . independent basis for federal jurisdiction" exists.[38]

The Court has construed the FAA expansively, reading Section 2 as "a congressional declaration of a liberal federal policy favoring arbitration

30. *See* Berger & Sun, *supra* note 13, at 754 n.45 ("Only Section 14 of Title 9 of the Code . . . , providing that the Act be referred to as the 'United States Arbitration Act,' was repealed in 1945 and not replaced with a materially identical provision in the 1947 Act. The revised Act was thereafter referred to as the Federal Arbitration Act.").

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

32. *See id.* ("We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.").

33. 9 U.S.C. § 2 (emphasis added).

34. *See* Arbitration Law, § 2, 1920 N.Y. Laws 803, 804 (current version at N.Y. C.P.L.R. § 7501 (McKinney 2023)) ("A provision in a written contract to settle by arbitration a controversy thereafter arising between the parties to the contract . . . shall be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."). Note that the provisions of the FAA directly address both of the above-mentioned archaic doctrines: revocability and invalidity.

35. *See* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 274 (1995) ("[T]his Court has previously described the Act's reach expansively as coinciding with that of the Commerce Clause.").

36. *Id.* at 281.

37. 9 U.S.C. § 4 (authorizing "aggrieved" parties to "petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement").

38. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1983).

agreements."[39] Thus, if a court can reasonably construe an issue as arbitrable under the arbitration agreement in question, it must.[40] While the FAA says nothing about preemption,[41] the Court explained in *Perry v. Thomas*[42] that state law, or its application, is preempted insofar as it "takes its meaning precisely from the fact that a contract to arbitrate is at issue."[43] The Act does not preempt state contract law only "*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally."[44] But this is not controversial. The Act carves out an exception for laws that would make *any* contract revocable,[45] which suggests that arbitration agreements are enforceable notwithstanding laws that would render *only* arbitration agreements invalid.

But the Court then declared it impermissible to "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable."[46] This opaque language means, in effect, that when a state's law renders an arbitration clause unconscionable, the FAA invalidates that law if the law "[i]n *practice* . . . would have a disproportionate impact on arbitration agreements."[47] When the Court applies this "obstacle" preemption, the inquiry is whether a state's law stands in the way of Congress's "purposes and objectives" in passing the preempting Act.[48] If it does, then it's no good.

Moreover, the Supreme Court has created an exception to the FAA: the "effective vindication doctrine." In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[49] the Court held enforceable an arbitration provision as applied to Sherman Act claims.[50] Justice Blackmun, writing for

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39. *Id.* at 24.

40. *See id.* at 24–25. The majority concluded that:

> [Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Id.

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

42. 482 U.S. 483 (1987).

43. *Id.* at 492 n.9.

44. *Id.*

45. 9 U.S.C. § 2. This is commonly referred to as the *savings clause*.

46. *Perry*, 482 U.S. at 493 n.9.

47. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 341–42 (2011) (emphasis added) (applying the language from *Perry* to a hypothetical).

48. *See* Hines v. Davidowitz, 312 U.S. 52, 67–68 (1941) (declining to enforce a Pennsylvania law that "stands as an *obstacle* to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the Federal Alien Registration Act of 1940 (emphasis added)).

49. 473 U.S. 614 (1985).

50. *Id.* at 616, 640.

the majority, explained in a footnote that if the arbitration agreement "operated . . . as a prospective waiver" of the defendant's liability under the Sherman Act, and thereby prevented the prospective litigant from effectively vindicating its federal statutory right, the Court would decline to enforce it.[51] Though the Court referenced the exception several times in later cases, it hasn't used the exception to invalidate or hold unenforceable an arbitration agreement.[52] In the most recent of these decisions, *American Express Co. v. Italian Colors Restaurant*,[53] the Scalia majority expressed doubt about the doctrine's legitimacy.[54] According to Justice Scalia, cases after *Mitsubishi Motors* "have similarly asserted the existence of an 'effective vindication' exception" but failed to actually apply it.[55] Much scholarship has focused on the effective vindication doctrine.[56] As discussed in more detail below, however, the problems with the Court's FAA jurisprudence are more fundamental than merely hindering parties' federal claims.[57] And the effective vindication doctrine is an inadequate, underinclusive, and ineffective solution.

51. *Id.* at 637 & n.19.

52. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991) (discussing a claim arising under the Age Discrimination in Employment Act of 1967 [ADEA]); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000) ("[W]e believe that where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."); 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 273–74 (2009) (declining to decide whether an agreement prevented effective vindication of a party's rights under the ADEA); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235–36 (2013) (declining to apply the effective vindication doctrine to the antitrust claims at issue). But lower courts have. *E.g.*, Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs., 59 F.4th 1090, 1112 (10th Cir. 2023).

53. 570 U.S. 228 (2013).

54. *Id.* at 235.

55. *Id.*

56. *See, e.g.*, Raul C. Loureiro, *Ineffective Vindication of Antitrust Rights*, 21 U. PA. J. BUS. L. 978, 979 (2019) (arguing that a liberal application of the doctrine furthers antitrust policy goals); Robert Ward, Note, *Divide & Conquer: How the Supreme Court Used the Federal Arbitration Act to Threaten Statutory Rights and the Need to Codify the Effective Vindication Rule*, 39 SETON HALL LEGIS. J. 149, 150–51 (2015) (arguing that Congress should codify the effective vindication doctrine in the FAA because of *Italian Colors*); Thomas J. Lilly, Jr., *The Use of Arbitration Agreements to Defeat Federal Statutory Rights: What Remains of the Effective Vindication Doctrine After* American Express v. Italian Colors Restaurant*?*, 61 WAYNE L. REV. 301, 304 (2016) (arguing that *Italian Colors* caused uncertainty about the effective vindication doctrine's ongoing legitimacy but concluding that it's still good law); Colby J. Byrd, Note, *Vindicating the Effective Vindication Exception: Protecting Federal Statutory Rights in the Employment Context*, 70 OKLA. L. REV. 761, 763 (2018) (endorsing the Tenth Circuit's interpretation of the doctrine).

57. *See infra* subpart I(C) and Part III.

B. The Court's Functionalism

Arbitration agreements must be enforced according to their terms.[58] In construing their provisions, however, the Supreme Court takes a functionalist approach. Instead of applying state law, or deferring to arbitral panels, the Court presumes that parties wouldn't consent to class arbitration because to hold otherwise would functionally write the arbitration agreement out of existence. Parties can contract around this, of course, by unambiguously manifesting their intent to do so within the four corners of the agreement. But what's important to note is that in the two cases below, the Court supplants traditional means of determining the legal effect of contract provisions with a presumption against a type of arbitration that it views as fundamentally different from the type of arbitration Congress apparently intended to promote in 1925. These two cases serve as a foundation for the argument here that the Court should alter its approach so as to do away with its defendant-favoring functionalism. Specifically, these cases effectively hold that when parties agree to arbitrate, they are agreeing to a specific *kind* of arbitration—one that doesn't involve collective action. The thesis of this Note is that the Court should similarly recognize that an agreement to arbitrate that functionally shields the defendant from any sort of liability *is* an exculpatory clause.

1. Stolt-Nielsen*: When the Agreement Is Silent on Class Arbitration*.— The dispute in *Stolt-Nielsen* arose from a Department of Justice finding that Stolt-Nielsen, an international shipping company, was violating antitrust law by its involvement in a price-fixing conspiracy.[59] AnimalFeeds filed a claim in federal court, it was transferred to a Multidistrict Litigation court, and the parties ultimately agreed that the admiralty-law Charter governing their contract required that the dispute be resolved in arbitration.[60] While a number of similar suits were pending, AnimalFeeds served Stolt-Nielsen with a demand for class arbitration.[61] The parties agreed to submit to arbitration the question whether their agreement permitted class arbitration; they stipulated that it was silent on the matter.[62]

In its decision, the arbitral panel found that the agreement did so permit,[63] but the Supreme Court disagreed.[64] The Court began its reasoning

58. *See* Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989) (observing that the FAA's central purpose is to ensure that "private agreements to arbitrate are enforced according to their terms").

59. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 666–67 (2010).

60. *Id.* at 667–68.

61. *Id.*

62. *Id.* at 668.

63. *Id.* at 669.

64. *Id.* at 687.

with the platitude that arbitration "is a matter of consent, not coercion."[65] The Court's analysis focused on *intent*.[66] Parties are free to create the terms of their agreement to arbitrate, and the FAA not only respects but requires the enforcement of the agreement's terms.[67] They are free to choose which issues to arbitrate, which rules will govern the arbitration, who the arbitrators will be, and, most important here, with whom they will arbitrate.[68] If the parties don't agree to allow for class arbitration, then class arbitration isn't allowed.[69] The parties stipulated that they didn't agree to class arbitration because their agreement was silent on the matter.[70] So shouldn't that be dispositive?

However, that wasn't the full extent of the Court's reasoning. The Court conceded that not every element of the arbitral proceedings will be explicitly agreed upon ex ante. Some "procedural" components may be implicitly authorized by the parties for the arbitrator to decide.[71] Yet although aggregation is a procedural mechanism, classwide arbitrability cannot be implicitly allowed. Why not? Because it's functionally *not* arbitration—it defeats the purpose of resolving disputes through extrajudicial means. The Court didn't state this directly, but it spent the remainder of the opinion describing all of the ways class arbitration fundamentally differs from its bilateral equivalent.[72] According to the Court, class arbitration forgoes many of the benefits that arbitration has over bilateral litigation.[73] Defendants now face much greater potential losses.[74] Secrecy is a typical benefit of arbitration, but the presumptions of privacy and confidentiality go away when absent class members are involved.[75] Although arbitration doesn't create legal precedent, class arbitration not only affects but also binds absentees.[76] And, in many instances, class arbitration is slower, less efficient, and costlier than individual arbitration.[77]

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65. *Id.* at 681 (quoting Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).

66. *Id.* at 682.

67. *Id.* at 683.

68. *Id.*

69. *Id.* at 684.

70. *See id.* at 687 ("Here, where the parties stipulated that there was 'no agreement' on this question, it follows that the parties cannot be compelled to submit their dispute to class arbitration.").

71. *Id.* at 684–85.

72. *Id.* at 686–87.

73. *Id.*

74. *Id.* at 686. But this is true of class-action litigation, too. And it has nothing to do with the benefits arbitration has relative to litigation, unless it's the case that defendants face lower potential losses in individual arbitration than in individual litigation.

75. *Id.*

76. *Id.* It's hard to see how this bears on the intent of the signatories.

77. *Id.* at 685.

Keep in mind that this result was not inevitable. A formalist reading of the Charter, which provides for *arbitration*, does not bar *class arbitration*—the latter is a variety of the former. But the Court did something different. The Court imputed an intent to the parties to an arbitration agreement, an intent to preclude class arbitration. To do otherwise, it seems, would defeat the purpose of arbitration and functionally write the arbitration provision out of the Charter by rendering it pointless. The Court equates an agreement to arbitrate with an agreement to seek the benefits that Congress intended to promote in 1925 when it passed the FAA.

2. Lamps Plus*: When the Agreement Is Ambiguous on Class Arbitration.*—In *Lamps Plus, Inc. v. Varela*, Varela sued his employer, Lamps Plus, in federal court in California on behalf of a putative class of his fellow employees.[78] Lamps Plus moved to compel arbitration on an individual basis.[79] The court granted the motion but authorized classwide arbitration, against Lamps Plus's request.[80] The Ninth Circuit affirmed the dismissal and authorization of classwide proceedings.[81] Finding the contract ambiguous on the issue of class arbitration, the court applied California's canon of construction *contra proferentem*, which requires such contracts be construed against the drafter—in this case, against Lamps Plus.[82] The Supreme Court presumed the agreement ambiguous but found, however, that *Stolt-Nielsen*'s reasoning extends to agreements ambiguous on classwide arbitrability as well as those silent on the question.[83] If classwide arbitration is so fundamentally different from traditional arbitration that it defeats the purpose of arbitration, then whether the contract is silent or ambiguous shouldn't matter—in neither circumstance did the parties *agree* to submit to classwide arbitration.[84]

The meaningful distinction between this case and *Stolt-Nielsen* lies not in the agreement's lack of clarity on the issue of class proceedings. The Court here had to overcome another hurdle: the ubiquitous canon of construction *contra proferentem*. Traditionally, the Court has deferred to state law as it applied to the construction of arbitration agreements.[85] But in *Lamps Plus*, the Court distinguished *contra proferentem* from other doctrines of state

78. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1413 (2019).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*; *see Contra Proferentem*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining *contra proferentem* as requiring that "ambiguities . . . be construed unfavorably to the drafter").

83. *Lamps Plus*, 139 S. Ct. at 1415–16.

84. *Id.* at 1416.

85. *See id.* at 1431 (Kagan, J., dissenting) ("The interpretation of [an arbitration] agreement is 'a matter of state law to which we defer.'" (quoting DirecTV, Inc. v. Imburgia, 577 U.S. 47, 54 (2015))).

contract law. *Contra proferentem*, according to the majority, is justified on grounds of public policy, not language.[86] Remember that arbitration is a matter of consent,[87] and thus parties cannot be compelled to arbitrate unless they agreed to. *Contra proferentem* is a canon of last resort, so to speak.[88] It applies only *after* the court finds that the parties' intent regarding the ambiguous provision cannot be determined.[89] Thus, to construe the arbitration agreement against the drafter on the issue of class arbitration would be to coercively subject the drafter to arbitration that it didn't agree to.[90] On the other hand, the implied waiver of classwide arbitrability from *Stolt-Nielsen* rests on a presumption about the parties' intent—that the parties would not implicitly agree to arbitration that defeats its own purpose.[91] Because arbitration is a matter of consent, not coercion, *contra proferentem* cannot take priority to that presumption and therefore must yield.[92]

Thus, *Lamps Plus* is important because it further illustrates the Court's commitment to its functionalist construction of arbitration agreements at the front end of the analysis. As mentioned above, typically procedural questions are left to the discretion of the arbitrator.[93] But *Lamps Plus* and *Stolt-Nielsen* show the Court's shifting of the class-action question to the *applicability* stage, the stage at which the district court must determine whether there was an agreement to arbitrate at all.[94] It's not that *contra proferentem* was not a legitimate doctrine but rather that it just came too late in the analysis—after the parties' intent had been ostensibly determined. Recall that the argument, further developed in Part III, is that courts at the *applicability* stage should ask whether the "arbitration agreement" at issue is functionally exculpatory. Doing so at the *applicability* stage is consistent with *Lamps Plus* and *Stolt-Nielsen* in the sense that those decisions recognize that the question of

86. *Id.* at 1417; *contra id.* at 1434 (Kagan, J., dissenting) (noting that the rule encourages drafters to clearly indicate the parties' agreement ex ante and that the rule allows ex post interpretation in accordance with the parties' likely expectations).

87. *See supra* text accompanying note 65.

88. *Lamps Plus*, 139 S. Ct. at 1417.

89. *Id.*

90. *See id.* at 1418 ("Such an approach is flatly inconsistent with 'the foundational FAA principle that arbitration is a matter of consent.'" (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010))).

91. *See Stolt-Nielsen*, 559 U.S. at 687 ("We think that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA, that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings."); *see also supra* text accompanying notes 65–66.

92. *Lamps Plus*, 139 S. Ct. at 1419.

93. *See supra* text accompanying note 71.

94. *See* Cox v. Ocean View Hotel Corp., 533 F.3d 1114, 1119–20 (9th Cir. 2008) (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444–45 (2006)) (explaining that while the validity of the contract containing the arbitration agreement is a question for the arbitrator to decide, the enforceability of the agreement to *arbitrate* is a question for the district court).

whether there is an agreement to arbitrate involves more than simply looking for the word *arbitration*. In those two cases, it involves a functionally justified presumption about what kind of arbitration the parties contemplated. In the proposed framework, it would also involve asking whether the agreement is an agreement to arbitrate that falls within the FAA's scope.

C. The Debate

The previous two subparts give background on the FAA and discussions of the two Supreme Court cases that are most relevant to this Note's functionalism thesis. This subpart summarizes the two subjects of debate among the Justices: the effective vindication doctrine and the "savings clause." The purpose of this exercise is to show that the often-dissenting Justices—specifically Justices Kagan, Breyer, and Ginsburg—focus their critique of the Court's decisions on *back-end exceptions*. By contrast, the better approach is to substitute (or at least supplement) these arguments with the more fundamental focus on *front-end applicability* of the FAA.

Recall the above discussion on *Italian Colors* and the effective vindication doctrine.[95] The upshot of Justice Scalia's opinion is that even if there is such an exception to the FAA's mandate of enforceability,[96] the party opposing arbitration in *Italian Colors* just failed to demonstrate that it was unable to effectively vindicate its statutory right.[97] The effective vindication doctrine, insofar as it is a valid defense, guarantees that a party will have the right to pursue its federal statutory claim.[98] But the majority draws a distinction between *pursuing* the claim and *proving* the claim.[99] According to Justice Scalia, the fact that the costs of proving a claim exceed the maximum potential recovery for that claim is not a violation of the right to pursue the claim.[100] It just makes it harder to prove.

Nonetheless, the majority acknowledged that baldly exculpatory language would prevent a claimant from pursuing her claim.[101] Scalia even conceded that unreasonably high filing and administrative fees imposed by an agreement would "perhaps" preclude effective vindication.[102] But the exception does not apply when the cost of proving antitrust liability through expert analysis approaches $1 million but the treble damages cap out at

95. *See supra* notes 53–55 and accompanying text.

96. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235 (2013) (expressing skepticism about the doctrine's legitimacy).

97. *Id.* at 236–39.

98. *Id.* at 236.

99. *Id.*

100. *Id.* ("But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy.").

101. *Id.*

102. *Id.* And in so conceding, Justice Scalia makes a concession to the doctrine.

$38,549.[103] The claimant can pursue a remedy all it likes. It doesn't seem to matter that summary judgment will surely issue.[104] Coordination and cost sharing aren't options either, at least not here. The agreement between the parties barred not only class arbitration but also joinder and consolidation.[105] It required confidentiality, so Italian Colors Restaurant couldn't privately organize with other claimants.[106] The restaurant was left with a sole means of recourse; yet the costs exceeded the potential benefits ten to thirty times over.

Meanwhile, Justice Kagan's dissent in *Italian Colors* addressed the cost-prohibitive nature of the arbitration agreement directly.[107] She viewed the concurrently operating provisions as clearly barring effective vindication.[108] Of course, the exception would cover a "baldly exculpatory" clause.[109] But a clever drafter can easily formulate a clause that says nothing about releasing a party from liability while having that exact effect.[110] Kagan's dissent gives a few examples, such as imposing a one-day statute of limitations, stripping the arbitrator of the power to award any meaningful relief, or appointing as the arbitrator somebody with an interest in the arbitration's outcome.[111] Or, as here, the drafting party might block the introduction of required proof by making it prohibitively expensive.[112] The point of the effective vindication exception is to allow a party to bring its federal statutory claim in court when it can't effectively do so in arbitration.[113] Such a policy isn't served by drawing arbitrary lines between the rights to *pursue* relief and *prove* that relief is merited.[114] The rule is concerned with function, not form: "The variations matter not at all. Whatever the precise mechanism, each 'operate[s] . . . as a prospective

103. *See id.* at 231 ("[R]espondents submitted a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be 'at least several hundred thousand dollars, and might exceed $1 million,' while the maximum recovery for an individual plaintiff would be $12,850, or $38,549 when trebled.").

104. That is, because the claimant will be practically unable to meet its burden of production.

105. *See Italian Colors*, 570 U.S. at 249–50 (Kagan, J., dissenting) ("The agreement's problem is that it bars not just class actions, but also all mechanisms . . . for joinder or consolidation of claims, informal coordination among individual claimants, or amelioration of arbitral expenses.").

106. *Id.* at 246.

107. *See id.* ("Amex has put Italian Colors to this choice: Spend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights.").

108. *Id.* at 241.

109. *Id.*

110. *Id.*

111. *Id.* at 241–42.

112. *Cf. id.* at 242 ("[A cleverly drafted] agreement might block the claimant from presenting the kind of proof that is necessary to establish the defendant's liability—say, by prohibiting any economic testimony . . . ."); *see also supra* text accompanying notes 105–106.

113. *Italian Colors*, 570 U.S. at 242 (Kagan, J., dissenting).

114. *See id.* at 244 ("What the FAA prefers to litigation is arbitration, not *de facto* immunity.").

waiver of a party's [federal] right[s]'—and so confers immunity on a wrongdoer."[115] The modifier *effective* would otherwise be superfluous.

In addition to the effective vindication doctrine, another point of debate is the Act's savings clause—the explicit exception to the enforcement mandate.[116] The clause saves from FAA preemption "such grounds as exist at law or in equity for the revocation of *any* contract."[117] In simpler terms: state contract law sometimes defeats the FAA's enforcement requirement. Justice Scalia's majority opinion in *AT&T Mobility LLC v. Concepcion*[118] found that California's facially neutral[119] *Discover Bank* rule did not defeat FAA enforcement.[120] As applied, it undermines the benefits arbitration yields relative to litigation, so it undermines the FAA's purpose of promoting arbitration and those benefits.[121] Justice Breyer argued in his dissent that the *Discover Bank* rule was simply an elaboration of California unconscionability doctrine, which California may define however it sees fit.[122] And it should survive the FAA—so long as it doesn't target arbitration—because it's a defense to *any* contract.[123] In the absence of the *Discover Bank* rule, or other similar state unconscionability doctrines, drafters of agreements can more easily insulate themselves from liability. Justice Breyer wondered: "What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?"[124]

Justice Ginsburg echoed similar concerns. Writing in dissent in *DirecTV, Inc. v. Imburgia*,[125] she characterized the Court's FAA jurisprudence as "depriv[ing] consumers of effective relief against powerful economic entities that write no-class-action arbitration clauses into their form contracts."[126] And in *Lamps Plus*, she stated that "mandatory individual

115. *Id.* at 248 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 n. 19 (1985)).

116. 9 U.S.C. § 2.

117. *Id.* (emphasis added).

118. 563 U.S. 333 (2011).

119. Here, *facially neutral* refers to doctrines applicable to contract provisions irrespective of whether those provisions deal with arbitration.

120. *Id*. at 352.

121. *See id.* at 351 (comparing class arbitration to arbitration subject to the Federal Rules of Civil Procedure and asserting that class arbitration "is not arbitration as envisioned by the FAA, lacks its benefits, and therefore may not be required by state law").

122. *Id.* at 364 (Breyer, J., dissenting).

123. *See id.* at 366 ("[W]e have not, to my knowledge, applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings."); 9 U.S.C. § 2 (saving "such grounds as exist at law or in equity for the revocation of *any* contract") (emphasis added).

124. *Concepcion*, 563 U.S. at 365.

125. 577 U.S. 47 (2015).

126. *Id.* at 67 (Ginsburg, J., dissenting).

arbitration continues to thwart 'effective access to justice' for those encountering diverse violations of their legal rights."[127]

The dissenters' arguments highlighted above all have in common the concern that under certain circumstances, prohibiting individual consumers and employees from bringing suits collectively prevents them from bringing them at all. State law may safeguard against unfair contract provisions generally. But if a contract has an arbitration clause, then those safeguards go away. In *Concepcion*, *DirecTV*, and *Lamps Plus*, state contract-law doctrines were rendered inapplicable—doctrines that operated to protect relatively powerless individuals against unfair terms in contracts of adhesion—because the agreements in question fell within the FAA's expansive scope.

However, what the dissenters fail to recognize is that an arbitration clause paired with a class waiver actually *is* an exculpatory clause in some circumstances. The debate thus far has centered on back-end exceptions to the FAA—the judicially created effective vindication doctrine and the explicitly denoted savings clause. Dissenting opinions and scholarship alike focus on protecting consumers and employees by invoking these defenses against the presumption that arbitration clauses are to be enforced, and to little avail. Presented with an arbitration clause and their signature on the dotted line, plaintiffs have, as their sole recourse, been relegated to saying, "yes, but—." *Concepcion* and *Italian Colors* reduced the effectiveness of the "but."[128] Yet *Stolt-Nielsen* and *Lamps Plus* increased the need for it.[129] Part III proposes an approach that improves on the one-sided functionalism of the modern Court's arbitration-clause analytical framework and that better promotes the actual policies of the FAA.[130] But first, a case study is helpful to introduce this Note's proffered approach and give the reader a concrete example before applying it to the FAA.

127. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1422 (2019) (Ginsburg, J., dissenting) (quoting *DirecTV*, 577 U.S. at 60 (Ginsburg, J., dissenting)); *see also* Judith Resnik, *Revising Our "Common Intellectual Heritage": Federal and State Courts in Our Federal System*, 91 NOTRE DAME L. REV. 1831, 1888 (2016) ("Few individuals can afford to pursue small value claims; mandating single-file arbitration serves as a means of erasing rights, rather than enabling their 'effective vindication.'").

128. *Concepcion* did so by weakening the savings clause; *Italian Colors* the effective vindication doctrine.

129. Both did so by imputing to the signatories an intent to bar class arbitration.

130. In addition, the class-waiver example takes up the majority of the discussion. But the same logic applies to any clauses that couple with arbitration provisions so as to functionally exculpate the defendant; class waivers are just the most common.

II. Case Study—*BrickKicker*[131]

The previous Part demonstrates the Court's functionalist construction of arbitration agreements, the unfair results that it causes, and the points of frequent disagreement among members of the Court. In other words, it provides doctrinal background. This Part gives theoretical background in the form of a case study. The following is a state court's application of the interpretive move for which this Note argues.

Jim and Heidi Glassford wanted to buy a house.[132] When they found one they liked, their realtor suggested they have it inspected before finalizing.[133] They contracted to buy the property conditional upon their satisfaction with the results of the home inspection.[134] Jim was busy with the sale of his current house.[135] Heidi had no experience in real estate, but it fell on her to hire an inspector; she went with BrickKicker, a company her realtor recommended.[136]

BrickKicker asked Heidi to sign a form contract,[137] which she did without reading.[138] The agreement's paragraph five (the "liquidated damages clause") limited BrickKicker's liability to $285, the cost of the inspection:

> [I]t is agreed that the liability of the Inspection Company arising out of this inspection, and subsequent Property Inspection Report shall be limited to actual damages, or equal to the inspection fee charged, whichever is less. IT IS AGREED THAT THIS IS AN ADEQUATE LIQUIDATED DAMAGE AND IS IN NO WAY INTENDED AS A PENALTY, ADMISSION OF NEGLIGENCE OR DEFAULT SETTLEMENT. THE CLIENT UNDERSTANDS AND AGREES THAT ACTUAL DAMAGES, OR EQUAL TO THE INSPECTION FEE PAID, WHICHEVER IS LESS, IS THE CLIENT'S SOLE AND EXCLUSIVE REMEDY NO MATTER THE THEORY OF LIABILITY UPON WHICH THE CLIENT SEEKS RECOVERY.[139]

Paragraph six contained an arbitration clause:

> Any dispute, . . . shall be submitted to final and binding arbitration under Rules and Procedures of the Expedited Arbitration of Home Inspection Disputes of Construction Arbitration Services, Inc.[140]

131. Glassford v. BrickKicker, 35 A.3d 1044 (Vt. 2011).
132. *Id.* at 1046.
133. Appellants' Brief at 1, *BrickKicker*, 35 A.3d 1044 (No. 2009-362).
134. *Id.* at 2.
135. *Id.* at 1.
136. *Id.*
137. *BrickKicker*, 35 A.3d at 1046.
138. Appellants' Brief, *supra* note 133, at 2.
139. *BrickKicker*, 35 A.3d at 1046.
140. *Id.*

And the "Rules," which weren't attached to the document, required the party asserting a claim to pay a filing fee of $1350, daily fees of $450, and potential travel expenses for the arbitrator.[141] The superior-court judge searched the contract "in vain" for reference to the $1350 fee;[142] Heidi had only a high-school education.[143]

BrickKicker's report said that nothing was wrong with the house.[144] After relying on the report and purchasing the house for $230,500, the Glassfords began to discover problems.[145] The amended complaint they filed with the superior court listed numerous defects, including a 50-degree difference between the thermostat's display and its actual setting, cracks in the drywall, and noncompliance with state law.[146] BrickKicker moved to dismiss, citing the contract's "binding arbitration clause."[147] The court dismissed the Glassfords' complaint, construing the "utterly clear" arbitration clause formalistically.[148]

The Vermont Supreme Court reversed and remanded.[149] The Glassfords' recovery in arbitration would be limited to $285. To seek that $285, they would have to pay a minimum of $1350.[150] The court recognized this as what it effectively was: "an exculpatory clause insulating the home inspector from all liability."[151] Instead of analyzing the provisions as arbitration and liquidated damages clauses, the court treated them as

141. *Id.* at 1046–47.

142. Appellants' Brief, *supra* note 133, at 3 n.3.

143. *Id.* at 1.

144. *See BrickKicker*, 35 A.3d at 1047 ("BrickKicker's inspector produced a detailed report declaring the house to be '[a] nice new home in need of routine maintenance and observation.'").

145. *Id.*

146. Appellants' Brief, *supra* note 133, at 4. The others: lack of air lock in the basement bulkhead, loose vinyl siding, defects in exterior doors, lack of door stops, lack of rail on basement stairs, lack of anti-tilt on range, fiberglass against chimney flue, lack of attic insulation, lack of joist insulation, lack of electrical compatibility protectors, inappropriate wiring in electrical panel, defective rocker switch in upstairs bathroom, lack of face plate screws on entry light switch, improper location of carbon monoxide detectors, improper connection of heating thermostats, improper placement of oil tank, improper installation of tub spout and shower head suction, lack of basement insulation, and improper evaluation of the significance of the crack in the foundation. *Id.*

147. *BrickKicker*, 35 A.3d at 1047.

148. *Id.* Vermont's arbitration statute, in part, closely tracks the FAA. *Compare* VT. STAT. ANN. tit. 12, § 5652(a) (2023) ("Unless otherwise provided in the agreement, . . . a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties creates a duty to arbitrate, and is valid, enforceable, and irrevocable, except upon such grounds as exist for the revocation of a contract."), *with* 9 U.S.C. § 2 ("[Any written contractual provision] to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

149. *BrickKicker*, 35 A.3d at 1054.

150. *Id.* at 1047.

151. *Id.* at 1049.

exculpatory, applied the standards from *Tunkl v. Regents of University of California*,[152] and held that the two clauses together were unconscionable.[153]

Note what the Vermont Supreme Court did not do. It did not find that the liquidated damages clause was unenforceable because it limited damages to a laughably small amount. It did not find the arbitration clause unenforceable because it was "so ridiculously unfair that it defie[d] reformation."[154] The court instead found that the constraint formed by the two clauses operating together functionally *was* an exculpatory clause. The whole was not the sum of its parts. Paragraphs five and six did not contain an arbitration agreement and a liquidated damages clause. It doesn't matter that the contract's language insisted that "THIS IS AN ADEQUATE LIQUIDATED DAMAGE" or that the words *BrickKicker shall not be held liable* appeared nowhere in the document. BrickKicker drafted the contract so as to insulate itself from liability for its negligence, and the court construed the agreement's terms so as to constitute the exculpatory provision that they opaquely were.

III. A Better Approach

The preceding Parts describe the FAA and the Court's jurisprudence on it; the two back-end exceptions to the FAA, on which much of the debate has focused; and an illustration of a functionalist method of construing arbitration agreements. This Part pulls these components together into an argument, the thesis of this Note. Subpart III(A) expounds this thesis; subpart III(B) discusses its procedural implications.

A. The FAA Should Not Require Courts to Enforce Functionally Exculpatory Clauses

Arbitration clauses that function as exculpatory clauses should not be mandatorily enforced under the FAA. Put differently, the linguistic content

152. 383 P.2d 441 (Cal. 1963); *see also BrickKicker*, 35 A.3d at 1050–52 (applying *Tunkl*). The *Tunkl Test*, as it's commonly called, is a widely accepted common-law framework for analyzing whether an exculpatory clause is enforceable. It provides a list of factors to consider in making that determination, paraphrased here: the defendant's business is a type generally thought suitable for regulation, the defendant is engaged in serving an important public function that is practically necessary, the service is generally available to any member of the public, the defendant has a decisive advantage of bargaining power over the plaintiff, the exculpatory clause was in a contract of adhesion, and the agreement subjected the plaintiff to the risk of carelessness by the defendant. *Tunkl*, 383 P.2d at 444–46.

153. *BrickKicker*, 35 A.3d at 1054. Two judges wrote concurring-and-dissenting opinions. Both agreed that the agreement was unenforceable as written. But one argued that the liquidated damages clause should be severed, see *id.* at 1054–55 (Dooley, J., concurring and dissenting), and the other that the arbitration clause should be severed, see *id.* at 1055–56 (Burgess, J., concurring and dissenting).

154. *Id.* at 1056 (Burgess, J., concurring and dissenting). To be sure, it was, but that wasn't the reason for denying its enforcement.

of an "arbitration agreement" shouldn't be the sole trigger for the FAA's applicability.[155] Nor should defendants be able to skirt accountability by cleverly inducing consumers and employees to agree to two concurrent waivers that have the dual effect of precluding meaningful recovery and lessening the efficacy of contract-law defenses. Rather than presumptively enforcing it, a court should first consider whether the "arbitration agreement" is only nominally so; the court should apply the FAA only after determining that the arbitration and other clauses don't function in tandem to shield the defendant from liability.

How can arbitration clauses that include class waivers function as exculpatory clauses? There are two moving parts. The first is the class waiver, which increases (or prevents reduction of) the cost of bringing a claim from the perspective of an individual plaintiff. In cases where the plaintiff's damages are small, the cost of litigating often exceeds the potential recovery. This is frequently the case in antitrust lawsuits. A defendant can spread its monopoly gains across a large group of consumers, thereby converting social harm that is substantial in the aggregate into relatively insignificant costs imposed on individuals. As *Italian Colors* illustrates, the cost of proving liability in such cases may be insurmountable for an individual party. Aggregating claims through class action or by contract would allow plaintiffs to spread the costs of litigating, much in the same way as the defendant spread the harm among them. The same problems arise in other types of consumer litigation, like the hypothetical in the Introduction. In *Concepcion*, the each individual plaintiff's actual damages for the defendant's alleged fraud was only $30.22.[156] Class arbitration allows parties seeking damages to share costs and take advantage of economies of scale.

The second moving part is the arbitration agreement itself. State law would probably render unenforceable the most egregious of these class waivers but for the FAA's enforcement mandate. As *Concepcion* illustrates, though, the FAA makes it much more likely that a would-be-unconscionable class-action waiver tucked into an arbitration agreement will be enforced.[157] At least one commentator expresses concern that the recent FAA decisions

155. An instrument's *linguistic content* and its *legal effect* may be very different things. For instance, a disproportionate liquidated-damages clause that insists upon its not being a penalty clause may actually be a penalty clause and have no legal effect. *See, e.g.*, Strouse v. Starbuck, 987 S.W.2d 827, 829 (Mo. Ct. App. 1999) ("[L]iquidated damages clauses are enforceable, but penalty clauses are not, and without evidence of damages, a liquidated damages clause actually becomes a penalty and is unenforceable."). Another example is exculpatory clauses. *See, e.g.*, Reardon v. Windswept Farm, LLC, 905 A.2d 1156, 1161 (Conn. 2006) ("We conclude that . . . the totality of the circumstances surrounding the recreational activity of horseback riding . . . offered by the defendants demonstrates that the enforcement of an exculpatory agreement in their favor from liability for ordinary negligence violates public policy and is not in the public interest.").

156. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 337 (2011).

157. *See supra* notes 118–24 and accompanying text.

make it easier for defendants to shoehorn in clauses other than class waivers that would be unenforceable in an ordinary contract, such as truncated statutes of limitations, non-coordination clauses, and—you guessed it—limitations on damages.[158]

However, the Court can prevent contract drafters from using the FAA to immunize themselves by holding that an arbitration clause that combines with other contractual provisions and consequently functions to insulate the defendant from liability is not "[a] written provision . . . to settle [a controversy] by arbitration"[159] and thus falls outside of the FAA's scope and its enforcement mandate. Such "arbitration agreements," if enforced, do the same thing as baldly exculpatory clauses. From the plaintiff's perspective, there's little difference between lacking a legally cognizable claim and lacking an economically viable way of asserting it. From the defendant's, the difference is about the same: unless the plaintiff's resources are great and its goals non-monetary, repercussions for wrongdoing are unlikely. The only real difference is the language the defendant used in the contract. And this semantic difference ought not to be enough to trigger FAA enforcement.

Indeed, the FAA's enforcement mandate should not apply to these "arbitration agreements" because they aren't arbitration agreements at all, at least not in any meaningful sense. In part because of *Stolt-Nielsen* and *Lamps Plus*, the odds of actually arbitrating are often negligible. If a defendant knows or has reason to know that no rational plaintiff would seek arbitral relief, how can it be said that the defendant *agreed* to arbitration? The Court has no trouble with the notion that nobody would agree to class arbitration without expressly so providing.[160] If no defendant can be said to have contemplated class arbitration in those circumstances, why can a plaintiff be said to have agreed to cost-prohibitive arbitration in lieu of her right to seek redress in court?

Just as penalty provisions are not liquidated damages clauses, functionally exculpatory clauses are not arbitration agreements. To construe them as such requires a selectively formal and narrow approach. It requires a myopic understanding of the term *arbitration agreement*—one preoccupied with form and blind to function. The *BrickKicker* majority recognized this. *Arbitration agreement* is at best a euphemism for the functionally exculpatory clause that Heidi Glassford signed—and at worst a lie. If the

158. *E.g.*, Leslie, *supra* note 24, at 282–90; *cf.* Glassford v. BrickKicker, 35 A.3d 1044, 1048–49 (Vt. 2011) (invalidating an arbitration clause paired with a damages cap).

159. 9 U.S.C. § 2.

160. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 685 (2010) ("[C]lass-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) ("Like silence, ambiguity does not provide a sufficient basis . . . ."); *supra* sections I(B)(1) and I(B)(2).

clause had contained language such as "THIS IS IN NO WAY AN EXCULPATORY CLAUSE OR INTENDED TO IMMUNIZE BRICKKICKER FROM LIABILITY," nothing would have changed. If it were enforced, the Glassfords would still be out of luck, and BrickKicker no-less insulated from liability.

The Court has created an asymmetrical presumption that favors civil defendants. It imputes to defendants the intent to waive class arbitration; it does not impute to plaintiffs an intent to retain some feasible means of relief. This asymmetrical presumption leads to the perverse scenario from the Introduction, paraphrased here: A consumer or an employee signs a form contract with an arbitration clause that doesn't mention class arbitration. The vendor or employer acts unlawfully and causes a modest but non-trivial amount of harm to fall on the consumer or employee, along with many other similarly situated consumers or employees. The cost of proving the defendant's misconduct far exceeds any one plaintiff's damages, so class arbitration is the most effective if not the only means of relief. In ruling on the defendant's motion to compel arbitration, the district court presumes that the parties implicitly disallowed class arbitration and thus dismisses for individual arbitration. Plaintiffs go uncompensated, and the defendant and other future defendants undeterred from wrongdoing.

Furthermore, the two lines of attack discussed above—the effective vindication doctrine and the savings clause—are inadequate to address this problem. The effective vindication doctrine applies only to federal statutory claims. Until the 1980s, the FAA itself didn't even apply to federal claims. And after *Italian Colors*, the doctrine is toothless. The savings clause is similarly ineffective. The *Discover Bank* rule, a contract defense existing "at law or in equity," was struck down because it indirectly undermined arbitration's benefits.[161] The same can be said of most contract defenses that are being invoked to avoid individual arbitration. Even if *Concepcion* were overruled or construed narrowly, neither of which it will likely be, the savings clause is still a weak protection. Its language limits its application to defenses that may be used to *revoke* any contract. Generally, however, unconscionability doctrines affect *enforceability* rather than providing a basis for *revocation*.[162] Therefore, neither the effective vindication doctrine nor the

161. *See Concepcion*, 563 U.S. at 344 ("Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.").

162. *See* RICHARD A. LORD, 8 WILLISTON ON CONTRACTS § 18:17 & n.2 (4th ed. 2023) ("[T]he court is given the power to refuse to enforce the agreement in its entirety, to delete the unconscionable clause and enforce the remainder of the contract, or to limit the unconscionable clause's application so that an unconscionable result will be avoided." (citing various states' precedents)); *id.* § 19:21 ("Generally, clauses limiting future liability are strictly construed by the courts and are unenforceable unless assented to in a context of free and understanding negotiation.").

savings clause suffices to protect individuals and other economically powerless entities from functionally exculpatory clauses.

The proposed extra step directly addresses the problem. It incorporates elements of both back-end exceptions, and it corrects for their weaknesses. Like the effective vindication doctrine should operate in theory, this Note's test for front-end applicability asks whether a party has a feasible means of obtaining relief. But unlike the doctrine, this Note's approach applies to all claims, rather than being limited to those arising under federal statutes. Like the savings clause, the front-end-applicability approach preserves vertical-federalism values, but it does so by deferring the arbitrability question to state contract law when the "arbitration agreement" is functionally exculpatory. It goes beyond the savings clause in that it's not formally limited to *revocation* defenses, and that it preempts preemption.[163]

The Court frequently reiterates the maxim that agreements to arbitrate must be "enforced according to their terms."[164] Declining to construe functionally exculpatory clauses as arbitration agreements does not run counter to this policy. The words of an agreement may differ from its terms.[165] This was evident when the Supreme Court imposed an ad hoc canon of construction into arbitration agreements that are silent or ambiguous regarding class arbitration.[166] In such cases the text of the instrument says nothing about it. The parties might have not even considered, or perhaps they took for granted, the possibility of classwide proceedings. Either way, the *terms* of the arbitration agreement include an implied waiver of class arbitration. Consider that "arbitration agreements" that function as exculpatory clauses are not arbitration agreements by their own terms. And because arbitration agreements must be enforced according to their terms under the FAA, the enforcement of such "agreements" should not be federally mandated.

B. Practical Implications

While the argument here is that the Supreme Court should adopt an additional step in its method of analyzing arbitration agreements under the FAA, the actual work happens at the federal district court level. The FAA

163. In *Concepcion*, state law was preempted because the FAA applied. *Concepcion*, 563 U.S. at 343. Under my approach, the FAA wouldn't apply in certain circumstances and thus would not preempt state law.

164. *E.g.*, Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989).

165. *See* Frederick Wilmot-Smith, *Term Limits: What Is a Term?*, 39 OXFORD J. LEGAL STUD. 705, 708 (2019) (defining *terms* as "the propositions of law made true by the contracting parties' acts"). Indeed, "terms" corresponds with what is above referred to as "legal effect." *See supra* note 155.

166. *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 687 (2010) (silent); Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) (ambiguous).

obliges trial courts to compel arbitration. So this subpart describes one, but not the only conceivable, way that the proposed extra step might be employed in practice. Under the current framework, district courts apply the FAA in roughly the following way: The defendant moves to compel arbitration. If the jurisdictional requirements are met,[167] then the district court determines the arbitrability of the claim or claims. The court must decide "whether the parties agreed to arbitrate [the] dispute" and it does so "by applying the 'federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'"[168] If the court determines that the parties did agree to arbitrate, then it sends the case to arbitration unless one of the back-end exceptions applies.

The extra step would occur in the arbitrability (or front-end-applicability) determination. Specifically, the court would take a functionalist approach to the question whether the parties "agreed to arbitrate." If it finds that the "arbitration agreement" is really an exculpatory clause, then the FAA analysis ends because the FAA doesn't apply. Such a clause is not arbitrable under the FAA because it's not an *arbitration agreement* as that term is used in the statute. The district court would not, however, hold that the agreement is per se non-arbitrable. Because the FAA's enforcement mandate would no longer apply, the court should analyze the agreement under state contract law, as it would if the FAA were never enacted. If the *Discover Bank* rule or an equivalent were in effect, then the arbitration clause or the class waiver or both might not be enforced. If the applicable state law does not prohibit these kinds of agreements, then individual arbitration may be in order.

At the stage of determining arbitrability, the burden of proving the existence of an arbitration agreement naturally lies with the movant—the party in favor of arbitration.[169] Under the current framework, once an

167. Those *jurisdictional requirements* include (1) a basis for subject matter jurisdiction independent of the FAA and (2) a contract whose subject matter qualifies for FAA treatment—namely, "any maritime transaction or a contract evidencing a transaction involving commerce." 9 U.S.C. § 2. The case may be before the district court because it was filed there or because it was filed in state court and removed for the purpose of seeking to compel arbitration. State courts must also apply the FAA if its jurisdictional requirements are met. Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984).

168. Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)). That substantive law provides, among other things, that questions are generally resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24–25. My approach doesn't undermine this policy; compelling arbitration when arbitration is infeasible does nothing to further the federal policy favoring arbitration. *Cf.* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 244 (2013) (Kagan, J., dissenting) ("What the FAA prefers to litigation is arbitration, not *de facto* immunity."). In addition, the presumption in favor of arbitrability comes into play only when it's been determined that a valid arbitration agreement exists. Kirleis v. Dickie, McCamey & Chilcote, P.C., 560 F.3d 156, 160 (3d Cir. 2009).

169. Zachman v. Hudson Valley Fed. Credit Union, 49 F.4th 95, 101–02 (2d Cir. 2022).

agreement is produced, the burden shifts to the party opposing arbitration to "show[] the agreement to be inapplicable or invalid."[170] Thus, the back-end exceptions—the effective vindication doctrine and the savings clause—must be proved by the party opposing arbitration, the non-movant. Because the extra step would occur at the stage of front-end applicability, the natural party on which to impose the burden of proving that the agreement is non-exculpatory would be the party seeking to compel arbitration. But this would be an unrealistic ask.

To illustrate, in the paradigmatic dispute, Plaintiff sues Defendant and Defendant moves to dismiss or compel arbitration. Defendant does not practically have access to the information that would be necessary to prove that Plaintiff has an economically or otherwise viable means of arbitrating her claim or claims. So, while the burden of showing that an arbitration agreement exists falls on Defendant, Plaintiff should at least have to raise the argument that she is effectively precluded from bringing a claim in order for it to be an issue before the court. After she raises the issue of functional exculpation, the district court should use its discretion to direct the production of evidence by both parties as it sees fit.

The procedural history of *BrickKicker* is instructive on this point. When BrickKicker moved to dismiss for arbitration, the trial court treated that motion as though it were a motion for summary judgment.[171] More precisely, "the court invited the parties to submit statements of undisputed fact and competing memoranda."[172] It was here that the Glassfords raised the argument that the arbitration fees plus the damages cap "effectively insulated BrickKicker against any liability based on its services and assured that no arbitration proceeding would take place."[173] Although the trial court ultimately got it wrong by failing to see the functionally exculpatory clause,[174] its evidentiary treatment of the case embodies the flexibility that district courts should be afforded in analyzing contracts under this Note's approach. Because it's a functionalist approach, and because the costs and possible benefits of individually arbitrating will vary by claim and by contract, a hard-and-fast evidentiary rule isn't useful here.[175]

With that said, one hard-and-fast rule is appropriate: the district court should assume that Plaintiff's claim is meritorious. If the court is inclined to

170. *Id.* at 102 (alteration in original) (quoting Harrington v. Atl. Sounding Co., 602 F.3d 113, 124 (2d Cir. 2010)).

171. Glassford v. BrickKicker, 35 A.3d 1044, 1047 (Vt. 2011).

172. *Id.*

173. *Id.*

174. *See id.* (describing the superior court's dismissal of the complaint because the arbitration clause was "utterly clear on its face").

175. Even if it were appropriate, this Note is concerned more with the concept of functionally exculpatory clauses than with procedure.

do an expected-value (EV) analysis, then the expected recovery should be 100% of that being sought. This avoids a situation in which Plaintiff's claim is meritless and thus has a lower EV, while the amount sought actually exceeds the costs of arbitrating individually. Put differently, it would be absurd to allow Plaintiff, who has no case, to avoid individual arbitration simply because her expected recovery of individually arbitrating is zero.[176]

A related issue, but one less easily solved, is which claims the court ought to consider in its analysis. It would be similarly undesirable for Plaintiff to plead small claims when she could plead high-dollar claims and to thus successfully circumvent the individual arbitration to which she agreed. This is another reason to afford courts latitude at the front-end applicability stage. If the Glassfords deliberately forwent a $2,500 claim that was permissible under their contract, for instance, then the trial court might correctly conclude that they weren't effectively prevented from recovery. In any case, trying to predict the variety of complications that might arise at trial is beyond the scope of this Note and might deserve its own scholarship in the future.

Conclusion

This Note has strived to identify a missing analytical step in the Supreme Court's FAA jurisprudence. After giving a brief history of the Act, it described two doctrinal categories: the Court's functionalist construction of arbitration agreements in *Stolt-Nielsen* and *Lamps Plus*, and the back-end exceptions that the Court has recognized but stripped of their potency in *Concepcion* and *Italian Colors*. The purpose of detailing the former doctrinal category, the functionalist construction, was to support the argument that the Court's one-sided functionalism ought to be counterbalanced by a more realistic reading of so-called arbitration agreements that actually function to insulate defendants from liability. The purpose of the second, the back-end exceptions, was to show that the dissenters' arguments have been focused too narrowly and on exceptions that come too late and are too ineffective. Following that was a case study on *BrickKicker*, a Vermont case in which the state Supreme Court read the coupling of an arbitration clause with a liquidated-damages clause to *actually be* an exculpatory clause, and thus invalidated the pair. This case inspires and embodies the front-end-applicability approach. Finally, this Note argued for that approach—that the Court should, at the stage of front-end applicability, require inquiry into whether the arbitration agreement and another clause in the contract, most often a class-action waiver, function in tandem to exculpate the defendant by

176. As mentioned, the class waiver–arbitration clause combination is the most relevant, but it's not the only one that could function as an exculpatory clause. Thus, instead of *to avoid individual arbitration*, consider reading *to avoid arbitration under the putative terms of the contract*.

making claim assertion impracticable for the plaintiff. The discussion concluded with a potential, but by no means exclusive, procedural method for lower courts to apply.

In so doing, this Note has identified a trend of functionalism in the Court's FAA jurisprudence and has offered a novel functionalist approach to balance the scales. As demonstrated, the argument has centered on the back-end exceptions to the FAA. These tactics are ineffective; the better approach is more fundamental and gets to the root of the problem—it recognizes that many "arbitration agreements" that the dissenters are concerned about are *not* arbitration agreements but rather exculpatory clauses. Such an approach is fairer to plaintiffs, more aligned with the FAA's policies, and a more accurate conceptualization of agreements to arbitrate.