
COMMENT

ALL ALONE IN ARBITRATION: *AT&T MOBILITY*
V. *CONCEPCION* AND THE SUBSTANTIVE
IMPACT OF CLASS ACTION WAIVERS

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INTRODUCTION

On April 27, 2011, the Supreme Court announced its decision in *AT&T Mobility LLC v. Concepcion*,¹ one of the most closely watched cases of the 2010 Term. In *Concepcion*, the Court considered whether states may condition the enforceability of arbitration agreements on the availability of class-wide arbitration proceedings.² While the subject of class arbitration is rarely viewed as a headline-grabbing legal topic, *Concepcion* attracted the attention of many consumer advocates, corporate counsel, and procedural scholars because of its far-reaching implications for consumer and employment contracts and class action policy.³ Ultimately, the Court held that the Federal Arbitration Act (FAA) preempts states from invalidating class action waivers in arbitration agreements because these invalidations stand as an obstacle to the purposes behind the FAA.⁴

Was this result surprising? Not in the least. Indeed, given the increasingly predictable road the Court had taken in previous FAA cases,⁵ a contrary ruling exhibiting deference to a state’s views on arbitration would have represented an abrupt tug on the FAA steering wheel. But leaving the Court’s track record aside, was the Court’s decision to limit the role of states in shaping class action policy a legally sound and principled conclusion? In this Comment, I argue that it was not. Because class actions are so intimately linked to the vindication of substantive rights, the Court should not have unilaterally made a policy decision as to when the use of class proceedings is appropriate.

Though class action policy discussions typically focus on the efficacy of class action litigation⁶ or the inner workings of Rule 23 of the Federal Rules of Civil Procedure,⁷ *Concepcion* did not directly involve

¹ 131 S. Ct. 1740 (2011).

² *Id.* at 1744.

³ See generally *AT&T Mobility v. Concepcion*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/att-mobility-v-concepcion> (last visited Nov. 15, 2011) (listing amicus briefs from consumer advocacy associations, trade associations, and dispute resolution professors).

⁴ *Concepcion*, 131 S. Ct. at 1753.

⁵ See *infra* Section I.B.

⁶ See *infra* note 189.

⁷ Rule 23 provides procedural rules for class action suits. See FED. R. CIV. P. 23. For the Court’s most recent discussion of Rule 23, see *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2548-61 (2011).

either of these topics. Instead, *Concepcion* centered on the class action's close cousin, class arbitration⁸—proceedings involving similarly situated litigants that occur before an arbitrator, rather than before a judge or jury in court. While the development of class arbitration was still in its embryonic stages, several judges and businesses adopted the view that this method of dispute resolution was antithetical to the whole point of arbitrating in the first place,⁹ which is to provide a speedy and efficient alternative to litigation.¹⁰ Eventually, with the addition of more claimants and in light of the uncertainty surrounding this new form of aggregate procedure, class arbitration became what was described as “a lose-lose proposition” to which “no rational business [would] agree.”¹¹

As a solution, defendant businesses turned to their contracts for protection. By inserting class action waivers into their arbitration agreements—agreements that were themselves part of larger contracts with consumers, employees, and other actors in the marketplace—businesses attempted to narrowly circumscribe the procedures available to their adversaries.¹² In essence, once an opposing party agreed to arbitrate any future claims and also to waive his right to bring proceedings as a class, the only remaining option was bilateral arbitration: arbitration between two individual parties.

It was only matter of time before this solution was attacked in court. In particular, consumers pleaded that class action waivers were exculpatory provisions in the small claims setting because the inclusion of these waivers in arbitration agreements effectively relieved

⁸ *Concepcion*, 131 S. Ct. at 1744.

⁹ See, e.g., *Keating v. Superior Court*, 645 P.2d 1192, 1215 (Cal. 1982) (Richardson, J., concurring and dissenting) (“[C]lass procedures would tend to make arbitration inefficient instead of efficient, lengthy instead of expeditious, and procedural instead of informal.”), *rev'd sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

¹⁰ See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (describing one of the FAA's goals as the “encouragement of efficient and speedy dispute resolution”).

¹¹ Brief for Petitioner at 22, *Concepcion*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 3017755, at *22.

¹² See Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 437 (2010) (“[The] received wisdom [is] that some businesses' use of consumer arbitration clauses is motivated, at least in part, by a desire to reduce their exposure to class actions.”); Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 396 (2005) (“In the late 1990s, trade-journal articles first appeared encouraging corporate counsel to consider redrafting contracts to include provisions requiring consumers and others to waive the right to participate in class actions or even group arbitrations.”).

businesses from liability.¹³ Without class proceedings, no individual consumer in the small claims setting had an incentive to file a claim.¹⁴ In some states, such arguments were initially met with favorable responses. For example, an early opinion on the matter in California held that such class action waivers supplied defendants with a “‘get out of jail free’ card.”¹⁵ These waivers were also considered troublesome because they were almost always found in contracts of adhesion, or on a “take it or leave it” basis.¹⁶

But the businesses in these suits were not without a strong defense. Virtually all of the arbitration agreements in dispute were governed by the FAA,¹⁷ a federal statute that the Supreme Court has consistently held to proclaim a “liberal federal policy favoring arbitration agreements.”¹⁸ Thus, the common argument defendants raised in motions to compel arbitration was that the FAA required courts to enforce the arbitration agreements, and with them, the class action waivers.¹⁹ Under this theory, the FAA, by way of the Supremacy Clause, would preempt state rules relating to arbitration. On this point, however, state and circuit courts divided. For example, some states and circuits ruled that the class action waiver was enforceable on its face or that the FAA preempted state policies to the contrary.²⁰ But other decisions—including the California Supreme Court’s leading opinion in *Discover*

¹³ See, e.g., *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007) (examining whether a class action waiver in a cell phone contract’s arbitration agreement “effectively exculpat[ed] its drafter from liability for a large class of wrongful conduct”); *Muhammad v. Cnty. Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 99-100 (N.J. 2006) (engaging in a similar inquiry in the context of a consumer loan contract).

¹⁴ See *Scott*, 161 P.3d at 1007 (noting that Washington customers had brought no individual claims against the cell phone provider over a six-year period).

¹⁵ *Szetela v. Discover Bank*, 118 Cal Rptr. 2d 862, 868 (Ct. App. 2002).

¹⁶ *Id.* at 867.

¹⁷ 9 U.S.C. §§ 1-16 (2006). The Act provides that “an agreement in writing to submit to arbitration an existing controversy arising out of . . . a contract, transaction, or refusal [involving commerce], shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” *Id.* § 2.

¹⁸ *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (internal quotation marks omitted); *Perry v. Thomas*, 482 U.S. 483, 489 (1987) (quoting same).

¹⁹ See, e.g., *Scott*, 161 P.3d at 1008 (introducing the defendant’s argument that its cell phone contract was covered by the FAA).

²⁰ See, e.g., *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 558-59 (7th Cir. 2003) (enforcing a waiver based on its explicit language); *Strand v. U.S. Bank Nat’l Ass’n N.D.*, 693 N.W.2d 918, 927 (N.D. 2005) (same); see also *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 176 (5th Cir. 2004) (reversing a district court’s conclusion that an arbitration agreement was unconscionable and compelling arbitration pursuant to the FAA).

Bank v. Superior Court—held that § 2 of the FAA, known as the savings clause, enabled states to strike down class action waivers in the small claims setting on unconscionability grounds.²¹ Further complicating the analysis in some cases were additional clauses that ostensibly altered the cost equation for litigants, such as clauses providing for the reimbursement of arbitration costs or the payment of attorneys' fees.²²

Concepcion took the *Discover Bank* rule head on, with the majority ultimately siding in favor of preemption.²³ In doing so, the Court limited states' latitude to strike down class action waivers and effectively forced upon the states its own views regarding the pros and cons of certain aggregation policies (i.e., policies relating to the aggregation of claimants in a class action or collective action). It is here, I will argue, that the Court erred. Aggregation policies should not be a topic solely for our nation's highest court. As several commentators have recently argued, the availability of class proceedings is often deeply rooted in substantive regulatory policies, including state policies on the resolution of consumer disputes.²⁴ In light of this inseparable connection to substantive law, it should be the state's prerogative to determine whether the availability of class proceedings in arbitration would help further its substantive policies. In support of this argument, I will highlight the inconsistencies within the *Concepcion* opinion, as well as the doctrinal confusion between the Court's treatment of one aggregation mechanism, class arbitration, in *Concepcion* and the treatment of another aggregation mechanism, the class action, in a

²¹ See, e.g., 113 P.3d 1100, 1103 (Cal. 2005) (finding that "under some circumstances . . . class action waivers in consumer contracts of adhesion are unenforceable" and that the FAA did not preempt California law on this issue), *abrogated by* AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2011); see also *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 988-93 (9th Cir. 2007) (holding that an arbitration agreement was unconscionable under state law and thus not preempted by the FAA); *Scott*, 161 P.3d at 1009 (same).

²² See, e.g., *Concepcion*, 131 S. Ct. at 1744 (describing the cost-shifting provisions in AT&T's arbitration agreement).

²³ *Id.* at 1753.

²⁴ See, e.g., Stephen B. Burbank & Tobias Barrington Wolff, *Redeeming the Missed Opportunities of Shady Grove*, 159 U. PA. L. REV. 17, 21 (2010) (arguing that Rule 23 does not set aggregation policy, but rather is "merely the mechanism for carrying an aggregate proceeding into effect when the underlying law supports that result"); cf. David Marcus, *Flawed but Noble: Desegregation Litigation and Its Implications for the Modern Class Action*, 63 FLA. L. REV. 657, 716 (2011) (suggesting that the authors of Rule 23(b)(2) considered class treatment as "essential to the vindication of substantive rights").

recent Rules Enabling Act challenge, *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*²⁵

In Part I of this Comment, I will analyze both the history of the FAA and the Supreme Court's interpretation of this statute in relation to class arbitration. Part II will briefly discuss lower courts' use of unconscionability as a bulwark against class action waivers, while Part III will analyze the *Concepcion* case itself. Part IV will juxtapose the FAA decisions with *Shady Grove*. In Part V, I will examine several questions that remain unanswered after *Concepcion* and discuss avenues for reform. These avenues include a potential amendment to the FAA, administrative regulations that could target class action waivers, and most importantly, a change in the way the Court approaches class actions in future cases, which should involve a greater appreciation for the role class actions play in the enforcement of substantive law.

I. A REVIEW OF THE FEDERAL ARBITRATION ACT

The question of whether states may mandate that class proceedings be available in arbitration, notwithstanding an express contractual agreement to the contrary, ultimately turns on courts' interpretation of the FAA. Over the years, the Supreme Court has interpreted the FAA broadly and has in turn exhibited a considerable amount of deference to the black-and-white terms of the arbitration agreements at issue.²⁶ But much of the FAA jurisprudence is constructed upon a foundation of assumptions about the intent of the FAA's framers—assumptions that are still being questioned today. This Part will briefly analyze the history and text of the FAA and describe the FAA case law leading up to *Concepcion*.

A. *The Text and History of the FAA*

The key language of the FAA appears in § 2, which states in pertinent part that agreements to arbitrate “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for

²⁵ 130 S. Ct. 1431 (2010) (plurality opinion). The Court in *Shady Grove* held that Rule 23 superseded a New York state law that prohibited certain class actions. *Id.* at 1437-38.

²⁶ See Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1422 (2008) (noting that the Court “has interpreted the FAA expansively, nullifying most of the state laws and public policies that formerly excluded many types of transactions, such as consumer and employment transactions, from arbitration”).

the revocation of any contract.”²⁷ This latter clause, which provides courts with room to invalidate arbitration agreements on generally applicable contract defenses, is commonly referred to as the FAA’s “savings clause.”²⁸

An idea that has persisted throughout the FAA line of cases is that Congress enacted this language in 1925 in response to hostility from the state courts toward the use of arbitration.²⁹ The thought goes that the Act endeavored to put arbitration agreements on an “equal footing with other contracts.”³⁰ In *Concepcion*, both the majority opinion and Justice Breyer’s dissenting opinion subscribe to this view, albeit to varying degrees. Justice Scalia’s majority opinion takes a more expansive view, suggesting that the FAA’s goal of achieving streamlined proceedings is of roughly equal importance to the FAA’s corresponding goal of enforcing private agreements to arbitrate.³¹ Justice Breyer, on the other hand, cautions against viewing the efficiency objective as a primary goal of the statute.³² Moreover, Justice Breyer submits that when Congress enacted the FAA in 1925, the statute’s scope was intended to cover agreements between merchants possessing “roughly equivalent bargaining power.”³³ Scalia explicitly rejects this point, proposing that “[s]uch a limitation appears nowhere in the text” and that recent cases involving unequal bargaining partners have declined to apply the statute in this manner.³⁴

While Justice Breyer leaves much to be desired in his explanation of the FAA’s legislative history,³⁵ his account more closely aligns with scholarly research on the issue. For example, in a detailed historical

²⁷ 9 U.S.C. § 2 (2006).

²⁸ *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 990 n.8 (9th Cir. 2007).

²⁹ *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270-71 (1995) (explaining that “American courts initially followed [the] English practice . . . [of] prohibiting arbitration clause enforcement” and that Congress “was ‘motivated, first and foremost, by a . . . desire’ to change this antiarbitration rule” (fourth alteration in original) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985))).

³⁰ *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010).

³¹ *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2010) (describing the dissent’s view that the expeditious resolution of claims is not the overriding goal of the FAA as “greatly misleading”).

³² *Id.* at 1758 (Breyer, J., dissenting).

³³ *Id.* at 1759.

³⁴ *Id.* at 1749 n.5 (majority opinion) (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)).

³⁵ Justice Breyer cites several congressional reports but gives little explanation as to how such reports reflect his account of congressional intent regarding the scope of the FAA. *Id.* at 1759 (Breyer, J., dissenting).

account of the statute, Paul Carrington and Paul Haagen write that the FAA was “not necessarily the product of hostility to arbitration.”³⁶ Rather, the movement behind the passage of the FAA centered mostly on promoting interstate commerce and “mak[ing] the benefits of arbitration generally available to the business world.”³⁷ To be sure, it is likely that at least some state judges were miffed by the idea of having *their* cases pulled from their dockets because of a binding arbitration clause, and that by passing the FAA, Congress could ensure that these judges would refrain from acting territorially.³⁸ But hostility, according to Carrington and Haagen, was not the main concern. In fact, although state courts and legislatures were worried that binding arbitration clauses could become a “trap for the unwary” and could be used “as a potential means of economic oppression,”³⁹ many courts favored arbitration as a general matter.⁴⁰

Moreover, Carrington and Haagen suggest that Congress intended the FAA to apply to sophisticated businesses and not to stifle Progressive-era concerns for the weak and vulnerable.⁴¹ Indeed, the FAA excluded employment contracts of certain transportation workers from its scope.⁴² While the FAA’s true purpose may prove to be evasive, legislators are currently attempting to resolve the debate. As Part V will discuss in more detail, congressional lawmakers, acting in response to the Court’s ruling in *Concepcion*, have introduced a bill—the Arbitration Fairness Act of 2011⁴³—that would amend the FAA. Among the bill’s findings is a provision stating that the FAA “was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.”⁴⁴ Certainly, *Concepcion*’s supporters will likely view this statement as a blatant example of revisionist history. But at a minimum, this statement, along with research

³⁶ Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 339.

³⁷ *Id.* at 341 (emphasis omitted) (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 407 (2d Cir. 1959)) (internal quotation marks omitted).

³⁸ See *Concepcion*, 131 S. Ct. at 1757 (Breyer, J., dissenting) (noting that some courts “refus[ed] to order specific performance of agreements to arbitrate”).

³⁹ Carrington & Haagen, *supra* note 36, at 340, 343.

⁴⁰ See *id.* at 339 (explaining that “arbitration was widely favored in America”); see also IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 19 (1992) (“[C]ontrary to modern folklore . . . the premodern statutory law of arbitration was largely supportive of that institution, as was the common law.”).

⁴¹ Carrington & Haagen, *supra* note 36, at 344.

⁴² Bruhl, *supra* note 26, at 1431.

⁴³ S. 987, 112th Cong. (2011).

⁴⁴ *Id.* § 2(1).

such as Carrington and Haagen's, demonstrates the considerable disagreement over the majority opinion's historical account of the FAA.

Finally, one important feature of the historical period during which Congress enacted the FAA is that federal courts were still operating under the *Swift v. Tyson* regime, which applied general federal common law to the types of commercial contracts that included arbitration provisions.⁴⁵ It would be another thirteen years before the Court would require that state law be applied in federal-diversity contract disputes.⁴⁶ With this in mind, any attempt to recreate Congress's intent with respect to the savings clause in diversity suits takes a bit of creativity.⁴⁷ As I discuss below, much of the debate surrounding the savings clause focuses on how much latitude it affords the states in invalidating arbitration agreements. But given that Congress may have not had state contract law in mind at the time of enactment,⁴⁸ a determination of Congress's intent regarding the statute's deference to that law may be a Sisyphean task.

B. Case Law Interpreting the FAA

In the decades since the FAA's enactment, the Supreme Court has heard numerous challenges to its applicability.⁴⁹ And in response to these challenges, the Court has ruled in favor of the party requesting

⁴⁵ 41 U.S. 1, 19 (1842). The *Swift* court held that the interpretation and effect of "contracts and other instruments of a commercial nature . . . are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence." *Id.* at 19. For a discussion of the expansion and eventual displacement of the *Swift* doctrine, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 550-64 (6th ed. 2009).

⁴⁶ See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State.").

⁴⁷ Cf. Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1238 (2011) ("[T]he 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.").

⁴⁸ See 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, 811 (2004) ("[T]he FAA was enacted in the shadow of *Swift v. Tyson*, meaning that the enacting Congress would not have expected federal courts to apply any state common law.").

⁴⁹ Much of the FAA jurisprudence has focused on the arbitrability of particular statutory claims, see, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), and the appropriate procedural interplay between the courts and the arbitrator, see, e.g., *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

arbitration virtually every time,⁵⁰ displaying in some cases a *Lochner*-esque approach to the freedom of contract.⁵¹ While an extended discussion of the FAA jurisprudence exceeds the scope of this Comment, this Section will discuss several early decisions that helped shape the Court's reasoning in *Concepcion*, as well as the Court's previous encounters with class arbitration in the FAA context.

The modern Court's policy toward the enforcement of arbitration clauses has its roots in two key decisions from the Burger Court. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, Justice Brennan set the standard for future FAA cases: "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."⁵² A year later, in *Southland Corp. v. Keating*, a majority of the Court held that in creating a federal substantive law of arbitrability, Congress intended for the FAA to apply not only in federal courts, but also in state courts.⁵³ Furthermore, the Court explained that the policy from *Moses H. Cone* aimed to "foreclose state legislative attempts to undercut the enforceability of arbitration agreements."⁵⁴ Thus, when the Court applied this policy to a California statute that required judicial consideration of claims arising from a franchise agreement, it held that the FAA preempted the statute, notwithstanding the fact that the appeal came from the California Supreme Court.⁵⁵

Yet the majority's view that the FAA applies to state courts was met with considerable resistance, and ironically, the debate over *Southland*

⁵⁰ See Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1092 (2011) ("[T]he modern Court has never yet met an arbitration clause that it didn't like.").

⁵¹ In *Lochner v. New York*, the Supreme Court held that a New York state law limiting employment in bakeries to sixty hours a week and ten hours a day was "arbitrary interference" with the freedom to contract. 198 U.S. 45, 46, 63 (1905). Justice Holmes, in his well-known dissent, criticized the Court's promotion of economic due process, stating that "the 14th Amendment does not enact Mr. Herbert Spencer's Social Statics" (i.e., a nineteenth-century English work advocating laissez-faire philosophies). *Id.* at 75 (Holmes, J., dissenting). But as Carrington and Haagen suggest, a variation of economic due process is reemerging via the FAA. See Carrington & Haagen, *supra* note 36, at 338 ("Herbert Spencer's *Social Statics*, so long lost from constitutional law, has been found by the Court to be alive and well and residing in the Federal Arbitration Act of 1925." (footnote omitted)).

⁵² 460 U.S. 1, 24 (1983).

⁵³ 465 U.S. 1, 12 (1984). Previously, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, this issue had been raised but left "up in the air." 388 U.S. 395, 424 (1967) (Black, J., dissenting).

⁵⁴ *Southland*, 465 U.S. at 16.

⁵⁵ *Id.* at 5, 16-17.

may still be affecting the Court's modern-day certiorari decisions, such as its decision to hear *Concepcion*. In *Southland*, Justice O'Connor penned a vigorous dissent, arguing that the legislative history of the FAA demonstrated Congress's unambiguous intention for the statute to apply only in federal court.⁵⁶ The academic literature on the history of the FAA tends to support her view.⁵⁷ Her argument, moreover, has received subsequent support from conservative justices. Justice Scalia has written that he "stand[s] ready to join four other Justices in overruling [*Southland*],"⁵⁸ and Justice Thomas has subscribed to this view as recently as 2008.⁵⁹ If *Concepcion* had been an appeal from a state court, then it is uncertain whether the FAA would have applied *at all*, because the Court, particularly Justices Scalia and Thomas, might have felt obliged to reconsider the majority's view in *Southland*.⁶⁰ But it is perhaps no coincidence that the Court consistently rejected certiorari petitions involving unconscionability rulings in state courts, and instead waited to grant certiorari to *Concepcion*, a Ninth Circuit case interpreting California law.⁶¹ As one commentator has put it, the Court's current certiorari process enables it to "wait for the right vehicles in which to make law," and a federal case, like *Concepcion*, was an ideal vehicle through which the Court could advance its FAA agenda.⁶²

⁵⁶ *Id.* at 25 (O'Connor, J., dissenting). Justice O'Connor opined in *Southland*, "One rarely finds a legislative history as unambiguous as the FAA's. That history establishes conclusively that the 1925 Congress viewed the FAA as a procedural statute, applicable only in federal courts." *Id.*

⁵⁷ In a detailed account of the FAA's history, Ian Macneil verifies O'Connor's opinion, writing that *Southland* "is an Orwellian object lesson in the potential and often actual unreliability of the legislative history of judges rationalizing results in cases." MACNEIL, *supra* note 40, at 144; *see also* Carrington & Haagen, *supra* note 36, at 380 (describing the majority's opinion in *Southland* as "an extraordinarily disingenuous manipulation of the history of the 1925 Act").

⁵⁸ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting).

⁵⁹ *See* *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (Thomas, J., dissenting) (listing his previous dissenting opinions in which he argues that the FAA does not apply to arbitration clauses being analyzed in state courts).

⁶⁰ *See* Aaron Bruhl, *AT&T v. Concepcion and Adherence to Minority Views*, PRAWFSBLAWG (May 5, 2011, 1:50 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/05/atts-long-game-on-arbitration.html> (exploring a range of possible outcomes the Court might have reached regarding FAA preemption had *Concepcion* originated in state court).

⁶¹ *See* Aaron Bruhl, *AT&T's Long Game on Unconscionability*, PRAWFSBLAWG (May 5, 2011, 9:40 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/05/atts-long-game-on-unconscionability.html> ("[C]ompanies trying to enforce the clauses filed plenty of petitions . . . asking the Supreme Court to slam the door on unconscionability challenges. They were all denied.").

⁶² *Id.*

Following *Southland*, the savings clause itself received much closer scrutiny. In *Perry v. Thomas*, the Court again addressed the validity of a California statute that authorized judicial determinations “without regard to the existence of any private agreement to arbitrate.”⁶³ Given the holding in *Southland*, the Court had no reservations about preempting the state statute.⁶⁴ Yet the Court’s dicta in *Perry* provided an important explanation of the savings clause, an explanation that would later factor prominently in the Court’s treatment of the *Discover Bank* rule in *Concepcion*. In a footnote, the *Perry* Court emphasized that when litigants use traditional state law defenses to revoke a contract, those principles—such as duress, fraud, or unconscionability—must be applied uniformly to “any contract.”⁶⁵ In other words, if a state court’s unconscionability doctrine is applied differently to arbitration agreements than it is to other contracts, then the Supremacy Clause⁶⁶ requires that the FAA preempt the state court’s attempt to regulate the law of arbitrability.

Although the subject of class arbitration made fleeting appearances in these early cases,⁶⁷ the Court did not confront a question specifically involving class procedures in arbitration until 2003 in *Green Tree Financial Corp. v. Bazzle*.⁶⁸ Unfortunately, the *Bazzle* ruling yielded no majority opinion and left several key questions unanswered. In *Bazzle*, the defendant argued that class arbitration was impermissible in a proceeding that left it liable for over \$20 million in statutory damages.⁶⁹ Prior to the Court’s review, the South Carolina Supreme Court ruled that class arbitration was permissible because the contracts were silent on that subject.⁷⁰ On appeal, instead of deciding whether class arbitration could occur when contracts were silent, and rather than discussing the practical consequences of class arbitration, the Court simply ruled that

⁶³ 482 U.S. 483, 484 (1987) (quoting CAL. LAB. CODE § 229 (West 1971)) (internal quotation marks omitted).

⁶⁴ *See id.* at 491 (“[C]lear federal policy places § 2 of the Act in unmistakable conflict with California’s § 229 requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the state statute must give way.”).

⁶⁵ *Id.* at 492 n.9 (quoting 9 U.S.C. § 2 (1982)).

⁶⁶ U.S. CONST. art. VI, cl. 2.

⁶⁷ *See Southland Corp. v. Keating*, 465 U.S. 1, 9 & n.4 (1984) (highlighting the California Supreme Court’s conclusion that imposing a class action structure on the arbitration was acceptable, but refusing to determine whether such a conclusion would be contrary to the FAA because the state supreme court had not reached this latter question).

⁶⁸ 539 U.S. 444 (2003) (plurality opinion).

⁶⁹ *Id.* at 449.

⁷⁰ *Id.* at 450.

the arbitrator, and not the court, should decide whether the parties intended to permit class proceedings.⁷¹ Moreover, only a plurality of Justices joined the *Bazzle* holding,⁷² with four Justices dissenting⁷³ and Justice Stevens concurring on alternate grounds.⁷⁴

During the 2009 Term, the Court finally took up the issue of class arbitration in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*⁷⁵ Picking up where *Bazzle* left off, the Court took up the question of whether class arbitration can be imposed on parties when the “arbitration clause [is] ‘silent’ on that issue.”⁷⁶ Here, the Court decided it could not.⁷⁷

The arbitration agreement in *Stolt-Nielsen* was part of a contract, originally drafted in 1950, between several businesses and a group of shipping companies.⁷⁸ The agreement said nothing about class proceedings.⁷⁹ In the arbitration literature, scholars have referred to such an agreement as a “first-generation arbitration clause[.]” because it included neither a class action waiver (as would a “second-generation clause[.]”) nor contractual provisions intended to make the arbitration agreement seem more consumer-friendly (as would a “third-generation clause[.]”).⁸⁰ Despite this silence, an arbitration panel in *Stolt-Nielsen* had previously decided that class proceedings in arbitration would be appropriate.⁸¹

The Supreme Court, however, disagreed with the panel, holding that an arbitrator could decide “procedural questions which grow out of the dispute,” but that class arbitration was not such a question.⁸² In

⁷¹ *Id.* at 452-53. Bruhl has characterized this decision as an example of “the ultimate trump card in the unconscionability game” because it allowed the Court both to avoid ruling on a difficult question of state contract law and to avoid creating a federal common law of contracts. Bruhl, *supra* note 26, at 1470, 1475-77.

⁷² 539 U.S. at 447.

⁷³ *Id.* at 455 (Rehnquist, C.J., dissenting); *id.* at 460 (Thomas, J., dissenting).

⁷⁴ *Id.* at 454-56 (Stevens, J., concurring).

⁷⁵ 130 S. Ct. 1758 (2010).

⁷⁶ *Id.* at 1764.

⁷⁷ *Id.* at 1776-77.

⁷⁸ *Id.* at 1764-65.

⁷⁹ *Id.* at 1766.

⁸⁰ Nagareda, *supra* note 50, at 1106.

⁸¹ 130 S. Ct. at 1766.

⁸² *Id.* at 1775 (quoting *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002)). It is uncertain whether *Stolt-Nielsen* overrules *Bazzle*. The majority in *Stolt-Nielsen* noted that *Bazzle* only retained a plurality, *id.* at 1771-72, and—while it might be a moot point after *Concepcion*—*Stolt-Nielsen* seems to open the door to future challenges regarding whether courts or arbitrators should determine the parties’ intent in allowing class arbitration. See John Elwood, *After Stolt-Nielsen v. AnimalFeeds Int’l Corp.: Deciding*

Justice Alito's majority opinion, the Court stressed that a "basic precept" of the FAA is that "arbitration 'is a matter of consent, not coercion.'"⁸³ The Court then concluded that the arbitration agreement did not exhibit any explicit or implied intent by the parties to consent to class arbitration proceedings.⁸⁴ On the issue of implied consent, the Court stated that "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it."⁸⁵ Additionally, the Court explained that class proceedings would invite several "fundamental changes" to the arbitration by adjudicating the rights of absent parties and transforming the dispute into a high-stakes showdown with limited judicial review.⁸⁶

As I will discuss in Part IV, this language from *Stolt-Nielsen*, which *Concepcion* subsequently adopted, is difficult to reconcile with other recent decisions involving aggregate proceedings. But while *Stolt-Nielsen*'s statements controlled agreements that were silent on class arbitration, the holding did not address whether the doctrine of unconscionability could be used to invalidate class action waivers found in second- and third-generation arbitration agreements. The next Part will discuss several of the unconscionability cases that were brewing in the lower courts and that eventually prompted the Court to grant certiorari in *Concepcion*.

II. THE UNCONSCIONABILITY OF CLASS ACTION WAIVERS IN STATE AND FEDERAL COURTS

Although the Supreme Court had established in *Southland* and later cases that attempts by state legislatures to undercut the FAA would be preempted, plaintiffs seeking to avoid the enforcement of their arbitration agreements still had a shield to use against defendants who moved to compel arbitration. State courts were free to provide relief based on the explicit terms of the savings clause. The savings clause permits courts to invalidate arbitration agreements on the basis of

When Class Arbitration Is Permissible, VOLOKH CONSPIRACY (Apr. 27, 2010, 5:35 PM), <http://volokh.com/2010/04/27/after-stolt-nielsen-v-animalfeeds-intl-corp-deciding-when-class-arbitration-is-permissible> (noting that *Stolt-Nielsen* and *Bazze* fail to resolve the question of whether the arbitrator or the court decides if an agreement permits class arbitration).

⁸³ *Stolt-Nielsen*, 130 S. Ct. at 1773 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

⁸⁴ *Id.* at 1775.

⁸⁵ *Id.*

⁸⁶ *Id.* at 1776.

generally applicable contract defenses.⁸⁷ Recognizing this fact, plaintiffs argued that class action waivers were unconscionable because their use in contracts of adhesion increased the chances that businesses would avoid liability for consumer fraud or employment discrimination in the small claims setting.⁸⁸ Ultimately, state and circuit courts divided on the unconscionability issue, with the courts of up to twenty states constructing barriers against businesses' use of these waivers.⁸⁹

A. *Unconscionability in the Lower Courts*

Unconscionability, a ground that “exist[s] at law or in equity for the revocation of any contract,”⁹⁰ is a common law principle that differs from state to state. As with any common law contract doctrine, it requires a fact-specific inquiry. Therefore, the disparities among courts on the issue of class action waivers are not surprising.⁹¹ Nevertheless, almost all courts subscribe to several common principles of unconscionability. For example, the defending party usually must prove both procedural and substantive unconscionability—with the procedural aspect relating to defects in the bargaining and the substantive aspect relating to harsh or one-sided terms.⁹² Also, courts often apply a sliding scale approach, meaning that the more procedurally unconscionable a contractual provision is, the less substantively unconscionable it must be, and vice versa.⁹³ In light of these common principles, as we will see, varying attitudes toward class actions, not differing approaches to unconscionability, best explain the disparate results across states and circuits.

California pioneered the use of unconscionability to protect individuals from class action waivers. One of the earliest invalidations of a

⁸⁷ See *supra* text accompanying notes 28 and 65.

⁸⁸ See *supra* note 13.

⁸⁹ Brief for Respondents at 1, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 4411292, at *1; see also *id.* app. at 1a-3a (listing the twenty states and corresponding decisions that have invalidated class action waivers).

⁹⁰ 9 U.S.C. § 2 (2006).

⁹¹ One reason courts have not applied the doctrine uniformly is that they have struggled to develop an exact definition for unconscionability. One commentator has noted, “That the term is incapable of precise definition is a source of both strength and weakness.” 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS 581 (3d ed. 2004). Unconscionability, however, is commonly defined as “an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.” *Id.* at 582 (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)) (internal quotation marks omitted).

⁹² *Id.* at 582-88.

⁹³ *Id.* at 585.

class action waiver occurred in *Szetela v. Discover Bank*.⁹⁴ In *Szetela*, the California Court of Appeals found that the class action waiver at issue was procedurally unconscionable because it was offered on a “take it or leave it” basis.⁹⁵ Furthermore, the *Szetela* court held that “[t]he manifest one-sidedness . . . [was] blindingly obvious” because the class action waiver would certainly not harm the defendant, Discover Bank.⁹⁶ Not only was the provision unconscionable, but it was also against public policy because it granted Discover Bank “a ‘get out of jail free’ card while compromising important consumer rights.”⁹⁷ In other words, the inclusion of the waiver undermined a consumer’s right to have his deceptive business practices claim adjudicated. Notably, the appeals court did not face an FAA preemption challenge in the case.

Three years later, the California Supreme Court decided the seminal case on the issue of unconscionability and laid down the three-part test that the Ninth Circuit subsequently used in *Concepcion*. In *Discover Bank v. Superior Court*, the court held that, in at least some instances, class action waivers are unconscionable.⁹⁸ Specifically, the court acknowledged that “[c]lass action and arbitration waivers are not, in the abstract, exculpatory clauses,” that is clauses that would relieve the defendants from liability.⁹⁹ The *Discover Bank* court nevertheless concluded that, in practice, these waivers are “indisputably one-sided.”¹⁰⁰ The court then laid out its three-part test, holding that class action waivers are unconscionable under California law if (1) “the waiver is found in a consumer contract of adhesion”; (2) the setting “predictably involve[s] small damages”; and (3) “it is alleged that the party with superior bargaining power has [attempted] to deliberately cheat large numbers of consumers out of individually small sums of money.”¹⁰¹ Under these conditions, the Court reasoned, the agree-

⁹⁴ 118 Cal Rptr. 2d 862 (Ct. App. 2002).

⁹⁵ *Id.* at 867.

⁹⁶ *Id.*

⁹⁷ *Id.* at 868.

⁹⁸ 113 P.3d 1100, 1108 (Cal. 2005). The dispute in *Discover Bank* involved claims by credit cardholders who had been charged late fees. *Id.* at 1103. Although the cardholders made payments on the specified day, they did not make them by a certain unspecified time—a time which the credit card company used to assess fees. *Id.*

⁹⁹ *Id.* at 1108.

¹⁰⁰ *Id.* at 1109.

¹⁰¹ *Id.* at 1110. The court explained that the waiver, by satisfying these three criteria, violated the state’s prohibition against “contract clauses that are contrary to public policy.” *Id.* at 1108; *see also* CAL. CIV. CODE § 1668 (West 2009) (“All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether

ment violated the state's statutory provisions against unconscionable and exculpatory contracts, noting additionally that "class actions and arbitrations are . . . inextricably linked to the vindication of substantive rights."¹⁰²

In *Discover Bank*, the California Supreme Court also reversed the appeals court's conclusion that the FAA preempted California's policy regarding class action waivers.¹⁰³ The court explained that "the principle that class action waivers are, under certain circumstances, unconscionable . . . does not specifically apply to arbitration agreements, but to contracts generally."¹⁰⁴ For support, the court cited its decision in *America Online, Inc. v. Superior Court*,¹⁰⁵ which also found a class action waiver unenforceable, though outside the arbitration context.¹⁰⁶ As noted earlier, the U.S. Supreme Court, in its explanation of the savings clause in *Perry*, warned against discriminatory applications of general contract principles to arbitration agreements.¹⁰⁷ But because the *America Online* case showed that California's unconscionability test was not limited to the arbitration context, the admonition in *Perry* would presumably not apply. Thus, under this interpretation, the unconscionability test in *Discover Bank* would fall squarely into the acceptable parameters of the savings clause.

Finally, the *Discover Bank* court commented on the use of class arbitration. Although class arbitration is not an optimal form of dispute resolution, the court said it "must be evaluated, not in relation to some ideal but in relation to its alternatives."¹⁰⁸ In other words, while class arbitration may have its flaws, if the alternative is to foreclose consumer rights, then courts must consider compelling class arbitration.

Although several other state courts had invalidated similar class action waivers before *Discover Bank*,¹⁰⁹ many courts adopted the California

willful or negligent, are against the policy of the law."). California law also includes a statutory prohibition against unconscionable contracts. *See id.* § 1670.5 (allowing courts to "limit the application of any unconscionable clause").

¹⁰² *Discover Bank*, 113 P.3d at 1109.

¹⁰³ *Id.* at 1110.

¹⁰⁴ *Id.* at 1112.

¹⁰⁵ 108 Cal. Rptr. 2d 699 (Ct. App. 2001).

¹⁰⁶ *Discover Bank*, 113 P.3d at 1106-07, 1112.

¹⁰⁷ *See supra* note 65 and accompanying text.

¹⁰⁸ *Id.* at 1116 (quoting *Keating v. Superior Court*, 645 P.2d 1192, 1209 (Cal. 1982), *rev'd sub nom.* *Southland Corp. v. Keating*, 465 U.S. 1 (1984)).

¹⁰⁹ *See, e.g., Leonard v. Terminix Int'l Co.*, 854 So. 2d 529, 538-39 (Ala. 2002) (invalidating a class action waiver in a termite protection contract); *State ex rel. Dunlap v. Berger*, 567 S.E.2d 265, 282-84 (W. Va. 2002) (finding a class action waiver in an insurance contract unenforceable).

Supreme Court's reasoning after the ruling.¹¹⁰ Some state courts have gone to even greater lengths to show that they will find a class action waiver unconscionable only if it is indeed exculpatory. For example, the New Jersey Supreme Court invalidated a class action waiver involving small claims on the same day it enforced a provision involving no small claims.¹¹¹ This is not to say that state and federal courts have uniformly invalidated class action waivers, however. Numerous states and circuits have enforced the waivers pursuant to the explicit terms of the arbitration agreement without regard to the size of the claim.¹¹²

In addition to the decisions that view class action waivers "through the prism of state unconscionability law,"¹¹³ several circuit courts have utilized a somewhat different analysis, albeit one that produces essentially the same result. Rather than apply state contract law principles, these circuits have analyzed the friction between class action waivers and statutes that rely primarily on private enforcement and class actions to achieve public policy goals, such as the Sherman Act.¹¹⁴ While several circuits have found that class action waivers do not conflict with the statutory schemes at issue,¹¹⁵ both the First and Second Cir-

¹¹⁰ See, e.g., *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 984 (9th Cir. 2007) (applying *Discover Bank's* three-part test to Cingular's class arbitration waiver and finding it "both procedurally and substantively unconscionable"); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1006 (Wash. 2007) (finding that the "class action is often the only effective way to halt and redress . . . exploitation" of consumers by companies (quoting *Discover Bank*, 113 P.3d at 1105)).

¹¹¹ Compare *Muhammad v. Cnty. Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 99-101 (N.J. 2006) (invalidating the waiver at issue where each plaintiff's claim was so small that it was unlikely that individuals would bring suit), with *Delta Funding Corp. v. Harris*, 912 A.2d 104, 115 (N.J. 2006) (upholding a waiver in a suit for over \$100,000 in damages in which the plaintiff had "adequate incentive" to bring an individual suit).

¹¹² See *supra* note 20; see also, e.g., *Johnson v. W. Suburban Bank*, 225 F.3d 366, 369 (3d Cir. 2000) (concluding that the right to bring a class action can be contractually waived); *Stenzel v. Dell, Inc.*, 870 A.2d 133, 143-45 (Me. 2005) (enforcing a class action ban under Texas law and determining that the "one-sided aspects of the arbitration provision [do not] render it unconscionable"); *Walther v. Sovereign Bank*, 872 A.2d 735, 750-51 (Md. 2005) (upholding a class action ban under Maryland law and noting the "strong policy, made clear in both federal and Maryland law, that favors the enforcement of arbitration agreements").

¹¹³ *Kristian v. Comcast Corp.*, 446 F.3d 25, 63 (1st Cir. 2006).

¹¹⁴ See, e.g., *In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 196-98 (2d Cir. 2011) (highlighting the importance of class actions for plaintiffs vindicating their rights under antitrust statutes).

¹¹⁵ See, e.g., *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (enforcing a class action waiver in a dispute involving claims under the Fair Labor Standards Act and rejecting plaintiffs' argument that the waiver "deprive[d] them of substantial rights guaranteed by [that Act]"); *Snowden v. Checkpoint Check Cashing*, 290 F.3d 631, 638-39 (4th Cir. 2002) (enforcing a waiver in a dispute involving

cuits have invalidated class action waivers using a “statutory rights analysis.”¹¹⁶ Under this analysis, courts refuse to enforce class action waivers if the foreseeable result is plaintiffs’ inability to vindicate their statutory rights in arbitration. For instance, in an antitrust suit, if class proceedings are not available, then a plaintiff’s claim could be cost-prohibitive because of the great expense of hiring an economist as an expert witness. On these facts, the Second Circuit declared a class action waiver unenforceable.¹¹⁷ As Part V will explain, cases relying on a statutory rights analysis appear to survive the *Concepcion* decision.

B. *Pre-Concepcion Commentary and the Procedure/Substance Divide*

Before the Court granted certiorari in *Concepcion*, courts striking down class action waivers had been the subject of critical reviews in the arbitration literature.¹¹⁸ Nevertheless, these early criticisms began to shed light on how courts were incorporating state aggregation policies—policies relating to the aggregation of claimants in a class action or collective action—into their rulings.

Despite the California Supreme Court’s assertion that its rule against unconscionable class action waivers applied generally to all contracts and not just arbitration agreements, several commentators claim that the California courts were not actually practicing what they preached. For example, Michael McGuinness and Adam Karr contend that the California courts were applying a “heightened standard of unconscionability in the arbitration context”¹¹⁹ and that they “ha[d] taken the FAA’s ‘savings clause’ where no court ha[d] gone before.”¹²⁰ While

Truth in Lending Act claims and finding “no limitations upon the substantive remedies available to [the plaintiff] in arbitration”).

¹¹⁶ See, e.g., *In re Am. Express*, 634 F.3d at 197-99 (invalidating a class action waiver as inconsistent with the Sherman and Clayton Acts because it “preclude[d] plaintiffs from enforcing their statutory rights”); *Kristian*, 446 F.3d at 59, 61 (invalidating a class action waiver on the basis that Comcast would be “essentially shielded from private consumer antitrust enforcement liability” if the agreement were upheld).

¹¹⁷ See *In re Am. Express*, 634 F.3d at 197-98 (“[T]he cost of plaintiffs’ individually arbitrating their dispute with Amex would be prohibitive, effectively depriving plaintiffs of the statutory protections of the antitrust laws.”).

¹¹⁸ See, e.g., 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 (arguing that California courts were “accomplish[ing] what the FAA commands cannot be done . . . all under the guise of a ‘generally applicable contract defense’” (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996))).

¹¹⁹ *Id.* at 81.

¹²⁰ *Id.* at 62.

the authors limited their analysis primarily to employment disputes, they concluded that the California courts were demonstrating an antiquated form of hostility toward arbitration agreements.¹²¹

Such arguments may also have empirical support. Stephen Broome's analysis of California Courts of Appeal cases from 1982 to 2006 found that unconscionability challenges to provisions in arbitration agreements were about five times more successful than unconscionability challenges in the nonarbitration context.¹²² He argues that during this time, the California courts strayed from their traditional "shock[s] the conscience" analysis.¹²³ However, Professor Aaron-Andrew Bruhl countered such evidence by arguing that this aggregate data may indicate that the arbitration agreements at issue were indeed much more one-sided than other agreements.¹²⁴

Although these studies do not delve into great detail about aggregation policies, they suggest that courts are intertwining policy decisions regarding class actions with these unconscionability analyses. The intermingling of substantive and procedural policy discussions by the courts is not necessarily undesirable. Rather, perhaps it is scholars' dismay with this intermingling that should cause concern. For instance, Broome writes, "The California courts presume that the procedural limitation will have substantive consequences."¹²⁵ Likewise, Professor Richard Nagareda argues that although "nominally cast in terms of unconscionability, the court's analysis [in *Discover Bank*] ulti-

¹²¹ See *id.* at 61 ("[T]he same judicial hostility ostensibly thwarted eighty years ago continues today, albeit in a more subtle—but equally hostile—form").

¹²² 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, 44-48 (2006). Broome's research showed that "unconscionability challenges succeeded in about fifty-eight percent of cases in the arbitration context," whereas such challenges in the nonarbitration context "succeeded only eleven percent of the time." *Id.* at 47-48.

¹²³ *Id.* at 53 (quoting *Hicks v. Superior Court*, 8 Cal. Rptr. 3d 703, 714 (2004)) (internal quotation marks omitted).

¹²⁴ See Bruhl, *supra* note 26, at 1457 ("The fact that arbitration agreements were more often held unconscionable may simply reflect the fact that during the relevant period they really *were*, on average, more unfair than other types of challenged agreements . . .").

¹²⁵ Broome, *supra* note 122, at 57. Some judges have also voiced skepticism about the effect of class action waivers on substantive rights. See, e.g., *Strand v. U.S. Bank Nat'l Ass'n N.D.*, 693 N.W.2d 918, 927 (N.D. 2005) (reasoning that these waivers are not unconscionable because the plaintiff "retains all substantive remedies he would otherwise have without the 'no class action' provision").

mately speaks to the distortion that a foreclosure of aggregation might work . . . upon underlying substantive law.”¹²⁶

But, as I will explain in more detail in Part IV, this is exactly what state courts should be authorized to do.¹²⁷ Because class action decisions are often deeply rooted in substantive regulatory policies, neither the contract nor the FAA should limit a state in furthering its regulation of arbitration agreements in the small claims setting. In *Concepcion*, the Court finally had the opportunity both to resolve the class action waiver debate and to provide a candid discussion about the practical effect that class actions have on substantive rights and liabilities. The Court, however, failed to produce.

III. *AT&T MOBILITY V. CONCEPCION*: THE FAA AND THE CALIFORNIA COURTS COLLIDE

For the past decade, scholars have speculated as to how our nation’s highest court would eventually resolve the class action waiver debate.¹²⁸ The Court’s decision to intervene was a foregone conclusion—after all, lower courts’ unconscionability rulings and their heavy reliance on the FAA’s savings clause seemed to deviate starkly from the Court’s liberal policy favoring arbitration. But as one scholar had noted, the “pro-arbitration Supreme Court [found] itself in the position of having picked most of the low-hanging anti-arbitration fruit.”¹²⁹ In *Southland*, for example, once the Court decided that the FAA should apply in state courts, its invalidation of the state legislature’s blatant attempt to flout the FAA was a fairly simple task.¹³⁰ Judicial circumventions of the FAA, on the other hand, are harder to identify. Surely, the Court did not want to appear as if it was second-guessing state contract law principles. This hesitation may explain why the

¹²⁶ Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1901 (2006).

¹²⁷ Certainly, there is a further question about the appropriate allocation of policy discussions between state courts and state legislatures. However, state-level separations-of-powers concerns are beyond the scope of this Comment.

¹²⁸ See, e.g., Bruhl, *supra* note 26, at 1464-88 (proposing several strategies that the Supreme Court could use were it to grant certiorari to a lower court’s unconscionability ruling); Wilson, *supra* note 48, at 791-92 (providing four hypothetical holdings for a case like *Concepcion*).

¹²⁹ Bruhl, *supra* note 26, at 1467.

¹³⁰ See *id.* (explaining that the *Southland* decision “involved relatively clear questions of federal law”).

Court, over the last decade, has rejected dozens of certiorari petitions challenging lower court unconscionability rulings.¹³¹

Then along came the Ninth Circuit's ruling in *Concepcion*, and with it, an ideal set of facts for the Court to continue its predictable path in FAA cases. This Part will briefly summarize the facts underlying the *Concepcion* dispute and then discuss the Court's views regarding the enforceability of AT&T's class action waiver. As I will explain, the Court, in siding with AT&T—a company that prompts its customers to “rethink possible”¹³²—first considered, and then severely limited, the possibilities open to states that want to incorporate class proceedings into their regulatory policies.

A. Background of the Case

The underlying dispute in *Concepcion* centers on a cellular phone contract between Vincent and Liza Concepcion and AT&T Mobility. The Concepcions purchased cell phone service from AT&T and received two new cell phones as part of the agreement.¹³³ Though the Concepcions did not have to pay for the phones themselves, AT&T charged them \$30.22 in sales tax for the new devices.¹³⁴ In response, the Concepcions brought a claim in the Southern District of California and asserted that AT&T's advertisements for “free” phones were fraudulent.¹³⁵ The case was later consolidated with a putative class action against AT&T involving the same issues.¹³⁶ AT&T then moved to compel arbitration pursuant to the arbitration agreement between the parties.¹³⁷

At its core, the arbitration agreement between the Concepcions and AT&T was similar to the agreements at issue in previous California cases, such as *Szetela* and *Discover Bank*. The cell phone contract's arbitration clause and class action waiver read as follows: “You and AT&T agree that each may bring claims against the other only in your or its individual capacity, and not as a plaintiff or class member in any

¹³¹ See *id.* at 1466 (“Since 2000, there have been dozens of petitions . . . yet the court let them pass by . . .”).

¹³² *The Network of Possibilities*, AT&T, <http://www.att.com/rethinkpossible> (last visited Nov. 15, 2011).

¹³³ AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 1744-45.

purported class or representative proceeding.¹³⁸ Unlike the first-generation arbitration clause in *Stolt-Nielsen*, this agreement explicitly referenced class proceedings and could at first blush be referred to as a second-generation arbitration clause.¹³⁹

Yet the arbitration clause in *Concepcion* is more accurately categorized as a third-generation arbitration clause, because it “attempt[s] to respond in various ways to the lower-court invalidations of second-generation clauses.”¹⁴⁰ What was this attempted response? AT&T included “consumer-friendly”¹⁴¹ provisions that supposedly altered the cost calculation for plaintiffs. These additional provisions included, but were not limited to, a \$7500 payment if the arbitration award exceeded the last written settlement offer AT&T made prior to selecting an arbitrator; cost-free arbitration for nonfrivolous claims; double attorneys’ fees if the arbitrator awarded the customer more than AT&T’s last settlement offer; and the option of conducting the arbitration in person, over the phone, or solely on the filed papers.¹⁴²

Although AT&T claimed that the addition of “consumer-friendly” provisions would help consumers bring low-value claims to arbitration,¹⁴³ the clauses were almost certainly a strategic move by AT&T to avoid state unconscionability rulings and to strengthen its position on appeal. In fact, when AT&T’s codefendants petitioned for the Court to grant certiorari in *T-Mobile USA, Inc. v. Laster*, a 2007 case involving a second-generation provision, AT&T filed an amicus brief requesting that the Court *deny* its codefendants’ petition.¹⁴⁴ The amicus brief explained that AT&T had developed a new arbitration clause and that *Laster* was “a less than ideal vehicle for addressing whether States may refuse to enforce class waivers.”¹⁴⁵ Thus, as one commentator has noted, AT&T’s long-term litigation strategy enabled it to return to the Court in 2010 with a “much less messy case” based on “the right set of facts.”¹⁴⁶

¹³⁸ Brief for Respondents, *supra* note 89, at 3.

¹³⁹ See *supra* text accompanying note 80.

¹⁴⁰ Nagareda, *supra* note 50, at 1106.

¹⁴¹ Brief for Petitioner, *supra* note 11, at 1 (quoting *Makarowski v. AT&T Mobility, LLC*, No. 09-1590, 2009 WL 1765661, at *3 (C.D. Cal. June 18, 2009)).

¹⁴² *Id.* at 5-7.

¹⁴³ *Id.* at 5.

¹⁴⁴ See Brief of AT&T Mobility LLC as Amicus Curiae in Support of Neither Party at 4-7, *T-Mobile USA, Inc. v. Laster*, 553 U.S. 1064 (2008) (No. 07-976), 2008 WL 534808, at *4-7.

¹⁴⁵ *Id.* at 21.

¹⁴⁶ Bruhl, *supra* note 61.

Both the district and circuit courts held that AT&T's third-generation class action waiver was unenforceable. Although the district court initially found that the provisions in the arbitration agreement were an "adequate substitute" for consumers seeking class arbitration, it ultimately concluded that it had to invalidate the waiver because of deterrence considerations.¹⁴⁷ Applying the *Discover Bank* test, the district court reasoned that some putative class members might be unaware of any attempt to defraud consumers and that, without class proceedings, an adequate deterrent effect was lacking.¹⁴⁸ On appeal, the Ninth Circuit affirmed.¹⁴⁹ In particular, the Ninth Circuit analyzed whether the potential for a \$7500 premium payment actually altered the cost equation for plaintiffs.¹⁵⁰ On this issue, the court reasoned that "the maximum gain to a customer for the hassle of arbitrating a \$30.22 dispute is still just \$30.22."¹⁵¹ Realistically, AT&T would simply pay the face value of a claim rather than proceed to arbitration and face the likelihood of a \$7500 liability.¹⁵² The Ninth Circuit also concluded that preemption was not warranted because the *Discover Bank* rule was "simply a refinement of the unconscionability analysis applicable to contracts generally in California."¹⁵³

With this record in front of the Court, the Justices had several options. For instance, the Court could have deferred to California's decision to incorporate the availability of class proceedings into its regulatory policy. More generally, the Justices could have decided that this issue required them to wade too far into the intricacies of California's contract law and its unconscionability doctrine. Relying on federalism principles would presumably have been appealing to Justice Scalia. After all, it was he who wrote in a case involving a state's choice-of-law rules that the Court should leave such rules to the states, given that there was "no compass to guide [the Court] beyond [its] own perceptions of what seems desirable."¹⁵⁴ But the Court balked at both of

¹⁴⁷ *Laster v. T-Mobile USA, Inc.*, No. 05-1167, 2008 WL 5216255, at *10-14 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom. Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

¹⁴⁸ *Id.* at *12-13.

¹⁴⁹ *Laster*, 584 F.3d at 852.

¹⁵⁰ *Id.* at 855-56.

¹⁵¹ *Id.* at 856.

¹⁵² *Id.*

¹⁵³ *Id.* at 857 (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007)).

¹⁵⁴ *Sun Oil Co. v. Wortman*, 486 U.S. 717, 727-28 (1988).

these options and instead intruded on the states' prerogative to formulate class action policies.

B. *The Conception Opinions*

Like other recent FAA cases, *Concepcion* was a 5-4 decision.¹⁵⁵ Not surprisingly, the votes divided along traditional ideological lines, with the Justices volleying arguments about the FAA and the state's role in shaping arbitration procedures.

In the majority opinion, Justice Scalia frames his analysis by reiterating the “fundamental principle that arbitration is a matter of contract.”¹⁵⁶ He then discusses the Court's historical interpretation of the savings clause, focusing specifically on *Perry's* prohibition of discriminatory applications of state contract defenses such as unconscionability, and warning that “the act cannot be held to destroy itself.”¹⁵⁷ With these standards in place, Scalia reasons that even if the *Discover Bank* rule applied to “any” contract—and not just arbitration agreements—“the rule would have a disproportionate impact on arbitration agreements.”¹⁵⁸ As support, Justice Scalia references Broome's article on unconscionability statistics in California, albeit with the disclaimer that the statistics are “not definitive.”¹⁵⁹ Justice Scalia's opinion also suggests that if the Court were to allow states to condition the enforceability of arbitration agreements on the availability of class proceedings, then it would be obliged to allow states to demand other procedures in arbitration, such as judicially monitored discovery.¹⁶⁰

After critiquing the *Discover Bank* rule, Justice Scalia moves to a discussion of class arbitration, picking up where Justice Alito left off in *Stolt-Nielsen*. Here, Justice Scalia reiterates that the shift from individual to class proceedings introduces changes that are “fundamental,” including the introduction of absent parties, different procedures, and higher stakes.¹⁶¹ He then explains that class arbitration would

¹⁵⁵ Both *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010), and *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009), were 5-4 decisions.

¹⁵⁶ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (quoting *Rent-A-Center*, 130 S. Ct. at 2276) (internal quotation marks omitted).

¹⁵⁷ *Id.* at 1748 (quoting *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-228 (1998)).

¹⁵⁸ *Id.* at 1747.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 1750 (quoting *Stolt-Nielsen, S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010)) (internal quotation marks omitted).

“greatly increase[] risks to defendants” and reasons that this risk will force defendants to accept “in terrorem” settlements of questionable claims.¹⁶² Finally, the majority opinion concludes with a brief discussion of the claim-disabling effect of class action waivers in the small claims setting. But on this point, Justice Scalia gives short shrift to the Concepcions’ argument, stating that “[s]tates cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”¹⁶³

Justice Thomas filed a concurring opinion, in which he relies more closely on the text of the FAA than does Justice Scalia. According to Justice Thomas, Congress’s use of the word “revocation” in the savings clause and its “conspicuous omission of ‘invalidation’ and ‘nonenforcement,’” indicate that the savings clause carves out an exception for some, but not all, state contract defenses.¹⁶⁴ Because the *Discover Bank* rule was more akin to a rule prohibiting contracts against public policy, and not one that dealt with the making of the arbitration agreement, Justice Thomas concludes that the savings clause does not protect that rule.¹⁶⁵ Thus, under his interpretation, the *Discover Bank* rule warrants preemption.

In dissent, Justice Breyer attacks several of Justice Scalia’s propositions. On the facts, he asserts that the *Discover Bank* rule is not necessarily discriminatory toward class action waivers and cites various cases in which courts have upheld class action waivers under California law, despite unconscionability challenges.¹⁶⁶ On the FAA more generally, Justice Breyer also questions Justice Scalia’s assumption that a “fundamental attribute” of arbitration is its individualized, not class, nature.¹⁶⁷ Nothing in the FAA’s history, Justice Breyer contends, supports this conclusion.¹⁶⁸

Furthermore, Justice Breyer provides a defense of the Ninth Circuit’s view of the incentives to file suit in the small claims setting. Invoking Judge Richard Posner’s famous quote that “only a lunatic or a fanatic sues for \$30,” Justice Breyer explains that class proceedings can provide countervailing advantages to the parties, particularly

¹⁶² *Id.* at 1752.

¹⁶³ *Id.* at 1753.

¹⁶⁴ *Id.* at 1754 (Thomas, J., concurring).

¹⁶⁵ *Id.* at 1756.

¹⁶⁶ *Id.* at 1757 (Breyer, J., dissenting) (citing, e.g., *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 114 Cal. Rptr. 3d 449, 459-62 (Ct. App. 2010)).

¹⁶⁷ *Id.* at 1759.

¹⁶⁸ *Id.*

plaintiffs.¹⁶⁹ Justice Breyer, however, only briefly addresses the role of states in formulating aggregation policies by asking the majority, “[w]hy is this kind of decision—weighing the pros and cons of all class proceedings alike—not California’s to make?”¹⁷⁰ Ultimately, with an uncharacteristic recitation of federalist principles, Justice Breyer concludes that the majority has run afoul of the federalism goals contained in the FAA’s savings clause.¹⁷¹

C. *An Initial Critique of the Reasoning in Concepcion*

By and large, the initial response to *Concepcion* among policymakers, media outlets, and the legal community was negative. Several commentators, for example, lambasted the Court for its “devastating blow to consumer rights,” and Justice Scalia, in particular, for the “selective nature of his brand of originalism.”¹⁷² In contrast, some commentators welcomed the opinion, claiming that *Concepcion* was a step in the right direction in a world in which plaintiffs’ attorneys have exploited the claims of class members with injustices such as coupon settlements.¹⁷³ This Section will offer a brief critique of several of the opinion’s key points before explaining the larger doctrinal problems with the Court’s views of class actions in Part IV.

The Court’s “Contract” Approach. On the surface, the majority’s approach constitutes an emphatic promotion of contract autonomy. Indeed, the thrust of the Court’s class arbitration criticisms is based on the idea that the defendants would not have willingly agreed to arbi-

¹⁶⁹ *Id.* at 1761 (quoting *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1762.

¹⁷² Editorial, *Gutting Class Action*, N.Y. TIMES, May 13, 2011, at A26; see also Erwin Chemerinsky, Op-Ed., *Supreme Court: Class (Action) Dismissed*, L.A. TIMES, May 10, 2011, at A11, available at 2011 WLNR 9250480 (contending that, after *Concepcion*, it is “increasingly a myth that an injured person can sue”).

¹⁷³ See, e.g., Lawrence W. Schonbrun, *Supreme Court Ruling Is Not Bad News for Consumers, the Class Action System Is the Real Culprit*, HUFFPOST POLITICS (May 19, 2011, 2:42 PM), http://www.huffingtonpost.com/lawrence-w-schonbrun/supreme-court-ruling-is-n_b_862491.html (“Consumers need real protection from nefarious corporate behavior, not the class action runaround that only benefits the lawyers.”). The term “coupon settlement” refers to class action settlements that award class members worthless coupons, which are rarely redeemed, and that award class counsel generous attorneys’ fees. For a discussion of the social legitimacy problems emerging from these settlements and the resulting political pressures for Congress, see David Marcus, *Response, Attorneys’ Fees and the Social Legitimacy of Class Actions*, 159 U. PA. L. REV. PENNUMBRA 157, 164-66 (2011), <http://www.pennumbra.com/responses/02-2011/Marcus.pdf>.

trate if they knew they could be subject to the disadvantages of class proceedings.¹⁷⁴ But contract autonomy is a two-way street. Practically speaking, the Court's enforcement of AT&T's class action waiver can hardly be construed as promoting autonomy because, like most class action waivers, it was contained in a contract of adhesion. In fact, in explaining the scope of the *Discover Bank* rule, Justice Scalia states that "the times in which consumer contracts were anything other than adhesive are long past."¹⁷⁵ This concession is rather puzzling in light of the FAA's contract-promoting goals.¹⁷⁶ Furthermore, even if the autonomy of both parties is enhanced, *Concepcion* steers the Court closer to its *Lochner*-era jurisprudence, in which the Court often prioritized economic liberty over sensible and socially desirable regulation.¹⁷⁷ Class actions can help further such regulation. But after *Concepcion*, states have limited power to incorporate class proceedings into their regulatory structures.

The Scope of the FAA's Savings Clause. There is no question that an overly expansive reading of the savings clause could threaten to "destroy [the Act] itself."¹⁷⁸ The problem, though, is that the majority uses this admonition to justify its broad-sweeping and overinclusive FAA principles. As one scholar explained before the *Concepcion* decision, a "remarkable aspect of the [Court's FAA jurisprudence] is its formalism: it does not matter *why* a state . . . singles out arbitration, just that it does so."¹⁷⁹ Perhaps the Court's FAA approach could yield better results if it examined whether the state rule "rest[s] on generalizations about arbitration's inadequacy as a dispute resolution process."¹⁸⁰ Unfortunately, the current approach is more of an

¹⁷⁴ See *Concepcion*, 131 S. Ct. at 1752 ("We find it hard to believe that defendants would bet the company with no effective means of review . . .").

¹⁷⁵ *Id.* at 1750.

¹⁷⁶ See Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts* 40 (George Wash. Univ. Legal Studies Research, Paper No. 547, 2011), available at http://ssrn.com/abstract_id=1809005 ("[T]he Court [in *Concepcion*] commits contradictions that manifest a lack of understanding of contract law and even life. Most strikingly: on one page Justice Scalia observes that consumer contracts are totally 'adhesive' today yet on the very next page strikes the California law because the aggregate actions it ordains are not 'consensual.'" (quoting *Concepcion*, 131 S. Ct. at 1750-51)).

¹⁷⁷ See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 620-21 (3d ed. 2006).

¹⁷⁸ *Concepcion*, 131 S. Ct. at 1748 (quoting *AT&T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227-28 (1998)); see also *supra* note 157 and accompanying text.

¹⁷⁹ Aragaki, *supra* note 47, at 1248.

¹⁸⁰ *Id.* at 1297.

“on/off” switch¹⁸¹—the mere fact that the state rule can be interpreted as “singl[ing] out” arbitration is enough for the Court to preempt.¹⁸² *Concepcion* exemplifies this approach. Thus, in light of the Court’s invalidation of the *Discover Bank* rule, it is now of seemingly no consequence that a state, New Jersey in this instance, invalidated a class action waiver on the same day it upheld another outside the small claims setting.¹⁸³ Unfortunately, the Court completely disregarded whether the invalidation of the waiver may have been “desirable for unrelated reasons,”¹⁸⁴ such as the avoidance of a class action waiver’s claim-disabling effect.

Fixing Problems in the Class Action System. Admittedly, supporters of class action waivers like that in *Concepcion* correctly note that the class action system is far from perfect.¹⁸⁵ “Entrepreneurial plaintiff’s attorney[s]”¹⁸⁶ have been criticized—perhaps justifiably—for their abuses of the system, including their attempts to maximize attorneys’ fees at the expense of the class.¹⁸⁷ But is the Court’s enforcement of a class action waiver, which effectively strips consumers of an aggregate remedy, really a good solution to these problems? Certainly not. Legislative reform, such as Congress’s enactment of the Class Action Fairness Act of 2005 (CAFA),¹⁸⁸ can help cure some of class action’s ills. Furthermore, scholars have considered tweaks to the current fee regime that could per-

¹⁸¹ *Id.* at 1245.

¹⁸² *Id.* at 1247.

¹⁸³ See *supra* note 111 and accompanying text (summarizing the New Jersey Supreme Court’s reasoning in these two cases).

¹⁸⁴ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

¹⁸⁵ For example, class action reform could help enhance judicial economy and fairness to the litigants. See Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, *LAW & CONTEMP. PROBS.*, Winter–Spring 2004, at 75, 102 (“Academics as well as corporate interests have pointed to ethical and efficiency issues and have urged that class actions be limited or reformed, if not eliminated.”).

¹⁸⁶ John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 879 (1987).

¹⁸⁷ See *id.* at 882-96 (detailing the divergent incentives that motivate plaintiffs’ attorneys and plaintiffs in class action litigation). But see Myriam Gilles & Gary B. Friedman, *Exploiting the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 103-05 (2006) (arguing, in opposition to Coffee, that class action opponents improperly focus on fairness considerations, such as whether “plaintiffs’ lawyers are being overcompensated,” instead of on the more important issue of whether class action litigation deters undesirable behavior by defendants).

¹⁸⁸ Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. § 1332(d) (2006)). CAFA expanded federal court jurisdiction over class actions, in part to reduce forum shopping and the effects of plaintiff-friendly state courts.

haps effectuate better results.¹⁸⁹ While none of these reforms is foolproof, each is certainly a better way of handling problems within the class action system than removing the availability of class proceedings altogether.

State Preferences for Other Procedures in Arbitration. As noted earlier, the majority in *Concepcion* was concerned that if it allowed states to require the availability of class arbitration, then it would be obliged to allow states to require other procedures, such as judicially monitored discovery.¹⁹⁰ This is a fair point—one that the *Concepcions* had difficulty refuting.¹⁹¹ Nevertheless, discovery procedures do not exhibit the same claim-enabling effects as class actions. Surely, the costs of discovery procedures influence the parties and, in extreme situations, can factor into a party's decision to either go forward with or settle a claim. But as the *Discover Bank* court recognized—and as I will explain in more detail in Part IV—class actions are “inextricably linked” to substantive regulatory policies.¹⁹² In some cases, this holds true from the policy's inception.¹⁹³ That the *Concepcions* could not distinguish how class proceedings differ from procedures like judicially monitored discovery only underscores how important it is for the Court to provide a candid discussion about the practical effects of class proceedings.

IV. CLASS ACTION POLICY IN THE WAKE OF *CONCEPCION* AND *SHADY GROVE*

Concepcion was indeed a crossroads for the class action. Policies relating to this form of aggregate proceeding had come a long way since the 1966 amendments to Rule 23, which revolutionized the modern class action.¹⁹⁴ But during the 2009 Term, the Court created some

¹⁸⁹ See, e.g., Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047 (2010) (proposing that class action lawyers in small-stakes actions should receive one-hundred percent of the class's recovery so as to “fully incentiviz[e] class action lawyers to bring as many cost-justified actions as possible”); see also Marcus, *supra* note 173, at 163-66 (challenging Fitzpatrick's utilitarian proposal and suggesting that it may overlook legitimacy benefits that emerge from a smaller attorney fee reward).

¹⁹⁰ See *supra* text accompanying note 160.

¹⁹¹ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (questioning the *Concepcions*' contention that cases involving other procedures would be a “far cry” from the instant case involving class arbitration).

¹⁹² See *supra* text accompanying note 102.

¹⁹³ For an example, see *infra* text accompanying note 233.

¹⁹⁴ For a discussion of the 1966 amendments and their effects on class actions, see Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1484-89 (2008).

doctrinal confusion in two cases analyzing class proceedings. In *Shady Grove*, the Court held that Rule 23 preempted a state's attempt to limit aggregate remedies in court, and in so doing, wrote that class actions only have "incidental effect[s]" on substantive rights.¹⁹⁵ Four weeks later, in *Stolt-Nielsen*, the Court seemed to change its view toward class actions—at least in the arbitration context—by holding that an arbitration panel's decision to allow aggregate remedies in arbitration would "fundamental[ly] change" proceedings "to such a degree" that the consent of the two parties could not be presumed.¹⁹⁶

With *Concepcion*, another class arbitration case, on the docket last Term, the Court had the opportunity to resolve this confusion by either distinguishing the two lines of reasoning or revisiting its flawed analysis in *Shady Grove*. But the majority failed to seize the opportunity; instead, it blindly followed the language in *Stolt-Nielsen* and perhaps only added to the confusion by treating the rights of plaintiffs and defendants differently within the same opinion. This Part will discuss this troubling development within class action policy. It will also offer a critique of one scholar's attempt to reconcile these two lines of reasoning by showing that such a reconciliation requires a strained reading of *Stolt-Nielsen* and a reliance on *Shady Grove*'s shortcomings. Ultimately, clarity from the Court is needed in order to explain the class action's unique role as both a procedural mechanism and a vindicator of substantive rights.

A. *Shady Grove* and the "Incidental Effects" on Substantive Rights

Lest there be confusion about the implications of a case like *Shady Grove*, it is important to begin by clarifying how these three cases differ. *Shady Grove* did not involve the FAA; rather, it implicated a Rules Enabling Act (REA)¹⁹⁷ challenge and is perhaps the most important decision addressing the *Erie* doctrine since *Gasperini v. Center for Humanities, Inc.*¹⁹⁸ In contrast, neither *Concepcion* nor *Stolt-Nielsen* involved an REA challenge, but instead considered the preemptive force of the

¹⁹⁵ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) (quoting *Miss. Publ'g Corp. v. Murphree*, 326 U.S. 438, 445 (1946)).

¹⁹⁶ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775-76 (2010).

¹⁹⁷ 28 U.S.C. § 2072 (2006). The REA provides that all state and federal laws "in conflict with" the "general rules of practice and procedure" in federal courts are void. *Id.*

¹⁹⁸ 518 U.S. 415 (1996). In *Gasperini*, the Supreme Court held that the lower court should have applied New York's standard governing excessive jury verdicts in a federal diversity case, as doing so would not have violated the Seventh Amendment. *Id.* at 419.

FAA. Nevertheless, the Court's analysis in *Shady Grove* was the source of an important point of disagreement between the parties in *Conception* because of a single unifying fiber—the class action.

Shady Grove involved a class action against Allstate Insurance in the Eastern District of New York for Allstate's alleged failure to pay a statutory penalty on late benefits payments that were due to health care providers.¹⁹⁹ The named plaintiff, Shady Grove Orthopedic Associates, claimed that it had received late payments for orthopedic services covered under one of Allstate's auto insurance policies, but that it had not received a statutorily prescribed two percent monthly interest fee from the insurer.²⁰⁰ In response, Allstate pointed the court's attention to section 901(b) of New York's Civil Practice Law and Rules, which provided that "an action to recover a penalty . . . may not be maintained as a class action" unless the statute creating the penalty includes an express authorization.²⁰¹ The New York insurance statute that prescribed the two percent fee included no such authorization.²⁰²

Because this class action was a diversity suit in federal court, the New York court rule would not automatically resolve the issue unless the rule was considered substantive, rather than procedural, in nature. Thus, the Court was faced with the following *Erie* question: whether, in a federal diversity suit, Rule 23 should supersede a state law that appeared to set policy on the availability of aggregate remedies.²⁰³ Although section 901(b) seemed to be a calculated attempt by the New York legislature to limit the substantive liabilities of defendants in statutory penalty suits,²⁰⁴ its insertion into a collection of civil procedural rules no doubt muddled the issue.

Intertwined with this question was an ancillary inquiry into the validity of Rule 23 itself. In order for Rule 23 to be found valid under the REA, the rule would have to "really regulate[] procedure"²⁰⁵ and overcome the REA's prohibition against rules that "abridge, enlarge

¹⁹⁹ *Shady Grove*, 130 S. Ct. at 1436-37.

²⁰⁰ *Id.* at 1436.

²⁰¹ N.Y. C.P.L.R. 901(b) (McKinney 2010).

²⁰² See N.Y. INS. LAW § 5106(a) (McKinney 2010).

²⁰³ *Shady Grove*, 130 S. Ct. at 1436.

²⁰⁴ See Burbank & Wolff, *supra* note 24, at 69-70 ("[T]his limitation on aggregate liability in New York 'was the result of a compromise among competing interests' that arose from concerns among prodefendant groups that the aggregation of penalties would lead to gross and destructive overenforcement." (quoting *Sperry v. Crompton Corp.*, 863 N.E.2d 1012, 1015 (N.Y. 2007))).

²⁰⁵ *Shady Grove*, 130 S. Ct. at 1445 (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)).

or modify any substantive right.”²⁰⁶ Although the invalidation of Rule 23—a rule that has allowed an enormous number of plaintiffs to bring collective actions in federal court—seems unfathomable, the argument for invalidation maintains some legitimacy.²⁰⁷ Previously, on the topic of class actions and substantive rights, Professor Stephen Burbank has suggested that “[i]t is difficult to conclude, other than through a wooden analysis . . . that the advent of the small claims (negative value) class action did not ‘alter substantive law.’”²⁰⁸ Rule 23 might still be valid, but the Court’s analysis would have to be sophisticated enough both to preserve Rule 23 and still leave room for state class action policy decisions. Instead, in *Shady Grove*, the Court served up a “wooden” analysis of Rule 23.²⁰⁹ Ultimately, a plurality of the Court concluded that, under a *Hanna* analysis, Rule 23 is valid and supersedes section 901(b) in federal court, leaving the defendant potentially liable for the statutory penalties.²¹⁰

The most contentious portion of the plurality’s analysis explained that class proceedings are simply a matter of procedure, and nothing more:

A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties’ legal rights and duties intact and the rules of decision unchanged.

. . . The likelihood that some (even many) plaintiffs will be induced to sue by the availability of a class action is just the sort of “*incidental effec[t]*” we have long held does not violate § 2072(b) [of the REA].²¹¹

Yet this reasoning seems to be at odds with *Stolt-Nielsen’s* and *Concepcion’s* language about the fundamental changes that class proceedings introduce. As Professor Richard Nagareda points out, “The formida-

²⁰⁶ 28 U.S.C. § 2072(b) (2006).

²⁰⁷ See Burbank & Wolff, *supra* note 24, at 19 (describing the argument for Rule 23’s invalidation as “increasingly compelling” but noting that “the disruptive consequences of such a conclusion would be unacceptable”).

²⁰⁸ Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1928 (2006) (quoting Nagareda, *supra* note 126, at 1877).

²⁰⁹ See Burbank & Wolff, *supra* note 24, at 41.

²¹⁰ *Shady Grove*, 130 S. Ct. at 1437-38, 1442-44. The Court’s analysis followed that of *Hanna v. Plumer*, 380 U.S. 460, 470-74 (1965), which states that under a traditional *Erie* analysis, if there is an applicable federal rule on point and no substantial variation between the state and federal rule, then the court should apply the federal rule.

²¹¹ *Shady Grove*, 130 S. Ct. at 1443 (alteration in original) (emphasis added) (quoting *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 455 (1946)).

ble claim-enabling effect of class treatment that the *Shady Grove* Court deems incidental in litigation becomes a fundamental difference in *Stolt-Nielsen*”²¹² Viewed together, these two cases exhibit a bit of doctrinal confusion regarding the correct treatment of aggregate proceedings and cannot be reconciled without ignoring the practical realities of class proceedings.

B. *Reconciling Shady Grove with the FAA Cases . . . or Not*

An analysis of the reasoning underlying these opposing views on aggregate proceedings illustrates why *Concepcion* is critically flawed. Facially, the two lines of decisions do involve different mechanisms—class litigation on the one hand, which has been refined through countless iterations in the courts, and class arbitration on the other hand, which is far from a tested formula. The doctrinal problems exceed this distinction, however, because the Court’s concern for the defendant’s increased liability in *Concepcion* is simply absent from *Shady Grove*.

In his attempt to resolve the cases’ apparent discrepancies, Professor Nagareda argues that the FAA’s international dimension should be viewed as the distinguishing factor. He contends that class actions are a standard method of adjudicating *domestic* business disputes, and that for the *Hanna* analysis in *Shady Grove*, the effect of class actions can be treated as truly “incidental.”²¹³ But in cases such as *Stolt-Nielsen* and others implicating the FAA, the *international* dimension of the FAA is overlooked.²¹⁴ Because class actions are not nearly as common in the transnational setting as they are in the domestic setting, Professor Nagareda argues that imposing class arbitration would, in fact, be a “fundamental change” for many international parties.²¹⁵ And, with-

²¹² Nagareda, *supra* note 50, at 1090; *see also id.* at 1074 (“Across the two cases, the Court maintains an almost studied avoidance of any explanation for the difference of view as to class treatment.”). During the 2010 Term, Justice Scalia continued to subscribe to his *Shady Grove* and *Stolt-Nielsen* views. *Compare* *Brown v. Plata*, 131 S. Ct. 1910, 1952 (2011) (Scalia, J., dissenting) (reiterating his stance in *Shady Grove* that “the sole purpose of classwide adjudication is to aggregate claims that are individually viable” and that, as such, class actions do not alter the substantive rights of parties), *with* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1750 (2011) (invoking his reasoning in *Stolt-Nielsen* that “the shift from bilateral arbitration to class-action arbitration” leads to “changes” that are “fundamental,” and exploring these changes in greater depth (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1776 (2010)) (internal quotation marks omitted)).

²¹³ Nagareda, *supra* note 50, at 1101-02.

²¹⁴ *See id.* at 1090-99 (arguing that international commerce disputes have informed the Court’s FAA jurisprudence).

²¹⁵ *Id.* at 1101-03.

out a relative degree of certainty in arbitration, international business could return to being a “legal no-man’s-land.”²¹⁶ Finally, tying together this explanation of the *Concepcion* dispute, he argues that because *Shady Grove* was correct vis-à-vis class action litigation, the lower courts in *Concepcion* were wrong in holding that the class action waiver in AT&T’s contract was unconscionable.²¹⁷ In his view, this is especially true because AT&T’s waiver is not exculpatory.²¹⁸

While insightful, Professor Nagareda’s analysis misses the mark in a few key ways. First, although his argument may shed some light on the differences between *Shady Grove* and the FAA cases, it deviates substantially from the actual language in *Stolt-Nielsen* to come up with a distinguishing factor. Concerns for international relations, no doubt, play a role in some FAA cases. With this in mind, the Court is arguably fashioning federal common law in an appropriate manner.²¹⁹ But this point should not fundamentally alter the aggregation analysis as Professor Nagareda argues it does.²²⁰

Second, the plurality’s reasoning in *Shady Grove*, with which Nagareda agrees, is questionable to say the least. As Professors Stephen Burbank and Tobias Wolff contend, the Court’s categorization of an aggregation mechanism’s “expansion of liability exposure [as] merely an ‘incidental effect’ does not describe reality, and we should not pretend otherwise.”²²¹ Such a categorization ignores the practical realities of Rule 23 and its monumental “impact on the regulation of economic and social activity.”²²² This categorization, of course, fails to acknowledge that under the modern formulation of the rule, negative-value claims can be converted into headline-grabbing, bet-the-company cases.²²³

²¹⁶ *Id.* at 1097-98.

²¹⁷ *Id.* at 1119-20.

²¹⁸ *Id.* at 1126.

²¹⁹ See Carrington & Haagen, *supra* note 36, at 358 (noting that some federal courts have properly treated prior FAA cases as subject to federal common law). I say “arguably” because, as Carrington and Haagen point out, the federal common law of international relations generally does not involve matters of “slight political consequence,” *id.*, such as *Stolt-Nielsen*’s rule that class arbitration is a matter of consent.

²²⁰ For a similar critique of Professor Nagareda’s inconsistent approach toward class proceedings in arbitration and in the courts, see Burbank, *supra* note 208, at 1935-37.

²²¹ Burbank & Wolff, *supra* note 24, at 65.

²²² *Id.* at 25.

²²³ See *id.* at 19 (“Certification can transform unenforceable negative-value claims into an industry-changing event . . .”).

So if *Shady Grove* is wrong, does that mean that *Concepcion* was correct when it highlighted the increased risks to defendants in class arbitration? To a large extent, yes. Surely those risks are real. But what *Concepcion* failed to do was consider the flip-side of the equation—the risk of creating a claim-disabling effect through the removal of class proceedings. Rather, with respect to the plaintiffs, the Court seemed to follow *Shady Grove*'s erroneous reasoning.²²⁴ In the same vein, by ignoring the risk to plaintiffs, the Court failed to realize that states should be able to weigh the risks posed to both plaintiffs and defendants.

An extrapolation of the arguments in Professors Burbank and Wolff's critique of the *Shady Grove* decision helps synthesize these arguments. Both section 901(b) of the New York Civil Practice Law and Rules in *Shady Grove* and the California statute that enabled the unconscionability rule in *Discover Bank* attempted to set liability policy. In both cases, the availability or nonavailability of the class action device was the determining factor in the regulatory decision. Therefore, the class action is not simply a procedural mechanism with an "incidental effect" but rather a deeply rooted means for advancing regulatory choices. States certainly may come to different conclusions on a waiver's unconscionability depending on the individual's incentives to file suit, as is evidenced by New Jersey's unconscionability analyses.²²⁵ Congress could also enact its own liability policies that would trump the state's regulatory decisions. But viewed in isolation, the state's decision should not be preempted by a federal statute, like the FAA, that does not endeavor to affect liability policies.²²⁶

Several lower courts have adopted this line of reasoning. As noted earlier, the California Supreme Court in *Discover Bank* proclaimed that "class actions . . . are . . . inextricably linked to the vindication of substantive rights."²²⁷ The Maryland Court of Appeals has similarly noted

²²⁴ In its brief, AT&T claimed that if the availability of a class action under Rule 23 did not alter the defendant's aggregate liability in *Shady Grove*, then the Court could not deem the class action waiver "exculpatory" because the withholding of class proceedings would not change a defendant's liability. Brief for Petitioner, *supra* note 11, at 44-45. Although the Court in *Concepcion* never actually cited *Shady Grove*, it effectively came to the same conclusion when it ignored the ruling's effect on future plaintiffs.

²²⁵ See *supra* text accompanying note 111.

²²⁶ Concededly, the *Southland* decision did interpret the FAA as "creat[ing] a body of federal substantive law" for issues of arbitrability. *Southland Corp. v. Keating*, 465 U.S. 1, 12 (1984) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (internal quotation marks omitted). However, this does not equate to a congressional intent to affect the liability of wireless phone companies.

²²⁷ *Discover Bank v. Superior Court*, 113 P.3d 1100, 1109 (Cal. 2005), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

that rather than being a mere matter of procedure, the class action has a “penumbral remedial aspect” because of its claim-enabling effect.²²⁸ While Justice Breyer’s recognition of the state’s role in weighing the pros and cons of class proceedings is a good first step, the Court should come to appreciate this “penumbral remedial aspect” in future class action cases rather than rely on the sort of flawed reasoning found in *Shady Grove*. Otherwise, the Court will fail to acknowledge the practical realities of class action waivers. Without class actions, the concern is not simply that plaintiffs will be alone in arbitration (the title of this Comment is, indeed, somewhat of a misnomer). Instead, the likely consequence of removing class proceedings is that plaintiffs will either have no incentive to go to arbitration, or they may not even know that their rights have been infringed at all.

V. FURTHER DEVELOPMENTS AND THE PATH TO REFORM

With *Concepcion* now in the rearview mirror, commentators have speculated as to whether the entire class action system as we know it will soon be behind us as well.²²⁹ To some extent, this is true; the frequency of class arbitrations will almost assuredly decrease. Fortunately, though, post-*Concepcion* developments suggest that class action litigation will not be flatlining anytime soon. In the months following the release of the *Concepcion* opinion, lower courts have found various ways to distinguish the case, based both on the unique facts of AT&T’s class action waiver and the unresolved questions stemming from the opinion.²³⁰ Moreover, reform efforts have commenced, with Congress already considering a bill that would amend the FAA and with admin-

²²⁸ *Gilman v. Wheat, First Sec., Inc.*, 692 A.2d 454, 464 (Md. 1997). The court explained that this “penumbral remedial aspect” of class actions helps overcome “procedural or economic impediments that might hinder a normal action [and] make relief that otherwise might be only potentially available to a plaintiff actually available.” *Id.*

²²⁹ See, e.g., Ashby Jones, *After AT&T Ruling, Should We Say Goodbye to Consumer Class Actions?*, WALL ST. J. L. BLOG (Apr. 27, 2011, 12:36 PM), <http://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions> (noting Professor Brian Fitzpatrick’s prediction that a victory for AT&T could lead to “the end of class action litigation”).

²³⁰ Although this section focuses on how courts have distinguished *Concepcion*, some courts have faithfully followed the opinion. See, e.g., *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1207 (11th Cir. 2011) (holding that the FAA preempts a Florida law requiring class-wide proceedings in arbitration); see also *Arellano v. T-Mobile USA, Inc.*, No. 10-5663, 2011 WL 1842712, at *2 (N.D. Cal. May 16, 2011) (following *Concepcion* but noting that the *Concepcion* opinion had “regrettably” rejected the plaintiff’s argument that individual arbitration made it cost prohibitive for a single plaintiff to bring suit).

istrative agencies considering additional remedies. This Part will begin by briefly analyzing the post-*Concepcion* landscape. It will then explain that, though efforts to change *Concepcion*'s effect at the legislative and administrative level are a step in the right direction, tweaks in the judicial treatment of the class action device could provide immediate protection both for consumers and for states that want to factor aggregation policies into their regulatory regimes.

A. *The Evolving Scope of the Concepcion Opinion*

The first noteworthy development regarding *Concepcion*'s scope concerns its interaction with the "statutory rights analysis" used by some lower courts. As Part II mentioned, some courts that invalidated class action waivers over the past decade used a "statutory rights analysis" rather than the doctrine of unconscionability.²³¹ Using this analysis, courts have invalidated class action waivers where the foreseeable result is that plaintiffs will be unable to vindicate their statutory rights in arbitration.

The analysis seems particularly applicable in situations where Congress has embedded procedural devices, such as the class action, into a statute to further public policy goals.²³² For example, when Congress amended the Civil Rights Act in 1991, it expanded the statute's damages provisions, and in doing so, provided plaintiffs with an incentive to bring class claims.²³³ Furthermore, statistics since 1991 show that the number of employment discrimination class actions have increased as a result of the amendments, thus improving private enforcement of the federal statute.²³⁴ Therefore, a waiver of class proceedings for a civil rights claim, for instance, would seem to be at odds with the statutory structure.

To date, the statutory rights analysis has been used to circumvent both *Stolt-Nielsen* and *Concepcion*. Prior to *Stolt-Nielsen*, the Second Circuit invalidated a class action waiver in an antitrust case against American Express because the retention of multiple expert witnesses—which is par for the course in antitrust cases—was prohibitively expensive for

²³¹ See *supra* notes 113-17 and accompanying text.

²³² See Marcus, *supra* note 173, at 162 ("Governments regularly use procedural devices to fine-tune the regulatory force of the substantive law.").

²³³ Civil Rights Act of 1991, sec. 102, § 1977A, 105 Stat. 1071, 1072-74 (codified at 42 U.S.C. 1981a (2006)); see also Nancy Levit, *Megacases, Diversity, and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 367 (2008) (explaining that the Act expanded compensatory and punitive damage relief).

²³⁴ *Id.* at 367, 374-75.

individual plaintiffs and would have effectively stripped the plaintiffs of their statutory rights.²³⁵ The Supreme Court subsequently vacated and remanded this decision in light of *Stolt-Nielsen*.²³⁶ On reconsideration, however, the Second Circuit reaffirmed its previous ruling, concluding that the Court's contract approach in *Stolt-Nielsen* did not control its fact-specific approach centered on the plaintiffs' statutory rights.²³⁷ The Second Circuit also found support in earlier FAA cases for its conclusion that a statutory rights analysis can be invoked, notwithstanding the Court's liberal policy favoring arbitration.²³⁸ Although the Second Circuit conceded that *Stolt-Nielsen* prevented it from ordering class *arbitration*, it ruled that *Stolt-Nielsen* did not prevent class action *litigation* from moving forward.²³⁹ Notably, the Southern District of New York, in accordance with this opinion—and apparently sticking its tongue out toward Washington, D.C.—invalidated a class action waiver *the day after* the Supreme Court released *Concepcion*.²⁴⁰

If circuit courts continue to follow a statutory rights analysis, then the Supreme Court will likely grant certiorari at some point to clarify whether this line of reasoning can act as an exception to the standard FAA rule favoring arbitration. As an initial matter, the extent to which these cases can circumvent *Concepcion* is not entirely clear. Given that a lawsuit must involve a right protected by federal statute, the statutory rights analysis is narrower than unconscionability rules like *Discover Bank's*. But what is clear is that the statutory rights analysis provides an example of how the Court could consider the class action's role within substantive law. To her credit, Justice Ginsburg, in her dissent in *Stolt-Nielsen*, intimates that she would take this approach. She notes that “class proceedings may be ‘the thing’” in the small claims context because “without them, potential claimants will have little, if any, incentive to seek vindication of their rights.”²⁴¹ But whether she can

²³⁵ *In re Am. Express Merchs.' Litig.*, 554 F.3d 300, 315-20 (2d Cir. 2009), *vacated sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

²³⁶ *Am. Express Co.*, 130 S. Ct. at 2401.

²³⁷ *See In re Am. Express Merchs.' Litig.*, 634 F.3d 187, 193-94, 199 (2d Cir. 2011) (highlighting the narrow reach of *Stolt-Nielsen* and stressing that “each case which presents a question of the enforceability of a class action waiver . . . must be considered on its own merits”).

²³⁸ *Id.* at 197 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

²³⁹ *Id.* at 200.

²⁴⁰ *See Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394, 411 (S.D.N.Y. 2011) (invalidating a class action waiver without a single reference to *Concepcion*).

²⁴¹ *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1783 (2010) (Ginsburg, J., dissenting).

persuade four Justices to join her will certainly be difficult considering the Court's recent track record in FAA cases.

A second development regarding *Concepcion*'s scope—one that is much narrower than the first but similar in that it involves a federal statute that may conflict with the Court's interpretation of the FAA—concerns whether the decision conflicts with certain contracts governed by the National Labor Relations Act (NLRA).²⁴² Just a few months before *Concepcion* was released, an administrative law judge for the National Labor Relations Board concluded that a class action waiver in an employer's arbitration agreement violated sections 8(a)(1) and 8(a)(4) of the NLRA because employees could have reasonably believed that they were precluded from filing charges with the Board.²⁴³ Following *Concepcion*, the full Board invited interested parties to submit amicus briefs explaining whether the Board should enforce the waiver.²⁴⁴ Admittedly, the Board's decision will be limited to employment contracts under the NLRA, and employers could presumably cure this problem simply by being more explicit about their workers' rights in future contracts. Nevertheless, this case may prove significant, as the Board might temporarily be able to sidestep *Concepcion* in the NLRA context.

A third development regarding *Concepcion* concerns whether lower courts might take the old-fashioned route and distinguish *Concepcion* on its facts. One interpretation of the case is that it only singles out state rules that make class action waivers "per se unenforceable."²⁴⁵ Such a reading does not mean that all class action waivers are "per se enforceable."²⁴⁶ Within this gap, unconscionability challenges could presumably continue.²⁴⁷ Indeed, despite *Concepcion*, one Northern District of California judge has taken this approach, ruling that California unconscionability law can still be used to invalidate an employ-

²⁴² 29 U.S.C. §§ 151–169 (2006).

²⁴³ D.R. Horton, Inc., No. 12-CA-25764, 2011 NLRB LEXIS 1, at *11-14 (Jan. 3, 2011). Sections 8(a)(1) and 8(a)(4) of the NLRA make it an unfair labor practice to interfere with employees' statutory rights under section 7 or to discriminate against those who file charges with the Board. 29 U.S.C. § 158(a)(1), (a)(4) (2006).

²⁴⁴ Notice and Invitation to File Briefs, D.R. Horton, Inc., No. 12-CA-25764, 2011 NLRB LEXIS 307, at *1 (June 16, 2011).

²⁴⁵ John Murray, Jr., *The Supreme Court's Decision on Unconscionability, the Purpose of the Federal Arbitration Act, and Banning Class Arbitration: Dr. John E. Murray, Jr. on AT&T Mobility LLC v. Concepcion*, LEXISNEXIS EMERGING ISSUES ANALYSIS, May 18, 2011, available at LEXIS, 2011 EMERGING ISSUES 5659 (italics omitted).

²⁴⁶ *Id.* (italics omitted).

²⁴⁷ *See id.* (noting that the AT&T contract has "created a new model draft of arbitration clauses in such consumer contracts").

er's class action waiver.²⁴⁸ In addition, a New Jersey appellate court recently invalidated a class action waiver that it found to be "too confusing, too vague, and too inconsistent to be enforced," despite its conclusion that *Concepcion* controlled.²⁴⁹

In the same vein, while AT&T's "consumer-friendly" provisions perhaps provided an ideal vehicle through which the Court could further its FAA policies,²⁵⁰ their uniqueness also makes the case easily distinguishable. For instance, if the agreement is merely a second-generation clause that lacks additional provisions, then a court could perhaps distinguish *Concepcion* on its unique facts. Albeit a welcome development for consumers, this approach would unfortunately do little to clarify current problems with class action policy.

Finally, a fourth development regarding *Concepcion's* scope involves its effect, or lack thereof, on suits brought under state private attorney general statutes. In the months after *Concepcion*, a California appellate court considered whether to enforce a waiver in an employer's arbitration agreement that prohibited suits by employees under the California Private Attorneys General Act of 2004 (PAGA).²⁵¹ Specifically, the PAGA allows employees to bring representative actions against their employers for violations of the state's Labor Code.²⁵² These actions are not class actions and are thus not subject to the same requirements, such as certification or notice requirements.²⁵³ These suits, however, can have some of the same deterrence effects of class actions.²⁵⁴ Ultimately, the court held that the waiver of PAGA suits was unenforceable and that FAA preemption would effectively nullify the benefits of these actions to the public.²⁵⁵ The court also distinguished *Concepcion* quite gracefully by noting that a representative

²⁴⁸ See *Kanbar v. O'Melveny & Myers*, No. 11-0892, 2011 WL 2940690, at *6-7, *12-13 (N.D. Cal. July 21, 2011) (concluding that the waiver was unconscionable but granting the defendant's motion to compel arbitration because the plaintiff had waived this argument).

²⁴⁹ *NAACP of Camden Cnty. E. v. Foulke Mgmt. Corp.*, 2011 WL 3273896, at *1 (N.J. Super. Ct. App. Div. Aug. 2, 2011).

²⁵⁰ See *supra* notes 143-46 and accompanying text.

²⁵¹ CAL. LAB. CODE §§ 2698-2699.5 (West 2011); see also *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 856 n.1 (Ct. App. 2011).

²⁵² CAL. LAB. CODE § 2699(a).

²⁵³ *Brown*, 128 Cal. Rptr. 3d at 862-63.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 863-65.

action in arbitration would not have the same attributes as class arbitration, which so concerned the majority in *Concepcion*.²⁵⁶

While a discussion of the pros and cons of these private attorney general statutes, such as “day in court” considerations, is beyond the scope of this Comment, this fourth development underscores that *Concepcion* has not completely eliminated the deterrence effect of court proceedings. Some wrongdoing will still be held in check, even without the class action. Nevertheless, barring a significant upswing in the enactment and usage of these types of statutes, other reform efforts are needed to cure the problems resulting from *Concepcion*.

B. Reform Efforts

Thus far, this Comment has advocated reform efforts solely at the judicial level, and in particular, for a change in the way the Court views the class action mechanism in FAA cases. A more flexible approach to the FAA, rather than the Court’s current rigid approach, would enable the Court to appreciate the role that class actions play in substantive law.²⁵⁷ Such a reform does have its disadvantages, however. For example, a case-by-case approach that analyzes how the class action device either fits into a state’s unconscionability paradigm or into a federal statutory scheme does require a greater share of courts’ time and resources. Furthermore, there is not always a clear line distinguishing claims that are prohibitively expensive from those that are economically viable. Even so, a more flexible approach to the FAA would certainly yield better outcomes than the Court’s current approach, which effectively prohibits plaintiffs from vindicating substantive rights.

There are, however, steps at both the legislative and administrative levels that could be taken to facilitate a new approach at the judicial level. Most prominently, after *Concepcion* was handed down, a group of lawmakers reintroduced a bill in Congress that would amend the FAA. The bill, the Arbitration Fairness Act, was originally proposed in

²⁵⁶ *Id.* at 863.

²⁵⁷ Other scholars have also advocated a more flexible approach to the FAA, although one that does not necessarily account for the current problems regarding class action policy. See Aragaki, *supra* note 47, at 1283 (proposing a functional test for determining when state law singles out arbitration); Diana M. Link & Richard A. Bales, *Waiving Rights Goodbye: Class Action Waivers in Arbitration Agreements After Stolt-Nielsen v. AnimalFeeds International*, 11 PEPP. DISP. RESOL. L.J. 275, 276 (2011) (advocating a “totality of the circumstances” approach); Wilson, *supra* note 48, at 792 (concluding that states should be permitted to invalidate waivers based on unconscionability principles as long as those principles are “applied in an objectively reasonable manner”).

2009²⁵⁸ and excludes employment contracts and consumer agreements from the FAA's scope.²⁵⁹ As I noted earlier, commentators have labeled it as an attempt to restore Congress's original intent of only applying the FAA to parties with relatively equal bargaining power.²⁶⁰ The bill, however, will undoubtedly face intense lobbying attacks, and it has been criticized as taking a "meat cleaver . . . to an issue that requires a scalpel" because not all employees, consumers, and franchisees are unsophisticated bargainers.²⁶¹ Nevertheless, the introduction of the bill is a welcome development to those who are dismayed by the Court's current FAA jurisprudence.

Also at the legislative level, it will be interesting to see whether states begin enacting more private attorney general statutes like California's PAGA statute. State lawmakers who want to increase deterrence efforts aimed at harmful business practices should consider enacting these statutes because presumably they would have a greater chance of withstanding an FAA preemption challenge.²⁶² Additionally, even supporters of limited government intervention may react favorably to this method of reform because it would leave the enforcement of substantive law up to the courts, rather than politicized public agencies.²⁶³

Finally, at the administrative level, the recently established Consumer Financial Protection Bureau (CFPB) is in a position to help guarantee the availability of class remedies through future regulations. However, the CFPB, which emerged as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act,²⁶⁴ is only beginning to take shape, and Republican lawmakers have adamantly opposed the Bureau's organizational plans.²⁶⁵ Thus, a considerable amount of time

²⁵⁸ Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

²⁵⁹ Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 3 (2011).

²⁶⁰ See *supra* notes 43-44 and accompanying text.

²⁶¹ See Aragaki, *supra* note 47, at 1273 (quoting Peter B. Rutledge, *The Case Against the Arbitration Fairness Act*, DISP. RESOL. MAG., Fall 2009, at 4, 7) (internal quotation marks omitted).

²⁶² See *supra* notes 251-56 and accompanying text.

²⁶³ Cf. Burbank, *supra* note 208, at 1931 (noting that private enforcement actions, such as class actions, can be "critically important to the vindication of substantive law norms in a society that distrusts, and is therefore unwilling to commit adequate resources to, centralized government enforcement").

²⁶⁴ § 1011(a), 12 U.S.C.A. § 5491(a) (West Supp. 2011).

²⁶⁵ Republicans have opposed plans proposed by the CFPB chief architect, Elizabeth Warren, and are expected to block President Obama's appointee for the CFPB director position, Richard Cordray. Tamara Keith, *New Consumer Protection Agency Faces Opposition*, NPR (July 21, 2011), <http://www.npr.org/2011/07/21/138550502/new-consumer-protection-agency-faces-opposition>. At the time of writing, Cordray had been approved

may pass before the agency implements any reform efforts.²⁶⁶ But aside from these obstacles, once the CFPB is up and running, it should immediately consider reforming the use of class action waivers to help cure the injustices the *Concepcion* opinion created.

CONCLUSION

AT&T Mobility LLC v. Concepcion was a crossroads for the future of class action policy, the protection of consumer rights, and the use of class arbitration as a technique for dispute resolution. This Comment has demonstrated why an appreciation for the “penumbral remedial aspect”²⁶⁷ of the class action and for states’ roles in formulating aggregation policy should have been factored into the Court’s analysis. While subsequent developments may limit or reform *Concepcion*’s scope, the Court should nevertheless reconsider its views on class action policy in future cases.

by the Senate Banking Committee but not by an entire Senate vote. Bobby Caina Calvan, *Brown Endorses Cordray to Head New Consumer Watchdog Agency*, BOS. GLOBE, Nov. 15, 2011, at A18, available at 2011 WLNR 23592188.

²⁶⁶ See Nathan Koppel, *Will Federal Consumer Bureau Ride to the Rescue of Class Actions?*, WALL ST. J. L. BLOG (Apr. 29, 2011, 6:03 PM), <http://blogs.wsj.com/law/2011/04/29/will-federal-consumer-bureau-ride-to-the-rescue-of-class-actions> (noting that reform from the CFPB could take years).

²⁶⁷ *Gilman v. Wheat, First Sec., Inc.*, 692 A.2d 454, 464 (Md. 1997).