

# The United States Supreme Court and Class Arbitration: A Tragedy of Errors

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Over the past decade, the U.S. Supreme Court has issued a series of confusing and, at times, confused opinions on class arbitration. The tortuous path of these various decisions has caused substantial uncertainty and an enormous waste of resources by litigants, courts, and arbitral institutions. Worse, the Court's most recent decisions threaten to undermine U.S. arbitration law more generally; their analysis badly misinterprets the Federal Arbitration Act (FAA) and misconceives the basic concept of "arbitration" in the United States. These misadventures have turned a field where the U.S. Supreme Court once pioneered international developments, in decisions like *Mitsubishi Corp. v. Soler Chrysler-Plymouth, Inc.*<sup>1</sup> and *Scherk v. Alberto-Culver Co.*,<sup>2</sup> into one where the Court's reasoning stands out as an example of how not to deal with the arbitral process.<sup>3</sup>

"Class arbitration" is a relatively recent, and almost entirely American, procedural mechanism that marries arbitration with the class action procedures of U.S. litigation.<sup>4</sup> The class arbitration mechanism was first used during the 1980s, when a few state courts began to order arbitrations that would be conducted on a class basis – permitting claims brought by one party on behalf of large numbers of

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1. 473 U.S. 614, 618-20, 625 (1985) (holding that there is no presumption against arbitration of statutory claims, in this case antitrust claims, and enforcing an agreement to arbitrate in Japan).

2. 417 U.S. 506, 509-10, 519-20 (1974) (staying federal court litigation to allow arbitration to proceed in accordance with arbitration clause in international commercial contract).

3. U.S. decisions in the field of arbitration are often closely observed by courts and legislatures outside the United States. See, e.g., GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 329 (2009) (noting that the Supreme Court's reasoning in *Prima Paint Corp. v. Conklin Mfg. Co.*, 388 U.S. 395 (1967), was later used by the German Bundesgerichtshof); *id.* at 792-95 (noting that the Supreme Court's findings in *Mitsubishi Corp. v. Soler Chrysler Plymouth Inc.* regarding the arbitrability of antitrust claims were later broadly followed in the European Union). Indeed, in his dissent from the tribunal's finding of jurisdiction in the first ever ICSID mass arbitration, Georges Abi-Saab noted with approval the distinctions between bilateral and class arbitration that the U.S. Supreme Court articulated in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* and *AT&T Mobility LLC v. Concepcion* (two cases discussed *infra* at Section III). *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Dissenting Opinion of Georges Abi-Saab, ¶¶ 148-53 (Aug. 4, 2011). See also Gabrielle Nater-Bass, *Class Action Arbitration: A New Challenge*, 27 ASA BULL. 671, 671-90 (2009); see generally S.I. Strong, *Collective Arbitration Under the DIS Supplementary Rules for Corporate Law Disputes: A European Form of Class Arbitration*, 29 ASA BULL. 45 (2011).

4. In U.S. civil procedure, a class action is a civil suit, often a mass torts or consumer litigation, in which one or more named plaintiffs represent a large, sometimes indeterminate, number of similarly-situated individuals in pursuing related claims against one or more defendants. The logic of class actions is to permit large numbers of comparatively small claims that would not otherwise readily be pursued to be heard efficiently in a single proceeding. See Alba Conte & Herbert B. Newberg, *NEWBERG ON CLASS ACTIONS* § 1:1 (2002).

similarly-situated claimants (usually consumers), all having identical arbitration agreements with the same defendant. For a time, class arbitration seemed destined to remain a niche phenomenon, largely confined to state courts in California. In the words of one commentator, class arbitration was a “mythical beast: half litigation, half arbitration and rarely seen.”<sup>5</sup>

In 2003, however, the U.S. Supreme Court appeared to alter the landscape. It concluded, in *Green Tree Financial Corp. v. Bazzle*,<sup>6</sup> that the question whether an arbitration agreement permitted class arbitration was an issue that arbitrators, not courts, were to decide. The *Bazzle* Court’s decision was widely and understandably interpreted as giving both arbitral tribunals and courts to order arbitrations on a class-wide basis: while previously uncommon, class arbitration sightings became frequent in U.S. practice after *Bazzle*. In due course, more than 300 class arbitrations, involving many billions of dollars in claims, were pending before the American Arbitration Association (AAA) alone.

A decade later, however, the Supreme Court issued two decisions that performed a fairly complete about-face, effectively overruling its earlier holding in *Bazzle* and largely closing the door on class arbitration under the FAA. In *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, the Court held that class arbitration was only permissible in contracts that affirmatively provided for this procedure.<sup>7</sup> That holding substantially undercut both the Court’s earlier decision in *Bazzle* and the burgeoning growth of class arbitrations. More recently, in *AT&T Mobility LLC v. Concepcion*, the Court upheld class waiver provisions in arbitration agreements against unconscionability challenges.<sup>8</sup>

The result in *Concepcion* was likely correct, but the uncertainty and waste resulting from the Court’s various decisions were both enormous and unnecessary; equally, the Court’s changing and contradictory treatments of class arbitration reflected poorly on both its institutional competence and commitment to providing a stable and predictable legal environment for arbitration in the U.S. Of even more lasting concern is the reasoning in *Concepcion*, which was both misconceived and dangerous. With scant consideration, the Court’s analysis abandoned the conception of “arbitration” which has prevailed in the U.S. for much of the 20<sup>th</sup> century – as a process for resolving a wide variety of disputes, using an equally wide range of procedures, depending on the parties’ individual needs and objectives. In its place, *Concepcion* concluded that the FAA only protected the type of arbitration prevalent in 1925 (quaintly conceived of as informal, small-stakes, bipartite proceedings).

This concept of “arbitration,” and of the FAA, is fundamentally wrong. In fact, arbitration is, and has long been, a highly diverse form of dispute resolution, routinely including very formal, very large and very complicated multi-party proceedings. The contrary suggestion in *Concepcion* is incorrect and, taken seriously, would deny the FAA’s protections to a wide range of different forms of arbitration, both domestic and international. That is clearly neither what Congress

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5. Kelly Thompson Cochran & Eric Mogilnicki, *Current Issues in Consumer Arbitration*, 60 BUS. LAW. 785, 791 (2005).

6. 539 U.S. 444 (2003).

7. 130 S.Ct. 1758, 1775-76 (2010).

8. 131 S.Ct 1740, 1753 (2011).

intended in enacting the FAA nor what sound policy calls for; it is hopefully also not what the Court intended, despite its apparent analysis in *Concepcion*.

This Essay describes and critiques the U.S. Supreme Court's recent misadventures with class arbitration. First, the Essay reviews the origins and rise of class arbitration under the FAA, particularly following the Supreme Court's *Bazze* decision. In Part II, the Essay discusses application of the unconscionability doctrine to class action waivers, under the California courts' *Discover Bank* doctrine. In Part III, the Essay recounts the Supreme Court's retrenchment from class arbitration in *Stolt-Nielsen* and, more fully, in *Concepcion*. It also critiques the Court's apparent analysis in *Concepcion* and offers an alternative analysis for the *Concepcion* result that is more consistent with the FAA and its purposes.

## I. THE ORIGINS OF CLASS ARBITRATION IN THE UNITED STATES

Class arbitration rarely evokes a neutral response—some herald it as a sensible, efficient alternative to cumbersome class litigation, while others oppose it variously as a means of denying consumers and others the procedural rights they would enjoy in litigation or as an unworkable combination of the worst of both litigation and arbitration.<sup>9</sup> It is helpful to summarize briefly the development of class arbitration and the framework that the FAA provided for that development.

### A. Section 2 of the FAA

Section 2 is the cornerstone of the FAA. It provides that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>10</sup> It is uncontroversial that the purpose of Section 2 is “to make arbitration agreements as enforceable as other contracts.”<sup>11</sup>

The U.S. Supreme Court and lower federal courts have repeatedly held that Section 2 mandates enforcement of arbitration agreements, doing so across a wide

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9. See, e.g., S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrator Creating Internationally Enforceable Awards in Cases of Contractual Silence or Ambiguity*, 30 MICH. J. INT'L L. 1017, 1048-49 (2009) (arguing that class arbitration has the potential to enhance efficiency and promote social justice); Thomas Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, available at <http://ssrn.com/abstract=1919936> (arguing that in its recent rulings curtailing class arbitration the Supreme Court “has eliminated key safeguards aimed at ensuring fundamental fairness to consumers and employees in arbitration”); Thomas Doyle, *Protecting Nonparty Class Members in Class Arbitration*, 25 A.B.A. J. LAB. & EMP. L. 25, 26-27 (2009) (declaring that “class actions are an odd fit for arbitration” and expressing concern regarding the rights of nonparty class members in class arbitrations); David Clancy & Matthew Stein, *An Uninvited Guest: Class Arbitration and the Federal Arbitration Act's Legislative History*, 63 BUS. LAW. 55, 62-63, 67 (2007) (arguing that class arbitration raises serious procedural concerns, that it has never been legislatively or judicially validated, and that “it is by no means clear that it *should* be validated.”) (emphasis in original).

10. 9 U.S.C. § 2 provides: “A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2 (2011).

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

range of settings. The Supreme Court first fully articulated the modern conception of the FAA in *Southland Corp. v. Keating*<sup>12</sup> – arising, coincidentally, from a class action litigation.

In *Southland*, Keating filed a class action suit on behalf of a class of 7-Eleven franchisees against Southland, the 7-Eleven franchisor, “alleging, among other things, fraud, breach of contract, breach of fiduciary duty, and violation of the California Franchise Investment Law.”<sup>13</sup> Southland moved to compel multiple individual arbitrations with each franchisee in accordance with arbitration clauses in its various franchise agreements.<sup>14</sup> After conflicting lower court decisions, the California Supreme Court held that Section 31512 of the California Franchise Investment Law required claims under that statute to be brought exclusively in state courts and that this requirement did not conflict with Section 2 of the FAA.<sup>15</sup>

The *Southland* Court reversed, first holding that the FAA applied to state (as well as federal) court proceedings. The Court reaffirmed its holding in *Prima Paint Corp. v. Flood & Conklin Manufacturing Corp.*, that the FAA “rests on the authority of Congress to enact substantive rules under the Commerce Clause,”<sup>16</sup> and quoted its then recent decision in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* declaring that the FAA “‘creates a body of federal substantive law’ . . . applicable in state and federal court.”<sup>17</sup> The Court also held that Section 2 preempted state law rules purporting to declare particular categories of disputes non-arbitrable: in “creating a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements.”<sup>18</sup> On this basis, the Court held that Section 31512 of the California Franchise Investment Law was preempted by Section 2 of the FAA and compelled arbitration between Southland and its various franchisees.<sup>19</sup>

In subsequent years, the Court repeatedly held that Section 2 of the FAA required enforcement of agreements to arbitrate a sweeping range of disputes, including both state and federal statutory claims of almost every description. In *Perry v. Thomas*, for example, the Court held that a California statute prohibiting the arbitration of wage collection actions was preempted,<sup>20</sup> while in *Gilmer v. Interstate/Johnson Lane Corp.* the Court held that federal employment discrimination claims were arbitrable under Title VII.<sup>21</sup> In *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, the Court concluded that federal antitrust claims were arbitrable.<sup>22</sup> Likewise, the Court variously held that agreements to arbitrate feder-

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12. 465 U.S. 1, 10 (1984).

13. *Id.* at 4.

14. *Id.*

15. *Id.* at 5.

16. *Id.* at 11 (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395 (1967)).

17. *Southland Corp.*, 465 U.S. at 12 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983)).

18. *Id.* at 16.

19. *Id.* at 16-17.

20. 482 U.S. 483, 492 (1987).

21. 500 U.S. 20, 35 (1991).

22. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985).

al RICO claims,<sup>23</sup> California fair employment statutory claims,<sup>24</sup> federal truth in lending statutory claims,<sup>25</sup> and Florida truth in lending and usury claims,<sup>26</sup> were all subject to arbitration.

### B. Class Arbitration in the U.S. Prior to 2003

The origins of class arbitration in the U.S. began with the same dispute that ushered in the Court's modern conception of the FAA. Although often overlooked, the *Southland* Court had in fact also granted review of the question "whether arbitration under the FAA is impaired when a class action structure is imposed on the process by the state courts."<sup>27</sup> In the end, however, the *Southland* Court did not address this issue, holding that *Southland* had not contested class arbitration on federal grounds in the California Supreme Court proceedings.<sup>28</sup>

The *Southland* Court thus left undisturbed a prior line of California court decisions regarding class arbitration, which decisions marked the beginning of class arbitration in the U.S. In California appellate proceedings in the *Southland* case, captioned *Keating v. Superior Court*,<sup>29</sup> the 7-Eleven franchisees argued that if the court were to deem arbitration appropriate, arbitration should proceed on a class basis rather than individual basis, *i.e.*, that "the trial court should determine the preliminary issues regarding class certification before the cases are resolved on their merits."<sup>30</sup> *Southland* responded that class procedures in arbitration were impermissible, insisting that its agreements to arbitrate contemplated only individual arbitrations.<sup>31</sup> The California appellate court considered the issue "one of first impression,"<sup>32</sup> and concluded that "there is no insurmountable obstacle to

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23. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (finding RICO claims arbitrable and reaffirming the finding in *Scherk v. Alberto-Culver Co.* that securities claims are arbitrable).

24. *Circuit City Stores v. Adams*, 532 U.S. 105 (2001).

25. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000).

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

27. *Southland Corp.*, 465 U.S. at 3.

28. *Id.* at 17.

29. 167 Cal.Rptr. 481 (Cal. Ct. App. 1980).

30. *Id.* at 490.

31. *Id.*

32. *Id.* The first reported cases in the U.S. mentioning class arbitration took place a few years earlier. In a series of three cases, the Georgia Supreme Court first allowed and then rejected class arbitration of taxpayers' claims against a board of tax assessors. The applicable state statute in these disputes provided for resolution through arbitration. In *Boynton v. Carswell*, the taxpayers originally brought their claims in state trial court, arguing that the arbitral procedure did not provide adequate remedy. *Boynton v. Carswell*, 238 Ga. 417 (1977). The Georgia Supreme Court, however, found that the "issue between each member of the class in these cases and the Joint Board of Assessors [was] identical" and that therefore there was "no legal or practical reason why this class controversy could not be settled in a class arbitration." *Id.* at 419. In the next trip to the Georgia Supreme Court, the tax officials argued that the state statute that provided the procedures for arbitration did "not provide for class arbitration for for any procedure applicable to class arbitration." *Callaway v. Carswell*, 240 Ga. 579, 582 (1978). The court disagreed, upholding the trial judge's decision to permit class arbitration and to devise procedures for such arbitration. *Id.* However, the court determined that it had erred in its prior decision, and that class arbitration would not be permitted in the future because the issue in question was not, after all, arbitrable under the state statute. *Id.* at 583. The court reaffirmed this finding in *Nw. Civic Assoc., Inc. v. Cates*, and there, apparently, Georgia's experimentation with class arbitration ended. *Nw. Civic Assoc., Inc. v. Cates*, 241 Ga. 39 (1978).

conducting an arbitration on a class-wide basis. In an appropriate case, it would undoubtedly be the fairest and most efficient way of resolving the parties' dispute."<sup>33</sup>

On appeal, the California Supreme Court came to the same conclusion. The Court's analysis began from the premise that class action is an important device for vindicating the rights of large groups of persons and that adhesion contracts present an ideal setting for class actions. The Court described class arbitration as a way "to give expression to the basic arbitration commitment of the parties."<sup>34</sup> The California Supreme Court saw class arbitration as a solution that honored an agreement to arbitrate without denying parties to an adhesion contract their rights to pursue class action remedies:

An adhesion contract is not a normal arbitration setting, however, and what is at stake is not some abstract institutional interest but the interests of the affected parties. Classwide arbitration, as Sir Winston Churchill said about democracy, must be evaluated, not in relation to some ideal but in relation to its alternatives. If the alternatives in a case of this sort is to force hundreds of individual franchisees each to litigate its cause with Southland in separate arbitral forum, then the prospect of classwide arbitration, for all its difficulties, may offer a better, more efficient, and fairer solution. Where that is so, and gross unfairness would result from the denial of opportunity to proceed on a classwide basis, then an order structuring arbitration on that basis would be justified.<sup>35</sup>

After the California Supreme Court's decision in *Keating*, California state courts ordered class arbitration in a wide variety of circumstances.<sup>36</sup>

Despite these developments, it initially appeared that class arbitration would remain a state court phenomenon confined almost exclusively to California.<sup>37</sup> Courts in at least three other states rejected the possibility of class arbitration.<sup>38</sup> At the same time, federal courts generally balked at ordering class arbitration when it was not expressly provided for in the arbitration agreement.<sup>39</sup>

33. *Keating*, 167 Cal.Rptr. at 492.

34. *Keating v. Superior Court*, 31 Cal.3d 584, 610 (1982).

35. *Id.*

36. See e.g. *Lewis v. Prudential-Bache Sec., Inc.*, 179 Cal.App.3d 935, 946 (Cal. Ct. App. 1986); *Izzi v. Mesquite Country Club*, 86 Cal.App.3d 1309, 1323 (Cal. Ct. App. 1986); *Anesthesia Care Assocs. Med. Grp., Inc. v. Blue Cross of California*, No. 986677, 994846, 2002 WL 484662, at \*7 (Cal. Sup. Feb. 25, 2002); *Sanders v. Kinko's, Inc.*, 99 Cal.App.4th 1106, 1113-1114 (Cal. Ct. App. 2002); *Garcia v. Directv*, No. B158570, 2002 WL 31769224, at \*4 (Cal. Ct. App. Dec. 11, 2002).

37. State courts in Pennsylvania and South Carolina followed the California state courts' approach. See *Dickler v. Hearson Lehman Hutton, Inc.*, 596 A.2d 860 (Pa. Super. Ct. 1986); *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, (S.C. 2002).

38. See *Steinberg v. Prudential-Bache Sec., Inc.*, 12 Del. J. Corp. L. 371, 380 (Del. Ch. 1986) (finding that ordering class arbitration was impermissibly "rewriting the contract"); *Med Center Cars, Inc. v. Smith*, 727 So.2d 9 (Ala. 1998); *Stein v. Geonerco, Inc.*, 17 P.3d 1266 (Wash. Ct. App. 2001). The court in *Steinberg* distinguished the California Supreme Court's opinion in *Keating* by stating, wrongly, that "the United States Supreme Court remanded the case for a determination of whether [class arbitration] is permissible under the Federal Arbitration Act." *Steinberg*, 12 Del. J. Corp. L. at 380 n.5.

39. See e.g. *Gammaro v. Thorp Consumer Disc. Co.*, 828 F.Supp. 673 (D. Minn. 1993) (finding the court had no authority to order class arbitration because it had to "give effect to the agreement of the parties, and this arbitration agreement makes no provision for class treatment of disputes.").

The leading federal court decision was that of the Seventh Circuit in *Champ v. Siegel Trading Co., Inc.*, which refused to order class arbitration where the parties had not specifically agreed upon it.<sup>40</sup> The *Champ* court held that the “overriding goal of the FAA was to place private arbitration agreements on the same footing as other contracts negotiated between private parties,”<sup>41</sup> even if doing so created “possible inefficiencies”<sup>42</sup> or “piecemeal litigation.”<sup>43</sup> The court rejected the argument that if “an order compelling class arbitration *would not contradict* the terms of an arbitration...would still be *in accordance with* those terms as required by Section 4 of the FAA,”<sup>44</sup> instead holding that class arbitration would only be compelled if affirmatively authorized by the parties’ agreement to arbitration.<sup>45</sup> Given that the vast majority of arbitration agreements did not provide expressly for class arbitration, *Champ* appeared to seal the status of class arbitration, at least outside of California, as “a mythical beast . . . rarely seen.”

### *C. Green Tree Financial Corp v. Bazzle*

In 2003, a sharply-divided decision by the U.S. Supreme Court in *Green Tree Financial Corp v. Bazzle* dramatically changed the landscape for class arbitrations – at least for a time. In *Bazzle*, a putative class of homeowners brought a state-court class action against Green Tree Financial Corporation alleging that home improvement loans it had issued violated the South Carolina Consumer Protection Code.<sup>46</sup> Green Tree objected to class certification and sought to compel arbitration. The trial court both certified a class action and compelled arbitration.<sup>47</sup> The arbitrator, “administering the case as a class arbitration, eventually awarded the class \$10,935,000 in statutory damages” plus attorney fees.<sup>48</sup> A similar class arbi-

40. 55 F.3d 269 (7th Cir. 1995).

41. *Id.* at 275.

42. *Id.* at 275 (quoting *United Kingdom v. Boeing Co.*, 998 F.2d 68, 72 (2d Cir. 1993)).

43. *Id.* at 277 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

44. *Id.* at 274. 9 U.S.C. § 4 provides, *inter alia*, that in light of “a written agreement for arbitration ... courts shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.” 9 U.S.C. § 4 (2011).

45. *Champ*, 55 F.3d at 275. For reasons similar to those of *Champ*, California federal district courts also took the view that they could not order class arbitration if an arbitration agreement did not specifically provide for such procedure. *See e.g.* *McCarthy v. Providential Corp.*, 122 F.3d 1242, 1246 (9th Cir.1997); *Gray v. Conseco, Inc.*, No. SACV000322, 2001 WL 1081347, at \*3 (C.D. Cal. Sept. 6, 2001); *Bischoff v. Directv, Inc.*, 180 F.Supp.2d 1097, 1109 (C.D. Cal. 2002).

46. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447-49 (2003).

47. *Id.* at 449.

48. *Id.* The arbitration agreement between Green Tree and its customers provided the following terms:

ARBITRATION-All disputes, claims, or controversies arising from or relating to this contract or the relationships which result from this contract ... shall be resolved by binding arbitration by one arbitrator selected by us with consent of you. This arbitration contract is made pursuant to a transaction in interstate commerce, and shall be governed by the Federal Arbitration Act at 9 U.S.C. section 1...THE PARTIES VOLUNTARILY AND KNOWINGLY WAIVE ANY RIGHT THEY HAVE TO A JURY TRIAL, EITHER PURSUANT TO ARBITRATION UNDER THIS CLAUSE OR PURSUANT TO A COURT ACTION BY U.S. (AS PROVIDED HEREIN) .... The parties agree and understand that the arbitrator shall have all powers provided by the law and the contract. These powers shall include all legal and equitable remedies, including, but not limited to, money damages, declaratory relief, and injunctive relief.

tration against Green Tree involving mobile homes resulted in an award of \$9,200,000 in statutory damages plus attorneys' fees. Green Tree appealed both cases on the grounds that, among other things, "class arbitration was legally impermissible."<sup>49</sup>

The South Carolina Supreme Court noted that the two cases presented "the same novel issue: whether class-wide arbitration is permissible when the arbitration agreement between the parties is silent regarding class actions."<sup>50</sup> The court summarized the state of the law governing class arbitration, noting that the U.S. Supreme Court had declined to rule on the issue in *Southland* and that courts in other jurisdictions had taken different approaches:

Several federal circuits have precluded class-wide arbitration when the arbitration agreement is silent based on their interpretation of Section 4 of the FAA. Representing the opposing view, the California courts have permitted class-wide arbitration on a case by case basis when the arbitration agreement is silent.<sup>51</sup>

The South Carolina court adopted the California position, holding "that class-wide arbitration may be ordered when the arbitration agreement is silent if it would serve efficiency and equity, and would not result in prejudice."<sup>52</sup> The Court reasoned:

If we enforced a mandatory, adhesive arbitration clause, but prohibited class actions in arbitration where the agreement is silent, the drafting party could effectively prevent class actions against it without having to say it was doing so in the agreement . . . . Under those circumstances, parties with nominal claims, but significant collective claims, would be left with no avenue for relief and the drafting party with no check on its abuses of the law. Further, hearing such claims (involving identical issues against one defendant) individually, in court or before an arbitrator, does not serve the interest of judicial economy.<sup>53</sup>

The U.S. Supreme Court accepted the case for review. In a badly-fragmented set of opinions, captioned *Green Tree Financial Corp v. Bazzle*, the Court reversed and remanded. For better or worse, the various opinions in *Bazzle* opened the doors to the rapid, robust development of class arbitration.

Justice Breyer's plurality opinion in *Bazzle* initially considered whether the South Carolina Supreme Court had correctly decided that the parties' arbitration agreement was silent on the issue of class arbitration or whether the agreement in

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*Id.* at 448 (emphasis and capitalization as found in the opinion, where emphasis was added and capitalization was from the original).

49. *Id.* at 444.

50. *Bazzle v. Green Tree Fin. Corp.*, 569 S.E.2d 349, 351 (S.C. 2002).

51. *Id.* at 356 (identifying *Champ* as the seminal Court of Appeals decision and *Keating* as the seminal California state court decision).

52. *Id.* at 360.

53. *Id.* at 360-61.

fact, as Green Tree contended, forbade class arbitration.<sup>54</sup> The plurality concluded that it was not for the courts to decide this question and therefore did not adopt either party's interpretation of the arbitration agreement. Rather, the plurality concluded that this question— whether the arbitration clause authorized class arbitration — was for the arbitrators, not the courts, to decide. According to the plurality, this question did not fall within the category of “gateway matters” (such as the validity of an arbitration agreement and other “arbitrability” issues) that are for courts to determine, absent clear agreement to the contrary.<sup>55</sup> Rather, the plurality thought the question whether an arbitration agreement permits class arbitration “concerns contract interpretation and arbitration procedures. Arbitrators are well situated to answer that question.”<sup>56</sup>

Technically, the *Bazze* plurality did not reach the question of whether the FAA permits class arbitration where an arbitration agreement is silent. Conceivably, on remand, an arbitrator could have found the arbitration agreement silent on the issue and ordered class arbitration, only for a court, in a subsequent action to vacate, to hold that class arbitration was impermissible under the FAA. Under the plurality's analysis, however, that result appeared very unlikely: having categorized the question of class arbitration as a matter of contract interpretation and arbitration procedures, not a gateway issue of arbitrability, the plurality strongly suggested that decisions on these questions by arbitral tribunals would be subject only to the very limited judicial review generally available for such issues.<sup>57</sup>

That conclusion was bolstered by Justice Stevens' opinion, concurring in the judgment. Justice Stevens wrote that the plurality's opinion was “close to [his] own” and that he concurred so that there would be a controlling opinion.<sup>58</sup> Nonetheless, Justice Stevens would have affirmed the South Carolina Supreme Court on other grounds — in particular, because he thought that its decision was “correct as matter of law.”<sup>59</sup> Justice Stevens reasoned:

The Supreme Court of South Carolina had held as a matter of state law that class-action arbitrations are permissible if not prohibited by the applicable agreement, and that the agreement between these parties is silent on the issue . . . There is nothing in the Federal Arbitration Act that precludes either of these determinations by the Supreme Court of South Carolina.<sup>60</sup>

Chief Justice Rehnquist's dissent disagreed with the plurality as to who should decide whether the parties' arbitration clause permitted class arbitration, opining that “the determination is one for the courts, not arbitrator.”<sup>61</sup> Justice Rehnquist also disagreed with Justice Steven's concurrence, going on to conclude

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54. *Green Tree Financial Corp.*, 539 U.S. at 447.

55. *Id.* at 453.

56. *Id.*

57. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942-43 (1995); *Nat'l Postal Mail Handlers Union v. Am. Postal Workers Union*, 589 F.3d 437, 441-42 (D.C. Cir. 2009); *Burlington N. and Santa Fe Ry. Co. v. Pub. Serv. Co. of Okla.*, 636 F.3d 562, 567-68 (10th Cir. 2010).

58. *Green Tree Financial Corp.*, 539 U.S. at 455 (Stevens, J. concurring and dissenting).

59. *Id.* at 455.

60. *Id.* at 454-55.

61. *Id.* at 455 (Rehnquist, C.J., dissenting).

that “the holding of the Supreme Court of South Carolina contravenes the terms of the contracts and is therefore pre-empted by the FAA.”<sup>62</sup> On his reading, the arbitration agreements at issue permitted parties to choose an arbitrator for each individual contract and set of claims, a requirement that would be contravened by a single arbitrator hearing all claims by all class members in a single arbitration. In other words, Justice Rehnquist concluded that the express terms of the parties’ arbitration agreements foreclosed class arbitration; he did not address the question whether class arbitration would be permissible when the arbitration agreement was silent on the issue.<sup>63</sup>

Predictably, the Court’s 2003 decision in *Bazzle* produced a dramatic increase in the use of class arbitration. With *Champ* no longer barring the way, arbitrators across the U.S. were free to determine whether particular arbitration agreements permitted class arbitration – so long as the procedure was not expressly forbidden by the arbitration agreement – and they frequently concluded that the agreements impliedly permitted class arbitrations.<sup>64</sup> At the same time, arbitral institutions moved to adopt rules for class arbitration, with both the AAA and JAMS quickly issuing class arbitration rules.<sup>65</sup> By 2011, the AAA had approximately three hundred class arbitrations on its docket,<sup>66</sup> while JAMS administered a substantial number of additional arbitrations on a class-wide basis.<sup>67</sup>

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62. *Id.*

63. Justice Rehnquist’s opinion suggested, however, that he would interpret most arbitration agreements as expressly forbidding class arbitration (given his view of the parties’ right to select different arbitrators for disputes under individual contracts and their respective arbitration agreements).

64. See e.g. *Rollins, Inc. v. Garrett*, 176 Fed.Appx. 968 (11th Cir. 2006); *Dealer Computer Servs., Inc. v. Champion Ford*, No. 07-13174, 2008 WL 205249 (E.D.Mich. Jan. 24, 2008); *JSC Surgutneftegaz v. President and Fellows of Harvard College*, No. 04 Civ 6069(RMB), 2007 WL 3019234 (S.D.N.Y. Oct. 11, 2007); see generally Alan Scott Rau, *Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT’L ARB. 435 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1938565](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1938565) (page numbers follow PDF) (“*Bazzle* was immediately taken to be an endorsement by the Court of a new norm of classwide arbitrations.”).

65. In its policy on class arbitrations, the AAA explained its reasons for adopting class arbitration rules as follows:

On October 8, 2003, in response to the ruling of the United States Supreme Court in *Green Tree Fin. Corp. v. Bazzle*, the American Arbitration Association issued its Supplementary Rules for Class Arbitrations to govern proceedings brought as class arbitrations. In *Bazzle*, the Court held that, where an arbitration agreement was silent regarding the availability of class-wide relief, an arbitrator, and not a court, must decide whether class relief is permitted. Accordingly, the American Arbitration Association will administer demands for class arbitration pursuant to its Supplementary Rules for Class Arbitrations if (1) the underlying agreement specifies that disputes arising out of the parties’ agreement shall be resolved in accordance with the Association’s rules, and (2) the agreement is silent with respect to class claims, consolidation or joinder of claims.

See AAA Policy On Class Arbitrations, available at <http://www.adr.org/sp.asp?id=28779>. See also Kelly Thompson Cochran & Eric Mogilnicki, *Current Issues in Consumer Arbitration*, 60 BUS. LAW. 785, 792 (2005); S.I. Strong, *Enforcing Class Actions in the International Sphere*, 30 U. PA. J. INT’L L. 1, 36-37 (2008).

66. AAA Class Action Docket, available at [www.adr.org/sp.asp?id=22563](http://www.adr.org/sp.asp?id=22563) (last visited on May 27, 2011). A Westlaw search of U.S. federal and state court cases reveals 63 cases referencing “class arbitration,” “classwide arbitration” or “class action arbitration” prior to *Bazzle* and 550 such cases post-*Bazzle*.

67. JAMS reported over 20 consumer arbitrations that have proceeded on a class-wide basis. See <http://www.jamsadr.com/files/uploads/documents/JAMS-consumer-arbitrations.pdf>.

## II. DISCOVER BANK V. SUPERIOR COURT OF LOS ANGELES: UNCONSCIONABILITY AND CLASS ARBITRATION

In the wake of *Bazzle*, many businesses took steps to avoid class arbitration. In particular, franchisee, employee, and consumer contracts routinely incorporated express and often detailed class action waivers into their arbitration provisions.<sup>68</sup> The objective was to ensure that these arbitration agreements could only be interpreted to require individual arbitrations, not class arbitrations.

In response, however, California state courts, and subsequently other state courts, applied the unconscionability doctrine to deny enforcement of class action waivers. This approach was first taken in *Szetela v. Discover Bank* by the California Court of Appeal.<sup>69</sup> There, the arbitration clause provided: “Neither you nor we shall be entitled to join or consolidate claims in arbitration by or against other card members with respect to other accounts or arbitrate any claims as a representative or member of a class or in a private attorney general capacity.” The California court held the clause unconscionable:

The clause is not only harsh and unfair to Discover customers who might be owed a relatively small sum of money, but it also serves as a disincentive for Discover to avoid the type of conduct that might lead to class action litigation in the first place. By imposing this clause on its customers, Discover has essentially granted itself a license to push the boundaries of good business practice to their furthest limits, fully aware that relatively few, if any, customers will seek legal remedies, and that any remedies obtained will only pertain to that single customer without collateral estoppel effect. The potential for millions of customers to be overcharged without an effective method of redress cannot be ignored. Therefore, the provision violates fundamental notions of fairness.<sup>70</sup>

As a result, the court invalidated the waiver provision of the arbitration agreement, leaving the parties to class arbitration (or class litigation, if the class action waiver were held non-severable from the agreement to arbitrate).<sup>71</sup> *Szetela* was not presented with, and did not address, the effects of the FAA on the question of class arbitration. This issue was left for the California Supreme Court in *Discover Bank v. Superior Court of Los Angeles*.<sup>72</sup>

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68. See, e.g., Samuel Estreicher & Steven C. Bennett, *Using Express No-Class Action Provisions to Halt Class-Claims*, N.Y. L.J., June 10, 2005, at 3 (“In response to *Bazzle*, and the non-trivial risk that an arbitrator will entertain class or collective actions in the absence of such a clause, many employers have begun incorporating explicit ‘no-class action’ clauses into their employment alternative dispute resolution (ADR) programs.”); Laurence Z. Shiekman, Stephen S. Harvey & Angelo A. Stio, *Another Federal Circuit Knocks Out Class Action Waiver Provisions in Arbitration Agreement Based on Public Policy Under Federal Antitrust Laws*, 62 CONSUMER FIN. L.Q. REP. 169, 266 (2008) (“Numerous companies responded to *Bazzle* by revising their standard arbitration agreements to expressly prohibit class arbitration.”).

69. 97 Cal.App.4th 1094, 1099-1102 (Cal. Ct. App. 2002).

70. *Id.* at 1101.

71. *Id.* at 1102.

72. 36 Cal.4th 148, 163-64 (2005).

The same class waiver provision found in *Szetela* was also at issue in *Discover Bank*. In *Discover Bank*, however, the California Court of Appeal held that the California rule prohibiting class waivers in arbitration agreements, announced in *Szetela*, was preempted by the FAA.<sup>73</sup> On appeal, the California Supreme Court considered whether the waiver was unconscionable and, if so, whether the FAA preempted the *Szetela* rule.

The California Supreme Court first noted that California courts had held waivers of class action rights contrary to California law in both the litigation and the arbitration contexts. The court emphasized the importance of class action lawsuits in protecting consumers by deterring fraudulent practices from business enterprises and avoiding the burden of duplicative litigation involving identical claims.<sup>74</sup> The court also reasoned that contractual waivers of class actions allow wrongdoers to retain the benefits of their misdeeds.<sup>75</sup> The court then announced the following generally applicable rule of unconscionability with regard to class waivers:

[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party from responsibility for [its] own fraud, or willful injury to the person or property of another.<sup>76</sup>

The court also held that the FAA did not preempt California's unconscionability rule. The court's analysis focused on *Perry v. Thomas*,<sup>77</sup> where the U.S. Supreme Court held that the FAA preempted a section of the California Labor Code that authorized suit for the collection of wages "without regard to the existence of any private agreement to arbitrate."<sup>78</sup> According to the California Supreme Court, the *Perry* decision made "the critical distinction . . . between 'a state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue,' which is preempted by the FAA, and a state law that 'govern[s] issues concerning the validity, revocability, and enforceability of contracts generally,' which is not."<sup>79</sup> Applying this distinction, the California Supreme Court found that California's unconscionability rule prohibiting class action waivers was not preempted by the FAA because "it applie[d] equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements."<sup>80</sup>

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73. *Id.* at 153.

74. *Id.* at 156.

75. *Id.* at 157.

76. *Id.* at 162-63 (internal quote and citation omitted).

77. 482 U.S. 483 (1987).

78. 482 U.S. at 484, 491.

79. 36 Cal.4th at 165 (quoting *Perry*, 482 U.S., at 493 n.9).

80. *Id.* at 165-66.

After *Bazzle* and *Discover Bank*, a substantial number of state and federal courts held that class action waivers were, at least in certain circumstances, unconscionable and, as a consequence, that class arbitrations would be compelled.<sup>81</sup> These decisions concluded not only that class arbitrations would be compelled where arbitration agreements were silent on the issue, but also where arbitration agreements invalidly barred class arbitration, through use of an unconscionable class action waiver. Following *Discover Bank*, class arbitration continued the robust growth that had begun with the Supreme Court's *Bazzle* decision.<sup>82</sup>

### III. STOLT-NIELSEN AND CONCEPCION: AN ABOUT-FACE AND A FUNDAMENTAL ANALYTICAL MISTAKE

The U.S. Supreme Court's approach to class arbitration shifted dramatically in two recent decisions – *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,<sup>83</sup> decided in 2010, and *AT&T Mobility LLC v. Concepcion*,<sup>84</sup> decided in 2011. The Court's two decisions apparently executed an almost complete about-face from the treatment of class arbitration in *Bazzle*. At the same time, the Court's analysis also unnecessarily adopted, albeit apparently in dicta, a profoundly misconceived and erroneous view of both the "fundamental" character of arbitration and the scope of the FAA's protections. Taken seriously, which is difficult to imagine, these views would seriously jeopardize U.S. arbitration law and the efficacy of the FAA.

#### A. Stolt-Nielsen: *Silent Arbitration Clauses Do Not Permit Class Arbitration*

Like *Bazzle*, *Stolt-Nielsen* presented the question whether arbitration clauses that were silent on the issue permitted class arbitration. As discussed above, the Supreme Court had concluded in *Bazzle* that the question whether such clauses permitted class arbitration was for arbitrators to decide. In *Stolt-Nielsen*, however, the Supreme Court largely reversed course, holding that courts could, after all, determine whether an arbitration agreement permitted class arbitration, at least in the context of a vacatur action, and that "silent" arbitration clauses did not permit class arbitration.

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81. See, e.g., *Muhammad v. Cnty. Bank of Rehoboth Beach*, Del., 912 A.2d 88, 100-03 (N.J. 2006); *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 278 (Ill. 2006); *Thibodeau v. Comcast Corp.*, 912 A.2d 874, 882-87 (Pa. Super. Ct. 2006); *Cottonwood Fin., Ltd. v. Estes*, 325 Wis.2d 749, 764-66 (Wis. Ct. App. 2010); *Picardi v. Eighth Judicial Dist. Ct.*, 251 P.3d 723, 726-728 (Nev. 2011); *Cooper v. QC Fin. Servs., Inc.*, 503 F.Supp.2d 1266, 1286-1290 (D. Arizona 2007) (applying Arizona law); *Dale v. Comcast Corp.*, 498 F.3d 1216, 1223-1224 (11th Cir. 2007) (applying Georgia law); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 58-60 (1st Cir. 2007) (applying Massachusetts law).

82. The path to class arbitration, however, was not completely smooth, as evidenced by the misadventures of JAMS with the issue. Initially, JAMS determined that it would not enforce class waivers in arbitration agreements and would require that they be waived. It subsequently withdrew this policy, acknowledging that court decisions on the validity of such clauses varied by jurisdiction. Kelly Thompson Cochran & Eric Mogilnicki, *Current Issues in Consumer Arbitration*, 60 BUS. LAW. 785, 793-94 (2005).

83. 130 S.Ct. 1758 (2010).

84. 131 S.Ct. 1740 (2011).

Unlike most class arbitration cases, the dispute in *Stolt-Nielsen* involved sophisticated businesses (and an international setting). AnimalFeeds supplied raw ingredients to animal-feed producers around the world,<sup>85</sup> while Stolt-Nielsen was a world-wide ocean shipping company.<sup>86</sup> AnimalFeeds brought a class arbitration against Stolt-Nielsen and similar shipping companies asserting antitrust claims (based on allegedly illegal price fixing by ocean shippers).<sup>87</sup> The arbitration agreement in the AnimalFeeds-Stolt-Nielsen contract was silent on whether class arbitration was permitted.<sup>88</sup>

The arbitral tribunal in *Stolt-Nielsen* had considered whether class arbitration was permissible, given a silent arbitration agreement, and determined that it was. As the Court understood it, however, the arbitral tribunal had not actually interpreted the arbitration agreements in making this determination. The Court concluded that the arbitral tribunal instead had “simply imposed its own conception of sound policy” based on the perception of “a post-*Bazze* consensus among arbitrators that class arbitration is beneficial in ‘a wide variety of settings.’”<sup>89</sup> In Justice Alito’s view, “the panel proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.”<sup>90</sup> As a consequence, the Court held that the arbitrators’ decision to proceed with class arbitration exceeded their authority, requiring that their award be vacated.<sup>91</sup>

The Court then went on to “establish the rule to be applied in deciding whether class arbitration is permitted.”<sup>92</sup> The Court first noted that a “foundational FAA principle” is that “arbitration is a matter of consent.”<sup>93</sup> It then found that compelling class arbitration simply because the parties’ agreement did not preclude it was “fundamentally at war” with this principle.<sup>94</sup> The Court reasoned that class arbitration is not a term that can be “infer[red] solely from the fact of the parties’ agreement to arbitrate,”<sup>95</sup> because “class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed that the parties consented to it by simply agreeing to submit their dispute to an arbitrator.”<sup>96</sup>

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85. *Stolt-Nielsen*, 130 S.Ct. at 1764.

86. *Id.*

87. *Id.* at 1765.

88. *Id.* at 1766.

89. *Id.* at 1769. It is difficult to see the basis for the *Stolt-Nielsen* Court’s conclusion that the arbitral tribunal had not in fact interpreted the parties’ arbitration agreements and had instead “simply imposed its own conception of sound policy.” *Id.* In fact, whatever one thinks about the correctness of their analysis, the arbitrators’ award performed a relatively unexceptional examination of the parties’ agreement to arbitrate.

90. *Id.* at 1769.

91. *Stolt-Nielsen*, 130 S.Ct. at 1776.

92. *Id.* at 1772. The Court explained that *Bazze* had “left that question open.” *Id.* As described above, this assessment of *Bazze* is technically correct, but the much more obvious interpretation was that the *Bazze* Court permitted class arbitration in circumstances when the arbitration agreement was silent on the issue. Certainly, this was the meaning divined by the AAA and JAMS, hundreds of litigants and multiple courts.

93. *Id.* at 1775.

94. *Id.*

95. *Id.*

96. *Id.* The Court added that “[i]n bilateral arbitration, parties forgo the procedural rigor and appellate reviews of the courts in order to realize the benefits of private dispute resolution.” *Id.* As discussed below, this view of the “procedural rigor” of arbitration would subsequently find greater voice in Justice Scalia’s opinion in *Concepcion*.

Based on these considerations, the Court concluded that an arbitration agreement would not be interpreted to permit class arbitration unless it is clear that “the parties *agreed to authorize class arbitration.*”<sup>97</sup> In other words, the parties must have affirmatively, and likely explicitly, addressed the issue.<sup>98</sup> That decision almost entirely undid the results in *Bazzle*, which had apparently left to arbitrators the largely unreviewable authority of determining whether particular arbitration agreements permitted class arbitration. In its place, *Stolt-Nielsen* held that the availability of class arbitration was a matter for de novo judicial determination in a vacatur action (and, very likely, also in an action to compel arbitration);<sup>99</sup> at the same time, the Court also held that silent arbitration clauses could no longer be used as the basis for class arbitrations under the FAA.

*B. Concepcion: The FAA Preempts State Unconscionability Rules  
Against Class Arbitration Waivers*

In late April of 2011, eight years after its decision in *Bazzle* opened the door to class arbitration, the Supreme Court almost entirely closed that door. In its eagerness to reverse course, however, the Court adopted an obviously mistaken definition of “arbitration,” and conception of the FAA more broadly, which would, if given effect, do serious damage to U.S. arbitration law.

In *AT&T Mobility LLC v. Concepcion*, Vincent and Liza Concepcion, customers of AT&T, filed a complaint alleging that the company had defrauded them by charging sales tax (about \$30) on phones advertised as free; the Conceptions’ complaint was later consolidated with a class action on behalf of other cell phone users.<sup>100</sup> AT&T sought dismissal of the claims brought against it by both the Conceptions and other class members, moving to compel individual arbitrations pursuant to an arbitration clause contained in AT&T’s cell phone contracts with

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97. *Stolt-Nielsen*, 130 S.Ct. at 1776 (emphasis in original).

98. The Court did, arguably, leave the door open for arbitrators to find implicit consent to class arbitration if the applicable rule of law “contains a ‘default rule’ under which an arbitration clause is construed as allowing class arbitration in the absence of express consent.” *Id.* at 1768-69.

99. The Court noted that in *Bazzle* the plurality, rather than the majority, had determined that “an arbitrator, not a court, [must] decide whether a contract permits class arbitration.” *Id.* at 1772. While evidently skeptical of this notion, the Court stated that it did not need revisit the question because the parties had “expressly assigned this issue to the arbitration panel.” *Id.* Lower courts have thus been left with no meaningful guidance from the Supreme Court on the issue. In *Central West Virginia Energy, Inc. v. Bayer Cropscience LP*, the court noted that *Stolt-Nielsen* “specifically declined to address whether it was for a court or an arbitrator to decide the issue of consent to class arbitration,” and thus the court refused to overrule an earlier fourth circuit decision holding that only questions whether the parties had decided to arbitrate “at all” were for the courts to decide. 645 F.3d 267, 275 n.7 (4th Cir. 2011). Another federal court, noting the contradictory opinions in *Bazzle* and *Stolt-Nielsen*, stated that “[w]ithout clear guidance from the Supreme Court, the Court is left with Eighth Circuit precedent which indicates that it is appropriate for the Court, not an arbitrator, to resolve [the class arbitration] question.” *Mork v. Loram Maint. of Way, Inc.*, Civ. No. 11-2069 (MJD/FLN), 2012 WL 38628, at \*2 (D. Minn. Jan. 9, 2012). A third federal court, however, followed the plurality opinion in *Bazzle*, noting that *Stolt-Nielsen* “did not decide the threshold issue,” and therefore “conclude[d]...that the ability of a class to arbitrate a dispute where the parties contest whether the agreement to arbitrate is silent or ambiguous on the issue is a procedural question that is for the arbitrator to decide.” *Guida v. Home Sav. of Am., Inc.*, 793 F.Supp.2d 611, 616 (E.D.N.Y. 2011).

100. 131 S.Ct. 1740, 1744 (2011).

its customers.<sup>101</sup> The clause required arbitration of all disputes between AT&T and each of its customers; it also contained a class action waiver providing that all claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."<sup>102</sup> In addition, the arbitration clause provided (if any doubt remained) that "the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding."<sup>103</sup>

Despite these provisions, the *Concepcions* argued that they were free to pursue a class action, on the grounds that their class action waiver was unenforceable under the California Supreme Court's decision in *Discover Bank*. Applying that decision's rule, the District Court and the Ninth Circuit Court of Appeals rejected AT&T's motion to compel individual arbitrations, holding that the class action waiver was unconscionable and, therefore, permitting the *Concepcion*'s class action litigation to proceed.<sup>104</sup>

The lower courts were unmoved by the relatively "consumer-friendly" aspects of the arbitration agreement at issue in AT&T's cell phone contracts. Among other things, the agreement provided for arbitration in a convenient situs (where the consumer is billed); arbitration in person, by telephone or online, at the consumer's choice, for amounts less than \$10,000; the availability of injunctive relief and punitive damages; no right by AT&T to claim attorneys' fees; and an option to choose small claims court (rather than arbitration).<sup>105</sup> These features did not, however, dissuade the lower courts from invalidating the class action waiver (and the underlying agreement to arbitrate) on unconscionability grounds.

In a 5-4 decision, which was only slightly less fragmented than that in *Bazzele*,<sup>106</sup> the Supreme Court reversed. Writing for the Court, Justice Scalia declared that California's *Discover Bank* rule is preempted by the FAA because it permits consumers to demand class arbitration, which, in his view, is a procedure that is incompatible with the "fundamental" character of arbitration under the FAA.<sup>107</sup>

In concluding that class arbitration was contrary to the "fundamental" character of arbitration, Justice Scalia reasoned that "the point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute."<sup>108</sup> In contrast, he said, "class arbitration requires procedural formality"<sup>109</sup> and "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural

101. *Id.* at 1744-45.

102. *Id.* at 1744.

103. *Id.* at 1744, n.2.

104. *Id.* at 1745.

105. *Id.* at 1744., 131 S.Ct.at 1744.

106. The *Concepcion* opinion was joined by five Justices. The fifth vote was provided, however, by Justice Thomas, who also concurred. Justice Thomas would have reversed the Ninth Circuit not because class wide arbitration is contrary to the "fundamental" character of arbitration, but rather because under his reading of the FAA an agreement to arbitrate must be enforced "unless a party successfully challenges the formation of the arbitration agreement." *Concepcion*, 131 S.Ct. at 1753 (Thomas, J. concurring).

107. *Id.* at 1748.

108. *Id.* at 1749.

109. *Id.* at 1751 (emphasis in original).

morass than final judgment.”<sup>110</sup> The Court also thought that “class arbitration greatly increases risk to defendants” by aggregating claims without providing for multilayered review.<sup>111</sup> Given the limited grounds upon which courts can vacate an arbitral award, the Court concluded, arbitration is “poorly suited to the higher stakes of class litigation.”<sup>112</sup> Finally, the Court found it significant that class arbitration did not exist in 1925, when the FAA was enacted – apparently suggesting that class arbitration was thus inconsistent with “arbitration as envisioned by the FAA.”<sup>113</sup>

In sum, Justice Scalia concluded that state law may not require procedures that are “not arbitration as envisioned by the FAA,” and “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”<sup>114</sup> The Court therefore held that the *Discover Bank* rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” and was preempted by the FAA.<sup>115</sup>

Writing for the dissent, Justice Breyer declared that the FAA’s purpose is not “to guarantee these particular procedural advantages,” but to treat arbitration on equal footing as other contracts.<sup>116</sup> The dissent reasoned that “California is free to define unconscionability as it sees fit,” and as long as it “applies the same legal principles to address the unconscionability of class arbitration waivers as it does to address the unconscionability of any other contractual provision, the merits of class proceedings should not factor into our decision.”<sup>117</sup> Justice Breyer also argued that “class arbitration is consistent with the use of arbitration,” and pointed out that the AAA’s amicus brief in *Stolt-Nielsen* “found class arbitration to be ‘a fair, balanced and efficient means of resolving class disputes.’”<sup>118</sup>

### C. Reflections on the Supreme Court’s Misadventures

On any view, the various opinions in *Bazzle*, *Stolt-Nielsen*, and now *Concepcion* make for unhappy reading. As an initial matter, the erratic course of ushering in class arbitration in *Bazzle*, followed by largely or entirely ushering it out again less than a decade later in *Stolt-Nielsen* and *Concepcion*, is both a serious institutional failure for the Court and an enormous waste of resources for American society.

What was the point, and why must parties and taxpayers bear the costs, of the countless disputes, arbitrations and litigations over the past ten years provoked by the Court’s shifting views? What happens now to the 300 or so AAA class arbi-

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110. *Id.* at 1751 (emphasis in original).

111. *Id.* at 1752. The Court said that ordering an arbitration to proceed on a class basis would be as antithetical to arbitration as ordering parties in an arbitration to incorporate “judicially monitored discovery,” the Federal Rules of Evidence, or “ultimate disposition by a jury.” *Id.* at 1747.

112. *Concepcion*, 131 S.Ct. at 1752.

113. *Id.* at 1753. The Court also suggested that the California rule could result in fewer companies choosing to arbitrate, although the factual support for that premise is obscure.

114. *Id.* at 1748.

115. *Id.* at 1748 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

116. *Id.* at 1758 (Breyer, J., dissenting) (citing 9 U.S.C. § 2).

117. *Id.* at 1760.

118. *Concepcion*, 131 S.Ct. at 1758.

trations which are pending? What weight should parties and lower courts give to future Supreme Court pronouncements on the FAA – and for how long? The tortuous and contradictory path of the Supreme Court's decisions on class arbitration imposed very substantial waste and uncertainty on parties who had concluded arbitration clauses based on existing judicial precedent.

More generally, the Court's contradictory positions seriously compromise the legal framework for arbitration in the U.S., leaving businesses, courts and others with little security about how arbitration agreements will be interpreted and enforced in the future. The Court has recognized the high public importance of the FAA and the legal regime for arbitration in the U.S. – agreeing to review a disproportionate number of arbitration decisions over the past two decades.<sup>119</sup> At the same time, the Court's shifting and contradictory decisions involving class arbitration are a striking example of how not to provide a stable and effective framework for the arbitral process.

This is not a question of whether *Bazzle*, on the one hand, or *Stolt-Nielsen* and *Concepcion*, on the other hand, was correctly decided; rather, it is a question of consistency and predictability. In order for arbitration, like other aspects of contemporary business, to function effectively, it requires a stable, predictable and durable legal framework; it does not require, nor benefit from, unyielding jurisprudential logic and rhetorical display by whatever majority commands the Court in a particular Term. Appellate courts in other legal systems are able to produce consistent and predictable bodies of judicial authority on issues of arbitration – despite substantial diversities of opinion on the same sorts of issues that the U.S. Supreme Court faces.<sup>120</sup> The U.S. legal regime for arbitration would benefit enormously if the Supreme Court were able to provide comparable consistency and clarity in this country.

Turning to the Court's interpretation of the FAA in *Concepcion*, Justice Scalia's opinion would, if taken seriously, erroneously redefine the very concept of arbitration under the FAA, with potentially serious consequences for U.S. arbitration law more generally. Most importantly, the Court's declarations about the supposed "fundamental" character of those arbitrations that are protected by the FAA are both inaccurate and dangerous: indeed, those declarations threaten the broader body of U.S. arbitration law.

Specifically, Justice Scalia suggests that the FAA only protects a particular type of arbitration – the archetype of arbitration supposedly contemplated by Congress in 1925. On this view, class arbitration is simply "not arbitration as

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119. The Supreme Court has repeatedly stated that the FAA establishes a "liberal federal policy favoring arbitration agreements." *See, e.g.*, *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012) (quoting *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Since 1991 the Court has decided more than 20 cases concerning the Federal Arbitration Act, often reversing lower court rulings disfavoring arbitration. This is a disproportionate number of FAA decisions considering that the Court only hears 75-80 cases a year (out of 10,000 certiorari petitions filed each year). *See* Supreme Court Website, Frequently Asked Questions, <http://www.supremecourt.gov/faq.aspx#faq9> (last visited Mar. 30, 2012).

120. The decisions of the French Cour de Cassation, the U.K. Supreme Court and the Swiss Federal Tribunal all provide examples of national appellate courts that have succeeded in providing a stable and effective legal regime for arbitration in their respective jurisdictions. *See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 121-31 (2009) (describing the legal regimes of France, the U.K. and Switzerland).

envisioned by the FAA,” and class arbitration “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”<sup>121</sup>

Justice Scalia’s reasoning – which, on its own terms, would withhold FAA protection from any type of arbitration not envisioned by Congress in 1925 – is manifestly wrong. Taken at face value, it would mean that all class arbitration agreements – express, implied or otherwise – would be denied the protections of Sections 2 and 4 of the FAA, because class arbitration is supposedly not arbitration at all. On the contrary, on Justice Scalia’s view, those arbitration agreements would be “inconsistent with the FAA.”

It is very difficult to imagine that this result, or the reasoning in *Concepcion*, are what the Court intended or would hold in future cases; both the result and reasoning plainly contradict both the express terms of Section 2, which requires that “agreements to arbitrate” be enforced, and the Court’s repeated pronouncements that the FAA “ensur[es] that private arbitration agreements are enforced according to their terms.”<sup>122</sup> Likewise, that conclusion contradicts the fundamental purpose of the FAA, which is to give effect to parties’ agreements to submit their disputes for final resolution by an arbitrator – which is plainly what a class arbitration clause does.

Where parties agree to class arbitration, Justice Scalia’s suggestion that this “is not arbitration” – because it is not informal, not bipartite and involves large stakes – is simply not correct. In fact, contrary to the Court’s supposed archetype of the arbitral process, arbitration has historically taken widely varying forms, in widely varying settings – ranging from institutional to ad hoc arbitration; from trade, commercial, religious, community, and international to investor-state arbitration; and from documents only, on-line, or quality arbitrations to arbitrations resembling trial court litigations. Arbitration has historically encompassed a vast range of different procedures, depending on the parties’ particular objectives and interests – very often including formal, multiparty, and high stakes dispute resolution proceedings.

First, arbitration is by no means necessarily informal; rather, arbitration is aimed first and foremost at ensuring the parties’ procedural autonomy. In the Court’s own previous, and accurate, description, “adaptability and access to expertise are hallmarks of arbitration.”<sup>123</sup> Sometimes that adaptability means procedural informality; sometimes it means procedural innovation; and sometimes it means procedural formality. Arbitrations with a high degree of procedural formality are conducted around the United States, and the world, every day – if that

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121. *Concepcion*, 131 S.Ct. at 1748. This line of thought was foreshadowed, at least in part, by Justice Alito’s opinion in *Stolt-Nielsen*, holding that “the task of an arbitrator is to interpret and enforce a contract, not to make public policy,” and chastising the arbitral tribunal for having “proceeded as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.” *Stolt-Nielsen*, 130 S.Ct. at 1767, 1769. This criticism is difficult to follow and ignores the Court’s (robust) approval of the arbitrability of antitrust, securities, Title VII and other disputes involving issues of “public policy.” See, e.g., *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (finding dispute under the Securities Exchange Act of 1934 arbitrable); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (finding antitrust claims to be arbitrable); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) (finding RICO claims arbitrable); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 35 (1991) (finding federal employment discrimination claims under Title VII arbitrable).

122. *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Univ.*, 489 U.S. 468, 478 (1989).

123. *Mitsubishi Motors*, 473 U.S. at 633.

is what the parties' desire and agree upon.<sup>124</sup> Contrary to the Court's suggestions, there is nothing inherent in arbitration that excludes formality, motions, or complexity.

Remarkably, the *Concepcion* opinion also declared "[p]arties could agree to arbitrate pursuant to the Federal Rules of Civil Procedure, or pursuant to a discovery process rivaling that in litigation," but that "what the parties in the aforementioned examples would have agreed to is not arbitration as envisioned by the FAA."<sup>125</sup> That too is incorrect, illustrating the broader mistakes in the Court's analysis.

Arbitration clauses routinely provide for arbitration pursuant to the Federal Rules of Civil Procedure (hereinafter Federal Rules), or for discovery pursuant to the Federal Rules.<sup>126</sup> Internationally, arbitration agreements routinely incorporate the International Bar Association's Rules on the Taking of Evidence in International Commercial Arbitration – providing for disclosure not radically different from that aspects of the discovery that is available under the Federal Rules.<sup>127</sup> Countless other arbitration agreements contain comparable levels of formality, both with regard to procedures and discovery. Clauses with these sorts of provisions are critical to contemporary business and are routinely enforced by courts, in the U.S. and elsewhere, every day of the year.<sup>128</sup> The idea that the FAA does not envision or apply to these provisions is flatly wrong.<sup>129</sup>

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124. In international arbitration, for example, the parties, in consultation with the tribunal, routinely decide procedural issues such as the number and sequence of the pleadings, as well as whether to bifurcate (or even trifurcate) the proceedings. See, e.g., Rule 20 of the ICSID Arbitration Rules ("1. As early as possible after the constitution of a Tribunal, its President shall endeavour to ascertain the views of the parties regarding questions of procedure...2. In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters[.]").

125. *Concepcion*, 131 S.Ct. at 1752-53.

126. See, e.g., GARY BORN, DRAFTING INTERNATIONAL ARBITRATION AGREEMENTS 80 (2006); PAUL FRIEDLAND, ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS 81 (2007).

127. IBA Rules on the Taking of Evidence in International Commercial Arbitration, art. 3(3) (relating to requests for the production of documents), available at [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

128. See, e.g., *Panepucci v. Honigman Miller Schwartz & Cohn LLP*, 281 Fed.Appx. 482, 485 (6th Cir. 2008) (upholding arbitration clause that, *inter alia*, mandated discovery "conducted pursuant to the Federal Rules of Civil Procedure"); *Bhim v. Rent-A-Center, Inc.*, 655 F. Supp. 2d 1307, 1314 (S.D.Fla., 2009) (upholding an arbitration agreement that provided for depositions, document requests, and subpoenas, as well as additional discovery if ordered by the arbitrator for good cause); *Amgen Inc. v. Kidney Center of Del. Cnty., Ltd.*, 879 F.Supp. 878, (N.D.Ill. 1995) (enforcing a subpoena for documents and deposition testimony when the parties "agreed to arbitrate their dispute pursuant to the Federal Rules of Civil Procedure"); *Jardine Lloyd Thompson Canada Inc. v. Western Oil Sands Inc.*, [2006] 264 D.L.R. 4th 358, para. 27 (Can. Alta. Ct. App. 2006) (finding that by virtue of the parties' arbitration agreement the arbitral tribunal did have power to order non-parties to produce documents and submit to pre-hearing discovery); Martin Hunter, *The Procedural Powers of Arbitrators under the English Act 1996*, 13 ARB. INT'L 345, 350 (1997) ("Discovery forms a part of arbitration proceedings only when there is an express or implied agreement of the parties, or when the tribunal orders it in the exercise of its discretion."); ENGLISH ARBITRATION ACT, 1996, §1(b) ("The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest"); *Id.* §34(1) ("It shall be for the tribunal to decide all procedural and evidential matters, subject to the right of the parties to agree any matter."); *Id.* §43(1) ("A party to arbitral proceedings may use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence.").

129. See, e.g., *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) ("the FAA lets parties tailor some, even many features of arbitration by contract, including the way arbitrators are

Second, contrary to the Court's stated views, there is nothing inherent in arbitration that limits it to small stakes. On the contrary, enormous disputes have always been, and still are, decided in arbitration. Justice Breyer's dissent pointed out a few recent examples of high stakes arbitrations.<sup>130</sup> There are, in fact, numerous, famous, high-stakes arbitrations: the IBM/Fujitsu arbitration (involving, in the 1980s, billions of dollars),<sup>131</sup> the 1980's Iran-U.S. Claims Tribunal (which adjudicated many billions of dollars in claims, by both private and government parties),<sup>132</sup> the 1990s Andersen Consulting arbitration (where the claim exceeded \$14 billion),<sup>133</sup> and the 19<sup>th</sup> century Alabama Arbitration (where the U.S. recovered an amount from the United Kingdom equal to its annual government budget).<sup>134</sup> There are also hundreds of currently pending domestic and international commercial and investment arbitrations listed each year in the *American Lawyer*, most involving amounts well in excess of \$1 billion.<sup>135</sup> Justice Scalia's conception of arbitration as inherently involving small stakes is unrelated to the actual practice of arbitration in contemporary life.

Third, again contrary to the Court's stated views in *Concepcion*, arbitration need not be bipartite. On the contrary, it is frequently conducted among multiple parties. The International Chambers of Commerce reports that approximately a third of its cases are multiparty disputes,<sup>136</sup> while entire books are written on the subject of multiparty arbitration.<sup>137</sup> Equally, the Iran-U.S. Claims Tribunal was vested with authority to decide large numbers of small claims (less than \$250,000) in multi-party proceedings, with the claimants' home state acting on their be-

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chosen, what their qualifications should be, which issues are arbitrable, along with procedure and choice of substantive law."); *Life Receivables Trust v. Syndicate 102 at Lloyd's of London*, 549 F.3d 210, 217 (2d Cir. 2008) ("Where agreements so provide, [an arbitrator's] authority includes the power to order discovery from the parties in arbitration since 'the FAA lets parties tailor some, even many features of arbitration by contract, including . . . procedure.'") (quoting *Hall Street Assocs.*, 552 U.S. at 586); *Chiarella v. Viscount Indus. Co., Ltd.*, No. 92 Civ. 9310(RPP), 1993 WL 497967, at \*4 (S.D.N.Y. Dec. 1, 1993) (finding that "[t]he scope of an arbitration panel's authority is determined by the terms of the arbitration agreement" and determining that the arbitrator's discovery orders were permitted by the AAA arbitration rules to which the parties had agreed).

130. 131 S.Ct. at 1760.

131. See Robert H. Mnookin, *Creating Value through Process Design*, 11 J. INT'L ARB. 125, 125-32 (1994).

132. According to the U.S. Department of State, the U.S.-Iran Claims Tribunal has resolved approximately 4000 private claims, resulting in awards totaling more than \$2.5 billion to U.S. nationals and companies. Significant claims between the two governments remain to be resolved by the tribunal. See <http://www.state.gov/s/1/3199.htm>.

133. See *The Andersen Arbitration*, 10 AM. REV. INT'L ARB. 437 (1999).

134. Great Britain was ordered to pay, and did pay, the equivalent of \$15.5 million in gold for violating its neutrality in the U.S. Civil War and having permitted the outfitting of a Confederate privateer that caused substantial damage to Union shipping. See Thomas W. Balch, *THE ALABAMA ARBITRATION* (1900).

135. See Michael D. Goldhaber, *Arbitration Scorecard: Contract Disputes*, AM. LAW. (July 2011) (listing over sixty arbitrations with \$1 billion or more in dispute, including one case with \$20 billion in dispute).

136. See ICC 2010 Statistical Report, at p.2.

137. See, e.g., *MULTIPARTY ARBITRATION* (Bernard Hanotiau and Eric Schwartz eds., 2010); *MULTIPLE PARTY ACTIONS IN INTERNATIONAL ARBITRATION: CONSENT PROCEDURE AND ENFORCEMENT* (Belinda Macmahon ed., 2009).

half.<sup>138</sup> There is simply nothing in the history or practice of arbitration that even remotely suggests that it must involve only two parties.<sup>139</sup>

Fourth, *Concepcion*'s suggestion that arbitration is somehow limited to what Congress envisioned in 1925 is also impossible to accept. Arbitration in the 21st century has no necessary resemblance to that in 1925 – nor should it. Arbitration has historically evolved and been tailored to respond to economic, social and technological developments. As a consequence, contemporary arbitration now routinely addresses statutory claims (under legislation enacted decades after 1925),<sup>140</sup> using telecommunications, on-line and other technologies (developed decades after 1925),<sup>141</sup> dealing with commercial businesses and industries (again, developed decades after the FAA was enacted).<sup>142</sup>

Although the irony was apparently lost on the Court, the bipartite arbitration agreement at issue in *Concepcion* itself, which Justice Scalia was so anxious to protect as an archetypal arbitration clause, contained an elaborate, formal procedural regime that provided for on-line or telephonic consumer arbitration of cell phone disputes involving multiple statutory claims.<sup>143</sup> That arbitration clause contemplated arbitrations using procedural means unknown in 1925, to resolve statutory claims that had not been imagined in 1925, about a technology that would not be invented for decades after 1925. Ironically, it is fairly clear that the bipartite arbitration agreement the Court was ostensibly protecting under the FAA in *Concepcion* would not itself have satisfied Justice Scalia's demand that arbitration in 2011 be the same as that in 1925.

In fact, *Concepcion*'s suggestion that the FAA only envisioned a particular kind of informal, small stakes, bipartite arbitration of the sort supposedly conducted in the 1920s is again patently incorrect. There is nothing at all in the FAA suggesting that Congress intended only to protect arbitrations as they were being

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138. See CHARLES N. BROWER & JASON D. BRUESCHKE, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 116-18 (1998).

139. Professor S.I. Strong notes that courts and commentators are no longer skeptical of multiparty arbitrations. See S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration?* *Stolt-Nielsen, AT&T and a Return to First Principles*, 17 HARV. NEGOT. L. REV. \_\_\_ (forthcoming 2012). Professor Strong also compares the traits of class arbitration and multiparty arbitrations, concluding that these two modes of arbitration differ in only two respects – relief sought and underlying policy considerations – and that these differences do not necessarily alter the nature of arbitration. *Id.*

140. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (finding that Title VII claims are arbitrable).

141. See, e.g., Article 8 of the IBA Rules on the Taking of Evidence in International Arbitration (at the discretion of the tribunal, a witness may appear at an evidentiary hearing by videoconference), available at [http://www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

142. Indeed, the rise of patent arbitration makes it certain that arbitration will often play a pivotal role in disputes involving high tech industries. See e.g. *Cordia Corp. v. C.R. Bard, Inc.*, Civ. A. No. H-92-1623, 1993 WL 723844 (S.D. Tex. Mar. 11, 1993) (regarding an arbitration between medical device manufacturers disputing a patent to a balloon catheter used in angioplasty procedures). 35 U.S.C. § 294 and other statutes encouraging patent arbitration were enacted in the 1980s. See AAA Patent Arbitration Rules (Introduction), available at <http://www.adr.org/sp.asp?id=22013#Introduction>. Of course, there are also many non-patent arbitrations involving businesses and industries that did not exist in 1925. See e.g. *Advanced Micro Devices, Inc. v. Intel Corp.*, 9 Cal.4th 362 (1994) (concerning an arbitration involving a contract dispute between computer chip manufacturers).

143. The claims in the case were based on three separate California statutes, and the ATT website provided the forms for filing a Notice of Dispute and Demand for Arbitration. See *Laster v. T-Mobile USA Inc.*, No. 05cv1167 DMS (AJB) 2008 WL 5216255, at \*1, 3 (S.D. Cal. Aug. 11, 2008).

conducted in 1925 – and that view would conflict squarely with Congress’ objectives of encouraging arbitration as a flexible, efficient alternative to litigation.

Finally, the claim in *Concepcion* that class arbitration is not really arbitration is also contrary to all available definitions of arbitration,<sup>144</sup> including the Court’s own prior definitions<sup>145</sup> – all of which Justice Scalia omitted even to mention in his discursion on the “fundamental” nature of arbitration. Those definitions have none of the limitations that Justice Scalia relies upon and, on the contrary, are expansive and catholic in their reach.<sup>146</sup> That is, of course, hardly surprising in light of the extraordinary variety and diversity that arbitration has historically exhibited.

In summary, if it were given effect, Justice Scalia’s view about the “fundamental” character of arbitration is as dangerous as it is misinformed. Taken at face value, the suggestion that the FAA protects only a particular historical conception of arbitration – involving informal, small, bipartite disputes between local merchants – threatens to radically limit the meaning and effect of the FAA. It

144. See, e.g., Martin Domke, Larry Edmonson & Gabriel M Wilner, DOMKE ON COMMERCIAL ARBITRATION § 1:1 (“Arbitration is a process by which parties voluntarily refer their disputes to an impartial third person (an arbitrator) selected by them for a decision based on the evidence and arguments to be presented before the arbitration tribunal.”); Jill I. Gross, *Securities Mediation: Dispute Resolution for the Individual Investor*, 21 OHIO ST. J. ON DISP. RESOL. 329, 358 (2006) (providing the following definition of arbitration: “(1) the parties choose to have a dispute or disputes decided by a third party, called an arbitrator; (2) the parties choose the arbitrator or a method for his or her selection; (3) the arbitrator hears the dispute; (4) the arbitrator makes a binding award; (5) the arbitrator’s decision is, subject to very limited grounds of review, final and enforceable by State law in the same manner as a judgment”) (citing IAN MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 7-8 (1992)); GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 63-64 (2009) (“[I]nternational commercial arbitration is a means by which international business disputes can be definitively resolved, pursuant to the parties’ agreement, by independent, non-governmental decision-makers, selected by or for the parties, applying neutral judicial procedures that provide the parties an opportunity to be heard.”); NIGEL BLACKBAY, CONSTANTINE PARTASIDES, ALAN REDFERN & MARTIN HUNTER, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 1-2 (2009) (In an arbitration, “[p]arties who are in dispute agree to submit their disagreement to a person whose expertise or judgment they trust . . . who listens, considers the facts and the arguments, and then makes a . . . final and binding [decision]; and it is binding because the parties have agreed that it should be, rather than because of the coercive power of any State.”); BLACK’S LAW DICTIONARY (9th ed. 2009) (defining arbitration as a “method of dispute resolution involving one or more neutral parties who are usually agreed to by the disputing parties and whose decision is binding”); American Arbitration Association (“Arbitration is the submission of a dispute to one or more impartial persons for a final and binding decision”) available at [http://www.adr.org/aaa/faces/services/disputeresolution-services/arbitration?\\_afLoop=795808709003563&\\_afWindowMode=0&\\_afWindowId=null#%40%3F\\_afWindowId%3Dnull%26\\_afLoop%3D795808709003563%26\\_afWindowMode%3D0%26\\_adf.ctrl-state%3Dj4dh38nk\\_v\\_4](http://www.adr.org/aaa/faces/services/disputeresolution-services/arbitration?_afLoop=795808709003563&_afWindowMode=0&_afWindowId=null#%40%3F_afWindowId%3Dnull%26_afLoop%3D795808709003563%26_afWindowMode%3D0%26_adf.ctrl-state%3Dj4dh38nk_v_4).

145. Ironically, in a prior case, the Court relied on a broad definition of arbitration when finding that a statutory procedure did not qualify as arbitration. *Rush Prudential HMO, Inc. v. Moran*, 536 U.S. 355, 382 (2002) (stating that “arbitration occurs when ‘parties in dispute choose a judge to render a final and binding decision on the merits of the controversy and on the basis of proofs presented by the parties.’”) (quoting 1 I. MacNeil, R. Speidel, & T. Stipanowich, *Federal Arbitration Law* § 2.1.1 (1995)).

146. See, e.g., GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 227-28 (2009) (cataloging the expansive view that courts have taken, both under the FAA and in foreign common and civil law jurisdictions, of the definition of arbitration); Strong, *supra* note 139 (addressing the difficulties in defining the nature of arbitration in part due to the wide variety of procedures possible); David St. John Sutton, Judith Gill & Matthew Gearing, RUSSEL ON ARBITRATION § 1:2 (“[p]erhaps the absence of an accepted definition of arbitration, which encompasses its many facets but precludes other forms of dispute resolution, simply demonstrates the diverse scope of the subject.”).

would, applied in a principled fashion, very likely exclude arbitration of most statutory claims (that did not exist in 1925) from the FAA's protections, as well as consumer arbitration and on-line arbitration (that also did not exist in the 1920s). Equally, if taken seriously, Justice Scalia's view would deny the FAA's protections to arbitration agreements requiring any appreciable level of procedural formality (e.g., discovery pursuant to the Federal Rules and motions procedures). Indeed, the various aspects of Justice Scalia's conception of arbitration are eerily reminiscent of some 19<sup>th</sup> century judicial decisions, which treated arbitration as a second class form of rough justice suitable only for limited types of disputes and, as a consequence, subject to strict judicial supervision.<sup>147</sup>

Hopefully, *Concepcion's* erroneous conception of arbitration will remain but a rhetorical extravagance that does not further confuse the development of arbitration law under the FAA or elsewhere. It is very difficult to imagine that the Court would ever refuse to enforce agreements to arbitrate because the parties had agreed to formal procedures, multiparty proceedings or forms of dispute resolution not common in 1925. For the moment, however, Justice Scalia's analysis represents that of the Court, binding in both state and federal courts, and the risk that it will be given effect by lower court judges is a very real one.<sup>148</sup>

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147. In *Tobey v. County of Bristol*, Justice Story found that:

It is certainly the policy of the common law, not to compel men to submit their rights and interests to arbitration, or to enforce agreements for such purpose. Nay, the common law goes farther, and even if a submission has been made to arbitrators, who are named, by deed or otherwise, with an express stipulation, that the submission shall be irrevocable, it is still revocable and countermandable, by either party, before the award is actually made, although not afterwards.

*Tobey v. County of Bristol*, 23 F.Cas 1313, 1321 (C.C.D. Mass. 1845). Justice Story justified this supposed hostility of the common law toward arbitration as follows:

[A] court of equity ought not to compel a party to submit the decision of his rights to a tribunal, which confessedly, does not possess full, adequate, and complete means, within itself, to investigate the merits of the case, and to administer justice.... Now we all know, that arbitrators, at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law and equity, to administer effectually, in complicated cases; and hence it has been said that the judgment of arbitrators is but rusticum iudicium. Ought then a court of equity to compel a resort to such a tribunal, by which, however honest and intelligent, it can in no case be clear that the real legal or equitable rights of the parties can be fully ascertained or perfectly protected?

*Id.* at 1320-21.

148. It was precisely to overcome the hostility of decisions like that of Justice Story in *Tobey v. County of Bristol* that, according to the *Southland* Court, Congress passed the FAA. *Southland Corp.*, 465 U.S. at 14 (in passing the FAA, Congress addressed the problem of "old common law hostility toward arbitration"). Justice Scalia's views regarding the nature of arbitration have, unfortunately, already been quoted in international arbitration. In his dissenting opinion in *Abaclat and Others v. Argentina*, *supra* note 3, Georges Abi-Saab quotes approvingly Justice Scalia's view that in arbitration "[t]he absence of multilayered review makes it more likely that errors will go uncorrected. That risk of error may become unacceptable when damages allegedly owed to thousands of claimants are aggregated and decided at once. Arbitration is poorly suited to these higher stakes." *Abaclat and Others v. Argentina*, ICSID Case No. ARB/07/5, Dissenting Opinion of Georges Abi-Saab, ¶ 153 (Aug. 4, 2011) (quoting *Concepcion*, 131 S.Ct. at 1751).

More broadly, the analysis in *Concepcion* raises the same concerns of predictability and institutional responsibility that arise from the unhappy trilogy of splintered opinions in *Bazzele*, *Stolt-Nielsen* and *Concepcion*. One can accept the premise that it is unlikely that the Court will ever apply the analysis adopted in *Concepcion* – avoiding the damage that this analysis would do to U.S. arbitration law. But that raises the more fundamental question of how the Court can fulfill its institutional responsibilities if its opinions continue to reflect the views of individual Justices, often diverging substantially and unpredictably from existing precedent on basic analytical issues, with limited and uncertain weight in future cases. Given the importance of arbitration to contemporary commercial and other affairs in the U.S., the Court owes American businesses and taxpayers a more durable, predictable and consistent view of the FAA. Again, appellate courts in other jurisdictions have succeeded in providing such a framework for the arbitral process – as the U.S. Supreme Court also did in the era of *Prima Paint*, *Scherk* and *Mitsubishi Motors*. There is no reason that the Court could not do so, once again, and its Members' collective failure to accomplish this is a serious and costly institutional failure.

#### *D. The Court's Misconception of Arbitration Is Unnecessary to the Result in Concepcion*

Ironically, the result reached by the Court in *Concepcion* could have been arrived at in a sensible manner, without threatening to limit the scope and protections of the FAA. *Concepcion* could very readily, and correctly, have been decided on the basis that the California Supreme Court's *Discover Bank* rule is preempted because it does not comply with Section 2 – providing that arbitration agreements “shall be valid, irrevocable and enforceable,” subject only to a “saving clause” for generally-applicable contract law defenses that apply to “the revocation of any contract.”<sup>149</sup> Contrary to Section 2's requirements, the “unconscionability” rule announced in *Discover Bank* does not treat arbitration agreements as valid and enforceable, but instead invalidates them – on the basis of a rule not designed for or applicable to contracts generally.

The *Discover Bank* rule clearly did not accord with Section 2's basic requirement that arbitration agreements are “valid, irrevocable and enforceable.” Instead of treating AT&T's arbitration agreements – which provided expressly and only for bipartite arbitration – as valid and enforceable, the *Discover Bank* rule did the opposite. It expressly invalidated a central provision of those agreements (the class action waiver) and required either litigation or a form of arbitration not provided for, and expressly excluded, by the parties' agreement. That indisputably violated the basic requirements in Section 2 and 4 of the FAA, that arbitration agreements be enforced in accordance with their terms.

The disputed issue in *Concepcion* was instead whether, as Justice Breyer's dissent concluded, the *Discover Bank* rule was nonetheless permitted by the FAA because it was a generally-applicable rule of contract law, applicable to all contracts within the meaning of Section 2's savings clause. On this question, the proper interpretation of Section 2's savings clause is that it does not rescue the

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149. 9 U.S.C. § 2 (2011) (emphasis added).

asserted rule of “unconscionability” adopted by the California courts in *Discover Bank*.

The *Discover Bank* rule was tailored for, and specifically directed, only to class action waivers, in both arbitration and forum selection (choice of court) agreements. Under that rule, class actions waivers in both arbitration and forum selection clauses are invalid whenever they involve adhesion contracts, multiple small claims and an alleged scheme to defraud consumers;<sup>150</sup> no further inquiry into the generally-applicable criteria of unconscionability is required to invalidate a class action waiver under *Discover Bank*.

As such, the *Discover Bank* rule was not a generally applicable rule of contract law, applicable to “any contract,” as required by Section 2’s savings clause. Rather, the rule created a special, unique standard of invalidity, not requiring any showing of traditional unconscionability factors, that was necessarily applicable to only class action waivers and not to other contractual provisions (i.e., the price, delivery, warranty and other provisions of consumer contracts, which were not, and never could be, affected by the *Discover Bank* rule).<sup>151</sup> Because the California rule automatically applied only to this fairly narrow sub-set of contractual provisions, it was not, as demanded by Section 2, an unconscionability rule generally applicable to all contracts. It was, instead, a specially tailored rule applicable only to class action waivers. As such, the *Discover Bank* rule was not rescued by Section 2’s savings clause and is instead preempted by the requirement of Sections 2 and 4 that arbitration agreements be enforced in accordance with their terms.

Contrary to Justice Breyer’s dissent, the fact that the *Discover Bank* rule applied to *both* forum selection clauses and arbitration agreements does not bring it within Section 2’s savings clause. That conclusion is clear from a few examples.

A state law that invalidated all agreements to resolve disputes in either out-of-state courts or out-of-state arbitrations would be preempted by Section 2 no less than a law that invalidated only agreements to arbitrate in an out-of-state location. Similarly, a state law that required all forum selection and arbitration clauses to be signed separately, or to be re-affirmed by both parties after a dispute arose, would violate Section 2 no less than a law that imposed these requirements only on arbitration agreements. Likewise, a state law that invalidated any forum selection clause or arbitration agreement as applied to disputes below (or above) a specified monetary sum would again plainly violate Section 2, once more, no less than a provision applying only to arbitration agreements. The fact that the *Discover Bank* rule also invalidates class action waivers in forum selection agreements does nothing to save it, as applied to arbitration agreements, under Section 2.

Justice Breyer’s dissent was also wrong to rely on the fact that the *Discover Bank* rule applied to only some class action waivers.<sup>152</sup> The essential point is that the *Discover Bank* rule invalidated the provisions of arbitration agreements that are plainly subject to the FAA. The fact that the rule might have invalidated a

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150. *Discover Bank*, 36 Cal.4th at 162-63.

151. *Id.* at 162-63.

152. *Concepcion*, 131 S.Ct. at 1756-57.

broader range of class action waivers does nothing to alter its effects on those waivers to which it applies.<sup>153</sup>

Moreover, as already noted, the *Discover Bank* rule applied a flat rule of unenforceability to a substantial subset of all class action waivers – invalidating all class actions waivers in adhesion contracts in cases involving claims of fraud seeking small amounts of damages, without any further requirement for proof of traditional indicia of unconscionability. Although denominated “unconscionability,” the California rule was in fact an automatic rule of invalidity directed at a defined, and fairly substantial, set of arbitration and forum selection agreements.

Thus, the *Discover Bank* rule is precisely the type of state law invalidation of arbitration agreements that the FAA has repeatedly been held to prohibit. As applied in *Concepcion*, the *Discover Bank* rule required resolution of a defined category of disputes (involving specified types of fraud claims arising from particular types of contract) in a different forum from the bipartite arbitral forum agreed to by the parties. Specifically, following *Stolt-Nielsen*, the *Discover Bank* rule requires that disputes which are subject to bipartite arbitration agreements nonetheless be brought in class action litigation.<sup>154</sup>

The application of the *Discover Bank* rule in this manner is substantively identical to typical state law non-arbitrability rules which have routinely been struck down under the FAA – such as requirements that all state securities law or franchise disputes be resolved in state courts or before state administrative tribunals.<sup>155</sup> Like those requirements, the *Discover Bank* prohibition is also preempted by Sections 2 and 4 of the FAA.

This conclusion would be no different if the Ninth Circuit in *Concepcion* had applied the *Discover Bank* rule to require class arbitration, rather than class litigation.<sup>156</sup> Just as Sections 2 and 4 of the FAA do not permit states to require class litigation of particular categories of disputes, they also do not permit states to require class arbitrations that the parties have not accepted in their agreement to arbitrate. This conclusion does not rest on any judgment that class arbitration is not true “arbitration”; it rests on the fact that the *Discover Bank* rule requires parties to arbitrate in a manner to which they have not agreed – an obvious breach of

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153. A state law rule providing for the invalidity of any agreement to arbitrate state securities law claims in excess of \$50,000 would be preempted no less than a rule invalidating all such arbitration agreements. A state law rule requiring that arbitration clauses in all real estate or all distribution agreements be in capital letters or be reaffirmed after a dispute arises would be preempted no less than a rule imposing such requirements on all arbitration agreements.

154. As discussed above, *Stolt-Nielsen* required an affirmative and likely express agreement providing for class arbitration before permitting class arbitration to be compelled. See *supra* Section III.A. It is clear that agreements like the AT&T arbitration agreement do not – even after invalidating their class action waivers – provide affirmatively for class arbitration. Thus, after *Stolt-Nielsen*, when a class action waiver was invalidated under the *Discover Bank* rule, the only available remedy would be to order class litigation. See, e.g., *Fensterstock v. Educ. Fin. Partners*, 611 F.3d 124, 140-41 (2d Cir. 2010); *Ruhl v. Lee's Summit Honda*, 322 S.W.3d 136 (Mo. 2010); see also *Rau, supra* note 64, at p. 80 (PDF version).

155. These types of restrictions have been impermissible since the Court's decision in *Southland*. See *supra* Section I.A.

156. Preliminarily, any such conclusion would be precluded by *Stolt-Nielsen*, which required a clear affirmative agreement before parties could be compelled to participate in a class arbitration. Here, there was absolutely no suggestion that the AT&T arbitration agreement affirmatively provided for class arbitration; on the contrary, it did the opposite. This fact alone would have been sufficient to reject arguments that class arbitration could have been required under the AT&T arbitration clause.

Section 2's basic requirement that the parties' agreements to arbitrate "shall be valid, irrevocable and enforceable."

The same conclusion would apply equally to a state law requirement that all arbitrations be conducted only in a local, in-state seat (regardless what the parties' agreement on arbitral seat provided), that all arbitrations be conducted before a sole arbitrator (regardless what the parties' agreement provided about the number of arbitrators), or that all arbitrations include either broad discovery or an in-person evidentiary hearing (again, regardless what the parties had agreed). In each case, there is nothing in the "fundamental" character of arbitration that is inconsistent with arbitrations being conducted in any particular place, before a sole arbitrator or with discovery or a live evidentiary hearing. Arbitrations are conducted in such places, before sole arbitrators, and with discovery and live hearings all the time. Rather, in each case, imposing such a requirement by state law would offend Sections 2 and 4 of the FAA because it would force parties to conduct an arbitration in a manner to which they had not agreed. Those requirements – like the *Discover Bank* rule requiring parties to arbitrate in a manner to which they have not agreed – would violate the FAA's basic rule of party autonomy.

Despite these relatively straightforward answers to *Concepcion*, the U.S. Supreme Court embarked on an unnecessary and ill-informed discourse on the supposedly "fundamental" character of the arbitral process and the FAA's supposed concern with the character of arbitration in 1925. That discourse was wrong and should be ignored, lest it cause yet further damage to the fabric of American arbitration law.

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The Court's misadventures with class arbitration are unfortunate and unsettling. Its tortuous path of contradictory decisions has caused immense waste and uncertainty, while the *Concepcion* analysis would, if taken at face value, threaten even greater damage to the body and stature of American arbitration law more generally. Against this background, one can only wonder what the Court will say next about arbitration. And, regrettably, one can only hope that – unless the Court begins to take its institutional responsibilities more seriously – we will have to wait a long time to hear.