

## **CONCEPCION AND PREEMPTION UNDER THE FEDERAL ARBITRATION ACT**

Ian D. Mitchell\* & Richard A. Bales\*\*

### Abstract

The Supreme Court held in *AT&T Mobility LLC v. Concepcion* that a California law declaring class arbitration waivers unconscionable was preempted because it stood as an “obstacle to the accomplishment and execution of the full purposes and objectives” of the Federal Arbitration Act. The Court’s *Concepcion* decision was necessarily based on implied preemption, because the FAA contains no express preemption clause and because there was no textual conflict between the FAA and the California law. *Concepcion* illustrates two fundamental problems with implied preemption: it violates federalism principles by permitting significant federal encroachment on state laws, and it violates separation-of-powers principles by permitting the Court to re-write federal statutes in accordance with the Court’s inferred (and arguable) interpretation of statutory purpose. This article argues that the Court’s preemption analysis of the FAA is wrong and that the FAA should preempt only textually inconsistent state laws.

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\*\* Professor of Law and Director, Center for Excellence in Advocacy, Salmon P. Chase College of Law, Northern Kentucky University.

The Supreme Court's recent 5-4 decision in *AT&T Mobility LLC v. Concepcion*<sup>1</sup> controversially held a California law that declared class arbitration waivers *unconscionable* was preempted because it stood as an "obstacle to the accomplishment and execution of the full purposes and objectives"<sup>2</sup> of § 2 of the Federal Arbitration Act (FAA).<sup>3</sup> In doing so, the majority engaged in a contentious debate with the dissenters over whether California's *Discover Bank*<sup>4</sup> rule was consistent with the FAA's primary objective and to what extent the FAA's savings clause in § 2 precluded California's general policy against exculpatory contracts. Crucially, however, the two sides disagreed over the FAA's primary purpose and whether the nature of class arbitration proceedings was fundamentally at odds with the appropriate definition of arbitration.

This disagreement and others like it involving doctrines of implied preemption can be avoided by applying Professor Stephen Gardbaum's new perspective on federal preemption.<sup>5</sup> Gardbaum argues that a fundamental misconception of preemption, that Congress's power to preempt flows from the Supremacy Clause, confuses the issue of whether concurrent state authority has actually been displaced.<sup>6</sup> A proper understanding of the FAA's effect on state contract disputes therefore begins with framing Congress's power to preempt.<sup>7</sup> This article asserts that the modern dialectic over the FAA's preemption power overly focuses on the purposes and objectives of Congress in passing the Act, rather than the true issue of whether there is actual conflict between state law and the FAA's text. Adoption and incorporation of Gardbaum's preemption analysis provides a necessary guide to navigating the tricky waters left in the wake of *Concepcion*.

A conversation regarding the nature of preemption and whether the FAA has preemptive power is essential, as *Concepcion* demonstrates, because the Court has shown itself willing to supersede state laws reflecting state public policy when those laws conflict with an inferred purpose of the FAA, rather than with the actual text of the Act.<sup>8</sup> Part I of this article provides an accounting of the *Concepcion* case itself. It methodically considers the three opinions in the case and the main arguments advanced by each. In Part II, the current doctrine of implied preemption is analyzed and compared with the preemption theories of two legal commentators on the issue. This section particularly focuses on the problems associated with the "categorical" approach to preemption and the idea that the Court may infer the purpose of Congress to displace state authority. Part III briefly examines several of the recent criticisms of *Concepcion* and the suggested unavoidable consequences of the majority's holding. Throughout the article we will demonstrate that the entrenched thinking on FAA preemption of state law exists largely because of misinterpretations of Congress's preemption power and has resulted in harsh results for state governments as well as for unsophisticated parties to arbitration agreements.

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<sup>1</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>2</sup> *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

<sup>3</sup> 9 U.S.C. § 2 (2006). This section is commonly referred to as the FAA's "savings clause," which provides the criteria for which arbitration agreements are not enforceable under the FAA.

<sup>4</sup> *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

<sup>5</sup> See Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39 (2006); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767 (1994).

<sup>6</sup> Stephen Gardbaum, *Congress's Power to Preempt the States*, 33 PEPP. L. REV. 39, 41 (2006) ("Thus, although both supremacy and preemption displace (or supersede) state law, they operate to displace *different* types of state law and do so by the *different* mechanisms of automatic consequence and discretionary power respectively.").

<sup>7</sup> See *id.* at 40.

<sup>8</sup> *Concepcion*, 131 S. Ct. at 1753.

## I. CONCEPCION

### A. Background & Facts

Vincent and Liza Concepcion's case started with an increasingly typical consumer transaction. Responding to Cingular Wireless's<sup>9</sup> advertisement offering a free cellular phone with every new wireless contract, the Concepcions signed a two-year Wireless Service Agreement (WSA) in February 2002.<sup>10</sup> The WSA contained both a clause requiring that all disputes arising out of the agreement be submitted to arbitration, and a class action waiver that barred the aggregation of similar claims.<sup>11</sup> After signing the contracts and receiving two new phones, the Concepcions also received a bill for \$30.22, a charge for sales tax on the phones.<sup>12</sup> Instead of following the WSA's procedure for claim dispute resolution, involving arbitration, the Concepcions sued AT&T Mobility in the United States District Court for the Southern District of California in March 2006.<sup>13</sup> The Concepcions alleged that AT&T had defrauded them as consumers and had falsely advertised the phones as "free."<sup>14</sup> The district court consolidated the Concepcions' claim in September 2006 with the *Laster v. AT&T Mobility LLC* class action involving the same types of advertisements and charges.<sup>15</sup>

In December 2006, AT&T modified the arbitration clause of the WSA to include a "premium payment clause," which required AT&T to pay \$7,500 to a claimant if an arbitrator awarded the consumer an amount greater than AT&T's largest settlement offer at the time of arbitrator selection.<sup>16</sup> After the addition of this clause, AT&T filed its motion to compel arbitration under the WSA's revised terms.<sup>17</sup> The district court denied AT&T's motion and, applying the California Supreme Court's holding in *Discover Bank v. Superior Court*,<sup>18</sup> held that "California's stated policy of favoring class litigation and arbitration to deter alleged fraudulent conduct in cases involving large numbers of consumers with small amounts of damages, compels the Court to invalidate [AT&T]'s class waiver provision."<sup>19</sup>

California's *Discover Bank* test requires satisfying three prongs to determine the unconscionability of a class action waiver in a consumer contract:

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<sup>9</sup> Although the Concepcions bought the contract from Cingular in 2002, the company was bought by AT&T in 2005 and renamed AT&T Mobility in 2007. *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 852 n.1 (2009).

<sup>10</sup> *Concepcion*, 131 S. Ct. at 1744.

<sup>11</sup> *Laster*, 584 F.3d at 852.

<sup>12</sup> *Id.*

<sup>13</sup> *Concepcion*, 131 S. Ct. at 1744.

<sup>14</sup> *Id.*

<sup>15</sup> *Laster*, 584 F.3d at 853.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Discover Bank*, 113 P.3d at 1100.

<sup>19</sup> *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at \*14 (S.D. Cal. Aug. 11, 2008).

(1) is the agreement a contract of adhesion; (2) are disputes between the contracting parties likely to involve small amounts of damages; and (3) is it alleged that the party with superior bargaining power has carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money.<sup>20</sup>

The Ninth Circuit upheld the district court's application of California law and also found that the FAA did not expressly or impliedly preempt the *Discover Bank* rule.<sup>21</sup> According to the Ninth Circuit, the FAA did not expressly preempt California law because the *Discover Bank* rule applied equally to any contract clause that barred class aggregation of claims.<sup>22</sup> Therefore it did not conflict with the FAA's § 2 which states that arbitration clauses "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."<sup>23</sup> Additionally, the FAA did not impliedly preempt *Discover Bank* under a theory of obstacle preemption because California's law "placed arbitration agreements on the *exact same footing* as contracts that bar class litigation outside the context of arbitration."<sup>24</sup>

## **B. The Scalia Majority Opinion**

Justice Scalia wrote for the Court. He began his analysis by discussing the purposes and general policy of the FAA, foreshadowing a finding of implied preemption,<sup>25</sup> specifically the variety referred to as obstacle preemption.<sup>26</sup> The majority determined that California's policy of protecting consumers by barring class waivers from arbitration agreements obstructed Congress's purpose in enacting the FAA and was therefore preempted.<sup>27</sup> Scalia's argument for FAA preemption rested on two main points: (1) that California's "policy against exculpation" was not a ground under the FAA's § 2, that "exist[s] at law or in equity for the revocation of any contract,"<sup>28</sup> and (2) that *Discover Bank* was inconsistent with the FAA's "'principal purpose' to ensure that private agreements are enforced according to their terms."<sup>29</sup>

In holding that the *Discover Bank* rule was not "a ground that 'exist[s] at law or in equity for the revocation of any contract' under FAA § 2,"<sup>30</sup> Scalia engaged in a categorical evaluation of whether a state policy against class waivers satisfied the textual requirements of the FAA's savings clause.<sup>31</sup> In the majority's view, California's policy of protecting consumers from class waivers in adhesion contracts had a "disproportionate impact on arbitration agreements,"<sup>32</sup> and

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<sup>20</sup> *Laster*, 584 F.3d at 854.

<sup>21</sup> *Id.* at 857-59.

<sup>22</sup> *Id.* at 857.

<sup>23</sup> *Id.* (citing 9 U.S.C. § 2 (2006)).

<sup>24</sup> *Id.* (emphasis in original).

<sup>25</sup> *Concepcion*, 131 S. Ct. at 1745.

<sup>26</sup> Gardbaum, *supra* note 5, at 62.

<sup>27</sup> *Concepcion*, 131 S. Ct. at 1753.

<sup>28</sup> *Id.* at 1746.

<sup>29</sup> *Id.* at 1748 (citing *Volt Info. Scis. Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 489 (1989)).

<sup>30</sup> *Id.* at 1746.

<sup>31</sup> *Id.* at 1747.

<sup>32</sup> *Id.*

was therefore inconsistent with the Court’s previous holding in *Perry v. Thomas*.<sup>33</sup> In *Perry*, the Court had held that states cannot “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.”<sup>34</sup> In other words, because the state policy in *Discover Bank* applied only to consumer adhesion contracts, it did not apply “generally” to contracts and in fact would disproportionately affect agreements where the parties had agreed to settle their disputes through arbitration.<sup>35</sup> Scalia also cited two law review articles in stating that “California courts have been more likely to hold contracts to arbitrate unconscionable than other contracts.”<sup>36</sup>

The majority’s second conclusion, that *Discover Bank* is hostile to the “primary purpose” of the FAA, exhibited a more functional analysis of what arbitration under the FAA was supposed to look like.<sup>37</sup> In painting a picture of the kind of arbitration favored by the FAA, the majority described arbitration as: “efficient, streamlined procedures tailored to the type of dispute,” relatively informal, generally successful at “reducing the cost and increasing the speed of dispute resolution,” and beneficial because “the costliness and delays of litigation . . . can be largely eliminated . . .”<sup>38</sup> This was crucially important because the *Concepcion* plaintiffs argued that aggregation of arbitration claims, though inconsistent with the class waiver provision in the arbitration agreement, were not inconsistent with the purpose of promoting arbitration. Given this position, the majority opinion held that class arbitration proceedings were too dissimilar to the kind of arbitration contemplated by the FAA to be consistent with its “primary purpose.”<sup>39</sup> The majority determined that “class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.”<sup>40</sup> This rationale takes issue with the form of arbitration sought by the plaintiffs and its fundamental inconsistency with traditional bilateral arbitration.

In our view, the second conclusion is more critical to the majority’s opinion than the first because it strikes at the heart of obstacle preemption: frustration of purpose. The majority

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<sup>33</sup> *Perry v. Thomas*, 482 U.S. 483 (1987).

<sup>34</sup> *Id.* at 493 n.9.

<sup>35</sup> This inference supposes that the majority of consumer contracts include a mandatory arbitration clause for handling all disputes under the contract. Because nearly all consumer contracts are now contracts of adhesion, the effect of the rule then applies primarily to consumer contracts. The majority particularly found troubling the fact that the *Discover Bank* test’s requirements that damages be predictably small and a scheme to cheat consumers be alleged. In its view, the majority considered these factors “toothless and malleable” and contrary to the FAA’s purpose in favoring arbitration by only requiring mere allegation to invalidate an arbitration agreement. *See Concepcion*, 131 S. Ct. at 1750.

<sup>36</sup> *Concepcion*, 131 S. Ct. at 1747 (citing Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39, 54, 66 (2006); and Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of the Unconscionability Doctrine*, 52 BUFF. L. REV. 185, 186-87 (2004)).

<sup>37</sup> *See Concepcion*, 131 S. Ct. at 1748-53.

<sup>38</sup> *Id.* at 1749 (citing *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 269 (2009); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); and *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

<sup>39</sup> *Id.* at 1750.

<sup>40</sup> *Id.* at 1751; *see also id.* at 1750 (“[T]he ‘changes brought about by the shift from bilateral arbitration to class-action arbitration’ are ‘fundamental.’”) (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1776 (2010)); and *Concepcion*, 131 S. Ct. at 1750 (“Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And . . . arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.”).

concludes that class arbitration procedures cannot be as efficient as the bilateral procedures contemplated by the FAA.<sup>41</sup> In his view, Justice Scalia considered class arbitration incapable of producing “efficient, streamlined” results for parties agreeing to arbitrate their disputes.<sup>42</sup> The majority states, contrary to the dissent’s view, that the primary purpose of the FAA is the “expeditious resolution of claims” through an informal, low-cost proceeding.<sup>43</sup> Additionally, arbitrators by and large are simply incapable of understanding the “often-dominant” procedural demands of class certification.<sup>44</sup> As will be discussed later, these arguments *for* arbitration in *Concepcion* are eerily similar to the types of arguments initially launched *against* arbitration when the FAA was enacted. Yet, the majority finds that the essence of arbitration in the FAA is incompatible with the modern procedural form of class actions, which is “slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>45</sup>

The Court’s holding in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*<sup>46</sup> is vital in this respect because it determined that the class form of arbitration is so incompatible with the fundamental purpose of arbitration that where arbitration agreements are silent as to the availability of class procedure for dispute resolution, it cannot be found impliedly available.<sup>47</sup> *Stolt-Nielsen* makes the logic of the *Concepcion* majority clear: if class arbitration is not impliedly available absent a class waiver, then finding an arbitration agreement’s class waiver unconscionable and void under state law cannot make claim aggregation any more available than where the waiver was absent. The *Concepcion* plaintiffs, however, raised the obvious argument that because parties to an arbitration agreement could *provide* for the possibility of aggregated claims in their agreement, class arbitration cannot be incompatible with the purpose of FAA arbitration.<sup>48</sup> Yet Scalia, in stating that “[a]rbitration is a matter of contract, and the FAA requires courts to honor parties’ expectations,”<sup>49</sup> dismisses this argument because presumably parties cannot reasonably expect the availability of class arbitration where the contract does not so provide.<sup>50</sup>

The majority opinion closes by addressing the functional effect issues raised by the *Concepcion* plaintiffs, specifically that companies that include class waiver provisions in their arbitration agreements will effectively immunize themselves from fraud claims.<sup>51</sup> Citing the Ninth Circuit’s findings, the majority stated that the “*Concepcions* were *better off* under their arbitration agreement with AT&T than they would have been as participants in a class action” because of the premium payment clause in the revised contract.<sup>52</sup> Therefore, because submitting disputes to arbitration under the agreement would result in the vastly improved position of the consumer, it was immaterial whether most aggrieved consumers would consider the claim too

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<sup>41</sup> *Id.* at 1750-51.

<sup>42</sup> *Id.* at 1749-51.

<sup>43</sup> *Concepcion*, 131 S. Ct. at 1749.

<sup>44</sup> *Id.* at 1750.

<sup>45</sup> *Id.* at 1751. “Indeed, class arbitration was not even envisioned by Congress when it passed the FAA in 1925; as the California Supreme Court admitted in *Discover Bank*, class arbitration is a ‘relatively recent development.’” *Id.* (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)).

<sup>46</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010).

<sup>47</sup> *Id.* at 1775.

<sup>48</sup> *Concepcion*, 131 S. Ct. at 1752.

<sup>49</sup> *Id.* (citing *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777 (2010)).

<sup>50</sup> *See id.*

<sup>51</sup> *Id.* at 1753.

<sup>52</sup> *Id.* (quoting *Laster*, 2008 WL 5216255, at \*12).

insignificant to contest or too burdensome. In other words, despite the Ninth Circuit's consideration that California had a valid (and non-preempted) interest in *detering* consumer fraud through the class waiver ban, the majority found the interest insufficient to meet the FAA § 2 standard of "a ground that 'exist[s] at law or in equity for the revocation of any contract.'" <sup>53</sup>

### C. The Thomas Concurrence

Justice Thomas reiterated his traditional opposition to the Court's use of the implied preemption doctrine, but concurred with the majority because he believed *Discover Bank* did not provide a "ground for the *revocation* of any contract" as textually required by FAA § 2. <sup>54</sup> His concurrence analyzed the textual requirements of the FAA and the ability of the *Discover Bank* rule to provide a reason compatible with the FAA for the class waiver ban. Because the text of § 2 refers to "grounds . . . for revocation," it necessarily meant that only those grounds related to the *making* of the contract were sufficient to activate the savings provision of the FAA. <sup>55</sup>

The *Discover Bank* rule provides for the *nonenforcement* of an arbitration clause, rather than the *revocation* of the contract as required by FAA § 2. <sup>56</sup> In Thomas' view, the California rule, therefore, did not satisfy the savings clause provision of the FAA and was invalid. <sup>57</sup> To Thomas, the Ninth Circuit's characterization of AT&T's arbitration clause as "exculpatory" was fatal because "[e]xculpatory contracts are a paradigmatic example of contracts that will not be enforced because of public policy . . . Refusal to enforce a contract for public policy reasons does not concern whether the contract was properly made." <sup>58</sup> Therefore, because the nonenforcement of the class waiver did not need to consider whether the contract was properly formed, it was not a ground sufficient for the savings clause and was preempted. <sup>59</sup>

### D. The Breyer Dissent

The *Concepcion* dissent was written by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan. <sup>60</sup> Breyer followed the organization of the majority opinion and argued that: (1) the *Discover Bank* rule satisfies the requirements of the FAA's savings clause in § 2,

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<sup>53</sup> *Concepcion*, 131 S. Ct. at 1746 (quoting 9 U.S.C. § 2 (2006)).

<sup>54</sup> *Id.* at 1753 (Thomas, J., concurring) (emphasis added) (quoting 9 U.S.C. § 2 (2006)); Justice Thomas has repeatedly stated his opposition to implied preemption, objecting to where "the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law," *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring); *see also* *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 459 (2005) (Thomas, J., concurring) ("[I am] increasing[ly] reluctan[t] to expand federal statutes beyond their terms through doctrines of implied pre-emption.").

<sup>55</sup> *Concepcion*, 131 S. Ct. at 1754-55 (Thomas, J., concurring).

<sup>56</sup> *Id.* at 1756.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Concepcion*, 131 S. Ct. at 1756 (Breyer, J., dissenting).

<sup>60</sup> *Id.*

merely placing arbitration clauses on the same or equal footing as other contract clauses,<sup>61</sup> and (2) the *Discover Bank* rule is consistent with the purpose behind the FAA because class arbitration is not opposed to the fundamental attributes of arbitration.<sup>62</sup> Accordingly, the dissent argued that the ban on class waivers applied broadly enough to all contracts that it satisfied the savings clause and that class arbitration's form was not fundamentally adverse to the purpose of the FAA.<sup>63</sup>

The dissent premised its argument for qualification under the savings clause on the notion that the *Discover Bank* rule was nothing more than an "authoritative state-court interpretation" of that state's general unconscionability law.<sup>64</sup> California Civil Code already declared exculpatory contracts or clauses illegal, and authorized expansion of the unconscionability doctrine to such terms.<sup>65</sup> Therefore, consumer adhesion contracts that effectively exculpated companies like AT&T through class waivers violated the pre-existing California unconscionability doctrine. To the dissent, the *Discover Bank* rule did little more than determine that certain contracts that met the three-prong requirement were as exculpatory as other contracts that limited liability under California law.<sup>66</sup> Indeed, not all class action waivers were unconscionable under California law, only ones which satisfied the qualities of an exculpatory contract or term.<sup>67</sup> Breyer reasoned that application of California's unconscionability doctrine under these circumstances, whether in an arbitration agreement or an agreement subject to litigation, placed class waivers "upon the same footing as other contracts."<sup>68</sup>

In response to Scalia's condemnation of class arbitration as a process fundamentally different from bilateral arbitration because of its form, the dissent urged that the FAA was not enacted to secure substantive rights to any particular procedural advantages.<sup>69</sup> Rather, the FAA was passed so that arbitration, when freely chosen by the contracting parties as a venue for remedy, would be honored by the courts.<sup>70</sup> To the dissent, class arbitration itself would not be adverse to the primary purpose or primary objective of the FAA unless it discouraged the enforcement of arbitration agreements.<sup>71</sup> Therefore the primary objective of the FAA was enforcement of arbitration clauses and not, as the majority indicated, protecting a particular form of arbitration that guaranteed low costs to parties or expedient claim resolution.<sup>72</sup>

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<sup>61</sup> *Id.* at 1760 (Breyer, J., dissenting); *see also id.* (Breyer, J., dissenting) ("Because California 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."); and *id.* at 1758 ("[U]nlike the majority's examples, the *Discover Bank* rule imposes equivalent limitations on litigation . . .").

<sup>62</sup> *Id.* at 1759 (Breyer, J., dissenting) (citing *Concepcion*, 131 S. Ct. at 1743 n.9) ("Where does the majority get its contrary idea--that individual, rather than class, arbitration is a 'fundamental attribut[e]' of arbitration? The majority does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself.").

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 1756.

<sup>65</sup> *Id.* (citing CAL. CIV. CODE §§ 1668, 1670.5(a) (West 1985)).

<sup>66</sup> *See Concepcion*, 131 S. Ct. at 1757 (Breyer, J., dissenting).

<sup>67</sup> *Id.* ("Courts applying California law have *enforced* class action waivers where they satisfy general unconscionability standards.") (emphasis added).

<sup>68</sup> *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

<sup>69</sup> *Id.* at 1758.

<sup>70</sup> *Id.*

<sup>71</sup> *See Concepcion*, 131 S. Ct. at 1758 (Breyer, J., dissenting) ("But we have also cautioned against thinking that Congress' primary objective was to guarantee these particular procedural advantages. Rather, that primary objective was to secure the 'enforcement' of agreements to arbitrate.") (citing *Dean Witter Reynolds Inc.*, 470 U.S. at 221).

<sup>72</sup> *Id.*



To counter the litany of difficulties associated with class procedure as outlined by the majority, Breyer referenced several sources approving of class arbitration and declared the procedure “consistent with the use of arbitration.”<sup>73</sup> Prominently, the dissent cited the American Arbitration Association’s (AAA) *amicus* brief from *Stolt-Nielsen*, which described class arbitration as “a fair, balanced, and efficient means of resolving class disputes.”<sup>74</sup> The AAA also favorably described the benefits of class arbitration, stating that class arbitration reduced the average time for dispute resolution over court-based class actions.<sup>75</sup> Therefore, *even if* the FAA was enacted for the specific purpose of expediting claims in a low-cost, efficient, and fair resolution process, class arbitration was not inconsistent with any of those attributes.<sup>76</sup>

The dissent concluded by stating that the Court has previously considered the dynamic nature of arbitration proceedings and the varied forms they might take, demonstrating the illogic of the majority’s restriction of arbitration to a particular form.<sup>77</sup> Absent a state law that “disfavors arbitration,” the dissent stated that California’s law was not preempted and that states should be able to apply their own doctrines of unconscionability consistent with that restriction.<sup>78</sup>

## II. FAA PREEMPTION & ANALYSIS

As the holding in *Concepcion* rests on the majority’s finding that the FAA preempts California law, it is vital to consider the source of the FAA’s preemption and the context in which state law is supplanted by the operation of the federal statute. Since the Supreme Court’s decision in *Southland Corp. v. Keating*,<sup>79</sup> the Court has interpreted § 2 of the FAA as preempting state laws that single out arbitration for disfavored treatment.<sup>80</sup> As the Court has stated in the past, however, the FAA contains no express preemption provision.<sup>81</sup> Therefore, a preemption finding is dependent upon an implication of Congress’s intent to displace state authority. In *Concepcion*, the majority held that the *Discover Bank* rule was preempted “because it ‘stands as

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (quoting Brief for American Arbitration Association as Amicus Curiae at 25, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010) (No. 08-1198)).

<sup>75</sup> *Id.* at 1759 (quoting Brief for American Arbitration Association as Amicus Curiae Supporting Neither Party at 24, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 2896309); *see also id.* at 1759-60 (“Data from California courts confirm that class arbitrations can take considerably less time than in-court proceedings in which class certification is sought . . . And a single class proceeding is surely more efficient than thousands of separate proceedings for identical claims. Thus, if speedy resolution were all that mattered, the *Discover Bank* rule would reinforce, not obstruct that objective of the Act.”).

<sup>76</sup> *See Concepcion*, 131 S. Ct. at 1758 (Breyer, J., dissenting). The dissent specifically rejected the idea that the FAA’s “primary purpose” was to provide a simplified and expedient claim resolution process, citing *Dean Witter*: “we ‘reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.’” *Dean Witter*, 470 U.S. at 219.

<sup>77</sup> *Id.* at 1761 (Breyer, J., dissenting) (“We have reached results that authorize complex arbitration procedures . . . We have upheld nondiscriminatory state laws that slow down arbitration proceedings . . . But we have not, to my knowledge, applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings.”).

<sup>78</sup> *Id.* at 1760.

<sup>79</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>80</sup> Richard A. Bales, *Contract Formation Issues in Employment Arbitration*, 44 BRANDEIS L.J. 415, 422 (2006).

<sup>81</sup> *Volt Info. Scis., Inc., v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989) (“The FAA contains no express pre-emptive provision, nor does it reflect a general congressional intent to occupy the entire field of arbitration.”).

an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>82</sup> This section examines (1) the source of Congress’s preemption power, and (2) the doctrine of implied “obstacle” preemption and the problems associated with implied FAA preemption.

### A. The Source of Congress’s Power to Preempt

It is widely agreed that the “pre-emption doctrine is derived” from the Supremacy Clause,<sup>83</sup> and “any state law, however clearly within a State’s acknowledged power, which interferes with or is contrary to federal law, must yield.”<sup>84</sup> Further, to determine “whether the Congress ha[s] precluded state enforcement of select state laws adopted pursuant to its authority . . . [t]he purpose of Congress is the ultimate touchstone.”<sup>85</sup> These two often quoted pillars of federal preemption doctrine continue to guide the Court’s reasoning in FAA cases dating back to *Southland*.<sup>86</sup>

However, acceptance of these maxims is not universal and some legal theorists, including Professor Stephen Gardbaum and Professor Caleb Nelson, compellingly contend that federal preemption doctrine incorrectly locates the source of Congress’s preemption power in the Supremacy Clause.<sup>87</sup> Their alternative view posits that the Supremacy Clause operates automatically to determine whether state law or federal law should govern where the two sources of power are contradictory.<sup>88</sup> Preemption, on the other hand, occurs when Congress affirmatively deprives states of their authority to act, even where state law does not contradict the federal law at all.<sup>89</sup> This view challenges the accepted doctrine of implied preemption that state law is displaced when it merely obstructs the purposes of Congress.<sup>90</sup> As the Court in *Concepcion* expanded the interpretation of the FAA to preclude a particular *form* of arbitration, revisiting FAA preemption is warranted to comprehend to what extent state law is valid before it conflicts with the FAA’s “principal purpose.”

Under Gardbaum and Nelson’s alternative approach, state law is naturally displaced, or “trumped,” under the Supremacy Clause by a federal statute “[w]hen a court must choose between applying a valid rule of federal law and applying some aspect of state law.”<sup>91</sup> This distinction is important to the application of the doctrine of implied preemption because it categorizes “supremacy” as the effect which occurs when compliance with both laws *as written* is

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<sup>82</sup> See *Concepcion*, 131 S. Ct. at 1753 (quoting *Hines*, 312 U.S. at 67).

<sup>83</sup> U.S. Const., art. VI, cl. 2.

<sup>84</sup> *Gade v. Nat’l Solid Waste Mgmt.*, 505 U.S. 88, 108 (1992) (citing *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

<sup>85</sup> *Retail Clerks Int’l Ass’n, Local 1625 v. Schermerhorn*, 375 U.S. 96, 103 (1963) (“Congress under the Commerce Clause may displace state power.”).

<sup>86</sup> *Southland Corp.*, 465 U.S. at 1-2.

<sup>87</sup> See Gardbaum, *supra* note 5, at 39; Caleb Nelson, *Preemption*, 86 VA. L. REV. 225 (2000).

<sup>88</sup> Nelson, *supra* note 87, at 231.

<sup>89</sup> See Gardbaum, *supra* note 5, at 771.

<sup>90</sup> As stated, FAA preemption of state law can be traced to *Southland*, where the Court first held that the FAA preempts state laws that target arbitration agreements. See Bales, *supra* note 80, at 422.

<sup>91</sup> Nelson, *supra* note 87, at 231.

impossible.<sup>92</sup> If the Supremacy Clause does not provide Congress with an affirmative power, but instead acts as a “tiebreaker” for courts in determining which law should govern a particular matter, then the Supremacy Clause cannot be the source of power for implied preemption.<sup>93</sup> Because obstacle preemption is a particular variety of the implied preemption doctrine, determining whether supremacy or preemption is involved has specific importance to *Concepcion*.

This does not mean, however, that preemption is unauthorized by the Constitution. To the contrary, Professor Gardbaum describes preemption as a valid exercise of Congress’s power under the Necessary and Proper Clause<sup>94</sup> to displace state authority.<sup>95</sup> According to Gardbaum “the most compelling argument in favor of a congressional power of preemption is a practical one – the need for uniform national regulation, for one set of rules in particular areas.”<sup>96</sup> The Necessary and Proper Clause enables Congress to effectuate its enumerated powers under the Constitution, and most frequently under the Commerce Clause.<sup>97</sup> This is consistent with the Court’s statement of federal preemption in *Retail Clerks Int’l Ass’n, Local 1625 v. Schermerhorn*,<sup>98</sup> although missing the step of the Necessary and Proper Clause’s operation, stating that “Congress under the Commerce Clause may displace state power.”<sup>99</sup>

Yet, Gardbaum contends that Congress *is* limited to an extent in using its power to preempt.<sup>100</sup> Because preemption involves the operation of one of Congress’s enumerated powers, incorporating the power under the Necessary and Proper Clause, it is a discretionary power which may only be invoked expressly.<sup>101</sup> Thus, it is predictable that Gardbaum concludes: “[a]s a matter of constitutional law, there should be no such thing as implied preemption.”<sup>102</sup>

## B. Implied Preemption

The doctrine of implied preemption features most prominently in *Concepcion* in the majority’s consideration of the “principal purpose” of the FAA.<sup>103</sup> Arriving at the conclusion that the FAA’s purpose is to “ensur[e] that private arbitration agreements are enforced according to

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<sup>92</sup> See Gardbaum, *supra* note 5, at 41. Though Professor Nelson does not draw the same taxonomical distinction between preemption and supremacy as Gardbaum, he nonetheless outlines his “logical-contradiction” test (which *is* compatible with Gardbaum’s views) for determining whether a state law is trumped by the Supremacy Clause: “Courts are required to disregard state law if, but only if, it contradicts a rule validly established by federal law.” Nelson, *supra* note 87, at 260.

<sup>93</sup> Implied preemption will be discussed *infra*, but is generally described as occurring when a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Hines*, 312 U.S. at 67.

<sup>94</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>95</sup> See Gardbaum, *supra* note 5, at 781.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 782.

<sup>98</sup> *Retail Clerks Int’l Ass’n Local 1625 v. Schermerhorn*, 375 U.S. 96 (1963).

<sup>99</sup> *Id.* at 103.

<sup>100</sup> Gardbaum, *supra* note 5, at 51-59.

<sup>101</sup> *Id.* at 51 (“Preemption is one of Congress’s enumerated powers albeit, as I have argued, a part of its enumerated implied powers under the Necessary and Proper Clause. As an inherent feature of federal law, supremacy operates whether Congress says so or not. By contrast, as a discretionary power of Congress, preemption operates only if Congress says so.”)

<sup>102</sup> *Id.* at 52.

<sup>103</sup> *Concepcion*, 131 S. Ct. at 1748-53.

their terms.”<sup>104</sup> Scalia next states that “[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”<sup>105</sup> The majority opinion then adopts the view that arbitration, as Congress intended when it enacted the FAA, required certain procedural and functional qualities with which class arbitration would be inconsistent.<sup>106</sup> This purpose was inferred by the Court, and consistent with its prior holding in *Stolt-Nielsen*.<sup>107</sup> Because Congress had not stated its intent to preempt state law, both the primary purpose of the FAA and Congress’s intent to preempt state authority were implied. By restricting the form that arbitration may take outside of the specific intent of the contracting parties, the Court expanded the preemptive power to exclude more state law than previously considered.

Many critics of FAA preemption point to the Court’s decision in *Southland* as the crucial moment where the FAA’s § 2 was first considered preemptive “substantive law,” rather than procedural law that did not bind state courts.<sup>108</sup> In *Southland*, the majority concluded that “[i]n enacting [Section] 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties had agreed to resolve by arbitration.”<sup>109</sup> Justice O’Connor notably dissented in that case and argued that the FAA declared federal procedural law, which applied only in federal courts, not state courts.<sup>110</sup> This view has been echoed most recently by Justice Thomas who continues to argue that the FAA applies only in federal courts.<sup>111</sup>

This conflicting interpretive view of the FAA’s purpose is the critical juncture where the alternative view mentioned in the previous section might be instructive. *Southland* must be based upon implied preemption because the FAA “contains no express pre-emption provision.”<sup>112</sup> There is no indication that the FAA is necessarily incompatible with state arbitration laws, at least to the extent that the state laws do not ban arbitration clauses outright. Supremacy, under Gardbaum’s alternative view, therefore is not at issue.<sup>113</sup> Determining whether the FAA trumps state law under the Supremacy Clause is a matter of statutory construction, similar to the

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<sup>104</sup> *Id.* at 1748.

<sup>105</sup> *Id.* at 1749.

<sup>106</sup> *See id.* at 1748.

<sup>107</sup> *Stolt-Nielsen*, 130 S. Ct. at 1773 (2010).

<sup>108</sup> *See generally* David S. Schwartz, *The Federal Arbitration Act and the Power of Congress over State Courts*, 83 OR. L. REV. 541, 544 (2004) (stating that “[t]he constitutional problem of applying the FAA to the states has been avoided or overlooked, simply by taking at face value the *Southland* Court’s assertion that the FAA is ‘substantive’ law. But what if it is not?”); Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 394 n.3 (2004) (“Despite the passage of time and the Supreme Court’s reaffirmance of *Southland* in *Allied-Bruce*, 513 U.S. at 272-73, *Southland*’s holding that the FAA applies in state court remains controversial.”).

<sup>109</sup> *Southland Corp.*, 465 U.S. at 10.

<sup>110</sup> *Id.* at 22-23 (O’Connor, J., dissenting) (“The Court’s decision is impelled by an understandable desire to encourage the use of arbitration, but it utterly fails to recognize the clear congressional intent underlying the FAA. Congress intended to require federal, not state, courts to respect arbitration agreements.”).

<sup>111</sup> *See e.g.*, *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 285-86 (1995) (Thomas, J., dissenting) (“In *Southland Corp. v. Keating*, this Court concluded that [section] 2 of the FAA ‘appl[ies] in state as well as federal courts,’ and ‘withd[r]aws the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.’ In my view, both aspects of *Southland* are wrong.” (citations omitted)).

<sup>112</sup> *Volt*, 489 U.S. at 477.

<sup>113</sup> *See Gardbaum, supra* note 5, at 770. (“The supremacy of federal law means that valid federal law overrides otherwise valid state law in cases of conflict between the two.”).

procedure required for evaluating “whether one statute repeals another.”<sup>114</sup> Because the alternative view eliminates the doctrine of implied preemption, O’Connor’s view that the FAA applies only in federal courts is vindicated.

Although this discussion may seem trivial considering the Court’s devotion to the present “categorical” approach to preemption<sup>115</sup> and wide adoption of the doctrine of implied preemption,<sup>116</sup> the distinction between preemption and supremacy is helpful for halting an expansive doctrine of preemption evidenced in *Concepcion*. As FAA obstacle preemption is based on a state law’s conflict with Congress’s purposes, an ever-narrowing construction of the kind of procedures the Court infers to be permitted under the FAA necessarily expands the FAA’s preemptive effect. For instance, prior to *Stolt-Nielsen* (and to a certain extent *Green Tree Fin. Corp. v. Bazzle*<sup>117</sup>) the Court had not held that class arbitration was inconsistent with the concept of arbitration advanced in the FAA. To the extent that the Court had not yet considered whether the availability of class arbitration was inconsistent with the FAA, California’s state law was, at that point, not preempted.

This of course highlights the fundamental problem with implied preemption: it is subject to change depending upon the interpretation of Congress’s “purpose” by the Court’s majority. As Justice O’Connor stated in *Allied-Bruce Terminix Cos. v. Dobson*: “over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.”<sup>118</sup> In the 59 years prior to *Southland*, the Supreme Court had never held that the FAA even applied in state courts.<sup>119</sup> A more predictable standard of preemption advocated by the alternative view above, where Congress’s intent to displace state authority must be expressly stated, provides greater clarity for delineating the balance between state and federal law.<sup>120</sup>

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<sup>114</sup> Nelson, *supra* note 87, at 303.

<sup>115</sup> The “categorical” approach I refer to here is the practice of complicating what is argued above to be an enumerated power of Congress to preempt by creating different categories of preemption that each make different inferences about the nature of Congress’s intent (e.g. “field,” “conflict,” “obstacle,” “express,” and “purpose-conflict”). See Gardbaum, *supra* note 5, at 61-62.

<sup>116</sup> Even Justice O’Connor later stated her belief that her dissent in *Southland* had failed to correct the fundamental problems with the Court’s interpretation of the FAA. In *Allied-Bruce*, she stated her resignation: “I have long adhered to the view, discussed below, that Congress designed the Federal Arbitration Act to apply only in federal courts. But if we are to apply the Act in state courts, it makes little sense to read § 2 differently in that context. In the end, my agreement with the Court’s construction of § 2 rests largely on the wisdom of maintaining a uniform standard.” 513 U.S. at 282 (O’Connor, J., concurring).

<sup>117</sup> *Green Tree Corp. v. Bazzle*, 539 U.S. 444 (2003). In *Green Tree*, the Court considered whether a state court could order class-wide arbitration. The South Carolina Supreme Court had found that the arbitration agreement at issue was silent on the issue of class-wide arbitration, and on this basis had ordered such arbitration to resolve similar disputes of additional parties. The U.S. Supreme Court held that the arbitrator, rather than the state court should have decided whether the arbitration agreement permitted class-wide arbitration. Bales, *supra* note 80, at 424.

<sup>118</sup> *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 283 (2003) (O’Connor, J., concurring).

<sup>119</sup> See *id.* at 286 (Thomas, J., dissenting) (stating that the FAA’s application in state courts was not even suggested by a court until 1959).

<sup>120</sup> Gardbaum, *supra* note 5, at 52 (“Congress can only exercise its preemption power expressly. As a matter of constitutional law, there should be no such thing as implied preemption. If Congress wishes to exercise its preemption power, it must say so by speaking directly to the issue. It is up to the courts to determine what Congress has said, using ordinary principles of statutory interpretation in the case of ambiguity, but not to premise an exercise of this power on “sheer implication” from congressional silence, as is now the case”) (quoting *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 546 (1992) (Scalia, J., concurring in part and dissenting in part)).

### III. WHAT *CONCEPCION* MEANS FOR THE CLASS-ACTION

Although the alternative view proposed in Section II would greatly improve clarity of judicial preemption doctrine, the Court's adherence to the current "categorical" approach combined with the resignation of previous dissenters to *stare decisis*<sup>121</sup> makes it unlikely that any real change is on the horizon. However, substantial questions remain regarding the effect the majority opinion in *Concepcion* will have on class actions and consumer agreements. Several commentators have suggested that *Concepcion* sounded the death knell of class actions.<sup>122</sup> This section considers the various concerns raised by those commentators.

In 2000, Professor Jean Sternlight wrote an article in the William & Mary Law Review that prophesied the coming of *Concepcion*.<sup>123</sup> She noted that companies would use arbitration clauses as vehicles to immunize themselves from class action lawsuits.<sup>124</sup> She referred to an arbitration clause packaged with a class waiver as a "Trojan horse."<sup>125</sup> Additionally, Professor Sternlight observed that companies would issue mandatory class waiver provisions after the filing of class actions and would be successful.<sup>126</sup> The similarities between her predicted worst case scenario for consumers and the actual case of *Concepcion* is striking, as nearly all came to pass. Sternlight, however, was incorrectly optimistic that courts would come around to reject class waivers from arbitration clauses as unconscionable under state law.<sup>127</sup>

Professor Brian Fitzpatrick believes that *Concepcion* will likely lead to the end of class actions against businesses altogether, not just consumer class actions.<sup>128</sup> He predicates this theory on the Supreme Court's decisions limiting the certification of tort class actions beginning in the 1990s.<sup>129</sup> In his opinion, potential class litigants now come primarily from individuals involved in a contractual business relationship, and where businesses have been given the green light to immunize themselves through class waivers in adhesion contracts, the result will greatly reduce the availability of class proceedings.<sup>130</sup> Correctly, Fitzpatrick points to the remaining solution to

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<sup>121</sup> I refer here primarily to Justice O'Connor's position in *Allied-Bruce*, discussed *supra* note 116.

<sup>122</sup> See e.g., Jean Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?* 42 WM. & MARY L. REV. 1, 5 (2000); Hiro Aragaki, *Status and contract in AT&T Mobility v. Concepcion*, SCOTUSBLOG (Sep. 14, 2011, 3:53 PM), <http://www.scotusblog.com/2011/09/status-and-contract-in-att-mobility-v-concepcion>; Cliff Palefsky, *Closing thoughts on the arbitration symposium*, SCOTUSBLOG (Sep. 26, 2011, 6:41 PM), <http://www.scotusblog.com/2011/09/closing-thoughts-on-the-arbitration-symposium>; Brian Fitzpatrick, *Is the end of the class actions upon us?* SCOTUSBLOG (Sep. 14, 2011, 9:35 AM), <http://www.scotusblog.com/2011/09/is-the-end-of-class-actions-upon-us>; David Schwartz, *Do-it-yourself tort reform: How the Supreme Court quietly killed the class action*, SCOTUSBLOG (Sep. 16, 2011, 10:52 AM), <http://www.scotusblog.com/2011/09/do-it-yourself-tort-reform-how-the-supreme-court-quietly-killed-the-class-action>.

<sup>123</sup> See Sternlight, *supra* note 122, at 5.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 125.

<sup>126</sup> *Id.* at 11.

<sup>127</sup> *Id.* at 126. Although Professor Sternlight could be correctly credited with predicting the district court and Ninth Circuit decisions in *Concepcion*, the result at the Supreme Court precludes the likelihood that courts will, in the future, enforce state law bans on class waivers ("This author predicts that, as courts begin to reject defendants' attempts to eliminate class actions altogether, it will become evident that the hybrid of classwide arbitration has few advocates. Rather, defendants, plaintiffs, and society as a whole, likely will adopt the securities industry's conclusion that class actions are most efficiently and justly handled through litigation.").

<sup>128</sup> Fitzpatrick, *supra* note 122.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

the plight of the class action: federal intervention.<sup>131</sup> As the Court in *Concepcion* further limited the extent to which state law might survive obstacle preemption, only a contrary federal law or amendment to the FAA can return FAA jurisprudence to its rightful, presumably pre-*Southland*, place.

Professor David Schwartz agrees with Professor Sternlight, stating that “it has been an open secret for over a decade that a major motivation, perhaps *the* dominant motivation for the imposition of arbitration clauses in adhesion contracts has been the hope that these clauses would blossom into class action waivers.”<sup>132</sup> Further, he argues that the Supreme Court has permitted, even manipulated, the FAA to become a functional, “do-it-yourself tort reform.”<sup>133</sup> Arbitration agreements therefore have become supercontracts<sup>134</sup> that defy the Court’s ruling in *Prima Paint Corp. v. Flood & Conklin Mfg.*,<sup>135</sup> that the FAA “make[s] arbitration agreements as enforceable as other contracts, *but not more so*.”<sup>136</sup>

These commentators all recite a similar litany: that the *Concepcion* Court, by expanding the preemption doctrine to preclude state policies against exculpatory agreements through class waivers in adhesion contracts, authorized the death of the class action. Of course, the extent to which this statement is true depends upon several factors, such as whether Congress chooses to enact arbitration reform legislation, whether the membership of the Court changes to weigh in favor of those justices who dissented in *Concepcion*, and whether businesses themselves recognize the utility of class action litigation. Only time will tell, but for the short term it seems that the Court has certainly foreclosed most of the conceivable challenges states might bring against FAA preemption.

#### IV. CONCLUSION

The Supreme Court in *Concepcion* expanded its application of obstacle preemption to preclude states from enforcing public policies against unconscionable adhesion contracts.<sup>137</sup> In doing so, it carried on the logical conclusion from its holding in *Stolt-Nielsen*, that class arbitration is fundamentally opposed to the purposes of bilateral arbitration and the FAA.<sup>138</sup> However, even if the FAA’s “principal purpose” as described by Scalia, “is to ‘ensur[e] that private arbitration agreements are enforced according to their terms,’”<sup>139</sup> the FAA cannot be taken to mean that private agreements to arbitrate should be enforced in spite of their *unconscionable* terms. Surely the FAA stands for a fundamental agreement to contract, based on the consent *and intent* of *both* contracting parties.<sup>140</sup> Presuming this to be true, it is even more difficult to believe that the Court can find the freedom of contract embodied in agreements where the parties cannot

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<sup>131</sup> *Id.*

<sup>132</sup> Schwartz, *supra* note 108.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> 388 U.S. 395 (1967).

<sup>136</sup> *Id.* at 404 n.12 (emphasis added).

<sup>137</sup> See *Concepcion*, 131 S. Ct. at 1753.

<sup>138</sup> See generally *Stolt-Nielsen*, 130 S. Ct. at 1758.

<sup>139</sup> *Concepcion*, 131 S. Ct. at 1748.

<sup>140</sup> See Stephen J. Ware, *Punitive Damages in Arbitration: Contracting Out of Government’s Role in Punishment and Federal Preemption of State Law*, 63 FORDHAM L. REV. 529, 555 (1994) (“Application of the contract-enforcing rule of Section 2 [of the FAA] to choice-of-law clauses is entirely consistent with the freedom of contract core of the FAA.”).

be shown to have entered freely.<sup>141</sup> “[I]t would be an odd conception of contractual liberty if a law were taken to restrict freedom of contract simply because it interfered with the parties’ agreement as written.”<sup>142</sup>

Despite concern over the practical effects of *Concepcion* and the very real threat to the availability of class actions, the primary issue focused on in this article is the Court’s decision to permit an expansive interpretation of the purposes of Congress in enacting particular legislation. Obstacle preemption should be abandoned by the Court as a doctrine and substituted with the simplified approach to preemption proposed by Professor Gardbaum.<sup>143</sup> Doing so will certainly place a greater onus on Congress to be clear in asserting its power to displace state power, but this is not inconsistent with the Court’s previous holdings on Congress’s abrogation of sovereign immunity under the Eleventh Amendment.

Additionally, the Court’s view that arbitration under the FAA is restricted to a particular form is not only absent from the text of the FAA, it is reminiscent of the prejudices and attitudes towards arbitration that precipitated its enactment. The Court’s “essentialism,” as termed by Professor Hiro Aragaki, is outmoded considering the modern capabilities and experience of arbitrators to handle aggregated claims.<sup>144</sup> Additionally, the Court’s conclusion that banning class waiver provisions will disfavor arbitration because parties will be less inclined to enter into arbitration agreements merely guarantees that the “most loyal patrons” are favored over the “institution of arbitration.”<sup>145</sup>

As Justice O’Connor stated in her *Allied-Bruce* concurrence, the “edifice” of the Court’s FAA preemption caselaw has been largely of its own construction.<sup>146</sup> The fear is that this construction has become too impenetrable and that there is no way back through the woods in which the Court has led us. The Court’s holding in *Concepcion* stands as a bleak indication that a state policy interest in protecting unsophisticated parties with little or no real bargaining power is an interest the Court believes is subservient to the rigid religion of the FAA.

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<sup>141</sup> See Palefsky, *supra* note 122 (“But the real vice of the Court’s decision is not how they have contorted contract law and the FAA to reach their desired result, but rather that they have refused to analyze the issues under the Constitution or real statutory public policies which sit higher on the continuum of legal analysis and require the waiver or rights inherent in an arbitration agreement to be knowing and voluntary. And there shouldn’t be a freedom of contract analysis when the contract was not entered into freely.”).

<sup>142</sup> Aragaki, *supra* note 122.

<sup>143</sup> Gardbaum, *supra* note 5, at 59-64.

<sup>144</sup> See Aragaki, *supra* note 122.

<sup>145</sup> *Id.*

<sup>146</sup> See *Allied-Bruce*, 513 U.S. at 283 (O’Connor, J., concurring).