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Summer 2012

## Procedure in Eclipse: Group-Based Adjudication in a Post-Conception Era

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### Recommended Citation

Myriam E., *Procedure in Eclipse: Group-Based Adjudication in a Post-Conception Era*, 56 Saint Louis University School of Law 1203 (2012).

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**PROCEDURE IN ECLIPSE:  
GROUP-BASED ADJUDICATION IN A POST-*CONCEPCION* ERA**

MYRIAM GILLES\*

*“[L]et me be clear that while I believe Due Process Procedure to be in  
eclipse, it is surely not dead.”<sup>1</sup>*

INTRODUCTION

Running through Professor Judith Resnik’s body of work is a deep and abiding interest in and exploration of the significance of real-life lawyers and judges in the civil justice system—their shared responsibility to discover, conceptualize, evaluate, frame, consolidate, monitor, negotiate, adjudicate, and decide complex cases. This theme is a constant in her recent book, *Representing Justice*, co-written with Dennis Curtis,<sup>2</sup> which brings together many strands of Professor Resnik’s long and illustrious academic and legal career.

*Representing Justice* chronicles the changing nature of adjudication in the twentieth century. In classic Resnikian terms, our uniquely American form of adjudication envisions courts “in conversation . . . with the citizenry about the normative” content of law.<sup>3</sup> In this vision, open adjudicatory processes are themselves a foundation of democracy—legitimizing government power and allowing the public a lens into the way law functions.<sup>4</sup> Mapping the rise and

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\* Professor of Law, Cardozo Law School. I would like to thank Judith Resnik, Dennis Curtis, the organizers of the 2011 Richard J. Childress Memorial Lecture at Saint Louis University School of Law, and my co-presenters and panelists. This Article draws significantly from a recent paper I co-wrote with Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012).

1. Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 624 (2005) [hereinafter Resnik, *Procedure*].

2. JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011).

3. Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 306 (1996) [hereinafter Resnik, Curtis & Hensler, *Individuals*].

4. *Id.* at 382 (“What courts offer . . . are opportunities for public participation, for transformative exchanges about, as well as reaffirmation of, social and moral values.”); *id.* at 306 (we “aspire[] to a court system in conversation with litigants and with the citizenry about the normative context in which we live and its practical import. Courts are celebrated because their

fall of this adjudicatory model against a background evolution in architecture and visual representations of law and justice, Professors Resnik and Curtis teach us that, as the law granted more individuals legal personhood and the concomitant ability to have their grievances aired in open court through transparent and fair procedural rules, a strain was put on judges, on procedure, on the provision of justice itself.<sup>5</sup> And this strain led judges and policymakers to embrace dilutive and destructive versions of the original conception of open adjudication.<sup>6</sup>

Professor Resnik's managerial judge therefore portrays a willingness to prioritize settlement over hearing both sides;<sup>7</sup> on *managing* the process rather than providing *due* process;<sup>8</sup> on promoting and legitimating "alternatives" to open adjudication—alternative dispute resolution ("ADR"), mediation, private arbitration.<sup>9</sup>

So by the close of the twentieth century, Professors Resnik and Curtis chronicle, the celebrated and uniquely American model of providing publicly-subsidized, broadly-available means of adjudicating disputes was in sharp decline, along with other public institutions once regarded as vital to disseminating knowledge about the government—such as the press and post office.<sup>10</sup>

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processes have the capacity to dignify and respect individuals' entitlements to voice and efficacy."); see also *Courtroom Use: Access to Justice, Effective Judicial Administration, and Courtroom Security: Hearing Before the Subcomm. on Courts & Competition Policy of the H. Comm. on the Judiciary*, 111th Cong. 84 (2010) (statement of Judith Resnik) ("[P]ublic adjudicatory procedures make important contributions to functioning democracies."); Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 419–20 (1987) [hereinafter Resnik, *A Public Dimension*]; Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 82–83 (2011) [hereinafter Resnik, *Fairness in Numbers*] (asserting that "public processes" are an important facet of "due process norms—the obligation to open adjudicatory processes to third parties, so as to illuminate and monitor the other facets of the process 'due' and, in democratic orders, to legitimate the binding power of the judgments made").

5. See RESNIK & CURTIS, *supra* note 2, at 306–10.

6. See Judith Resnik, *For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication*, 58 U. MIAMI L. REV. 173, 199–200 (2003) [hereinafter Resnik, *For Owen M. Fiss*] (arguing that the last century has seen the triumph of adjudication but also its demise, through growth of alternative dispute resolution ("ADR") and administrative process, and that "[a]djudication's supporters need to return to their claims for adjudication and ask how adjudication can be refashioned to deliver its promises more broadly").

7. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 376–77 (1982).

8. *Id.* at 425–26, 430.

9. See Resnik, *For Owen M. Fiss*, *supra* note 6, at 188 (explaining that by the end of the twentieth century, federal judges had embraced alternatives to adjudication, such as arbitration, to allow the parties to resolve their disputes at a lower cost).

10. RESNIK & CURTIS, *supra* note 2, at 304–07.

Nowhere has this strain on, and resultant abandonment of, the adjudicatory ideal been more acutely felt than in the world of class actions. In many ways, class actions and aggregate litigation represent the law's best-effort at procedural democracy, at providing access to courts for groups—consumers, employees, small business owners—that would otherwise be unable to have their claims openly adjudicated.<sup>11</sup> But the story of class actions mirrors in many ways the narrative of adjudication that Professors Resnik and Curtis trace more generally: from the adoption of the 1966 class action rule<sup>12</sup> forward, as more class actions were certified,<sup>13</sup> more strain was put on judges to manage quite ungainly processes. Critiques of the class action became increasingly sharp. Foremost was the assertion that the agency costs inherent in representative litigation were too high, giving class action lawyers tremendous and nearly unfettered power to extract massive settlements from risk-averse corporations.<sup>14</sup> Other accounts stressed the due process and autonomy-based concerns of voice, exit, and opportunity of class members to actively engage in group-based adjudication.<sup>15</sup> Taken together, these critiques severely challenged courts in ways that parallel the Resnik and Curtis account of adjudication more broadly.

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11. Resnik, Curtis & Hensler, *Individuals*, *supra* note 3, at 299 (“[O]ne of the primary purposes of class actions is to enable groups otherwise without legal representation to obtain access to courts; the group creates sufficiently large economic or social interests to attract attorney attention and entrepreneurial risk-taking.”); *see also* Resnik, *Fairness in Numbers*, *supra* note 4, at 84 (describing the class action rule as providing “consumers claiming statutory rights the capacity to attract lawyers through the potential for large monetary recoveries”).

12. FED. R. CIV. P. 23 (amended 1966).

13. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1344–45 (1995) (explaining that by the end of the 1980s, class actions were increasingly certified).

14. *See, e.g.*, Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 103, 156 n.199 (2006) (citing John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882–83 (1987); Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1402 (2000) (“Risk averse parties will pay a premium to avoid taking a gamble.”); Note, *Risk-Preference Asymmetries in Class Action Litigation*, 119 HARV. L. REV. 587, 600 (2005) (noting that in a “low-merit suit” the defendant’s risk aversion will be heightened, and a “risk-averse defendant would likely pay a high premium to avoid the variance of a class action trial.”)).

15. Resnik, Curtis & Hensler, *Individuals*, *supra* note 3, at 318 n.63, 320, 391–95; *see also id.* at 389–90 (“[I]n some class actions, class representatives [should] have to fashion means to ensure the delivery of legal services and procedural opportunities for individual clients. . . . [S]tatutes or other rules that create provisions for aggregation should acknowledge the existence of variation among claimants within an aggregate. . . . [J]udges [should] police those procedures by warning lawyers that failure to meet these obligations could be grounds for disaggregation and could be relevant to the payment of both costs and fees.”).

In general and over time, judges and legislators became increasingly suspicious of class actions, and sought ways to curtail access to group adjudication. Courts ramped up the standards governing the certification of damages<sup>16</sup> and injunctive classes,<sup>17</sup> and created new standing requirements for consumer class actions.<sup>18</sup> Congress enacted legislative reforms, such as the Private Securities Litigation Reform Act<sup>19</sup> and the Class Action Fairness Act.<sup>20</sup>

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16. See, e.g., *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 316, 320 (3d Cir. 2008) (“An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met. . . . Factual determinations necessary to make Rule 23 findings must be made by a preponderance of the evidence.”); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41–42 (2d Cir. 2006) (rejecting the “some showing” standard and adopting a requirement that plaintiffs provide definitive proof, through “affidavits, documents, or testimony, to . . . [establish] that each Rule 23 requirement has been met”); see also J. Douglas Richards & Benjamin D. Brown, *Predominance of Common Questions—Common Mistakes in Applying the Class Action Standard*, 41 RUTGERS L.J. 163, 168–69 (2009).

17. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2556–57 (2011). By redefining the hitherto easy-to-satisfy commonality requirement of Rule 23(a)(2), the Supreme Court in *Wal-Mart* made injunctive cases nearly as difficult to certify as damages cases under the *IPO/Hydrogen Peroxide* line of cases. See *id.*; *supra* note 16.

18. See, e.g., Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 310, 316 (2010) (describing the development of an “implicit requirement” of ascertainability, under which courts in consumer cases have refused to certify classes in the absence of “reliable proof of purchase or a knowable list of injured plaintiffs” and asserting that this new standing requirement dooms many consumer class actions arising from small retail purchases because consumers are unlikely to retain the proof of purchase necessary to satisfy ascertainability); see also *In re Teflon Prods. Liab. Litig.*, 254 F.R.D. 354, 357, 365, 371 (S.D. Iowa 2008) (denying certification and asserting that “where claims turn on individual facts . . . the typicality requirement cannot be met” in a products liability suit where plaintiffs had purchased cookware coated with Teflon); *In re Conagra Peanut Butter Prods. Liab. Litig.*, 251 F.R.D. 689, 691, 699 (N.D. Ga. 2008) (denying class certification to a group of plaintiffs who purchased contaminated peanut butter, and asserting that “the governing law requires individual proof of damages”); *In re Fresh Del Monte Pineapples Antitrust Litig.*, No. 1:04-md-1628 (RMB), 2008 WL 5661873, at \*3, \*5, \*8 (S.D.N.Y. Feb. 20, 2008) (denying certification to the “Indirect Purchaser Class” of pineapples in part due to these plaintiffs’ failure to retain and present “proof of purchases made during the Class period”); *In re Phenylpropanolamine Prods. Liab. Litig.*, 214 F.R.D. 614, 617–18 (W.D. Wash. 2003) (“Here, individuals would be required to show some proof of injury—in this case purchase and possession of a non-expired PPA-containing product . . . . The court doubts that many individuals will still have records of minor purchases such as these products dating back to the fall of 2000.”).

19. The Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.). This Act provides that the lead plaintiff—the class member with the largest claimed loss who seeks the position, 15 U.S.C. § 77z-1 (a)(3)(B)(iii)(I)(bb) (2006)—shall “select and retain counsel to represent the class.” 15 U.S.C. § 77z (a)(3)(B)(v). The PSLRA “transformed the lead plaintiff process from a ‘race to the courthouse’ to an orderly procedure.” David H. Webber, *Is “Pay-to-Play” Driving Public*

Taken together, these “reforms” have had the overall and generally intended effect of pushing litigants towards non-collective, non-adjudicatory remedies.<sup>21</sup>

Yet, throughout these decades of arguing about and seeking means to reform class actions and aggregate litigation, Rule 23’s procedures<sup>22</sup> remained viable and accessible, representing both the great promise and the significant problems of the Resnikian adjudicatory model.<sup>23</sup> At the very least, these procedural devices remained generally viable until the Supreme Court’s April 2011 decision in *AT&T Mobility LLC v. Concepcion*, finding state-law rules invalidating class action waivers on unconscionability grounds preempted by the Federal Arbitration Act (“FAA”).<sup>24</sup>

So while Professor Resnik wrote the epigraph cited above just seven years ago—expressing her belief that procedural due process was not dead, but merely “in eclipse”<sup>25</sup>—the decision in *Concepcion* challenges this view with regard to aggregate litigation. The decision to uphold class waivers and disallow the aggregation of legal claims is a direct rejection of the Resnikian adjudicatory model that seeks to provide “opportunities for public

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*Pension Fund Activism In Securities Class Actions? An Empirical Study*, 90 B.U. L. REV. 2031, 2038 (2010).

20. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.). CAFA expands federal diversity jurisdiction over class actions to include any case with more than 100 plaintiffs and \$5 million in controversy. Class Action Fairness Act of 2005 § 4 (codified as amended in 28 U.S.C. §§ 1332(d)(2)(A), 1332(d)(5)(B)); see also EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., THE IMPACT OF THE CLASS ACTION FAIRNESS ACT OF 2005 ON THE FEDERAL COURTS: FOURTH INTERIM REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 2 (2008), available at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Fourth%20Interim%20Report%20Class%20Action.pdf> (reporting an increase in number of removals to federal court immediately after CAFA was enacted, followed by a flattening to pre-CAFA levels).

21. There are some indications that net class action filings have remained consistent over the past three years. See, e.g., FULBRIGHT & JAWORSKI L.L.P., 7TH ANNUAL LITIGATION TRENDS SURVEY FINDINGS 19 (2010), available at <http://www.fulbright.com/litigationtrends>. Given the increased evidentiary and burden-of-proof standards that plaintiffs must satisfy, a significant number of these classes are not certified. See Joel S. Feldman, Simone Cruickshank & Gary McGinnis, *Evidentiary and Burden of Proof Standards for Class Certification Rulings*, 11 CLASS ACTION LITIG. REP. (BNA), June 11, 2010, at 536, 536, 539. Securities fraud class actions appear to be the exception. See, e.g., JORDAN MILEV, ROBERT PATTON & SVETLANA STARYKH, NAT’L ECON. RESEARCH ASSOCS., RECENT TRENDS IN SECURITIES CLASS ACTIONS: 2011 MID-YEAR REVIEW 1 (2011) (reporting that securities class action filings remained steady in the first half of 2011 and suggesting that “a wave of new cases alleging breach of fiduciary duty in connection with mergers and acquisitions” is the cause).

22. See FED. R. CIV. P. 23.

23. See *supra* note 3 and accompanying text (describing the Resnikian adjudicatory model).

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

25. Resnik, *Procedure*, *supra* note 1, at 624.

participation.”<sup>26</sup> Rather, on this new vision of non-adjudication, the legal claims of consumers, employees and others (to the extent they can be brought at all) occur in private one-on-one arbitration rather than the public, participatory forum of a courtroom.<sup>27</sup> In this brave new world, judges are disabled from adjudicating claims involving broadly inflicted harms, and private lawyers are no longer incentivized to ferret out mass wrongs and to litigate small claims. So irrespective of whether one buys into the Posnerian critiques about the over-empowerment of class action plaintiffs,<sup>28</sup> or the Resnikian concern with “[g]roup litigation [as] basically belong[ing] to judges, special masters, and lawyers—talking only with each other and making decisions about categories of claims”<sup>29</sup> the debate is now moot. Suddenly, defendants hold the power to avoid aggregate dispute resolution through the simple expedient of including boilerplate waivers in their standard form contracts.<sup>30</sup>

This is the world in which we find ourselves in the aftermath of *Concepcion*. Newly validated by Justice Scalia’s majority opinion, class action waivers will soon seep into every contract<sup>31</sup>—whether signed, clicked, mass-emailed, posted on a website, or otherwise “consented to”—until aggregate litigation itself becomes a procedural relic examined only briefly in courses on the legal history of the twentieth century, that long-ago era where legal claims were actually adjudicated in public courts of law.<sup>32</sup> If this is an eclipse, it is difficult to see what will make the sun come out again.

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26. See Resnik, Curtis & Hensler, *Individuals*, *supra* note 3, at 382; see also *supra* note 3 and accompanying text.

27. See, e.g., Resnik, *Fairness in Numbers*, *supra* note 4, at 87 (“Indeed, it is the performance of fairness before the public that legitimates adjudication.”).

28. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294, 1297–98 (7th Cir. 1995) (describing “the sheer magnitude of the risk to which the class action, in contrast to . . . individual actions . . . exposes” defendants and worrying that such massive liability exposure will create “intense pressure to settle”).

29. Resnik, Curtis & Hensler, *Individuals*, *supra* note 3, at 399.

30. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753, 1755 (2011) (invalidating California’s *Discover Bank* rule, which found class-action waivers in arbitration agreements contained in certain consumer contracts of adhesion unconscionable).

31. See *id.* at 1743, 1753.

32. Indeed, a major theme of REPRESENTING JUSTICE is the changing nature of adjudication in the twenty-first century. See RESNIK & CURTIS, *supra* note 2, at 306–10. As Professor Resnik asserts, even as Americans built grander and grander courthouses during that century—“glorious new edifices to adjudication”—these houses of justice became available to fewer and fewer litigants—mainly wealthy, corporate, repeat players using courts as one of multiple means towards their desired ends. Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1154 (2006) [hereinafter Resnik, *Whither Adjudication?*] (“[T]he large and distinguished new buildings of courthouses may well capture the practices of contemporary adjudication—that it is a luxury good, available for only a few, inhabiting sparsely populated and gracious buildings.”).

As with so many legal developments, Professor Resnik foresaw this general retreat from adjudication long ago and early on sounded the warning that broad acceptance of arbitration had given rise to a troubling body of contract procedure that forced most civil litigation out of open-forum courts.<sup>33</sup> She, who famously reproduced her actual cell phone agreement (with its typical class action waiver) in a 2006 article on the demise of the adjudicatory model, also anticipated the rise of class action waivers.<sup>34</sup> But few could have predicted the breathtakingly broad decision in *Concepcion*, nor the shallow opportunities for class action litigation that remain in its wake.<sup>35</sup>

This Article, inspired by and written in honor of Professor Resnik, seeks to examine the gloomy post-*Concepcion* landscape and to ponder the possibility of reshaping aggregate litigation through the offices of the states' attorneys general, bringing claims on behalf of injured citizens pursuant to their *parens patriae* authority. For Resnik, a principal value of open adjudication is the public's participatory presence, which enables the electorate to "form independent judgments about the quality of government actions," forcing information into the public realm that "becomes part of iterative exchanges with other branches of government" and "help[ing] to generate a new set of democratic norms."<sup>36</sup> But if courts are no longer willing and able to engage in this "ambitious project that put[s] government processes before the public eye and offer[s] access to all,"<sup>37</sup> then we must consider whether other institutions of government are available to meet these needs.

My argument, which draws heavily from other recent work,<sup>38</sup> is that "the 'private attorney general' role assumed by class action lawyers over the past

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33. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 539–41 (1986) [hereinafter Resnik, *Failing Faith*] (examining emerging hostility toward adjudication).

34. Resnik, *Whither Adjudication?*, *supra* note 32, at 1134–36 ("[B]y unwrapping the phone and activating the new service, I waived my rights to go to court and became obligated to 'arbitrate disputes arising out of or related to' this or 'prior agreements.' Further, both the provider and I agreed to waive our rights to pursue any 'class action or class arbitration.'"); see also RESNIK & CURTIS, *supra* note 2, at 319, fig.201 (reproducing Professor Resnik's cell phone contract).

35. Though writing back in 2006, Professor Resnik was quite pessimistic, warning that the "continued diminution of adjudicatory possibilities comes from the current composition of both the Congress and the federal judiciary, as well as the concerted campaigns to curb the use of courts (replete with anti-trial lawyer advertisements) by private sector actors." Resnik, *Whither Adjudication?*, *supra* note 32, at 1150.

36. Resnik, *Fairness in Numbers*, *supra* note 4, at 91–92, 168.

37. *Id.* at 168.

38. See generally Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012) [hereinafter Gilles & Friedman, *After Class*] (arguing that state attorneys general "have the ability to fill the void created by class actions . . . through expanded use of the *parens patriae* authority").



several decades [could] give way to a world in which state attorneys general make broad use of their *parens patriae* authority . . . to represent the interests of their citizens” in the types of class actions that are now blocked by the waivers.<sup>39</sup> This Article situates the state AGs as a second-best solution, and *parens patriae* litigation as a viable alternative to the open adjudication of claims. My assertion is not that reliance on state AGs is ideal, but only that in the aftermath of *Concepcion* and the growing hostility towards broad rights-based litigation, it may be the only viable option for group-based adjudication.<sup>40</sup>

Part I sketches the legal topography of the pre- and post-*Concepcion* landscape, charting the rise of class action waivers up to the April 2011 Supreme Court ruling, and suggesting a handful of legal challenges and legislative responses to waivers that remain viable today. Part II asks whether viable alternatives to class actions exist in the wake of *Concepcion*—specifically, whether we might look to regulatory agencies to bring claims or seek changes to broad-scale injurious practices, or whether individual arbitration of claims could realistically replace class or aggregate litigation. Finding these alternatives sorely lacking, Part III presents the state AGs as a possible savior of the wounded class action mechanism. This final part is merely an outline—more muscular analysis awaits—but the general idea of state AGs using their *parens patriae* authority to bring claims on behalf of injured citizens seeks to leverage many of the benefits of a public adjudicatory system that Professors Resnik and Curtis extol: responsible public officials in dialogue with their community on shared issues of significance, seeking efficient and just means of resolving disputes and communicating normative aspects of law and democracy.<sup>41</sup> In this final Part, I endeavor to gauge the state AG model against Resnikian standards; her views and her writings provide an intricate atlas that may help map our progress from this point to the next, post-eclipse stage of aggregate litigation.

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39. *See id.* at 630.

40. *See, e.g.*, RESNIK & CURTIS, *supra* note 2, at 315 (describing the devolution of judicial authority to agencies as “a second-best response, a necessary adaptation in the face of [increasing] demand”).

41. *See* Resnik, Curtis & Hensler, *Individuals*, *supra* note 3, at 306.

I. *AT&T MOBILITY LLC v. CONCEPCION*:  
THE ASCENDANCE OF CLASS ACTION WAIVERS

The vast majority of class actions are based on some sort of contractual relationship, often in the form of a standard-form contract.<sup>42</sup> This is true of nearly all consumer, employment, and antitrust class actions, as well as “class actions relating to insurance benefits, ERISA plans, mutual funds, franchise agreements, and an endless variety of other matters.”<sup>43</sup> Beginning as early as the 1940s, companies began to insert in their contracts arbitration provisions requiring disputes to be arbitrated before the American Arbitration Association or the National Arbitration Forum, rather than litigated in courts.<sup>44</sup> At first, courts were “reluctant to enforce contracts to arbitrate”: “[p]rotective of their special mandate, judges frowned on [these] agreements.”<sup>45</sup> But by the 1980s, the Supreme Court had “reread federal statutes to permit—rather than to prohibit—enforcement of arbitration contracts” pursuant to the FAA.<sup>46</sup> In the late 1980s and into the 1990s, the Court further “moved from accepting arbitration clauses to a posture of slavish deference” in a set of rulings finding that the FAA applies in state as well as federal court proceedings and preempts state legislation affecting arbitration.<sup>47</sup> By the dawn of the twenty-first century, it was clear that the Supreme Court “insisted on the validity of contracts that put dispute resolution outside of courthouses and away from open and public hearings.”<sup>48</sup>

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42. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) [hereinafter Gilles, *Opting Out*].

43. *Id.*

44. *See id.* at 396–97; *see also* Resnik, Curtis & Hensler, *Individuals*, *supra* note 3, at 327, 331 (“The orientation has shifted from a focus on regulatory rights-pronouncement and individual litigants to an emphasis on dispute resolution, which has been facilitated by court adoption of settlement conferences, court-annexed arbitration, and other modes of encouraging consensual dispositions.”).

45. RESNIK & CURTIS, *supra* note 2, at 319; *see also* Resnik, *Procedure*, *supra* note 1, at 619–20 (“[T]he law [has] been ambivalent about enforcing obligations to participate in private dispute resolution at the expense of access to public processes. Judges guarded their own monopoly power and regularly refused to enforce arbitration contracts.”).

46. RESNIK & CURTIS, *supra* note 2, at 320; *see also* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 478–79, 483, 486 (1989) (finding that claims under the Securities Act of 1933 were arbitrable); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 641 (1985) (announcing a “federal policy favoring arbitration”); Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) (“[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”); Judith Resnik, *Procedure’s Projects*, 23 CIV. JUST. Q. 273, 289 (2004) (“Over the course of the twentieth century, the attitudes of legislators and court-based adjudicators [towards arbitration] changed.”).

47. Gilles, *Opting Out*, *supra* note 42, at 393–94 n.108; *see also* Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996) (finding that the FAA preempted a state-law requirement that a contract containing an arbitration clause include notification on the first page of the contract); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 272 (1995) (rejecting arguments

Buoyed by this extraordinary judicial deference, some companies went a step further, inserting class action waivers in contractual arbitration provisions. Class action waivers work “to ensure that any claim against the corporate defendant may be asserted only in a one-on-one, non-aggregated arbitral proceeding. More virulent strains of the clause force the would-be plaintiff to waive even her right to be represented as a passive, or absent, class member” or to finance or aid in the commencement of a class proceeding by another injured party.<sup>49</sup> In short, class action waivers doom any aggregate or group litigation, so it isn’t at all surprising that corporate defendants with a keen interest in avoiding class action liability have aggressively adopted and defended the validity of these contractual devices.<sup>50</sup>

The movement to insert class action waivers in consumer contracts<sup>51</sup> accelerated in 1999, when the National Arbitration Forum, “a for-profit arbitral body designated in the arbitration provisions of many large companies, disseminated marketing materials cautioning corporate attorneys that the only

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by twenty state attorneys general in finding that the FAA applies in state as well as federal court); *Perry v. Thomas*, 482 U.S. 483, 484, 491 (1987) (holding the FAA preempted the California Labor Code, which authorized an action for the collection of wages “without regard to the existence of any private agreement to arbitrate”); *Southland Corp. v. Keating*, 465 U.S. 1, 10, 15–16 (1984) (holding that the FAA applies in state courts and preempting state legislation interpreted to protect franchisees from unfair arbitration agreements); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, LAW & CONTEMP. PROBS., Winter/Spring 2004, at 5, 5 (“Despite its constant, talismanic repetition, the ‘national policy favoring arbitration’ is illusory and is highly dubious federalism.”). Professor Resnik has compared the Class Action Fairness Act to the Supreme Court’s arbitration-preemption jurisprudence, writing both are “part of a cohort of enactments and doctrinal developments of this era that preempt state decision making and push litigants toward noncollective and nonadjudicative remedies such as privately sponsored arbitration programs.” Judith Resnik, *Lessons in Federalism from the 1960s Class Action Rule and the 2005 Class Action Fairness Act: “The Political Safeguards” of Aggregate Translocal Actions*, 156 U. PA. L. REV. 1929, 1930 (2008).

48. RESNIK & CURTIS, *supra* note 2, at 320.

49. Gilles, *Opting Out*, *supra* note 42, at 375–76.

50. See, e.g., *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 51, 58 n.4 (1st Cir. 2007) (appealing from the district court’s order striking the class waiver and arguing for its validity based on “the company’s assumption of the costs of mediation and arbitration, reimbursement of legal costs up to \$2,500 to each employee who wishes to arbitrate, the mutuality of the obligation to arbitrate, and the ease and speed of arbitration”); *Jenkins v. First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 882–83 (11th Cir. 2005) (appealing and obtaining a reversal of the district court’s finding that the arbitration agreement was unconscionable and unenforceable); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008) (“Defendants argue that finding this [arbitration] clause to be unconscionable would be ‘hostile to arbitration.’”).

51. See Judith Resnik, *Courts: In and Out of Sight, Site, and Cite*, 53 VILL. L. REV. 771, 796 (2008) (“[The] worldwide movement toward ADR is propelled by political and social forces trumpeting deregulation and privatization and is staffed by lawyers and other professionals seeking and shaping new markets.”).

way to insulate their clients from class action liability . . . was to implement arbitration provisions containing [class action waivers].<sup>52</sup> Companies were responsive: American Express sent notices to roughly 1.5 million small-merchant accounts providing that agreements would be deemed to include arbitration provisions containing express class waivers;<sup>53</sup> cell phone and internet companies informed customers in monthly bill-stuffers that continued usage of their phones or data service plans constituted agreement to class action waivers;<sup>54</sup> and waivers quickly began popping up in standard-form contracts with shippers,<sup>55</sup> health clubs,<sup>56</sup> and other ordinary goods and services providers.<sup>57</sup>

#### A. Unconscionability Challenges circa 1999-2011

Inevitably, some of the companies that implemented class action waivers found themselves as defendants in putative class actions.<sup>58</sup> As those defendants asserted the waivers as a defense, plaintiffs' lawyers looked for ways to challenge their enforceability. The common law contract doctrine of unconscionability appeared promising:<sup>59</sup> under the FAA, a party may oppose

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52. Gilles, *Opting Out*, *supra* note 42, at 397.

53. *In re Am. Express Merchs. Litig.*, No. 03 CV 9592(GBD), 2006 WL 662341, at \*2, \*9 (S.D.N.Y. Mar. 16, 2006).

54. *See, e.g.*, *Laster v. T-Mobile USA, Inc.*, No. 05CV1167 DMS (AJB), 2008 WL 5216255, at \*2 (S.D. Cal. Aug. 11, 2008), *aff'd*, *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Note that under the FAA, arbitration clauses need not be signed to be enforceable. 9 U.S.C. § 2 (2006).

55. *See Answer and Jury Demand of Defendant Fed. Express Corp.* at 21, *Moody v. Fed. Express Corp.*, No. 02 L 601 (Ill. Cir. Feb. 6, 2003) (asserting that each putative class member, all customers of FedEx, "agreed in their contracts with FedEx that each 'will not sue [FedEx] as a class'").

56. *See Benjamin Sachs-Michaels, The Demise of Class Actions Will Not Be Televised*, 12 CARDOZO J. CONFLICT RESOL. 665, 667 (2011).

57. *See, e.g.*, *Dale v. Comcast Corp.*, 498 F.3d 1216, 1217, 1218 (11th Cir. 2007) (involving a contract with a cable TV provider containing a class action waiver); *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 978, 980, 984 (9th Cir. 2007) (involving a contract for cell phone service containing a class action waiver); *Fluke v. CashCall, Inc.*, No. 08-05776, 2009 WL 1437593, at \*1, \*2 (E.D. Pa. May 21, 2009) (involving a contract with a payday lender containing a class action waiver); *Brazil v. Dell Inc.*, No. C-07-01700 RMW, 2007 WL 2255296, at \*1, \*2 (N.D. Cal. Aug. 3, 2007) (involving an agreement for a computer purchase containing a class action waiver).

58. *See supra* note 57.

59. Basic contract law directs that a contractual provision be deemed unenforceable if it is both procedurally and substantively unconscionable. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011). Procedural unconscionability focuses on "oppression" or "surprise" due to unequal bargaining power, while substantive unconscionability focuses on "overly harsh" or "one-sided" results. *Id.*; *see also* 6A ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 1376, at 21 (1962) (stating that standardized contracts offered to individuals on an "accept this or get

arbitration on such “grounds as exist at law or in equity for the revocation of any contract,”<sup>60</sup> and seventeen years ago, the Supreme Court held that unconscionability provides one such ground.<sup>61</sup>

At first, courts were skeptical of these unconscionability challenges leveled at the class action waivers, and the vast majority of early decisions upheld the waivers against this challenge.<sup>62</sup> The tide turned in 2005, when the California Supreme Court decided in *Discover Bank v. Superior Court* that “at least some class action waivers in consumer contracts are unconscionable under California law.”<sup>63</sup> Specifically, where class action waivers “operate effectively as exculpatory contract clauses that are contrary to public policy,” the court held them invalid.<sup>64</sup> Other state courts soon followed the *Discover Bank* ruling, and by 2011, fourteen state supreme courts had invalidated class action waivers on unconscionability grounds.<sup>65</sup> By the time of the *Concepcion* decision in April 2011, “the trend was unmistakable: class action waivers were being defeated in courts around the country.”<sup>66</sup>

### B. *The Concepcion Decision*

In April 2011, a closely divided Supreme Court decided *AT&T Mobility LLC v. Concepcion*, rejecting the unconscionability challenge to waivers that had gained significant traction in the state courts over the past decade.<sup>67</sup> The *Concepcion* case arises from facts that are fairly typical of everyday consumer transactions: Vincent and Liza Concepcion signed up for a two-year service agreement with AT&T Mobility in order to receive a “free” cell phone, but then learned that they had to pay \$30.22 in sales tax for the putatively free

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nothing’ basis” are subject to vigilant judicial scrutiny to avoid enforcement of unconscionable provisions).

60. 9 U.S.C. § 2 (2006).

61. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (“[G]enerally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening §2 [of the FAA].”).

62. *See, e.g.*, *Jenkins v. First Am. Cash Advance*, 400 F.3d 868, 882–83 (11th Cir. 2005); *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 176 (5th Cir. 2004); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 558 (7th Cir. 2003); *Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638–39 (4th Cir. 2002).

63. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

64. *Id.* at 1105–06, 1108, 1110 (explaining that the public policy concern was founded on the “important role of class action remedies in California law” as “the only effective way to halt and redress [consumer] exploitation”).

65. *See* Gilles & Friedman, *After Class*, *supra* note 38, at 633.

66. *Id.*

67. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746–48, 1753 (2011).

device.<sup>68</sup> The Concepcions filed a class action lawsuit alleging consumer fraud, and AT&T moved to compel arbitration pursuant to the arbitration clause in its standard service agreement, which contained a class action waiver.<sup>69</sup> In ruling on AT&T's motion to compel arbitration, a reluctant district court felt itself duty-bound by *Discover Bank* to invalidate the class action waiver.<sup>70</sup> The Ninth Circuit affirmed.<sup>71</sup>

The Supreme Court granted certiorari to "consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures."<sup>72</sup> In arguing against preemption, the plaintiffs focused on the FAA's saving clause, and asserted that the *Discover Bank* rule holding class action waivers unconscionable applies with equal force to contracts mandating arbitration or those banning class actions in court.<sup>73</sup>

But a slim majority of the Supreme Court disagreed, finding California's *Discover Bank* rule too broad to be covered by the FAA's saving clause.<sup>74</sup> As Justice Scalia wrote, "[a]lthough § 2's saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."<sup>75</sup> The majority found the categorical nature the *Discover Bank* rule posed just such an obstacle, as it essentially allows any consumer to demand classwide arbitration.<sup>76</sup> As such, the Court found the state law unconscionability approach of California and fourteen other states preempted by the FAA.<sup>77</sup>

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68. *Id.* at 1744; *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 852 (9th Cir. 2009), *rev'd*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

69. *Concepcion*, 131 S. Ct. at 1744–45.

70. *Laster v. T-Mobile USA, Inc.*, No. 05CV1167 DMS (AJB), 2008 WL 5216255, at \*14 (S.D. Cal. Aug. 11, 2008), *aff'd*, *Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

71. *Laster*, 584 F.3d at 857, 859 (asserting that the *Discover Bank* ruling was a "refinement of the unconscionability analysis applicable to contracts generally in California" and therefore did not discriminate against arbitration).

72. *Concepcion*, 131 S. Ct. at 1744.

73. *Id.* at 1746.

74. *Id.* at 1747–48, 1753.

75. *Id.* at 1748.

76. *Id.* at 1750 ("California's *Discover Bank* rule . . . interferes with arbitration. Although the rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*.").

77. *See Concepcion*, 131 S. Ct. at 1748, 1753 (finding the *Discover Bank* rule fatally "interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA"); *see supra* note 65 and accompanying text.

### C. *Legal and Legislative Responses to Class Action Waivers Post-Concepcion*

In the aftermath of *Concepcion*, we should expect and are beginning to see more companies incorporating class action waivers into all sorts of consumer contracts.<sup>78</sup> We should also expect that plaintiffs' class action lawyers will continue (for a little while, at least) to challenge these waivers, so that courts will soon be forced to carefully consider the impact of the *Concepcion* ruling. The scope of the *Concepcion* decision therefore requires careful and critical analysis.

The Supreme Court's decision in *Concepcion* is clear on one point: that a broad state law rule holding unenforceable class action waivers in consumer adhesion contracts will be preempted by the FAA.<sup>79</sup> But in recent years plaintiffs have mounted successful challenges to class waivers on another theory—"that the waiver's implicit prohibition against spreading the costs of litigation across multiple claimants in collective litigation precludes the individual plaintiff from being able to vindicate her federal statutory rights."<sup>80</sup> Unlike the state law founded unconscionability challenge,<sup>81</sup> this theory of unenforceability is grounded in the Supreme Court's recognition in *Green Tree Financial Corp. v. Randolph* that "the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."<sup>82</sup> In *Randolph*, the Court held that "where . . . a party

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78. Jonathan Gertler & Christian Schreiber, AT&T Mobility v. *Concepcion: The Death Knell for Class Actions?*, PLAINTIFF, June 2011, at 24, 28.

79. See *Concepcion*, 131 S. Ct. at 1748, 1750, 1753.

80. Gilles & Friedman, *After Class*, *supra* note 38, at 633; see also Gilles, *Opting Out*, *supra* note 42, at 407 ("[T]he collective action waiver[s] . . . implicit ban on spreading across multiple plaintiffs the costs of experts, depositions, neutrals' fees, and other disbursements—forces the individual claimant to assume financial burdens so prohibitive as to deter the bringing of claims. In the absence of the waiver, the claimant may spread these costs across thousands of coventurers (or have them advanced by lawyers, as happens in practice). In the presence of the waiver, these costs fall on her alone. And these costs, in a complex commercial case, will exceed the value of the recovery she is seeking.") (footnotes omitted).

81. See *Affordable Hous. Found., Inc. v. Silva*, 469 F.3d 219, 237 (2d Cir. 2006) (noting an "an important legal distinction between" preemption analysis, and cases where courts seek "to reconcile two federal statutes to ensure that one did not trench on the other, a task routinely performed by federal courts"); *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 86 (2d Cir. 2006) (internal citation omitted) ("[T]he preemption doctrine flows from the Constitution's Supremacy Clause, U.S. Const., Art. VI, cl. 2, which 'invalidates state laws that interfere with, or are contrary to federal law.' The doctrine is inapplicable to a potential conflict between two federal statutes."); *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 608 (6th Cir. 2004) ("[P]reemption does not describe the effect of one federal law upon another; it refers to the supremacy of federal law over state law when Congress, acting within its enumerated powers, intends one to displace the other.").

82. *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000).

seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.”<sup>83</sup>

Prior to *Concepcion*, a few circuit courts had invalidated class action waivers on this ground<sup>84</sup> or recognized the validity of the analysis,<sup>85</sup> raising the question of whether the vindication-of-rights theory survives the Court’s ruling. In *Amex III*, the Second Circuit considered this exact question, ruling “*Concepcion* does not alter our analysis”<sup>86</sup> and finding the class action waiver “unenforceable[] ‘because enforcement of the clause would effectively preclude any action seeking to vindicate the statutory rights asserted by the plaintiffs.’”<sup>87</sup> The court interpreted *Concepcion* as limited to the question of “whether a state contract law is preempted by the FAA,” as distinct from the “vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.”<sup>88</sup> The *Amex III* decision follows upon and affirms a number of post-*Concepcion* district court decisions—interestingly, all out of the Southern District of New York—finding waivers unenforceable on these grounds.<sup>89</sup> But defendants have sought en banc review, and will surely petition

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83. *Id.* at 92.

84. *See, e.g., In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 320 (2d Cir. 2009), *vacated sub nom.*, *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010); *Kristian v. Comcast Corp.*, 446 F.3d 25, 55, 64 (1st Cir. 2006).

85. *See, e.g., In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 285 (4th Cir. 2007) (“[I]f a party could demonstrate that the prohibition on class actions likely would make arbitration prohibitively expensive, such a showing could invalidate an agreement . . . .”); *Livingston v. Assocs. Fin., Inc.*, 339 F.3d 553, 557 (7th Cir. 2003) (quoting *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 90 (2000)) (“A party seeking to invalidate an arbitration agreement must establish that the agreement precludes them from effectively ‘vindicated [their] statutory cause of action in the arbitral forum.’ . . . In the present case, the [plaintiffs] have not offered any specific evidence of arbitration costs that they may face in this litigation, prohibitive or otherwise, and have failed to provide any evidence of their inability to pay such costs . . . .”). As the Second Circuit remarked in *Amex III*,

In each of these cases, plaintiffs’ attempts to avoid the waiver clause failed because plaintiffs were unable to demonstrate the class-action waivers barred them from vindicating their statutory rights. Their failures speak to the quality of the evidence presented, not the viability of the legal theory. The fact that plaintiffs so often fail in their attempts to overturn such waivers demonstrates that the evidentiary record necessary to avoid a class-action arbitration waiver is not easily assembled, and that the courts are capable of the scrutiny such arguments require.

*In re Am. Express Merchs.’ Litig.*, 667 F.3d 204, 217 (2d Cir. 2012).

86. *In re Am. Express Merchs.’ Litig.*, 667 F.3d at 206.

87. *Id.* (quoting *In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 304 (2d Cir. 2009)).

88. *Id.* at 213.

89. *See, e.g., Raniere v. Citigroup, Inc.*, No. 11 Civ. 2248, 2011 WL 5881926, at \*13 (S.D.N.Y. Nov. 22, 2011) (“[E]ven if *AT & T* is read broadly to acquiesce to the enforcement of an arbitral agreement that as a practical matter would prevent the vindication of state rights in the name of furthering the strong federal policy favoring arbitration, that would not alter the validity



for certiorari, so until all appeals are exhausted, the viability of this theory remains unsettled.<sup>90</sup>

Challenges to class action waivers based on state statutory or common law will likely face greater difficulty navigating the Court's *Concepcion* decision. Recall that the *Concepcion* majority was concerned with state law rules seeking to regulate the legality of class action waivers that might "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" as expressed in the FAA.<sup>91</sup> But because the majority is not entirely clear on just what "stands as an obstacle" means,<sup>92</sup> it is difficult to predict what sorts of state statutory or common law rules might survive in the post-*Concepcion* era. Any analysis arguably requires a case-by-case evaluation, wherein plaintiffs could show (for example) that the imposition of the class waiver confers de facto immunity on the defendant or otherwise violates the savings clause in case-specific, factually intensive ways. Put differently, "[t]he sin of the *Discover Bank* rule was that it did not require the claimant to show that the agreement operated as an exculpatory contract on a case-specific basis."<sup>93</sup> So it may be possible for state courts post-*Concepcion* to invalidate waivers based on recognized defenses to contract on a case-by-case basis (as opposed to California's "categorical" rule),<sup>94</sup> so long as any such effort does not discriminate against arbitration<sup>95</sup> or have the effect of rendering arbitration, as traditionally defined, unavailable in some category of cases.<sup>96</sup>

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of the federal statutory rights analysis articulated in *Mitsubishi*, *Green Tree* [and] *American Express* . . . ."); *Chen-Oster v. Goldman, Sachs & Co.*, No. 10 Civ. 6950(LBS)(JCF), 2011 WL 2671813, at \*3-5 (S.D.N.Y. July 7, 2011) (declining to apply *Concepcion* where the question before the court involved the plaintiff's ability to vindicate a federal statutory right); *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 550-51 (S.D.N.Y. 2011) (finding *Amex I* "retains its persuasive force" following *Stolt-Nielsen*).

90. See, e.g., Appellant's Opening Brief and Appendix Volume I of III at 29 n.2, *Homa v. Am. Express Co.*, No. 11-3600 (3d Cir. Dec. 21, 2011) (appealing a district court's enforcement of an arbitration agreement in light of *Concepcion* and preserving for en banc review the issue of whether certain states' rules are outside the scope of *Concepcion*).

91. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

92. In using the phrase "stands as an obstacle," the *Concepcion* court referred back to *Hines v. Davidowitz*, whose only elaboration on the phrase is that "states cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations." *Hines*, 312 U.S. at 66-67.

93. Gilles & Friedman, *After Class*, *supra* note 38, at 651.

94. See *supra* note 76 and accompanying text.

95. David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 454 (2011) (explaining that in *Perry v. Thomas*, the Supreme Court "described the FAA as a kind of equal protection clause that bar[s] state courts from applying contract principles in a manner that discriminate[s] against arbitration").

96. In one of the first cases to interpret *Concepcion*, the Eleventh Circuit reasoned that the "Supreme Court concluded that the triggering conditions of California's *Discover Bank* rule

If judicial challenges to class action waivers fail post-*Concepcion*, there remains some possibility of legislative action.<sup>97</sup> For example, Congress could declare that class action waivers are simply unenforceable—at least in standard-form consumer and employment contracts. This is the general idea behind two proposed bills—the Arbitration Fairness Act of 2011<sup>98</sup> and the Consumer Mobile Fairness Act of 2011<sup>99</sup>—though neither seems likely to pass.<sup>100</sup>

Some hope also lies with the Consumer Financial Protection Bureau (“CFPB”). The CFPB was created by the Dodd-Frank Act as an independent bureau within the Federal Reserve, designed to protect consumers in their transactions with banks, credit card companies, mortgage brokers, and other financial institutions.<sup>101</sup> Section 1028 of the Dodd-Frank Act requires the CFPB to conduct a study of and submit a report to Congress on the use of arbitration in consumer transactions, and “prohibit or impose conditions or limitations on the use of . . . arbitration of any future dispute between the parties, if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.”<sup>102</sup>

imposed no effective limit on its application” and it “implied that although the *Discover Bank* rule was cast as an application of unconscionability doctrine, in effect, it set forth a state policy placing bilateral arbitration categorically off-limits for certain categories of consumer fraud cases, upon the mere *ex post* demand by any consumer.” *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1211 (11th Cir. 2011). For *this* reason, the Eleventh Circuit recognized, the “Court then held that . . . this state-imposed policy preference ‘interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.’” *Id.*

97. See, e.g., RESNIK & CURTIS, *supra* note 2, at 320 (describing pre-*AT&T* legislative proposals to make class action waivers “unenforceable for consumers, or for employees bringing civil rights claims” as well as “a few targeted statutes [that] have been enacted to limit their applicability”).

98. S. 987, 112th Cong. (2011); H.R. 1873, 112th Cong. (2011).

99. S. 1652, 112th Cong. § 3 (2011). This bill would legislatively overturn *Concepcion* for all cell phone contracts, so that “a predispute arbitration agreement between a covered individual and a provider of mobile service shall not be valid or enforceable.”

100. See Editorial, *Gutting Class Action*, N.Y. TIMES, May 13, 2011, at A26 (noting that the chances of the Arbitration Fairness Act passing to override *Concepcion* “aren’t great in the current political environment”); David Lazarus, *Lawmakers Should Ensure Consumers Have the Right to Sue*, L.A. TIMES, Jan. 13, 2012, at B1 (reporting that the Arbitration Fairness Act “bill hasn’t gone anywhere since it was unveiled in May [because] [i]ts corporate opponents, including the U.S. Chamber of Commerce, have lobbied against it”); David Lazarus, *Aiming to Restore Our Right to Sue*, L.A. TIMES, Oct. 18, 2011, at B1 (noting that industry lobbyists oppose both bills).

101. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376 (2010); 12 U.S.C. § 5491 (Supp. 2011).

102. Dodd-Frank Act § 1028(b); 12 U.S.C. § 5518(b). Notably, Dodd-Frank confers similar authority on the SEC to ban mandatory arbitration in the securities context and flatly prohibits mandatory arbitration in mortgage and home equity loan contracts. Dodd-Frank Act § 1414(e). The Act also bans mandatory arbitration that would waive protections for those who blow the whistle on securities fraud and commodities fraud. *Id.* §§ 748, 922.

It is therefore possible that, after conducting its study of arbitration provisions in consumer contracts, the CFPB might someday issue regulations prohibiting class action waivers in those contracts over which it has direct authority.<sup>103</sup>

But as of this writing, the CFPB remains steeped in controversy, as congressional Republicans have vowed to “defund, delay and defang” the nascent agency.<sup>104</sup> Finally, after a nearly two-year stalemate, President Obama in January 2012 made a recess appointment of Richard Cordray to direct the CFPB.<sup>105</sup> But even if the CFPB miraculously survives the current political battle, conducts the arbitration study, and concludes that banning class action waivers in these contracts is “in the public interest and for the protection of consumers,”<sup>106</sup> “any resulting rule will apply, under [Dodd-Frank’s] grandfather clause, only to contracts entered into more than 180 days after that rule is issued.”<sup>107</sup> This would severely limit the effectiveness of any regulations the agency might promulgate.

In sum, judicial, legislative, and regulatory responses to *Concepcion* promise little; none appear imminent, likely, or complete. Meanwhile, class waivers are being inserted into hundreds of contracts by the minute. This begs the obvious question: What is lost in a world without class actions?

## II. WHAT IS LOST IN A WORLD WITHOUT CLASS ACTIONS?

The outlook for aggregate litigation—perhaps all forms of litigation<sup>108</sup>—in the wake of *Concepcion* is bleak. The Supreme Court’s opinion is sufficiently broad that potential judicial interventions are unlikely or will operate in the exception rather than the main; and legislative or regulatory fixes appear infeasible in the current political climate. Taken together, this means that most class cases will not survive the impending onslaught of class action waivers. A fundamental question therefore arises: What is really lost in upholding class action waivers? If private class actions are on the decline, are there other means by which claimants can seek to have their cases heard and injuries

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103. Gilles & Friedman, *After Class*, *supra* note 38, at 656 & n.120 (considering the “enumerated consumer laws” within the CFPB’s jurisdiction).

104. *Id.* at 655.

105. E.g., Jim Puzzaghera & Lisa Mascaro, *Obama Bypassing Senate to Appoint Richard Cordray Consumer Chief*, L.A. TIMES (Jan. 4, 2012), <http://www.latimes.com/business/money/la-fi-obama-cordray-20120104,0,2612330.story>.

106. Dodd-Frank Act § 1028(b).

107. Gilles & Friedman, *After Class*, *supra* note 38, at 658 (citing Dodd-Frank Act § 1028(d)).

108. Resnik, *Fairness in Numbers*, *supra* note 4, at 80 (asserting that the Court’s rulings in *Concepcion* and *Wal-mart* “make plain that the constitutional concept of courts as a basic public service provided by government is under siege”).

compensated, and alternative forms of deterrence to influence a defendant's behavior?<sup>109</sup>

A. *Doing Away With the "Private Attorney General"*

One possible response to the demise of private class actions is greater reliance on public regulatory agencies to adjudicate claims. This vision of a robust public-agency-centered-rights regime would have the SEC, DOJ, EPA, FTC, EEOC, and their state counterparts bringing all manner of securities, antitrust, environmental, consumer, and employment litigation on behalf of injured citizens. This, of course, is at least theoretically possible; Professor Resnik has chronicled a similar phenomenon in discussing the steady migration of adjudicatory functions from courts to administrative agencies,<sup>110</sup> with the concomitant increase in administrative personnel.<sup>111</sup> For Professor Resnik, one suspects that such a model—where public authorities are vested with the *exclusive* authority to enforce broad public rights—would be problematic to the extent that it “removes conflict resolution from public purview,” and therefore fails to capture the benefits of a public, open adjudicatory ideal.<sup>112</sup>

But whatever its merits, a massive shift to a public enforcement regime is completely impractical and antithetical to contemporary socio-political norms. Private involvement in public civil law enforcement is deeply embedded in our politics and culture. Indeed, our entire civil justice system is constructed around the essential idea that private actors will be the “frontline enforcers in actions redressing broadscale securities fraud, consumer fraud and deceptive trade practices, antitrust violations (outside of the merger context), civil rights violations and many other areas.”<sup>113</sup> State and local enforcement agencies in particular (and many federal ones, too<sup>114</sup>) are funded and organized on the

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109. See RESNIK & CURTIS, *supra* note 2, at 306 (“[D]elegating adjudication to other government institutions, and outsourcing [] represent a movement toward privatization that removes conflict resolution from public purview.”).

110. *Id.* at 314–15 (chronicling the creation and evolution of the Court of Claims to the Court of Federal Claims in the twentieth century, and describing other specialized “agency-based courts” created by Congressional legislation).

111. *Id.* at 315 (“[In 2001,] more than 4,700 administrative judges or hearing officers . . . work in federal agencies deciding specific kinds of claims, such as those brought by social security recipients, veterans, immigrants or federal employees. . . . During the same era, more than 10,000 administrative law judges were based in state and local agencies.”).

112. *Id.* at 306; see also *supra* note 3 and accompanying text.

113. Gilles & Friedman, *After Class*, *supra* note 38, at 625–26; see also Resnik, *Fairness in Numbers*, *supra* note 4, at 112 (“The ability to use courts turns in large measure on the private bar, a smattering of public legal aid programs, third-party insurance companies, and chronically underfunded agencies.”).

114. See, e.g., Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107, 126–27 (2005) (“Because the SEC lacks

clear, if largely unspoken, understanding that a vigorous and well-stocked private bar sits ready to deploy its ample resources to redress frauds and other harms perpetrated upon the general public.<sup>115</sup> So while “[o]ne can imagine a world where public agencies assume primary (or even sole) responsibility for the detection, investigation, and litigation of public frauds, as well as the collection of ill-gotten gains and the distribution of compensation to injured persons . . . one would be imagining a very different world—one that provides orders of magnitude more resources to state and local enforcement agencies.”<sup>116</sup>

### B. *Is Arbitration the New Adjudication?*

Could it be that, post-*Concepcion*, nothing changes and nothing is lost in moving from litigation to arbitration—that claims can and will be arbitrated and resolved within the arbitral forum as they would be in court? This is a view one often hears from corporate defendants:<sup>117</sup> it presumes the arbitral forum to be sufficient and equivalent to public-court adjudication and takes seriously the Supreme Court’s apparent judgment that “bilateral” or individual arbitration is preferable to adjudication.<sup>118</sup> Indeed, proponents of ADR have long asserted that arbitration is superior to litigation, focusing “on adjudication’s failings—that it is too expensive, too cumbersome, and too aggressive.”<sup>119</sup> Arbitration, on the other hand, is touted as “produc[ing] significant cost reductions while not altering outcomes.”<sup>120</sup> On this view, arbitration offers “more than adjudication can—more access for claimants, less cost, and more congenial procedures.”<sup>121</sup>

Professor Resnik has written extensively on this movement away from formal adjudication and towards arbitration, as more and more claims are

adequate resources to effectively police the national securities market, supplemental enforcement is essential to achieve an appropriate level of deterrence.”).

115. See, e.g., Mark E. Budnitz, *The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement*, 24 GA. ST. U. L. REV. 663, 664 (2008) (“Recognizing the resource limitations of government agencies, many consumer laws provide a private right of action so individual consumers also can litigate violations of these laws. Many of these laws also provide class actions and statutory damages which encourage consumers to act as ‘private attorneys general.’”).

116. Gilles & Friedman, *After Class*, *supra* note 38, at 626.

117. See RESNIK & CURTIS, *supra* note 2, at 335 (“[T]he movement toward ADR is justified as offering more than adjudication can—more access for claimants, less cost, and more congenial procedures.”).

118. Resnik, *Fairness*, *supra* note 4, at 117–18 (tracing Supreme Court arbitration decisions).

119. RESNIK & CURTIS, *supra* note 2, at 309.

120. *Id.* at 313. But see *id.* at 321 (“[S]upport for the proposition that contractual dispute resolution programs are better than adjudication—in terms of access, costs, speed, or outcomes—is hard to come by.”).

121. *Id.* at 335.

being decided by private arbitral bodies.<sup>122</sup> For Resnik, these developments (which she situates within a broader movement towards privatization of all sorts of heretofore governmental charges<sup>123</sup>) are perhaps a natural and expected result of the success of the adjudicatory model,<sup>124</sup> as well as its failures.<sup>125</sup> As more claimants have been vested with legal personhood and viable legal claims,<sup>126</sup> the pressure put on courts has become intense and has led to multi-dimensional efforts to shift adjudication elsewhere.<sup>127</sup>

But, as Professor Resnik points out, shifting the work of the courts to other fora creates problems for the fair administration of justice, as “mini-codes of civil procedure are being created by . . . a multitude of private providers.”<sup>128</sup> Of particular concern to Resnik is the prospect of unequal bargaining power and the absence of decision-transparency—the due process and fairness implications of “Contract Procedure.”<sup>129</sup> Open courts produce tremendous

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122. *Id.* at 308; see also Resnik, *Procedure*, *supra* note 1, at 597 (“[F]ederal judges who once had declined to enforce ex ante agreements to arbitrate . . . now generally insist on holding parties to such bargains, thereby outsourcing an array of claims.”).

123. RESNIK & CURTIS, *supra* note 2, at 310 (“The outsourcing of what had been a public function is not a phenomenon unique to courts but rather part of a pervasive pattern in which various kinds of services (police, detention, school, and the military) have been shifted to the private sector.”); *id.* at 336 (describing Jody Freeman and Martha Minow’s work on “Government by Contract”).

124. See *id.* at 308 (describing the “very success of courts, attracting large numbers of claimants imposing demands that exceed capacity,” and the problems created when “governments have not allocated adequate funds—either for judges and courthouses or for subsidies to litigants unable to afford court and lawyer fees”); see also *id.* at 308–09 (describing legislative authority over judicial salaries resulting in too-low compensation levels for judges as compared to their counterparts in private practice); *id.* (describing states’ recessionary responses to justice, such as closing courthouses, limiting the availability of trials, and imposing increased court fees).

125. See Resnik, *Fairness in Numbers*, *supra* note 4 at 90 (“But not all celebrate the trajectory that identifies these due process obligations, producing more rights and more claimants knocking at courthouse doors. The intersection of high demand curves for courts, the burdens of procedures, the costs of lawyers, and the regulatory successes achieved by some plaintiffs have prompted diverse critiques, styling the civil justice system as overburdened, overreaching, and overly adversarial.”).

126. *Id.* at 105–06 (“As women gained stature as equal persons, state and federal laws governing families burgeoned to deal with rights to divorce, child custody, and support. Moreover, both state and federal statutes authorized governments, individuals, and groups to bring claims and created both procedures and incentives to do so, such as the treble damage provisions of the antitrust laws, the 1966 class action rule, and the 1976 Civil Rights Attorney’s Fees Awards Act.”).

127. RESNIK & CURTIS, *supra* note 2, at 335 (“Outsourcing, devolution, subcontracting, and facilitating nonpublic resolutions are increasingly the norm, as courts and legislatures send work to agencies and to private dispute resolution centers.”).

128. Resnik, *Procedure*, *supra* note 1, at 597.

129. See *id.* at 598, 653. Instead of asking, “How could fair decisions be achieved? What kind and quantum of information sufficed to render binding judgments that had law’s force

amounts of information about case proceedings and outcomes; “[i]n contrast, private dispute resolvers are left to do as they wish,” with little obligation to “make available to the public information about parties, categories of disputes, time to disposition, and outcomes.”<sup>130</sup> If a vital function that courts serve in our democracy is to provide citizens a lens into the way law operates, private arbitration is formally designed to provide no such window: “third parties can neither attend nor inspect records (if made) of proceedings, opinions are not published, and parties may be subject to admonitions of confidentiality.”<sup>131</sup> The information-suppressing effects of arbitration were once upon a time considered problematic by the Supreme Court,<sup>132</sup> but that view lost favor in the late-1980s.<sup>133</sup>

Yet these concerns no longer seem as significant in the aftermath of *Concepcion*: class actions are not being “outsourced” to the private arbitral forum because the class action waiver effectively bars these claims from being brought in *any* forum.<sup>134</sup> Despite how “quick [and] easy” AT&T’s arbitration process in the *Concepcion* case may have been, “few consumers invoked [that] process”<sup>135</sup>—and one wonders if any did. Certainly, individual arbitrations of consumer claims will have a difficult time attracting lawyers, who will find little profit in representing a handful of small-claims clients.<sup>136</sup> As Justice Breyer asked in his *Concepcion* dissent, “What rational lawyer would have

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behind them? How much process was due?,” *id.* at 596, our system now asks “when an enforceable settlement has been achieved, who has the power to bind whom, whether courts should refuse certain of the bargains struck, and which court has jurisdiction to enforce settlements when disputes arise.” *Id.* at 597. Another set of concerns raised by the move away from adjudication and towards arbitration was the state’s own involvement in validating the “social and political attitudes [that are] less hospitable to government oversight.” *Id.* at 623.

130. Resnik, *Fairness in Numbers*, *supra* note 4, at 108.

131. *Id.* at 111.

132. See, e.g., *Wilko v. Swan*, 346 U.S. 427, 435–36 (1953) (finding it problematic that arbitrators’ awards “may be made without explanation of [arbitrators’] reasons and without a complete record of their proceedings,” such that no understanding could be had of the “arbitrators’ conception of the legal meaning” of fundamental doctrinal norms), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989); see also Judith Resnik, *Many Doors? Closed Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 223–24 (1995).

133. See *Rodriguez de Quijas*, 490 U.S. at 484 (overruling *Wilko*).

134. See RESNIK & CURTIS, *supra* note 2, at 336; Gilles & Friedman, *After Class*, *supra* note 38, at 675.

135. Resnik, *Fairness in Numbers*, *supra* note 4, at 111 (internal quotations omitted).

136. See Christopher M. Mason & Benjamin R. Dwyer, *Class Action Alert*, NIXON PEABODY LLP, 2, 4 (Apr. 27, 2011), [http://www.nixonpeabody.com/linked\\_media/publications/Class\\_Action\\_Alert\\_04\\_27\\_2011.pdf](http://www.nixonpeabody.com/linked_media/publications/Class_Action_Alert_04_27_2011.pdf) [hereinafter *Class Action Alert*] (advising companies to “consider tailoring their contracts to provide the individual customer reasonable access to a fair and inexpensive dispute resolution process like the contract addressed in *Concepcion*”); see also *infra* note 137.

signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?”<sup>137</sup>

Moreover, as corporate defendants craft ever more generous and consumer-friendly arbitration clauses—as we should expect they will so as to pass legal muster<sup>138</sup>—courts faced with these provisions will be hard-pressed to find them insufficient or wanting. In *Concepcion*, for example, one of the reasons AT&T’s arbitration clause was viewed so favorably by the Court was that it provided that claimants were entitled to a \$7500 cash award if they received an arbitration award superior to the defendant’s final pre-award offer.<sup>139</sup> One post-*Concepcion* decision has already enforced a similar arbitration clause, which provided that “if the arbitrator awards [plaintiff] more than [defendant’s] last settlement offer, plaintiffs are entitled to double attorney’s fees.”<sup>140</sup>

Resnik’s concern with the contractualization of procedure and the attendant due process implications of mini-codes<sup>141</sup> has been eclipsed by a grim reality that—at least for aggregate litigation—procedure is no more. Under current law, class action waivers cut off all viable means of bringing legal claims, silencing “the communicative possibilities provided through courts to record, as well as to struggle with, conflicts of meaning, rights, and facts.”<sup>142</sup>

In sum, if neither a purely public, administrative, agency-based response, nor a purely private, individual, arbitration-based response are reasonably

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137. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (2011) (Breyer, J., dissenting); see also *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 553 (S.D.N.Y. 2011) (“Even if [plaintiff] were willing to incur approximately \$200,000 to recover a few thousand dollars, she would be unable to retain an attorney to prosecute her individual claim. . . . [Plaintiff’s counsel] will not prosecute her individual claim without charge, and will not advance the required costs where the [defendant’s] [a]greement’s fee-shifting provisions present little possibility of being made whole.”); *Picardi v. Eighth Judicial Dist. Court*, 251 P.3d 723, 725 (Nev. 2011) (noting plaintiffs’ argument that “the class action waiver was exculpatory because, in cases . . . where the individualized claims are relatively small, it is almost impossible to secure legal representation unless those claims are aggregated with the claims of other similarly situated individuals”).

138. See *Class Action Alert*, *supra* note 136, at 4 (advising companies to “consider tailoring their contracts to provide the individual customer reasonable access to a fair and inexpensive dispute resolution process like the contract addressed in *Concepcion*”).

139. *Concepcion*, 131 S. Ct. at 1745, 1753. Indeed, the district court judge described AT&T’s arbitration provision as “perhaps the most fair and consumer-friendly provisions this Court has ever seen.” *Makarowski v. AT&T Mobility, LLC*, No. CV 09-1590-GAF (CWx), 2009 WL 1765661, at \*3 (C.D. Cal. June 18, 2009).

140. *In re Apple and AT&T iPad Unlimited Data Plan Litig.*, No. C-10-02553 RMW, 2011 WL 2886407, at \*6 (N.D. Cal. July 19, 2011) (order granting AT&T Mobility’s motion to compel arbitration and stay claims except as to plaintiff Hanna).

141. Resnik, *Procedure*, *supra* note 1, at 597.

142. See RESNIK & CURTIS, *supra* note 2, at 336.



foreseeable in the wake of *Concepcion*, then group-based adjudication may soon vanish. And as this great mass of consumer protection, antitrust, employment, and other cases is swept out to sea, the question arises: What or who can fill the resulting enforcement gap?

### III. THE OFFICE OF THE STATE ATTORNEY GENERAL IS OPEN FOR BUSINESS

Elsewhere, I have offered a specific prescription remedying for the enforcement gap created by *Concepcion*.<sup>143</sup> Specifically, I have suggested that state attorneys general might step into the void left by private class action attorneys by exploiting their broad *parens patriae* authority.<sup>144</sup> This prescription is both practical and strategic: suits brought under *parens patriae* are not subject to the strictures of Rule 23, as these are not technically class actions.<sup>145</sup> Therefore, class action waivers ought not apply against the state attorney general.<sup>146</sup>

But in addition to being a functional response to *Concepcion*, the prospect of state AGs taking on a more robust enforcement role engages and interacts with Professor Resnik's vision of adjudication. If state AGs step up and assume responsibility for the cases that have traditionally been litigated by the private class action bar—and particularly if they come to engage private counsel to help identify and litigate those cases—should we (and would Professor Resnik) applaud or boo?

On the one hand, for Professor Resnik, one of the main values of public adjudication of disputes is publicity—the “idea that the public, as an audience” can watch, participate, and therefore help produce the content and meaning of law.<sup>147</sup> Indeed, for Resnik, “it is the performance of fairness before the public

143. See generally Gilles & Friedman, *After Class*, *supra* note 38, at 658–75 (discussing the ability of the states' attorneys general to bring suit under *parens patriae* authority on behalf of the citizens of their state as a potential remedy to the disappearing ability of citizens to bring class actions themselves).

144. *Id.* at 660–61.

145. *Id.* at 660.

146. *But see id.* at 664–65 (discussing the possibility that defendants could assert that *parens patriae* suits are barred under agency principles, wherein the agent-state attorney general is bound by the class action waivers agreed to by the principal-consumer; but arguing that agency principles are incompatible with the theory underlying *parens patriae* authority).

147. Resnik, *Fairness in Numbers*, *supra* note 4, at 87. She continues:

Fairness requires not only procedurally adequate hearings . . . but also participation from those outside a litigation triangle, invited to partake in interactive exchanges that produce, confirm, or reject legal rules. That publicity enables assessments of whether procedures and decisionmakers are fair and permits an understanding of the impact of resources . . . . The presence of the public divests both the government and private litigants of control over the meanings of the claims made and the judgments rendered and enables popular debate about and means to seek revision of law's content and application.

*Id.*

that legitimates adjudication.”<sup>148</sup> This concept of publicity lies at the center of her democratic theory of courts having a distinct role “in producing, redistributing, and curbing power.”<sup>149</sup> Greater reliance on state AGs—acting through their own offices or hiring private lawyers to represent the state in *parens patriae* cases—has the potential to satisfy Professor Resnik’s insistence on publicity and public adjudication.

In addition, Professor Resnik’s concerns with accessibility, voice, and equality<sup>150</sup> are also potentially satisfied by an AG-centered model, as the state’s most prominent and most public law office is well-situated to receive, triage, and (as warranted) act upon complaints voiced by the citizenry.<sup>151</sup> And the very fact that the claim itself will be heard in open court—that it will not be deep-sixed by a class action waiver—is a big plus, as is the accountability of the civil prosecutor to public democratic processes.

But the claim that greater state AG involvement could result in greater democratic participation in litigation is complicated and indeterminate, presenting some daunting challenges. To the extent that state AGs rely on private lawyers to bring claims on behalf of the state, there is the possibility of pay-to-play type corruption—or at the very least, a system that restricts access to justice to claims asserted by favored constituents of a centralized gatekeeper.<sup>152</sup> Any such regime<sup>153</sup> is flatly antithetical to the values that animate Professor Resnik’s scholarship. While there are ways to regulate and proscribe the potential capture of public servants by private interests,<sup>154</sup> finding the political will to utilize *parens patriae* authority to bring actions on behalf of injured citizens and to tap private lawyers to bring those actions where cash-strapped AGs’ offices are unable will require tremendous resolve.

In the end, the question here is not a normative one. Whether the state AG model is a good thing depends, really, on how things play out. It depends on

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148. *Id.*; see also Judith Resnik, *Bring Back Bentham: “Open Courts,” “Terror Trials,” and Public Sphere(s)*, 5 L. & ETHICS HUM. RTS. 1, 4–5 (2011) (describing Bentham’s view that publicity enables the electorate to form independent judgments about the quality of government actions).

149. See RESNIK & CURTIS, *supra* note 2, at xv.

150. See *supra* notes 11, 15, 128–29 and accompanying text.

151. See Gilles & Friedman, *After Class*, *supra* note 38, at 660–64 (explaining the particular position of state AGs in terms of explicit authorization to redress wrongs on behalf of citizens, ability to circumvent Rule 23 requirements, and limited standing issues).

152. See *generally id.* at 670 (worrying that this “model courts ‘pay-to-play’ type abuses, where state officials extract benefits for bestowing lucrative engagements upon favored members of the private bar”).

153. *Id.* at 674 n.230 (citing examples of corrupt “pay-to-play” regimes).

154. See *id.* at 675 n.232 (describing the American Legislative Exchange Council’s 2008 proposed model legislation entitled the Private Attorney Retention Sunshine Act, requiring “an open and competitive bidding process prior to the awarding of any state contract for legal services”).

people—the choices they make and how they behave. We have to wait and see.

### CONCLUSION

Perhaps Professor Resnik is right that due process procedure is merely “in eclipse, [but] is surely not dead.”<sup>155</sup> But recent years have evidenced a significant and palpable shift away from the ideals that she reveres. Access to courts has been limited by doctrines of federal preemption,<sup>156</sup> sovereign immunity,<sup>157</sup> heightened pleading requirements,<sup>158</sup> limitations on attorneys’ fees,<sup>159</sup> exhaustion of remedies requirements,<sup>160</sup> and other innovations of a legal and political system that increasingly views “many kinds of private litigation as wrong-headed and wasteful.”<sup>161</sup> This hostility has proven far more ferocious when directed against class action litigation, which has been under siege for decades.

With the decision in *Concepcion*, the war against class actions seems nearly done, as opponents have won a string of important battles.<sup>162</sup> These judicial and legislative decisions radically restrict the continued ability of private actors to vindicate public rights via the class action mechanism. As the private attorney general model recedes, Professor Resnik’s vision of adjudication as a public good goes with it. This vision—wherein adjudication serves democratic goals beyond the resolution of individual or aggregate claims<sup>163</sup>—values adjudication’s public dimensions, which “enable a diverse audience to see the effects of the application of law in many specific situations.”<sup>164</sup> This is a vision of litigation as an “instrument[] of the public, of

155. Resnik, *Procedure*, *supra* note 1, at 624.

156. *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 330 (2008).

157. *See, e.g.*, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 363 (2001) (“The ultimate guarantee of the Eleventh Amendment is that nonconsenting States may not be sued by private individuals in federal court.”).

158. *See, e.g.*, *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (requiring a plaintiff to plead “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56, 570 (2007) (requiring facts sufficient “to state a claim to relief that is plausible on its face”).

159. *See, e.g.*, 5 U.S.C. § 504 (2006).

160. *See, e.g.*, 42 U.S.C. § 1997e(a) (2006).

161. Jean Maclean Snyder, *Closing the Courthouse Door*, LITIG., Fall 2008, at 43, 43.

162. *See generally* Gilles & Friedman, *After Class*, *supra* note 38, at 626–27 & n.13, 658–59 (detailing the increasingly heightened standards on class certification and standing).

163. *See* Resnik, *Whither Adjudication?*, *supra* note 32, at 1102; *see also* Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 536–37 (2006).

164. Resnik, *Whither Adjudication?*, *supra* note 32, at 1102; *see also* Resnik, *Failing Faith*, *supra* note 33 at 553–54 (“[O]ne of the saving graces of adjudication is its ‘public dimension’—the accountability and education which flow from its public, visible nature.”); Resnik, *A Public*

judges as guardians of the public, and of the public as having an interest in adjudication beyond its function of concluding disputes of the parties or across a series of disputes over time.”<sup>165</sup> This is a vision on the decline, and without a strong and immediate response to decisions such as *Concepcion* that decline may be severe and permanent.

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*Dimension*, *supra* note 4, at 417 (“I believe that the norms are generated in the course of the interaction among disputants and adjudicator, and among disputants, adjudicator, and the public. This is an interaction over time, during which the polity develops, learns about, and changes the norms that govern disputes.”).

165. Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1527 (1994).