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# How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act

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# HOW THE SUPREME COURT THWARTED THE PURPOSE OF THE FEDERAL ARBITRATION ACT

*Jodi Wilson*<sup>†</sup>

*“A greater power than we can contradict  
Hath thwarted our intents.”*

—William Shakespeare\*

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\* WILLIAM SHAKESPEARE, *ROMEO AND JULIET* act 5, sc. 3 (Jill L. Levenson ed., Oxford Univ. Press 2000).

## INTRODUCTION

Arbitration is omnipresent.<sup>1</sup> If you have a bank account, a credit card, or a cell phone, you have an arbitration agreement. American businesses have incorporated mandatory arbitration agreements into all types of contracts.<sup>2</sup> And, as a general rule, courts will enforce these arbitration agreements like any other contractual agreement.<sup>3</sup>

But this was not always the case. There was a time when the judiciary was hostile to arbitration and refused to enforce arbitration agreements.<sup>4</sup> In 1925, Congress responded to this judicial hostility by enacting the United States Arbitration Act, now known as the Federal Arbitration Act (“FAA”).<sup>5</sup> Section 2 is the heart of the FAA.<sup>6</sup> Section

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1. One court has likened arbitration to the invasive vine kudzu: “When introduced as a method to control soil erosion, kudzu was hailed as an asset to agriculture, but it has become a creeping monster. Arbitration was innocuous when limited to negotiated commercial contracts, but it developed sinister characteristics when it became ubiquitous.” *Knepp v. Credit Acceptance Corp. (In re Knepp)*, 229 B.R. 821, 828 (Bankr. N.D. Ala. 1999).
  2. See Thomas E. Carbonneau, *The Revolution in Law Through Arbitration*, 56 CLEV. ST. L. REV. 233, 257–59 (2008) (discussing the spread of arbitration to the point of touching on “nearly all civil disputes,” including disputes among securities firms, disputes between securities firms and their investors and employees, broad employment disputes, and consumer disputes).
  3. As discussed *infra*, arbitration agreements reflecting a transaction involving commerce are enforceable pursuant to the Federal Arbitration Act, 9 U.S.C. § 2 (2006). Moreover, many states have adopted similar state laws. See, e.g., Tennessee Uniform Arbitration Act, TENN. CODE ANN. §§ 29-5-302 to -320 (2011); Illinois Uniform Arbitration Act, 710 ILL. COMP. STAT. 5/1-23 (2011); see also *infra* note 10 (discussing the frequency with which arbitration agreements are enforced).
  4. See, e.g., *Headley v. Ætna Ins. Co.*, 80 So. 466, 467 (Ala. 1918) (a contractual agreement to “submit every matter of dispute between the parties, growing out of such contract, to arbitration . . . to the end of defeating the jurisdiction of courts as to the subject-matter, [is] universally held to be void, as against public policy”); *Rison v. Moon*, 22 S.E. 165, 167 (Va. 1895) (“[E]ither party may withdraw from an agreement to arbitrate, made after a cause of action has arisen, and before the award has been rendered, and . . . such an agreement is no bar to suit at law or in equity, and no foundation for a decree of specific performance.”); see also *infra* Part I.A (discussing in more detail the judicial hostility toward arbitration).
  5. As discussed in Part I.A *infra*, the FAA was originally enacted as the United States Arbitration Act, ch. 213, 43 Stat. 883 (1925). It was codified in 1947 and is commonly referred to as Federal Arbitration Act. Federal Arbitration Act, ch. 392, 61 Stat. 669 (1947) (codified as amended at 9 U.S.C. §§ 1–16 (2006)). Both the House Report and the Senate Report accompanying the legislation identified judicial hostility as the impetus for the legislation. H.R. REP. NO. 68-96, at 1–2 (1924)

2 is comprised of two discrete parts, which together strike a careful balance between federal regulation of arbitration agreements specifically and state regulation of contracts generally. The first part of section 2—the enforcement clause—provides that arbitration provisions in written agreements affecting interstate commerce are “valid, irrevocable, and enforceable.”<sup>7</sup> The second part of section 2—the savings clause—clarifies that arbitration agreements are still subject to “such grounds as exist at law or in equity for the revocation of any contract.”<sup>8</sup> As reflected in both the House Report and the Senate Report, the purpose of the FAA was to place arbitration agreements on the “same footing as other contracts” and thereby overcome judicial hostility to arbitration.<sup>9</sup>

The FAA proved to be a turning point for arbitration, as it overcame judicial hostility such that arbitration agreements are now routinely enforced.<sup>10</sup> Consistent with the savings clause in section 2,

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(discussing the jurisdictional “jealousy” of the courts and the resulting refusal to enforce arbitration agreements). The Senate Report reflects the same sentiment. S. REP. NO. 68-536, at 2-3 (1924) (discussing resistance to enforcing arbitration agreements and the reasons for that resistance).

6. *See* *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (referring to section 2 as the “primary substantive provision of the Act”).
7. 9 U.S.C. § 2 (2006). As discussed in Part I.A *infra*, the text of section 2 of the FAA is the same today as it was when it was originally enacted. *Compare* United States Arbitration Act, ch. 213, 43 Stat. 883 (1925), *with* 9 U.S.C. § 2 (2006).
8. 9 U.S.C. § 2 (2006).
9. H.R. REP. NO. 68-96, at 1-2 (1924); *see also* S. REP. NO. 68-536, at 2 (1924) (noting one could reasonably conclude that state and federal courts’ “desire to retain, if not extend their jurisdiction had much to do with inspiring the fear that arbitration tribunals could not do justice between the parties”). For more details about the purpose of Congress in enacting the FAA, *see infra* Part I.A.
10. *See, e.g.*, *Hagrputa for Trading & Distribution, Ltd. v. Oakley Fertilizer Inc.*, No. 09 Civ. 9779, 2010 WL 2594286, at \*5, \*8 (S.D.N.Y. June 18, 2010) (compelling arbitration and noting that arbitration clauses are “routinely enforced” even if one party claims to be unaware that he agreed to arbitration); *Grimm v. First Nat. Bank of Pa.*, 578 F. Supp. 2d 785, 795, 801 (W.D. Pa. 2008) (compelling arbitration and noting that arbitration clauses printed on the backs of contracts are “routinely enforced”). As one commentator has noted, “[t]oday, arbitration agreements are enforced in a staggering array of contexts” including those involving employment, health care, consumer transactions, and discrimination. Michael Moffitt, *Three Things to be Against (“Settlement” Not Included)*, 78 *FORDHAM L. REV.* 1203, 1230-31 (2009). “Regardless of the scale of the dispute, courts today consistently stay litigation in favor of arbitration when an arbitration agreement even arguably encompasses the dispute.” *Id.* at 1231.

however, courts have struck down arbitration agreements that violated generally applicable state contract law.<sup>11</sup> Thus, at first blush, section 2 of the FAA seems to be accomplishing Congress's purpose. Judicial hostility has been quelled, and arbitration agreements occupy the same footing as other contracts.

But upon closer review, it becomes evident that the United States Supreme Court has thwarted the equal footing policy established in the FAA and replaced it with a judicial policy favoring arbitration.<sup>12</sup> Almost thirty years ago, the Court announced that the FAA evidenced a policy *favoring* arbitration, despite the apparent conflict such a policy has with Congress's stated intent to place arbitration agreements on the *same footing* as other contracts.<sup>13</sup> Since first announcing this favoritism policy, the Court has often repeated the policy as a basis for its decisions, to the detriment of the stated congressional policy of equal footing.<sup>14</sup>

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11. *See, e.g.*, *Alexander v. Anthony Int'l, L.P.*, 341 F.3d 256, 272 (3d Cir. 2003) (holding an arbitration provision unenforceable due to unconscionability and reversing the district court's decision compelling arbitration); *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1550–51 (11th Cir. 1985) (affirming district court's decision that an arbitration clause was unenforceable under New York law due to insufficient consideration). Justice Thomas has argued that Congress intended to save only some contract defenses with the savings clause. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1754 (2011) (Thomas, J., concurring) (asserting that because the text of the savings clause uses the word “revocation” and omits the words “invalidation” and “nonenforcement,” the savings clause should *not* be interpreted to include *all* generally applicable state contract laws). If adopted, this narrow interpretation of the savings clause would break new ground. *See, e.g.*, *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (“Like other contracts, however, [arbitration agreements] may be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996))). For a detailed analysis of Justice Thomas’s theory, see David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. COLLOQUY 13, 24–30 (2011) (arguing that Justice Thomas’s interpretation is inconsistent with both the text and legislative history of the FAA).
  12. *See infra* Parts I.B, III (discussing the Court’s overstep in creating a policy of favoritism regarding arbitration agreements).
  13. *Compare* *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (announcing for the first time that “[s]ection 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary”), *with* H.R. REP. NO. 68-96, at 1–2 (1924) (“[A]rbitration agreement[s] are placed upon the same footing as other contracts.”).
  14. *See infra* Part I.B (discussing the shift towards judicial favoritism of arbitration agreements).

This policy of favoritism was the cornerstone of the Court's decision in *AT&T Mobility LLC v. Concepcion*,<sup>15</sup> which extended the preemptive effect of the FAA to apply to a generally applicable state contract doctrine, thereby striking a blow to the savings clause of section 2.<sup>16</sup> In *Concepcion*, the issue was whether the FAA preempted the application of the state-law doctrine of unconscionability to class action waivers contained in contracts with arbitration agreements.<sup>17</sup> Although the Court acknowledged that it should "place arbitration agreements on an equal footing with other contracts,"<sup>18</sup> the Court emphasized that the FAA reflects a "liberal federal policy favoring arbitration."<sup>19</sup> After acknowledging these two conflicting principles, the Court concluded that the "overarching purpose of the FAA" was to "ensure the enforcement of arbitration agreements according to their terms *so as to facilitate streamlined [arbitration] proceedings*."<sup>20</sup> Applying an obstacle preemption analysis,<sup>21</sup> the Court then held that the rule at issue in *Concepcion* stood as an obstacle to this purpose and was, therefore, preempted.<sup>22</sup> The "overarching purpose" identified by the Court is premised on the judicially created policy favoring arbitration and places insufficient, if any, weight on the stated congressional policy of equal footing. Based on this flawed purpose, the Court expanded the preemptive effect of the FAA to include a generally applicable state-law doctrine that *should* have been protected by the savings clause of section 2.<sup>23</sup>

Part I describes the environment of judicial hostility that existed when the FAA was enacted. This Part next summarizes the legislative history establishing that Congress's purpose in enacting the FAA was

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15. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).
  16. As discussed in Part II, the Court held that when a class action waiver is contained in a contract with an arbitration agreement, the FAA preempts a state-law rule applying the doctrine of unconscionability to the class action waiver. *Concepcion*, 131 S. Ct. at 1748. As a result, an unconscionable class action waiver in a contract *without* an arbitration provision is unenforceable, but the same unconscionable class action waiver in a contract *with* an arbitration provision is enforceable.
  17. *Id.* at 1746, 1753.
  18. *Id.* at 1745.
  19. *Id.* (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (internal quotation marks omitted).
  20. *Concepcion*, 131 S. Ct. at 1748 (emphasis added).
  21. Obstacle preemption exists when state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also infra* notes 144, 145, 147, and 161.
  22. *Concepcion*, 131 S. Ct. at 1753.
  23. *See infra* Parts II.C, III.

to eliminate this judicial hostility by mandating that arbitration agreements exist on the same footing as other contracts. Finally, this Part describes the Court's progression from hostility to favoritism.

Part II describes the conflict between the Court's policy favoring arbitration and the application of the savings clause to protect generally applicable state law, focusing specifically on the unconscionability doctrine at issue in *Concepcion*. This Part then recounts the Court's resolution of the conflict in *Concepcion* in favor of arbitration.

Part III presents a critique of *Concepcion*.<sup>24</sup> This Part argues that the Court improperly preempted state law by relying on a flawed purpose focused on enforcing arbitration agreements in order to facilitate streamlined arbitration proceedings. This purpose is fundamentally flawed because it ignores the equal footing policy reflected in the text of the FAA and expressed in the legislative history of the FAA, places undue weight on the judicially created policy favoring arbitration, and incorporates a vision of arbitration that is not reflected in the FAA. By premising its preemption analysis on this flawed purpose, the Court justified its expansion of the preemptive effect of the FAA. The text and legislative history of the FAA reflect that its purpose was simply to overcome judicial hostility by ensuring that arbitration agreements are enforced on equal footing with other contracts. Had the Court premised its analysis on this purpose, it would not have expanded the preemptive effect of the FAA to include a generally applicable state contract doctrine.

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24. *Concepcion* has been derided by commentators and citizen watch groups alike as sounding the death knell for class actions, encouraging corporate abuses, and providing further evidence of the Court's pro-business, anti-consumer bias. See, e.g., Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012) ("*Concepcion* will provide companies with free rein to commit fraud, torts, discrimination, and other harmful acts without fear of being sued."); Harvey Rosenfield & Todd Foreman, *Supreme Court Arbitration Ruling: Courts for the Wealthy and Wall Street*, CONSUMER WATCHDOG (April 27, 2011), <http://www.consumerwatchdog.org/newsrelease/supreme-court-arbitration-ruling-courts-wealthy-and-wall-street> (declaring that the decision "effectively eliminates" class action rights and will open the floodgates to corporate abuses); 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> ("*Concepcion* is the latest in a long line of Supreme Court decisions interpreting the Federal Arbitration Act in a manner consistently hostile to consumer and employee protection laws."). This Article, however, focuses on the broader issue of the Court's preemption analysis and, more specifically, on the Court's analysis of the purpose of the FAA.

I. ARBITRATION AND THE JUDICIARY:  
FROM HOSTILITY TO FAVORITISM

The relationship between arbitration and the judiciary has gradually evolved. A century ago, the judiciary was hostile to arbitration agreements.<sup>25</sup> In 1925, Congress enacted the United States Arbitration Act, now known as the Federal Arbitration Act (“FAA”), to counteract that hostility and ensure that arbitration agreements received the same treatment as any other contract.<sup>26</sup> Almost sixty years later, however, the United States Supreme Court shifted the level playing field intended by the FAA and announced a federal policy *in favor* of arbitration.<sup>27</sup> This announcement ushered in a new era for arbitration. Arbitration agreements were no longer mere equals among contracts; arbitration agreements became super contracts.<sup>28</sup> Since first announcing this federal policy favoring arbitration, the Court’s FAA decisions have repeatedly relied upon this policy in support of pro-arbitration decisions.<sup>29</sup>

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25. See *infra* Part I.A.

26. See *supra* note 5.

27. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements . . . .”); see also *infra* Part I.B (explaining the Supreme Court’s shift from hostility to favoritism regarding arbitration agreements).

28. See Sandra F. Gavin, *Unconscionability Found: A Look at Pre-dispute Mandatory Arbitration Agreements 10 Years After Doctor’s Associates, Inc. v. Casarotto*, 54 CLEV. ST. L. REV. 249, 250 (2006) (noting that courts have arguably turned arbitration agreements into “‘super enforceable’ contracts,” making them more enforceable than other contracts).

29. See, e.g., *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (refusing to allow contractual expansion of judicial review of arbitration awards beyond that outlined in the FAA because the relevant provisions “substantiat[e] a national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway”); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 447–49 (2006) (reiterating that the FAA “embodies the national policy favoring arbitration” and holding that a claim that a contract is illegal and thus void ab initio is an issue to be resolved by the arbitrator under the severability doctrine established in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967)).

Though bound by the Court’s decisions, some lower courts have begun—or continued—to openly question whether the Court’s FAA jurisprudence is well reasoned, particularly its pronouncement of a federal policy favoring arbitration. Perhaps the most blatant example is found in *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011), *vacated sub nom. Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201 (2012) (per curiam). In *Brown*, the Supreme Court of Appeals of West Virginia refused to enforce an arbitration



A. *The FAA: A Remedy for Judicial Hostility*

The FAA was conceived as a remedy for judicial hostility toward arbitration agreements. This judicial hostility dated back to colonial times.<sup>30</sup> It was prevalent in both state<sup>31</sup> and federal courts—reaching even the United States Supreme Court:

Every citizen is entitled to resort to all the courts of the country, and to invoke the protection which all the laws or all those courts may afford him. . . . In a civil case he may submit his particular suit by his own consent to an arbitration, or to the decision of a single judge. . . . He cannot, however, bind himself in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented.<sup>32</sup>

If one party to the arbitration agreement decided it no longer wanted to arbitrate, courts refused to compel arbitration, allowing the objecting party to revoke its agreement. This rule, followed by most state and federal courts, was referred to as the “revocability

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provision requiring arbitration of personal injury and wrongful death claims against a nursing home because arbitrating such claims was contrary to public policy. *Id.* at 292. The state supreme court acknowledged that such a rule disfavored arbitration for a particular class of transactions but concluded that Congress never intended the FAA to apply to such claims. *Id.* at 291. In discussing the United States Supreme Court’s arbitration jurisprudence, the state court took the Supreme Court to task, describing some of the Supreme Court’s FAA precedent as being based on “tendentious reasoning” and “created from whole cloth.” *Id.* at 278–79. Moreover, contrary to the Supreme Court’s declaration of a policy favoring arbitration, the state supreme court concluded “that the purpose and objective of section 2 of the FAA is for courts to treat arbitration agreements like any other contract” and that “[t]he Act does not favor or elevate arbitration agreements to a level of importance above all other contracts.” *Id.* at 280. The United States Supreme Court swiftly vacated and remanded the decision. *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1204 (2012) (*per curiam*) (simultaneously granting certiorari, vacating the decision, and remanding to the state supreme court for assessment of whether the arbitration agreement was unenforceable under any common law principles not specific to arbitration).

30. Kenneth F. Dunham, *Southland Corp. v. Keating Revisited: Twenty-Five Years in Which Direction?*, 4 CHARLESTON L. REV. 331, 333–34 (2010) (discussing treatment of arbitration by British and early American courts).
31. *See supra* note 4 (explaining the general hostility arbitration agreements faced in state courts).
32. *Ins. Co. v. Morse*, 87 U.S. (20 Wall.) 445, 451 (1874).

doctrine.”<sup>33</sup> Judicial refusal to enforce arbitration agreements was premised primarily on the theory that parties could not “oust” the jurisdiction of the courts.<sup>34</sup> An alternative, but less common, premise asserted that courts could not guarantee fairness in arbitration and, therefore, needed to protect the rights of citizens by granting access to the courts.<sup>35</sup>

By the early 1900s, however, the business community had begun to rely heavily on arbitration and had grown increasingly distressed that courts refused to enforce arbitration agreements.<sup>36</sup> So the business community lobbied for change.<sup>37</sup> In 1920, the New York legislature passed the New York Arbitration Act of 1920,<sup>38</sup> which legislatively overruled the revocability doctrine. This state legislation ultimately provided the model for the United States Arbitration Act,<sup>39</sup>

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33. KATHERINE V.W. STONE & RICHARD A. BALES, *ARBITRATION LAW* 22 (2d ed. 2010). For a more historical review of the revocability doctrine and the general hostility towards arbitration at the time the FAA was enacted, see Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238 (1929) (comparing the law of arbitration agreements under common law with statutes).
  34. See also STONE & BALES, *supra* note 33, at 22–23 (noting that the “oust the court of jurisdiction” premise was the primary rationale accepted by the courts for refusing to enforce arbitration agreements).
  35. *Id.* at 23. In *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065), Justice Story relied on this premise in refusing to compel arbitration and explained that he could not compel specific performance of an agreement “where it [was] doubtful whether it may not thereby become the instrument of injustice, or to deprive parties of rights which they are otherwise fairly entitled to have protected.”
  36. See JEROLD S. AUERBACH, *JUSTICE WITHOUT LAW?* 101–14 (1983) (discussing the efforts of the business community to effect a change in the law of arbitration); STONE & BALES, *supra* note 33, at 26–30 (excerpting AUERBACH and discussing the events leading up to the adoption of the New York Arbitration Act of 1920).
  37. In his article discussing the Supreme Court’s decision in *Southland v. Keating*, 465 U.S. 1 (1984), Kenneth F. Dunham provides a discussion of this burgeoning lobby for change. Dunham, *supra* note 30, at 335–37. As Dunham notes, this movement met with success at the state level. *Id.*
  38. Act of April 19, 1920, ch. 275, 1920 N.Y. Laws 803–07 (current version at N.Y. C.P.L.R. § 7503 (Consol. 2011)).
  39. United States Arbitration Act, ch. 213, 43 Stat. 883 (1925); STONE & BALES, *supra* note 33, at 30 (discussing the passage of the United States Arbitration Act and noting that it was based on the New York statute). Just as business organizations lobbied at the state level, they also lobbied at the federal level. For example, in the joint hearing on the United States Arbitration Act, the New York State Chamber of Commerce, the Importers and Exporters’ Association, the Merchants’ Association of New York, and seventy-three other business organizations sent a representative to the hearing to make a case in favor of the legislation. *Bills to Make Valid and Enforceable Written Provisions or*

which was codified in 1947 and is now known as the Federal Arbitration Act.<sup>40</sup>

Section 2 of the FAA is the “primary substantive provision.”<sup>41</sup> Section 2 is the same now as it was when Congress first enacted it in 1925:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>42</sup>

With this provision, Congress intended to ensure that arbitration agreements occupied “the same footing as other contracts.”<sup>43</sup>

Although Congress did not enact a statement of purpose, the House Report is particularly instructive. The House Report identifies the purpose of the bill as being “to make valid and enforceable agreements for arbitration”<sup>44</sup> and notes that the law is necessary in order for “such contracts [to] be enforced in the Federal courts.”<sup>45</sup> The House Report further explains that “[a]rbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. . . . [Thus,] an

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*Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce Among the States or Territories or with Foreign Nations: J. Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the S. and H. Comms. on the Judiciary, 68th Cong. 5–9 (1924).* A number of other business or business-related organizations, including the Committee on Commerce, Trade, and Commercial Law for the American Bar Association and the American Farm Bureau Federation, similarly appeared at the hearing to support the legislation. *Id.* at 10–11.

40. Federal Arbitration Act, ch. 392, 61 Stat. 669 (1947) (codified as amended at 9 U.S.C. §§ 1–16 (2006)).
41. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).
42. 9 U.S.C. § 2 (2006); United States Arbitration Act, ch. 213, § 2, 43 Stat. 883, 883 (1925); Federal Arbitration Act, ch. 392, § 2, 61 Stat. 669, 670 (1947).
43. H.R. REP. NO. 68-96, at 1 (1924); *see also* THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 114–16 (2009) (citing 65 CONG. REC. 1,931 (1924) (statement of Rep. Graham)) (explaining that the legislative history of the FAA shows that it was not intended to create new substantive rights, but to allow for enforcement of “ordinary contractual rights”).
44. H.R. REP. NO. 68-96, at 1 (1924).
45. *Id.*

arbitration agreement *is placed upon the same footing as other contracts, where it belongs.*"<sup>46</sup> The House Report then explains that the "need for the law arises from an anachronism of our American law" and describes the judicial hostility against arbitration agreements.<sup>47</sup> In describing the process for enforcing an arbitration agreement, the House Report notes twice that the procedure established by the statute allows for enforcement while still protecting the parties' rights.<sup>48</sup> Thus, the purpose of the FAA as reflected in the House Report was to quell judicial hostility by mandating that arbitration agreements be enforced on the same footing as other contracts.<sup>49</sup>

Despite the enactment of the FAA, the judiciary remained wary of arbitration. This wariness was evident a full twenty-nine years later in the United States Supreme Court's decision in *Wilko v. Swan*.<sup>50</sup> In *Wilko*, the Court refused to enforce an arbitration agreement that would have required the arbitration of claims under the Securities Act

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46. *Id.* (emphasis added).

47. *Id.* The House Report provides a succinct summary of the history of judicial hostility:

Some centuries ago, because of the jealousy of the English courts for their own jurisdiction, they refused to enforce specific agreements to arbitrate upon the ground that the courts were thereby ousted from their jurisdiction. This jealousy survived for so long a period that the principle became firmly embedded in the English common law and was adopted with it by the American courts. The courts have felt that the precedent was too strongly fixed to be overturned without legislative enactment, although they have frequently criticised the rule and recognized its illogical nature and the injustice which results from it. The bill declares simply that such agreements for arbitration shall be enforced, and provides a procedure in the Federal courts for their enforcement.

*Id.* at 1-2.

48. *Id.* at 2.

49. Similarly, the Senate Report reflects that the purpose of the FAA was to ensure that arbitration agreements were enforced on the same terms as other contracts. The Senate Report advises that "[t]he purpose of the bill is clearly set forth in section 2" and provides the text of that provision, including the savings clause. S. REP. NO. 68-536, at 2 (1924). Like the House Report, the Senate Report explains that arbitration agreements were not being enforced at the time as a result of judicial resistance to arbitration. *Id.* at 2-3.

50. *Wilko v. Swan*, 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989); *see also Rodriguez de Quijas*, 490 U.S. at 480 ("The Court's characterization of the arbitration process in *Wilko* is pervaded by what Judge Jerome Frank called 'the old judicial hostility to arbitration.'" (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942))).

of 1933.<sup>51</sup> In refusing to enforce the agreement, the Court concluded that the right to select a judicial forum under the Securities Act of 1933 was not waivable.<sup>52</sup> The Court reasoned that allowing a buyer to waive a judicial forum required the buyer to give up an advantage granted to him under the statute at a time when he was at a disadvantage in terms of knowledge.<sup>53</sup> As one commentator has noted, this decision “reflected the distrust of arbitration as a process that could afford a claimant the same relief as a court.”<sup>54</sup> But this vestige of judicial hostility would eventually give way.<sup>55</sup>

*B. The FAA: From Judicial Hostility to Favoritism*

In 1967, the United States Supreme Court’s opinions began to reflect a change in the Court’s attitude towards arbitration. Although the plain language and legislative history of the FAA indicated that arbitration agreements were to be treated like all other agreements,<sup>56</sup> the Court began a slow shift that ultimately led to a policy favoring arbitration over other agreements. This favoritism policy is at odds with the equality dictates of the FAA.<sup>57</sup>

The Court’s shift toward favoritism began in 1967 with *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*<sup>58</sup> In *Prima Paint*, the Court announced the separability doctrine, holding that an

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51. *Wilko*, 346 U.S. at 434–36.

52. *Id.* at 435.

53. *Id.* at 435–37.

54. Dunham, *supra* note 30, at 343; *see also* Carbonneau, *supra* note 2, at 244 (suggesting that courts “invented reasons to distrust” arbitration because they viewed “arbitration as a competitor”).

55. Indeed, almost forty years later, the Court expressly overruled *Wilko* in *Rodriguez de Quijas*, concluding that the case “rested on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants.” 490 U.S. at 481.

56. *See infra* Part III and accompanying notes.

57. Stephen Friedman presented this conflict nicely: “There cannot be both equality and favoritism. The current status of arbitration provisions is probably akin to that of the pigs in George Orwell’s *Animal Farm*—all contract provisions are equal, but some (like arbitration provisions) are more equal than others.” Stephen Friedman, *Arbitration Provisions: Little Darlings and Little Monsters*, 79 *FORDHAM L. REV.* 2035, 2038 (2011).

58. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967); *see also* Carbonneau, *supra* note 2, at 250 (“The holding in *Prima Paint* was the first step in the federalization of the law of arbitration . . . .” (footnote omitted)); Dunham, *supra* note 30, at 342–44 (arguing that *Southland Corp. v. Keating*, 465 U.S. 1 (1984), discussed *infra* notes 72–77 and accompanying text, represents a turning point in the Court’s cases and builds on the Court’s holding in *Prima Paint*).

arbitration provision within a contract is its own contract and must be separated from the overall contract for independent assessment.<sup>59</sup> Thus, even if the overall contract is void, the courts must enforce the arbitration contract embedded within it unless the arbitration contract itself was induced by fraud or other unlawful means.<sup>60</sup> The Court reasoned that this outcome was dictated by the language of the FAA, which focuses on the “making of the agreement for arbitration” rather than the contract generally.<sup>61</sup> Without much discussion, the Court also concluded that this outcome was consistent with the savings clause of section 2 and the goal of the FAA to make arbitration provisions equal to other contracts.<sup>62</sup> The Court reasoned that the separated arbitration contract would be subject to state-law challenges, just like any other contract.<sup>63</sup> Justice Black, joined by Justices Douglas and Stewart, dissented and harshly criticized the separability doctrine.<sup>64</sup> Among other things, Justice Black took issue with the majority’s decision because, rather than placing arbitration agreements “upon the same footing as other contracts,” the separability doctrine elevated arbitration agreements above other contracts by excluding them from the traditional analysis used to determine whether a contract provision is separable or non-separable, instead granting arbitration provisions permanent separable status.<sup>65</sup> Thus, *Prima Paint’s* separability doctrine reflects a small step towards treating arbitration agreements with favor rather than as equal to all other contracts.

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59. *Prima Paint*, 388 U.S. at 402–04.

60. *Id.* at 403–04.

61. *Id.* (quoting United States Arbitration Act, ch. 213, § 4, 43 Stat. 883, 883 (1925)).

62. *Prima Paint*, 388 U.S. at 404 n.12.

63. *Id.* at 403–04.

64. *Id.* at 407–09 (Black, J., dissenting).

65. *Id.* at 423–24 (quoting H.R. REP. NO. 68-96, at 1 (1924)) (internal quotation marks omitted). As one commentator has noted,

it is difficult to imagine a set of facts that would give rise to a fraud or duress claim that centered specifically on the arbitration clause, rather than the container contract. After all, if a drafter had the desire and opportunity to exploit the other party, she would likely manipulate major terms such as price and quantity, rather than those that govern dispute resolution. Thus, by insulating the arbitration clause within the container contract, the separability doctrine shields the clause from several major contract defenses.

David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV. 437, 450 (2011) (footnote omitted).

Twenty years later, in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, the Court confirmed the “federal policy favoring arbitration” hinted at in *Prima Paint*.<sup>66</sup> In *Moses H. Cone*, the district court stayed a federal action seeking an order compelling arbitration so that the parties could resolve a related state-court action. The Court held that the district court abused its discretion by staying the case.<sup>67</sup> As part of its analysis, the Court noted that the FAA would govern the case and declared that section 2 of the FAA reflected a “congressional declaration of a liberal federal policy favoring arbitration agreements.”<sup>68</sup> The Court did not cite to the legislative history or acknowledge the conflict between this new favoritism policy and the equal footing policy reflected in the legislative history of the FAA and the Court’s own precedent.<sup>69</sup> Noting that since *Prima Paint* the lower courts had “consistently concluded that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration,”<sup>70</sup> the Court agreed with this conclusion and explained that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”<sup>71</sup> From this point forward, the policy favoring arbitration would become firmly embedded in the Court’s arbitration jurisprudence.

Less than a year later, the Court reaffirmed the policy favoring arbitration in *Southland Corp. v. Keating*.<sup>72</sup> In *Southland*, the Court began its analysis of the FAA with a statement of the “national policy favoring arbitration.”<sup>73</sup> The Court then held that the FAA was more than a procedural statute governing federal courts and, instead, was a substantive statute intended to make arbitration agreements

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

67. *Id.* at 19.

68. *Id.* at 24 (“Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”).

69. *Id.* at 23–25; *see also* *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 510–11 (1974) (“The United States Arbitration Act, . . . reversing centuries of judicial hostility towards arbitration agreements, was designed to . . . place arbitration agreements ‘upon the same footing as other contracts . . .’” (footnote omitted) (quoting H.R. Rep. No. 68-96, at 1 (1924))).

70. *Moses H. Cone*, 460 U.S. at 24.

71. *Id.* at 24–25.

72. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

73. *Id.* at 10. As in *Moses H. Cone*, the policy was asserted but was not supported by reference to the legislative history.

enforceable in both state<sup>74</sup> and federal court.<sup>75</sup> Justice O'Connor called the majority's decision an "exercise in judicial revisionism."<sup>76</sup> Nevertheless, the majority's decision still stands and marks a significant turning point in arbitration law.<sup>77</sup> From this point forward, the judicially created federal policy favoring arbitration would control in all courts.

Twenty-five years after *Southland*, the Court's policy favoring arbitration played an important role in *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>78</sup> In *Hall Street*, the Court held that parties could not contractually expand the grounds for judicial review of an arbitration award beyond those set forth in the FAA.<sup>79</sup> At first blush, this result might seem odd. After all, arbitration is a "creature of contract,"<sup>80</sup> and section 2 of the FAA requires courts to enforce arbitration contracts according to their terms, subject to the savings clause.<sup>81</sup>

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74. *Southland*, 465 U.S. at 14 ("To confine the scope of the Act to arbitrations sought to be enforced in federal courts would frustrate what we believe Congress intended . . .").

75. *Id.* at 12–16.

76. *Id.* at 36 (O'Connor, J., dissenting).

77. Dunham, *supra* note 30, at 345. According to Dunham, the Court's extension of the FAA began with *Southland* when the Court "converted" an act defining federal procedures to an act declaring substantive law that would be applicable in both state and federal courts despite minimal, if any, indication in the legislative history that Congress intended to declare substantive law. *Id.* at 332, 345–47. However, another commentator has concluded that the Court's analysis of legislative history and congressional intent in *Southland* was correct. See Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 105–07 (2002) (arguing that the legislative history has ambiguities and that permitting the FAA to apply in state court is the best interpretation of the legislative history).

78. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

79. *Id.* at 590–92.

80. See *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564, 570–71 (1960) (Brennan, J., concurring) ("[S]ince arbitration is a creature of contract, a court must always inquire . . . whether the parties have agreed to arbitrate the particular dispute."); see also *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) ("The FAA reflects the fundamental principle that arbitration is a matter of contract."); *Nolde Bros. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 250 (1977) ("[T]he arbitration duty is a creature of the collective-bargaining agreement . . .").

81. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989) (noting that the principal purpose of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms"); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53–54 (1995) ("[T]he central purpose of the Federal



Yet, in *Hall Street*, the Court rejected the terms of the arbitration contract, concluding that the arbitration the parties *thought* they had agreed to was not, in fact, the arbitration they were entitled to under the FAA.<sup>82</sup> In reaching its decision that the text of the FAA precluded the parties from agreeing to additional grounds for judicial review, the Court emphasized the national policy favoring arbitration:

[I]t makes more sense to see the three [FAA] provisions [related to judicial review] . . . as substantiating a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway. Any other reading opens the door to the full-bore legal and evidentiary appeals that can "rende[r] informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process" . . . .<sup>83</sup>

Thus, although the FAA was created to enforce the terms of the contract, the Court applied the policy favoring arbitration to justify a decision invalidating those very terms. As noted in Justice Stevens's dissent, the outcome in *Hall Street* "conflict[ed] with the primary purpose of the FAA" of eliminating judicial hostility and requiring enforcement of the arbitration agreement according to its terms.<sup>84</sup> Faced with this conflict between the congressional purpose of enforcing the contract as written, subject to contractual defenses, and the judicially created purpose of favoring arbitration,<sup>85</sup> the Court opted for favoring arbitration.

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Arbitration Act [is] to ensure 'that private agreements to arbitrate are enforced according to their terms.'" (quoting *Volt*, 489 U.S. at 479)).

82. *Hall St. Assocs.*, 552 U.S. at 586.
83. *Id.* at 588 (quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 998 (9th Cir. 2003)).
84. *Hall St. Assocs.*, 552 U.S. at 593 (Stevens, J., dissenting). As Justice Stevens asserted, when the primary purpose of the FAA is considered, the judicial review provisions of the FAA are "best understood as a shield meant to protect parties from hostile courts, not a sword with which to cut down parties' 'valid, irrevocable and enforceable' agreements to arbitrate their disputes subject to judicial review for errors of law." *Id.* at 595 (quoting Federal Arbitration Act § 2, 9 U.S.C. § 2 (2006)).
85. The Court's analysis in *Hall Street* foreshadowed the overarching purpose later identified in *Concepcion*. In *Hall Street*, the Court reasoned that the FAA should be read to allow for only the judicial review needed for the "essential virtue of resolving disputes straightaway." *Hall St. Assocs.*, 552 U.S. at 588. As discussed *infra* Part III.A.3, the overarching purpose adopted in *Concepcion* similarly attempts to define the essential virtues or nature of arbitration.

As these cases reflect, more than eighty years after the enactment of the FAA, the Court has overcome its own hostility to arbitration and adopted a policy favoring arbitration.

## II. *AT&T MOBILITY LLC v. CONCEPCION*

With the Court's policy favoring arbitration firmly in place, the conflict between this policy and the savings clause of section 2 was unavoidable. The savings clause of section 2 promotes the congressional purpose behind the FAA—quelling judicial hostility to arbitration by placing arbitration agreements on equal footing with other contracts<sup>86</sup>—because the savings clause ensures that, like other contracts, arbitration agreements are subject to all generally applicable contract defenses.<sup>87</sup> If arbitration agreements are favored to the point that federal law seeks to *promote* arbitration, then generally applicable state laws are bound to conflict with this favoritism policy. *AT&T Mobility LLC v. Concepcion* squarely presented this conflict.

### A. *The Conflict: The Policy Favoring Arbitration Versus the Unconscionability Doctrine and the Discover Bank Rule*

California, like many states, has adopted the general contract doctrine of unconscionability.<sup>88</sup> In short, if a contract is unconscionable, a court may refuse to enforce it. In California, unconscionability has both procedural and substantive components.<sup>89</sup> Procedural unconscionability looks to the circumstances in which the contract was made and focuses on “‘oppression’ or ‘surprise’ due to unequal bargaining power,” while substantive unconscionability looks

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86. See *supra* Part I.A and *infra* Part III.

87. 9 U.S.C. § 2 (2006). Section 2 of the FAA provides that arbitration provisions in written agreements “evidencing a transaction involving commerce [are] . . . valid, irrevocable, and enforceable” subject to a savings clause that provides for the application of “such grounds as exist at law or in equity for the revocation of any contract.” *Id.*

88. CAL. CIV. CODE § 1670.5(a) (West 2011) (“If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract . . . .”); see *generally* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981) (discussing the doctrine of unconscionability); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459 (1995) (discussing California’s unconscionability doctrine in detail).

89. *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 121 (Ct. App. 1982) (noting that the California statute does not define unconscionability and explaining that the California doctrine has both procedural and substantive components); see *generally* 8 RICHARD A. LORD, WILLISTON ON CONTRACTS § 18.10 (4th ed. 1993) (discussing the various state-law views).

to the terms of the contract and focuses on “‘overly harsh’ or ‘one-sided’ results.”<sup>90</sup> Although both procedural and substantive unconscionability are required under California law, California courts apply a “sliding scale” such that a strong showing of substantive unconscionability will overcome a weak showing of procedural unconscionability and vice versa.<sup>91</sup>

The United States Supreme Court has recognized that the unconscionability doctrine falls within the savings clause of section 2.<sup>92</sup> Thus, it is no surprise that litigants have asserted the

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90. *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 690 (Cal. 2000) (quoting *A & M Produce Co.*, 186 Cal. Rptr. at 121–22) (summarizing the doctrine of unconscionability under California law and noting that it is applicable to arbitration agreements as a generally applicable contract defense); see generally LORD, *supra* note 89, § 18.10 (discussing procedural and substantive unconscionability).

91. *Armendariz*, 6 P.3d at 690; see generally John A. Spanogle, Jr., *Analyzing Unconscionability Problems*, 117 U. PA. L. REV. 931, 950 (1969) (discussing the “sliding scale” of procedural and substantive elements of unconscionability).

92. See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (recognizing unconscionability as a generally applicable contract defense, along with fraud and duress). In *Perry v. Thomas*, the Supreme Court addressed the relationship between unconscionability and the savings clause. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Although the Supreme Court declined to address the respondent’s claim in *Perry* that a particular arbitration agreement was unconscionable, the Supreme Court noted that the claim could be addressed on remand. *Id.* Perhaps anticipating the proceedings that would follow, the Court provided the following guidance:

In instances such as these, the text of §2 provides the touchstone for choosing between state-law principles and the principles of federal common law envisioned by the passage of that statute: An agreement to arbitrate is valid, irrevocable, and enforceable, *as a matter of federal law*, “save upon such grounds as exist at law or in equity for the revocation of *any* contract.” Thus state law, whether of legislative or judicial origin, is applicable *if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally. A state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue does not comport with this requirement of §2. A court may not, then, in assessing the rights of litigants to enforce an arbitration agreement, construe that agreement in a manner different from that in which it otherwise construes nonarbitration agreements under state law. Nor may a court 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 we hold today the state legislature cannot.

*Id.* (citations omitted). As discussed in more detail in Parts II.C and III *infra*, the Court in *Concepcion* also acknowledged that unconscionability is one of the “generally applicable contract defenses” contemplated

unconscionability doctrine as a defense to the enforcement of arbitration agreements.<sup>93</sup> Nor is it a surprise that courts have invalidated arbitration agreements on grounds of unconscionability.<sup>94</sup>

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by the savings clause. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (quoting *Doctor's Assocs.*, 517 U.S. at 687). Despite this acknowledgement, the Court went on to preempt a state rule applying the unconscionability doctrine to class action waivers. *Id.* at 1753.

93. One commentator has asserted that unconscionability has become the “defense of choice” against arbitration agreements. Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL’Y 477, 489–90 (2009) (“Unconscionability, a general state law defense to contracts, became the defense of choice in early cases contesting arbitration clauses in employment or consumer agreements.”). There is some statistical support for this proposition, or at least for the proposition that those seeking to avoid arbitration have identified unconscionability as a viable theory. See Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 195 (2004) (concluding that over a two-year period 68.5 percent of 235 unconscionability cases involved arbitration agreements). Then again, perhaps this arguably high number of unconscionability claims has something to do with the “aggressively drafted arbitration clauses” generated by employers and others “taking full advantage of the pro-arbitration philosophy articulated by the federal judiciary.” Gavin, *supra* note 28, at 270–71 (asserting that drafters are “stamped[ing]” toward arbitration with very favorable provisions given the pro-arbitration climate generated by the Supreme Court’s interpretation of the FAA (quoting William M. Howard, *Arbitrating Employment Discrimination Claims: Do You Really Have To? Do You Really Want To?*, 43 DRAKE L. REV. 255, 255 (1994))); see also Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 766, 799 (2004) (describing an “upsurge” in the judicial acceptance of unconscionability as a means of dealing with arbitration agreements and suggesting that it “appears to be activated in part by the excesses of opportunistic legal actors attempting to capitalize on problematic legal doctrine” established in the Supreme Court’s pro-arbitration cases).
94. See, e.g., *Nagrampa v. Mailcoups, Inc.*, 469 F.3d 1257, 1293 (9th Cir. 2006) (holding that a franchise agreement’s arbitration provision was unenforceable as unconscionable under California law); *Ingle v. Circuit City Stores, Inc.*, 328 F.3d 1165, 1180–81 (9th Cir. 2003) (holding that the arbitration agreement in an employment contract was unconscionable and unenforceable under California law); *Tillman v. Commercial Credit Loans, Inc.*, 655 S.E.2d 362, 373 (N.C. 2008) (holding that the arbitration clauses in the plaintiffs’ loan agreements were unconscionable and unenforceable); *Arnold v. United Cos. Lending Corp.*, 511 S.E.2d 854, 862 (W. Va. 1998) (holding that an arbitration agreement in a consumer loan transaction was unconscionable and unenforceable). In one study, just over 50 percent of the arbitration agreements asserted to be unconscionable were found to be unconscionable. Randall, *supra* note 93, at 194–95 (analyzing decisions

California's so-called *Discover Bank* Rule is an "application of a more general [unconscionability] principle."<sup>95</sup> In *Discover Bank v. Superior Court*, the California Supreme Court addressed an issue of first impression for California when it was asked to apply the doctrine of unconscionability to a class action waiver in a consumer contract.<sup>96</sup> The plaintiff asserted that the contract was procedurally unconscionable because it was an adhesion contract<sup>97</sup> and substantively unconscionable because the class action waiver was an exculpatory provision.<sup>98</sup> More specifically, the plaintiff argued that the class action waiver violated a

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over a two-year period). Some commentators have suggested that contracting parties and courts are turning to unconscionability in greater numbers in response to the Supreme Court's increasingly pro-arbitration decisions. *See, e.g.*, Gavin, *supra* note 28, at 270–71 (asserting that the Supreme Court may be generating a "backlash" such that contracting parties and courts are turning to unconscionability as "one of the few options left for denying enforceability of these agreements"); Stempel, *supra* note 93, at 765–66 ("[T]he legal system has witnessed an incremental effort by lower courts to soften the rough edges of the Supreme Court's pro-arbitration jurisprudence through rediscovery of . . . the 'unconscionability norm' . . .").

95. *Concepcion*, 131 S. Ct. at 1757 (Breyer, J., dissenting) (quoting Gentry v. Superior Court, 165 P.3d 556, 564 (Cal. 2007)) (internal quotation marks omitted); *see also* Laster v. AT & T Mobility LLC, 584 F.3d 849, 857 (9th Cir. 2009) ("Essentially, the *Discover Bank* test applies the general sliding-scale approach to unconscionability in the specific context of class action waivers."); Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 987 (9th Cir. 2007) ("The rule announced in *Discover Bank* is simply a refinement of the unconscionability analysis applicable to contracts generally in California . . ."); *Discover Bank v. Superior Court*, 113 P.3d 1100, 1112 (Cal. 2005) (noting that unconscionability of class action waivers is a principle of California law that applies to contracts generally).
96. *Discover Bank*, 113 P.3d at 1100. The specific provision at issue in *Discover Bank* was contained within a contract with an arbitration agreement. *Id.* at 1103. For purposes of the court's unconscionability analysis, however, that fact was not important. *Id.* at 1108–10. In fact, the California Supreme Court did not invalidate the arbitration agreement in the contract. Rather, the California Supreme Court invalidated only the class action waiver, thus leaving *Discover Bank* with the choice of whether it wanted the class action to go forward in arbitration, per the arbitration agreement, or in litigation. *Id.* at 1117.
- The California Supreme Court considered and rejected *Discover Bank's* argument that the FAA preempted the application of unconscionability to a class action waiver contained in a contract with an arbitration agreement. *Id.* at 1110–17. Of course, that argument ultimately proved victorious in *Concepcion*, as discussed *infra*.
97. Respondent's Opening Brief on the Merits at 12–13, *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005) (No. S113725), 2003 WL 21397693, at \*12–13 [hereinafter Opening Brief].
98. Opening Brief, *supra* note 97, at 13–18.

generally applicable California statute providing that any contract which serves “to exempt anyone from responsibility for his own fraud . . . or violation of law . . . [is] against the policy of the law.”<sup>99</sup>

While acknowledging that class action waivers were not exculpatory clauses “in the abstract,”<sup>100</sup> the California Supreme Court went on to recognize that when the damages are small, such waivers tend to eliminate the “only effective way to halt and redress” wrongful conduct.<sup>101</sup> Moreover, although the class waivers purport to be bilateral, it is difficult to imagine that they actually impose any burden on the drafter in the consumer context.<sup>102</sup> Thus, focusing on the classic characteristics of substantively unconscionable contracts,<sup>103</sup> the California Supreme Court concluded that “such one-sided, exculpatory contracts in a contract of adhesion, at least to the extent they operate to insulate a party from liability that otherwise would be imposed under California law, are generally unconscionable.”<sup>104</sup>

The California Supreme Court stated that not all class action waivers were unconscionable.<sup>105</sup> Rather, the California Supreme Court

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99. CAL. CIV. CODE § 1668 (West 2011).

100. *Discover Bank*, 113 P.3d at 1108.

101. *Id.* at 1108–09 (quoting *Linder v. Thrifty Oil Co.*, 2 P.3d 27, 38 (Cal. 2000)).

102. *Discover Bank*, 113 P.3d at 1109 (“Although styled as a mutual prohibition on representative or class actions, it is difficult to envision the circumstances under which the provision might negatively impact Discover [Bank], because credit card companies typically do not sue their customers in class action lawsuits.” (alteration in original) (quoting *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862, 867 (Ct. App. 2002)) (internal quotation marks omitted)).

103. *Am. Software, Inc. v. Ali*, 54 Cal. Rptr. 2d 477, 480 (Ct. App. 1996) (“Substantive unconscionability is indicated by contract terms so one-sided as to ‘shock the conscience.’” (quoting *Cal. Grocers Ass’n. v. Bank of Am.*, 27 Cal. Rptr. 2d 396, 402 (Ct. App. 1994))); *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 122, 125–26 (Ct. App. 1982) (finding a disclaimer of warranties in a sales contract substantively unconscionable because the disclaimer unreasonably shifted risk from the knowledgeable seller to the inexperienced buyer and led to overly harsh and one-sided results); *Baker v. Osborne Dev. Corp.*, 71 Cal. Rptr. 3d 854, 858, 864 (Ct. App. 2008) (holding arbitration agreement in a home warranty booklet substantively unconscionable where it included a disclaimer of all warranties by the builder, significantly limited the remedies available to the buyer, and lacked mutuality when builder would have no reason to take legal action against the homeowners).

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

105. *Id.* at 1110. Although this comment might appear to be toothless, lower courts have taken the California Supreme Court at its word and rejected claims of unconscionability with respect to class action waivers. *See, e.g., Walnut Producers of Cal. v. Diamond Foods, Inc.*, 114 Cal. Rptr.

provided future courts with guidance on when class action waivers would be exculpatory and thus unconscionable under California state law. Specifically, a class action waiver is an unconscionable exculpatory provision under California law when: (1) the waiver is contained in a consumer adhesion contract;<sup>106</sup> (2) the waiver is found in a setting that will likely involve disputes over small amounts of money; and (3) the plaintiff alleges a scheme to defraud many people out of small amounts of money.<sup>107</sup> Thus, the *Discover Bank* Rule was born.

In establishing the *Discover Bank* Rule, the California Supreme Court explicitly stated that the rule was applicable to all contracts, even though the particular contract at issue in *Discover Bank* included an arbitration provision.<sup>108</sup> And, in the relatively short time

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3d 449, 461 (Ct. App. 2010) (applying the *Discover Bank* Rule and holding that the class action waiver was not unconscionable because, among other things, plaintiffs had other means of redress besides a class action given that the individual damages were large enough to warrant individual action); *Arguelles-Romero v. Superior Court*, 109 Cal. Rptr. 3d 289, 305–07 (Ct. App. 2010) (same); *see also* *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196, 1201 (C.D. Cal. 2006) (rejecting assertion that if Texas law would permit enforcement of a class action waiver then it would violate a fundamental policy of California law relying, in part, on *Discover Bank*'s explicit statement that not all class action waivers are unconscionable).

106. This aspect satisfies the procedural component of unconscionability. *See* *Gatton v. T-Mobile USA, Inc.*, 61 Cal. Rptr. 3d 344, 355–56 (Ct. App. 2007) (noting that a minimal degree of procedural unconscionability is established by the existence of a contract of adhesion).

107. *Discover Bank*, 113 P.3d at 1110. The second and third prongs of the *Discover Bank* Rule work together to establish substantive unconscionability. The alleged wrong is one that is unlikely to be vindicated absent the class action mechanism, thus making the class action waiver exculpatory. *See* Monica T. Nelson, Comment, *Discover Bank v. Superior Court: The Unconscionability of Classwide Arbitration Waivers in California*, 30 AM. J. TRIAL ADVOC. 649, 659–71 (2007) (analyzing *Discover Bank*'s holding of substantive unconscionability in class action waivers and its application to later California cases); Jonathan Rizzardi, *Discover Bank v. Superior Court of Los Angeles*, 21 OHIO ST. J. ON DISP. RESOL. 1093, 1095–96 (2006) (discussing the public policy rationales and substantive unconscionability factors at play in *Discover Bank*).

108. *Discover Bank*, 113 P.3d at 1112. In *Discover Bank*, the California Court of Appeals had concluded that while the unconscionability doctrine could invalidate a class action waiver in most contracts, it could not do so when the class waiver was contained in an arbitration agreement governed by the FAA. *Id.* at 1111–12. The California Supreme Court rejected that conclusion, calling it “puzzling” because it ignored the fact that the doctrine being applied was a generally applicable contract doctrine. *Id.* Lest there be any doubt, the California

since *Discover Bank* was decided, the *Discover Bank* Rule has been applied to class action waivers contained in contracts without arbitration agreements.<sup>109</sup> Thus, the *Discover Bank* Rule would appear to be a generally applicable state-law doctrine well within the savings clause of section 2.

*B. The Conflict Continues:*

*AT&T Mobility LLC v. Concepcion in the Lower Courts*

Almost a year after the California Supreme Court announced the *Discover Bank* Rule, the plaintiffs in *Concepcion* filed a putative class action complaint against AT&T Mobility LLC (“AT&T”) in the Southern District of California.<sup>110</sup> The plaintiffs alleged that AT&T engaged in a fraudulent marketing scheme whereby it “bait[ed]” customers with promises of free or discounted phones only to charge them sales tax on the full value of the phones.<sup>111</sup> The named plaintiffs’ total damages? \$30.22.<sup>112</sup>

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Supreme Court clarified the general applicability of the principle it was announcing:

[T]he principle that class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory is a principle of California law that does not specifically apply to arbitration agreements, but to contracts generally. In other words, it applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements.

*Id.* at 1112.

109. *See, e.g., In re Yahoo! Litig.*, 251 F.R.D. 459, 465–67 (C.D. Cal. 2008) (applying the *Discover Bank* Rule to class action waivers in advertising agreements without arbitration provisions).
110. The decision in *Discover Bank* was issued on June 27, 2005. *Discover Bank*, 113 P.3d at 1100. The plaintiffs in *Concepcion* filed a putative class action complaint against Cingular Wireless, now known as AT&T Mobility LLC, on March 27, 2006. Complaint for Violations of Consumers Legal Remedies Act; Unfair Competition Law; False Advertising Statute; Fraudulent Concealment; and Unjust Enrichment, *Concepcion v. Cingular Wireless LLC*, No. 06CV0675 (S.D. Cal. Mar. 27, 2006), 2006 WL 1194855 [hereinafter *Concepcion Complaint*].
111. *Concepcion Complaint*, *supra* note 110, ¶ 11; *see also* Plaintiffs’ Memorandum of Points and Authorities in Opposition to Motion to Compel Individual Arbitration by Defendant, *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008), *aff’d sub nom.* *Laster v. AT & T Mobility, LLC*, 584 F.3d 849 (9th Cir. 2009), *rev’d sub nom.* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), 2008 WL 2073403 [hereinafter *Concepcion Opposition to Arbitration*] (discussing AT&T’s alleged misconduct); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).
112. *Concepcion Complaint*, *supra* note 110, ¶ 8; First Amended Complaint for Violations of Consumers Legal Remedies Act; Unfair Competition



In March 2008, two years after the *Concepcion* complaint was filed, AT&T moved to compel arbitration.<sup>113</sup> Moreover, AT&T sought

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Law; False Advertising Statute; Fraudulent Concealment; and Unjust Enrichment ¶ 4, *Concepcion v. Cingular Wireless LLC*, No. 06CV0675 (S.D. Cal. May 2, 2006), 2006 WL 1866797; *Concepcion*, 131 S. Ct. at 1744.

113. *Concepcion*, 131 S. Ct. at 1744. The case has an interesting, if convoluted, procedural history. Before the *Concepcion* Complaint was filed, at least three other named plaintiffs filed suits in state court against AT&T (then Cingular Wireless) and other cellular companies alleging facts similar to those alleged in the *Concepcion* Complaint. See *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at \*3-4 (S.D. Cal. Aug. 11, 2008) (discussing procedural history of the case up to the point of the district court's denial of the motion to compel arbitration), *aff'd sub nom.* *Laster v. AT & T Mobility, LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). These plaintiffs' claims were removed to the Southern District of California. *Id.* at \*4. One was dismissed without prejudice, but the other two remained in what is referred to as the *Laster* case. *Id.* AT&T and T-Mobile filed motions to compel arbitration, but the court denied the motions and rejected the defendants' preemption arguments. *Id.* Defendants appealed. While the appeal was pending, the *Concepcion* case was consolidated with the *Laster* case. *Id.* On August 17, 2007, while the appeal was still pending, the Ninth Circuit Court of Appeals issued *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976 (9th Cir. 2007), holding that AT&T's class action waiver was unconscionable under California law and that the FAA did not preempt such a holding. *Id.* at 978. As a result, AT&T dismissed its appeal in the *Laster* case. T-Mobile did not dismiss its appeal, but the Ninth Circuit affirmed the district court on October 25, 2007, in an unpublished memorandum. *Laster*, 2008 WL 5216255, at \*5. T-Mobile sought review by the United States Supreme Court on January 25, 2008. *Id.* AT&T's attempt to compel arbitration in the *Concepcion* matter was filed on March 13, 2008, while T-Mobile's petition for certiorari was still pending. *Id.* The United States Supreme Court denied T-Mobile's petition on May 27, 2008. *Id.* Just two years later, the Supreme Court granted AT&T's petition. *AT & T Mobility LLC v. Concepcion*, 130 S. Ct. 3322 (2012) (granting cert. on May 24, 2010).

According to AT&T, the class waiver at issue in the *Concepcion* case was distinct from the waivers previously rejected by the Ninth Circuit Court of Appeals. *Laster*, 2008 WL 5216255, at \*5. More specifically, during the pendency of the *Concepcion* matter, AT&T amended the contract and asserted that the amended provision controlled. *Id.* at \*6. The district court agreed. *Id.*

One can only speculate about what made the difference between T-Mobile's petition in *Laster* and AT&T's petition two years later in *Concepcion*. One commentator has speculated that if the Supreme Court wanted the outcome reached in *Concepcion*, the *Concepcion* facts provided a perfect vehicle for accomplishing it as the arbitration provision at issue could be considered, at least relatively speaking, consumer friendly. See Aaron Bruhl, *AT&T's Long Game on Unconscionability*, PRAWFSBLAWG (May 5, 2011, 9:40 AM), <http://prawfsblawg.blogs.com/prawfsblawg/2011/05/atts-long-game-on->

individual arbitration, rather than class-wide arbitration, pointing to the class action waiver contained in the plaintiffs' contract.<sup>114</sup> The plaintiffs objected, asserting that the class action waiver was unenforceable because it was unconscionable under California law.<sup>115</sup> AT&T disputed the assertion that the provision was unenforceable and asserted that the unconscionability doctrine was preempted by the FAA when applied to class action waivers contained in contracts with arbitration agreements.<sup>116</sup>

On August 11, 2008, the district court denied AT&T's motion to compel arbitration.<sup>117</sup> After reviewing the general principles of unconscionability and the application of those principles to class waivers as set forth in *Discover Bank*, the district court concluded that the class waiver provision at issue was unconscionable and, therefore, unenforceable.<sup>118</sup> The district court also rejected AT&T's assertion that the FAA preempted such a holding.<sup>119</sup>

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unconscionability.html (noting that AT&T actually opposed certiorari in the *Laster* matter because its new arbitration provision was, in Bruhl's words, "so amazingly consumer-friendly that if any court struck it down, such a ruling would have to be preempted because it would represent a per se bar against class waivers even when consumers could profitably pursue individual arbitration"); *see also* Frank Blechschmidt, Comment, *All Alone in Arbitration: AT&T Mobility v. Concepcion and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541, 550–51 (2012) (agreeing with Bruhl that the Court may have been waiting for the "ideal vehicle through which [it] could advance its FAA agenda" and suggesting that the Supreme Court might not have accepted certiorari had *Concepcion* originated in state court given the previous statements of at least three Justices that *Southland* should be overruled such that the FAA would not apply in state court).

114. Memorandum of Points and Authorities in Support of Defendant AT&T Mobility LLC's Motion to Compel Arbitration and to Dismiss Claims of Concepcion Plaintiffs Pursuant to the Federal Arbitration Act at 2–3, *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom.* *Laster v. AT & T Mobility, LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), 2008 WL 2073400 [hereinafter AT&T's Memorandum in Support of Motion to Compel].
115. *Concepcion*, 131 S. Ct. at 1745; *see also* *Concepcion Opposition to Arbitration*, *supra* note 111, at 10 (arguing that the class action waiver was unconscionable under applicable state law). As discussed in the Plaintiff's memorandum, California unconscionability law requires a finding of both procedural and substantive unconscionability. *Id.* at 11.
116. AT&T's Memorandum in Support of Motion to Compel, *supra* note 114, at 18–20; *Concepcion*, 131 S. Ct. at 1747–48.
117. *Laster*, 2008 WL 5216255, at \*1.
118. *Id.* at \*6–14.
119. *Id.* at \*14 n.11 (adopting the reasoning set forth in a prior order denying the motion to compel other plaintiffs to arbitrate).

Although AT&T appealed, the Ninth Circuit Court of Appeals affirmed the district court's decision that the class waiver at issue was unconscionable.<sup>120</sup> Like the district court, the Ninth Circuit reviewed the general principles of unconscionability and the application of those principles to class waivers as described in *Discover Bank*.<sup>121</sup> The Ninth Circuit then applied the three-prong *Discover Bank* Rule and held that the class waiver at issue was unconscionable.<sup>122</sup> Nothing in the Ninth Circuit's application of the *Discover Bank* Rule to the class waiver at issue had anything to do with the fact that the class waiver existed in a contract with an arbitration agreement. The analysis would have been the same even if the class waiver had existed in an agreement that did not include an arbitration provision.<sup>123</sup>

The Ninth Circuit also rejected AT&T's assertion that the FAA preempted the application of the unconscionability doctrine to class action waivers contained in contracts with arbitration agreements.<sup>124</sup> First, the Ninth Circuit rebuffed AT&T's contention that the *Discover Bank* Rule was a "new rule" applicable only to arbitration agreements" and, thus, outside the scope of the savings clause and expressly preempted.<sup>125</sup> In doing so, the Ninth Circuit reasoned that the *Discover Bank* Rule is nothing more than an application of California's unconscionability doctrine in the context of class action waivers.<sup>126</sup> Moreover, the Ninth Circuit recognized that the *Discover*

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120. *Laster v. AT & T Mobility LLC*, 584 F.3d 849, 855 (9th Cir. 2009), *rev'd sub nom.* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

121. *Laster*, 584 F.3d at 853–54.

122. *Id.* at 854–55.

123. *See id.* at 854 ("We have interpreted *Discover Bank* as creating a three-part test to determine whether a class action waiver in a consumer contract is unconscionable . . ."). As the Ninth Circuit's analysis reflects, in applying the three parts of the *Discover Bank* Rule, the forum in which the class action will take place—or not, if the waiver is successful—is irrelevant. The contract is adhesive (or not) regardless of whether it involves an arbitration agreement. The dispute involves predictably small claims (or not) regardless of whether the contract contains an arbitration agreement. And the allegations will involve a scheme to cheat large numbers of consumers out of small sums of money (or not) regardless of whether the contract contains an arbitration agreement.

124. *Id.* at 856.

125. *Id.* at 857.

126. *Id.* As discussed earlier, California courts require both procedural and substantive unconscionability, but the two components exist on a sliding scale such that more of one will allow less of the other. *See supra* Part II.A and accompanying notes. The Ninth Circuit placed the *Discover Bank* Rule in this context: "The best way to read *Discover Bank* in light of the sliding-scale approach is that, if a contract clause is, in practice, exculpatory, as long as there is any degree of procedural

*Bank* Rule does not expose arbitration clauses to different standards from those applicable to other contracts.<sup>127</sup>

After resolving AT&T's express preemption claim, the Ninth Circuit rejected AT&T's implied preemption claim.<sup>128</sup> Although the Ninth Circuit acknowledged that a state law would be impliedly preempted if it stood "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,"<sup>129</sup> the court rejected AT&T's claim that California's unconscionability doctrine interfered with Congress's purposes in enacting the FAA.<sup>130</sup> Accordingly, the court affirmed the district court's decision that the FAA did not impliedly preempt California's unconscionability law.<sup>131</sup>

And so the stage was set. With both the district court and the Ninth Circuit concluding that AT&T's class waiver was unconscionable and that the generally applicable doctrine of unconscionability as applied by the *Discover Bank* Rule was not preempted by the FAA, AT&T appealed the preemption issue to the United States Supreme Court seeking protection from California's unconscionability doctrine.<sup>132</sup> And protection it would get.

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unconscionability, the element of substantive unconscionability is generally adequate, as a matter of law." *Laster*, 584 F.3d at 857. This tipping of the sliding scale to allow minimal procedural unconscionability to suffice in the face of significant substantive unconscionability is not unique to class action waivers. *See, e.g.*, *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1293 (9th Cir. 2006) (applying a sliding scale and concluding that arbitration agreement was unconscionable where substantive unconscionability was significant even though procedural unconscionability was minimal); *Horton v. Cal. Credit Corp.*, No. 09-CV274-IEG-NLS, 2009 WL 2488031, at \*4-7 (S.D. Cal. Aug. 13, 2009) (holding that an agreement forcing borrowers to take all claims to arbitration, while lender reserved right to judicial forum for foreclosure claims, and forcing borrowers to incur up-front costs in order access arbitration forum showed sufficient substantial unconscionability to overcome the minimal degree of procedural unconscionability present in the adhesion contract).

127. *Laster*, 584 F.3d at 857.

128. *Id.*

129. *Id.* (quoting *Shroyer v. New Cingular Wireless Servs. Inc.*, 498 F.3d 976, 988 (9th Cir. 2007)).

130. *Laster*, 584 F.3d at 857-58. Citing its previous analysis in *Shroyer*, 498 F.3d at 989, the Ninth Circuit identified two purposes underlying the FAA: "first, to reverse judicial hostility to arbitration agreements by placing them on the same footing as any other contract, and second, to promote the efficient and expeditious resolution of claims." *Laster*, 584 F.3d at 857.

131. *Laster*, 584 F.3d at 859.

132. Petition for Writ of Certiorari at 1-2, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 6617833, at \*1-2. AT&T wisely reframed the issue to avoid acknowledging that the

C. *Resolution: The Court's Policy of Favoring Arbitration Compels the Preemption of the Discover Bank Rule*

*Concepcion* squarely presented the question of whether a generally applicable state contract doctrine could be preempted by the FAA, despite the explicit savings clause of section 2. In a five–four decision, the United States Supreme Court answered that question in the affirmative and expanded the preemptive effect of the FAA.<sup>133</sup>

Writing for the majority,<sup>134</sup> Justice Scalia defined the issue in *Concepcion* as “whether the FAA prohibit[ed] States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”<sup>135</sup> After noting that the FAA responded to “widespread judicial hostility to arbitration agreements,” the Court identified two principles: (1) section 2 reflects a “liberal federal policy favoring arbitration,”<sup>136</sup> and (2) “arbitration is a matter

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doctrine at issue was a generally applicable contract doctrine, instead framing the issue as follows: “Whether the Federal Arbitration Act preempts States from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims.” *Id.* at i. The majority adopted this reframing. *See Concepcion*, 131 S. Ct. at 1744 (“We consider whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures.”).

133. *Concepcion*, 131 S. Ct. at 1748.

134. Justice Scalia’s majority opinion was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Alito. *Id.* at 1743. Although Justice Thomas penned an alternative analysis, discussed *supra* note 11 and *infra* note 145, he joined in the majority opinion, stating that he believed the test outlined in the majority opinion would often lead to the same outcome as his own test and that having a majority opinion was important in providing lower courts with guidance. *Concepcion*, 131 S. Ct. at 1754 (Thomas, J., concurring). One commentator has suggested that Justice Thomas’s concurrence so clearly rejects the reasoning of the majority opinion that it converts the majority opinion into a plurality opinion. *See* Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of AT&T Mobility v. Concepcion*, 35 AM. J. TRIAL ADVOC. 87, 113–23 (2011) (discussing the differences in the two opinions and arguing that “Justice Thomas reaches the same conclusion as the putative majority—that the *Discover Bank* rule is preempted by the FAA—but rejects every aspect of the putative majority’s opinion”).

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

136. *Id.* at 1745 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (internal quotation marks omitted).

of contract.”<sup>137</sup> The Court not only acknowledged that “courts must place arbitration agreements on an equal footing with other contracts,” but also indicated that the equal footing requirement is in harmony with these two principles.<sup>138</sup>

Turning to the savings clause of section 2, the Court recognized that the savings clause permits the invalidation of arbitration agreements by “‘generally applicable contract defenses, such as . . . unconscionability,’ but not by defenses that apply *only* to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>139</sup> Implicitly acknowledging that the *Discover Bank* Rule did not fall within this category of preempted defenses, the Court identified a new category of potentially preempted defenses. Specifically, the Court concluded that a generally applicable contract defense, which would otherwise be preserved by the savings clause of section 2, could be preempted if it was “applied in a fashion that disfavors arbitration”<sup>140</sup> or “disproportionate[ly] impact[s] arbitration agreements.”<sup>141</sup>

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137. *Concepcion*, 131 S. Ct. at 1745 (quoting *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010)) (internal quotation mark omitted).

138. *Concepcion*, 131 S. Ct. at 1745.

139. *Id.* at 1746 (emphasis added) (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)).

140. *Concepcion*, 131 S. Ct. at 1747. The Court cited *Perry v. Thomas*, 482 U.S. 483 (1987), in support of this principle. In *Perry*, an employee asserted that an arbitration agreement in his employment contract was unconscionable because the arbitration selection process would result in biased arbitration and because arbitration would not provide for adequate discovery. *Id.* at 487 n.4. The Court declined to reach the unconscionability claim, as it had not been decided below. *Id.* at 492 n.9. But the Court offered the lower courts some preemptive guidance, reminding the lower courts that any “state-law principle that takes its meaning precisely from the fact that a contract to arbitrate is at issue” would not be within the meaning of the savings clause. *Id.* Instead, a court must construe arbitration agreements in the same manner as non-arbitration agreements and may not “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.” *Id.* Thus, the Court implied that a state court could not declare an arbitration agreement unconscionable based on the unique procedures of the arbitral forum because the unconscionability doctrine would then be a pretext for the true anti-arbitration reason for the decision. *Concepcion* takes the *Perry* guidance a step further by focusing on a doctrine that does not draw *any* meaning from the fact that the contract includes an arbitration agreement, although the doctrine could affect the procedures under which the arbitration would proceed, just as it could affect the procedures under which litigation would proceed if the contract did not have an arbitration agreement.

141. *Concepcion*, 131 S. Ct. at 1747. Notably, to the extent arbitration agreements are disproportionately affected by the *Discover Bank* Rule,

Although the Court acknowledged that *Discover Bank* “applied [the unconscionability] framework to class-action waivers,” the Court emphasized that the class action waiver at issue in *Discover Bank* was contained in a contract with an arbitration agreement.<sup>142</sup> Indeed, the Court reframed California’s *Discover Bank* Rule to underscore its effect on arbitration agreements, describing it as “classifying most *collective-arbitration waivers* in consumer contracts as unconscionable.”<sup>143</sup>

Having announced that generally applicable doctrines having a disproportionate impact on arbitration agreements could be preempted despite the savings clause and emphasizing the *Discover Bank* Rule’s effect on arbitration agreements, the Court conducted a preemption analysis and concluded that the *Discover Bank* Rule was indeed preempted by the FAA.<sup>144</sup> Relying on obstacle preemption,<sup>145</sup>

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that effect is a function of the ubiquitous nature of arbitration agreements, particularly in consumer contracts, not the rule itself. Thus, contract drafters created the circumstances that the Court relied on, in part, to explain why the *Discover Bank* Rule is not preserved as a generally applicable state doctrine pursuant to the savings clause of section 2.

142. *Id.* at 1746.

143. *Id.* (emphasis added). At one point, the Court asserted that the *Discover Bank* Rule had been frequently applied to hold arbitration agreements unconscionable. *Id.* In each of the three cases cited by the Court in support of this statement, however, the California court found a *class action waiver* unconscionable, not an *arbitration agreement*. See *Cohen v. DirecTV, Inc.*, 48 Cal. Rptr. 3d 813, 819–21, 823 (Ct. App. 2006) (finding class action waiver unconscionable); *Klussman v. Cross Country Bank*, 36 Cal. Rptr. 3d 728, 739–40 (Ct. App. 2005) (same); *Aral v. EarthLink, Inc.*, 36 Cal. Rptr. 3d 229, 237–38 (Ct. App. 2005) (same). In one of the cases cited by the Court, the motion to compel arbitration was denied because of an unconscionable class waiver and an unreasonable forum selection clause, which presumably could not be severed from the arbitration agreement. See *Aral*, 36 Cal. Rptr. 3d at 238, 242 (finding it unreasonable to expect California consumers “to travel to Georgia to obtain redress on a case-by-case basis”). In the remaining two cases, the arbitration agreements containing the unconscionable class action waivers were invalidated because the agreements included non-severability clauses providing that the class action waiver could not be severed from the arbitration agreement. *Cohen*, 48 Cal. Rptr. 3d at 816; *Klussman*, 36 Cal. Rptr. 3d at 741. Thus, the arbitration agreement could have been enforced but for the defendant’s decision to tie the fate of the arbitration agreement to the fate of the class waiver. The arbitration agreement in *Concepcion* had a similar provision requiring that if the class waiver was “found to be unenforceable, then the entirety of this arbitration provision shall be null and void.” Brief for Respondents at 3, *Concepcion*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 4411292 at \*3 (internal quotation marks omitted).

144. *Concepcion*, 131 S. Ct. at 1753. Federal preemption of state law can result from either express preemption, where the federal statute’s language explicitly preempts state law, or implied preemption, where the

the Court held that the *Discover Bank* Rule stood “as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” and, therefore, was preempted.<sup>146</sup>

To reach this holding, the Court first concluded that the “overarching purpose of the FAA” is to “ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”<sup>147</sup> To establish this purpose, the Court began with the uncontroversial policy of enforcing arbitration

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preemption is implicit in light of the “structure and purpose” of the federal statute. *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992). The Supreme Court has recognized two types of implied preemption: (1) field preemption, where the federal law occupies the entire field and (2) conflict preemption, where it is impossible to comply with both state and federal law or “where the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). This latter type of conflict preemption is referred to as obstacle preemption. *See* JAMES T. O’REILLY, *FEDERAL PREEMPTION OF STATE AND LOCAL LAW: LEGISLATION, REGULATION AND LITIGATION* 74–76 (2006) (providing a thorough discussion of the law of preemption, including obstacle preemption).

145. The Supreme Court previously recognized that the FAA has no express preemptive provision and that Congress did not intend to occupy the entire field of arbitration when it adopted the FAA. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). Thus, state law will only be preempted by the FAA under a conflict preemption analysis. *Id.*

Although Justice Thomas joined the majority in *Concepcion*, he also penned a concurring opinion explaining that he would read section 2 of the FAA to limit the savings clause to doctrines related to defects in the making of an agreement. *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring). As such, the *Discover Bank* Rule would be preempted under an impossibility conflict analysis. *Id.* In doing so, Justice Thomas reaffirmed his skepticism of “purposes-and-objectives pre-emption” as stated in *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring). *Concepcion*, 131 S. Ct. at 1754. In *Wyeth*, Justice Thomas noted that he had become “increasingly skeptical of this Court’s ‘purposes and objectives’ pre-emption jurisprudence” because its reliance on “perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of the federal law” makes it “inconsistent with the Constitution.” *Wyeth*, 555 U.S. at 583; *see also infra* note 161 (providing a more detailed description of Justice Thomas’s and others’ criticisms of obstacle preemption).

146. *Concepcion*, 131 S. Ct. at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).
147. *Concepcion*, 131 S. Ct. at 1748. In determining whether state law is preempted, the question is “one of congressional intent” and the “ultimate touchstone” is Congress’s purpose in enacting the federal law. *Gade*, 505 U.S. at 96 (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)) (internal quotation mark omitted).



agreements according to their terms. The Court then turned to the policy favoring arbitration, which the Court has found in the FAA. Building on that policy,<sup>148</sup> the Court concluded that the FAA not only reflects a policy favoring arbitration but “was designed to promote arbitration.”<sup>149</sup> Moreover, the Court noted that one of the primary purposes of an arbitration agreement is to obtain “streamlined proceedings and expeditious results.”<sup>150</sup> Taken together, these principles provided the basis for the Court’s premise that the overarching purpose of the FAA is to enforce arbitration agreements in order to “facilitate streamlined proceedings.”<sup>151</sup>

With the overarching purpose identified, the Court turned to consideration of whether the *Discover Bank* Rule stood as an obstacle to that purpose. Given the focus of the overarching purpose on the facilitation of streamlined proceedings, the Court focused its analysis on whether class arbitration interfered with the promotion of such proceedings.<sup>152</sup> The Court concluded that class arbitration would “make[] the process slower, more costly, and more likely to generate procedural morass.”<sup>153</sup> The Court further concluded that class arbitration would require a level of “procedural formality” significantly different from the informality traditionally associated with arbitration.<sup>154</sup> Finally, the Court concluded that the potential for class arbitration would deter defendants from choosing arbitration because it would significantly increase their risk given the high stakes of the case and the lack of appellate review for arbitral awards.<sup>155</sup> Based on these three distinctions, the Court determined that class arbitration was not the streamlined proceeding envisioned and favored

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148. See *Concepcion*, 131 S. Ct. at 1749 (relying on “a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary” (quoting *Moses H. Cone Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (internal quotation marks omitted)).

149. *Concepcion*, 131 S. Ct. at 1749 (emphasis added).

150. *Id.* (quoting *Preston v. Ferrer*, 552 U.S. 346, 357 (2008)) (internal quotation marks omitted).

151. *Concepcion*, 131 S. Ct. at 1748. While the Court acknowledged the equal footing policy in its opinion, the Court’s analysis of the overarching purpose of the FAA neglects that policy. *Id.* at 1748–49.

152. See *id.* at 1750–52 (describing class arbitration as slower and more costly than proceeding in court or individual arbitration).

153. *Id.* at 1751.

154. *Id.*

155. See *id.* at 1752 (“[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable.”).

by the FAA.<sup>156</sup> Thus, the Court held that the *Discover Bank* Rule stood as an obstacle to the overarching purpose of the FAA and, therefore, was preempted.<sup>157</sup>

### III. A CRITIQUE OF THE COURT'S ANALYSIS

After *Concepcion*, class waivers may be invalidated as unconscionable if they are in an agreement that does not have an arbitration clause, but they may not be invalidated under the same doctrine if they are in an agreement that *does* have an arbitration clause. In other words, by opting for arbitration, corporations can always opt out of class actions, despite a generally applicable state-law doctrine that would limit such opt outs. This result is not consistent with the purpose of the FAA that is reflected in the text and legislative history: eliminating judicial hostility by ensuring that arbitration agreements are enforced on *equal* footing with other contracts. Had the Court premised its preemption analysis on the true congressional purpose, rather than a purpose driven by the judicially created policy of favoritism, the Court would not have expanded the preemptive effect of the FAA to a generally applicable state contract doctrine like the *Discover Bank* Rule.

#### A. *The Court Relied on an Incorrect "Overarching Purpose"*

Under obstacle preemption, state law is only preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."<sup>158</sup> Thus, Congress's purpose is the "ultimate touchstone" in the preemption analysis.<sup>159</sup> Moreover, the Court must presume that Congress did not intend to preempt state law absent a "clear and manifest purpose of Congress."<sup>160</sup> Accordingly, if the purpose relied upon by the Court is incorrect, the preemption analysis is incorrect.<sup>161</sup>

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156. *Id.* at 1753.

157. *Id.*

158. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

159. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

160. *Wyeth*, 555 U.S. at 565 (internal quotation mark omitted).

161. *See supra* note 145 and accompanying text. Obstacle preemption is controversial. Justice Thomas is one of its most vehement critics:

[T]his brand of the Court's pre-emption jurisprudence facilitates freewheeling, extratextual, and broad evaluations of the "purposes and objectives" embodied within federal law. This, in turn, leads to decisions giving improperly broad pre-emptive effect to judicially manufactured policies, rather than to the statutory text enacted by Congress pursuant to the Constitution and the agency actions authorized thereby. Because such a

That is precisely the problem with the Court's decision in *Concepcion*. The overarching purpose identified by the Court—to “ensure the enforcement of arbitration agreements according to their terms *so as to facilitate streamlined proceedings*” (referred to hereafter as the streamlined proceedings purpose)—is flawed.<sup>162</sup> First, the streamlined proceedings purpose ignores the equal footing policy reflected in the text of the FAA and expressed in the legislative history of the FAA. Second, the streamlined proceedings purpose places undue weight on the judicially created policy favoring arbitration. Third, the streamlined proceedings purpose incorporates a vision of arbitration that is not reflected in the FAA.

1. The Court's streamlined proceedings purpose discounts the equal footing policy reflected in the text of the FAA and expressed in the legislative history of the FAA.

The Court's analysis of the overarching purpose of the FAA gave little, if any, weight to the equal footing policy reflected in the text of the FAA and expressed in the legislative history of the FAA. This policy, however, is an indispensable part of the FAA's purpose. As such, the Court should have given the equal footing policy significant weight in defining the overarching purpose of the FAA.<sup>163</sup>

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sweeping approach to pre-emption leads to the illegitimate—and thus, unconstitutional—invalidation of state laws, I can no longer assent to a doctrine that pre-empts state laws merely because they “stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives” of federal law, as perceived by this Court.

*Wyeth*, 555 U.S. at 604 (Thomas, J., concurring) (citation omitted); *see also* *Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 678 (2003) (Thomas, J., concurring) (noting “the concomitant danger of invoking obstacle pre-emption based on the arbitrary selection of one purpose to the exclusion of others”). Other Supreme Court Justices have also expressed concerns. *See, e.g.*, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting) (referring to the obstacle preemption doctrine as “potentially boundless (and perhaps inadequately considered)” and noting that one commentator has criticized the doctrine and suggested that the Court eliminate it); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388–91 (2000) (Scalia, J., concurring) (rejecting the majority's use of legislative history to determine statutory intent where statutory intent is “perfectly obvious on the face of th[e] statute”). Commentators have similarly criticized obstacle preemption because the doctrine is susceptible to manipulation. *See, e.g.*, Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 231 (2000) (arguing that “constitutional law has no place for the Court's fuzzier notions of ‘obstacle’ preemption”).

162. *Concepcion*, 131 S. Ct. at 1748 (emphasis added); *see also supra* note 147 (discussing the Court's test for preemption).
163. *See Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 96 (1992) (“To discern Congress' intent we examine the explicit statutory

To determine Congress's purpose for a preemption analysis, the Court must, of course, consider the text of the FAA.<sup>164</sup> Congress did not include an explicit statement of purposes in the text of the FAA, but the Senate Report declared that "[t]he purpose of the [Act] is clearly set forth in section 2."<sup>165</sup> Section 2 provides that arbitration agreements "shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*"<sup>166</sup> Thus, the savings clause is part and parcel of the purpose of the FAA.

As discussed in Part II.A, the Court's purpose analysis focused on the policy favoring arbitration and the presumed purpose of arbitration agreements. The Court did not, however, consider the effect of the savings clause on the purpose of the statute.<sup>167</sup> Instead, before beginning its purpose analysis, the Court discounted the savings clause because it did not "suggest[] an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."<sup>168</sup> Thus, the Court reasoned that "would be absolutely inconsistent with the provisions of the act."<sup>169</sup> Based on these principles, the Court defined the FAA's overarching purpose without considering the effect of the savings clause on that purpose. The conundrum here is that the Court identified an overarching purpose *without* considering the full text of section 2, specifically *without* considering the savings clause. Then, the Court refused to apply the savings clause because doing so would conflict with that statutory purpose. In effect, the Court wrote the savings clause out of the FAA for purposes of its preemption analysis.

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language and the structure and purpose of the statute." (quoting *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990)).

164. *Id.*

165. S. REP. NO. 68-536, at 2 (1924).

166. 9 U.S.C. § 2 (2006) (emphasis added).

167. The Court's purpose analysis first focused on the FAA's "principal purpose" of "ensur[ing] that private arbitration agreements are enforced according to their terms" and noted that the purpose was "readily apparent from the FAA's text," pointing to section 2, as well as sections 3 and 4. *Concepcion*, 131 S. Ct. at 1748 (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)) (internal quotation marks omitted). With regard to section 2, the Court noted the savings clause in passing, stating that section 2 "makes arbitration agreements 'valid, irrevocable, and enforceable' as written (subject, of course, to the savings clause)." *Id.*

168. *Concepcion*, 131 S. Ct. at 1748.

169. *Id.* (quoting *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 228 (1998)).

In preemption cases in other contexts, the Court has recognized the import of a savings clause in identifying congressional purpose. In *Geier v. American Honda Motor Co.*,<sup>170</sup> the Court held that the existence of a savings clause required it to read an express preemption clause narrowly.<sup>171</sup> Although section 2 of the FAA is not formulated as an express preemption clause, the substance is precisely that. As one commentator noted,

for most purposes, [section 2] is identical to a provision that “no state or local government shall adopt or enforce any law or policy that makes a written arbitration agreement in a contract evidencing a transaction involving commerce invalid, revocable, or unenforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>172</sup>

Thus, the structure of section 2 may differ from a typical express preemption clause and savings clause combination, but the policy and the effect are the same. Under *Geier*, the enforcement portion of this recast provision would be narrowly construed as a classic express preemption clause coupled with a savings clause. There is no reason

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170. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861 (2000).

171. *See id.* at 867–68 (“Without the saving[s] clause, a broad reading of the express pre-emption provision arguably might pre-empt [state common-law liability] actions.”). In *Geier*, federal law required airbags in certain vehicles. The defendant in a products liability case asserted that the plaintiff’s “no airbag” tort claim was preempted by the federal law. *Id.* at 866–67. The federal statute included an express preemption provision precluding states from establishing or continuing any “safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.” *Id.* at 867 (quoting 15 U.S.C. § 1392(d) (1988)) (internal quotation mark omitted). The statute also had a savings clause providing that compliance with the federal standard did not “exempt any person from any liability under common law.” *Id.* at 868 (quoting 15 U.S.C. § 1397(k) (1988)) (internal quotation mark omitted). The Court held that, in light of the savings clause, the preemption clause should be read narrowly to preclude only state statutes and regulations, and not common law claims. *Id.*

172. Nelson, *supra* note 161, at 299 (asserting that the presumption against preemption is flawed and should be abandoned and that a general policy of obstacle preemption is misplaced). According to Nelson, the Court has taken the position that express preemption clauses should be read narrowly, at least in areas of traditional state regulation, which is consistent with the Court’s stated presumption against preemption. *Id.* at 298. Nelson suggested, however, that the Court only applies the presumption halfheartedly and “does not insist that other express provisions of federal law should also be read narrowly in order to minimize what the Court calls ‘conflict’ preemption.” *Id.* Thus, the Court construes section 2 of the FAA as a substantive rule, rather than a preemption clause, and reads it broadly rather than narrowly. *Id.* at 299.

that the enforcement clause of section 2 should be construed broadly simply because it was cast as a substantive rule instead of an express preemption clause.<sup>173</sup>

Even if the Court's differing treatment of substantive rules and express preemption clauses is reasonable, the savings clause is still an indicator of congressional intent regarding the substantive rule. In *Geier*, the Court considered whether a state-law tort action was impliedly preempted by the federal law.<sup>174</sup> Although the Court concluded that the state rule was preempted, the Court first considered whether the savings clause protected the state-law rule from implied preemption.<sup>175</sup> The Court concluded that the savings clause was not broad enough to encompass the state-law rule.<sup>176</sup> The Court reasoned that the specific language of the savings clause did not suggest an intent to save *all* state-law tort actions.<sup>177</sup> Rather, the Court looked to the language of the savings clause and determined that it only spoke to a specific defense.<sup>178</sup>

Unlike the narrow savings clause at issue in *Geier*, the savings clause in section 2 of the FAA explicitly saves all generally applicable state laws. Thus, the enforcement clause of section 2 is modified by the savings clause of section 2. Indeed, the Court acknowledged more than forty years ago that “the ‘saving[s] clause’ in §2 indicates [that] the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, *but not more so.*”<sup>179</sup>

Thus, the Court should have analyzed how the savings clause affected the purpose of the statute. If the Court had given the savings clause due consideration, the analysis would have changed

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173. As Nelson explained, there is “no obvious reason” that statutory language that is, in substance, an express preemption clause should be construed more broadly than a provision explicitly cast as a preemption clause. *Id.* at 299.

174. *Geier*, 529 U.S. at 869.

175. *Id.* at 869–70.

176. *Id.* at 870.

177. *Id.* at 869–70.

178. *Id.* (concluding that the savings clause prohibited the defense that compliance with federal law exempted a defendant from state law).

179. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added) (“To immunize an arbitration agreement from judicial challenge on the ground of fraud in the inducement would be to elevate it over other forms of contract—a situation inconsistent with the ‘saving[s] clause.’”); see also *Arthur Andersen LLP v. Carlisle*, 129 S. Ct. 1896, 1901 (2009) (“[Section 2] creates substantive federal law regarding the enforceability of arbitration agreements, requiring courts ‘to place such agreements upon the same footing as other contracts.’” (quoting *Volt Info. Scis., Inc., v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989))).

significantly. The inclusion of the savings clause in section 2 reflects that Congress's purpose in enacting the FAA was to ensure that arbitration agreements were on equal footing with other contracts by expressly providing for arbitration agreements to be subject to the same defenses as other contracts.<sup>180</sup>

This equal footing purpose is further buttressed by the legislative history of the FAA.<sup>181</sup> As detailed in Part I.A, the legislative history of the FAA reflects that Congress enacted the FAA in response to judicial hostility that resulted in decisions refusing to enforce agreements simply because they were arbitration agreements.<sup>182</sup> To combat this judicial hostility, Congress enacted the FAA to ensure that arbitration agreements would be reviewed "upon the same footing as other contracts."<sup>183</sup> This conclusion about the purpose shown in the legislative history is not just the musing of commentators mining the legislative history; it is also identified in the Court's cases. Almost four decades ago, the Court recognized that the legislative history established that the purpose of the FAA was to

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180. See O'REILLY, *supra* note 144, at 18 ("The savings clause increases the need for attention to the specific context, because the decision of Congress to include a savings clause means Congress did not desire to occupy the entire field.").

181. The Court has recognized the importance of legislative history in determining the statutory purpose for a preemption analysis. See, e.g., *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 210–11 (1983) (relying on legislative history to determine the extent to which statutory language was intended to affect the ability of states to regulate energy facilities); *Ray v. Atl. Richfield Co.*, 435 U.S. 151, 166–67 (1978) (relying on legislative history to support the conclusion that Congress intended to establish a uniform nationwide standard for tanker-design standards and, therefore, preempt state laws that varied from the federal standard).

182. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1757 (2011) (Breyer, J., dissenting) (noting the "well known" fact that "many courts expressed hostility to arbitration" before the FAA).

183. *Id.* (emphasis removed) (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). Indeed, the Court has previously recognized this very purpose. See, e.g., *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010) (acknowledging that the FAA "places arbitration agreements on an equal footing with other contracts" and that arbitration agreements must be enforced "according to their terms," subject to generally applicable state contract doctrines); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006) ("To overcome judicial resistance to arbitration, Congress enacted the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–16. Section 2 embodies the national policy favoring arbitration and places arbitration agreements on equal footing with all other contracts . . .").

ensure that arbitration agreements were on equal footing with other agreements.<sup>184</sup> And the Court has repeatedly reaffirmed this purpose.<sup>185</sup>

Despite this history firmly establishing the equal footing purpose of the FAA, the Court's analysis in *Concepcion* failed to give this purpose any weight.<sup>186</sup> The Court did acknowledge the equal footing mandate early in its opinion.<sup>187</sup> But when the Court turned to determining the purpose of the FAA—a cornerstone in its preemption analysis—the equal footing mandate was omitted from the analysis.<sup>188</sup>

In light of the text of the FAA and the legislative history, the clear purpose of the FAA was to overcome judicial hostility by ensuring that arbitration agreements stand on the same footing as other contracts. That is, arbitration agreements should be enforced (or invalidated) on the same grounds as any other contract. This purpose was not incorporated in the Court's analysis or in its ultimate conclusion that the purpose of the FAA is to enforce arbitration agreements for the purpose of facilitating streamlined proceedings. The Court's failure to incorporate this established purpose reflects a fundamental flaw in the Court's overarching purpose.

2. The Court's streamlined proceedings purpose places undue weight on the judicially created policy favoring arbitration.

The Court's overarching purpose draws heavily on the federal policy favoring arbitration. As discussed in Part II.C, based upon this favoritism policy and the Court's repeated affirmations of the policy, the Court concluded that the FAA was actually designed to *promote*

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184. *Scherk*, 417 U.S. at 511; see also *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985) (“The House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement ‘upon the same footing as other contracts, where it belongs’ . . . .” (quoting H.R. REP. NO. 68-96, at 1 (1924))).

185. See, e.g., *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (stating that the purpose of the FAA was to eliminate judicial hostility and ensure equal footing for arbitration agreements as compared to other agreements); *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (citing *Dean Witter*, 470 U.S. at 219–20; *Scherk*, 417 U.S. at 511) (acknowledging that the Act was “designed” to put an end to the judiciary’s unwillingness to enforce arbitration agreements and to ensure that arbitration agreements were on equal footing with other contracts); *Scherk*, 417 U.S. at 510–511 (recognizing that the FAA “revers[ed] centuries of judicial hostility to arbitration agreements” and “was designed to allow parties to avoid ‘the costliness and delays of litigation,’ and to place arbitration agreements ‘upon the same footing as other contracts’” (quoting H.R. REP. NO. 68-96, at 1–2 (1924))).

186. *Concepcion*, 131 S. Ct. at 1748–49.

187. *Id.* at 1745.

188. *Id.* at 1748–49.



arbitration. Based on this conclusion, the Court held that the purpose of the FAA was to enforce agreements “so as to facilitate” arbitration.<sup>189</sup> As reflected in the Court’s analysis of class arbitration, the purpose of “facilitating” arbitration includes avoiding deterrents to arbitration.<sup>190</sup>

The policy favoring arbitration, however, is a judicial fiction. The Court asserted two grounds for its conclusion that the FAA reflects a policy favoring—even promoting—arbitration. First, the Court cited to legislative history establishing that Congress was aware of the potential benefits of arbitration.<sup>191</sup> Second, the Court stated that its “cases place it beyond dispute that the FAA was designed to promote arbitration.”<sup>192</sup> Neither reason establishes a *congressional* policy favoring arbitration.

The legislative history relied upon by the Court does not reflect that Congress intended to favor or promote arbitration when it enacted the FAA. The Court cites to the following excerpt from the House Report: “It is practically appropriate that the action should be taken at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable.”<sup>193</sup> This excerpt cannot be viewed in a vacuum. Rather, it must be considered in light of the explicit language of section 2 and the legislative history as a whole.

As detailed in Part I.A, the text of section 2 and the legislative history of the FAA establish that the purpose of the FAA was to reverse judicial hostility by ensuring that arbitration agreements would be enforced on equal footing with other contracts. Indeed, the House Report expressly identifies the goal as equal footing—not favoritism: “Arbitration agreements are purely matters of contract, and the effect of the bill is simply to make the contracting party live up to his agreement. . . . [Thus, a]n arbitration agreement is placed upon the same footing as other contracts, where it belongs.”<sup>194</sup>

Only after making declarations about ensuring equal footing, eliminating judicial hostility, and protecting the parties’ rights does the House Report reference the practical benefits of arbitration, as

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189. *Id.* at 1748.

190. *See id.* at 1752 (discussing the deterrent effect of class arbitration as one reason that the *Discover Bank* Rule was inconsistent with the FAA).

191. *Id.* at 1749.

192. *Id.*

193. H.R. REP. NO. 68-96, at 2 (1924).

194. *Id.* at 1.

cited to by the Court.<sup>195</sup> Thus, the House Report cited by the Court reflects only that (1) Congress recognized that contracting parties entered into arbitration agreements to obtain the practical benefits of arbitration and (2) making those agreements enforceable to the same degree as other contracts was appropriate because there was no just reason for them to be less enforceable. The House Report does not support a conclusion that the FAA was intended to favor or promote arbitration or to elevate arbitration agreements by insulating them from generally applicable state law. Such a conclusion is at odds with the expressly stated congressional purpose of ensuring that courts enforce arbitration agreements to the same degree as any other contract would be enforced—no more and no less.

Thus, the remaining support for the policy favoring arbitration is the Court's assertion that its "cases place it beyond dispute that the FAA was designed to promote arbitration."<sup>196</sup> But the Court can only interpret congressional intent; it cannot create it.<sup>197</sup> Thus, while the Court's decisions make it beyond dispute that the Court has repeatedly stated that the FAA establishes a policy favoring arbitration, it is not beyond dispute that the FAA *actually* does so. If the Court's prior decisions lack support, then they are wrongly decided, even if controlling.<sup>198</sup>

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195. *Id.* at 2. The Senate Report is similar. As set forth in Part II.A, the Senate Report quotes the full text of section 2, including the savings clause, as the purpose of the FAA. S. REP. NO. 68-536, at 2 (1924). Only after explaining the state of the law making arbitration agreements "in large part ineffectual" does the Senate Report discuss "the great value of voluntary arbitrations [and] the practical justice" of enforcing arbitration agreements. *Id.* at 2-3.

196. *Concepcion*, 131 S. Ct. at 1749. As discussed *supra* in Part I.B, this policy of promoting arbitration was first declared in dicta and without support in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 23-25 (1983). Since then, the policy has become a mainstay in the Court's arbitration decisions.

197. Some would argue that allowing courts to infer congressional intent from legislative history is a backdoor for allowing courts to create congressional intent. *See, e.g.*, Alex Kozinski, *Should Reading Legislative History Be an Impeachable Offense?*, 31 SUFFOLK U. L. REV. 807, 812 (1998) (arguing against the use of legislative history as a tool for courts and pointing out the "illegitimate uses of legislative history . . . [as] efforts to make a substantive change in the law by means other than changing the statutory language").

198. Basic principles of judicial review acknowledge this proposition given that the Court can and does overrule previous holdings when it decides that those holdings were incorrect. *See, e.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (overruling *Wilko v. Swan*, 346 U.S. 427 (1953), thirty-six years after it was handed down). Indeed, in *Concepcion*, four Justices joined in a dissent rejecting the proposition that "Congress' primary objective was to guarantee . . . procedural advantages" of arbitration, although they did not go so far as

Here, the proposition that Congress intended to establish a policy favoring arbitration by enacting the FAA is not supported in the text of the statute or the legislative history. As discussed previously, both the text of the statute and the legislative history reflect Congress's intent to ensure enforcement of arbitration agreements *to the same degree* as other contracts and to eliminate judicial hostility toward arbitration agreements. The fact that the legislative history acknowledged the benefits of arbitration does not transform those benefits into an objective or purpose of the legislation. Rather, the acknowledgement provides context for why Congress would seek to ensure that the agreements intended to obtain those benefits should be subject to the same state-law principles as every other contract.

The overarching purpose of the FAA, as identified by the Court, placed significant weight on the policy favoring arbitration. Had the Court acknowledged that this policy was one of judicial making rather than congressional purpose, it could not have concluded that the overarching purpose of the FAA was to “ensure enforcement of arbitration agreements according to their terms *so as to facilitate streamlined proceedings.*”<sup>199</sup>

Further, even if the policy favoring or promoting arbitration were supported by the text and legislative history, that policy would be, at best, a secondary purpose of the FAA. The Court has even acknowledged that the policy favoring arbitration should take a backseat to the purpose of equal footing:

We . . . reject the suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims. The Act, after all, does not mandate the arbitration of all claims, but merely the enforcement . . . of privately negotiated arbitration agreements. The House Report accompanying the Act makes clear that its purpose was to place an arbitration agreement “upon the same footing as other contracts, where it belongs,” and to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.<sup>200</sup>

Indeed, within the last two years, the Court has explained that its policy favoring arbitration is “merely an acknowledgement of the FAA’s commitment to ‘overrule the judiciary’s longstanding refusal to

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to reject the policy favoring arbitration altogether. *Concepcion*, 131 S. Ct. at 1758 (Breyer, J., dissenting).

199. *Concepcion*, 131 S. Ct. at 1748 (emphasis added).

200. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 (1985) (citation omitted). The Court held that lower courts should compel arbitration of arbitrable claims even if that would result in piecemeal litigation, despite the fact that piecemeal litigation conflicted with the goal of encouraging “efficient and speedy dispute resolution.” *Id.* at 221.

enforce agreements to arbitrate and to place such agreements upon the same footing as other contracts.”<sup>201</sup>

As a secondary purpose, the policy favoring arbitration should yield to the equal footing purpose, especially where failure to do so would exempt the agreement from generally applicable state law.<sup>202</sup> By giving primacy to the policy favoring arbitration, the Court harmed the primary purpose. Under *Concepcion*, arbitration agreements have been exempted from a generally applicable state law.<sup>203</sup> Thus, the purpose of ensuring that arbitration agreements are enforced on equal footing as other contracts—a purpose the Court has previously acknowledged<sup>204</sup>—has been thwarted.

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201. *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 130 S. Ct. 2847, 2859 (2010) (quoting *Volt Info. Scis., Inc., v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). The Court rejected the assertion that the policy favoring arbitration required arbitration of some disputes despite insufficient evidence of an agreement to arbitrate the particular dispute. *Id.*
202. *See Granite Rock Co.*, 130 S. Ct. at 2859–60 (“We have applied the presumption favoring arbitration . . . *only* where it reflects, and derives its legitimacy from, a judicial conclusion that arbitration . . . is what the parties intended because their express agreement to arbitrate was validly formed and . . . is *legally enforceable* and . . . encompass[es] the dispute.” (emphasis added)).
203. The Court’s holding is actually even broader than this. As discussed above, the *Discover Bank* Rule applies to class waivers, not arbitration agreements. *See supra* notes 143. The only reason the *Discover Bank* Rule affected the arbitration agreement was because AT&T tied the fate of the arbitration provision to the fate of the class waiver by inserting a non-severability clause. *See supra* note 143. Thus, the Court’s preemption of the *Discover Bank* Rule actually means that a non-arbitration provision contained in a contract with an arbitration agreement has been exempted from a generally applicable state law. Arguably, the Court’s decision does not even require that the class waiver be tied to the arbitration agreement in order to be exempt from the *Discover Bank* Rule. After all, if class action procedures are inconsistent with arbitration, as the Court concludes they are, the invalidation of a class waiver would require *class* arbitration if a defendant chose to proceed with the arbitration it was entitled to under the agreement. Thus, the applicable rule would still be preempted under *Concepcion*.
204. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (“As we have explained, [the FAA’s] ‘purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.’” (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991))); *Dean Witter*, 470 U.S. at 219–20 (rejecting the “suggestion that the overriding goal of the [FAA] was to promote the expeditious resolution of claims” and concluding instead that the “House Report accompanying the [FAA] makes clear that its purpose was to place an arbitration agreement ‘upon the same footing as other contracts, where it belongs,’

3. The Court's streamlined proceedings purpose incorporates a vision of arbitration that is not reflected in the FAA.

The Court concluded that the overarching purpose of the FAA was not just to enforce arbitration agreements in order to promote arbitration. Rather, the purpose, according to the Court, was to “enforce arbitration agreements . . . so as to facilitate streamlined proceedings.”<sup>205</sup> In support of this purpose, the Court stated that “the point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute” and pointed out that the legislative history does not contemplate the existence of class arbitration.<sup>206</sup> The Court noted that streamlined proceedings were the “prime objective of an agreement to arbitrate.”<sup>207</sup> And after explaining that class arbitration would be more formal, more costly, and more procedurally complicated than individual arbitration, the Court concluded that class arbitration was “not arbitration as envisioned by the FAA.”<sup>208</sup>

Yet this vision of what arbitration entails under the FAA is not reflected in the text of the FAA. The FAA does not dictate specific procedures required or prohibited in arbitration.<sup>209</sup> With the exceptions of section 5 and section 7, all of the provisions of the FAA focus on the time period before and after the arbitration.<sup>210</sup> Section 5 of the FAA provides a procedure for appointing an arbitrator *if* the agreement does not provide a method or if, for some reason, the method fails.<sup>211</sup> Section 7 provides arbitrators with the authority to summon witnesses and documents and provides a mechanism for

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and to overrule the judiciary's longstanding refusal to enforce agreements to arbitrate” (citation omitted)).

205. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (emphasis added).
206. *Id.* at 1749.
207. *Id.* (quoting *Preston v. Ferrer*, 552 U.S. 346, 357 (2008)) (internal quotation marks omitted).
208. *Concepcion*, 131 S. Ct. at 1753.
209. *See* 9 U.S.C. §§ 1–16 (2006). Similarly, while the legislative history of the FAA reflects that Congress was aware that those entering into arbitration agreements did so, at least in part, because they desired streamlined, time-efficient, and cost-efficient proceedings, the legislative history does not support the conclusion that Congress envisioned any particular proceedings.
210. *See id.* (including provisions dealing with jurisdiction, applicability, staying court proceedings, petitioning the district court to compel arbitration, giving notice, vacating and modifying awards, and appealing court orders regarding arbitration).
211. *Id.* § 5.

enforcing the summons in a district court.<sup>212</sup> The FAA does not, however, dictate other requirements for or prohibitions on the procedures to be followed.

Indeed, the Court has previously held that “[t]here is no federal policy favoring arbitration under a certain set of procedural rules.”<sup>213</sup> Rather, Congress intended for courts to enforce an agreement to arbitrate under any set of procedural rules the parties agreed to—whether streamlined or extremely complicated—*so long as* those procedures do not run afoul of generally applicable state law.<sup>214</sup>

To be sure, parties entering into an agreement to arbitrate may desire streamlined proceedings, as acknowledged in the legislative history of the FAA. But the intent of the contracting parties does not establish congressional purpose. Congress’s purpose was simply to ensure that arbitration agreements were on equal footing with other contracts.

Moreover, the view of arbitration as streamlined, procedurally minimalistic, inexpensive, and quick does not match the reality of many modern arbitrations. Some forums permit depositions<sup>215</sup> and broad discovery, including discovery of electronically stored information.<sup>216</sup> Some forums significantly curtail the possibility of early disposition.<sup>217</sup> Indeed, while the Court relies on the proposition that arbitration is faster and cheaper than litigation,<sup>218</sup> modern arbitration

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212. *Id.* § 7.

213. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989).

214. Agreements to arbitrate are “valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*” 9 U.S.C. § 2 (emphasis added).

215. *See, e.g.*, JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES R. 16.2(d)–(e), 17(b) (JAMS, effective Oct. 1, 2010), available at [http://www.jamsadr.com/files/uploads/documents/JAMS-rules/JAMS\\_comprehensive\\_arbitration\\_rules-2010.pdf](http://www.jamsadr.com/files/uploads/documents/JAMS-rules/JAMS_comprehensive_arbitration_rules-2010.pdf) (permitting depositions in arbitration proceedings); COMMERCIAL ARBITRATION RULES & MEDIATION PROCEDURES R. L-4(d) (Am. Arbitration Ass’n, amended and effective June 1, 2009), available at [http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/adrstg\\_004103](http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/adrstg_004103) (permitting depositions in arbitration proceedings for complex commercial disputes).

216. *See, e.g.*, JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURES R. 16.2(f), 17 (JAMS, effective Oct. 1, 2010), available at [http://www.jamsadr.com/files/uploads/documents/JAMS-rules/JAMS\\_comprehensive\\_arbitration\\_rules-2010.pdf](http://www.jamsadr.com/files/uploads/documents/JAMS-rules/JAMS_comprehensive_arbitration_rules-2010.pdf) (permitting broad discovery in arbitration proceedings, including e-discovery).

217. *See, e.g.*, CODE OF ARBITRATION PROCEDURE FOR CUSTOMER DISPUTES R. 12504 (FINRA, last amended June 6, 2011), [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=7377](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7377) (severely limiting motions to dismiss prior to the arbitration hearing).

218. *Conception*, 131 S. Ct. at 1749, 1751.

guarantees no such benefits.<sup>219</sup> It may be unlikely that Congress “envisioned” an arbitration procedure that looks so much like litigation, but such an arbitration procedure is the modern reality. Moreover, it is consistent with the FAA given that Congress did not mandate specific procedures.

If the Court had acknowledged in *Concepcion* that the FAA does not establish a federal policy favoring arbitration under a certain set of procedural rules, as it has previously acknowledged,<sup>220</sup> it could not have concluded that the overarching purpose of the FAA included the concept of streamlined proceedings. Rather, the Court would have been compelled to recognize that Congress’s purpose in enacting the FAA was merely to eliminate judicial hostility by ensuring enforcement of arbitration agreements on the same footing as other contracts.

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219. See e.g., Robert B. Fitzpatrick, *The War in the Workplace Must End, But Arbitration is Not the Answer*, in ADVANCED EMPL. L. & LITIG. 101, 105 (ALI-ABA Course of Study, Dec. 1–3, 1994), available at C953 ALI-ABA 101 (Westlaw) (“Increasingly, those who have had experiences with arbitration report that it is not cheap, not quick, and as acrimonious as a court battle.”); Henry S. Noyes, *If You (Re)Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration’s Image*, 30 HARV. J.L. & PUB. POL’Y 579, 585–89 (2007) (reviewing data, statistics, and anecdotal reports and concluding that arbitration is not necessarily quicker or cheaper than litigation). But see L. Tyrone Holt, *Whither Arbitration? What Can Be Done To Improve Arbitration and Keep Out Litigation’s Ill Effects*, 7 DEPAUL BUS. & COM. L.J. 455, 456 (2009) (noting that while commentators as well as arbitration participants “perceive arbitration as becoming as costly and time-consuming as litigation,” the limited empirical evidence available suggests that arbitration may still be less expensive than litigation). In August 2003, the ABA Section of Litigation’s Task Force on ADR Effectiveness conducted a survey intended to ascertain “trial lawyer perceptions of the effectiveness of [arbitration].” ABA SECTION OF LITIGATION TASK FORCE ON ADR EFFECTIVENESS, SURVEY ON ARBITRATION 2 (2003), available at <http://apps.americanbar.org/litigation/taskforces/adr/surveyreport.pdf>. The survey produced mixed responses. While 78 percent of those responding found arbitration to be “generally timelier than litigation” and 56 percent found it to be cheaper, 60 percent reported that they recommended arbitration “less than 3 times out of 10” and 34 percent reported that they recommended against arbitration “6 times out of 10.” *Id.* at 4. Of those who counsel against arbitration, 22.2 percent cited excessive costs as a primary reason. *Id.* Even for those recommending arbitration, the report indicates that some of those recommendations may be based on the fact that arbitration is the only option (e.g., a statutory or contractual mandate compels it). *Id.* at 5.

220. *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989) (“There is no federal policy favoring arbitration under a certain set of procedural rules . . .”).

B. *The Discover Bank Rule Does Not Stand as an Obstacle to the Purpose of the FAA*

The Court's preemption analysis rises or falls on its identification of the overarching purpose of the FAA. Once that overarching purpose is revised, as it must be, it becomes evident that the *Discover Bank* Rule is not preempted.

Section 2 of the FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*"<sup>221</sup> As discussed previously, Congress's purpose in enacting the FAA was to overcome judicial hostility by ensuring that arbitration agreements stand on the same footing as other contracts. The *Discover Bank* Rule is a generally applicable state law. It does not target arbitration. Its impact is not limited to arbitration agreements.<sup>222</sup> And it does not "take[] its meaning precisely from the fact that a contract to arbitrate is at issue."<sup>223</sup> To the contrary, it applies to contracts *with* arbitration provisions and to contracts *without* arbitration provisions.<sup>224</sup>

Thus, under the Court's analysis, if the contract in *Concepcion* had not contained an arbitration agreement, the California Supreme Court would have been well within its rights to invalidate the class waiver under the *Discover Bank* Rule. But solely because the contract *did* include an arbitration agreement, the California Supreme Court was precluded from invalidating the class waiver under the *Discover Bank* Rule. This outcome immunizes a contract with an arbitration agreement from a generally applicable state law. As such, it impermissibly "elevate[s the arbitration contract] over other forms of contract."<sup>225</sup>

Although the Court previously recognized that elevating arbitration contracts over other forms of contract is inconsistent with

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221. 9 U.S.C. § 2 (2006) (emphasis added).

222. The Court predicted that the *Discover Bank* Rule "would have a disproportionate impact on arbitration agreements." *Concepcion*, 131 S. Ct. at 1747. The Court's assumption appears to be that entities which would be subject to class actions, and thus desire class waivers, would also desire arbitration. It seems illogical to allow the fact that arbitration agreements have become almost omnipresent in certain contracts to convert an otherwise generally applicable state law into a law that targets arbitration.

223. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987) (warning the lower court that it could not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable").

224. *See supra* notes 108, 109, 143 (discussing judicial application of the *Discover Bank* Rule).

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



the FAA and the savings clause specifically,<sup>226</sup> the Court abandoned that principle in *Concepcion*. In doing so, the Court thwarted the equal footing purpose of the FAA in favor of the Court's own policy favoring arbitration.

## CONCLUSION

The Court's decision in *Concepcion* dealt a significant blow to the savings clause, thwarted the purpose of Congress in enacting the FAA, and further expanded the preemptive effect of the FAA. Over a decade ago, Justice O'Connor acknowledged that the Court had long since "abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."<sup>227</sup> With each decision emphasizing the Court's policy favoring arbitration, the Court has reinforced this edifice and allowed a judicially created preference for arbitration to influence its decisions and thwart Congress's purpose.

In *Concepcion*, the Court used this edifice to justify a significant expansion of federal power under the FAA. Until *Concepcion*, the lower courts, and perhaps the legislators, have

taken the Supreme Court at face value. [They] have taken it to mean what it says when it always points out . . . that those grounds that exist at law and equity for the revocation of any contract can be applied to binding, pre-dispute arbitration agreements.<sup>228</sup>

With *Concepcion*, the Court has shown that it can no longer be taken at face value on this point. The Court is willing to curtail the savings clause and subvert Congress's equal footing purpose in the interest of the Court's policy favoring arbitration as a streamlined proceeding.<sup>229</sup> As a result, generally applicable state-law doctrines that should be protected by the savings clause are now at risk if they interfere with the Court's newly established policy of promoting arbitration as a streamlined proceeding.<sup>230</sup>

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226. *Id.*

227. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

228. Terry N. Trieweller, in POUND CIVIL JUSTICE INSTITUTE, THE PRIVATIZATION OF JUSTICE? MANDATORY ARBITRATION AND THE STATE COURTS: REPORT OF THE 2003 FORUM FOR STATE APPELLATE COURT JUDGES 38 (2006), available at <http://www.roscoepound.org/images/2003forumreport.pdf>.

229. See *supra* Part III.

230. As one commentator has noted, although *Concepcion* focused on a specific application of the unconscionability doctrine, the case "leaves one wondering what is left of the doctrine of unconscionability in [the]

Of course, Congress could amend the FAA to rein in the Court's expansion of federal power and to curtail the policy favoring arbitration. Indeed, over the last decade, members of Congress have introduced legislation seeking either wholesale amendments to the FAA<sup>231</sup> or amendments carving out targeted industries like nursing homes and consumer debt collectors.<sup>232</sup> *Concepcion* prompted renewed calls for significant changes to the FAA.<sup>233</sup> To date, however, the calls for reform have not been heeded.

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arbitration setting.” Thomas Stipanowich, *The Third Arbitration Trilogy: Revelation, Reaction and Reflection on the Direction of American Arbitration*, SCOTUSBLOG (Sep. 21, 2011, 8:36 AM), <http://www.scotusblog.com/2011/09/the-third-arbitration-trilogy-revelation-reaction-and-reflection-on-the-direction-of-american-arbitration>.

231. *E.g.*, Fair Arbitration Act of 2011, S. 1186, 112th Cong. (2011); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011); Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Fair Arbitration Act of 2007, S. 1135, 110th Cong. (2007); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007); Arbitration Fairness Act of 2002, S. 3026, 107th Cong. (2002).
232. *E.g.*, Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act, S. 2838, 110th Cong. (2008); Fairness in Nursing Home Arbitration Act of 2008, H.R. 6126, 110th Cong. (2008); Automobile Arbitration Fairness Act of 2008, H.R. 5312, 110th Cong. (2008). Although attempts to amend the FAA directly have been unsuccessful, indirect efforts to carve out a targeted industry have met with some success. *See, e.g.*, Motor Vehicle Franchise Contract Arbitration Fairness Act, Pub. L. No. 107-273, § 11028, 116 Stat. 1835 (2002) (codified at 15 U.S.C. § 1226 (2006)) (providing that arbitration of a dispute arising out of a motor vehicle franchise contract is only available if all parties to the dispute consent to arbitration *after* the dispute arises).
233. On the day the *Concepcion* decision was issued, Senator Al Franken, Senator Richard Blumenthal, and Representative Hank Johnson announced that they intended to reintroduce the Arbitration Fairness Act to “restore consumers’ rights to seek justice in the courts” by “eliminat[ing] forced arbitration clauses in employment, consumer, and civil rights cases.” Press Release, Sen. Al Franken, Sen. Richard Blumenthal & Rep. Hank Johnson, Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power in the Courts Against Corps. (April 27, 2011), *available at* <http://blumenthal.senate.gov/newsroom/press/release/sens-franken-blumenthal-rep-hank-johnson-announce-legislation-giving-consumers-more-power-in-the-courts-against-corporations>. Commenting on *Concepcion*, Senator Franken focused on the consequences of the decision to consumers: “This ruling is another example of the Supreme Court favoring corporations over consumers . . . . The Arbitration Fairness Act would

Although an examination of the existing legislative proposals is beyond the scope of this Article, any legislative reform should address the policy favoring arbitration. The Court's decision in *Concepcion* makes it clear that this favoritism policy will not be abandoned or abated. Instead, the favoritism policy has become the foundation upon which the Court has expanded the preemptive effect of the FAA. The favoritism policy is at odds with the equal footing purpose of the FAA as reflected in the statute and expressed in the legislative history. Thus, any legislative reform should seek to eliminate ambiguity about the purpose of the FAA so that the Court will no longer have the freedom to find a policy favoring arbitration in the shadows of the FAA. Such a reform could be as simple as a statement of purposes expressing that the purpose of the FAA is to ensure that arbitration agreements are enforced and invalidated according to the same rules as are applicable to other agreements and clarifying that arbitration agreements are not only no less enforceable than other agreements but also no more. By reaffirming the statute's historical purpose in explicit terms within the text, Congress could more effectively control the preemptive effect given to the FAA under the Court's "potentially boundless" obstacle preemption doctrine.<sup>234</sup>

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help rectify the Court's most recent wrong by restoring consumer rights." *Id.* (internal quotation marks omitted).

234. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 907 (2000) (Stevens, J., dissenting).



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