AT&T MOBILITY L.L.C. V. CONCEPCION: THE DISAPPEARANCE OF THE PRESUMPTION AGAINST PREEMPTION IN THE CONTEXT OF THE FAA

INTRODUCTION

Beginning in 1984 with *Southland Corp. v. Keating*,[1] the United States Supreme Court has repeatedly held[2] that the Federal Arbitration Act (FAA)[3] preempts state laws invalidating arbitration agreements. Most recently, the Court held in *AT&T Mobility L.L.C. v. Concepcion*[4] that California law "classifying most collective arbitration waivers in consumer contracts as unconscionable" was preempted by Section 2 of the FAA.[5]

Section 2, the "primary substantive provision of the Act,"[6] outlines both the general rule for the treatment of arbitration clauses as well as the exception to the rule:

> A written provision in . . . 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.[7]

The Court has construed the language of the FAA's saving clause—"save upon such grounds as exist at law or in equity for the revocation of any contract"—to allow the invalidation of arbitration agreements by "generally applicable contract defenses, such as fraud, duress, or unconscionability."[8] This interpretation of the saving clause, coupled with the Court's general presumption against federal preemption of state

1. 465 U.S. 1, 15-16 (1984).

2. *See, e.g.*, AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (holding that California's rule classifying most collective arbitration waivers in consumer contracts as unconscionable was preempted by the FAA); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996) (holding that a Montana statute, which conditioned the enforceability of arbitration clauses on their compliance with a special notice requirement, was preempted by the FAA); Perry v. Thomas, 482 U.S. 483, 491–92 (1987) (holding that the provision of California Labor Law, which stated that wage collection actions may be maintained without regard to any private agreement to arbitrate, was preempted by the FAA); *Southland*, 465 U.S. at 15–16 (holding that the California Franchise Investment Law was preempted by the FAA).

3. 9 U.S.C. §§ 1–16 (2006). Because this Comment focuses upon the preemption of state laws, it refers only to sections contained in Chapter 1 of the FAA, which focuses principally on domestic arbitration. However, the full FAA includes additional chapters and sections. *See id.* §§ 201–208, 301–307.

4. 131 S. Ct. 1740 (2011).

5. *Id.* at 1746, 1753.

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

7. 9 U.S.C. § 2 (2006).

8. *Doctor's Assocs.*, 517 U.S. at 687 (interpreting the saving clause of 9 U.S.C. § 2).

laws,[9] might lead observers to expect not only a liberal application of this saving clause, but a distinct proclivity of the Court to uphold state laws against challenges under the FAA. However, in practice, the Court has "routinely" held that the FAA preempts state laws invalidating arbitration agreements.[10]

Part I of this Comment provides a brief description of the history and case law pertaining to FAA preemption. Part II summarizes the facts, procedural history, and opinions in *Concepcion*. Part III describes the inherent conflict in the *Concepcion* Court's decision. In addition, Part III examines the practical implications of the *Concepcion* decision and the means by which the Supreme Court or Congress could bring this decision into closer alignment with federalist principles. This Comment concludes by noting that although the holding in *Concepcion* represents a steadfast adherence to the line of jurisprudence preempting state laws under the FAA, these collective decisions deviate from and conflict with the principles inherent in the preemption doctrine and federalism.

I. BACKGROUND

A. Preemption Doctrine

The doctrine of preemption is based on the Supremacy Clause of the United States Constitution,[11] which states that federal law is the "supreme Law of the Land."[12] The Supreme Court has articulated the general concept of preemption as recognizing that "under the Supremacy Clause, . . . any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield."[13]

The preemption doctrine can be divided into two primary categories: express preemption and implied preemption.[14] Although all preemption cases require the court to make a determination about the congressional intent of the federal statute, express and implied preemption differ in how this determination is made.[15] Express preemption involves the interpretation of statutes that include an express provision dictating that the federal legislation preempts state laws. However, even without such

9. Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 398 (2004) ("[W]e start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947))).

10. *Id.* at 393–94 & n.2.

11. *See* Gade v. Nat'l Solid Wastes Mgmt. Ass'n., 505 U.S. 88, 108 (1992); s*ee also* Drahozal, *supra* note 9, at 397. *But see* Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 770–77 (1994) (asserting that the prevailing view that preemption and supremacy are either identical or inherently connected is incorrect and that they represent two distinct legal concepts).

12. Drahozal, *supra* note 9, at 397 (quoting U.S. CONST. art. VI, cl. 2).

13. *Gade*, 505 U.S. at 108 (internal quotation marks omitted).

14. David S. Schwartz, *The Federal Arbitration Act and the Power of Congress Over State Courts*, 83 OR. L. REV. 541, 547 (2004).

15. *Id.*

an express preemption clause, the court may nonetheless determine that a state law is impliedly preempted by federal legislation.[16] This implied preemption requires a determination of Congress's preemptive intent based on other statutory provisions, legislative history, or both.[17] Implied preemption is further subdivided into field preemption and conflict preemption.[18] Field preemption exists when the Court finds, within federal legislation, a clear congressional intent that federal law should exclusively occupy a field.[19] The Supreme Court has inferred the requisite congressional intent to create this type of preemption in cases where the federal statutory scheme is "so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it."[20] Conflict preemption arises when a state law actually conflicts with the federal law.[21] There are two situations in which courts may find conflict preemption[22]: first, where the federal and state laws are mutually exclusive, such that a party would be unable to simultaneously comply with both laws,[23] and second, where the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[24] The former category of conflict preemption is also referred to as "impossibility preemption,"[25] while the latter is typically referred to as "obstacle preemption."[26] Obstacle preemption is the most frequent category of implied preemption at issue in cases.[27] In these types of cases, the threshold requirement for preemption is that the state law "frustrate [the] imperative of enforceability" of the federal legislation.[28]

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16. *Id.*

17. *Id.*

18. *See Gade*, 505 U.S. at 98 ("Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (citations omitted) (internal quotation marks omitted)); *see also* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 435 (3d ed. 2009).

19. CHEMERINSKY, *supra* note 18, at 435.

20. Pac. Gas & Elec. Co. v. State Energy Res. Cons. & Dev. Comm'n., 461 U.S. 190, 203–04 (1983) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

21. Schwartz, *supra* note 14, at 546 n.17.

22. Karen A. Jordan, *The Shifting Preemption Paradigm: Conceptual and Interpretive Issues*, 51 VAND. L. REV. 1149, 1151 (1998).

23. *See, e.g.*, Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142–43 (1963); McDermott v. Wisconsin, 228 U.S. 115, 126–28 (1913) (evaluating conflict between the Federal food and drugs act and state statute regulating labeling consumer goods).

24. Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *see also* CHEMERINSKY, *supra* note 18, at 436.

25. Gregory M. Dickinson, *An Empirical Study of Obstacle Preemption in the Supreme Court*, 89 NEB. L. REV. 682, 684–685 (2011).

26. Drahozal, *supra* note 9, at 397–98; Hiro N. Aragaki, *Arbitration's Suspect Status*, 159 U. PA. L. REV. 1233, 1241 (2011).

27. Drahozal, *supra* note 9, at 398.

28. Aragaki, *supra* note 26, at 1242 (citing Preston v. Ferrer, 552 U.S. 346, 356 (2008)).

Although the power to preempt state laws is constitutionally authorized,[29] the Court typically construes the preemptory effect of federal laws in light of the Unites States' federalist foundation, such that "in subject matter areas 'traditionally occupied' by the states, the Court applies a presumption against preemption."[30] The Supreme Court expounded upon this concept by explaining that because preemption is an "extraordinary power in a federalist system," Congress must make its intention to "alter the usual constitutional balance between the States and the Federal Government . . . unmistakably clear in the language of the statute."[31] Thus, the doctrine of preemption attempts to strike a balance between the uniformity of laws on a national scale[32] and the preservation of the States' right to serve as "laboratories"[33] for experimentation with respect to social and economic policy.[34]

B. Federal Arbitration Act

Congress enacted the FAA in 1925 "in response to widespread judicial hostility to arbitration agreements."[35] The Supreme Court has recognized that the FAA was fundamentally designed to "overcome courts' refusals to enforce agreements to arbitrate,"[36] and has described Section 2 as reflecting a "liberal federal policy favoring arbitration."[37] Although the Court's interpretation of the FAA's reach has changed since its enactment,[38] the modern reading allows its application in state courts,[39]

29. *See supra* notes 11–13 and accompanying text.

30. Drahozal, *supra* note 9, at 398 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)); *see also* AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1762 (2011) (Breyer, J., dissenting); English v. Gen. Elec. Co., 496 U.S. 72, 79 (1990) ("Where . . . the field which Congress is said to have pre-empted includes areas that have been traditionally occupied by the States, congressional intent to supersede state laws must be clear and manifest." (internal quotation marks omitted) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977))).

31. Gregory v. Ashcroft, 501 U.S. 452, 460 (1991) (internal quotation marks omitted) (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1984)).

32. *See, e.g.*, Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 799–800 (1996) (discussing the conflicting objectives of not "disrupting the existing balance of federal–state powers" and facilitating "one set of rules in the relevant field").

33. This quote is a reference to Justice Brandies's dicta in *New State Ice Co. v. Leibmann*, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

34. *See, e.g.*, David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 11 (2004.

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

36. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 270 (1995).

37. *Concepcion*, 131 S. Ct. at 1745 (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

38. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1427–32 (2008).

39. Southland Corp. v. Keating, 465 U.S. 1, 12–14 (1984) (choosing not to confine the application of the FAA to federal courts).

extends its scope to the equivalent of Congress's Commerce Clause power,[40] and permits its use in statutory causes of action.[41]

The general rule created by Section 2 of the FAA is that courts must place arbitration agreements on an equal footing with other contracts and enforce them according to their terms.[42] The saving clause at the end of Section 2 provides the mechanism under which state laws and rules may be upheld against challenges under the FAA, contingent upon these laws and rules being based on "generally applicable contract defenses."[43] Although the plain language of Section 2 allows for the invalidation of an arbitration clause "upon such grounds as exist at law or in equity for the revocation of any contract," the Supreme Court has rarely utilized the exception,[44] the presumption against preemption[45] notwithstanding.

As the Supreme Court established in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."[46] Accordingly, conflict preemption was the only ground on which the Court could find that the FAA invalidated state laws addressing arbitration.[47] The Supreme Court has interpreted the FAA's preemptive power as arising under the obstacle subsection of conflict preemption,[48] stating in *Volt* that state laws found to "undermine the goals and policies of the FAA" would be preempted.[49]

40. *Allied-Bruce*, 513 U.S. at 268–70 (explaining that the FAA extends to the current reach of the Commerce Clause power).

41. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480–84 (1989).

42. *Concepcion*, 131 S. Ct. at 1745 (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)); Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

43. *See* Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

44. *Compare Concepcion*, 131 S. Ct. at 1753 (holding California's *Discover Bank* rule was preempted by the FAA), *and Doctor's Assocs.*, 517 U.S. at 688 (holding the Montana statute was preempted by the FAA), *and* Perry v. Thomas, 482 U.S. 483, 491 (1987) (holding the California Labor Code was preempted by the FAA), *and Southland*, 465 U.S. at 16 (holding the California Franchise Investment Law was preempted by the FAA), *with Volt*, 489 U.S. at 477–79 (holding the FAA did not preempt the California Law).

45. Drahozal, *supra* note 9, at 398 (citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)).

46. *Volt*, 489 U.S. at 477.

47. *See id.*; *supra* Part I.A and accompanying notes 14–28; *see also* Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1191 (2011).

48. Note, *An Unnecessary Choice of Law:* Volt, Mastrobuono, *and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250, 2253 (2002) (quoting *Volt*, 489 U.S. at 477); *see also* Drahozal, *supra* note 9, at 396–98 (noting the different categories of preemption analysis, including "obstacle" conflict preemption).

49. *Volt*, 489 U.S. at 477–78 (framing the issue presented in that case and quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941), as creating the authority to exercise obstacle preemption over state laws).

While the Supreme Court has recognized that determining congressional intent is the "ultimate touchstone" of the preemption doctrine,[50] many commentators have noted that the language and the legislative history of the FAA lack the requisite preemptive intent to invalidate state arbitration laws.[51]

C. Southland Corp. v. Keating[52]

The Supreme Court first applied the FAA to preempt a state law that undercut the enforceability of arbitration agreements in *Southland Corp. v. Keating*.[53] In *Southland*, several franchisees sued the Southland Corporation in state court, "alleging, among other things, fraud, oral misrepresentation, breach of contract, breach of fiduciary duty, and violation of the disclosure requirements of California's Franchise Investment Law (FIL)."[54] After the individual cases were consolidated, Southland Corporation filed a motion to compel arbitration based on the arbitration clause in the franchise agreements.[55] The trial court granted Southland's motion to compel arbitration on all claims except those based on the FIL.[56] The court of appeals reversed, allowing arbitration on the FIL claim; however, this ruling was subsequently overturned by the California Supreme Court, which held that the FIL "require[d] judicial consideration of claims" and furthermore, that the statute was not preempted by the FAA.[57]

The United States Supreme Court reversed the California Supreme Court, holding that the California law was preempted because it stood as an obstacle to accomplishing Congress's objectives in enacting the FAA.[58] Specifically, the Court explained that upholding the California Supreme Court's holding would create a situation in which the right to

50. *See* Retail Clerks Int'l. Ass'n, Local 1625 v. Schermerhorn, 375 U.S. 96, 103 (1963); *see also* Schwartz, *supra* note 34, at 16.

51. *See, e.g.*, Schwartz, *supra* note 34, at 23–27; Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 641–44, 49 (arguing that Congress did not intend to prevent states from protecting weaker parties or to enforce arbitration agreements against ignorant consumers); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1952–53 (1996) (referring to the Supreme Court's expansion of FAA jurisprudence as a "slight-of-hand" [sic]). *But see* Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 112–14 (2002) (arguing that the *Southland* Court reached the correct conclusion about the FAA's legislative history).

52. 465 U.S. 1 (1984).

53. 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, 485 (2009) (arguing that "since the Supreme Court's 1984 decision in Southland v. Keating, the FAA's substantive application in state courts and preemption of state laws undercutting the enforceability of arbitration agreements has been accepted").

54. Southland Corp. v. Keating, 465 U.S. 1, 4 (1984). California's Franchise Investment Law is codified at CAL. CORP. CODE §§ 31000–31516 (West 2011).

55. *Southland*, 465 U.S. at 4.

56. *Id.*

57. *Id.* at 5.

58. *Id.* at 10.

enforce an arbitration contract was dependent on the particular forum in which the case was brought.[59] The Court opined that in drafting the FAA, "Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[60]

In his concurring and dissenting opinion, Justice Stevens argued that the saving clause in Section 2 allows for the revocation of arbitration agreements on any grounds that are sufficient to revoke a contract at common law.[61] Therefore, Justice Stevens argued, the FAA should not preempt the FIL because the waiver was based on public policy, which forms a sufficient basis for the revocation of a contract at common law.[62]

Justice O'Connor's dissent proposed an alternative rationale for not preempting the California law, asserting that Congress's intent was to create "a procedural statute, applicable only in federal courts."[63] Based on this assertion, Justice O'Connor articulated that Section 2 "should have no application whatsoever in state courts," thereby eliminating the FAA's authority to preempt state law in state courts.[64]

D. Perry v. Thomas[65]

Preemption under the FAA next arose in *Perry v. Thomas*, which involved Section 229 of California's Labor code, requiring that litigants be provided a judicial forum for resolving wage disputes.[66] The Supreme Court held that the California statute was in "unmistakable conflict" with Section 2 of the FAA, and that therefore, "[u]nder the Supremacy Clause, the state statute must give way."[67]

Again, Justice Stevens and Justice O'Connor dissented,[68] mirroring the arguments presented in their dissenting opinions in *Southland*.[69] Although the majority made a passing reference to the availability of general contract defenses to arbitration clauses, it made no attempt to apply this assertion to the public policy argument advanced by Justice Stevens.[70] The majority opinion merely noted that courts "may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law

59. *Id.* at 15.
60. *Id.*
61. *Id.* at 19 (Stevens, J., concurring in part and dissenting in part).
62. *Id.* at 20.
63. *Id.* at 25, 36 (O'Connor, J., dissenting).
64. *Id.* at 31.
65. 482 U.S. 483 (1987).
66. *Id.* at 491; CAL. LAB. CODE § 229 (West 2011).
67. *Perry*, 482 U.S. at 491.
68. *Id.* at 493 (Stevens, J., dissenting), 494–95 (O'Connor, J., dissenting).
69. *See Southland*, 465 U.S. at 19–20 (Stevens, J., concurring in part and dissenting in part): *Southland*, 465 U.S. at 25, 36 (O'Connor, J., dissenting).
70. *See Perry*, 482 U.S. at 491–92 (majority opinion).

holding that enforcement would be unconscionable, for this would enable the court to effect what we hold today the state legislature cannot."[71]

E. Doctor's Associates, Inc. v. Casarotto[72]

In *Doctor's Associates v. Casarotto*, the Supreme Court held that the FAA preempted[73] a Montana statute that invalidated arbitration clauses unless they were types in underlined capital letters on the first page of the contract.[74] The holding was predicated on the idea that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions" because Section 2 requires that arbitration clauses be afforded the same authority as other contracts.[75] The Court reasoned that the Montana statute "condition[ed] the enforceability of arbitration agreements on [their] compliance with a special notice requirement not applicable to contracts generally," and therefore, the statute must be preempted.[76]

Justice Thomas dissented based on his "view that [Section] 2 of the Federal Arbitration Act does not apply to proceedings in state courts,"[77] the same rationale presented by Justice O'Connor in *Southland* and *Perry*.[78]

F. Discover Bank v. Superior Court[79]

Although *Discover Bank v. Superior Court* was not heard by the Supreme Court, it presented a unique challenge to the FAA insofar as it created a judicial framework allowing California courts to treat arbitration agreements containing class arbitration waivers differently from other contracts.[80] The case involved a challenge by a credit card holder who sought class arbitration despite language in the arbitration agreement that forbade it.[81] The Supreme Court of California held that when a consumer alleges that a class action waiver in a consumer contract has the effect of exculpating a party with superior bargaining power, the contract is unconscionable and unenforceable.[82] The rule created by *Discov-*

71. *Id.* at 492 n.9.
72. 517 U.S. 681 (1996).
73. *Id.* at 683 (quoting MONT. CODE ANN. § 27-5-114(4) (section (4) repealed 1997)).
74. Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688 (1996).
75. *Id.* at 687 (emphasis in original).
76. *Id.*
77. *Id.* at 689 (Thomas, J., dissenting) (internal citation omitted).
78. Southland Corp. v. Keating, 465 U.S. 1, 25, 36 (1984) (O'Connor, J., dissenting); *Perry*, 482 U.S. at 494 (O'Connor, J., dissenting).
79. 113 P.3d 1100 (Cal. 2005), *abrogated by* AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740 (2011).
80. Lampley, *supra* note 53, at 485–86.
81. *Discover Bank*, 113 P.3d at 1103.
82. *Id.* at 1110 ("We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat

er Bank was a key element in the Supreme Court's decision in *AT&T Mobility L.L.C. v. Concepcion*.[83]

II. *AT&T MOBILITY L.L.C. V. CONCEPCION*

A. Facts

In 2002, Vincent and Liza Concepcion contracted with Cingular Wireless, which was subsequently purchased by AT&T,[84] for the purchase of cellular telephones and service.[85] The contract included an arbitration clause that "required . . . claims to be brought in the parties' individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding."[86] The Concepcions purchased the AT&T cellular service, and although the telephones were advertised as free, the Concepcions were charged $30.22 in sales tax based on the phones' retail value.[87]

B. Procedural History

The Concepcions filed a complaint against AT&T in the United States District Court for the Southern District of California, alleging that AT&T had "engaged in false advertising and fraud by charging sales tax on phones it advertised as free."[88] The complaint was consolidated with a putative class action based on the same claims.[89]

In 2008, AT&T moved to compel arbitration under the terms of the agreement; however, the Concepcions opposed the motion, arguing "that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed classwide [sic] procedures."[90] Relying on the rule the California Supreme Court articulated in *Discover Bank*, the district court found the arbitration clause unconscionable and denied AT&T's motion.[91]

The Ninth Circuit affirmed the decision, finding not only that the *Discover Bank* rule rendered the arbitration clause unconscionable, but

large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced." (alteration in original) (quoting CAL. CIV. CODE § 1668 (West 2011))).

83. *See* AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

84. AT&T acquired Cingular in November of 2005 and renamed the company AT&T Mobility in January of 2007. *Id.* at 1744 n.1; Laster v. AT&T Mobility LLC, 584 F.3d 849, 852 n. 1 (9th Cir. 2009), *rev'd*, *sub nom*. AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740 (2011)).

85. *Concepcion*, 131 S. Ct. at 1744 & n.1.

86. *Id.* (internal quotation marks omitted).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* at 1744–45.

91. *Id.* at 1745 (citing Discover Bank v. Superior Court, 113 P.3d 1100, 1103 (Cal. 2005), *abrogated by Concepcion*, 131 S. Ct. 1740).

that it was not preempted by the FAA because that rule was "simply a refinement of the unconscionability analysis applicable to contracts generally in California."[92] The Ninth Circuit further noted that "*Discover Bank* placed arbitration agreements with class action waivers on the *exact same footing* as contracts that bar class action litigation outside the context of arbitration."[93]

C. Majority Opinion

In a 5-4 decision authored by Justice Scalia, the Supreme Court reversed the decision of the Ninth Circuit and held that FAA preempts the *Discover Bank* rule because "it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[94]

The Court rejected the argument that the *Discover Bank* rule was based upon unconscionability, and thereby falls within the saving clause of Section 2 of the FAA, because "nothing in [Section 2] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives."[95] The majority further stated that the "overarching purpose" of the FAA is to ensure agreements are enforced according to their terms, and because requiring class arbitration fundamentally alters arbitration, permitting class proceedings in this case would be inconsistent with the FAA.[96]

The majority found that the *Discover Bank* rule allows parties to a consumer contract to "demand [class arbitration] *ex post*," and because arbitration in this context is mandated by the rule, rather than by agreement of the parties, it is inconsistent with the FAA.[97] Further, the majority identified three inherent problems with class arbitration.[98] First, class arbitration "sacrifices the principal advantage of arbitration—its informality—[making] the process slower, more costly," and less likely to result in final judgment.[99] Second, it requires a level of procedural formality sufficient to bind absent parties to the results.[100] Third, it increases the risk to defendants because allowing an aggregation of claims increas-

92. Laster v. AT&T Mobility L.L.C., 584 F.3d 849, 857 (9th Cir. 2009), *rev'd, sub nom*. AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740 (2011).

93. *Id.* at 858 (quoting Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 990 (9th Cir. 2007)).

94. *Concepcion*, 131 S. Ct. at 1753 (internal quotation marks omitted) (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941)).

95. *Id.* at 1748.

96. *Id.*

97. *Id.* at 1750–51.

98. *Id.* at 1751–52.

99. *Id.* at 1751.

100. *Id.* ("For a class-action money judgment to bind absentees in litigation, class representatives must at all times adequately represent absent class members, and absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class. At least this amount of process would presumably be required for absent parties to be bound by the results of arbitration." (citations omitted)).

es the chance of suffering "a devastating loss," thereby coercing defendants into settling what might otherwise be questionable claims.[101]

D. Justice Thomas's Concurring Opinion

In his concurring opinion, Justice Thomas described his reading of Section 2 of the FAA, which is based upon the linguistic differences between the general rule and the saving clause.[102] Specifically, Justice Thomas emphasized that although Section 2 requires that arbitration clauses be "valid, irrevocable, and enforceable," the saving clause applies only to "grounds as exist in law or in equity for the *revocation* of any contract."[103] Justice Thomas concluded that these semantic differences indicate a congressional intent to apply the saving clause solely to those "grounds relating to the making of the agreement."[104] Accordingly, because the *Discover Bank* rule does not relate to contract *formation*, it does not qualify as a basis for revocation pursuant to the saving clause of Section 2 and is, therefore, preempted by the FAA.[105]

E. Justice Breyer's Dissenting Opinion

The dissenting opinion, authored by Justice Breyer and joined by Justices Ginsburg, Sotomayor, and Kagan, criticized the majority for preempting California law, and maintained that the *Discover Bank* rule is consistent with not only the plain language of the FAA, but its primary goals as well.[106]

The dissent argued that the *Discover Bank* rule was formulated by the California Supreme Court's interpretation of two provisions of the California Civil Code,[107] and that the rule applies to contracts generally, according to the principle of unconscionability.[108] Because the rule "applies equally to class action litigation waivers in contracts without arbitration agreements as it does to class arbitration waivers in contracts with such agreements," the rule comports with the saving clause of Section 2—falling directly within the scope of the FAA's exception.[109]

Furthermore, the dissent asserted that the *Discover Bank* rule is consistent with the purpose of the FAA insofar as it "puts agreements to arbitrate and agreements to litigate 'upon the same footing.'"[110] Although the majority asserted that the *Discover Bank* rule stands as an obstacle to

101. *Id.* at 1752.
102. *Id.* at 1753–54 (Thomas, J., concurring).
103. *Id.* at 1754 (emphasis added) (quoting 9 U.S.C. § 2 (2006)).
104. *Id.* at 1754–55.
105. *Id.* at 1755–56.
106. *Id.* at 1756 (Breyer, J., dissenting).
107. *Id.* (citing CAL. CIV. CODE §§ 1670.5(a), 1668 (West 1985)).
108. *Id.*
109. *Id.* at 1757 (quoting Discover Bank v. Superior Court, 113 P.3d 1100, 1112 (Cal. 2005), *abrogated by* Concepcion, 131 S. Ct. 1740); *see also* 9 U.S.C. § 2 (2006)).
110. *Id.* at 1758 (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).

the primary objective of the FAA by "discriminating in practice against arbitration," the dissent argued that this finding is erroneous because "class arbitration is consistent with the use of arbitration" and is a form of arbitration used in California and other jurisdictions.[111] Because the language of the *Discover Bank* rule is consistent with Section 2, and because the principles of federalism demand that the Court honor the presumption against preemption, the dissent contended that the *Discover Bank* rule should have been upheld.[112]

III. ANALYSIS

The Supreme Court's holding in *AT&T Mobility L.L.C. v. Concepcion* deserves both commendation and criticism. The *Concepcion* Court should be lauded for creating a uniform field of jurisprudence pertaining to preemption under the FAA. Conversely, the Court's decision warrants condemnation based on its continuing disregard of federalist principles in FAA preemption cases. In resolving this dispute, the Court was forced to evaluate the competing interests that exist at the very core of preemption under the FAA. By deciding the case as it did, the Court effectively chose to eschew the concept of consumer fairness and protection in favor of commercial interests.

A. Leveling the Field of Preemption Under the FAA

The Supreme Court's decision in *Concepcion* normalized the statutory and judicially-created laws relating to arbitration and collective action waivers across the country, yielding two related benefits: (1) a more universal framework upon which to guide the decisions of lower courts; and (2) direction to businesses and individuals responsible for drafting contracts, allowing these entities to better create enforceable agreements.

The Court's decision in *Concepcion* to abrogate the *Discover Bank* rule created a consistent line of jurisprudence with respect to the preemption of arbitration clauses under the FAA, dating back to *Southland*.[113] Prior to the decision in *Concepcion*, California, as a result of the *Discover Bank* rule, remained the only jurisdiction that consistently found collective action waivers in contracts with arbitration agreements substan-

111. *Id.* at 1758 (citing *id.* at 1747–48 (majority opinion)). The American Arbitration Association has described class arbitration to be "a fair, balanced, and efficient means of resolving class disputes." *Id.* at 1758 (Breyer, J., dissenting) (citation omitted). Furthermore, the dissenting opinion asserts that the majority's assertion that class arbitration is inconsistent with the goals of the FAA cannot be traced back to the FAA itself because at the time of its enactment, "arbitration procedures had not yet been fully developed," so the idea of precluding class arbitration was not yet envisioned. *Id.* at 1759.

112. *Id.* at 1762 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)).

113. *See, e.g.*, *Id.* at 1753 (majority opinion) (holding California's *Discover Bank* rule preempted by the FAA); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 688–89 (1996) (holding the Montana statute preempted by the FAA); Perry v. Thomas, 482 U.S. 483, 491–92 (1987) (holding the provision of California Labor Law preempted by the FAA); Southland Corp. v. Keating, 465 U.S. 1, 15–16 (1984) (holding the California Franchise Investment Law preempted by the FAA).

tively unconscionable.[114] This discrepancy was remedied by the Supreme Court's decision in *Concepcion*, bringing the prevailing laws in California pertaining to arbitration clauses and class waivers into line with the laws in the rest of the country.[115] In addition to creating consistency among judicial decisions, the Supreme Court eliminated the concern expressed in Justice Baxter's dissenting opinion in *Discover Bank*—that California, because of its minority position on the issue, may be a targeted jurisdiction for plaintiffs' lawyers seeking favorable outcomes in this type of case.[116]

By creating consistent precedent across the various states and federal circuits, lower courts are afforded a solid foundation upon which to base future decisions, thereby reducing the likelihood that their decisions will be overturned by appellate courts. This benefit was expressed by Justice O'Connor in *Allied-Bruce*, in which she stated that her primary reason for concurring in that decision, despite believing that it was ultimately wrong, "rest[ed] largely on the wisdom of maintaining a uniform standard."[117] This notion favoring a uniform application of the law has also been expressly articulated in other preemption contexts.[118]

Establishing a consistent line of decisions serves an additional purpose—informing those individuals and companies charged with drafting contracts as to the current state of the law. This benefit was also acknowledged by Justice O'Connor, stating, "[P]arties have undoubtedly made contracts in reliance on the Court's interpretation of the Act in the [ten years that have passed between the decisions in *Southland* and *Allied-Bruce*]."[119]

A consistent field of FAA preemption jurisprudence provides businesses operating in multiple states with a more concrete expectation of the enforceability of their consumer agreements, regardless of the jurisdiction in which the transactions take place. Rather than being compelled to draft multiple versions of agreements for use across different states, a company is better positioned to have a single consistent agreement for

114. Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 400–01 (2005) (outlining California's minority position holding collective arbitration provisions unconscionable).

115. *Compare* Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by* AT&T Mobility, L.L.C. v. Concepcion, 131 S. Ct. 1740, 1753 (2011); *with Doctor's Assocs., Inc.*, 517 U.S. at 688–89 (holding the Montana statute preempted by the FAA); *and Perry*, 482 U.S. at 491–92 (holding the provision of California Labor Law preempted by the FAA); *and Southland*, 465 U.S. at 15–16 (holding the California Franchise Investment Law preempted by the FAA).

116. *Discover Bank*, 113 P.3d at 1118 (Baxter, J., concurring in part and dissenting in part).

117. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 282 (1995) (O'Connor, J., concurring).

118. *See* Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1376–77 (2006) (discussing the express preemption provision found in the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1144(a) (2006) (ERISA provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan")).

119. *Allied-Bruce*, 513 U.S. at 283–84 (O'Connor, J., concurring).

use in all states where it conducts business. The impact of this change on consumers varies based on one's perspective. On one hand, it increases the likelihood that consumers will be compelled to arbitrate any dispute individually, meaning that many potential claims become cost prohibitive—thereby eliciting the exact scenario that the *Discover Bank* rule was intended to prevent.[120] In this scenario, consumers who have suffered only minimal damages cannot likely justify proceeding to arbitration and, as a result of the lack of financial damages, will likely be unable to find attorneys willing to assist them. This results in the arbitration provision operating as a de facto exculpatory clause.[121] Alternatively, having the ability to draft fewer agreements, coupled with more certainty as to the enforcement of these agreements, results in a reduction of costs to businesses. In some cases, the reduced costs of drafting and litigating these agreements could be quite substantial. Theoretically, this should reduce the gross costs of producing products or rendering services, allowing companies to offer goods and services to consumers at a lower price without affecting profitability. In practice, however, it is unlikely that the majority of businesses would pass this savings on to the consumer.[122]

B. Another Battle Lost for the Presumption Against Preemption

While, admittedly, there is some inherent benefit to be derived from having a consistent line of Supreme Court jurisprudence, the violation of a fundamental principle of federalism is significantly more problematic to both the judiciary and the country at large.

In the final lines of his dissent, Justice Breyer addressed an important concept relating to preemption in general, recognizing that the principles of federalism, upon which this country was founded, dictate that state laws be given the benefit of the doubt, in the form of a general

120. *Discover Bank*, 113 P.3d at 1110 (majority opinion).

121. *See id.* at 1008–10.

122. Much has been written on the topic of the "pass-through" of cost reductions to the end consumer. *See, e.g.*, F.T.C. v. CCC Holdings, Inc., 605 F.Supp.2d 26, 74 (D.D.C. 2009) (stating that even if cost savings were generated, there was a lack of evidence to indicate that the savings would accrue to the benefit of consumers). Most frequently this topic arises in the context of mergers and anti-trust litigation where courts require a showing "that the intended acquisition would result in significant economies and that these economies ultimately would benefit competition and, hence, consumers." F.T.C. v. University Health, Inc., 938 F.2d 1206, 1223 (11th Cir. 1991); *see also* Jamie Henikoff Moffitt, *Merging in the Shadow of the Law: The Case for Consistent Judicial Efficiency Analysis*, 63 VAND. L. REV. 1697, 1745 (2010) (describing consumer "pass-through" as one of three factors courts use to determine the evaluate efficiencies of merging entities). This "Passing-On" requirement exists because of the general belief that businesses are unlikely to pass along savings to a consumer unless market forces compel them to do so. *See* Paul L. Yde & Michael G. Vita, *Merger Efficiencies: Reconsidering the "Passing-On" Requirement*, 64 ANTITRUST L.J. 735, 740 (stating that both proponents and opponents of a passing-on requirement have adopted "a conception of market conduct in which a firm will 'pocket' merger-specific efficiencies in the form of higher profits *unless* competition forces the firm to pass on the efficiencies in the form of lower prices") (emphasis in original). *But see id.* at 743–46 (arguing that other factors, including the firm-specific demand and efficiencies, are more indicative of market price effects).

presumption against preemption.[123] Against this backdrop, a review of the prominent preemption cases, from *Southland* to *Concepcion*, reveals that the decisions could, and arguably should, have been decided in the alternative.

In *Southland*, the Supreme Court held that Section 2 of the FAA preempted California's Franchise Investment Law (FIL).[124] Interestingly, only Justice Stevens' concurring and dissenting opinion discussed the presumption against preemption.[125] In his opinion, Justice Stevens argued that because the language of Section 2 "does not define what grounds for revocation may be permissible . . . the judiciary must fashion the limitations as a matter of federal common law."[126] Justice Stevens further reasoned that the Court should recognize that by including an exception within Section 2, Congress intended "to make arbitration agreements as enforceable as other contracts, but not more so."[127]

Justice Stevens contended that the anti-waiver provision in the FIL was justified by a public policy concern, and because public policy provides grounds for the revocation of a contract at common law, this provision, when viewed together with a presumption against preemption, should have prevented the California law from being preempted by the FAA.[128]

Furthermore, Justice O'Connor argued in her dissent that Congress's intent was to create "a procedural statute, applicable only in federal courts, [which was] derived . . . from the federal power to control the jurisdiction of the federal courts," and as a result, the Court should have held that the FAA does not apply in state courts.[129]

Despite having two sufficient bases for not preempting the California law—a narrow justification in public policy and a broader justification in the FAA's inapplicability in state courts—the Supreme Court instead dispensed with the presumption against preemption and held that the FIL violated the Supremacy Clause.[130] This decision not only infringed upon a "field traditionally occupied by State law,"[131] thus violat-

123. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1762 (2011) (Breyer, J., dissenting) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." (alteration in original) (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996))).

124. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984).

125. *See id.* at 18 (Stevens, J., concurring in part and dissenting in part).

126. *Id.* at 19.

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

128. *Id.* at 20–21. The Court applies a presumption against preemption in areas traditionally occupied by the states, including contract law. Drahozal, *supra* note 9, at 398 (citing United States v. Locke, 529 U.S. 89, 108 (2000)).

129. *Southland*, 465 U.S. at 25, 31 (O'Connor, J., dissenting).

130. *Id.* at 15–16 (majority opinion).

131. *Id.* at 18 (Stevens, J., concurring in part and dissenting in part) (citing Ray v. Atlantic Richfield Co., 435 U.S. 151, 157 (1978)).

ing the principles of federalism, but also influenced each of the subsequent cases based on the principle of stare decisis.[132]

In *Perry*, despite indicating that state law defenses are "available if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,"[133] the Court brushed aside the public policy justification for the California labor provision and held the law preempted by the FAA.[134] The dissenting opinions of Justices Stevens and O'Connor again addressed the inappropriateness of applying the FAA in state court proceedings[135] and outlined a public policy defense—the desire to prevent employers from forcing employees to waive their right to bring suit in the court system—that should have protected the state statute from preemption.[136] Thus, as in *Southland*, the Supreme Court was content to disregard the notion of a presumption against the preemption of state laws despite the existence of valid reasons that would have allowed the Court to defer to the California courts and legislature.

In light of Montana Supreme Court Justice Trieweiler's concurring opinion setting forth the "real" reasons for upholding the statute,[137] in *Doctor's Associates*, the Supreme Court was limited in its ability to find that a Montana statute was not preempted by the FAA. The plaintiffs argued to the United States Supreme Court that the Montana statute could be upheld as nondiscriminatory because the statutory notice requirement was merely a state law rule requiring that "[u]nexpected provisions in adhesion contracts must be conspicuous."[138] This interpretation would be consistent with the FAA because it does not apply only to arbitration agreements, but instead presents a requirement, under state law, that govern contracts generally. The Court, however, did not address this argument because the Montana Supreme Court failed to cite any such

132. *See, e.g.*, Allied-Bruce Terminix Co. v. Dobson, 513 U.S. 265, 284 (1995) (O'Connor, J., concurring).

133. Perry v. Thomas, 482 U.S. 483, 492 n.9 (1987).

134. *Id.* at 491.

135. *Id.* at 493-94 (Stevens, J., dissenting, O'Connor, J., dissenting).

136. *Id.* at 495 (O'Connor, J., dissenting); *see also id.* at 493-94 (Stevens, J., dissenting).

137. Bruhl, *supra* note 38, at 1459 (citing Casarotto v. Lombardi, 886 P.2d 931, 939 (Mont. 1994) (Trieweiler, J., concurring), *vacated, sub nom*. Doctor's Assocs., Inc. v. Casarotto, 515 U.S. 1129 (1995)). Justice Trieweiler's concurring opinion included the following language:

> What I would like the people in the federal judiciary, especially at the appellate level, to understand is that due to their misinterpretation of congressional intent when it enacted the Federal Arbitration Act, and due to their naive assumption that arbitration provisions and choice of law provisions are knowingly bargained for, all of these procedural safeguards and substantive laws are easily avoided by any party with enough leverage to stick a choice of law and an arbitration provision in its pre-printed contract and require the party with inferior bargaining power to sign it. The procedures we have established, and the laws we have enacted, are either inapplicable or unenforceable in the process we refer to as arbitration.

Casarotto v. Lombardi, 886 P.2d 931, 940 (Mont. 1994) (Trieweiler, J., concurring).

138. *Casarotto*, 517 U.S. at 687 n.3.

general common law doctrine.[139] Therefore, had Justice Trieweiler not been so candid in his comments disparaging arbitration and adhesionary arbitration clauses, this statute might have been upheld as not discriminating against arbitration, but creating a general requirement that terms in a contract must comport with the reasonable expectations of the consumer.[140]

In *Concepcion*, sufficient grounds existed to find that the FAA did not preempt the *Discover Bank* rule, particularly when considered in conjunction with the underlying presumption against preemption inherent in the federal system. While the majority argued that the rule "treat[s] arbitration agreements with class arbitration waivers differently from other contracts, . . . [rendering] any arbitration agreement containing a class arbitration waiver . . . *per se* unenforceable,"[141] the *Discover Bank* rule is facially based on the common law principle of unconscionability,[142] which presents a basis for invalidating contracts generally, thereby falling within the saving clause of Section 2 of the FAA.

In isolation, each of the cases outlined in this section had sufficient grounds upon which to uphold the statute against a challenge of preemption under the FAA, but when viewed collectively, these cases represent a clear departure from the presumption against preemption and signify an infringement upon States' rights as "independent sovereigns in our federal system."[143]

Throughout the years, many of the Supreme Court Justices have articulated misgivings about this line of decisions,[144] which *Concepcion* now joins. As the author of the original dissenting opinion in *Southland*,[145] Justice O'Connor remained highly critical of these decisions involving preemption under the FAA.[146] This criticism included a reiteration of her belief that this line of precedent was "'unfaithful to congressional intent, unnecessary, and in light of the [Act's] antecedents and the

139. Bruhl, *supra* note 38, at 1460 (quoting Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 n.3 (1996)).

140. *Id.* at 1461–62 (citing Kloss v. Edward D. Jones & Co., 54 P.3d 1, 69 (Mont. 2002)).

141. Lampley, *supra* note 53, at 485–86.

142. Discover Bank v. Superior Court, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by* AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740 (2011); *see also Concepcion*, 131 S. Ct. at 1746.

143. *Concepcion*, 131 S. Ct. at 1762 (Breyer, J., dissenting) (quoting Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996)) ("[B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action." (alteration in original)).

144. *See, e.g.*, Southland Corp. v. Keating, 465 U.S. 1, 21–36 (1984) (O'Connor, J., dissenting); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 282–84 (1995) (O'Connor, J., concurring); (Perry v. Thomas, 482 U.S. 483, 494–95 (1987) (O'Connor, J., dissenting).

145. *Southland*, 465 U.S. at 21–36 (O'Connor, J., dissenting).

146. *See, e.g.*, *Allied-Bruce*, 513 U.S. at 282–84 (O'Connor, J., concurring); *Perry*, 482 U.S. at 494–95 (O'Connor, J., dissenting).

intervening contraction of federal power, inexplicable . . . .'"[147] Further, Justice O'Connor stated that "[a]lthough each decision has built logically upon the decisions preceding it, the initial building block in *Southland* laid a faulty foundation."[148] Justice O'Connor also underscored the inconsistency in the Supreme Court holdings under the FAA, opining that although Congress may limit or preclude a waiver of a judicial forum, the Court has never explained why state legislatures should not also have such power.[149] She further recognized that although a litany of Supreme Court decisions asserted that the pre-emptive effect of a federal statute is fundamentally a question of congressional intent, "over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."[150] Perhaps most striking, however, was her eventual capitulation, acknowledging that in the ten years following the decision in *Southland*, after subsequent cases had built upon its reasoning and "parties [had] undoubtedly made contracts in reliance on the Court's interpretation of the [FAA]," she was "persuaded by considerations of stare decisis . . . to acquiesce in today's judgment."[151]

Justice Stevens, who wrote a decision concurring in part and dissenting in part in *Southland*,[152] further criticized the holding in his dissenting opinion in *Perry v. Thomas*, stating that through the Court's decision in *Southland*, the Supreme Court had, for all intents and purposes, effectively rewritten the FAA "to give it a pre-emptive scope that Congress certainly did not intend."[153] Justice Stevens further explained that because the states retain the power to "exempt certain categories of disputes from arbitration" this authority "should be preserved unless Congress decides otherwise . . . ."[154]

Justice Scalia, although not on the Court at the time *Southland* was decided, also asserted that this decision "clearly misconstrued the Federal Arbitration Act," stating that "[a]dhering to *Southland* entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes."[155] Justice Scalia further explained that in spite of this belief, he would not dissent from future opinions based on *Southland*, but will "stand ready" to overrule the decision should four other

147. *Perry*, 482 U.S. at 494 (O'Connor, J., dissenting) (alteration in original) (quoting *Southland*, 465 U.S. at 36 (O'Connor, J., dissenting)).

148. *Allied-Bruce*, 513 U.S. at 284 (O'Connor, J., concurring).

149. *Perry*, 482 U.S. at 494 (O'Connor, J., dissenting) (citing *Southland*, 465 U.S. at 21 (Stevens, J., concurring in part and dissenting in part)).

150. *Allied-Bruce*, 513 U.S. at 283 (O'Connor, J., concurring).

151. *Id.* at 283–84.

152. *Southland*, 465 U.S. at 17 (1984) (Stevens, J., concurring in part and dissenting in part).

153. *Perry*, 482 U.S. at 493 (Stevens, J., dissenting).

154. *Id.* at 494.

155. *Allied-Bruce*, 513 U.S. at 284–85 (Scalia, J., dissenting).

Justices decide to do so, as "*Southland* will not become more correct over time."[156]

The primary problem with the *Concepcion* decision is that it relies upon the faulty interpretation of the FAA's preemptive effect established in *Southland*. The Court's categorization of the FAA as a preemptive substantive law ignores the primary factor in the preemption analysis: congressional intent.[157] The FAA and its legislative history are devoid of reference, either express or implied, to its effect on state law.[158] This reasoning alone should have been sufficient to compel a decision against any preemptive effect when contemplated against the backdrop of federalism.[159]

In addition to the congressional intent problem, the line of decisions from *Southland* to *Concepcion* conflict with the principle of state sovereignty inherent in the federalist system.[160] This concept, which dates back to the Eleventh Amendment of the United States Constitution, was articulated by the Supreme Court as follows: "The constitutionally mandated balance of power between the States and the Federal Government was adopted by the Framers to ensure the protection of our fundamental liberties."[161] The Court's interference with this balance of power infringes on States' rights by failing to acknowledge their retention of sovereign power.[162] The idea that the Supreme Court "should not go far out in front of Congress in discovering national policies in silent statutes when the effect is such a large-scale intrusion into state autonomy on a matter of traditional state regulation"[163] has been violated by the Court's interpretation of FAA preemption in *Southland* and its progeny.

Beyond its infringement upon traditional state powers, FAA preemption has also invalidated numerous state laws designed to protect individual consumers.[164] The Court's extension of FAA preemption in

156. *Id.* at 285.

157. *See* Schwartz, *supra* note 14, at 554–57; Schwartz, *supra* note 34, at 7–10; *see also supra* notes 46–51 and accompanying text. *But see* Christopher R. Drahozal, *Revisiting* Southland, 10 DISP. RESOL. MAG. 23, 27–28 (2004).

158. Schwartz, *supra* note 34, at 8 (citing Southland Corp. v. Keating, 465 U.S. 1, 11–12 (1984).

159. *See supra* notes 29–34 and accompanying text.

160. Schwartz, *supra* note 14, at 571–72.

161. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) (internal quotation marks omitted) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1985)).

162. *See* Gregory v. Ashcroft, 501 U.S. 452, 460–61 (1991) (requiring Congress to make its preemptive intent "unmistakably clear in the language of the statute" so as to "acknowledg[e] that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").

163. Schwartz, *supra* note 34, at 30.

164. *E.g.*, Miller v. Corinthian Colls., Inc., 769 F.Supp.2d 1336, 1343 (D. Utah 2011) (holding that the FAA preempted portions of the Utah Consumer Sales Practices Act, UTAH CODE ANN. 1953 § 13-11-4 in a deceptive trade practice suit); Abela v. General Motors Corp., 669 N.W.2d 271, 278 (Mich. Ct. App. 2003) (holding that the FAA preempted provisions of a motor vehicle lemon law statute, M.C.L.A. §§ 257.1401–1409, prohibiting waiver of rights and remedies); Estate of Ruszala *ex rel.* Mizerak v. Brookdale Living Cmtys., Inc., 1 A.3d 806, 809 (N.J. Super. Ct. App. Div. 2010)

Concepcion represents a further shift towards the protection of corporate and commercial interests at the expense of consumer protection.

C. Practical Effects of the Decision

The *Concepcion* decision will undoubtedly have practical effects on not only future preemption jurisprudence but also in the drafting of consumer contracts. While the impact that the *Concepcion* decision will have on commercial agreements may not be fully appreciated for years to come, the Court's decision has already influenced a variety of cases across the nation.

One of the first decisions to apply the Supreme Court's holding from *Concepcion* was *Arellano v. T-Mobile USA, Inc*.[165] In this case, the plaintiff sought injunctive relief and other remedies for claims brought under the California Unfair Competition Law, California Consumer Legal Remedies Act, California False Advertising Act, and the Federal Communications Act.[166] The defendant moved to compel arbitration and the plaintiff opposed on the grounds that these claims were not subject to arbitration as a matter of public policy,[167] citing previous California Supreme Court decisions.[168] The Supreme Court's holding in *Concepcion* compelled the court's decision, stating that the FAA "preempts California's exemption of claims for public injunctive relief from arbitration" in federal court, "despite public policy arguments thought to be persuasive in California."[169]

Although, on its face, the *Concepcion* decision served only to overturn California's *Discover Bank* rule, some commentators have suggested that the holding is broad enough to apply nationwide.[170] Because the *Concepcion* decision presents a tremendous obstacle to the invalidation of arbitration and class waivers on the grounds of unconscionability, that attorneys may focus on alternative grounds upon which to invalidate arbitration clauses, such as issues of contract formation or contract revocation. In theory, this should provide a legitimate means of invalidating agreements that contain arbitration clauses because the saving clause of Section 2 has been interpreted by the Supreme Court to treat agreements

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(holding that the FAA preempted a prohibition of arbitration provisions in living facilities' contracts contained in the Nursing Home Responsibilities and Rights of Residents Act, N.J.S.A. 30:13-8.1).

165. No. C 10–05663 WHA, 2011 WL 1842712, at *1 (N.D. Cal. May 16, 2011).

166. *Id.*

167. *Id.* at *1–2.

168. *Id.* at *1 (citing Broughton v. Cigna Healthplans of Cal., 988 P.2d 67, 75–76 (1999) (holding that claims for public injunctive relief brought under the CLRA are not subject to arbitration); Cruz v. PacifiCare Health Sys., 66 P.3d 1157, 1165 (2003) (holding that claims for public injunctive relief brought under the UCL are not subject to arbitration)).

169. *Arellano*, 2011 WL 1842712, at *2.

170. *E.g.*, Stephen G. Harvey & Angelo A. Stio, III, *Supreme Court Upholds Class Action Waiver Provisions in* AT&T Mobility LLC v. Concepcion, PEPPER HAMILTON LLP CLASS ACTION CLIENT ALERT (Apr. 28, 2011), http://www.pepperlaw.com/publications_article.aspx?ArticleKey=2094.

containing arbitration clauses "upon the same footing" as those without such provisions.[171] Furthermore, this approach is consistent with the Court's efforts "to make arbitration agreements as enforceable as other contracts, but not more so."[172]

Concepcion will also likely have a far-reaching impact on the drafting of contracts. With the elimination of what at least one commentator has argued is the principal means by which to invalidate arbitration clauses,[173] businesses will undoubtedly be encouraged to incorporate arbitration provisions into a greater number and broader range of contracts.[174] These include not only a wider breadth of consumer service and product contracts, but potentially into employment agreements as well.[175]

Moreover, while the arbitration agreement in *Concepcion* had many consumer-friendly provisions,[176] in light of this decision, the motivation for businesses to include such terms is severely diminished if not eliminated altogether. The inclusion of the favorable terms in the AT&T agreement was likely done in an effort to directly combat any potential allegation that the inclusion of an arbitration clause was substantively unconscionable. In fact, the district court specifically noted the favorable consumer treatment in this agreement, stating that the dispute resolution mechanism found in this agreement was "quick, easy to use, and prompts full or . . . even excess payment to the customer *without* the need to arbitrate or litigate."[177] With the unconscionability loophole[178] now closed, companies drafting consumer agreements are no longer incentivized to include such consumer-friendly terms in their agreements because the need to combat unconscionability was effectively eradicated by the *Concepcion* Court.

171. *E.g.*, Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989).

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

173. *See, e.g.*, Bruhl, *supra* note 38, at 1436–37.

174. Jeffrey M. Judd, AT&T Mobility v. Concepcion—*Supreme Court Enforces Class Action Waiver*, JUDD LAW GROUP PUBLICATIONS/TALKS (May 11, 2011), http://juddlawgroup.com/supreme-court-enforces-class-action-waiver/.

175. *Id.*

176. The agreement provided that a consumer may initiate a dispute by completing a form on AT&T's website. AT&T then had the option to settle any claim presented. If the claim proceeded to arbitration, AT&T was required to pay all costs for non-frivolous claims. For claims of $10,000 or less, arbitration could be conducted in person, by telephone, or based only on submissions. AT&T was precluded from recovering attorney's fees and in the event that a customer received an arbitration award greater than AT&T's last written settlement offer, AT&T was required to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees. AT&T Mobility L.L.C. v. Concepcion, 131 S. Ct. 1740, 1744 (2011) (majority opinion).

177. Laster v. T-Mobile USA, Inc., 2008 WL 5216255, *11 (S.D. Cal., Aug. 11, 2008), *rev'd sub nom*. AT&T Mobility L.L.C v. Concepcion, 131 S. Ct. 1740 (2011).

178. *See* Bruhl *supra* note 38, at 1436 (describing unconscionability as an "outlet" for "court[s] wishing to strike back against arbitration"); Lampley *supra* note 53, at 489–91 (characterizing unconscionability as the "defense of choice" in cases contesting the validity of arbitration clauses).

D. Potential Cures

Should the Court decide to reconsider its decision in Concepcion and seek a greater balance between commercial interest and consumer fairness, the current line of jurisprudence may limit its ability to do so.

One such method would be for the Supreme Court to overturn the line of decisions dating back to *Southland*. Currently, none of the Justices who comprised the majority in *Southland* remain on the Supreme Court. More importantly, six of the nine current Justices have, at some point, expressed displeasure with or misgivings about this line of decisions.[179] While this solution is not impossible, it is improbable given the *Concepcion* decision and established jurisprudence.[180] There have been numerous opportunities over the past twenty-seven years to overturn *Southland*, and even with a collection of prominent legal scholars advocating for this course of action,[181] the Supreme Court has declined to do so.

A more direct approach to remedying the effect of the *Concepcion* decision on both the consumer and States' rights could come in the form of a legislative solution. Clearly, the most direct and certain way to effect change in this area would be though a congressional amendment of the FAA. By amending the saving clause to reflect a more clearly defined exception to the general application of FAA principles, Congress could provide more detailed direction to the Supreme Court as to the intended scope of the FAA and any potential exceptions to its provisions.

The process of amending the FAA may have already begun. The proposed Arbitration Fairness Act of 2011[182] seeks to amend the FAA to restrict the enforceability of arbitration clauses in employment, consum-

179. Justice Breyer authored the dissenting opinion in *Concepcion*, 131 S. Ct. at 1756–62 (Breyer, J. dissenting), which Justices Ginsburg, Sotomayor, and Kagan joined. Justice Thomas authored dissenting opinions in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (Thomas, J. dissenting), and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285–97(1995) (Thomas, J. dissenting). Justice Scalia joined Justice Thomas's dissent and authored a separate dissenting opinion in *Allied-Bruce*, 513 U.S. at 284–85 (Scalia, J. dissenting).

180. The inertia of the line of decisions from *Southland* to *Concepcion*, coupled with the Supreme Court's general reluctance to overturn cases render this potential solution highly unlikely. *See* Stephen F. Smith, *Activism as Restraint: Lessons from Criminal Procedure*, 80 TEX. L. REV. 1057, 1102 (2002) ("Unless we are to assume that a majority of the Supreme Court only disagrees with two cases a year on average, which seems highly implausible, the rate of overrulings suggests a general reluctance to overturn precedent."); *see also Allied-Bruce*, 513 U.S. at 284 (O'Connor, J., concurring).

181. *See* Brief of Law Professors as Amici Curiae in Support of Respondents, Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (No. 02-634), 2003 WL 1701513; *see also* Drahozal, *supra* note 157, at 23.

182. Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011). This legislation was originally presented in 2007 and was recently reintroduced by Senator Al Franken.

er, and civil rights cases.[183] This legislation, according to Senator Franken, is aimed at rectifying the Court's decision in *Concepcion*.[184]

Alternatively, there is another recent legislative development that could have a significant effect upon the landscape of FAA preemption. The Dodd–Frank Wall Street Reform and Consumer Protection Act[185] contains a directive that requires the Consumer Financial Protection Bureau to "conduct a study of, and . . . provide a report to Congress concerning, the use of agreements providing for arbitration of any future dispute between covered persons and consumers in connection with the offering or providing of consumer financial products or services."[186] The statute also provides the Consumer Financial Protection Bureau with the authority to enact regulations that prohibit or limit the use of arbitration provisions for the protection of consumers if the prohibitions or limitations serve the public interest.[187] It remains to be seen, however, if the Supreme Court would find any such regulations enacted by the Consumer Financial Protection Bureau to be in conflict with the FAA.[188] Given the Supreme Court's current interpretation of FAA preemption, the Dodd–Frank legislation may not be able to affect this jurisprudence without an amendment to the FAA itself.

CONCLUSION

Although the holding in *Concepcion* is consistent with the holdings in *Southland*, *Perry*, and *Doctor's Associates*, these decisions collectively demonstrate a departure from one of the core values outlined by the nation's founders: an inherent deference to States' rights in the form of a presumption against preemption. By holding that the FAA preempted the *Discover Bank* rule, the Supreme Court wrongly decided *AT&T Mobility L.L.C. v. Concepcion* and, in doing so, continued down a path which ultimately deviates from the fundamental principles of federalism embodied in the preemption doctrine.

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183. Ashley Cummings, AT&T Mobility LLC v. Concepcion*: U.S. Supreme Court Holds That the FAA Preempts State Court Rule Finding Class Waivers in Arbitration Contracts Unconscionable*, THE LITIGATOR SECTION, ATLANTABAR.ORG (May 2011), http://www.atlantabar.org/associations/6890/files/Article%202_ConcepcionArticle.pdf

184. *Id.*

185. Pub. L. No. 111-203, 124 Stat. 1376 (2010).

186. 12 U.S.C.A. § 5518(a) (2010).

187. §5518(b).

188. Cummings, *supra* note 183.

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