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Beyond Nondiscrimination: *AT&T Mobility LLC v. Concepcion* and the Further Federalization of U.S. Arbitration Law

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On April 27, 2011, the U.S. Supreme Court decided *AT&T Mobility LLC v. Concepcion*, which presented the question whether the Federal Arbitration Act (FAA) preempts state law that denies the enforcement of an arbitration agreement as unconscionable because the agreement bars class arbitration.¹ The Court held that California's version of the unconscionability doctrine, which renders consumer arbitration agreements barring classwide arbitration unconscionable, was not one of the "grounds as exist at law or in equity for the revocation of any contract" protected from federal preemption under the FAA.²

Concepcion has drawn widespread attention because of its potential effects on consumer class actions. However, the decision is also important because it represents yet another step in the federalization of U.S. arbitration law at the expense of state law. The decision in *Concepcion* is part of a series of cases in which the U.S. Supreme Court has considered the line between state contract law and federal arbitration law. The case law has created some tension as to the relative roles of state and federal law in the interpretation and enforcement of arbitration agreements. The U.S. Supreme Court has said, on the one hand, that arbitration is a matter of contract and that contracts are ordinarily governed by state law. On the other hand, it has said that federal restraints on state contract law must be imposed to prevent

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

2. *Id.* at 1742.

frustration of the FAA's main purposes—to reverse the traditional judicial opposition to arbitration and to ensure the enforcement of arbitration agreements according to their terms. *Concepcion* increases the federal restraints on state contract law by holding that even the application of a generally available contract defense like unconscionability, as interpreted by a state's highest court, can be preempted under the FAA.³ Of equal importance, *Concepcion* also expands the implicit purposes of the FAA—by preempting the application of general state contract defenses when those defenses conflict with fundamental attributes of arbitration as envisioned in the FAA.⁴

In finding preemption of California's unconscionability defense, *Concepcion* made clear that section 2 of the FAA (the Saving Clause)⁵ does not prevent preemption of state contract rules that conflict with the federal vision of arbitration—streamlined, efficient, and party-directed dispute resolution.⁶ The Court's ruling found that a rule requiring classwide arbitration absent express party agreement conflicts with these federal principles.⁷ Thus, the U.S. Supreme Court held that California's version of unconscionability was preempted.⁸

Part I of this Article addresses the scope and provisions of the FAA relevant to the decision in *Concepcion* and the federal–state balance in arbitration law, or “arbitral federalism.” Part II discusses the U.S. Supreme Court's past arbitral–federalism decisions. Part III explains the issues presented in *Concepcion* and summarizes the majority, concurring, and dissenting opinions. Finally, in Part IV explains the implications of the decision for arbitral federalism. This Part discusses how *Concepcion* furthers the expansion of federal arbitration law at the expense of state contract law, and how the decision follows a line of cases that makes federal common law dominant in arbitration cases.

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3. *Id.* at 1761 (Breyer, J., dissenting).
 4. *Id.* at 1745.
 5. *See infra* text accompanying note 17.
 6. *Id.*
 7. *Id.* at 1748.
 8. *Id.*

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I. THE ROLE OF STATE LAW UNDER THE FAA

The FAA, enacted in 1925, prescribes federal rules for all arbitration agreements that fall within the broad scope of the Commerce Clause.⁹ Section 2 of the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, *save upon such grounds as exist at law or in equity for the revocation of any contract.*¹⁰

Section 2 requires courts to interpret and enforce an arbitration agreement as they would any other contract. Arbitration agreements may only be denied enforcement “upon such grounds as exist at law or in equity for the revocation of any contract.”¹¹ Section 2 thus establishes a federal rule that courts cannot disfavor arbitration agreements as compared to other types of contracts. Instead, courts must apply general contract principles to determine the validity of arbitration agreements. Aside from preventing courts from treating arbitration agreements less favorably than other contracts—nondiscrimination, that is—section 2 does not expressly impose any federal rules regarding the interpretation and enforcement of arbitration agreements.¹²

As discussed in the next section, however, the U.S. Supreme Court has applied FAA section 2 to impose federal limitations on the application of state law to arbitration agreements beyond mere nondiscrimination.¹³ These decisions have created a body of substantive federal common law that imposes various rules favoring enforcement of arbitration agreements.¹⁴ In so doing, these decisions have led to difficult questions regarding the preemptive scope of section 2 and the federal common law that the courts have established pursuant to it.

9. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995) (holding that the FAA’s scope is coextensive with the Commerce Clause).

10. 9 U.S.C. § 2 (1947) (emphasis added).

11. *Id.*

12. *See id.*

13. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1957).

14. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984).

II. PRIOR DECISIONS ON ARBITRAL FEDERALISM

In order to understand *Concepcion*'s implications for arbitral federalism, it is helpful to understand the history of the U.S. Supreme Court's jurisprudence in the area. The U.S. Supreme Court has decided a number of cases that, explicitly and implicitly, address the respective roles of state and federal law regarding the interpretation and enforcement of arbitration agreements. The discussion of these cases below traces part of the evolution of FAA section 2 through what Justice O'Connor has called "the FAA's . . . colorful history."¹⁵

The U.S. Supreme Court has established generally applicable federal rules on the interpretation and enforceability of arbitration agreements, while at other times emphasizing the primary role of state contract law in the interpretation and enforceability of arbitration agreements under FAA section 2. These two approaches seem to be dictated by sometimes-competing views on how to reverse judicial hostility to arbitration—by enforcing arbitration agreements like any other contract or by supporting (and defining the contents of) a federal policy favoring arbitration. The tension between these two views is evident in *Concepcion*.

A. *The FAA Creates Federal Substantive Law*

One of the U.S. Supreme Court's earliest federalism decisions concerning the FAA was *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, decided in 1967.¹⁶ In *Prima Paint*, the Court noted that the FAA's purpose was to "make arbitration agreements as enforceable as other contracts, but not more so."¹⁷ But the Court also recognized a federal rule relating to the interpretation and enforcement of arbitration agreements that went beyond equalizing arbitration agreements and other contracts under state law.¹⁸ The Court held that arbitrators, and not the courts, must decide a claim that the contract in which an arbitration clause is contained

15. *Id.* at 35 (O'Connor, J., dissenting).

16. *Prima Paint*, 388 U.S. 395. The U.S. Supreme Court decided eight cases under the FAA before *Prima Paint*. Of those cases, *Bernhardt v. Polygraphic Co. of Am.*, 350 U.S. 198 (1956) might be considered a federalism decision. The Court there held that state law, not the FAA, governed the enforcement of an arbitration agreement that did not involve a maritime transaction or a transaction involving commerce. See *Bernhardt*, 350 U.S. at 200-01. *Bernhardt* was important because it suggested that the right to arbitration was a matter of "substantive" law rather than procedure, and thus that the FAA might prescribe substantive rights, a holding which later provided a basis for the Court's application of section 2 to cases in state courts. See *id.* at 204.

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

18. See *id.* at 419-23.

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was fraudulently induced.¹⁹ The Court determined that Congress had the constitutional authority under the Commerce Clause to establish this separability principle for federal courts; it did not decide whether the FAA applied in state courts.²⁰ The Court implicitly recognized in *Prima Paint* that, at least with regard to actions in federal court, courts could apply federal rules beyond section 2's nondiscrimination principle to ensure the enforcement of arbitration agreements.

It was not until the early 1980s, however, that the U.S. Supreme Court firmly established that the FAA does more than render arbitration agreements enforceable in federal court. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*²¹ and *Southland Corp. v. Keating*,²² the Court established principles that substantially expanded the role of the FAA and led to much of the confusion that exists today.

In *Moses H. Cone*, the Court described section 2 as "the primary substantive provision of the Act," and stated that it is a "congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."²³ The Court held that section 2 "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act," whether in state or federal court.²⁴ Thus, courts should not look solely to state contract law when determining the extent to which an arbitration agreement is valid and enforceable because "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."²⁵ The Court announced a federal rule that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability."²⁶

19. *See id.* at 403.

20. *See id.* at 405.

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

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

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

24. *Id.*

25. *Id.*

26. *Id.* at 24-25.

The Court continued the federalization of arbitration law in *Southland*, in which it reaffirmed that section 2 of the FAA “declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.”²⁷ The Court concluded that the FAA “rests on the authority of Congress to enact substantive rules under the Commerce Clause,” and, given Congress’s intent to end judicial hostility to arbitration agreements and the failure of state law to correct that hostility, the Court held that FAA section 2 applies in both federal and state courts.²⁸ The Court also held that section 2 “foreclose[s] state legislative attempts to undercut the enforceability of arbitration agreements.”²⁹ Applying these principles, the Court concluded that FAA section 2 preempted a California statute that required judicial resolution of claims relating to franchise disputes.³⁰

Justice Stevens concurred in part and dissented in part.³¹ He agreed with Justice O’Connor, who dissented, that the 1925 Congress, which passed the FAA, intended the statute to be procedural in nature and not to create any substantive federal law.³² But Justice Stevens explained that “intervening developments in the law” compelled the conclusion that the FAA applies in both federal and state courts.³³ Justice Stevens dissented, in part, because he believed that California’s policy against arbitration of franchise disputes was a ground to revoke a contract under section 2’s Saving Clause.³⁴ Because the Saving Clause “does not define what grounds for revocation may be permissible,” Justice Stevens maintained that “the judiciary must fashion the limitations as a matter of federal common law.”³⁵ Instead of adopting uniform federal grounds to invalidate arbitration agreements, Justice Stevens argued that federal courts should adopt state law as federal common law, provided that the state grounds do not conflict with section 2’s policies.³⁶

Justice O’Connor, joined by Justice Rehnquist, dissented. She argued that the majority improperly extended federal power because “Congress intended to require federal, not state, courts to respect arbitration

27. *Southland*, 465 U.S. at 10.

28. *See id.* at 11-15.

29. *Id.* at 16.

30. *See id.* at 10, 16.

31. *Id.* at 17 (Stevens, J., concurring in part and dissenting in part).

32. *Id.*

33. *See id.* at 18-21.

34. *See id.*

35. *Id.* at 19.

36. *See id.* at 19-21.

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agreements.”³⁷ Justice O’Connor surveyed the legislative history of the FAA and argued that “the 1925 Congress emphatically viewed the FAA as a procedural statute, applicable only in federal courts, derived . . . largely from the federal power to control the jurisdiction of the federal courts.”³⁸

Moses H. Cone and *Southland* began the expansion of the federal common law of arbitration. They held that section 2 creates substantive law that preempts state law and that applies even in state court. However, these cases theoretically left intact the application of state contract law to the interpretation of arbitration agreements and to general defenses to enforcement of arbitration agreements.

B. The Court Wavers Between Establishing Federal Substantive Law and Emphasizing State Contract Law

After *Moses H. Cone* and *Southland* established that FAA section 2 creates federal substantive law that applies in federal and state court, questions inevitably arose as to the preemptive scope of that substantive law. Subsequent decisions addressed these questions.

The Court’s 1987 decision in *Perry v. Thomas*³⁹ is particularly relevant to the issues in *Concepcion*. *Perry* held that FAA section 2 preempted a California statute that permitted suits to collect unpaid wages “without regard to the existence of any private agreement to arbitrate.”⁴⁰

The Court’s decision included an important footnote regarding federalism concerns in which the Court stated that “[a] choice-of-law issue . . . arises when defenses such as . . . unconscionability arguments are asserted.”⁴¹ According to the Court, “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 [the FAA]” when deciding whether an arbitration agreement can be revoked under section 2’s Saving Clause.⁴² The Court reasoned that:

37. *See id.* at 22-23 (O’Connor, J., dissenting).

38. *Id.* at 25.

39. *Perry v. Thomas*, 482 U.S. 483 (1987).

40. *See id.* at 484, 490-91 (internal quotation marks omitted).

41. *Id.* at 492 n.9.

42. *Id.*

[S]tate law, whether of legislative or judicial origin, is applicable [under section 2's Saving Clause] 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 § 2.⁴³

This language is important to *Concepcion* because it states the standard for the application of contract defenses under the Saving Clause as well as suggests that those defenses are a matter of state law.

While Justice Stevens reasoned in *Southland* that section 2's Saving Clause authorized the creation of federal common law defenses to enforcement of arbitration agreements and that courts should look to state law to define those defenses, the Court in *Perry* suggested that state contract law directly applies under the Saving Clause.⁴⁴ Both Justice Stevens in *Southland* and the Court in *Perry* agreed that federal common law preempts state contract defenses in limited circumstances.⁴⁵ The *Perry* Court explained that courts may not “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.”⁴⁶ The issue before the Court did not require this discussion of unconscionability and other contract defenses, and thus these statements might be considered dicta.

In a case decided two years after *Perry*, the Court turned its emphasis from the preemptive scope of federal common law on the enforcement of arbitration agreements to the role of state contract law in the interpretation of those agreements.⁴⁷ In *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*,⁴⁸ the Court described the purpose of the FAA as putting arbitration agreements on the same footing as other contracts.⁴⁹ The Court noted the pro-arbitration policy recognized in *Moses H. Cone*, but it explained that the true purpose of the policy “is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate,” which must be interpreted under state contract law.⁵⁰ These principles led the Court to defer to the California Court of Appeal's

43. *Id.*

44. *See id.*

45. *See id.*; *Southland Corp. v. Keating*, 465 U.S. 1, 19 (1984) (Stevens, J., concurring in part and dissenting in part).

46. *Id.*

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

48. *Id.*

49. *Id.* at 478.

50. *Id.* at 476.

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conclusion that a California choice-of-law clause called for the application of California arbitration law, rather than the FAA, to determine whether a court should stay the parties' arbitration pending related litigation.⁵¹

The Court in *Volt* also held that the FAA did not preempt the California law at issue.⁵² It explained that "[t]he FAA contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration."⁵³ The FAA therefore only preempts state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."⁵⁴ Congress's primary purpose for enacting the FAA was to "require[] courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms."⁵⁵ According to the Court, staying arbitration under California law "is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the [FAA] would otherwise permit it to go forward."⁵⁶

Volt is an important case for a number of reasons. Most notably, it diverged from the Court's prior decisions, enlarging the substantive federal common law recognized in *Moses H. Cone* and *Southland*. The *Volt* Court limited the preemptive effect of that federal common law by emphasizing the traditional state control over interpretation and enforcement of contracts.⁵⁷ The Court also sought to minimize its prior statements regarding a federal pro-arbitration policy by equating that policy with the goal of putting arbitration agreements on the same footing as other contracts.⁵⁸ Thus, *Volt* sought to halt the expansion of federal arbitration law at the expense of state contract law and suggested that the FAA had only a modest preemptive effect on state law.

In 1995, however, the Court implicitly shifted its emphasis back to federal common law regarding the interpretation and enforcement of arbitration agreements. In *First Options of Chicago, Inc. v. Kaplan*,⁵⁹ the

51. *See id.*

52. *See id.* at 477.

53. *Id.*

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

55. *Id.* at 478.

56. *Id.* at 479.

57. *See id.*

58. *See id.*

59. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

question was whether the Kaplans, who were not parties to an arbitration agreement between a company that they owned and First Options of Chicago, Inc., were required to arbitrate under that agreement.⁶⁰ The Court addressed what it called a narrow issue: “[W]ho—court or arbitrator—has the primary authority to decide whether a party has agreed to arbitrate.”⁶¹ The Court explained that the answer to this question is simply a matter of the parties’ intent, which is ordinarily determined according to state contract law.⁶² However, the Court added a “qualification” imposed as a matter of federal law: unless there is “clear and unmistakable” evidence that the parties agreed to arbitrate questions regarding the arbitrability of a dispute, the court, not an arbitrator, decides whether a dispute is subject to arbitration.⁶³ The Court contrasted this federal rule with the federal rule recognized in *Moses H. Cone*: “[T]he law treats silence or ambiguity about . . . *who* (primarily) should decide arbitrability differently from the way it treats silence or ambiguity about . . . *whether* a particular merits-based dispute is arbitrable because it is within the scope of a valid arbitration agreement.”⁶⁴ The “law” to which the Court referred was federal common law, not state contract law.

In *Mastrobuono v. Shearson Lehman Hutton, Inc.*,⁶⁵ decided the same year as *First Options*, the Court significantly undermined its holding in *Volt* six years earlier. The issue in *Mastrobuono* was whether a New York choice-of-law clause in a contract calling for arbitration under the rules of the National Association of Securities Dealers (NASD Rules) meant that New York state law determined whether the arbitrator could award punitive damages.⁶⁶ The Court recognized that, under *Volt*, parties may choose to incorporate in their contract state rules that limit the issues subject to arbitration.⁶⁷ New York law prohibited arbitrators from awarding punitive damages, but the NASD Rules did not.⁶⁸ Thus, if the parties intended to adopt New York law, which precludes arbitrators from awarding punitive

60. *Id.* at 942.

61. *Id.*

62. *Id.* at 944.

63. *See id.* The Court took this clear-and-unmistakable test from prior cases concerning labor arbitration pursuant to the Labor Management Relations Act. *See id.* (citing *AT&T Technologies, Inc. v. Commc’ns Workers of Am.*, 475 U.S. 643, 649 (1986); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 583 n.7 (1960)).

64. *Id.* at 944-45.

65. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995).

66. *See id.* at 55.

67. *See id.* at 58.

68. *Id.* at 59.

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damages, the courts would be required to enforce that agreement.⁶⁹ On the other hand, the Court explained, “if the contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration.”⁷⁰ The issue for the Court, therefore, was “what the contract has to say about the arbitrability of [a] claim for punitive damages.”⁷¹

The Court determined that the choice-of-law clause was likely nothing more than a substitute for the conflict-of-laws analysis that otherwise would determine what law to apply; the clause was not an “unequivocal exclusion of punitive damages claims.”⁷² The Court also held that any ambiguity as to whether claims for punitive damages could be arbitrated have to be resolved in favor of arbitration under federal law, and that state-law contract principles provide that an ambiguous contract should be construed against the drafters.⁷³ The Court concluded that the best way to harmonize the choice-of-law and arbitration clauses was “to read ‘the laws of the State of New York’ to encompass substantive principles that New York courts would apply, but not to include special rules on arbitrators’ authority.”⁷⁴

It is difficult to determine whether the Court held that interpretation of the arbitration and choice-of-law clauses were governed by state law, federal common law, or both. Justice Thomas, the lone dissenter, wrote that the majority opinion “amounts to nothing more than a federal court applying [state] contract law to an [arbitration] agreement [T]he majority’s interpretation of the contract represents only the understanding of a single federal court regarding the requirements imposed by state law.”⁷⁵

If Justice Thomas was correct, that the Court was merely applying state contract law to decide whether the parties intended to permit punitive damages by adopting the NASD Rules or to exclude them by adopting New York law, then other courts would be free to reach a different conclusion as a matter of state law. Some lower courts, however, have interpreted

69. *See id.* at 58.

70. *Id.*

71. *Id.*

72. *Id.* at 60.

73. *Id.* at 62.

74. *Id.* at 64.

75. *Id.* at 71-72 (Thomas, J., dissenting).

Mastrobuono to adopt a federal common law rule of interpretation that choice-of-law clauses do not incorporate state law limiting arbitrators' authority.⁷⁶ For example, the Second Circuit has interpreted *Mastrobuono* to hold that "federal policy favoring arbitration requires a specific reference to [state law] restrictions on the parties' substantive rights or the arbitrator's powers."⁷⁷ Likewise, the New York Court of Appeals has rather ambiguously said that "attention must also be paid" to *Mastrobuono* when deciding whether a New York choice-of-law clause incorporated New York's rule that statute of limitations issues must be resolved by a court rather than an arbitrator.⁷⁸

A year after *Mastrobuono*, the U.S. Supreme Court decided *Doctor's Associates, Inc. v. Casarotto*,⁷⁹ in which it repeated its holding that the FAA preempts state laws that disfavor arbitration agreements as compared to other contracts.⁸⁰ The Court explained that "generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2," but that courts "may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions."⁸¹ The Court noted that section 2 "preclude[s] States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'"⁸²

Based on these principles, the U.S. Supreme Court held that the FAA preempts a Montana statute requiring contracts containing arbitration clauses to include a notice that the contract is subject to arbitration on the first page of the contract in underlined capital letters.⁸³ The Court held that the "'goals and policies of the FAA . . . are antithetical to threshold limitations placed specifically and solely on arbitration provisions."⁸⁴

More recently, in *Preston v. Ferrer*,⁸⁵ the Court again relied on the "national policy favoring arbitration" to hold that the FAA preempts state

76. See Note, *An Unnecessary Choice of Law: Volt, Mastrobuono, and Federal Arbitration Act Preemption*, 115 HARV. L. REV. 2250, 2268 (2002) (citing cases).

77. *Sec. Ins. Co. of Hartford v. TIG Ins. Co.*, 360 F.3d 322, 327-28 (2d Cir. 2004) (internal quotation marks omitted).

78. *Smith Barney Shearson Inc. v. Sacharow*, 689 N.E.2d 884, 889 (N.Y. 1997).

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

80. *Id.* at 686-87.

81. *Id.* at 687.

82. *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)).

83. See *id.* at 684, 688.

84. *Id.* at 688.

85. *Preston v. Ferrer*, 552 U.S. 346 (2008).

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law. The statute at issue gave California's labor commissioner exclusive jurisdiction over disputes regarding talent-agency agreements.⁸⁶ The Court held that the FAA preempts the statute so that an arbitration agreement calling for arbitration of a dispute within the labor commissioner's exclusive jurisdiction—according to the California statute—should be enforced.⁸⁷

Returning to an issue addressed in *Volt* and *Mastrobuono*, the *Preston* Court rejected the argument that a California choice-of-law clause in the parties' contract incorporated the California talent-agency law at issue.⁸⁸ The Court distinguished *Volt* on two grounds. First, *Volt* involved a stay of arbitration pending litigation by parties not subject to the arbitration clause, and the arbitration agreement did not address the order of proceedings in such circumstances, so the *Volt* Court looked to the choice-of-law clause to fill the gap.⁸⁹ In contrast, the arbitration clause before the Court in *Preston* expressly called for arbitration of the validity or legality of the contract between the parties, which was the issue that fell within the labor commissioner's jurisdiction. Thus, unlike in *Volt*, "there is no procedural void for the choice-of-law clause to fill."⁹⁰ The *Preston* Court therefore interpreted *Volt* to mean that state law might act as a gap filler when an arbitration agreement is silent, not that state law governs all issues of the interpretation of arbitration agreements like it would other contracts.

Second, the *Preston* Court noted that the parties in *Volt* did not raise the effect of arbitral rules incorporated in their arbitration agreement.⁹¹ The Court did not need to decide the relationship between a choice-of-law clause and arbitral rules incorporated in an arbitration agreement until *Mastrobuono*.⁹² Because the arbitration agreement in *Preston* provided for arbitration in accordance with the American Arbitration Association rules, which gave the arbitrators the power to determine the validity of the contract, the Court held that *Mastrobuono*, rather than *Volt*, controlled the outcome of the case.⁹³ Rather than looking to the state law pursuant to the

86. *See id.* at 351, 355-56.

87. *See id.* at 359.

88. *Id.*

89. *Id.* at 361.

90. *Id.*

91. *Id.* at 361-62.

92. *Id.*

93. *See id.* at 361-63.

parties' choice-of-law clause to determine whether the parties intended to incorporate California's arbitration-limiting rules into their agreement, the Court followed *Mastrobuono*'s rule of interpretation and held that the choice-of-law clause did not incorporate the talent-agency law.⁹⁴

In 2010, the Court in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*⁹⁵ adopted another federal common law rule of interpretation under the FAA. The Court held that the FAA does not permit arbitrators to allow class arbitration unless authorized by the parties' arbitration agreement.⁹⁶

The Court began its analysis by stating: "While the interpretation of an arbitration agreement is generally a matter of state law, the FAA imposes certain rules of fundamental importance, including the basic precept that arbitration 'is a matter of consent, not coercion.'"⁹⁷

Based on the principle that the FAA's primary purpose was to give effect to the parties' agreements, the Court stated that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."⁹⁸ The Court distinguished an arbitrator's authority to decide procedural questions not expressly included in the arbitration clause: unlike purely procedural matters, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator."⁹⁹ In bilateral arbitration, "parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."¹⁰⁰ In the Court's view, however, class arbitration increases costs and complexity, threatens confidentiality, binds absent parties, and generally conflicts with parties' assumptions about arbitration.¹⁰¹ An arbitrator therefore does not have the power to impose class arbitration

94. *Id.* at 362-63.

95. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

96. *See id.* at 1776.

97. *Id.* at 1773 (citations omitted) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)).

98. *Id.* at 1775.

99. *Id.*

100. *Id.*

101. *Id.* at 1776.

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without the parties' consent.¹⁰² Thus, arbitrators exceed their authority if they order class arbitration in the absence of party agreement.¹⁰³

Although the result in *Stolt-Nielsen* was to restrict the scope of arbitrators' authority,¹⁰⁴ the decision was nevertheless an important precursor for *Concepcion*. The Court in *Stolt-Nielsen* built upon years of opinions tilting arbitral federalism toward federal law in both the interpretation and enforcement of arbitration agreements; indeed, it began its analysis from the principle that the FAA imposes limits on state contract law when interpreting arbitration agreements. The Court held that federal principles—primarily party autonomy—prevent arbitrators from imposing rules that “change[] the nature of arbitration” as envisioned by the Court.¹⁰⁵ The idea that the FAA envisions an arbitration process that is less costly, less formal, more efficient, and speedier than litigation was at the heart of the Court's decision in *Concepcion*.¹⁰⁶

III. CONCEPCION

In *Concepcion*, the Court moved further toward the federalization of arbitration law based on its view that California's version of the unconscionability doctrine as applied to classwide dispute resolution stood as an obstacle to the FAA's pro-arbitration goal.¹⁰⁷ As in *Stolt-Nielsen*, the Court held that the FAA supposes certain attributes of arbitration that class arbitration alters.¹⁰⁸ In *Stolt-Nielsen*, the Court held that the FAA prevents arbitrators from imposing class arbitration absent party agreement;¹⁰⁹ in *Concepcion*, the Court held that even generally applicable state contract law

102. *See id.*

103. *Id.* It is not clear to what extent courts after *Stolt-Nielsen* may look to state law to determine whether the parties implicitly agreed to permit class arbitration. For example, could a court find implicit agreement if the parties select a particular state law as governing their agreement, and that state law grants arbitrators the authority to permit class arbitration (assuming, under *Preston*, that any arbitral rules incorporated into the arbitration agreement are silent on class arbitration)?

104. *Id.*

105. *Id.* at 1775.

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

107. *Id.*

108. *Id.* *See also Stolt-Nielsen*, 130 S. Ct. 1758.

109. *Stolt-Nielsen*, 130 S. Ct. 1758.

cannot do so.¹¹⁰ Both decisions further expand the reach of federal arbitration law.

A. *Background to the Case*

Like *Southland*, *Perry*, *Volt*, and *Preston*, *Concepcion* presented a potential conflict between California state law and the FAA on the enforcement of arbitration agreements. The plaintiffs in *Concepcion* brought a putative class action alleging that AT&T Mobility committed fraud when it offered a free phone to customers who signed up for its services but still charged them sales tax on the phones.¹¹¹ AT&T Mobility argued that the claims had to be submitted to individual arbitration because the service contracts with the plaintiffs included an arbitration clause waiving the right to class arbitration.¹¹² The district court found that the arbitration clause was unconscionable and therefore unenforceable under the FAA.¹¹³ The Ninth Circuit agreed.¹¹⁴

The Ninth Circuit noted that section 2 of the FAA permits invalidation of arbitration agreements on generally applicable state law grounds and that unconscionability is such a ground.¹¹⁵ The Ninth Circuit looked to the Supreme Court of California's decision in *Discover Bank v. Superior Court*¹¹⁶ for California law on the unconscionability of class action waivers.¹¹⁷ In *Discover Bank*, the Supreme Court of California held that class action waivers are unconscionable:

[W]hen the [class] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money¹¹⁸

The Ninth Circuit interpreted *Discover Bank* to create a three-part inquiry to determine when a class action waiver in a consumer contract is unconscionable: (1) whether the agreement is a contract of adhesion; (2)

110. See *Concepcion*, 131 S. Ct. 1740.

111. See *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 852-53 (9th Cir. 2009).

112. See *id.*

113. *Id.* at 857.

114. See *id.* at 853, 859.

115. *Id.*

116. *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005).

117. *Laster*, 584 F.3d at 854.

118. *Id.* (quoting *Discover Bank*, 113 P.3d at 1109).

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whether disputes between the contracting parties are likely to involve small sums of money; and (3) whether it is alleged that the party with superior bargaining power deliberately cheated many consumers out of small sums of money.¹¹⁹ The Ninth Circuit applied this test and held that the class action waiver in the contract before it was unconscionable.¹²⁰

The Ninth Circuit also held that the FAA did not preempt the *Discover Bank* test.¹²¹ It concluded that *Discover Bank* simply applied California's general approach to unconscionability "in the specific context of class action waivers," which is permitted under FAA section 2's Saving Clause.¹²² In the court's view, California law treated class action waivers in arbitration agreements the same as class action waivers in other types of contracts not involving arbitration, and therefore all contracts with class action waivers were treated equally.¹²³ The *Discover Bank* test was thus a "ground[] [that] exist[s] at law or in equity for the revocation of any contract."¹²⁴

B. *The U.S. Supreme Court's Decision*

The U.S. Supreme Court granted certiorari in *Concepcion* to decide "[w]hether the [FAA] preempts States from conditioning the enforcement of an arbitration agreement on the availability of . . . classwide arbitration."¹²⁵ In a 5-4 decision, the Court held that section 2 of the FAA preempts the *Discover Bank* rule. Justice Scalia wrote the majority opinion, which Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined. Justice Thomas wrote a concurring opinion that made clear that he reluctantly joined the majority, while Justices Ginsburg, Sotomayor, and Kagan joined Justice Breyer's dissenting opinion.¹²⁶

119. *Id.* at 854.

120. *Id.*

121. *Id.*

122. *Id.* at 857.

123. *Id.*

124. 9 U.S.C. § 2 (1947).

125. Petition for Writ of Certiorari at i, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 6617833.

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

1. The Majority Opinion

The Court began its analysis by noting the FAA's purpose of ending the "widespread judicial hostility to arbitration agreements."¹²⁷ The Court then explained that section 2 of the FAA furthers this purpose by establishing a liberal federal policy favoring arbitration and requiring the enforcement of arbitration agreements like any other contract.¹²⁸ To determine whether a state-judicially-created rule is preempted under section 2, the Court held that it is not sufficient that the rule is the result of an application of a common law contract defense like unconscionability; a court must also analyze whether the application of the traditional contract defense interferes with a purpose of the FAA.¹²⁹

The Court conceded that the question in the case was not easy, noting that state laws prohibiting the arbitration of particular claims are clearly preempted, but that "the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration."¹³⁰ In the Court's view, unconscionability ordinarily might be considered a ground that exists "at law or in equity for the revocation of any contract," but it could become a tool for expressing judicial hostility to arbitration by invalidating, for example, agreements that fail to provide for judicially monitored discovery, application of the Federal Rules of Evidence, or a trial by jury.¹³¹ The Court did not believe that these examples were very far from the requirement of classwide arbitration.¹³² The essential question, in the Court's view, was whether California's application of the unconscionability doctrine "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA."¹³³

The Court held that the *Discover Bank* rule was inconsistent with the FAA's purpose of "ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings."¹³⁴ The Court explained that "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored

127. *Id.* at 1745.

128. *See id.* at 1745-46.

129. *Id.* at 1745.

130. *Id.* at 1747.

131. *Id.*

132. *Id.* at 1747-48.

133. *Id.* at 1748.

134. *Id.*

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to the type of dispute.”¹³⁵ The *Discover Bank* rule allows a party to demand class arbitration notwithstanding a waiver of class arbitration in the arbitration agreement, which conflicts with the goal of streamlined procedures—it slows down the arbitral process, makes arbitration more costly, requires procedural formality when informality would be preferred, entrusts arbitrators with the due process rights of absent class members, and subjects defendants to the risk of large judgments without appellate rights, and with only limited means to vacate an award.¹³⁶ Given the inconsistencies between mandatory classwide arbitration and the goals of party autonomy and efficient arbitral procedures, the Court held that the *Discover Bank* rule conflicted with Congress’s purposes expressed in the FAA and was therefore preempted.¹³⁷

2. Justice Thomas’s Concurrence

Justice Thomas “reluctantly” joined the Court’s opinion.¹³⁸ He argued that “the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress.”¹³⁹ Justice Thomas explained that the term “revocation” in section 2’s Saving Clause should be read in conjunction with section 4 of the FAA, which requires courts to enforce arbitration agreements unless the making of an agreement is at issue.¹⁴⁰ Under the historical understanding of unconscionability—for which Justice Thomas cited federal law—a contract is considered not to be validly formed when it is so unfair as to raise the presumption that it is the product of fraud, duress, or delusion.¹⁴¹ The *Discover Bank* rule departed from this traditional understanding because the rule was based on the idea that a contractual waiver of class dispute resolution is “exculpatory” and against public policy,

135. *Id.* at 1749.

136. *See id.* at 1750-53.

137. *See id.* at 1753.

138. *Id.* at 1754 (Thomas, J., concurring).

139. *Id.* at 1755.

140. *See id.* at 1754-55.

141. *See id.* at 1755 n.*. Justice Thomas noted that the footnote in *Perry v. Thomas*, discussed above, was dictum because the Court in that case had no need to decide the scope of the contract defenses that were preserved under section 2’s Saving Clause. *Id.*

not that it could only have been the product of improper coercion or an unsound mind and was thus not validly formed.¹⁴² Because the *Discover Bank* rule presupposed the formation of a contract, but rendered the contract invalid, it differed from the traditional definition of unconscionability and was not a matter of contract formation; therefore, the contract was not protected from preemption under section 2's Saving Clause.

3. The Dissenting Opinion

In Justice Breyer's dissent,¹⁴³ the *Discover Bank* rule was the Supreme Court of California's authoritative interpretation and application of California's unconscionability doctrine, which applied equally to arbitration agreements and contracts providing for litigation.¹⁴⁴ It therefore fell squarely under the language of the Saving Clause.¹⁴⁵

Justice Breyer argued that the *Discover Bank* rule was consistent with the primary purpose of the FAA—to place arbitration agreements on equal footing with other contracts.¹⁴⁶ He disagreed that the FAA demands any particular procedures and instead emphasized that *Discover Bank* simply applied the same state unconscionability rules as were applied to class action waivers in contracts that do not contain arbitration clauses.¹⁴⁷ Moreover, he disagreed that the *Discover Bank* rule necessarily made arbitration more complex and less efficient.¹⁴⁸ Justice Breyer contended that there was insufficient evidence that the rule would discourage parties from agreeing to arbitrate.¹⁴⁹

Finally, Justice Breyer argued that the majority's holding imposed a federal view of contract defenses that is not required by the text or purpose of the FAA.¹⁵⁰ He noted that federal arbitration law leaves contract defenses to the states, and that “California is free to define unconscionability as it sees fit.”¹⁵¹ As long as a state does not adopt a special rule that disfavors arbitration, “its common law is of no federal concern.”¹⁵² In Justice Breyer's

142. *Id.* at 1755.

143. *See id.* at 1756 (Breyer, J., dissenting).

144. *See id.* at 1756-57.

145. *Id.* at 1756.

146. *Id.* at 1757.

147. *See id.* at 1757-58.

148. *See id.* at 1758-59.

149. *See id.* at 1759-60.

150. *Id.* at 1756.

151. *Id.* at 1760.

152. *Id.*

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view, the FAA imposes a limited restraint on state sovereignty in an area traditionally reserved to the states—it requires equal treatment of arbitration agreements but does not elevate arbitration agreements over other types of contracts.¹⁵³ In the Saving Clause, Congress “reiterated a basic federal idea that has long informed the nature of this Nation’s laws.”¹⁵⁴ According to Justice Breyer, the Court’s decision violated “that federalist ideal” by invading the province of the states, even though the language of the FAA reaffirms state control over contract defenses.¹⁵⁵

IV. IMPLICATIONS OF *CONCEPCION*

As Justice Breyer’s dissenting opinion concluded, *Concepcion* does not merely have far-reaching consequences for consumer class actions, as has been widely reported.¹⁵⁶ The dissenters argued that the majority improperly read into the FAA a license to alter the traditional federal–state balance in contract law, in direct contravention of the FAA’s Saving Clause.¹⁵⁷ *Concepcion* pushes the Court’s FAA jurisprudence further toward the federalization of arbitration law and contributes to the diminution of state law’s role in the interpretation and enforcement of arbitration agreements.

The decision packs a specific view of arbitration into the long-standing, but vaguely-articulated, federal pro-arbitration policy, and elevates that federal view of arbitration over the rule that arbitration agreements should be treated like any other state law contracts.¹⁵⁸ Not only must a state contract law doctrine be one that exists at law or in equity for the revocation of any contract, it must also be applied in a manner that does not conflict with “fundamental attributes of arbitration” as envisioned by the FAA. Thus, section 2’s Saving Clause does not preserve the application of all generally applicable common law contract defenses, only those that are consistent with the federal view of what arbitration should look like.

This additional federal check on state contract law accords with the general trend of the U.S. Supreme Court’s cases on arbitral federalism.

153. *See id.* at 1761.

154. *Id.* at 1762.

155. *See id.*

156. *Id.* at 1761.

157. *Id.* at 1762.

158. *Id.*

Since *Moses H. Cone* and *Southland*, the Court has steadily enlarged the role of federal common law under the FAA, even if it has sometimes done so implicitly. The one notable exception to this trend—the Court’s decision in *Volt*—has been significantly undermined by *Mastrobuono* and *Preston*. The Court’s decisions curtailing the application of state arbitration and contract law impose rules that:

- an arbitration agreement is separable from the contract in which it is contained and thus can be enforced even if the underlying contract is allegedly unenforceable (*Prima Paint*);¹⁵⁹
- doubts regarding the scope of an arbitration agreement are resolved in favor of arbitration (*Moses H. Cone*);¹⁶⁰
- a court, rather than an arbitrator, has primary authority to decide whether a party has agreed to arbitrate unless the parties clearly and unmistakably agree otherwise (*First Options*);¹⁶¹
- state law selected in a generic choice-of-law clause does not limit the power of arbitrators granted by arbitral rules incorporated into the parties’ arbitration clause (*Mastrobuono* and *Preston*);¹⁶²
- state law defenses to arbitration are preempted when those defenses apply only to arbitration agreements and not to contracts generally (*Doctor’s Associates*);¹⁶³ and
- arbitrators and courts cannot compel class arbitration when the parties’ arbitration agreement is silent on the matter because doing so alters the nature of arbitration (*Stolt-Nielsen*).¹⁶⁴

Some of the federal rules stated in the Court’s pre-*Concepcion* FAA decisions might be considered rules of interpretation; others might be considered rules of enforcement. But all of them demonstrate that federal arbitration law does much more than make arbitration agreements enforceable under state law like any other contracts. *Concepcion* follows these precedents by protecting arbitration agreements against state versions of traditional contract defenses that disrupt the federal view of arbitration’s basic principles—such as low cost, speed, and efficiency—even if the state law equally applies to other types of contracts.

The fact that the Court’s federalization of arbitration law has invaded the Saving Clause is especially notable. The language of the clause itself

159. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

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

161. *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995).

162. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995); *Preston v. Ferrer*, 552 U.S. 346 (2008).

163. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996).

164. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010).

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suggests that it was meant to preserve some state control over arbitration agreements, just as state law governs other types of contracts.

After *Concepcion*, however, application of state contract law to invalidate arbitration clauses due to the lack of specific procedures in arbitration—not just the right to class arbitration—will be suspect. For example, an arbitration clause could not be considered unconscionable merely because it does not allow for discovery or other procedural rights that might be seen to complicate or slow down the arbitration, even if state legislatures or courts view the lack of those procedures as unfair. This result significantly dilutes the anti-preemptive effect of the Saving Clause and once again emphasizes that arbitration agreements—at least those coming within the wide grasp of the Commerce Clause—are primarily the domain of federal law.

V. CONCLUSION

Congress passed the FAA more than a decade before the U.S. Supreme Court's seminal decision in *Erie Railroad Co. v. Tompkins*,¹⁶⁵ which gave rise to a long line of cases considering the proper roles of federal and state law in diversity cases (as most federal cases under the FAA are). It is therefore not surprising that the FAA itself provides little guidance on federalism questions, and that the courts have resorted to federal common law to fill the deep statutory gaps. The U.S. Supreme Court's holding that FAA section 2 creates federal substantive law regarding the interpretation and enforcement of arbitration agreements began a series of common lawmaking decisions regarding difficult questions of federal preemption, including the question presented in *Concepcion*. The *Concepcion* opinion addresses one of those problems by holding that even traditional common law contract defenses, like unconscionability, can stand as an obstacle to the goals of the FAA when they interfere with the federal policy of encouraging streamlined and efficient arbitral procedures. This result once again expands the sphere of federal power over arbitration agreements at the expense of state contract law.

It is notable that the advocates of state power on the Court, including Justices Scalia and Thomas, voted in the majority to find preemption of state

165. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

contract law, while Justices Breyer, Ginsburg, Sotomayor, and Kagan—whom some might consider more likely to support federal authority—argued in dissent that the majority failed to honor the “federalist ideal.” The effect that *Concepcion* has on federalism may be used as an argument in favor of undoing the Court’s decision through legislative action. Congress can use its Commerce Clause power to make class action waivers, or consumer arbitration agreements in general, unenforceable under the FAA. Bills that have been introduced in Congress over the last few congressional terms seek to do so.¹⁶⁶ In addition to citing the effect that *Concepcion* may have on classwide dispute resolution, proponents of change may employ federalism arguments to support the call for amendments to the FAA.

166. See Arbitration Fairness Act of 2011, H.R. 1873, S. 987, 112th Cong. (2011); Arbitration Fairness Act of 2009, H.R. 1020, S. 931, 111th Cong. (2009).