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***AT&T MOBILITY V. CONCEPCION* AND THE
ANTIDISCRIMINATION THEORY OF FAA PREEMPTION**

Hiro N. Aragaki*

I.	THE PUZZLE OF <i>CONCEPCION</i>	41
	A. The Twilight of Contract	42
	B. The Twilight of Favoritism	45
II.	<i>CONCEPCION</i> THROUGH THE LENS OF ANTIDISCRIMINATION	51
III.	LITIGATING <i>CONCEPCION</i> : THE PERILS OF PROTO-THEORY	55
	A. What is the Subject of Discrimination?	56
	B. Is Discrimination Equivalent to Doctrinal Deviation?	59
	C. Purpose- or Effects-Based Discrimination?	62
IV.	THE MAJORITY’S REASONING: A CRITIQUE AND RECONSTRUCTION	65
	A. The Causes and Consequences of Essentialism	66
	B. The Touchstone of Intentional Discrimination	77
V.	CONCLUSION	80

In the eighteen months since it came down, the U.S. Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*¹ has variously been described as a “watershed,”² a “game-changer,”³ and perhaps even “[t]he most significant”⁴ case of the Court’s 2010 Term. I share this assessment, but not for the familiar reasons. In my view, *Concepcion* is significant not so much because of what it portends for the future of aggregate litigation or the ability of small-dollar plaintiffs to

* Associate Professor of Law, Loyola Law School, Los Angeles. I thank Jennifer Brown, Michael Helfand, David Horton, and participants at both the Yale/Quinnipiac Dispute Resolution Workshop held at Yale Law School in November 2011, and the Pennsylvania State University Dickinson School of Law symposium on *U.S. Arbitration Law in the Wake of AT&T Mobility v. Concepcion*, for invaluable feedback. I am also grateful to Jaime Bourns, David Doeling, and Harbik Gharabagi for their superb research assistance, and to Nick Fox for his editorial skill and judgment.

¹ 131 S. Ct. 1740 (2011).

² Richard C. Reuben, *FAA Law, Without the Activism: What if the Bellwether Cases Were Decided By a Truly Conservative Court?*, 60 KAN. L. REV. 883, 894 (2012).

³ Barbara Black, *Arbitration of Investors’ Claims Against Issuers: An Idea Whose Time Has Come?*, 75 L. & CONTEMP. PROBS. 107, 120 (2012).

⁴ Adam Liptak, *Supreme Court Weighs Class Action Suits*, N.Y. TIMES (Nov. 9, 2010), http://www.nytimes.com/2010/11/10/business/10bizcourt.html?_r=1&ref=adam_liptak; Debra Cassens Weiss, *The End of Consumer Class Actions? Supreme Court Upholds AT&T Arbitration Contract*, A.B.A. J. (Apr. 27, 2011, 9:29 AM), http://www.abajournal.com/news/article/the_end_of_consumer_class_actions_supreme_court_upholds_att_arbitration_con/; Paula M. Weber, *From Hire to Fire: Contracts During the Employment Relationship*, 1924 PLI/CORP 309 (2012).

redress systematic wrongdoing by large-scale defendants,⁵ but because it signals something of a paradigm shift in the law of Federal Arbitration Act (FAA)⁶ preemption.

Because the facts of *Concepcion* are now well known, I recite only those details relevant to my argument: The Concepcions signed up for AT&T service, which AT&T advertised as coming with a free phone. Although they received the free phone, the Concepcions were charged an additional \$30.22 in sales tax based on the phone's retail value, so they filed a putative class action against AT&T for fraud and false advertising. When AT&T moved to compel arbitration pursuant to a clause in its customer agreement, the Concepcions argued that the clause was unconscionable under a 2005 precedent from the California Supreme Court by the name of *Discover Bank v. Superior Court*.⁷ *Discover Bank* held that collective action waivers (whether in arbitration or litigation) are presumptively unconscionable when they are

found in [1] a consumer contract of adhesion [2] in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and [3] 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 money.⁸

The district court and the Ninth Circuit agreed with the Concepcions and, moreover, held that *Discover Bank* was not preempted by the FAA. The U.S. Supreme Court reversed these lower court preemption holdings.

This Article proceeds as follows. I begin Part I with what I think of as the puzzle of *Concepcion*: Notwithstanding the majority's declarations to the contrary, *Concepcion* represents a significant break from the traditional justifications offered for FAA preemption of state law. What, then, is the explanation for the Court's decision to preempt *Discover Bank*? In Part II, I offer an answer: *Concepcion* turns on what I have elsewhere described as an antidiscrimination theory of FAA preemption. Understanding how that theory plays out both in the majority's decision and in the parties' briefing of the issues will, I argue, help account for many aspects of the opinion that have so far been left unexplained.

To say that *Concepcion* is animated by an antidiscrimination theory of the FAA does not, however, imply anything about the nature of that theory or whether the Court got it correct. In Part III, I demonstrate that even though the theory has routinely been invoked over the past three decades to legitimize the FAA's displacement of state law, it remains vastly underdeveloped and poorly understood. From this point of view, the problem with *Concepcion* is less that a majority of the Court decided the case based on ideology or policy preferences, as many have argued,⁹ and more that the lack of any clear standards or limits to the antidiscrimination theory leaves the

⁵ See, e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012); James Vicini, *Supreme Court Rules for AT&T in Arbitration Case*, REUTERS (Apr. 27, 2011, 4:30 PM), <http://www.reuters.com/article/2011/04/27/us-att-arbitration-idUSTRE73Q4N520110427>.

⁶ See 9 U.S.C. §§ 1–16 (2009).

⁷ 113 P.3d 1100 (Cal. 2005).

⁸ *Id.* at 1110.

⁹ In any event, this is arguably true of most cases decided by the High Court. See, e.g., Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557 (1989).

theory prone to abuse in whichever direction the wind happens to blow. In Part IV, I draw on the collective learning in the antidiscrimination area to critique the Court’s opinion and to suggest that, with a more sophisticated understanding of what it means to discriminate against arbitration, the result in *Concepcion* would and should have been very different.

I. THE PUZZLE OF *CONCEPCION*

To understand the puzzle at the core of *Concepcion*, it will be necessary first to review the law of FAA preemption. FAA preemption is a species of conflict preemption, pursuant to which state law will be displaced if and only if it somehow conflicts with or “stands as an obstacle” to the text or purpose of a federal statute.¹⁰

The text of FAA section 2 provides that a “[1] written provision . . . to submit [specified disputes] to arbitration . . . shall be valid, irrevocable, and enforceable, [2] save upon such grounds as exist at law or in equity for the revocation of any contract.”¹¹ The first clause of section 2 has generally been understood as a mandate to “rigorously enforce”¹² arbitration agreements “according to their terms.”¹³ Following Richard Nagareda, I refer to this as the “command clause.”¹⁴ Any state law that stands as an obstacle to the command clause will be preempted by the FAA. For example, where the parties’ agreement contains an agreement to arbitrate any and all disputes, a state law that prohibits the arbitration of wage disputes will be preempted because it prevents enforcement of the agreement strictly as written.¹⁵

The second clause of section 2 contains the only exceptions to the command clause thus far recognized by the Court. This so-called “savings clause” has widely been understood as allowing states to regulate arbitration agreements so long as they do so using “generally applicable contract defenses, such as fraud, duress, or unconscionability.”¹⁶ As the Court put it, “if [a state] law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally,” then the law is not preempted.¹⁷ Applications of the unconscionability defense to invalidate arbitration clauses have for this reason almost uniformly avoided preemption, even when the application is alleged to “single out” arbitration agreements for unfavorable treatment.¹⁸

¹⁰ See *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

¹¹ 9 U.S.C. § 2 (2009). Section 2 is the only provision of the FAA that the Court has used to preempt state law. See *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 447 (2006).

¹² *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

¹³ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989). The injunction to enforce arbitration agreements to the letter effectively means that arbitration clauses must be enforced “notwithstanding any state substantive or procedural policies to the contrary.” *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

¹⁴ See Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1075–76 (2011).

¹⁵ See *Perry v. Thomas*, 482 U.S. 483 (1987).

¹⁶ *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (citation omitted).

¹⁷ *Perry*, 482 U.S. at 492 n.9.

¹⁸ See Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. PA. L. REV. 1233, 1287–88 (2011).

As part of California’s common law of unconscionability, *Discover Bank* fell within the savings clause and for this reason should have been spared from preemption according to the principles outlined above. But the Court did just the opposite. *Concepcion* therefore violates much of what we thought we knew about the interaction between the command and savings clauses.

To be sure, conflict preemption is not limited to situations in which the state law collides head-on with the plain language of a federal statute; it also covers situations in which the state law is consistent with the statutory text but nonetheless frustrates the text’s “purposes and objectives.”¹⁹ *Concepcion* might, therefore, be understood as making this type of determination about *Discover Bank*. To see whether this is the case, we must first come to grips with the purposes and objectives behind section 2’s command and savings clauses.

Perhaps the leading view is that those clauses, and the FAA more generally, seek to honor arbitration agreements *qua* contracts.²⁰ “Arbitration agreements are purely matters of contract, and the effect of the [FAA] is simply to make the contracting party live up to his agreement.”²¹ State laws are accordingly preempted when they undermine the enforceability of arbitration agreements. I refer to this as the “contract theory.” Another view, which might be referred to as the “favoritism theory,” holds that state laws are preempted if they disfavor arbitration or arbitration agreements. Most commentators (both critical and supportive of the opinion) appear to believe that *Concepcion* can be squared with one or both of these purposes and objectives.²²

I begin this Article with the following bold claim: *Concepcion* cannot be explained on either the contract or the favoritism theories. If I am correct, the basic puzzle of *Concepcion* comes into focus: What is the real reason why the Court held *Discover Bank* preempted? Otherwise stated, to what purpose or objective of the FAA did the Court believe *Discover Bank* stood as an obstacle?

A. The Twilight of Contract

Prior to the enactment of the FAA in 1925, it was virtually impossible to compel arbitration of disputes. The traditional explanation is that early common law courts, jealous of competition from private adjudicative forums, had devised artificial rules that thwarted the enforcement of promises to arbitrate for no apparent reason other than an “irrational,” “unjust,” and “anachronis[tic]” hostility toward the arbitral process.²³

¹⁹ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 873 (2000) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

²⁰ *See Moses Cone*, 460 U.S. at 25 n.32.

²¹ GEORGE S. GRAHAM, TO VALIDATE CERTAIN AGREEMENTS FOR ARBITRATION, H.R. REP. NO. 68–96, at 1 (1924).

²² *See, e.g.*, Lawrence A. Cunningham, *Rhetoric Versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 144–45 (2012); Craig Hoover et al., *Supreme Court Rules that Arbitration Agreements Can Foreclose Classwide Arbitration Proceedings*, MONDAQ (May 4, 2011), available at

<http://www.mondaq.com/unitedstates/x/131144/Arbitration+Dispute+Resolution/Supreme+Court+Rules+That+Arbitration+Agreements+Can+Foreclose+Classwide+Arbitration+Procedures>.

²³ Aragaki, *supra* note 18, at 1253.

On the contract theory, the “basic purpose of the Federal Arbitration Act [was] to overcome [these] refusals to enforce agreements to arbitrate.”²⁴ The rationale is that there is little defensible basis for enforcing an arbitration agreement with less determination than any other contract.²⁵ This is why arbitration agreements may be regulated only through rules that “arose to govern issues concerning the validity, revocability, and enforceability of contracts generally”²⁶—not through rules like the old common law ouster and revocability doctrines that applied only to arbitration agreements.²⁷ Thus, “[s]uccessful challenges to arbitration [agreements] must find their basis in contract law, not some other source of law” like employment or consumer protection law.²⁸ Consistent with the contract theory, the district court and the Ninth Circuit in *Concepcion* reasoned that *Discover Bank* avoided preemption because it was nothing more than a judicial precedent for the application of the common law unconscionability defense.²⁹

But the Court reached the opposite conclusion. It held that *Discover Bank* conflicted with section 2’s “overarching purpose to ‘ensure the enforcement of arbitration agreements according to their terms.’”³⁰ Although this may sound consistent with the contract theory, on closer inspection it is not. The only way to square the Court’s conclusion with the contract view is if the *Discover Bank* rule somehow does not qualify as a generally applicable contract defense—for example, because it is a rogue version of unconscionability otherwise unknown to the common law of contracts. During briefing on *certiorari* and on the merits, AT&T and its *amici* pressed this very point, arguing that the California rule was a “distortion” that “b[ore] no resemblance” to traditional unconscionability law.³¹

This argument did not win the day, however. It was rejected in no uncertain terms by justices on both sides of the aisle during oral argument,³² and it was also quietly dismissed in the Court’s opinion. After noting that general unconscionability requires both a procedural and a substantive element, for instance, the majority concluded that *Discover Bank* had in fact “applied

²⁴ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270 (1995); *see also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989).

²⁵ *See* JULIUS HENRY COHEN, *COMMERCIAL ARBITRATION AND THE LAW* 28, 51–52 (1918).

²⁶ *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

²⁷ *See generally* Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 *YALE L.J.* 147 (1921) (describing ouster and revocability doctrines).

²⁸ *See* STEPHEN J. WARE, *ALTERNATIVE DISPUTE RESOLUTION* 738 (2001); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 *J. AM. ARB.* 251, 265 (2006); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 *MCGEORGE L. REV.* 195, 195 (1998).

²⁹ *See* *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856–57 (9th Cir. 2009), *rev’d sub nom.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Laster v. T-Mobile U.S.A., Inc.*, No. 05–CV–1167, 2008 WL 5216255, at **7–8 (S.D. Cal. Aug. 11, 2008).

³⁰ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011) (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

³¹ *See* Petition for Writ of *Certiorari* at 25–26, 31, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2010) (No. 09–893); Brief for Petitioner at 18, 32, 47, *Concepcion*, 131 S. Ct. 1740 (No. 09–893). *See generally* Brief *Amici Curiae* of Distinguished Law Professors in Support of Petitioner, *Concepcion*, 131 S. Ct. 1740 (No. 09–893) (arguing that California courts have “distorted” traditional common law unconscionability principles beyond recognition); Brief of DRI—The Voice of the Defense Bar as *Amicus Curiae* in Support of Petitioner, *Concepcion*, 131 S. Ct. 1740 (No. 09–893) (arguing that *Discover Bank* “departs” from traditional unconscionability doctrine).

³² *See infra* notes 152–153 and accompanying text.

this framework” fair and square to class action waivers.³³ Indeed, any other conclusion would have put the Court in the deeply problematic posture of accusing the final arbiter of California law of misapprehending its own doctrine of unconscionability when it decided *Discover Bank*. The Court therefore had little choice but to accept *Discover Bank* as a *bona fide* principle of state contract law.

Concepcion therefore amounts to the proposition that a perfectly valid application of a generally applicable contract doctrine is nonetheless preempted by the FAA.³⁴ This is evident in Justice Scalia’s remark that “[a]lthough § 2’s savings clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”³⁵ In other words, it is possible for a state-law rule to frustrate the FAA *even if* it counts as generally applicable.

This is a complete and substantial break from the contract theory. If there was one thing that had seemed settled, it was that the FAA’s commitment to arbitration as a creature of contract meant that arbitration agreements would be made “enforceable as other contracts, *but not more so*.”³⁶ *Concepcion* changed all of that overnight.³⁷ If FAA preemption no longer turns on whether the state law is a genuine contract law defense, the contract paradigm cannot fully explain FAA preemption after *Concepcion*. *A fortiori*, it no longer captures the purposes and objectives of the FAA in quite the same way it did before. Something else, therefore, must be at work.

Here it is often retorted that *Concepcion* is perfectly consistent with the contract theory because the Court enforced the collective action waiver in AT&T’s customer agreement strictly according to its terms, *Discover Bank* notwithstanding.³⁸ The problem with this retort is that it confuses the contract paradigm with one based on freedom of contract. The Court’s decision might well be described as consistent with freedom of contract insofar as it displaced a state rule that limited the parties’ prerogative to “structure their arbitration agreements as they see fit.”³⁹ But that is not the same as the contract theory’s emphasis on “bring[ing] private contractual arbitration agreements into general contract *law*”⁴⁰—that is, on holding arbitration contracts to the same requirements of validity and enforceability imposed on other contracts. Far from synonymous with the ideal of unbridled private autonomy, contract law represents a continuing endeavor to balance that ideal against the protection of public values. This is why, as far back as the classical period, the common law singled out a variety of contracts and contract provisions for

³³ *Concepcion*, 131 S. Ct. at 1746; see also Phillip M. Lax, *Collective Action Waivers in Labor Law: Why They are Unenforceable Even After AT&T Mobility v. Concepcion* 11 (Mar. 7, 2012) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2017950.

³⁴ See, e.g., *Kaltwasser v. AT&T Mobility LLC*, 812 F. Supp. 2d 1042, 1046 (N.D. Cal. 2011) (observing that *Concepcion* “characterize[d]” the *Discover Bank* standard “as arising from the ‘generally applicable’ contract law doctrine of unconscionability”).

³⁵ *Concepcion*, 131 S. Ct. at 1748.

³⁶ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added).

³⁷ *Accord Cunningham*, *supra* note 22, at 144–45 (arguing that, if *Concepcion* had been faithful to contract principles, it would have struck AT&T’s class waiver consistent with state contract law).

³⁸ See, e.g., Andrew McBride & Thomas McCarthy, *Supreme Court Observations: AT&T Mobility v. Concepcion*, THE LEGAL PULSE (Apr. 29, 2011), <http://wlflegalpulse.com/2011/04/29/supreme-court-observations-at-mobility-v-concepcion/>.

³⁹ *Volt*, 489 U.S. at 479.

⁴⁰ David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act’s Encroachment on State Law*, 16 WASH. U. J.L. & POL’Y 129, 137–38 (2004) (emphasis added).

regulation in the public interest.⁴¹ Even during the height of the *Lochner* era, courts never pretended to enforce contracts exactly as written.⁴²

Moreover, it is not even clear that *Concepcion* is consistent with freedom of contract. Many would argue that consumers are not in any real sense “free” when they acquiesce to terms contained in adhesion contracts like AT&T’s service agreement.⁴³ If so, preempting *Discover Bank* would seem to exacerbate rather than mitigate this unfreedom. It is also doubtful whether a law such as *Discover Bank* can be understood as reducing liberty of contract simply because it interferes with the parties’ agreement as written, and thus whether displacing *Discover Bank* tends to increase that liberty.⁴⁴ For example, would we consider contracting parties to be freer if the state held them to an agreement that had been procured by fraud or duress?⁴⁵ An agreement that turns out to be impracticable? Or one that lacks consideration? The lesson here is that common law defenses such as unconscionability can do just as much to augment freedom of contract as they can to diminish it. Taken to its logical terminus, the retort leads to the untenable proposition that contracts should be enforced just for the sake of enforcement, no matter what their effect on other values such as voluntary consent, procedural fairness, or the reasonable expectations of the parties.

B. The Twilight of Favoritism

A discussion of the favoritism theory cannot proceed without resolving a threshold question about the supposed object of favoritism: Does the FAA seek to favor arbitration or arbitration agreements? The Court has used both formulations interchangeably,⁴⁶ which in turn enables lower courts to exploit the indeterminacy to justify FAA preemption outcomes based on policy rather than principle. To be sure, it is entirely possible to favor both the arbitration process

⁴¹ See Gregory S. Alexander, *The Limits of Freedom of Contract in the Age of Laissez-Faire Constitutionalism*, in THE FALL AND RISE OF FREEDOM OF CONTRACT 103, 103, 108 (F.H. Buckley ed., 1999); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454, 482–86 (1909); Samuel Williston, *Freedom of Contract*, 6 CORNELL L.Q. 365, 373 (1921) (noting that English courts before the 19th century refused to enforce a variety of contracts contrary to public policy).

⁴² See G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 448–49 (1993).

⁴³ See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 675–77 (1996).

⁴⁴ See Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 315 (1975) (“Properly understood, [freedom of contract] does not require a court to enforce every contract brought before it.”).

⁴⁵ Richard Epstein, among others, has argued that economic duress, nondisclosure, the statute of frauds, and certain applications of the doctrine of capacity are not in fact consistent with the freedom of contract ideal. See *id.* at 297–302. This would suggest that many general contract defenses currently presumed to fall within the savings clause might become problematic if freedom of contract were taken to be the touchstone for FAA preemption.

⁴⁶ The lack of precision here is truly astounding. See, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 479–81 (1989) (noting the FAA’s policy of “strongly favor[ing] the enforcement of agreements to arbitrate” and later referring to favoritism of “arbitration proceedings” as a “method of resolving disputes”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625, 630 (1985) (explaining that the “‘liberal federal policy favoring arbitration agreements’ . . . is at bottom a policy guaranteeing enforcement of private contractual arrangements” and then relying on the “emphatic federal policy in favor of arbitral dispute resolution”); *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (noting at once that Section 2 embodies a “liberal federal policy favoring arbitration agreements” and that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.”).

and the agreements that give rise to it. Nonetheless, I shall argue that the best interpretation of the theory is that federal arbitration law seeks to favor arbitration *qua* process, not *qua* contract. There are at least three reasons why.

First, one of the main objectives of the FAA was to overturn the old “revocability” doctrine,⁴⁷ which allowed a reluctant party to revoke her promise to arbitrate existing or future disputes at any time prior to issuance of the award. Revocability does not go to the question of whether the arbitration *agreement* is valid or enforceable, because the non-revoking party was always entitled to money damages for breach.⁴⁸ Instead, because the right of revocation simply prevents a court from ordering specific performance of the promise to arbitrate, revocability goes only to the question of remedy—whether a court may compel resort to the arbitration *process*.⁴⁹ A significant part of the FAA’s charge, therefore, was the vindication of arbitration as a process rather than a promise.

Second, favoring arbitration agreements is better understood as a means to an end rather than an end in itself.⁵⁰ If arbitration agreements were ends in themselves, there would be little more for the FAA to do beyond reversing the old ouster doctrine, which made pre-dispute arbitration agreements void. The validity of a pre-dispute arbitration agreement could then be enforced by the award of money damages without so much as a single arbitration proceeding ever taking place.⁵¹ But the FAA does so much more: Among other things, it creates procedures for compelling arbitration, for staying or barring related litigation, for appointing arbitrators and conducting hearings, for enforcing arbitral awards as court judgments, and for vacating and

⁴⁷ This is one of the chief reasons why the command clause makes arbitration clauses falling within its purview “valid, irrevocable, and enforceable.” 9 U.S.C. § 2 (2009) (emphasis added); see Note, Erie, Bernhardt, and Section 2 of the United States Arbitration Act: A Farrago of Rights, Remedies, and a Right to a Remedy, 69 YALE L.J. 847, 854–56 (1960). The other reason was to overturn the ouster doctrine. See *infra* note 49.

⁴⁸ See IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 20 (1992) (adding that money damages were typically nominal); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 973 (1999).

⁴⁹ By contrast, the ouster doctrine went to the question of validity, although apparently only to the validity of pre-dispute arbitration agreements. See *Scott v. Avery*, [1856] 10 Eng. Rep. 1135, 1138 (H.L.); Charles Newton Hulvey, *Arbitration of Commercial Disputes*, 15 VA. L. REV. 238, 238 (1929); Note, *supra* note 47, at 854 n.46. Post-dispute arbitration agreements were considered perfectly valid, even though the revocability doctrine could still be invoked to deny specific performance. Thus, pre-FAA law allowed a court to compel the enforcement of *some* arbitration agreements (namely, post-dispute arbitration agreements, through the remedy of money damages), but never to compel the arbitration process.

⁵⁰ Although they might agree in the final analysis, most judges and commentators remain confused about this basic point. See Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189, 1238–39 (2011); Brief of Arbitration Professors as Amici Curiae in Support of Respondents at 14–18, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2010) (No. 09–893). A notable exception is Justice Stevens, who demonstrated a particularly lucid understanding of the means-ends distinction in his dissenting opinion in *Hall Street Associates., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008). There, he reasoned that “American courts were generally hostile to *arbitration*. They refused, with rare exceptions, to order specific enforcement of executory agreements arbitrate. Section 2 of the FAA responded to this hostility by making written *arbitration agreements* ‘valid, irrevocable, and enforceable.’” *Id.* at 593 (Stevens, J., dissenting) (emphasis added).

⁵¹ Whether the agreement is enforced by specific performance or money damages is not, after all, an issue of enforcement or validity but one of remedy. See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 293–94 (1995) (Thomas, J., dissenting).

modifying such awards.⁵² The FAA's true object of concern, therefore, is not so much the agreement itself as the process that the agreement makes possible.⁵³

Third, it is difficult to appreciate what it means to favor arbitration *agreements* other than eliminating needless impediments to their enforcement.⁵⁴ But if so, this begins to sound much like the contract theory's emphasis on "rigorously enforc[ing]" such agreements. To avoid redundancy, therefore, the favoritism theory is best interpreted as directed toward the arbitration process.

If the foregoing is correct, *Concepcion* is anything but favorable to arbitration. As many of us have already noted,⁵⁵ the opinion is infected to the core with the very same limiting beliefs about arbitration that the Court has spent the better part of three decades attempting to debunk. "Arbitration," the majority declared, "is poorly suited to the higher stakes of class litigation."⁵⁶ "Arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification," so that it is "at the very least odd to think that an arbitrator would be entrusted with ensuring that third parties' due process rights are satisfied."⁵⁷ Unlike the *de novo* review of class certification questions available in court, arbitrators' class certification decisions are not appealable.⁵⁸ And although the resulting award is subject to the FAA's vacatur standards, those standards amount to "no effective means of review."⁵⁹

In an early line of cases, the Court used similar uncharitable assessments about arbitration to undo valid, broadly-worded arbitration agreements.⁶⁰ Thus, in holding that a claim under the Fair Labor Standards Act (FLSA)⁶¹ was nonarbitrable, the Court held that:

⁵² See 9 U.S.C. §§ 3–7, 9–11 (2009).

⁵³ See STEPHEN J. WARE, *PRINCIPLES OF ALTERNATIVE DISPUTE RESOLUTION* 33 (2d ed. 2007) ("Central to the FAA is its requirement that courts enforce arbitration agreements with the remedy of specific performance."). In the same vein, even critics argue that the real motivation behind the Court's FAA jurisprudence is to secure an alternative forum to help alleviate crowded court dockets. See, e.g., Larry J. Pittman, *The Federal Arbitration Act: The Supreme Court's Erroneous Statutory Interpretation, Stare Decisis, and a Proposal for Change*, 53 ALA. L. REV. 789, 830 (2002); Sternlight, *supra* note 43, at 661.

⁵⁴ *Accord* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, 473 U.S. 614, 625 (1985) (defining the "liberal federal policy favoring arbitration agreements" as "at bottom a policy guaranteeing the enforcement of private contractual arrangements . . .").

⁵⁵ See Ian D. Mitchell & Richard Bales, *Concepcion and Preemption Under the Federal Arbitration Act*, 4 Y.B. ARB. & MED. (forthcoming 2012); Hiro Aragaki, *Status and contract in AT&T Mobility v. Concepcion*, SCOTUSBLOG (Sept. 14, 2011, 3:53 PM), <http://www.scotusblog.com/2011/09/status-and-contract-in-att-mobility-v-concepcion/>.

⁵⁶ AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1752 (2011).

⁵⁷ *Id.* at 1750, 1752.

⁵⁸ *Id.* at 1752.

⁵⁹ *Id.*

⁶⁰ See, e.g., McDonald v. City of W. Branch, Mich., 466 U.S. 284, 290 (1984) (stating that arbitration is "[not] an adequate substitute for a judicial proceeding"); Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974) (calling arbitration "inferior" to courtroom adjudication); cf. Prima Paint v. Flood & Conklin Mfg. Co., 388 U.S. 395, 407 (1967) (Black, J., dissenting) (considering it "fantastic" that arbitrators could "decide legal issues").

⁶¹ 29 U.S.C. §§ 201–262 (2011).

[M]any arbitrators may not be conversant with the public law considerations underlying the FLSA. FLSA claims typically involve complex mixed questions of fact and law Although an arbitrator may be competent to resolve many preliminary factual questions, such as whether the employee “punched in” when he said he did, he may lack the competence to decide the ultimate legal issue [of] whether an employee’s right to a minimum wage or to overtime pay under the statute has been violated.⁶²

Similarly, in *Wilko v. Swan*,⁶³ the Court declared that arbitration was not an adequate alternative to a trial with respect to claims under the Securities Act of 1933, in part because the FAA’s vacatur standards were no substitute for “judicial review for error.”⁶⁴

The Court’s more recent position is that these earlier cases were “pervaded by . . . ‘the old judicial hostility to arbitration’”⁶⁵—in other words, that they positively “*disfavor[ed]* arbitration” and were “far out of step” with the Court’s “current strong . . . *favori[tism]* [of] this method of resolving disputes.”⁶⁶ If *Concepcion*’s limiting beliefs about arbitration are not materially different from those found in the early nonarbitrability cases, it is difficult to appreciate how the decision can possibly be squared with the favoritism theory.⁶⁷

Concepcion is further unfavorable toward arbitration because it tends to close off new possibilities—possibilities consistent with the early reformers’ desire to “raise arbitration to the status and dignity of judicial process.”⁶⁸ In large part, modern FAA jurisprudence has been a jurisprudence of enablement. The “national policy favoring arbitration”⁶⁹ has been joined at the hip with a trend toward greater inclusiveness with respect to the scope of disputes covered by an arbitration agreement,⁷⁰ the type of claims justiciable in arbitration,⁷¹ the range of gateway issues

⁶² *Barrentine v. Arkansas-Best Freight Sys., Inc.*, 450 U.S. 728, 743 (1981).

⁶³ 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

⁶⁴ *Id.* at 433, 436–37; *see also* *Bernhardt v. Polygraphic Co. of Am., Inc.*, 350 U.S. 198, 203 (1956).

⁶⁵ *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989) (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)).

⁶⁶ *Id.* at 481 (emphasis added); *see also* *Shearson/Am. Exp., Inc. v. McMahon*, 482 U.S. 220, 226 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985).

⁶⁷ As the California Supreme Court presciently observed over a decade ago and later again in *Discover Bank*, the proposition that arbitration is unsuitable to class actions itself “reflects, . . . ‘the very mistrust of arbitration that has been repudiated by the United States Supreme Court.’” *Discover Bank v. Superior Court*, 113 P.3d 1100, 1113 (Cal. 2005) (citing *Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 693–94 (Cal. 2000)).

⁶⁸ Joseph Wheelless, *Arbitration as a Judicial Process of Law*, 30 W. VA. L.Q. 210, 216 (1924); *see also* *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1116 (1st Cir. 1989) (describing the FAA’s purpose to “legitimate” arbitration); *cf.* REV. UNIF. ARBITRATION ACT §§ 6 cmt., 23 cmt. B (2000), *available at* <http://www.law.upenn.edu/bll/archives/ulc/uarba/arbitrat1213.htm> [hereinafter RUAA] (describing the RUAA’s purpose to provide a “credibl[e]” and “true” alternative to litigation).

⁶⁹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

⁷⁰ *See* Thomas J. Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U.L. REV. 953, 972 (1986).

⁷¹ *See* Thomas J. Stipanowich, *Punitive Damages and the Consumerization of Arbitration*, 92 NW. U.L. REV. 1, 7–8 (1997).

that may be entrusted to arbitrators,⁷² and the menu of remedies that arbitrators may consult when granting relief.⁷³ A truly pro-arbitration ruling, therefore, would have seen *Concepcion* as an opportunity for enriching the arbitration alternative to class action litigation; it would have found a place at the table for this brave new thing called “class arbitration.”

By contrast, *Concepcion* makes arbitration and class relief mutually exclusive almost by definition,⁷⁴ and in this way represents a profoundly *disabling* moment in the history of modern arbitration law.⁷⁵ Arbitration and the class mechanism are conceived as static and brittle, unable to evolve in new directions or to accommodate one another as times change. As a result, a distinctive process of collective claiming—one responsive to not just to the weaknesses but also to the strengths of the arbitral forum—is unlikely to see the light of day.⁷⁶ This does not just mean that there will be fewer class arbitrations; ironically, it also means that there will also be fewer *individual* arbitrations.⁷⁷ As Justice Breyer put it, “What rational lawyer would have signed on to represent the *Concepciones* in litigation for the possibility of fees stemming from a \$30.22 claim?”⁷⁸ This cannot possibly be favorable to arbitration’s future development.

Those who persist in the belief that *Concepcion* is pro-arbitration make one of two errors. The first is to confuse the policy of favoring arbitration with that of favoring arbitration agreements. But rules that disfavor the strict enforcement of arbitration agreements, such as the unconscionability defense and the statutory and common law vacatur rules, play an important role in underwriting the legitimacy of the arbitration process.⁷⁹ Consider a hypothetical law that would limit the enforceability of patently unfair arbitration agreements, like the agreement at issue in *Hooters of America, Inc. v. Phillips*.⁸⁰ Preempting such a law would certainly favor arbitration agreements, but would we so easily conclude that it thereby favors arbitration?

⁷² See *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2783–85 (2010) (holding that gateway decisions about the validity of arbitration agreements may be delegated to the arbitrators); *Prima Paint*, 388 U.S. 395 at 402–04 (holding that arbitration clauses are severable, such that disputes over the validity of the container contract must be heard in arbitration).

⁷³ See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 61 n.7 (1995).

⁷⁴ *Concepcion*, 131 S. Ct. at 1753 (stating that class arbitration “is not arbitration as envisioned by the FAA”).

⁷⁵ Accord Thomas Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT’L. ARB. 68–69 (2012).

⁷⁶ Cf. Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 122–24 (2011) (“[O]ne could find class arbitration attractive not only because of its potential to deal equally with similarly situated disputants but also because it might respond to . . . asymmetries between disputants.”). To be sure, parties might still choose to incorporate class arbitration procedures, but this would “not [be] arbitration as envisioned by the FAA,” *Concepcion*, 131 S. Ct. at 1753, and might therefore be prone to attack in other ways. See *infra* notes 254–259 and accompanying text.

⁷⁷ See Colin P. Marks, *The Irony of AT&T v. Concepcion*, 87 IND. L.J. SUPP. 31, 32 (2012).

⁷⁸ *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting).

⁷⁹ See Lawrence A. Cunningham, *Supreme Court Arbitration Rhetoric v. Reality and AT&T*, CONCURRING OPINIONS (Apr. 15, 2011, 6:08 AM), <http://www.concurringopinions.com/archives/2011/04/supreme-court-arbitration-rhetoric-v-reality-and-att-mobility.html> (arguing that simply to favor arbitration does not necessarily answer whether a clause banning class arbitration promotes or retards that policy).

⁸⁰ 173 F.3d 933 (4th Cir. 1999) (describing arbitration agreement that, *inter alia*, gave Hooters the ability to control the composition of the arbitral panel, including by placing its own managers on the panel); see also *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (suggesting that, consistent with the FAA, states could prohibit parties from agreeing to have their disputes presided over by a “panel of three monkeys . . .”).

The second error is to confuse favoring arbitration with favoring the big businesses that are most apt to use it.⁸¹ It is difficult to quarrel with the observation that *Concepcion* favors big business, especially those keen on avoiding collective action claims (in arbitration or litigation).⁸² But that is not the same as saying that it favors arbitration. Consider in this vein the one thousand or so duplicative arbitrations filed late last year by plaintiffs' law firms on behalf of AT&T customers seeking to block AT&T's announced merger with T-Mobile.⁸³ Instead of honoring its own agreement to arbitrate, AT&T filed multiple actions in federal court seeking to block even these *individual* arbitrations. It argued that arbitrating these disputes (whether individually or as a class) would cause it irreparable injury, in part because arbitrators would be called on to evaluate "highly sophisticated and complex econometric and engineering models" and conduct "a detailed assessment of this evidence as it relates to the benefits to consumers and businesses"—tasks that presumably cannot be expected from an essentially fast, cheap, and simple adjudicative forum.⁸⁴ These statements may have come from the mouthpiece of arbitration's supposed champion, but they certainly do not favor arbitration. They are better seen as embodying the type of limiting beliefs that the Court's own jurisprudence in this area has sought to overturn.⁸⁵

⁸¹ For examples of this error, see Adam Liptak, *Supreme Court Allows Contracts that Prohibit Class-Action Arbitration*, N.Y. TIMES (Apr. 27, 2011), <http://www.nytimes.com/2011/04/28/business/28bizcourt.html>; Jim Hamilton, *Supreme Court Ruling Continues Strong Federal Policy Favoring Arbitration*, JIM HAMILTON'S WORLD OF SEC. REG. (Apr. 28, 2011, 11:44 AM), <http://jimhamiltonblog.blogspot.com/2011/04/supreme-court-ruling-continues-strong.html>; Fisher & Phillips, LLP, *Supreme Court Expands Use of Arbitration Agreements*, FISHER & PHILLIPS BLOGS (Apr. 27, 2011), <http://www.laborlawyers.com/shownews.aspx?Supreme-Court-Expands-Use-Of-Arbitration-Agreements&Ref=list&Type=1122&Show=13985>.

⁸² See, e.g., Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion*, 7 DUKE J. CONST. L. & PUB. POL'Y 1, 74, 96 (2011) (special issue); Andrew Cohen, *No Class: The Supreme Court's Arbitration Ruling*, THE ATLANTIC, (Apr. 27, 2011, 5:33 PM), <http://www.theatlantic.com/national/archive/2011/04/no-class-the-supreme-courts-arbitration-ruling/237967/>.

⁸³ See, e.g., Complaint, AT&T Mobility LLC v. Gonnello, No. 11-CV-05636 (PKC), 2011 WL 4716617 (S.D.N.Y. Oct. 7, 2011). See generally Terry Baynes, *AT&T Sues Customers Who Seek to Block T-Mobile Deal*, THOMSON REUTERS NEWS & INSIGHT (Aug. 17, 2011), http://newsandinsight.thomsonreuters.com/Securities/News/2011/08_-_August/AT_T_sues_customers_who_seek_to_block_T-Mobile_deal/.

⁸⁴ Complaint at ¶ 6, *Gonnello*, 2011 WL 4716617. Although these statements are highly suspect, the same is not necessarily true of AT&T's argument that an arbitral forum would not sufficiently protect the interests of the public and third parties who were not signatories to AT&T's arbitration agreement. The latter argument is based on unavoidable structural limitations of the arbitral forum rather than on a mistrust of the competence of arbitrators or the arbitration process, and for this reason does not appear to pose the same danger of hostility. Cf. Aragaki, *supra* note 50, at 1250–54.

⁸⁵ See *supra* notes 60–64 and accompanying text.

II. CONCEPCION THROUGH THE LENS OF ANTIDISCRIMINATION

If contract and favoritism do not provide a persuasive account of *Concepcion*, what does? One answer may be that the decision is unabashedly political and abandons all pretense of a reasoned justification.⁸⁶

Against this view, I wish to suggest that *Concepcion* remains faithful to the general obstacle preemption framework described in Part I. Rather than abandon that framework altogether, it simply brings to the fore an alternative interpretation of the FAA's purposes and objectives, and thus an alternative theory of what a state law must look like in order to stand as an obstacle to those objectives. As the title of this Article suggests, that alternative theory is grounded in the idea of antidiscrimination: of reversing the common law's unfounded "suspicion," "prejudice[]," and unjustified "hostility" toward arbitration.⁸⁷ Coming to grips with that theory and its implications for the FAA's preemptive reach will prove indispensable not just for making sense of an opinion that at first blush defies explanation, but also for developing a more ambitious critique, one that goes beyond the accusations of judicial partisanship or hypocrisy that have so far dominated commentary on the case.

To appreciate *Concepcion's* antidiscrimination moorings, one must dig beneath the surface. I begin, then, by exhuming the parties' briefs on the merits. What is immediately striking here is that, despite the deep ideological chasm that separated them, AT&T and the *Concepcions* were in complete agreement that the outcome of the case hinged on whether the state law "discriminated" against arbitration.⁸⁸ Thus, rather than challenge AT&T's contention that *Discover Bank* should be preempted because it "runs afoul of th[e] fundamental nondiscrimination principle" enshrined in section 2,⁸⁹ the *Concepcions* fully embraced it.⁹⁰ "The preemption inquiry," they concurred, "turns on whether the state law in question discriminates against arbitration."⁹¹ The *Concepcions* simply disagreed that *Discover Bank* was discriminatory in the way that AT&T supposed.⁹²

To be sure, framing the FAA preemption question in this way seems peculiar, perhaps even jarring. Most of us rightly doubt whether arbitration can be understood as a victim of "discrimination." Be that as it may, numerous courts and commentators have appreciated what I have elsewhere referred to as the equal opportunity underpinnings of the Court's FAA

⁸⁶ See generally Reuben, *supra* note 2 (criticizing the Court's FAA jurisprudence, including *Concepcion*, as unprincipled and based on little more than judicial activism); Cliff Palefsky, *Closing thoughts on the arbitration symposium*, SCOTUSBLOG (Sept. 26, 2011, 6:41 PM), <http://www.scotusblog.com/2011/09/closing-thoughts-on-the-arbitration-symposium/>.

⁸⁷ See Aragaki, *supra* note 50, at 1197.

⁸⁸ See, e.g., Brief for Petitioner, *supra* note 31, at 28–29, 36–37, 42; Transcript of Oral Argument at 24, AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2010) (No. 09–893) [hereinafter Transcript].

⁸⁹ See Brief for Petitioner, *supra* note 31, at 28.

⁹⁰ They surely did not need to do so, because it was by no means a settled proposition even among arbitration scholars that one of the "purposes and objectives" of the FAA was to reverse "discrimination" against arbitration.

⁹¹ Brief for Respondents at 17, AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740 (2010) (No. 09–893); see also *id.* at 9–10, 11, 13, 14.

⁹² *Concepcion* thus became the first case on the merits before the U.S. Supreme Court to frame the FAA preemption analysis explicitly in terms of whether the state law "discriminated" against arbitration.

preemption jurisprudence.⁹³ And for at least a decade, commentators have criticized state unconscionability rulings using the very same antidiscrimination arguments advanced by AT&T in *Concepcion*.⁹⁴ My point in this Article is not to defend or attack the way in which FAA preemption doctrine has come to be organized around the idea of antidiscrimination. Instead, it is to draw attention to the undeniable fact of this organization and how it enables courts to deploy a potent rhetoric—often in ways that are internally inconsistent or incoherent—to legitimize the FAA’s extraordinary displacement of state law.⁹⁵

Surprisingly, few have ventured beyond the occasional, one-line reference to the FAA as an “anti-discrimination statute”⁹⁶ or as “a kind of equal protection clause” for arbitration provisions⁹⁷ in order to explain the meaning behind those claims. As a result, the antidiscrimination foundations of federal arbitration law remain to this day poorly understood and vastly under-theorized.⁹⁸ This would prove particularly problematic in *Concepcion* because the precise antidiscrimination issue raised by AT&T was itself far more complex than what had previously come before the Court.⁹⁹ The Court has typically preempted state laws that purposefully target arbitration—laws that “singl[e] out arbitration provisions for suspect status” on their face.¹⁰⁰ By contrast, the *Discover Bank* standard seeks only to regulate class waivers. It is “facially neutral”¹⁰¹ both in the sense that it does not specifically mention arbitration and because it applies equally to class waivers in arbitration *and* litigation. The *Concepcions* argued that this facial neutrality rendered *Discover Bank* presumptively nondiscriminatory. AT&T countered that ostensibly neutral laws may nonetheless be used as a pretext for reviving the old judicial hostility toward arbitration, and that *Discover Bank* was a clear example of just that.

⁹³ See Aragaki, *supra* note 18, at 1265–66.

⁹⁴ See, e.g., Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469 (2006); Michael G. McGuinness & Adam J. Karr, *California’s “Unique” Approach to Arbitration: Why This Road Less Traveled Will Make All the Difference on the Issue of Preemption Under the Federal Arbitration Act*, 2005 J. DISP. RESOL. 61 (2005); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004).

⁹⁵ This is not an argument I have the luxury to explain here. See generally Aragaki, *supra* note 18 (arguing that the Court’s FAA preemption jurisprudence should be understood as animated by a theory of nondiscrimination toward arbitration).

⁹⁶ Joshua Ratner & Christian Turner, *Origin, Scope, and Irrevocability of the Manifest Disregard of the Law Doctrine: Second Circuit Views*, 24 QUINNIPIAC L. REV. 795, 797–98 (2006).

⁹⁷ Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 COLUM. L. REV. 1919, 1955 (2003).

⁹⁸ I say “federal arbitration law” rather than “the FAA” because the antidiscrimination theory arises from the Court’s interpretation of the FAA and of its legislative history more so than from the text of the statute itself. See Aragaki, *supra* note 18, at 1238, 1250, 1283. When I refer to the antidiscrimination principle of the FAA throughout this Article, therefore, I mean that principle as gleaned from FAA jurisprudence as a whole rather than from the text or original intent of the FAA in 1925.

⁹⁹ *Accord* AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1747 (2011).

¹⁰⁰ *Doctor’s Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

¹⁰¹ Brief for Petitioner, *supra* note 31, at 29; Brief for Respondents, *supra* note 91, at 24; Transcript, *supra* note 88, at 35.

By definition, pretextual discrimination means purposeful discrimination.¹⁰² To describe an ostensibly neutral law as “pretextual” is not simply to claim that it *happens* to produce discriminatory results; rather, it is to claim that the law serves as a front for discrimination by design. Although this nuance appears to have been lost on counsel, it was immediately apparent to the justices during oral argument. Several of them, for instance, asked for a “test” that could be used to assess whether *Discover Bank* was in fact a “subterfuge”—that is, a “facially neutral contract law defense[] that implicitly discriminate[s] against arbitration.”¹⁰³ Justice Breyer cut to the heart of the issue with the following colorful hypothetical:

I would guess it’s like Switzerland having a law saying, we only buy milk from cows who are in pastures higher than 9,000 feet. That discriminates against milk from the rest of the continent. But to say we want cows that have passed the tuberculin test doesn’t. . . . And here, my impression is—correct me if I am wrong—the class arbitration exists. It’s. . . not like having a jury trial. You could have it in arbitration. You can have it in litigation. So where is the 9,000-foot cow, or whatever it is? Where is the discrimination?¹⁰⁴

Although the import of this hypothetical has remained obscure to most commentators,¹⁰⁵ it is made plain once we understand the underlying issue as one of pretext. The hypothetical asks whether *Discover Bank* is more like a rule against low altitude milk or more like one against unpasteurized milk. Both are ostensibly neutral with respect to country of origin, but we suspect only the former to be a foil for hostility toward foreign milk. Why? Because there are good reasons to discriminate against unpasteurized milk. By contrast, altitude does not bear even a *prima facie* relationship to any valid purpose such as national health. The apparent arbitrariness of the 9,000 foot rule, in other words, makes it more likely to be motivated by xenophobia.¹⁰⁶

These and other exchanges during oral argument, together with the parties’ briefing of the issues, teed up the Court to resolve one and only one question: Was *Discover Bank* a pretext—a cover for intentional and unjustified discrimination against arbitration?¹⁰⁷ Although the majority never uses the word “discrimination” in its holding,¹⁰⁸ it effectively answers this question in the affirmative. It begins by observing that the FAA was enacted to rectify a widespread judicial

¹⁰² See *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 256 (1981) (equating proof of “pretext[ual]” discrimination with proof of “intentional discrimination”); Robert Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235, 1284–85 (1988); see also BLACK’S LAW DICTIONARY 1307 (9th ed. 2009).

¹⁰³ Transcript, *supra* note 88, at 35 (Sotomayor, J.); see also *id.* at 16 (Sotomayor, J.); *id.* at 17 (Kagan, J.).

¹⁰⁴ *Id.* at 14.

¹⁰⁵ See, e.g., Dahlia Lithwick, *Can You Hear Them Now?*, SLATE (Nov. 9, 2010, 6:54 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2010/11/can_you_hear_them_now.html.

¹⁰⁶ Justice Breyer also associated the 9,000 foot rule with “lying,” which again implies intentional misconduct. See Transcript, *supra* note 88, at 38.

¹⁰⁷ This, I take it, is related to Michael Helfand’s point that what was problematic to the *Concepcion* Court about *Discover Bank* is the way the standard facilitated the lower courts’ perceived “knee-jerk” hostility to AT&T’s arbitration clause. See Michael A. Helfand, *Purpose, Precedent, and Politics: Why Concepcion Covers Less Than You Think*, 4 Y.B. ARB. & MED. (forthcoming 2012).

¹⁰⁸ It did, however, characterize AT&T’s claim as a claim that “California law discriminated against arbitration” in its recitation of the procedural history. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). The dissent more explicitly frames the issue in terms of discrimination. See *id.* at 1758–59, 1761 (Breyer, J., dissenting).

hostility toward arbitration¹⁰⁹—a purpose that is just as easily frustrated by state laws that single out arbitration as by more subtle variants that nevertheless “derive their meaning from the fact that an agreement to arbitrate is at issue.”¹¹⁰ It then considers whether *Discover Bank* can be distinguished from the following “parade of horrors”: (a) a rule requiring the availability of judicially monitored discovery in all public and private dispute resolution processes; (b) a rule requiring use of the Federal Rules of Evidence in such processes; or (c) a rule imposing jury fact finding in such processes.¹¹¹ The Court suggests that these facially neutral rules are problematic not so much because they might *end up* destroying arbitration, but because we have reason to suspect that they were specifically “aimed at destroying arbitration.”¹¹² Our suspicions, moreover, would hardly be “fanciful, since the judicial hostility towards arbitration that prompted the FAA ha[s] manifested itself in ‘a great variety’ of ‘devices and formulas’ declaring arbitration against public policy.”¹¹³ As an example of a “rationalization” for the first rule, a court could claim with a straight face that “no consumer would knowingly waive his right to full discovery, as this would enable companies to hide their wrongdoing.”¹¹⁴ Or, to “help avoid preemption,” the third rule could be dubbed a requirement to convene “a panel of twelve lay arbitrators.”¹¹⁵ The crux of the Court’s holding is that *Discover Bank* is equally suspect because it is indistinguishable from any of these examples of pretextual discrimination.

Properly understood, *Concepcion* thus stands for the proposition that *Discover Bank* somehow purposefully discriminates against arbitration. Many other commentators both within and outside of this Symposium have made the same observation, although they often employ the term “hostility” rather than “discrimination.”¹¹⁶ By locating *Concepcion* within an antidiscrimination paradigm, I do not mean to say that the contract and favoritism theories are no longer relevant. Contract and favoritism are important and enduring themes, not just in federal arbitration law but also in antidiscrimination theory. But as FAA preemption has increased in complexity, bringing within its purview not just state laws that single out arbitration but also those that are facially neutral, the older theories have begun to lose some of their explanatory power. Courts and litigants have more openly embraced antidiscrimination as an alternative

¹⁰⁹ *Id.* at 1745, 1747 (majority opinion).

¹¹⁰ *Id.* at 1746 (quotation omitted). This is very similar to the standard the Court has articulated in more traditional purpose-based antidiscrimination contexts. There, the fact that employers or state actors knew or could have foreseen that a protected group would be adversely affected by the law or measure in question is generally insufficient to prove intentional discrimination. *See, e.g., Frazier v. Garrison*, 980 F.2d 1514, 1526–27 (5th Cir. 1993). Instead, the law or measure must somehow take its meaning from the fact that a protected group will be adversely affected, in the sense that it was designed at least in part “because of, not merely in spite of,” its impact on the group. *See Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979) (internal quotation marks omitted).

¹¹¹ *See Concepcion*, 131 S. Ct. at 1747. To be sure, neither *Discover Bank* nor any of these hypothetical laws “requires” or “imposes” anything in arbitration; it simply prohibits the waiver of certain procedural mechanisms such as class actions. *See infra* note 273. I use this particular formulation for the sake of simplicity only.

¹¹² *Concepcion*, 131 S. Ct. at 1747 (emphasis added).

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *See, e.g., Marks*, *supra* note 77, at 31, 41; *Resnik*, *supra* note 76, at 125–26; *Stipanowich*, *supra* note 75, at 376, 380; Jill Gross, *AT&T Mobility, FAA Preemption, and Class Arbitration*, SCOTUSBLOG (Sept. 15, 2011, 9:29 AM), <http://www.scotusblog.com/2011/09/att-mobility-faa-preemption-and-class-arbitration/> (stating that the Court held *Discover Bank* to be preempted by the FAA because of its “anti-arbitration animus”).

paradigm that is both more robust and more nuanced for purposes of addressing these new challenges.

The basic problem, however, is that there is so far no widely-accepted consensus about the details of this alternative paradigm. To be sure, the cases are replete with cryptic maxims that sound in a distinctively antidiscrimination register: “Congress precluded States from singling out arbitration provisions for suspect status”;¹¹⁷ “the FAA is pre-emptive of state laws hostile to arbitration”;¹¹⁸ the savings clause does not protect a judicial holding that “rel[ies] on the uniqueness of an agreement to arbitrate as a basis for” a determination of unconscionability.¹¹⁹ The most famous of these is perhaps the following:

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal “footing,” directly contrary to the Act’s language and Congress’ intent.¹²⁰

Most of us think we know what these maxims mean. We think we know, for example, how to spot a law that “takes its meaning precisely from the fact that a contract to arbitrate is at issue”¹²¹ or that fails to place arbitration agreements on an “equal footing.” But the truth is that we do not. We have been lulled into a false confidence about the nature, scope, and limits of these propositions and the legal arguments they can be expected to support. The litigation of *Concepcion* is a testament to this, and so it is to this issue that I now turn.

III. LITIGATING *CONCEPCION*: THE PERILS OF PROTO-THEORY

The parties’ framing of the FAA preemption issue in terms of whether *Discover Bank* “discriminated” against arbitration forced the Court to confront a complex set of questions not just about the nature of the FAA’s antidiscrimination mandate, but also about the circumstances in which a facially neutral law can be deemed to discriminate against arbitration by pretext.¹²² Not surprisingly, the justices surfaced many of these questions during oral argument. But upon reading the transcript of the argument, it becomes painfully evident that counsel on both sides lacked the analytic tools and even the vocabulary to engage them on a meaningful level. The

¹¹⁷ *Doctor’s Assocs. Inc. v. Casarotto*, 517 U.S. 681, 687 (1996).

¹¹⁸ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 112 (2001).

¹¹⁹ *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

¹²⁰ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

¹²¹ *Perry*, 482 U.S. at 492 n.9.

¹²² To be sure, some of these questions had begun to surface in the lower courts and had even come knocking on the Court’s door in the recent past. *See, e.g.*, *Petition for a Writ of Certiorari at 16, Cingular Wireless LLC v. Mendoza*, 126 S. Ct. 2353 (2006) (No. 05–1119) (“Although we do not here challenge the Court’s recognition of unconscionability as a potentially valid state-law basis for refusing to enforce an arbitration provision, this case demonstrates the need to provide guidance as to when a court’s invocation of this extraordinarily malleable doctrine truly is arbitration-neutral as opposed to being a subterfuge for engaging in anti-arbitration animus.”). *See generally* *Petition for a Writ of Certiorari, Beverly Enters.-Ill., Inc. v. Blazier*, 130 S. Ct. 1698 (2009) (No. 09–747); *Petition for a Writ of Certiorari, Ryan’s Family Steak Houses, Inc. v. Walker*, 126 S. Ct. 730 (2005) (04–1672).

reason for this has less to do with the quality of counsel’s representation—which by all accounts was first rate and which I do not mean to criticize here—and more to do with the dearth of conceptual resources available to them for constructing sophisticated antidiscrimination arguments.

My goal in this Part is to draw attention to and to critique the surprisingly underdeveloped state of the law in this area by focusing on three central questions that the parties were unable adequately to address during the litigation of *Concepcion*. Coming to grips with these questions will be indispensable if we are to have any hope of mastering the antidiscrimination theory of FAA preemption.

A. What is the Subject of Discrimination?

One of AT&T’s leading arguments for why *Discover Bank* discriminated against arbitration was that, instead of applying across the board to *all* agreements under the sun, it only applied to a subset of agreements—namely, consumer contracts that contain class waivers.¹²³ In other words, the mere fact that some arbitration agreements fall within this subset while a whole range of other agreements do not (think of pharmaceutical, physician-patient, plumbing, prenuptial, prostate removal, and countless other agreements) is sufficient to establish discriminatory treatment. The obvious point that *Discover Bank* does not treat class waivers in arbitration any differently from those in litigation recedes into obscurity.

AT&T’s flagship argument that a state law “discriminates” for FAA preemption purposes if it fails to “place[] arbitration agreements on equal footing with *all other contracts*”¹²⁴ is, however, hopelessly incoherent. No law—not even the defense of fraud or duress—applies in any meaningful sense, as one group of *amici* put it, to “‘any’ and *every* contract.”¹²⁵ More to the point, the argument betrays a vital misunderstanding about the subject of the FAA’s antidiscrimination mandate. Most courts and commentators assume that the FAA’s purpose is to make arbitration agreements as enforceable as other contracts. But as I have already argued, making arbitration *agreements* as enforceable as other contracts was never an end in itself; rather, it was a means to enable the arbitration *process* to stand on an equal footing with litigation.¹²⁶ At root, therefore, the subject of the FAA’s mandate must be the latter and not the former.

A simple example from the antidiscrimination context will explain. The claim that a prosecutor’s use of the peremptory challenge to exclude African Americans from petit criminal juries violates the Equal Protection Clause is at root a claim that eligible African Americans are being discriminated against in favor of a comparison group. The comparison group plainly cannot consist of *all* other individuals, for the peremptory challenge is inapplicable to whole classes of persons (non-citizen permanent residents, children, convicted felons in custody, persons who

¹²³ Brief for Petitioner, *supra* note 31, at 17–18, 28–31.

¹²⁴ *Id.* at 28 (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)); *see also* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 25, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2010) (No. 09–893); Brief Amici Curiae of Distinguished Law Professors, *supra* note 31, at 8.

¹²⁵ Brief of the Chamber of Commerce of the United States of America, *supra* note 124, at 25 (emphasis added) (citation omitted). This is a complex argument that I have set out elsewhere. *See* Aragaki, *supra* note 50, at 1218–23.

¹²⁶ *See supra* notes 50–53 and accompanying text; Aragaki, *supra* note 50, at 1223–24, 1228–35.

have served in the past twelve months, and residents of other states, to name a few). Yet this lack of universal applicability hardly shakes our confidence in the prosecutor's evenhanded use of the challenge. What is relevant is only whether, given two or more groups whose members are *functionally interchangeable* in the sense that each could perform jury service in the same way, one is being disfavored for no reason other than race.¹²⁷ Thus, one way of raising an inference of race-based discrimination would be to show that the prosecutor used his peremptories more frequently against eligible African Americans than he did against eligible whites.¹²⁸

Now consider three different contract clauses: (i) an arbitration clause containing a class arbitration waiver, (ii) an attorney fee-shifting clause, and (iii) a release of liability clause. Like the prosecutor's use of the peremptory challenge in my example, *Discover Bank* arguably has an adverse effect only on the arbitration clause; it has no application whatsoever to the other two or indeed to most other contract clauses. But the fact that *Discover Bank* does not apply in this way to "all" clauses is surely not what it means for *Discover Bank* to discriminate. We do not suspect, for instance, that the California Supreme Court devised the *Discover Bank* standard in order to enable more attorney fee-shifting clauses to be enforced or to encourage contract drafters to include more releases in their form contracts. Striking the arbitration clause as unconscionable does not somehow favor the other two clauses in the way that excluding eligible African Americans from jury service favors eligible whites. The reason is that the other clauses are not functionally interchangeable with the arbitration clause and thereby provide no salient comparison group for purposes of establishing discrimination.

To the extent that the facially neutral *Discover Bank* rule can be considered discriminatory at all, therefore, it must be because the rule treats *arbitration and litigation* differently for essentially arbitrary reasons—reasons that we suspect derive from the common law's legacy of "jealousy" toward the arbitral forum.¹²⁹ This makes eminent sense not just as a matter of logic but also in light of the history of Anglo-American arbitration law. The central question that flows through that history—from *Scott v. Avery*¹³⁰ to *Tobey v. Bristol*¹³¹ to *Wilko v. Swan*¹³² and finally, I argue, *AT&T Mobility v. Concepcion*—is the question of whether arbitration and litigation are functionally equivalent dispute resolution forums, not whether arbitration agreements are or should be interchangeable with other contracts.

¹²⁷ Robert Post identifies this type of "functional rationality" as a basic premise behind the dominant conception of American antidiscrimination law. See ROBERT C. POST ET AL., PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTIDISCRIMINATION LAW 24–26 (2001).

¹²⁸ By contrast, evidence that African Americans in the jury venire were being disfavored relative to persons who wear crimson sweatshirts, persons whose last name begins with "A," or persons whose diet includes durian, without more, is of absolutely no moment until we know which of these persons were also members of the class of eligible whites.

¹²⁹ See *Arbitration of Interstate Commercial Disputes: Joint Hearings Before the Subcomms. of the Comms. on the Judiciary on S. 1005 and H.R. 646*, 68th Cong. 16 (1924) (statement of Julius Henry Cohen); STERLING, TO MAKE VALID AND ENFORCEABLE CERTAIN AGREEMENTS FOR ARBITRATION, S. REP. NO. 68–536, at 2–3 (1924); H.R. REP. NO. 68–96, at 1–2 (1924); Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 283 (1926).

¹³⁰ [1856] 10 Eng. Rep. 1135 (H.L.).

¹³¹ 23 F. Cas. 1313 (C.C.D. Mass. 1845).

¹³² 346 U.S. 427 (1953).

Despite what may in hindsight appear to be a fairly obvious point, FAA preemption doctrine continues to exhibit a bewildering indecisiveness about something as foundational as the subject of its antidiscrimination principle. Consider that the essentially specious “all contracts” *ratio* has for more than ten years been the leading standard used by lower courts to determine whether facially neutral laws other than standard contract law defenses are preempted by the FAA.¹³³ The confusion is so widespread and unquestioned that not even AT&T saw through it clearly. If it had, it surely would not have led with an argument that even justices who joined the majority dismissed as a non-starter.¹³⁴ Instead, AT&T would have focused its efforts on developing an argument that was still inchoate in its brief but that eventually carried the day: the claim that *Discover Bank*, like the Court’s parade of horrors, is tainted by the impermissible “assumption that arbitration cannot vindicate the public interest to the same extent as judicial class actions.”¹³⁵

Confusion about the subject of discrimination is problematic not simply because it breeds imprecision or inconsistency but because it tempts obfuscation. When courts mobilize the rhetoric of antidiscrimination to justify preempting state laws without being clear about the very subject of their purported solicitude, the resulting lack of transparency can be exploited to reach result-driven decisions. Consider a forum selection statute, facially neutral in the way I describe above,¹³⁶ that voids any agreement by persons with little or no bargaining power (*e.g.*, a franchisee or consumer) to resolve disputes outside her home state. The overwhelming majority of courts hold that such laws violate the maxim to place arbitration agreements on an “equal footing with all other contracts”¹³⁷ because the laws apply (i) only to forum selection clauses in (ii) only one type of contract (*e.g.*, franchise, consumer).¹³⁸ What gets occluded by this analysis, of course, is that those laws still treat arbitration and litigation exactly the same.¹³⁹

When the tables are turned, however, precisely the opposite argument is invoked. Thus, when the law at issue is a common law defense that (according to FAA lore) applies to all

¹³³ See Aragaki, *supra* note 50, at 1204–06.

¹³⁴ Justices Scalia and Kennedy expressed incredulity at the argument, pointing out the obvious fact that most legislative enactments—including those that AT&T readily conceded were *not* discriminatory—do not in fact apply to “all” contracts. See Transcript, *supra* note 88, at 4, 11, 23 (Scalia, J.); *id.* at 22 (Kennedy, J.). I have elsewhere sought to show that the argument is fundamentally incoherent. See Aragaki, *supra* note 50, at 1218–23; Brief of Arbitration Professors, *supra* note 50, at 25–29. The fact that two of the five justices in the majority signaled their strong inclination to reject the “all contracts” standard is perhaps one of the saving graces of *Concepcion*. It suggests that what is currently the majority approach to FAA preemption of facially neutral statutes in the lower courts, exemplified by cases such as *Bradley v. Harris Research, Inc.*, 275 F.3d 884, 890, 892 (9th Cir. 2001), would not survive if presented to the Court for decision.

¹³⁵ Brief Amici Curiae of Distinguished Law Professors, *supra* note 31, at 10, 25; see also Brief for Petitioner, *supra* note 31, at 50–51 (implying that state laws contravene the FAA when they impose on arbitration “‘procedural accoutrements’” characteristic of litigation, which effectively “amount[s] to ‘an attack on the character of arbitration itself’” (quoting *Iberia Credit Bureau v. Cingular Wireless LLC*, 379 F.3d 159, 175–76 (5th Cir. 2004))).

¹³⁶ See *supra* note 101 and accompanying text.

¹³⁷ *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006).

¹³⁸ See, *e.g.*, *Bradley*, 275 F.3d at 890; *KKW Enters., Inc. v. Gloria Jean’s Gourmet Coffees Franchising Corp.*, 184 F.3d 42, 51–52 (1st Cir. 1999); *Doctor’s Assocs., Inc. v. Hamilton*, 150 F.3d 157, 163 (2d Cir. 1998). *But see* *Keystone, Inc. v. Triad Sys. Corp.*, 971 P.2d 1240, 1245 (Mont. 1998).

¹³⁹ Moreover, the two are similarly situated with respect to the purpose behind such laws, which is to protect weaker parties from unfair hardship and to make it more difficult for stronger parties to evade liability for wrongful conduct.

contracts, those seeking preemption argue that the law “rests on nothing less than an assumption that arbitration, just because it is arbitration, is less desirable than litigation.”¹⁴⁰ In other words, when it is no longer feasible to claim that arbitration *agreements* have been placed on a different footing than other contracts, the axis of comparison switches to arbitration *vs.* litigation. “Heads we win, tails you lose.”

B. Is Discrimination Equivalent to Doctrinal Deviation?

AT&T’s other leading argument was that *Discover Bank* discriminated against arbitration because it represented such a “distortion” of California unconscionability doctrine that “[w]e have not located a single precedential California decision” to support it.¹⁴¹ The gravamen of this claim is not that *Discover Bank* merely extends or adapts the doctrine in questionable ways—ways that a reviewing court would leave undisturbed.¹⁴² Instead, it is that *Discover Bank* is unprecedented and erroneous as a matter of law, among other things because it considers the fairness of a clause (i) to persons who are not parties to the agreement and (ii) in light of subsequent events, rather than events at the time of contracting.¹⁴³ These “significant” and “extreme” doctrinal “deviat[ions]”¹⁴⁴ from settled unconscionability principles, AT&T argued, are sufficient to “demonstrate[] impermissible discrimination.”¹⁴⁵

But a moment’s thought should reveal that there is no necessary connection between discrimination and doctrinal error. Incorrect applications of the law may well be considered nondiscriminatory, as when laws are misapplied because of incompetence, oversight, or a self-confessed desire to further other, more important ends. And depending on how discrimination is defined, even incorrect applications that produce starkly disproportionate outcomes, if unaccompanied by improper motives, may not count as discriminatory.¹⁴⁶

By the same token, correct applications of the law may well be discriminatory. A good example of this is *Batson v. Kentucky*,¹⁴⁷ the inspiration for my previous example involving the

¹⁴⁰ McGuinness & Karr, *supra* note 94, at 83; *see also* Brief Amici Curiae of Distinguished Law Professors, *supra* note 31, at 25, 29; Burton, *supra* note 94, at 486, 488; Randall, *supra* note 94, at 198–220 (arguing that hostility in the application of the unconscionability rule may be inferred from stark differences in the way courts assess the fairness of a dispute resolution term relating to arbitration versus litigation). The flip side of this is that courts find *no* hostility, and thus no FAA preemption, when the unconscionability defense appears to be applied in a manner that does not “express the impermissible view that arbitration is inferior to litigation” *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004); *see also* Fensterstock v. Educ. Fin. Partners, 611 F.3d 124, 134 (2d Cir. 2010), *vacated sub nom.*, *Affiliated Computer Services, Inc. v. Fensterstock*, 131 S. Ct. 2989 (2011); *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 905–06 (7th Cir. 2004).

¹⁴¹ *See* Brief for Petitioner, *supra* note 31, at 36; *see also id.* at 32–33, 37, 39; *supra* note 31 and accompanying text.

¹⁴² *Accord* Brief for Respondents, *supra* note 91, at 35–36 (describing AT&T’s argument as raising “a question of state law, which this Court does not sit to review” (citation omitted)).

¹⁴³ *See* Brief for Petitioner, *supra* note 31, at 34–38.

¹⁴⁴ *Id.* at 32, 39.

¹⁴⁵ *Id.* at 37 (emphasis added); *see also id.* at 36; Brief Amici Curiae of Distinguished Law Professors, *supra* note 31, at 18; Transcript, *supra* note 88, at 6–7 (arguing that *Discover Bank*’s doctrinal deviations, without more, “quite clear[ly]” establish discrimination).

¹⁴⁶ *See infra* note 163 and accompanying text.

¹⁴⁷ 476 U.S. 79, 95 (1986).

peremptory challenge. The gist of Mr. Batson’s equal protection claim was not that the prosecutor had exercised his preremptories incorrectly (for example, because he had used too many). Quite the contrary: It was that it is virtually impossible for the prosecutor to do so, which is precisely what makes the discrimination so difficult to prove. If Mr. Batson had been required to establish an error of state law before he could establish his federal constitutional claim, equal protection law would entirely fail to capture much of what we consider pretextual discrimination. By overlooking this hallmark of a claim sounding in pretext—namely, the use of something *legitimate* to cover something illegitimate—AT&T underappreciated the crux of its own pretext-based claim.

Equipped with a more sophisticated account of discrimination under the FAA, AT&T might have marshaled a much stronger argument: Even if *Discover Bank* were a perfectly valid application or “refinement” of longstanding unconscionability principles (as the Concepcions and their *amici* had contended), it was *still* discriminatory and thus preempted.¹⁴⁸ The argument was hardly beyond contemplation. A loud chorus of courts and commentators has increasingly warned that unconscionability is being used as a ruse for a “new judicial hostility” toward arbitration.¹⁴⁹ In its strongest form, the contention is not so much that courts are getting the law of unconscionability wrong (even though, for want of a better alternative, this is indeed how many have framed it).¹⁵⁰ Instead, it is that the absence of bright line rules in the unconscionability area allows them to get it *right* and thereby to perpetuate the legacy of anti-arbitration hostility in ways that escape easy detection.¹⁵¹

Using doctrinal deviation as a proxy for discrimination did not just prevent AT&T from advancing much stronger arguments. Crucially, it also collapsed the federal preemption inquiry into a question of state contract law.¹⁵² This effectively put AT&T in the odious position of asking the Court to review the California Supreme Court’s *Discover Bank* decision on the merits—a request that even AT&T must have realized was deeply problematic from a federalism

¹⁴⁸ By the same token, the Concepcions might have argued that, even if AT&T were correct that the California Supreme Court had misapplied established unconscionability principles in *Discover Bank*, there were other, perfectly plausible explanations for this having nothing to do with discrimination. But they did not. *See* Brief for Petitioner, *supra* note 31, at 31–39. The reason for this, again, is not a failing on counsel’s part; instead, it stems from the problem that FAA jurisprudence currently lacks the doctrinal and theoretical resources with which to construct such an antidiscrimination-based argument.

¹⁴⁹ Burton, *supra* note 94, at 489–500; McGuinness & Karr, *supra* note 94, at 62; Thomas H. Riske, Note, *No Exceptions: How the Legitimate Business Justification for Unconscionability Only Further Demonstrates California Courts’ Disdain for Arbitration Agreements*, 2008 J. DISP. RESOL. 591, 600–01 (2008).

¹⁵⁰ *See, e.g.*, Randall, *supra* note 94, at 186.

¹⁵¹ This distinction appears to have been entirely lost on AT&T’s *amici*. The thrust of the “new judicial hostility” claim is not, as the *amici* put it, that courts are “hid[ing] this *distortion* [of the common law defense] in the garb of general unconscionability law.” Brief Amici Curiae of Distinguished Law Professors, *supra* note 31, at 32. Rather, it is that they are hiding *discrimination* within it.

¹⁵² This is especially problematic in a case like *Concepcion* for two reasons. First, unconscionability determinations are notoriously difficult to review. *See* Aragaki, *supra* note 18, at 1289–92. Second, when a state court’s application of the unconscionability defense is raised to a federal court, it implicates a host of other federalism concerns. *See* Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1444–59 (2008).

perspective.¹⁵³ The fact that AT&T persisted with the argument all the same speaks volumes about the reigning confusion over what it means to “discriminate” for purposes of FAA preemption.

Here one might reasonably ask how AT&T and others who fear the pretextual use of the unconscionability doctrine can prove discrimination without the crutch of doctrinal misapplication. An answer is suggested by a distinctive characteristic of pretext claims that we considered earlier: They presuppose intentional discriminatory treatment. As such, it should be possible to demonstrate that an adverse unconscionability determination, even if doctrinally unremarkable, was nonetheless motivated by impermissible hostility to arbitration.¹⁵⁴ For instance, a court might enunciate the familiar unconscionability rule yet apply it in a way that betrays “outmoded presumptions” about arbitration’s inferiority to litigation.¹⁵⁵ A court might also drop other hints in its opinion that suggest a visceral rather than reasoned opposition to arbitration.¹⁵⁶ A good example of the former is the California Supreme Court’s much-discussed opinion in *Armendariz v. Foundation Health Psychcare Services, Inc.*¹⁵⁷ *Armendariz* raises far fewer doctrinal red flags than *Discover Bank*. But because the holding in *Armendariz* rests in part on questionable assumptions about arbitration’s competence and desirability as a dispute resolution forum, it is arguably beset by the same anti-arbitration hostility prohibited by the FAA.¹⁵⁸

A final retort is that doctrinal irregularities and departures from the ordinary course, without more, are sometimes sufficient to raise an inference of discrimination.¹⁵⁹ Although this is certainly true, AT&T was not making this much more subtle point. Even if it were, it failed to offer persuasive reasons for drawing such an inference in the case of *Discover Bank*. In particular, it did not even attempt to explain how and why the doctrinal deviations it identified might be indicative of hostility specifically toward arbitration rather than toward class waivers.¹⁶⁰ Recall that *Discover Bank* does not apply only to arbitration clauses or even to all arbitration clauses; its

¹⁵³ Many justices expressed strong disinclination even to entertain AT&T’s claim that *Discover Bank* was erroneous as a matter of California state law. See, e.g., Transcript, *supra* note 88, at 5, 7 (Scalia, J.) (“Are we going to tell the State of California what it has to consider unconscionable?”); *id.* at 8 (Ginsburg, J.); *id.* at 19 (Kagan, J.); *id.* at 21 (Breyer, J.); *id.* at 24 (Sotomayor, J.).

¹⁵⁴ See Aragaki, *supra* note 18, at 1293–1303.

¹⁵⁵ This, indeed, is the approach followed by many courts when holding that a particular application of the unconscionability defense is *not* discriminatory and thus saved from preemption by the FAA. See, e.g., *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004); *Carbajal v. H&R Block Tax Servs., Inc.*, 372 F.3d 903, 906 (7th Cir. 2004).

¹⁵⁶ *Accord* Bruhl, *supra* note 152, at 1451–52 (suggesting that “anti-arbitration comments” by a court may be sufficient to establish a discriminatory application of the unconscionability defense). For a good example, see *Casarotto v. Lombardi*, 886 P.2d 931, 940–41 (Mont. 1994) (Trieweiler, J., specially concurring) (describing the “total lack of procedural safeguards” in arbitration and blaming arbitration of “subvert[ing] our system of justice as we have come to know it.”), *vacated*, 515 U.S. 1129 (1995).

¹⁵⁷ 6 P.3d 669 (Cal. 2000).

¹⁵⁸ See Aragaki, *supra* note 18, at 1300–02.

¹⁵⁹ Even in the equal protection context, departures from the ordinary course are not sufficient in themselves to warrant the inference; the court must also consider the totality of the circumstances. See *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–67 (1977).

¹⁶⁰ Not all arbitration clauses contain class waivers. See SEARLE CIVIL JUSTICE INST., CONSUMER ARBITRATION BEFORE THE AMERICAN ARBITRATION ASSOCIATION 103–04 (2009) (analyzing empirical data showing great variation in frequency with which class waivers appear in arbitration clauses).

real target is class waivers in consumer contracts. Thus, even when *Discover Bank* is used to void such a waiver, there are no necessary ramifications for the promise to arbitrate because courts may still order the case to class arbitration (as many have).¹⁶¹ Moreover, *Discover Bank* imposes the identical restriction on class waivers in the litigation process. Something more is therefore needed to support the conclusion that *Discover Bank*'s irregularities (if any) "express the impermissible view that arbitration is inferior to litigation."¹⁶² Doctrinal departures alone do not get us there.

C. Purpose- or Effects-Based Discrimination?

Mature antidiscrimination theories broadly recognize the distinction between intent-based and impact-based discrimination, and they make a self-conscious choice to rectify one or the other (or sometimes both). For instance, the heightened scrutiny afforded to suspect and quasi-suspect classes under the Equal Protection Clause requires proof of invidious purpose; the mere fact that the law's impact "may be more burdensome to the poor and to the average black than to the more affluent white"¹⁶³ is insufficient. By contrast, reasonable accommodation claims and statutory "disparate impact" claims seek to rectify more than purposeful discrimination. They therefore require no proof of intent; the only relevant question is whether a particular measure produces a certain type or degree of unequal outcome.¹⁶⁴

In the FAA context there has been comparatively little if any consideration of whether the FAA's antidiscrimination principle is aimed at remedying the law's purposeful disparate treatment of arbitration or merely its unintended effects on arbitration. Courts and commentators routinely blur this distinction, as a result of which the all-important question of just what must be proven to establish discrimination has remained largely unasked and unanswered.

This basic ambiguity about whether the FAA represents a purpose- or effects-based antidiscrimination regime haunted the litigation of *Concepcion* from start to finish. Justice Kagan put her finger on it during oral argument, when she pointedly asked counsel whether the test for discrimination under the FAA was "a purpose test or an effects test." That is, "[i]s it a test that says the State is doing this in order to kill arbitration, or is it a test that says the State is doing

¹⁶¹ This typically happens when the clause contains a severability provision or the court otherwise determines that the class waiver is severable. *See, e.g.,* Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 912 A.2d 88, 103 (N.J. 2006); Woods v. Q.C. Fin. Servs., 280 S.W.3d 90, 99–100 (Mo. Ct. App. 2008); Christopher R. Drahozal & Quentin R. Wittrock, *Is There a Flight From Arbitration?*, 37 HOFSTRA L. REV. 71, 106–08 & n.169 (2008). This was not a possibility in *Concepcion* only because AT&T's arbitration clause contained a "blowout" provision to the effect that if a court should strike the class waiver, the entire clause would fail and the dispute would be heard in a court of law. *See* Brief for Respondents, *supra* note 91, at 3.

¹⁶² *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 170 (5th Cir. 2004) (denying FAA preemption challenge to state unconscionability rule for this reason; cited in Brief for Petitioner, *supra* note 31, at 32, 50–51).

¹⁶³ *Washington v. Davis*, 426 U.S. 229, 248 (1976).

¹⁶⁴ *See* Samuel R. Bagenstos, "Rational Discrimination," *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 835–36 (2003); Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 648–58 (2001).

something that will kill arbitration?”¹⁶⁵ What is striking as one reads the transcript of oral argument is that counsel did not appear to have the first idea about how to answer this question. The state of confusion surrounding this critical issue, in turn, had strategic consequences for both parties.

For example, in response to Justice Kagan’s question, counsel for the Concepcions stated that “I think you can look to both.”¹⁶⁶ In other words, *either* purpose or effects might be sufficient, which is the same as saying that proof of discriminatory purpose is strictly unnecessary. As the party resisting the charge of discrimination, however, the Concepcions should have argued precisely the opposite. Discriminatory intent, after all, is extremely difficult to establish because it must almost always be inferred from circumstantial evidence.¹⁶⁷ By following this strategy, the Concepcions would have put AT&T to the test of proving not just that class-wide relief happens to place intolerable burdens on arbitration, but that the California Supreme Court willed those burdens when it issued its ruling back in 2005—a time, moreover, when class arbitration did not seem especially antithetical to arbitration.¹⁶⁸

But the Concepcions did not adopt this strategy even though it was perfectly viable given the way the Court and AT&T had characterized *Discover Bank* as a pretext.¹⁶⁹ At best, the Concepcions seemed hazy, sometimes arguing that *Discover Bank* should avoid preemption because it was not “aimed at destroying arbitration”¹⁷⁰ and at other times contending that the mere fact that it destroys arbitration was sufficient.¹⁷¹ At worst, they affirmatively endorsed an effects-based paradigm. This surfaced most clearly in the Concepcions’ attempts to distinguish *Discover Bank* from AT&T’s parade of horrors. In their brief, the Concepcions argued that the latter were preempted because they “demand[ed] procedures incompatible with arbitration” and would

¹⁶⁵ Transcript, *supra* note 88, at 49; *see also id.* at 17 (Kagan, J.); *id.* at 35–36 (Sotomayor, J.) (“I don’t want to look through legislative history and determine whether some committee person said something that sounds like subterfuge. How do I look at the law and its effects and determine that subterfuge or that discrimination?”); *id.* at 48 (Breyer, J.) (“What do I look to? It’s not logic . . . [W]hat should I read to show, in your opinion, you’re right?”).

¹⁶⁶ *See* Transcript, *supra* note 88, at 49.

¹⁶⁷ *See, e.g.,* Riordan v. Kempiners, 831 F.2d 690, 697 (7th Cir. 1987); Ralph Richard Banks & Richard Thompson Ford, *(How) Does Unconscious Bias Matter?: Law, Politics, and Racial Inequality*, 58 EMORY L.J. 1053, 1074 (2009).

¹⁶⁸ Consider that *Discover Bank* was handed down less than two years after the U.S. Supreme Court’s decision in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003)—widely interpreted as donning implicit approval to class arbitration—and five years before *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010), where the Court first suggested that class arbitration might not even be arbitration at all. In large part because of the *Bazzle* decision, the AAA and a number of other arbitration providers developed class arbitration rules. *See* Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 9–12, *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2009) (No. 08–1198).

¹⁶⁹ *See supra* notes 101–115 and accompanying text. Moreover, as I have elsewhere argued, the best interpretation of the Court’s FAA jurisprudence is that only purpose-based discrimination is prohibited. *See* Aragaki, *supra* note 50, at 1210–18 (distinguishing between formal and fair equality of opportunity).

¹⁷⁰ Brief for Respondents, *supra* note 91, at 32; *see also* Transcript, *supra* note 88, at 48–51.

¹⁷¹ *See, e.g.,* Brief for Respondents, *supra* note 91, at 11 (arguing that the FAA does not permit states to impose procedures that are “fundamentally incompatible” with arbitration); *id.* at 32–35; Transcript, *supra* note 88, at 38–39 (arguing that the test is whether the state law is “tantamount to a rule of non-enforceability of arbitration agreements”); *id.* at 47–48 (arguing that the hypothetical laws discriminate because of their “systematic effect[s]”); *id.* at 49.

thereby end up “destroy[ing]” the FAA unless they were preempted.¹⁷² Likewise, they suggested that the problem with the ouster rule (which they assimilated to the parade of horrors) was its “discriminatory effect[s]” on arbitration¹⁷³ rather than, as is commonly supposed, the anti-arbitration *motives* behind those effects.¹⁷⁴ By focusing on effects at the expense of purpose, these arguments reduced the resolution of the case to one of simple line-drawing: Does *Discover Bank* burden arbitration to quite the same degree as the parade of horrors? Ironically, it was the Conceptions’ own framing of the issue in this way that led an exasperated Justice Alito to foretell the outcome of the case in this exchange with the Conceptions’ counsel during oral argument:

What is the difference . . . between a rule that says you must follow the rules of evidence in every adjudication and a rule that says that class adjudication must always be available? I think your answer comes down to the proposition that the former is inconsistent with the idea of arbitration, and therefore, that’s why it’s not allowed, and the latter is not inconsistent with the idea of arbitration, and therefore, it is allowed. . . . [I]n the end . . . we have to make a value judgment about whether these things, one thing or the other, fits with arbitration. *That’s what it comes down to.*¹⁷⁵

For its part, AT&T appeared just as confused as the Conceptions about the purpose/effects distinction and its importance to the outcome of the case. AT&T took the state of California to task for intentionally targeting arbitration, not for devising well-meaning rules that unexpectedly interfered with the enforceability of arbitration agreements.¹⁷⁶ The ostensibly “even-handed” *Discover Bank* rule, in its view, was “gerrymandered to target arbitration provisions,”¹⁷⁷ “devise[d]” to encumber arbitration with all the accoutrements of litigation,¹⁷⁸ “aimed directly at agreements to resolve disputes—[which] almost invariably [means] arbitration agreements,”¹⁷⁹ and for these reasons “resuscitat[es] . . . judicial hostility to arbitration.”¹⁸⁰ Similarly, when comparing *Discover Bank* to the parade of horrors, AT&T suggested that the

¹⁷² Brief for Respondents, *supra* note 91, at 32. Even a “mere preference for procedures that are incompatible with arbitration,” they argued, would be preempted. *See id.* at 33. This makes proof of calculated hostility to arbitration strictly unnecessary, because a state’s “mere preference” for a procedure might stem from a variety of arbitration-neutral considerations including tradition, economic efficiency, or a concern about the reasonable expectations of parties. The real reason behind the claim that even a “mere preference” would be preempted must, therefore, be that incompatibility alone is sufficient to warrant preemption.

¹⁷³ *Id.* at 33–34.

¹⁷⁴ *See, e.g.,* Aragaki, *supra* note 18, at 1250–54.

¹⁷⁵ Transcript, *supra* note 88, at 46–47 (Alito, J.) (emphasis added).

¹⁷⁶ *See, e.g.,* Brief for Petitioner, *supra* note 31, at 42.

¹⁷⁷ *Id.* at 20; *see also id.* at 40.

¹⁷⁸ *Id.* at 29; *see also id.* at 42.

¹⁷⁹ *Id.* at 47; *see also id.* at 50–51.

¹⁸⁰ *Id.* at 41 (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959) for the proposition that “the FAA was enacted to overrule ‘a great variety’ of judicial ‘devices and formulas’ declaring arbitration agreements ‘against public policy’”); *see also id.* at 32.

problem with the latter was the bad motives they betrayed rather than their destructive effect on arbitration.¹⁸¹

A far easier and more direct route to proving discrimination would have been to piggy back on the *Concepcions*' argument by contending that *Discover Bank*'s devastating effect on arbitration, without more, was sufficient to prove discrimination.¹⁸² This was certainly a plausible contention.¹⁸³ AT&T was moreover astute enough to realize that Justice Scalia, at least, would have been receptive to it given the tenor of his questions during oral argument in *Green Tree Financial Corp. v. Bazzle*,¹⁸⁴ the other High Court case to address class arbitration. There, he asked: "Why isn't the Federal Arbitration Act more reasonably interpreted as directed at those State laws that . . . are destructive of arbitration, that . . . are hostile not in the sense of any . . . mental intent, but that in their operation make it difficult for parties to enter into arbitration agreements?"¹⁸⁵ Sure enough, the majority's opinion—authored by none other than Justice Scalia—adopted precisely this effects-based standard.¹⁸⁶ For rather than attempt to determine whether *Discover Bank*, like the hypothetical laws in the parade of horrors, disguised a purpose to discriminate, the majority characterized those laws as "fundamentally incompatible" with arbitration and simply asked whether *Discover Bank* was likewise incompatible.

IV. THE MAJORITY'S REASONING: A CRITIQUE AND RECONSTRUCTION

The parties' above-described handicaps in presenting persuasive accounts of what makes *Discover Bank* discriminatory (or not) for FAA preemption purposes left the Court largely to its own devices when deciding the case. Notably, even though it agreed with the result advocated by

¹⁸¹ *Id.* at 50 (describing the parade of horrors as evincing a "concern[] that traditional arbitration hinders parties situated similarly to the plaintiff from learning of infringements of their legal rights," or a "convi[ction] of the superiority of jury trials"). Likewise, AT&T's *amici* argued that *Discover Bank* and other California unconscionability precedents evince a purpose to "target arbitration agreements for disfavored treatment." Brief Amici Curiae of Distinguished Law Professors, *supra* note 31, at 10.

¹⁸² To be sure, AT&T argued in passing that *Discover Bank* had a disparate "impact" on arbitration because it had the "effect . . . [of] transfor[ming] arbitration in the ways the Court described in *Stolt Nielsen*." Transcript, *supra* note 88, at 10; *see also* Brief for Petitioner, *supra* note 31, at 21, 30–31. But these remarks were so understated that they sound more like afterthoughts or arguments made for the sake of completeness. It is moreover unclear whether AT&T meant to say that these disparate impacts are important for drawing an inference of intentional discrimination or whether they are sufficiently actionable in themselves. For instance, AT&T argued that *Discover Bank*'s disparate *impact* on arbitration would "as a practical matter allow use of 'the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable.'" *Id.* at 30–31. Because a state would only consider the uniqueness of an arbitration agreement if it intended to target arbitration, the argument suggests that impacts are simply a means of establishing intent.

¹⁸³ In unsuccessful *certiorari* petitions filed in similar cases, AT&T's counsel Mayer, Brown, Rowe & Maw LLP advanced precisely this type of effects-based argument for FAA preemption. *See, e.g.*, Petition for a Writ of Certiorari at 15–16, *Cingular Wireless LLC v. Mendoza*, 547 U.S. 1188 (2006) (No. 05–1119). The majority opinion in *Concepcion* not only ends up adopting an effects-based discrimination test, its declarations about the incompatibility between collective actions and the arbitration process also read as if they had been lifted straight from the arguments made by Mayer Brown in these unsuccessful *certiorari* petitions.

¹⁸⁴ 539 U.S. 444 (2003).

¹⁸⁵ Transcript of Oral Argument at 53 (Scalia, J.), *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (No. 02–634).

¹⁸⁶ *Accord Marks*, *supra* note 77, at 43–44.

AT&T, the majority did not incorporate or rely on any of AT&T’s leading arguments.¹⁸⁷ Instead, it held that *Discover Bank* discriminated against arbitration because the rule imposed a procedure that had the effect of destroying arbitration.

In this Part, I argue that the Court’s adoption of an effects-based standard of discrimination—and, more importantly, its reliance on essentialism to vindicate that standard—was a mistake for reasons that extend far beyond the confines of this particular case. I then argue that the Court should have stayed true to its longstanding position that the FAA was enacted to reverse the “old judicial law hostility to arbitration”¹⁸⁸ by asking whether *Discover Bank* evinced a discriminatory purpose.

A. The Causes and Consequences of Essentialism

A keystone of the Court’s holding in *Concepcion* is the assertion that class arbitration is not really “arbitration.” Class-wide relief, we are told, produces a “structural” change that “interferes with *fundamental attributes* of arbitration.”¹⁸⁹ Class arbitration is time consuming, formalistic, and procedurally complex—all the things that arbitration under the FAA is neither supposed to be nor likely *can* be. These and similar claims in the Court’s decision are problematic not so much because they are empirically dubious¹⁹⁰ as because they unnecessarily essentialize arbitration: They purport to identify, once and for all, certain constitutive or definitional features of the arbitral process.

It may be tempting here to think of this essentialism as following inescapably from the Court’s decision one year earlier in *Stolt-Nielsen S.A. v. AnimalFeeds International*.¹⁹¹ There, the Court opined that class proceedings were inconsistent with the very “nature of arbitration,” such that the shift from bilateral to class-wide arbitration would change the arbitral process in

¹⁸⁷ See *supra* notes 134, 153 and accompanying text. Although it is true that the parade of horrors originated in AT&T’s brief, AT&T did not use it to make an affirmative argument that *Discover Bank* was discriminatory. Rather, AT&T used it to rebut the Ninth Circuit’s conclusion that *Discover Bank* should withstand preemption because it applied equally to arbitration and litigation. See Brief for Petitioners, *supra* note 31, at 28–31. The mere fact that a state law applied to both forums, AT&T argued, could not be dispositive of the discrimination question because one can imagine many such laws that are clearly inimical to the FAA, such as a law requiring the use of jury trials in any dispute resolution context. Thus, AT&T’s argument was fundamentally defensive in nature.

¹⁸⁸ 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 266 (2009) (quoting *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 480 (1989)).

¹⁸⁹ AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1748 (2011) (emphasis added); see also *id.* at 1751; *supra* note 56 and accompanying text.

¹⁹⁰ See, e.g., Resnik, *supra* note 76, at 122–23; Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 40–42 & n.149 (2000); S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration?*, 17 HARV. NEGOT. L. REV. 201, 205–10 (2012).

¹⁹¹ 130 S. Ct. 1758 (2010).

“fundamental” ways.¹⁹² These sweeping pronouncements likely informed the majority’s analysis in *Concepcion*. But as others have noted, they did not preordain that analysis.¹⁹³

An alternative or perhaps more compelling explanation for *Concepcion*’s essentialism is that it helps establish that arbitration and litigation are differently situated, such that treating them exactly the same (as *Discover Bank* does) amounts to a type of discrimination.¹⁹⁴ Using the FAA to preempt *Discover Bank* then begins to look perfectly consistent with the goal of nondiscrimination, because it effectively allows the two forums to be treated differently in ways that reflect their essential differences.¹⁹⁵ From this standpoint, *Concepcion* appears simply to reaffirm the principle that “[s]ometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike.”¹⁹⁶ If this is, in fact, the underlying logic of the majority’s reasoning in *Concepcion*, then it is a very complex logic indeed, one that raises more questions than it answers and one whose consequences must be carefully considered.

It may be helpful here to look at how claims of equality predicated on the need for differential treatment—rather than on the default rule of similar treatment—have played out in more traditional antidiscrimination contexts. The dominant paradigm of American antidiscrimination law perceives the wrong of discrimination in terms of a failure to recognize our inherent sameness across race, gender, and other status-based categories.¹⁹⁷ It constructs a world in which men and women are presumed to have the same ability to become, say, firefighters or care givers; a world in which African-Americans and whites are presumed interchangeable for purposes of becoming office managers or jurors.¹⁹⁸ Status-based differences are thereby rendered irrelevant; what matters is simply the individual’s functional capacity to perform the task at hand.¹⁹⁹

As intuitively appealing as it is in form, however, this “sameness” model is potentially problematic because it overlooks real and unavoidable differences between groups. Gender

¹⁹² *Id.* at 1775–76. The Court’s essentialistic proclivities arguably surfaced even before *Stolt-Nielsen*. See, e.g., *Preston v. Ferrer*, 552 U.S. 346, 357 (2008) (foreshadowing similar remarks in *Concepcion* by holding that a “prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results’”); *Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576, 588 (2008) (describing arbitration’s “essential virtue” in terms of “resolving disputes straightaway” without any substantive review of the merits of arbitration awards).

¹⁹³ See Nagareda, *supra* note 14, at 1106–09. *Stolt-Nielsen* raised a question of party intent or contractual gap-filling. There, essentialism was used to establish that class-wide relief “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.” *Stolt-Nielsen*, 130 S. Ct. at 1775 (emphasis added). That is not, however, the same as saying that the change is so great that a state may not legitimately require class-wide relief to be available in certain disputes brought in arbitration.

¹⁹⁴ See *Tigner v. Texas*, 310 U.S. 141, 147 (1940) (“[T]hings which are different in fact . . . [need not] be treated in law as though they were the same.”); see also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 15–2, at 1306–07 (2d ed. 1988); Richard A. Epstein, *Gender Is for Nouns*, 41 DEPAUL L. REV. 981, 998 (1992).

¹⁹⁵ Because *Concepcion* is limited to FAA preemption, *Discover Bank* remains in force with regard to class waivers that are not governed by the FAA.

¹⁹⁶ *Jenness v. Fortson*, 403 U.S. 431, 442 (1971).

¹⁹⁷ See Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 968 (1984); Catherine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1286–88(1991).

¹⁹⁸ See POST, *supra* note 127, at 25–26; Owen M. Fiss, *A Theory of Fair Employment Laws*, 38 U. CHI. L. REV. 235, 235 (1971); Law, *supra* note 197, at 963.

¹⁹⁹ See POST, *supra* note 127, at 14.

presents an especially salient context in which “innate physical differences between the sexes”²⁰⁰ are such that treating men and women the same may sometimes be intolerable or, worse, impossible.²⁰¹ For example, the Court has relied on the biological fact that only women bear children in order to uphold state statutes that treat unwed mothers and fathers differently when it comes to parental rights.²⁰² It has also upheld the exclusion of women from such things as the draft and liability for statutory rape because of supposed “fundamental” and “physiological” differences between the sexes in matters relating to military combat and sexual predation.²⁰³

Many feminists supported these decisions. They argued that even if the decisions rested on gender-based stereotypes, those stereotypes were often overwhelmingly accurate: Women do, in fact, take primary responsibility for the nurture and care of children (often at great sacrifice to their own professional advancement), and they are statistically far more likely than males to be victims of physical and sexual aggression.²⁰⁴ Some feminists also warned that by demanding similar treatment to men in these contexts, women would on a deeper level risk “betraying [them]selves and supporting what [they] find least acceptable about the male world.”²⁰⁵ These arguments reflected a growing consciousness of women’s unique and “different voice,” one

²⁰⁰ *Petrie v. Ill. High Sch. Ass’n*, 394 N.E.2d 855, 862 (1979). This type of biological essentialism has frequently been invoked to justify excluding males from female athletic teams and *vice versa* in order to promote equal opportunity between the sexes in college athletics. See *Clark, By and Through Clark v. Ariz. Interscholastic Ass’n*, 695 F.2d 1126, 1131 (9th Cir. 1982) (relying on “average physiological differences”); *Cape v. Tenn. Secondary Sch. Athletic Ass’n*, 563 F.2d 793, 795 (6th Cir. 1977) (relying on “differences in physical characteristics and capabilities between the sexes”). See generally Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681 (2009).

²⁰¹ For example, if some women but no men become pregnant, how can the sexes be considered similarly situated for purposes of pregnancy benefits or exclusions? And if they cannot, is it so inconsistent with the norm of equality to fail to treat them the same for such purposes? Or might true equality demand even more, by imposing an affirmative duty to treat them differently? See generally Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1 (1985) (arguing that biological differences make it literally impossible to treat men and women equally in certain contexts); Law, *supra* note 197 (arguing that unavoidable biological differences such as pregnancy must be taken into account in order to achieve true equality between the sexes).

²⁰² The rationale is that childbirth almost always makes the woman an identifiable parent and the primary caretaker, whereas the father’s identity may never be discovered or he may never assume any responsibilities in child rearing. See, e.g., *Parham v. Hughes*, 441 U.S. 347, 355 (1979) (finding no equal protection violation in a law that required unmarried fathers, but not mothers, to legitimate their children as a condition for filing a wrongful death claim); *Lehr v. Robertson*, 463 U.S. 248, 267 (1983) (finding that because men and women are “[not] in fact similarly situated with regard to their relationship with the child,” a statute that accorded unwed fathers fewer rights than unwed mothers in adoption proceedings did not violate the equal protection clause); cf. *Caban v. Mohammed*, 441 U.S. 380, 399 (1979) (Stewart, J., dissenting) (relying on the “physical reality” and the “undeniable social reality that the unwed mother is always an identifiable parent and the custodian of the child” to defend a law that gave unmarried mothers (but not fathers) the right to block the adoption of their biological children).

²⁰³ See *Rostker v. Goldberg*, 453 U.S. 57, 76 (1981) (citing Department of Defense Authorization Act of 1981, S. REP. NO. 826, for the proposition that “[t]he principle that women should not intentionally and routinely engage in combat is fundamental, and enjoys wide support among our people”); *Michael M. v. Superior Court*, 450 U.S. 464, 471 (1981) (justifying statutory rape law’s differential treatment of men and women in part because “[o]nly women may become pregnant”); cf. *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977) (upholding explicit restriction on hiring women as guards in all-male maximum security prison under Title VII BFOQ exception on the ground that “[t]he employee’s very womanhood would . . . directly undermine her capacity to provide the security that is the essence of a correctional counselor’s responsibility”).

²⁰⁴ See Law, *supra* note 197, at 995–97, 1000–01.

²⁰⁵ Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 14 WOMEN’S RTS. L. REP. 151, 163 (1992).

grounded in an ethic of care and relationship as contrasted with a (perceived) male ethic of aggression and individualism.²⁰⁶ This consciousness, in turn, led women to envision a non-assimilationist, “difference theory” of equality, one that did not require women to become like men in order to be equal to them.²⁰⁷

By taking the position that arbitration and litigation are inherently different for purposes of class-wide relief, *Concepcion* traces its pedigree to something like the difference theory. From this perspective, it represents a more evolved state of thinking about the FAA’s antidiscrimination mandate because it avoids the facile presumption that arbitration and litigation must always be treated the same in order to be placed on an “equal footing.” But *Concepcion* is also problematic because it reifies differences that are arguably contingent and mutable. This, in turn, exposes it to the same critique of essentialism that has long been the Achilles’ heel of difference theory.²⁰⁸

Thus, many feminists have argued that the Court’s more recent, difference-based equal protection cases—even those that favor women by exempting them from requirements otherwise applicable to men—are in truth scarcely distinguishable from paternalistic decisions from the turn of the century that rested on deeply suspicious stereotypes about the ‘fairer sex.’²⁰⁹ Clearest among these were early cases that restricted women’s choices in the world of work—a world traditionally dominated by men. In *Muller v. Oregon*,²¹⁰ for instance, the Court upheld a statute making it a crime to employ women (but not men) in certain establishments for more than ten hours per day, even if the women wished to work longer. The rationale was that a woman’s “physical organization,” “maternal functions,” and role in child rearing and “the maintenance of the home” placed her in a position “inherent[ly] differen[t]” from that of a man.²¹¹ Only in more recent times would the Court come to appreciate the way that *Muller* and cases like it used the supposedly inexorable dictates of biology to legitimize arrangements that are now recognized as socially and historically contingent.²¹²

Not unlike what it did in *Muller*, in *Concepcion* the Court locates arbitration’s principal virtue over litigation in terms of “achiev[ing] ‘streamlined proceedings and expeditious

²⁰⁶ See generally CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982); ELIZABETH WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN (1980).

²⁰⁷ See MacKinnon, *supra* note 197, at 1290–93.

²⁰⁸ See, e.g., Ann E. Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913, 931–43 (1983); MacKinnon, *supra* note 197, at 1287 (arguing that difference theory masks the extent to which so-called “real” differences are socially and legally constructed). See generally Williams, *supra* note 205.

²⁰⁹ MacKinnon, *supra* note 197, at 1286–92. See generally Williams, *supra* note 205 (arguing that different treatment of men and women, even where well-intentioned, has historically resulted in the reinforcement of traditional gender roles).

²¹⁰ 208 U.S. 412 (1908).

²¹¹ *Id.* at 419 n.1, 422–23. Likewise, in *Bradwell v. Illinois*, 83 U.S. 130 (1872), the Court upheld a state law prohibiting women from becoming members of the bar. Concurring in the judgment, Justice Bradley reasoned that “[c]ivil law, as well as nature herself, has always recognized [that] . . . [t]he paramount destiny and mission of woman are to fulfil[] the noble and benign offices of wife and mother” rather than as a lawyer.” *Id.* at 141 (Bradley, J., concurring) (emphasis added).

²¹² See *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (criticizing these cases as “put[ting] women, not on a pedestal, but in a cage”).

results,”²¹³ and professes to protect that virtue from perceived threats such as *Discover Bank*. But it is precisely the notion that arbitration has a fixed *telos* waiting to be discovered that is so dangerously susceptible to abuse. Consider *Wilko v. Swan*,²¹⁴ a case that those who support *Concepcion* tend to consider a low point in the history of federal arbitration law. In words strikingly evocative of *Concepcion*, the Court in *Wilko* held that arbitration’s primary “advantage[.]” in “secur[ing] prompt, economical and adequate” decisions made it correspondingly unsuited to decide weighty and complicated issues under the federal securities laws.²¹⁵ Similarly, in *Alexander v. Gardner-Denver*,²¹⁶ the Court opined that “it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.”²¹⁷

These status-based judgments “centered on the nature of arbitration”²¹⁸ have been used time and again to justify invalidating broadly worded arbitration agreements.²¹⁹ They also fuel the claims of some of arbitration’s fiercest critics: “[T]here is inherent in the institutions of private dispute resolution an endemic disinclination to enforce legal rights rigorously”;²²⁰ there is a “total lack of procedural safeguards inherent in the arbitration process”;²²¹ “[n]ow we all know, that arbitrators . . . are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases.”²²² By resurrecting similar generalizations about arbitration’s essence—generalizations that are likely no longer even empirically accurate²²³—*Concepcion* is a case study in how easily the (otherwise legitimate) concern for

²¹³ *Concepcion*, 131 S. Ct. at 1749; see also *id.* (stating that the “point of affording parties discretion in designing arbitration processes” is not to honor autonomy or freedom of contract, but rather to promote “efficient, streamlined procedures” (emphasis added)). The elasticity of these claims is illustrated by AT&T’s shifting positions on the matter during the litigation. Compare Petition for Writ of Certiorari, *supra* note 31, at 25 (arguing that “the entire point of the FAA is to enable parties to . . . tailor the features of arbitration, especially the procedures, to their needs), with Brief for Petitioners, *supra* note 31, at 51 (“A prime objective of an agreement to arbitrate is to achieve ‘streamlined proceedings and expeditious results.’”).

²¹⁴ 346 U.S. 427 (1953), *overruled by* *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

²¹⁵ *Wilko*, 346 U.S. at 438. Compare this with the Court’s more modern *rejection* of the view that the “overriding goal of the [FAA] was to promote the expeditious resolution of claims.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985); see also *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

²¹⁶ 415 U.S. 36 (1974).

²¹⁷ *Id.* at 58.

²¹⁸ 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269 (2009).

²¹⁹ See Aragaki, *supra* note 18, at 1260; *supra* notes 60–67 and accompanying text.

²²⁰ Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 346 (1996).

²²¹ *Casarotto v. Lombardi*, 886 P.2d 931, 940–41 (Mont. 1994) (Trieweiler, J., specially concurring), *vacated*, 515 U.S. 1129 (1995).

²²² *Tobey v. Cnty of Bristol*, 23 F. Cas. 1313, 1321 (C.C.D. Mass. 1845) (No. 14,065).

²²³ See, e.g., Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 11–23 (describing the ways in which arbitration has gradually come to resemble litigation in terms of procedural complexity and delay—so much so that it is losing its popularity as the forum of choice for commercial disputes).

difference can be co-opted in ways that undermine rather than support the goal of nondiscrimination.²²⁴

Concepcion's essentialism is further problematic because it reinforces what in the gender context has been described as a "separate spheres ideology."²²⁵ Men and women are so ineluctably different, the argument goes, that they can be equal only in their separate and mutually exclusive realms. The answer to man's domination in the sphere of work or politics is therefore not to make woman an equal participant in the same sphere, but rather to give her dominion over an entirely different sphere—that of the hearth and home.²²⁶ To merge the spheres would so upset the essential order of things that women would stop marrying and procreating, and the species would face imminent extinction.²²⁷ The almost apocalyptic fear behind these contentions is of a piece with the fear of racial amalgamation that lies barely concealed beneath the surface of *Plessy v. Ferguson*.²²⁸ In both contexts, separateness is used to justify equality in form but subordination in substance.²²⁹

This same amalgamation anxiety animates *Concepcion*. It is evident, for instance, in the Court's suggestion that once states are permitted to make class-wide relief non-waivable in arbitration, it is a short step to state laws that require arbitration proceedings to incorporate jury fact finding or judicially monitored discovery.²³⁰ It drives AT&T's prediction that unless *Discover Bank* were preempted as to class arbitration waivers, states could "chip away at [the FAA] by indirection," and thereby "kill arbitration by converting it into litigation."²³¹ And it is

²²⁴ Defenders of arbitration have rightly attacked these generalizations as either misrepresenting, misinterpreting, or altogether ignoring available empirical data. See, e.g., Christopher Drahozal, *Arbitration Innumeracy*, 4 Y.B. ARB. & MED. (forthcoming 2012); Drahozal & Wittrock, *supra* note 161; Peter B. Rutledge, *Who Can Be Against Fairness? The Case Against the Arbitration Fairness Act*, 9 CARDOZO J. CONFLICT RESOL. 267 (2008); PETER B. RUTLEDGE, U.S. CHAMBER INST. FOR LEGAL REFORM, ARBITRATION—A GOOD DEAL FOR CONSUMERS (2008), available at <http://www.adrforum.com/rcontrol/documents/ResearchStudiesAndStatistics/200804ArbitrationGoodForConsumers-Rutledge.pdf>. But after *Concepcion*, the temptation by courts and advocacy groups to parrot these and other simplistic judgments about arbitration's inherent shortcomings vis-à-vis courtroom adjudication—empirical evidence to the contrary notwithstanding—will become harder to resist.

²²⁵ Williams, *supra* note 205, at 153–54.

²²⁶ See, e.g., Pamela S. Karlan & Daniel R. Ortiz, *In a Different Voice: Relational Feminism, Abortion Rights, and the Feminist Legal Agenda*, 87 NW. U. L. REV. 858, 892–93 (1993).

²²⁷ See BETTY A. DEBERG, UNGODLY WOMEN: GENDER AND THE FIRST WAVE OF AMERICAN FUNDAMENTALISM 53, 57 (1990).

²²⁸ 163 U.S. 537, 544 (1896), overruled by *Brown v. Bd. of Ed. of Topeka, Kan.*, 347 U.S. 483 (1954). The uneasy alliance between the "separate but equal" logic of *Plessy* and difference-based claims in the gender context has been widely noted. See, e.g., Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119–21 (1997); Earl C. Dudley, Jr. & George Rutherglen, *Ironies, Inconsistencies, and Interscholastic Athletics: Title IX, Title VII, and Statistical Evidence of Discrimination*, 1 VA. J. SPORTS & L. 177, 182 (1999) (arguing that by requiring separate male and female athletic teams, Title IX enforces a "separate but equal" framework). The connection between *Plessy* and *Concepcion* has likewise been noted. See Cliff Palefsky, *Separate and unequal*, SCOTUSBLOG (Sep. 14, 2011, 12:57 PM), <http://www.scotusblog.com/2011/09/separate-and-unequal/>.

²²⁹ See MacKinnon, *supra* note 197, at 1289–98; Siegel, *supra* note 228, at 1119–20.

²³⁰ See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747–48 (2011); Transcript, *supra* note 88, at 38 (Breyer, J.).

²³¹ Brief for Petitioner, *supra* note 31, at 17 (quotation omitted), 21; see also Petition for Writ of Certiorari, *supra* note 31, at 30–32.

latent in other recent decisions from the Court, such as *Hall Street Associates v. Mattel*,²³² that seek to enforce a clear boundary between the respective provinces of arbitral and judicial proceedings.²³³

To be sure, there are compelling policy reasons for advocating a “separate but equal” approach in the arbitration area in a way that does not obtain in the context of race. No matter what we believe (or are told by the Court to believe) about arbitration’s capacity to function as a surrogate for litigation in the vast majority of civil cases, there are certain undeniable architectural differences between the two forums—differences that make it impossible for arbitration to function in all the ways that a court of law can (and *vice versa*).²³⁴ The point is just that what we take to be “real” differences are not ideologically neutral but are more often than not self-fulfilling.²³⁵ Care must therefore be taken before using essentialism to justify exceptionalism.

As just one example of this danger, consider the way in which the Court manages to exaggerate the differences between litigation and arbitration by eliding the extent to which collective actions are arguably just as incompatible with the former as they are with the latter.²³⁶ For example, the rigorous requirements for class certification²³⁷ reflect a judgment that not all litigated cases are suitable for class-wide relief (and for exactly the same reasons of complexity, delay, and absent third parties that *Concepcion* identified in the context of arbitration).²³⁸ This

²³² 552 U.S. 576 (2008).

²³³ In *Hall Street*, the Court held that private parties could no longer contract for *de novo* review of arbitral awards by a court of law, in part because doing so “opens the door to . . . full-bore legal and evidentiary appeals,” which would compromise “arbitration’s *essential virtue* of resolving disputes straightaway.” *Id.* at 588 (emphasis added). Similarly, in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010), the Court faulted a well-respected panel of international arbitrators (Asken, G., Feinberg, K.R., Jentes, W.R.) for construing the parties’ arbitration agreement in light of public policy considerations—that is, for “proceed[ing] as if it had the authority of a common-law court to develop what it viewed as the best rule to be applied in such a situation.” *Id.* at 1769 (emphasis added).

²³⁴ I have previously made this very point in the arbitration context. See Aragaki, *supra* note 50, at 1250–54. Feminists have likewise argued that certain undeniably “real,” biological differences between the sexes justify treating men and women differently in order to achieve equality in substance. See *supra* notes 200–207 and accompanying text.

²³⁵ See *supra* note 208. Moreover, the bare fact of difference—even a so-called “essential” difference—does not in itself dictate the proper legal response to that difference. This point has been made forcefully in the context of disability discrimination. See, e.g., Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579, 597–608 (2004).

²³⁶ The Court has on numerous occasions declared that “[i]t is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process,” see *Hansberry v. Lee*, 311 U.S. 32, 40 (1940), and that “[t]his rule is part of our ‘deep-rooted historic tradition that everyone should have his own day in court.’” *Martin v. Wilks* 490 U.S. 755, 726 (1989) (quotation omitted), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102–166, 105 Stat. 1072.

Consider also that state class action rules vary widely. Some are modeled on Fed. R. Civ. P. 23 (either pre- or post-1966 revision), but others are based on the old nineteenth century Field Code, on the Uniform Class Action Act, or some combination thereof. See Thomas D. Rowe, *State and Foreign Class-Actions Rules and Statutes: Differences From—And Lessons For?—Federal Rule 23*, 35 W. ST. U. L. REV. 147, 148–51 (2007). Some states do not even have a class action rule. These differences suggest a disagreement even with litigation systems about the extent to which class-wide relief is compatible with the adjudicative process.

²³⁷ See FED. R. CIV. P. 23(b)(1)–(3).

²³⁸ See, e.g., *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 571 (2d Cir. 1968) (Lumbard, J., dissenting) (describing “practical and insurmountable difficulties . . . inherent” in maintaining the case at bar as a class action).

judgment is borne out by extant (but admittedly sparse) empirical data suggesting that well below half of all putative class actions are certified.²³⁹ In language reminiscent of *Concepcion*, scholars such as Martin Redish have claimed that “all class action models . . . should be rejected because they ignore, undermine, or dilute *fundamental* notions of process-based individual autonomy that are *essential* to the functioning of a civil justice system.”²⁴⁰ Likewise, when the 1966 revisions to Rule 23 of the Federal Rules of Civil Procedure were issued, many viewed them as doing “more to *change the face of federal practice* than any other procedural development of the twentieth century, including the promulgation of the Civil Rules in 1938.”²⁴¹ As in *Concepcion*, the fear was that class actions would make “litigation so complex as to be beyond the power of judicial tribunals to adjudicate on any rational basis.”²⁴² By showcasing the way that class-wide relief conflicts with arbitration while suppressing the way in which it is likewise incompatible with litigation, therefore, the Court manages to invent differences that are not necessary or unavoidable. This, in turn, downplays the important ways in which the two adjudicative forums are the same and thus the reasons why they should be regulated accordingly.

Once we commit ourselves to *Concepcion*'s premise that certain things commonly associated with litigation such as the class mechanism or the Federal Rules of Evidence frustrate the essence of arbitration, it seems to me we must now begin to re-evaluate many things that we previously took for granted. For example, the state of Illinois requires that in certain circumstances, the “Rules of Evidence that apply in the circuit court for placing medical opinions into evidence shall govern” in motor vehicle insurance coverage arbitrations.²⁴³ California deems

²³⁹ See Thomas E. Willging & Shannon R. Wheatman, *Attorney Choice of Forum in Class Action Litigation: What Difference Does it Make?*, 81 NOTRE DAME L. REV. 591, 635 (2006) (reporting class certification rate of 22% or lower); JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, CLASS CERTIFICATION IN CALIFORNIA: SECOND INTERIM REPORT FROM THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION 5 (2010) (reporting class certification rate of 22%); THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 9 (1996), available at <http://ftp.resource.org/courts.gov/fjc/rule23.pdf> (reporting class certification rate of 37%).

²⁴⁰ MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 90 (2009) (emphasis added); see also Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—the Twenty Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971) (describing class actions as a “*de facto* depriv[ation] of [defendants’] constitutional right to a trial on the merits”); cf. John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1345 (1995) (describing the increased acceptance of mass tort class actions as something of “a paradigm shift, signaling a fundamental movement away from the traditional bipolar organization of litigation to a new, more collectivized structure”).

²⁴¹ See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 665–66 (1979) (emphasis added). Compare this with the Court’s recent declaration that class 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.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010).

Likewise, in *Wal-Mart Stores, Inc. v. Dukes*, decided the very same Term as *Concepcion*, Justice Scalia acknowledged that the class action was an “exception” and a “departure” from “the usual rule that litigation is conducted by and on behalf of the individual named parties only.” 131 S. Ct. 2541, 2550 (2011).

²⁴² Am. Bar Ass’n., *Report of Pound Conference Follow Up Task Force*, 74 F.R.D. 159, 194 (1976); see also Miller, *supra* note 241, at 665–66.

²⁴³ See 215 ILL. COMP. STAT. ANN. 5/143a(1) (West 2008). The same statute makes certain provisions of the Illinois Code of Civil Procedure relating to subpoenas and cross examination applicable to such arbitration proceedings. *Id.* at 5/143a(2)(C) & (D).

incorporated into every agreement to arbitrate wrongful death or injury claims “a right to take depositions and to obtain discovery” in the same manner and to the same extent available in a comparable action pending before a superior court.²⁴⁴ Some regulatory bodies, trade associations, and dispute resolution providers not only prohibit waivers of, but affirmatively require, certain procedural protections similar (but not identical) to what might be found in litigation, such as (a) a right to discovery,²⁴⁵ (b) a right to file a motion to dismiss or a motion for summary judgment,²⁴⁶ (c) a right of appeal to an appellate arbitration panel,²⁴⁷ (d) a right to peremptory and cause-based challenges to appointed arbitrators,²⁴⁸ (e) a right to permissive joinder and consolidation,²⁴⁹ and (f) a right to written, publicly available awards.²⁵⁰ These are all examples of

Some private dispute resolution providers also require arbitrators to follow applicable state and federal rules of evidence or privilege. *See, e.g.*, AM. ARBITRATION ASS’N, COMMERCIAL ARBITRATION RULES, R-31(c) (2009); AM. ARBITRATION ASS’N, CODE OF ETHICS FOR ARBITRATORS IN COMMERCIAL DISPUTES, Canon II(H) (2004); INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, NON-ADMINISTERED ARBITRATION RULES, R. 12.2 (2007); *see also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 840 (1994) (“In general, lower U.S. courts have assumed that privileges are unaffected either by the parties’ agreement to arbitrate.”); Bruce A. McAllister & Amy Bloom, *Evidence in Arbitration*, 34 J. MAR. L. & COM. 35, 50–51 (2003) (“The attorney client privilege may be, and is often, asserted in arbitration proceedings. Arbitrators should, after in camera review of the assertedly privileged documents, uphold the privilege where appropriate.”); James H. Carter, *The Attorney-Client Privilege and Arbitration*, 2:1 ADR CURRENTS, Winter 1996–97, at 1, 15 (“The courts have held, in the main, that arbitrators should honor legal privileges as would judges.”).

²⁴⁴ *See* CAL. CIV. PROC. CODE §§ 1283, 1283.05, 1283.1 (West 2008).

²⁴⁵ *See* FIN. INDUS. REGULATORY AUTH. RULES, R. 10213 (superseded for claims filed after April 16, 2007) [hereinafter FINRA RULES]; *id.* 13500–13514; AM. ARBITRATION ASS’N, MINNESOTA NO-FAULT, COMPREHENSIVE OR COLLISION DAMAGE AUTOMOBILE INS. ARBITRATION RULES, R. 12 (2010) [hereinafter MINNESOTA NO-FAULT RULES]; *cf.* NAT’L CONSUMER DISPUTES ADVISORY COMM., CONSUMER DUE PROCESS PROTOCOL, princ. 13 (2011) (encouraging the use of discovery); TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMP’T, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMP’T RELATIONSHIP (1995) (same).

²⁴⁶ *See* FINRA RULES, *supra* note 245, R. 12504, 13504; AM. ARBITRATION ASS’N, NAT’L RULES FOR THE RESOLUTION OF EMP’T DISPUTES, R. 34(d) (1999); *cf.* 2005 AAA Employment LEXIS 50 (Robert T. Simmekjaer, Arb.) (“[S]ince courts are empowered to grant summary judgment pursuant to the Federal Rule of Civil Procedure . . . as well as through comparable state rules, this Tribunal is similarly authorized.”); RUAA, *supra* note 68, § 15(b)(2) (providing for summary disposition procedure).

²⁴⁷ *See, e.g.*, AM. ARBITRATION ASS’N, SUPPLEMENTARY PROCEDURES FOR THE ARBITRATION OF ANTI-DOPING RULE VIOLATIONS, R-45 (2009) [hereinafter ANTI-DOPING PROCEDURES]; AM. ARBITRATION ASS’N, RULES FOR ARBITRATION OF NO-FAULT DISPUTES IN THE STATE OF NEW YORK (2007) [hereinafter NEW YORK NO-FAULT RULES]; GREEN COFFEE ASS’N, RULES OF ARBITRATION, art. XVII, *available at* http://www.greencoffeeassociation.org/images/uploads/resources/PROFESSIONAL_RESOURCES-Arbitration_Rules.pdf; *cf.* James M. Gaitis, *International and Domestic Arbitration Procedure: The Need for a Rule Providing a Limited Opportunity for Arbitral Reconsideration of Reasoned Awards*, 15 AM. REV. INT’L ARB. 9 (2004) (urging providers to adopt procedures allowing parties to obtain reconsideration of arbitral awards).

²⁴⁸ FINRA RULES, *supra* note 245, R. 10308(d) & (f) (superseded for claims filed after April 16, 2007); *id.* 10311 (same); *id.* 13410; NEW YORK STOCK EXCH. DEPT. OF ARBITRATION, NYSE CONSTITUTION AND ARBITRATION RULES, R. 609(a) & (b) (2003) [hereinafter NYSE RULES]; MINNESOTA NO-FAULT RULES, *supra* note 245, R. 8; NEW YORK NO-FAULT RULES, *supra* note 247.

²⁴⁹ *See* FINRA RULES, *supra* note 245, R. 10314(d) (superseded for claims filed after April 16, 2007); NYSE RULES, *supra* note 248, R. 612(d).

²⁵⁰ FINRA RULES, *supra* note 245, R. 10330 (superseded for claims filed after April 16, 2007); *id.* 13904(h); AM. ARBITRATION ASS’N, SUPPLEMENTARY RULES FOR CLASS ARBITRATION, R. 9, 10 (2003); ANTI-DOPING PROCEDURES, *supra* note 247, R-42; *cf.* CAL. CIV. PROC. CODE § 1281.96 (West 2008) (requiring private arbitration providers to make publicly available key details of arbitration award).

imposing litigation-like procedures in arbitration—procedures that, after *Concepcion*, appear just as incompatible with arbitration as does the class mechanism.²⁵¹ Are they likewise preempted or otherwise displaced by the FAA?

A similar set of questions arises when, over the objection of one side, an arbitrator relies on state or federal rules of evidence or procedure in a way that affects the outcome of a case.²⁵² If the imposition of such rules of decision is fundamentally incompatible with the arbitration process after *Concepcion*, may the disappointed party now successfully argue for vacatur of the resulting award on the ground that the arbitrator has “exceed [her] powers” or violated (federal) public policy?²⁵³

These are serious and viable questions in a post-*Concepcion* world. If rules that operate to ensure fairness in the default context of litigation conflict with the very definition of arbitration, then efforts to regulate procedural fairness in arbitration (whether by states, private regulatory bodies, or arbitrators themselves) that are modeled on such rules will be prone to attack as underhanded attempts to conform arbitration to litigation’s image. Courts will increasingly use FAA preemption as an excuse to exempt arbitration from rules such as *Discover Bank* while continuing to enforce those rules in the litigation context. Efforts to uphold the same minimum standards in both forums will thereby be stymied. This perpetuates the very discrimination that the Court claims it seeks to eradicate because it reinforces arbitration’s separate sphere—a sphere in which the usual standards of fairness do not apply (and, after *Concepcion*, cannot apply without destroying the very nature of arbitration under the FAA).

Now consider the problem presented by the opposite of *Discover Bank*—laws that forbid rather than impose class arbitration, or that prohibit rather than require use of the Federal Rules of Evidence. Such laws would upset the contractual expectations of parties who currently incorporate all manner of litigation-like rules and procedures into their arbitration agreements: not just class-wide relief,²⁵⁴ but also appellate review,²⁵⁵ comprehensive discovery,²⁵⁶ the federal rules

²⁵¹ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

²⁵² *See, e.g., Painewebber Grp., Inc. v. Zinsmeyer Trusts P’ship*, 187 F.3d 988, 992 (8th Cir. 1999) (describing arbitration panel’s compliance with Fed. R. Civ. P. 26(b)(5)); 2009 AAA Employment LEXIS 240 (James Greenwood, III, Arb.) (applying state rules of evidence); 2009 AAA Employment LEXIS 203 (David H. Stacy, Arb.) (applying Fed. R. Civ. P. 36(a)(3) to discovery dispute in arbitration); 2005 AAA Employment LEXIS 331 (G. Phillip Shuler, III, Arb.) (applying Fed. R. Civ. P. 56 to grant summary judgment in arbitral proceeding); 2000 AAA Employment LEXIS 152 (William H. Ewing, Arb.) (stating that “legal rules of evidence . . . should apply in arbitration proceedings unless there is a very good reason for departing from them”); 1999 AAA Employment LEXIS 58 (Pamela J. White, Arb.) (noting that arbitrator was “guided by the Federal Rules of Evidence”); 1999 AAA Employment LEXIS 47 (Kevin B. Krauss, Arb.) (stating that the arbitrator used state rules of evidence and civil procedure “as a guide in processing this claim”).

²⁵³ *See* 9 U.S.C. § 10(a)(4) (2009); *United Paperworkers Int’l v. Misco*, 484 U.S. 29, 43 (1987).

²⁵⁴ *See Skirchak v. Dynamics Research Corp.*, 508 F.3d 49 (1st Cir. 2007) (noting stipulation by both parties to class arbitration); Sandra K. Partridge, *Arbitration post-AT&T Mobility v. Concepcion at the American Arbitration Association—A Service Provider’s Perspective*, 4 Y.B. ARB. & MED. (forthcoming 2012) (noting that 347 class arbitrations have been filed with the AAA alone since 2003, 53 of which after *Stolt Nielsen*).

of evidence²⁵⁷ and even the federal rules of civil procedure.²⁵⁸ The Court has emphasized time and again that “[a]rbitration under the [FAA] is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”²⁵⁹ The FAA should therefore preempt state laws that seek to curtail that freedom of contract. But after *Concepcion*, it is difficult to appreciate how a law that merely forbids the very things that the Court believes are fundamentally incompatible with arbitration’s true nature can possibly frustrate the FAA’s purpose.

This second set of examples highlights the way in which the Court’s preoccupation with arbitration’s status belies its purported fealty to freedom of contract in matters arbitration. Just as *Muller* restricted women’s choices in the sphere of employment, so *Concepcion* threatens one of the cardinal virtues of arbitration: the freedom it affords in the design of a disputing process. Modern arbitration law has largely been organized around vindicating this freedom by enabling arbitration to become whatever the contracting parties agreed it would become—even if this means it might never become anything at all.²⁶⁰ By contrast, *Concepcion* returns arbitration to the yoke of status. It implies that an agreement audacious enough to contemplate inefficient and complex class procedures does not deserve the FAA’s protection.²⁶¹ Freedom of contract and favoritism toward arbitration, in other words, are ultimately qualified—they are to be pursued only in the name of a particular conception of arbitration as a quick and dirty version of litigation.

²⁵⁵ Several arbitral providers have promulgated procedures for appealing arbitral awards to an appellate arbitral panel, suggesting that the practice is not unknown. *See, e.g.*, AM. ARBITRATION ASS’N, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE 37 (2007); JUDICIAL ARBITRATION & MEDIATION SERVS. (JAMS), OPTIONAL ARBITRATION APPEAL PROCEDURES 2–5 (2003); INT’L INST. FOR CONFLICT PREVENTION & RESOLUTION, ARBITRATION APPEAL PROCEDURE (2007). Several published court decisions have also described the use of appellate arbitration provisions. *See, e.g.*, *Little v. Auto Stiegler, Inc.*, 63 P.3d 979, 982, 987 (Cal. 2003); *In re Hospitality Emp’t Grp., LLC*, 234 S.W.2d 832, 835 (Tex. App. 2007).

²⁵⁶ *See, e.g.*, *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 541 (E.D. Pa. 2006) (describing arbitration clause providing for discovery pursuant to state rules of civil procedure); *Zebrasky v. Valdez*, 888 N.E.2d 1130, 1131 (Ohio App. 2008) (same); COMMERCIAL CONTRACTS: STRATEGIES FOR DRAFTING AND NEGOTIATING § 5.04[F][4], at 5–48 (2012) (recommending inserting a provision for discovery in accordance with the Federal Rules of Civil Procedure); Stipanowich, *supra* note 75, at 383.

²⁵⁷ *See infra* note 258.

²⁵⁸ *See, e.g.*, 2008 AAA Employment LEXIS 381 (Robert T. Simmelkjaer, Arb.) (noting that parties had agreed to be bound by the Federal Rules of Evidence and the Federal Rules of Civil Procedure); 2002 AAA Employment LEXIS 150 (Chuck Miller, Arb.) (same); 2001 AAA Employment LEXIS 53 (Ellen J. Alexander, Arb.) (noting that, per the parties’ agreement, “[t]he arbitrator shall also apply the Federal Rules of Evidence”); Stipanowich, *supra* note 75, at 383.

Consider also that in Britain during the nineteenth century, it was not unheard of for parties to provide that their disputes would be heard before a panel of up to seven arbitrators, “sworn and sitting as a jury.” COHEN, *supra* note 25, at 8 (quoting J. M. BELL, TREATISE ON THE LAW OF ARBITRATION IN SCOTLAND 14 (2d ed. 1877)).

²⁵⁹ *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989).

²⁶⁰ *See id.* at 478–79 (“[W]e have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so.”).

²⁶¹ *See supra* note 74.

B. The Touchstone of Intentional Discrimination

My goal in the prior section was to explain *Concepcion*'s essentialism as a classic antidiscrimination move, one that nonetheless comes with significant and well-known costs that our experience in the gender discrimination context suggests are not worth paying. In this section, I seek to show that these costs did not need to be (and should not have been) paid in the first place.

The Court used essentialism to answer the question of how we tell whether a facially neutral law “discriminates” against arbitration. It was led down this path, however, only because it mistakenly ended up focusing on “disproportionate impact” as the touchstone for discrimination²⁶²—that is, on *Discover Bank*'s *de facto* unequal treatment of arbitration and litigation in the way that it imposes on both forums a procedure that is fundamentally incompatible only with the former. This overlooks a much more compelling alternative, which was to focus on whether California's context-specific unconscionability rule constituted *de jure* discrimination. Doing so would have forced the Court to make good on its own claim that *Discover Bank* exhibits the same “judicial hostility towards arbitration that prompted the FAA [and that] had manifested itself in ‘a great variety’ of ‘devices and formulas’ declaring arbitration against public policy.”²⁶³

Hostility is not a word we associate with chance. To say that a law or employment practice is “hostile” toward a particular group is to say that it was motivated—however subliminally—by a purpose to discriminate.²⁶⁴ Thus, if we are to take seriously the Court's longstanding position that the FAA was enacted to reverse the “old common law hostility toward arbitration,”²⁶⁵ it follows that the FAA should be construed to preempt only state laws that are *intentionally* anti-arbitration.²⁶⁶ This is consistent with AT&T's framing of the preemption issue in terms of pretext and with the Court's own discussion of *Discover Bank* and the parade of horrors.²⁶⁷ Federal arbitration law, in short, represents a purpose-based antidiscrimination regime.²⁶⁸ This interpretation is not only more faithful to the Court's accumulated FAA jurisprudence, it is also more sensible from a federalism perspective. Because proving discriminatory purpose is exceptionally difficult, intent-based antidiscrimination regimes afford less protection than their effects-based counterparts.²⁶⁹ In the arbitration context, this means that

²⁶² See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

²⁶³ *Id.* (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959)).

²⁶⁴ See BLACK'S LAW DICTIONARY 806 (9th ed. 2009) (defining “hostility” as “[a] state of enmity between individuals or nations” and as “[a]n act . . . displaying antagonism”); defining “hostile” as “[s]howing ill will or a desire to harm”). By contrast, antistatutory claims, while perhaps a response to a legacy of hostility toward certain groups, are not necessarily predicated on continuing hostility. Instead, they tend to be focused more on remedying the effects of that hostility, even where the hostility itself has largely disappeared.

²⁶⁵ *Southland Corp. v. Keating*, 465 U.S. 1, 14 (1984); see also *supra* notes 109–110 and accompanying text.

²⁶⁶ This, I take it, is the point behind Alan Rau's claim that *Concepcion* does not prevent an arbitrator (as opposed to a court) from declaring class waivers unconscionable. See Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435, 507–09 (2011).

²⁶⁷ See *supra* notes 107–115 and accompanying text.

²⁶⁸ This is a point I have argued at length elsewhere. See Aragaki, *supra* note 50, at 1210–18.

²⁶⁹ See Siegel, *supra* note 228, at 1135–1140.

fewer claims of discrimination against arbitration will survive, and thus that fewer state laws will suffer preemption.²⁷⁰

By declaring that class arbitration is incompatible with arbitration’s true nature, the Court managed to find a colorable ground for conflict with the FAA without delving into the messier question of whether that conflict was haphazard or the product of improper motives. For if a state law can be described as striking at the essence of arbitration, it does not seem to matter much whether it does so through hostility or by accident. In either case, the FAA’s purposes and objectives would appear to be quite clearly frustrated. But notice that the *reason* why they are frustrated has now changed: It is no longer that the state law in question functions as a pretext, perpetuating anti-arbitration policies behind the guise of a facially neutral regulation, as AT&T had originally claimed. Instead, it is that the law—however well-intentioned toward arbitration—has managed to turn arbitration into something that it plainly is not.²⁷¹

Had the requirement to prove purposeful discrimination been better appreciated by the litigants and the Court, it would have provided a clean and simple way to distinguish *Discover Bank* from AT&T’s parade of horrors. These hypothetical laws are problematic not because they just happen to produce disparate impacts on arbitration. Rather, they are problematic because we suspect them to be predicated on little more than knee-jerk litigation chauvinism: the bare assumption that only the judicial forum—or features designed for that forum or otherwise unique to it, such as the Federal Rules of Evidence and jury fact-finding—is adequate to resolve certain types of consumer claims.²⁷²

In order to analogize *Discover Bank* to these examples, it would need to be fairly evident that *Discover Bank* likewise purposefully discriminates against arbitration. But even if it could be taken to “impose” class arbitration,²⁷³ *Discover Bank* does not dictate the particular *form* that such a procedure must take. It does not, for instance, require the wholesale importation of judicial class action rules and procedures such as Rule 23 of the Federal Rules of Civil Procedure into the arbitration context, and so does not betray the same type of chauvinism evident in the parade of horrors. The most that can be said about *Discover Bank* is that it mandates the availability of *some type* of class mechanism (and then only if the Concepcions could satisfy the requirements

²⁷⁰ On the current “over-preemption” of state laws by the FAA, see Aragaki, *supra* note 18, at 1269–85; Jill I. Gross, *AT&T Mobility and FAA Over-Preemption*, 4 Y.B. ARB. & MED. (forthcoming 2012).

²⁷¹ To be sure, the majority’s holding might be understood as a claim that *Discover Bank*’s attack on class waivers somehow represented the intentional targeting of the arbitration process itself. But AT&T offered no persuasive reasons to rebut the strong inference that a law that applies equally to class waivers in arbitration and litigation could possibly be construed as hostile only to arbitration. See *supra* notes 159–162 and accompanying text. Moreover, there are legitimate reasons for opposing class waivers (*e.g.*, protecting consumers, policing large-scale wrongdoing by companies, leveling the litigation playing field) that have nothing to do with—and do not readily suggest—hostility toward arbitration *per se*. In other antidiscrimination contexts, Justice Scalia has had no problem making this very point to conclude that purposeful discrimination had not been established. See, *e.g.*, *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263, 270–73 (1993) (Scalia, J.).

²⁷² See *supra* notes 107–115, 176–181 and accompanying text; see also Transcript, *supra* note 88, at 47 (Alito, J.) (hypothesizing that a state might require the use of evidence rules in arbitration on the ground that they are somehow “necessary in order for parties to be treated fairly”).

²⁷³ As others have pointed out, *Discover Bank* does not mandate anything other than the nonenforcement of class waivers in certain contexts. See, *e.g.*, Transcript, *supra* note 88, at 15–16 (Sotomayor, J.); Rau, *supra* note 266, 526–27; Jean R. Sternlight, *Tsunami: AT&T Mobility v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 707 (2012).

for class certification). Because the parties had agreed to arbitrate before the American Arbitration Association (AAA), that mechanism would have conformed to the AAA's class arbitration rules.²⁷⁴ But it did not need to. AT&T could just as well have drafted its own class arbitration rules, thereby protecting itself from all of the defense-side risks cited by the Court to defend its preemption holding. Alternatively, the arbitrator could have been entrusted to formulate a class arbitration procedure that stayed true to the supposed essential virtues of arbitration. Or the parties could have agreed on a class arbitration procedure after the fact, which likely would have been sufficient to protect the integrity of the process, at least from AT&T's perspective.²⁷⁵ Absent further explanation, therefore, *Discover Bank* does not betray any necessary hostility to arbitration.

Given these features of *Discover Bank*, a more appropriate comparison for the Court to draw would have been to (a) laws requiring the availability of *some type* of discovery process or evidentiary rules in arbitration and litigation, rather than to (b) laws requiring the availability specifically of judicially monitored discovery or the Federal Rules of Evidence. But it is not entirely clear that laws falling within category (a) are all that hostile to arbitration.²⁷⁶ Most arbitral providers allow each party some minimal discovery,²⁷⁷ and arbitral awards would likely be vacated if relevant material evidence were arbitrarily excluded.²⁷⁸ Moreover, because laws falling within category (a) impose the same generic restrictions in the litigation context, it suggests that they were intended to regulate the applicable process feature (discovery, evidence rules, etc.) rather than the particular forum in which those features are used. If *Discover Bank* is analogous to these laws, it follows from my argument that *Discover Bank* also does not evince the type of purposeful discrimination toward arbitration that the FAA was designed to reverse.

As the party seeking preemption based on a pretext theory, AT&T bore the burden to rebut this conclusion—to prove that a rule that declares class waivers unconscionable to the same extent in arbitration as in litigation somehow purposefully discriminates only against arbitration. In more traditional antidiscrimination contexts, a plaintiff asserting a claim of pretext is typically required to prove not just that employers or state actors were aware of the consequences of their

²⁷⁴ See *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.10 (9th Cir. 2009). True, the AAA modeled its rules after Fed. R. Civ. P. 23. But the same can be said for other rules commonly used in arbitration, such as those relating to discovery and appeal to an appellate arbitration panel. These rules have been in use for decades; yet nobody has thought to claim that they somehow change the fundamental nature of arbitration simply because they were modeled on a rule of court procedure.

²⁷⁵ By contrast, the Court's conclusion that class arbitration is fundamentally inconsistent with arbitration implies that no type of class arbitration, no matter how well tailored to the arbitral process, can get off the ground without vitiating the entire enterprise of FAA arbitration itself. It amounts to a ruling that the class mechanism is not a legitimate feature of adjudication generally, but is rather so intimately bound up with the litigation process that making it nonwaivable in other adjudicative forums would effectively convert those forums into litigation.

²⁷⁶ This is especially so where, as here, the application of such laws is further limited to "consumer contract[s] 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 money." *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005).

²⁷⁷ See *supra* note 245.

²⁷⁸ See 9 U.S.C. § 10(a)(3) (2009); *Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123, 1130 (7th Cir. 1997); RUA, *supra* note 68, § 15 cmt. 1.

actions on protected groups but that they affirmatively intended those consequences.²⁷⁹ AT&T made nothing close to this showing, however.²⁸⁰ The majority should, therefore, have held that AT&T had failed to discharge its burden to prove discrimination, as it has been apt to do in more traditional discrimination contexts.²⁸¹

Instead, the majority decided the FAA preemption issue by speculating about the effect that class actions would have on arbitration's essential nature, thereby relieving itself and AT&T from inquiring into discriminatory intention. In form, therefore, *Concepcion* amounts to a type of reasonable accommodation decision: It exempts arbitration from a neutral, generally applicable rule such as *Discover Bank* based solely on a perceived intolerable tension between the rule and the "essence" of arbitration.²⁸² From the standpoint of an antidiscrimination theory of FAA preemption, this was the crucial mistake in *Concepcion*.

V. CONCLUSION

In a trenchant critique of the majority's opinion, Alan Scott Rau argues that "whatever one can possibly spin out of all this in the way of 'doctrine' begins to seem increasingly pointless . . . [because] we are clearly quite far here from anything that bears a recognizable resemblance to any neutral and informed process of adjudication."²⁸³ By contrast, in this Article I have argued that *Concepcion* is in fact organized around a distinct logic of antidiscrimination—a logic that, while perhaps still unrefined and poorly understood, makes a claim to neutrality and principle nonetheless.

It is time for us to take that logic seriously. For far too long, our failure to do so at both the practitioner and academic levels has allowed courts and litigants to exploit ambiguities and lacunae in our collective understanding of that logic to justify partisan, result-driven outcomes. A more sophisticated engagement with that logic, I argue, opens up an avenue for holding courts and litigants to the full implications of their own antidiscrimination-based arguments and holdings. This, I hope, will help place sensible limits on the FAA's preemption of state law.

²⁷⁹ See *supra* note 102 and accompanying text; *supra* note 110.

²⁸⁰ See *supra* notes 159–162 and accompanying text.

²⁸¹ Michael Dorf put this point well: "In the *AT&T* case, moreover, the majority opinion exhibits tension with another jurisprudential principle favored by Justice Scalia and other conservatives. In cases under the Equal Protection Clause and the Free Exercise Clause, Justice Scalia and his fellow travelers have repeatedly argued against disparate impact tests." Michael C. Dorf, *Arbitration Decision Suggests SCOTUS Majority Are Pro-Business More Than Jurisprudential Conservatives*, DORF ON LAW (Apr. 29, 2011, 12:42 AM), <http://www.dorfonlaw.org/2011/04/arbitration-decision-suggests-scotus.html>; see also *Employment Div. v. Smith*, 494 U.S. 872, 878–84 (1990) (Scalia, J.) (holding that a generally applicable law does not offend the Free Exercise Clause absent proof that it was intended to discriminate against religion).

²⁸² Cf. *Wisconsin v. Yoder*, 406 U.S. 205, 210, 217–19 (1972) (finding generally applicable law to violate the Free Exercise Clause because it directly conflicted with "fundamental," "essential," and "central" commands of the Amish faith).

²⁸³ See Rau, *supra* note 266, at 550; see also *id.* at 544.