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Purpose, Precedent, and Politics: Why *Concepcion* Covers Less than You Think

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**PURPOSE, PRECEDENT, AND POLITICS:
WHY *CONCEPCION* COVERS LESS THAN YOU THINK**

Michael A. Helfand*

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I. INTRODUCTION

The Supreme Court’s landmark decision in *AT&T Mobility v. Concepcion* has undeniably changed the rules of the arbitration game.¹ To supporters of the decision, *Concepcion* finally put an end to judicial use of common law principles to undermine the enforceability of many arbitration agreements.² Such judicial incursions into the realm of arbitration had increasingly left arbitration on unequal footing with all other contracts.³ To critics of the decision, *Concepcion* served as a crushing blow to consumer protection on the one hand and principles of

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¹ For a comprehensive discussion of the recent flurry of Supreme Court arbitration decisions, see Thomas J. Stipanowich, *The Third Arbitration Trilogy*: Stolt-Nielsen, Rent-A-Center, *Concepcion* and the Future of American Arbitration, 22 AM. REV. INT’L ARB. 323 (2012).

² In recent years, a number of articles have criticized the increased judicial use of unconscionability to void otherwise valid arbitration agreements. See, e.g., Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006) (arguing that California courts improperly apply lower standards of unconscionability in determining the enforceability of arbitration agreements than in resolving other contractual issues); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469 (arguing that many courts favor litigation over arbitration by erroneously applying the unconscionability doctrine to strike down arbitration agreements); Eric J. Mogilnicki & Kirk D. Jensen, *Arbitration and Unconscionability*, 19 GA. ST. U. L. REV. 761 (2003) (arguing against attempts to broadly apply the unconscionability doctrine to arbitration agreements).

³ See *supra* note 2.

federalism on the other.⁴ By restricting the use of common law principles to invalidate arbitration agreements, the Supreme Court stripped lower courts of the meager judicial tools in their arsenal that could prevent arbitration from engulfing the entirety of employee and consumer claims.⁵

Indeed, the Supreme Court's decision provides ample reason to conclude that *Concepcion* has fundamentally altered the way lower courts apply the Federal Arbitration Act (FAA) to arbitration agreements. Most notably, the Court provided a narrow reading of § 2 of the FAA and an expansive reading of the FAA's purpose, thereby refusing to allow lower courts to invalidate arbitration provisions on common law grounds where doing so would "stand as an obstacle to the accomplishment of the FAA's objective."⁶ Indeed, many decisions issued by lower courts on the heels of the Court's decision in *Concepcion* further bolster the impression that the rules of the arbitration game have been radically transformed for the foreseeable future.⁷

However, while *Concepcion* will have a far-reaching impact on the enforceability of arbitration agreements going forward, there is good reason to believe that this impact will not be quite as far reaching as some have presumed. Notwithstanding some of the Court's sweeping statements in the decision, this Article aims to highlight why *Concepcion* covers less legal terrain and fewer cases than you might otherwise think. In so doing, it hopes to sketch three limits to how *Concepcion* will impact the enforceability of arbitration agreements and thereby outline some of the litigation fault lines that are beginning to appear in a post-*Concepcion* world.⁸

First, the Court's opinion in *Concepcion* focuses largely on how the "*Discover Bank* rule," in knee-jerk fashion, allowed plaintiffs to avoid arbitration agreements with class-action waivers so long as the contract was adhesive, the damages were predictably small, and the consumer alleged a scheme to cheat consumers.⁹ Such a sweeping rule did not take into account the variety of provisions in AT&T's form contract that, at least facially, provided plaintiffs with an alternative mechanism to resolve individualized disputes.¹⁰ Accordingly, lower courts may read the majority's decision as holding the *Discover Bank* rule was preempted by the FAA because it was too broad; it provided plaintiffs too much leeway to void otherwise valid

⁴ See, e.g., Hiro N. Aragaki, *Equal Opportunity for Arbitration*, 58 UCLA L. REV. 1189 (2011) (citing *Concepcion* as an example of how state law is "losing ground in the U.S. Supreme Court"). Critics of the Supreme Court's arbitration jurisprudence have for some time argued that the Court's decisions have severely undermined principles of federalism. See, e.g., David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 54 (2004) ("Southland and its progeny are the result of bad statutory interpretation and even worse federalism."). For a discussion of the central importance of federalism in the arbitration scheme, see Stephen L. Hayford & Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 FLA. L. REV. 175, 176 (2002).

⁵ See, e.g., Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 463 (2011) ("Finally, the Court appears to have placed the nail in the coffin on consumers' ability to pursue class processes when bound by an arbitration agreement in *AT&T v. Concepcion*.").

⁶ AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1748 (2011).

⁷ See *infra* note 32.

⁸ I do not discuss the "vindication-of-rights" doctrine – maybe the most celebrated potential limitation on the Court's holding in *Concepcion* – which has already been applied post-*Concepcion* by the Second Circuit to render a class-action waiver unenforceable. See *In re American Express Merchants' Litigation*, 634 F.3d 187 (2d Cir. 2011); see also David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 KANSAS L. REV. (forthcoming 2012) (outlining the origins of and theory behind the vindication of rights doctrine).

⁹ See *Concepcion*, 131 S. Ct. at 1750.

¹⁰ See *id.* at 1744-45.

arbitration agreements simply because they contained a class-action waiver without considering pro-consumer provisions in the same agreement.¹¹ Reading the Court's opinion in *Concepcion* in this way narrows its impact by empowering courts to continue to use common law contract rules to invalidate agreements which fail to adequately protect consumers.

Second, reading *Concepcion* as severely undermining the viability of common law contract defenses to invalidate arbitration agreements underestimates the impact of Justice Thomas's concurrence on the precedential value of the decision. While Justice Thomas did sign the majority opinion, his concurrence provides a wholly distinct – and in some instances, more limiting – ground for reaching the result outlined in majority's opinion.¹² Indeed, Justice Thomas joined the majority's invalidation of the *Discover Bank* rule because he held that § 2 of the Federal Arbitration Act did not empower lower courts to employ defenses such as public policy or substantive unconscionability to revoke otherwise valid arbitration agreements.¹³ However, Justice Thomas presumably remains of the view that a class action waiver may serve as a factor in invalidating an arbitration agreement so long as the primary consideration in invalidating the agreement is some form of procedural unconscionability that speaks to the failure of the agreement's formation.¹⁴ As a technical matter, by signing the majority opinion, Justice Thomas did provide five votes for the majority's rationale.¹⁵ However, similar concurring opinions such as Thomas's – those that differ so explicitly with the majority – can have a significant impact on how lower courts apply the majority's decision.¹⁶ Indeed, we are already beginning to see lower courts lean on Thomas's concurrence in applying *Concepcion*.¹⁷ In this way, Thomas's concurrence may very well limit *Concepcion*'s precedential value.

Third, given the “strategic judging” that animates judicial interpretation of arbitration doctrine,¹⁸ the tenuous nature of the Court's majority will likely effect state court application of *Concepcion*. Most notably, because Justice Thomas has consistently contended that the FAA only applies in federal courts,¹⁹ state courts are likely aware that there are not enough votes on the Supreme Court to reverse a *state court* decision aggressively applying common law contract principles to invalidate an arbitration agreement. Accordingly, state court judges are likely to push back on the Court's holding in *Concepcion*, limiting its application in order to retain authority over the enforcement of arbitration agreements. Indeed, the first round of California state courts applying *Concepcion* already provide some indication that state courts are likely to be more aggressive in rejecting a broad reading of the Court's holding.²⁰

¹¹ See *infra* Part II.

¹² See *infra* Part III.

¹³ See *infra* notes 71-76 and accompanying text.

¹⁴ See *infra* notes 77-89 and accompanying text.

¹⁵ See *Concepcion*, 131 S. Ct. at 1743.

¹⁶ See *infra* notes 89-102 and accompanying text.

¹⁷ See *infra* note 102.

¹⁸ See Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. Rev. 1420, 1420 (2008).

¹⁹ See *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Thomas, J., dissenting).

²⁰ See, e.g., *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 856, 865 (Ct. App. 2011), *cert. denied*, No. 11-880, 2012 WL 136923 (U.S. Apr. 16, 2012); *Macintosh v. Powered, Inc.*, No. A129063, 2011 WL 2237938, (Cal. Ct. App. June 8, 2011).

II. PURPOSE

For many, the Supreme Court's decision in *AT&T Mobility v. Concepcion* not only undermined the viability of class action lawsuits,²¹ but it also severely undermined principles of federalism by limiting the ability of states to create limitations that hamper the enforceability of arbitration provisions.²² Indeed, there was much in the Supreme Court's decision that supported such dire conclusions – most notably, the Court's treatment both of the FAA's purpose and its determination of disproportionate impact on arbitration agreements.

First, the Court focused on the “principal purpose” of the FAA, describing it “as embod[ying] [a] national policy favoring arbitration . . . and a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”²³ Contrary to the contentions of the dissent,²⁴ the Court's majority argued that part of the FAA's objective was to create “streamlined proceedings and expeditious results”²⁵ and not to “frustrate” or “hinder” the “speedy resolution of [] controvers[ies].”²⁶

Second, and in turn, the Court took aim at the “*Discover Bank* rule,” a rule announced by the California Supreme Court in *Discover Bank v. Superior Court*,²⁷ which was “California's rule classifying most collective-arbitration waivers in consumer contracts as unconscionable.”²⁸ The Court concluded that the *Discover Bank* rule was preempted by the FAA because it “interfere[d] with arbitration” by enabling “any party to a consumer contract to demand [classwide arbitration] *ex post*.”²⁹ In finding that the *Discover Bank* rule was preempted by the FAA, the Court focused on how such a rule had a “disproportionate impact on arbitration agreements,” citing various statistical studies that demonstrated how unconscionability had been used by California courts to target and void arbitration agreements.

In this way, the Court determined that the *Discover Bank* rule applied the doctrine of unconscionability in a manner that disfavored arbitration and represented a prime example of a state law doctrine that was preempted by the FAA.³⁰ Accordingly, the Court emphasized that standard state law contract defenses would be preempted by the FAA where they created hurdles to the enforceability of arbitration provisions that “rely on the uniqueness of an agreement to arbitrate.”³¹ Such a holding could be read to not only endanger judicial use of unconscionability to void arbitration agreements, but also the use of other state laws that similarly apply common

²¹ See, e.g., Cole, *supra* note 5, at 467 (“The Supreme Court's recent decision in *AT&T v. Concepcion*, in which the Court held that the FAA preempts a state court decision mandating that an arbitration agreement is unconscionable if the consumer with a low value claim is not permitted to proceed in a class arbitration, sounds the death knell for the class arbitration process.”); see also Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, S.F. CHRON., Nov. 7, 2010, at E8, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2010/11/06/INA41G6I3I.DTL> (arguing that the Court's decision in *Concepcion* could end class actions).

²² See, e.g., *supra* note 4.

²³ *Concepcion*, 131 S. Ct. at 1749 (internal quotation marks and citations omitted).

²⁴ See *id.* at 1758 (Breyer, J., dissenting).

²⁵ *Id.* at 1749 (quoting *Preston v. Ferrer*, 552 U.S. 346, 357-58 (2008)).

²⁶ *Id.* (quoting *Preston*, 552 U.S. at 358).

²⁷ 113 P.3d 1100 (Cal. 2005).

²⁸ *Concepcion*, 131 S. Ct. at 1746.

²⁹ *Id.* at 1750.

³⁰ See *id.* 1744.

³¹ *Id.* (quoting *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

law principles to limit the scope of enforceable arbitration agreements. In the wake of *Concepcion*, some lower courts have latched on to these portions of the Court’s opinion and thereby applied *Concepcion* broadly.³²

But the majority’s opinion, while it did contain much broad language, was also a creature of its facts. The Court addressed the enforceability of the arbitration provision in AT&T Mobility’s agreement for the sale and servicing of cellular phones. The agreement itself contained a number of unique provisions that structured specific methods for the resolution of disputes between the company and its customers. The agreement³³ provided that customers could initiate proceedings to resolve a dispute via a one-page online form.³⁴ After receiving the form, the dispute resolution system created by the agreement allowed AT&T to offer the customer a settlement to resolve the claim. If the claim remained unresolved for 30 days, the customer could submit another online form demanding arbitration.³⁵

Importantly, the terms of the arbitration were significantly constrained by the agreement in a variety of ways that, at least on their face, provided significant protections for consumers.³⁶ AT&T was required to pay all the costs of non-frivolous claims.³⁷ The arbitration had to take place in the county where the consumer was billed.³⁸ In addition, for all claims of \$10,000 or less, the customer was empowered to have the arbitration proceed either by telephone or to be decided based solely on submissions from the parties – in fact, for claims of such a size, either party could bring the claim in small claims court instead of pursuing arbitration.³⁹ Moreover, the agreement prohibited AT&T from seeking reimbursement of attorney’s fees and “in the event that

³² See, e.g., *Cardenas v. AmeriCredit Fin. Servs.*, No. 09-4978 SBA, 2011 U.S. Dist. LEXIS 78282, at *7-8 (N.D. Cal. July 19, 2011) (holding that *Concepcion* preempts California state decisional law that found certain claims for injunctive relief under various consumer protection laws and unfair competition laws were not arbitrable); *Nelson v. AT&T Mobility LLC*, No. C10-4802 TEH, 2011 U.S. Dist. LEXIS 92290 (N.D. Cal. Aug. 18, 2011) (same); *Wolf v. Nissan Motor Acceptance Corp.*, No. 10-cv-3338, 2011 U.S. Dist. LEXIS 66649, at *19-20 (D.N.J. June 22, 2011) (“Based on the United States Supreme Court’s holding and reasoning in *AT&T Mobility*, the Court cannot find that any public interest articulated in this case, either in connection with the SCRA or New Jersey law, overrides the clear, unambiguous, and binding class action waiver included in the parties’ arbitration agreement. New Jersey precedent notwithstanding, the Court is bound by the controlling authority of the United States Supreme Court.”); *Bernal v. Burnett*, 793 F. Supp. 2d 1280, 1288 (D. Colo. 2011) (“Thus, the Supreme Court considered the fact that the *Concepciones* and other class plaintiffs would be denied any recovery by its ruling, and ruled against the class plaintiffs nonetheless. The Court is bound by this ruling and, therefore, cannot be persuaded in this case by the fact that ordering the parties to arbitration may impact Plaintiffs’ ability to recover.”); *Alfeche v. Cash Am. Int’l, Inc.*, No. 09-0953, 2011 U.S. Dist. LEXIS 90085, at *17 (E.D. Pa. Aug. 12, 2011) (“The FAA preempts Pennsylvania’s unconscionability law with regard to class action waivers in arbitration agreements.”); *Ipcon Collections LLC v. Costco Wholesale Corp.*, No. 7:10-cv-9012, 2011 U.S. Dist. LEXIS 95468, at *13 n.5 (S.D.N.Y. Aug. 24, 2011) (“Plaintiff argues in its opposition that this case asks the question ‘[w]ill an entity with overwhelming economic power escape accountability before the court system after it has implemented a fraudulent scheme, and been complicitous in other fraudulent activities which have destroyed a business, the lives of people working in that business and taken away their homes.’ However, the Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*, makes clear that the parties’ respective sizes or economic power are irrelevant in determining whether an arbitration provision should be enforced.” (citation omitted)).

³³ The court actually was addressing a revised agreement, executed by AT&T pursuant to its contractual authority to make unilateral amendments to its agreement with cellular customers. *Concepcion*, 131 S. Ct. at 1744.

³⁴ See *id.*

³⁵ See *id.*

³⁶ See *id.*

³⁷ See *id.*

³⁸ See *id.*

³⁹ See *Concepcion*, 131 S. Ct. at 1744.

a customer receives an arbitration award greater than AT&T's last written settlement offer" the agreement required AT&T "to pay a \$7,500 minimum recovery and twice the amount of the claimant's attorney's fees."⁴⁰

While some lower courts have explicitly disregarded the factual context of the decision,⁴¹ successfully extracting the holding from *Concepcion* would appear to require more attention to the pro-consumer provisions in the AT&T agreement. Indeed, it is worth noting that the target of the Court's analysis was not the underlying agreement implicated in the litigation, but whether the *Discover Bank* rule was preempted by the FAA.⁴² The Court's holding, as well, was directed at the *Discover Bank* rule, which the Court held did not provide adequate safeguards against enabling each and every plaintiff to *ex post* void all arbitration agreements with class-action waivers.⁴³

The Court's critique largely focuses on the fact that the *Discover Bank* rule allows plaintiffs to avoid arbitration agreements with class-action waivers so long as the contract satisfied three requirements: (1) the contract is adhesive, (2) the damages are predictably small, and (3) the consumer alleges a scheme to cheat consumers.⁴⁴ The Court noted that plaintiffs could all too easily satisfy these three requirements: consumer contracts are almost always adhesive in some sense, California courts had deemed damages of \$4,000 to be sufficiently "small," and the scheme to cheat need not be proven, but only alleged, to satisfy the *Discover Bank* rule.⁴⁵ Accordingly, the Court referred to these requirements as "toothless and malleable," failing to providing any true "limiting effect" on the *Discover Bank* rule.⁴⁶

In this way, the Court's concern appeared to rest primarily with the wide scope of the *Discover Bank* rule and the fact that it enabled plaintiffs to easily avoid the terms of a duly executed arbitration provision.⁴⁷ This was particularly startling in the case before the Court where AT&T – at least facially – had incorporated a variety of pro-consumer provisions in the arbitration agreement. Accordingly, the pro-consumer provisions could have been read to counteract the impact of the class action waiver in AT&T's arbitration agreement. And the *Discover Bank* rule, as articulated by the California Supreme Court, failed to account for these pro-consumer provisions, using an all-too simplistic checklist to determine whether an arbitration agreement was unconscionable. As the Court noted, the district court below had described AT&T's arbitration procedures "favorably"⁴⁸ and yet within the framework created by the *Discover Bank* rule, such favorable provisions had no impact on the unconscionability analysis.

⁴⁰ *Id.*

⁴¹ See *Kaltwasser v. AT&T Mobility LLC*, No. 07-00411, 2011 U.S. Dist. LEXIS 106783, at *17 (N.D. Cal. Sept. 20, 2011) ("[I]t is incorrect to read *Concepcion* as allowing plaintiffs to avoid arbitration agreements on a case-by-case basis simply by providing individualized evidence about the costs and benefits at stake.").

⁴² See *id.* at *9-10 (describing the Court's holding as "California's *Discover Bank* rule is preempted by the FAA" and remanding the case).

⁴³ See *Concepcion*, 131 S. Ct. at 1750 ("Although the rule does not require classwide [sic] arbitration, it allows any party to a consumer contract to demand it *ex post*.").

⁴⁴ See *id.*

⁴⁵ See *id.*

⁴⁶ *Id.*

⁴⁷ It is also worth noting that this more limited interpretation of the Court's holding is further bolstered by the Court's order. The Court did not simply grant AT&T's motion to compel, but instead, limited its holding to finding that the *Discover Bank* rule was preempted and then remanded for further proceedings. See *id.* at 1753.

⁴⁸ *Id.* at 1745.

On such an interpretation, the problem with the *Discover Bank* rule was its failure to take a holistic approach to arbitration agreements; instead, the *Discover Bank* rule made it too easy for plaintiffs to demand *ex post* invalidation of an arbitration agreement that contained a class-action waiver. If we read *Concepcion* this way then there is no reason to conclude that the Court's decision rang the death knell for class actions or even the ability of common law contract defenses to render arbitration agreements unenforceable.⁴⁹ To fit within the requirements of *Concepcion*, an arbitration agreement would have to incorporate various pro-plaintiff provisions that provided genuine access to reasonably priced dispute resolution system – as AT&T had in its own arbitration agreement.

In this way, the Court's decision in *Concepcion* did not run counter to the long-standing principle – embodied in § 2 of the FAA – that arbitration provisions “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁵⁰ The Supreme Court had previously interpreted the second part of the sentence – the so-called “savings clause” – to allow “[s]tates [to] regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause ‘upon such grounds as exist at law or in equity for the revocation of any contract.’”⁵¹ The power of courts to use common law contract principles – including unconscionability – to invalidate arbitration agreements remained intact post-*Concepcion*.

By contrast, judicial application of the *Discover Bank* rule had taken to targeting arbitration agreements through failure to consider them in their entirety when applying unconscionability. In turn, the *Discover Bank* rule ran afoul of the general principle that arbitration agreements could not be singled out for worse treatment than any other contract. As the Court had previously noted, “[w]hat 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 Act 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.”⁵²

Indeed, in a recent *en banc* decision, the Supreme Court of Missouri followed this approach in limiting the impact of *Concepcion*. After having its prior decision vacated and remanded by the Supreme Court in light of *Concepcion*,⁵³ the Missouri Supreme Court held that while “the presence and enforcement of [a] class arbitration waiver does not make the arbitration clause unconscionable,” a court may still find an agreement with a class arbitration waiver unconscionable by “looking at the agreement as a whole to determine the conscionability of the arbitration provision.”⁵⁴ Thus, the Missouri Supreme Court emphasized that “the majority opinion [in *Concepcion*] discusses in detail the many ways in which the arbitration provisions at issue in *Concepcion* are fair and reasonable and do not lead to an unconscionable result.”⁵⁵ It

⁴⁹ See, e.g., Ashby Jones, *After AT&T Ruling, Should We Say Goodbye to Consumer Class Actions?*, WALL ST. J. L. BLOG (Apr. 27, 2011, 12:36 PM), <http://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions/>.

⁵⁰ 9 U.S.C. § 2 (2006).

⁵¹ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (quoting 9 U.S.C. § 2).

⁵² *Id.*

⁵³ *Missouri Title Loans, Inc. v. Brewer*, No. 10-1027, 2011 WL 531553 (U.S. May 2, 2011).

⁵⁴ *Brewer v. Missouri Title Loans*, No. SC 90647, 2012 WL 716878, at *1 (Mo. Mar. 6, 2012) (*en banc*).

⁵⁵ *Id.*

would therefore be a mistake to read *Concepcion*, argued the court, to conclude simply because “the *Discover Bank* rule was preempted by the [FAA] . . . that all state law unconscionability defenses are preempted by the [FAA] in all cases.”⁵⁶ In this way, the Missouri Supreme Court’s decision in *Brewer* serves as one of the first and clearest statements of *Concepcion*’s potential limitations, holding that the FAA “preemption analysis requires a case-specific assessment of the arbitration contract at issue.”⁵⁷

In sum, it seems fair to read the majority’s decision as holding the *Discover Bank* rule preempted by the FAA because it was too broad and provided plaintiffs too much leeway to void otherwise valid arbitration agreements simply because they contained a class-action waiver – even without considering pro-consumer provisions in the same agreement. Going forward, courts may be reluctant to apply the Court’s holding in *Concepcion* where a particular arbitration agreement satisfies the three requirements of the *Discover Bank* rule – that is, it is adhesive, involves small amounts of damages, and is accompanied by allegations of a scheme to cheat consumers – but fails to provide other pro-consumer provisions which could counter-balance the effect of the class-action waiver. As a result, *Concepcion* may be read to require lower courts to determine whether an arbitration agreement – taking all of its provisions into account – actually has the effect of, to use the dissent’s phrasing, “depriving claimants of their claims.”⁵⁸

III. PRECEDENT

A more nuanced reading of the majority’s opinion is not the only reason to think that *Concepcion* covers less than we might think. While five justices signed the majority opinion,⁵⁹ it is far from clear whether a majority of the Court agreed with the majority opinion’s logic. Although Justice Thomas signed on to the majority opinion, he also filed a concurring opinion providing an alternative interpretation of the FAA.⁶⁰ In explaining why he had signed the majority opinion notwithstanding his alternative reading of the FAA, Justice Thomas stated that he joined the majority only “reluctantly” and had done so because “the Court’s test will often lead to the same outcome as my textual interpretation.”⁶¹

But Justice Thomas is unambiguous in his concurrence that his interpretation of the FAA is quite different than the interpretation expressed in the majority opinion. For Thomas, the scope of § 2’s savings clause derives from a careful parsing of the text. On the one hand, § 2 of the FAA states clearly that arbitration agreements “shall be valid, irrevocable, and enforceable.”⁶² By contrast, when the FAA expresses the exceptions to the validity of arbitration awards, it simply states “save upon such grounds as exist at law or in equity for the *revocation* of any contract.”⁶³ In the words of Justice Thomas, “[t]he use of only ‘revocation’ and the conspicuous omission of ‘invalidation’ and ‘nonenforcement’ suggest that the exception does not include all

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Concepcion*, 131 S. Ct. at 1761 (Breyer, J., dissenting).

⁵⁹ *See id.* at 1743.

⁶⁰ *See id.* at 1753-56 (Thomas, J., concurring).

⁶¹ *Id.* at 1754 (Thomas, J., concurring).

⁶² *Id.* (quoting 9 U.S.C. § 2) (Thomas, J., concurring).

⁶³ *Id.* (Thomas, J., concurring)

defenses applicable to any contract but rather some subset of those defenses.”⁶⁴ In this way, Justice Thomas argues that the only standard contract defenses applicable to arbitration agreements are those that “revoke” the arbitration agreement – as opposed to those defenses that challenge an arbitration agreement’s validity or enforceability.⁶⁵

Of course, the distinction between revocation on the one hand and validity and enforceability on the other hand is somewhat murky. To explain the distinction, Thomas looks to § 4 of the FAA, which states that “[w]hen a party seeks to enforce an arbitration agreement in federal court, § 4 requires that ‘upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,’ the court must order arbitration ‘in accordance with the terms of the agreement.’”⁶⁶ The language of § 2, argues Thomas, should be read in light of the requirements in § 4; the grounds for “revocation” mentioned in § 2 must refer to the “making of the agreement” mentioned in § 4.⁶⁷ Thus, § 4 requires a federal court to make sure that none of the grounds for invalidating an arbitration award – as detailing § 2 – are present before sending the parties to arbitration.⁶⁸ Based on this interpretation, Thomas concludes that “[t]his [interpretation] would require enforcement of an agreement to arbitrate unless a party successfully asserts a defense concerning the formation of the agreement to arbitrate, such as fraud, duress, or mutual mistake.”⁶⁹ By contrast, “[c]ontract defenses unrelated to the making of the agreement – such as public policy – could not be the basis for declining to enforce an arbitration clause.”⁷⁰

This distinction makes all the difference for Thomas. As Thomas notes, the California Supreme Court applied the *Discover Bank* rule to hold that “class action waivers are, under certain circumstances, unconscionable as unlawfully exculpatory.”⁷¹ In fact, the California Supreme Court even analogized its concerns with class action waivers to circumstances where a contractual clause is contrary to public policy: “class action waivers [may be] substantively unconscionable inasmuch as they may operate effectively as exculpatory contract clauses that are contrary to public policy.”⁷² Indeed, Thomas highlights a number of instances where the California Supreme Court clearly conceptualized the *Discover Bank* rule as precluding the “enforce[ment]” of class action waivers because such waiver were “against the policy of law.”⁷³ The California Supreme Court never described the *Discover Bank* rule as a problem of contract formation – it clearly understood the *Discover Bank* rule as providing a defense to contract enforcement.

⁶⁴ *Concepcion*, 131 S. Ct. at 1754 (Thomas, J., concurring)

⁶⁵ *Id.* at 1754-55 (Thomas, J., concurring). This is not to endorse Justice Thomas’s reading of § 2 of the FAA. In fact, there may be some good reason to be skeptical of Justice Thomas’s textual interpretation. See David Horton, *Unconscionability Wars*, 106 NW. L. REV. COLLOQUY 13, 27-32 (2011) (criticizing Thomas’s textual interpretation of § 2).

⁶⁶ *Id.* (quoting 9 U.S.C. § 4) (Thomas, J., concurring).

⁶⁷ *Id.* at 1754-55 (Thomas, J., concurring).

⁶⁸ *See id.*

⁶⁹ *Id.* at 1755.

⁷⁰ *Concepcion*, 131 S. Ct. at 1755.

⁷¹ *Id.* (quoting *Discover Bank v. Superior Court*, 113 P.3d 1100, 1112 (Cal. 2005)).

⁷² *Id.*

⁷³ *Id.*

Accordingly, Thomas concludes that “the Discover Bank rule does not concern the making of the arbitration agreement.”⁷⁴ Instead, it is a rule aimed at preventing the enforcement of an otherwise valid arbitration agreement akin to the rule that contracts contrary to public policy are void. In turn, “the Discover Bank rule is not a ‘groun[d] . . . for the revocation of any contract.’”⁷⁵ It therefore functions as a defense aiming to render an otherwise valid arbitration agreement unenforceable. Such defenses, on Thomas’s account, are pre-empted by the FAA as only defenses speaking to contract formation remain viable under § 2.⁷⁶

While both Thomas and the rest of the Court’s majority agreed to strike down the *Discover Bank* rule, their divergent interpretations of the FAA would require different outcomes where, for example, an unconscionability claim rested on concerns regarding procedural unconscionability. Consider the facts of *Olvera v. El Pollo Loco*, a 2009 case before the California Court of Appeal.⁷⁷ As described by the court, El Pollo Loco – a fast food franchise – provided employees with written materials that included provisions addressing the method of resolving disputes between employees and the company.⁷⁸ In the explanatory section – written in both English and Spanish – the company stated that “If all attempts to resolve the problem are unsuccessful, the new policy requires that the employee and the company use a mediator to assist them in reaching a resolution. See your General Manager for additional details.”⁷⁹ This section made no mention of arbitration.⁸⁰ By contrast, the material contained an arbitration provision – only provided in English and without a Spanish translation – that stated the parties “may agree” to arbitration but that “the sole means to resolve any dispute not resolved through other means was through arbitration.”⁸¹ Moreover, the un-translated arbitration provision was in smaller type and appeared at the end of the packet, while the mediation provision was front and center in the materials provided to the employees.⁸² The arbitration provision also contained a class-action waiver.⁸³

Not surprisingly, the court found the arbitration provision unconscionable.⁸⁴ In its analysis, the court focused on the “high” degree of procedural unconscionability; this was not merely a contract of adhesion, but the incorporation of the English-only arbitration provision – which contradicted the translated mediation provision – misled the employees as to the terms of the new dispute resolution policy.⁸⁵ The class-action waiver, according to the court, also rendered the arbitration provision substantively unconscionable although the court did not describe the

⁷⁴ *Id.* at 1756.

⁷⁵ *Id.* (quoting 9 U.S.C. § 2).

⁷⁶ See *Concepcion*, 131 S. Ct. at 1754. It is also worth noting that to the extent state courts engage in “strategic judging” when interpreting arbitration doctrine, there is good reason to believe that Thomas’s concurrence will be used to support more narrow application of *Concepcion*. See *infra* Part IV.

⁷⁷ See *Olvera v. El Pollo Loco, Inc.*, 93 Cal. Rptr. 3d 65 (Ct. App. 2009). Many thanks to Steven Schultz for bringing this case to my attention.

⁷⁸ See *id.* at 68.

⁷⁹ *Id.*

⁸⁰ See *id.*

⁸¹ *Id.*

⁸² See *id.*

⁸³ See *Olvera*, 93 Cal. Rptr. 3d at 68.

⁸⁴ See *id.* at 74.

⁸⁵ *Id.* at 72-73.

degree of substantive unconscionability as high.⁸⁶ In this way, the court voided the arbitration provision by relying heavily on procedural unconscionability.⁸⁷

El Pollo Loco serves as an example where the majority opinion and Thomas would likely diverge.⁸⁸ While the majority would likely reject a finding of unconscionability predicated on a class-action waiver, Thomas would presumably embrace such a finding so long as the unconscionability claim rested primarily on the procedural side; in that way, the claim of unconscionability – like the claim in *El Pollo Loco* – would speak to formation as opposed to enforcement. Thus, in contrast to the majority’s opinion, Thomas’s concurrence embraces a set of state law claims – claims related to the formation of the agreement – that can still undermine the viability of arbitration agreements.⁸⁹

Of course, recognizing the impact of Thomas’s concurrence is only half the story. This is because Thomas did sign on to the majority’s opinion.⁹⁰ At first blush, there is good reason to believe that by signing on to the majority’s opinion, Thomas rendered his concurrence irrelevant as a matter of precedent.

However, such a dismissal would be premature. In 1977, the Supreme Court somewhat famously adopted the “*Marks Rule*,” which provided “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds”⁹¹ While the *Marks Rule*, by its terms, would not appear to apply where – as in *Concepcion* – five justices have assented to a single opinion of the court, federal courts have, in some instances, deployed the rule in a wider range of circumstances.

⁸⁶ See *id.* at 73-74.

⁸⁷ See *id.*

⁸⁸ To be sure, one might argue that even Thomas’s concurrence would require enforcing the arbitration agreement because the claim rested on a claim of substantive unconscionability – a claim that might be described as speaking to enforcement as opposed to formation. However, there are two reasons to resist such a conclusion. First, in cases where the predominant factor in the unconscionability decision is procedural unconscionability, it would seem most accurate to describe the defense as speaking to the formation of the agreement. Second, and relatedly, substantive unconscionability may not speak to formation, but may best be thought of as further evidence of procedural unconscionability, thereby linking substantive unconscionability directly to a defense speaking to the formation of the agreement. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 208, cmt. d (“A bargain is not unconscionable merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party. *But gross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent or appear to assent to the unfair terms. . . .*”) (emphasis added).

⁸⁹ To be sure, Thomas’s concurrence may at times provide more expansive grounds for eliminating defenses to the enforcement for arbitration agreements. Indeed, one might read the majority decision as holding that it is only when defenses are deployed to fundamentally change the nature of the arbitration process – like requiring certain claims to proceed on a class basis – that the FAA preempts the state law contract defense. By contrast, one might read Thomas’s concurrence as interpreting the FAA to preempt state law contract defenses whenever they spoke to enforcement – even where they did not fundamentally change the nature of the arbitration process. Thus, Thomas’s concurrence does not uniformly limit the preemptive effect of the FAA. That being said, his emphasis on the formation/enforcement distinction does provide some important protection against the enforcement of arbitration agreements where there is evidence of significant procedural unconscionability. (Many thanks to Christopher Drahozal for emphasizing this point to me.)

⁹⁰ See *Concepcion*, 131 S. Ct. at 1743.

⁹¹ *Marks v. United States*, 430 U.S. 188, 193 (1977) (citation and internal quotation marks omitted).

For example, in *Branzburg v. Hayes*, the Court’s majority held that the First Amendment provided no privilege for reporters called to testify before a grand jury regarding criminal charges.⁹² Justice Powell signed the Court’s majority opinion, serving as the ever-important fifth vote. However, Justice Powell also authored a concurring opinion, where he stated “[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”⁹³ In turn, “[t]he balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.”⁹⁴ In this way, Justice Powell’s concurrence differed from the majority opinion, contending that the First Amendment could provide reporters with immunity from testifying before a grand jury depending on the circumstances.⁹⁵

In applying *Branzburg*, lower courts have frequently considered Powell’s concurrence as limiting the holding of the majority.⁹⁶ As some have noted, such analysis appears predicated on the fact that Powell provided the fifth and deciding vote and simultaneously Powell’s concurrence limited the majority opinion’s holding.⁹⁷ While courts continue to differ over the application of *Branzburg*, it seems clear that Powell was, to some extent, successful in hijacking the Court’s majority opinion by providing a different – and conflicting – rationale in his concurrence.⁹⁸ Moreover, *Branzburg* may not be the only instance where a justice was able to limit the precedential impact of a Supreme Court decision by both signing the majority opinion and writing a conflicting concurrence.⁹⁹

In this way, *Branzburg* and cases like it indicate that Thomas’s concurrence may have significant impact in the application of *Concepcion* going forward. This is particularly true according to those who understand precedent not in terms of the best current understanding of the law, but in terms of predicting how courts – and most notably the Supreme Court – are likely to resolve future cases. Oliver Wendell Holmes famously expressed this “predictive” view of precedent: “The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.”¹⁰⁰ Thus, understanding precedent through the prism of a predictive model takes a “forward-looking view of the law” where “an inferior court discharges its duty to

⁹² See *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972) (“Newsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.”).

⁹³ *Id.* at 710 (Powell, J., concurring).

⁹⁴ *Id.*

⁹⁵ See, e.g., Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1951 (2006) (describing the different approaches expressed in the *Branzburg* Court’s majority and Justice Powell’s concurrence).

⁹⁶ See, e.g., *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595-96 (1st Cir. 1980); *United States v. Criden*, 633 F.2d 346 (3d Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708, 715-16 (3d Cir. 1979).

⁹⁷ Tristan C. Pelham-Webb, *Powelling for Precedent: “Binding” Concurrences*, 64 N.Y.U. ANN. SURV. AM. L. 693, 700-04 (2009).

⁹⁸ See *id.*

⁹⁹ See Igor Kirman, Note, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2089-96 (1995).

¹⁰⁰ Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

say what the law is by applying the dispositional rule that the superior court enjoying revisory jurisdiction predictably would embrace.”¹⁰¹

Along such lines, courts may very well limit the application of *Concepcion*, refraining from applying the Court’s analysis to cases of unconscionability predicated on conduct that undermines the formation of the agreement. Indeed, Thomas’s concurrence has already begun to creep into judicial opinions, providing further indication of its potential to limit the impact of *Concepcion*.¹⁰² In this way, Thomas’s concurrence provides another important reason for why *Concepcion* may not cover quite as much legal terrain as some have suggested.

IV. POLITICS

As noted above, both the majority and concurring opinions in *Concepcion* provide resources for limiting *Concepcion*’s precedential impact. On the one hand, the majority’s opinion is susceptible to a more narrow reading where common law grounds for contract revocation might still render arbitration agreements unenforceable so long as they take the entirety of the agreement into account. On the other hand, Thomas’s concurrence may be interpreted by lower courts to limit the precedential impact of *Concepcion*, with the Court’s holding only applying to instances where the common law contract doctrine serves as grounds for revocation as opposed to a defense against contract formation.

But there is also another reason to wonder whether *Concepcion*’s impact will be more limited than some have anticipated. In considering *Concepcion*, it is hard not to be struck by the tenuous nature of the Court’s five-vote majority. In the past, both Justice Thomas and Justice Scalia have expressly contested the Supreme Court’s holding in *Southland Corp. v. Keating*,¹⁰³ which held that the FAA applies in state courts. Thus, Justice Scalia has stated that “[a]dhering to

¹⁰¹ Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 16 (1994); see also Michael L. Eber, Comment, *When the Dissent Creates the Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 231-35 (2008).

¹⁰² The most notable example thus far has been the Supreme Court of Missouri’s decision in *Brewer v. Missouri Title Loans*, No. SC 90647, 2012 WL 716878, at *1 (Mo. Mar. 6, 2012) (en banc). As part of its decision limiting the application of *Concepcion*, the court focused on Thomas’s concurrence, arguing that Thomas’s concurrence highlights two of the foundational claims in the majority’s opinion: that the FAA “does not preempt state law contract defenses pertaining to the formation of a contract” and that the FAA “preemption analysis requires a case-specific assessment of the arbitration contract at issue.” *Id.* at *5-6; see also *supra* notes 53-57 and accompanying text (discussing *Brewer*).

For other examples of courts employing Thomas’s concurrence in their analysis, see *NAACP of Camden County East v. Foulke Mgmt. Corp.*, 24 A.3d 777, 792 (N.J. Super. Ct. App. Div. 2011) (“This caveat was developed more explicitly in Justice Thomas’s concurring opinion, which represented the pivotal fifth vote in the Court’s five-to-four decision in *AT&T Mobility*. As Justice Thomas noted, ‘the FAA requires that an agreement to arbitrate be enforced unless a party successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress.’”). See also *Cnty. State Bank v. Strong*, 651 F.3d 1241, 1267 (11th Cir. 2011) (“The ability of such contractual defects to invalidate arbitration agreements is not affected by the Supreme Court’s decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which preserved ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ so long as the defenses do not ‘apply only to arbitration or . . . derive their meaning from the fact that an agreement to arbitrate is at issue.’” (quoting *Concepcion*, 131 S. Ct. at 1746)); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1215 (11th Cir. 2011) (“In addition, like the plaintiffs in *Concepcion*, the Plaintiffs here do not allege any defects in the formation of the contract, aside from its generally adhesive nature, which alone is insufficient to invalidate a consumer contract.”).

¹⁰³ 465 U.S. 1 (1984).

Southland entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes.”¹⁰⁴ Similarly, Justice Thomas has described the Court’s decision in *Southland* as simply “wrong,” forcefully arguing that “[t]he statute that Congress enacted [i.e. the FAA] actually applies only in federal courts.”¹⁰⁵ And while Justice Scalia has stated that he will “not in the future dissent from judgments that rest on *Southland*,”¹⁰⁶ Justice Thomas has made no such concession. To the contrary, Justice Thomas has been highly critical of the use of *stare decisis* to insulate *Southland*: “Rather than attempting to defend *Southland* on its merits, petitioners rely chiefly on the doctrine of *stare decisis* in urging us to adhere to our mistaken interpretation of the FAA. In my view, that doctrine is insufficient to save *Southland*.”¹⁰⁷

That Justice Thomas remains unwilling to join decisions resting on *Southland*’s premise that the FAA applies in state courts is crucial to predicting future lower court application of *Concepcion*. As Aaron Bruhl has argued, state courts engage in various forms of “strategic judging,” by “choos[ing] the grounds for their decisions in ways that reach a desired result and simultaneously make it difficult for higher courts to review their decisions.”¹⁰⁸ This has been particularly true in the context of arbitration as “some judges disagree with the Supreme Court’s strongly pro-arbitration course, are willing to oppose it, and will take the survivability of their doctrinal choices into account when fashioning their arbitration rulings.”¹⁰⁹

This type of strategic judging has manifested itself in the increasing number of state courts deploying the doctrine of unconscionability to void otherwise valid arbitration agreements.¹¹⁰ Unconscionability became the doctrine of choice for courts resistant to the increasing scope of enforceable arbitration agreements because it provided them with sufficient doctrinal cover to avoid reversal on appeal.¹¹¹ Indeed, the Supreme Court took critical notice of this trend in *Concepcion*,¹¹² a trend that undoubtedly factored into the Court striking down the *Discover Bank* rule.

At first blush, the Supreme Court’s decision in *Concepcion* peeled back this doctrinal cover, arguing that judicial use of unconscionability had simply become a smokescreen for the widespread failure to put arbitration agreements on “equal footing” with all other contracts.¹¹³ And by calling out state courts for this type of decision-making, *Concepcion* goes far in undermining this increasingly popular judicial tactic.

¹⁰⁴ *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 284-85 (1995) (Scalia, J. dissenting).

¹⁰⁵ *Id.* at 286 (Thomas, J., dissenting).

¹⁰⁶ *Id.* at 285 (Scalia, J., dissenting).

¹⁰⁷ *Id.* at 295 (Thomas, J., dissenting).

¹⁰⁸ Bruhl, *supra* note 18, at 1444.

¹⁰⁹ *Id.* at 1446.

¹¹⁰ See Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004) (tracing the resurgence of judicial use of the unconscionability doctrine to void arbitration agreements); see also Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004) (examining how judicial use of the unconscionability doctrine has become an important counterweight to the Supreme Court’s pro-arbitration jurisprudence).

¹¹¹ See *supra* notes 108 and 110; see also *supra* note 2.

¹¹² See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011).

¹¹³ *Id.* at 1745-46.

But given the penchant of courts to engage in strategic judging, *Concepcion* will only be as strong as its weakest link. And one has to imagine that state courts are fully aware of Justice Thomas's unrelenting criticism of *Southland*. Indeed, if *Concepcion* had made its way before the Supreme Court via California courts, the outcome of the case would likely have been the opposite with Justice Thomas unwilling to join a majority opinion resting on *Southland*'s premise that the FAA applies in state courts. Put more starkly, state courts must be fully aware that the Supreme Court – as currently constituted – will not reverse any of their decisions in which they continue to apply rules similar to those struck down in *Concepcion*.¹¹⁴

Already some courts have begun to cabin the Supreme Court's holding in *Concepcion* as “preempt[ing] California's unconscionability law regarding exemption of certain claims from arbitration, at least for actions in federal court.”¹¹⁵ This implied limitation of *Concepcion* has even become explicit in some recent state court decisions. On the one hand, a recent Massachusetts state court explicitly rejected this argument, concluding that “[c]ounting the votes of justices is always perilous.”¹¹⁶ On the other hand, and maybe not surprisingly, a California state court recently noted the possibility that Justice Thomas's continued unwillingness to join decisions resting on *Southland* might limit the applicability of Supreme Court decisions that include Justice Thomas in the majority;¹¹⁷ the court, however, failed to reach the issue simply because the contentions of the parties enabled the court to avoid the question.¹¹⁸

To be sure, it is far from clear that as a doctrinal matter, Justice Thomas's continued dissent from *Southland* should impact the applicability of *Concepcion* to state courts. Indeed, there are some good reasons to think it should not.¹¹⁹ But if we agree that state courts engage in strategic judging, there is also good reason to think that – at least on the margins – some state courts may exhibit an increasing willingness to limit the impact of decisions such as *Concepcion* that, as a public policy matter, they find objectionable.¹²⁰

¹¹⁴ A prime example of this phenomenon is the Missouri Supreme Court's recent decision in *Brewer v. Missouri Title Loans*, No. 90647, 2012 WL 716878 (Mo. Mar. 6, 2012) (en banc). See *supra* notes 53-57 and accompanying text (discussing *Brewer*'s narrow reading of *Concepcion*).

¹¹⁵ *Laguna v. Coverall N. Am., Inc.*, No. 09cv2131-JM, 2011 U.S. Dist. LEXIS 81105, at *6 (S.D. Cal. July 26, 2011) (emphasis added); see also *Arellano v. T-Mobile USA, Inc.*, No. C 10-05663 WHA, 2011 U.S. Dist. LEXIS 52142, at *4-6 (N.D. Cal. May 16, 2011) (“Accordingly, despite public policy arguments thought to be persuasive in California, *Concepcion* has trumped these considerations, at least for cases in federal court.”); In re DirecTV Early Cancellation Fee Mktg. & Sales Practices Litig., 810 F. Supp. 2d 1060, 1072 (C.D. Cal. 2011) (citing *Arellano*).

¹¹⁶ *Feeney v. Dell, Inc.*, No. MICV 2003-01158, 2011 WL 5127806, at *7 n.10 (Mass. Super. Ct. Oct. 4, 2011).

¹¹⁷ See *Hartley v. Superior Court*, 127 Cal. Rptr. 3d 174, 179 (Ct. App. 2011).

¹¹⁸ See *id.* at 180.

¹¹⁹ See *Feeney*, 2011 WL 5127806, at *7 n.10 (“In any event, I assume that, if the Supreme Court were to consider this case on an issue-by-issue basis, as is its practice, there would be a majority to hold that the FAA applies to state court proceedings . . . and a differently-constituted majority to hold that the FAA preempts Discover Bank rule.”); *Iskanian v. CLS Transp. Los Angeles, LLC*, No. B235158, 2012 Cal. App. LEXIS 650, at *11-12 n.3 (Cal. App. 2d Dist. June 4, 2012) (“[Plaintiff] surmises that if the *Concepcion* case had reached the United States Supreme Court from state court, Justice Thomas (who provided the fifth vote) would not have found preemption. This is pure speculation, and it is belied by Justice Thomas's concurring opinion in *Concepcion*, which contains no indication that the holding should apply only in federal court.”).

¹²⁰ See *Bruhl*, *supra* note 18, at 1446 (“The chosen basis for the decision can affect the likelihood of reversal by a higher court, even when holding the decision's bottom line constant. Lower court judges realize this, and so they can manipulate their grounds of decision both to advance their preferred outcomes and to make review of their decisions more costly. This is the essence of the strategic instruments approach.”).

Consider the following example. In California, the Labor Code Private Attorneys General Act of 2004 (“PAGA”), allows “a civil action [to be] brought by an aggrieved employee on behalf of himself or herself and other current or former employees” to recover civil penalties for violations of the labor code.¹²¹ However, employees attempting to bring such class actions under PAGA have often had to overcome employment agreements that contain both arbitration provisions and class action waivers. Prior to *Concepcion*, California courts had held that arbitration agreements with class action waivers function to prevent plaintiffs “from seeking civil penalties on behalf of other employees, contrary to the PAGA,” and therefore such agreements were “as a whole . . . tainted with illegality and . . . unenforceable.”¹²²

In the wake of *Concepcion*, courts have been asked to consider whether or not this holding remains good law. In a recent decision, a federal district court for the Central District of California concluded that the Court’s decision in *Concepcion* rendered PAGA preempted by the FAA.¹²³ Citing *Concepcion*, the district court noted that “the Supreme Court held that, under the FAA, states could not ‘condition[] the enforceability of . . . arbitration agreements on the availability of classwide arbitration procedures.’”¹²⁴ Further summarizing *Concepcion*, the district court noted that “The [Supreme] Court concluded that requiring class arbitration when an arbitration agreement precluded it was ‘inconsistent with the FAA’ because class arbitration ‘sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment’ and because ‘class arbitration greatly increases risks to defendants,’ as ‘[t]he absence of multilayered review makes it more likely that errors will go uncorrected.’”¹²⁵

The district court then analogized the Supreme Court’s analysis of the *Discover Bank* rule to PAGA, holding that the plaintiff’s claims pursuant to PAGA were arbitrable.¹²⁶ The analogy, according to the district court, was straightforward:

For similar reasons, requiring arbitration agreements to allow for representative PAGA claims on behalf of other employees would be inconsistent with the FAA. A claim brought on behalf of others would, like class claims, make for a slower, more costly process. In addition, representative PAGA claims “increase[] risks to defendants” by aggregating the claims of many employees. . . . Defendants would run the risk that an erroneous decision on a PAGA claim on behalf of many employees would “go uncorrected” given the “absence of multilayered review.”¹²⁷

Thus, “[j]ust as ‘[a]rbitration is poorly suited to the higher stakes of class litigation,’ it is also poorly suited to the higher stakes of a collective PAGA action.”¹²⁸ As a result, the district court interpreted *Concepcion* to prevent California’s PAGA from rendering such claims non-

¹²¹ Cal. Lab. Code § 2699(a) (West 2004).

¹²² *Franco v. Athens Disposal Co., Inc.*, 90 Cal. Rptr. 3d 539, 559 (Ct. App. 2009).

¹²³ *See Quevedo v. Macy’s, Inc.*, 798 F. Supp. 2d 1122, 1142 (C.D. Cal. 2011).

¹²⁴ *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744, 1753 (2011)).

¹²⁵ *Id.* (quoting *Concepcion*, 131 S. Ct. at 1750-51, 1752).

¹²⁶ *See id.* at 1150.

¹²⁷ *Id.* at 1149.

¹²⁸ *Id.* (quoting *Concepcion*, 131 S. Ct. at 1752).

arbitrable: “*AT&T v. Concepcion* makes clear, however, that the state cannot impose such a requirement because it would be inconsistent with the FAA.”¹²⁹

The district court’s analysis is quite persuasive. Like the *Discover Bank* rule, PAGA protected a set of claims by ensuring a plaintiff could bring a representative suit. In turn, plaintiffs have sought to deploy PAGA in order to avoid arbitration agreements that incorporate class action waivers. In this way, PAGA encapsulated a California state public policy, which served to void otherwise valid arbitration agreements; and, under *Concepcion*, such a state law would appear to be preempted by the FAA when applied to arbitration agreements.

But this argument, while persuasive in federal courts, has not been adopted in California state court. In reaching the opposite conclusion, the California Court of Appeal argued that PAGA claims are fundamentally different from typical class action claims. According to the court, “[t]he representative action authorized by the PAGA is an enforcement action, with one aggrieved employee acting as a private attorney general to collect penalties from employers who violate the Labor Code.”¹³⁰ As expressed in prior California decisional law, “Such an action is fundamentally a law enforcement action designed to protect the public and penalize the employer for past illegal conduct. Restitution is not the primary object of a PAGA action, as it is in most class actions.”¹³¹ Indeed, “The [PAGA] attempted to remedy the understaffing of California’s labor law enforcement agencies by granting employees the authority to bring civil actions against their employers for Labor Code violations.”¹³²

Prior California decisions had been unwilling to allow contractual provisions to undermine the objectives of PAGA: “efforts to ‘nullify the PAGA and preclude [the plaintiff] from seeking civil penalties on behalf of other current and former employees, that is, from performing the core function of a private attorney general . . . impedes [the] goal of ‘comprehensive[ly] enforc[ing]’ a statutory scheme through the imposition of ‘statutory sanctions’ and ‘fines.’ . . . [And] the prohibition of private attorneys general is invalid.”¹³³

Based on this distinction, the California Court of Appeal determined that *Concepcion*’s holding did not render PAGA claims arbitrable. According to the court, *Concepcion* “concerns the preemption of unconscionability determinations for class action waivers in consumer cases” and thereby “specifically deals with the rule enunciated in *Discover Bank* . . .”¹³⁴ By contrast, *Concepcion* “does not purport to deal with the FAA’s possible preemption of contractual efforts to eliminate representative private attorney general actions to enforce the Labor Code.”¹³⁵ Under PAGA, the “aggrieved employee acts as the proxy or agent of state labor law enforcement agencies, representing the same legal right and interest as those agencies, in a proceeding that is designed to protect the public, not to benefit private parties.”¹³⁶ In this way, “[t]he purpose of the

¹²⁹ *Quevedo*, 798 F. Supp. 2d at 1149 (quoting *Concepcion*, 131 S. Ct. at 1753).

¹³⁰ *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 860 (Ct. App. 2011), *cert. denied*, No. 11-880, 2012 WL 136923 (U.S. Apr. 16, 2012).

¹³¹ *Id.* (quoting *Franco*, 171 Cal. App. 4th at 1300).

¹³² *Id.* (quoting *Franco*, 171 Cal. App. 4th at 1301).

¹³³ *Id.* (quoting *Franco*, 171 Cal. App. 4th at 1303).

¹³⁴ *Id.* at 500.

¹³⁵ *Brown*, 128 Cal. Rptr. 3d at 861.

¹³⁶ *Id.* (quoting *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court*, 46 Cal. 4th 993, 1003 (2009)).

PAGA is not to recover damages or restitution, but to create a means of ‘deputizing’ citizens as private attorneys general to enforce the Labor Code.”¹³⁷

According to the court, “[t]his purpose contrasts with the private individual right of a consumer to pursue class action remedies in court or arbitration, which right, according to AT&T, may be waived by agreement so as not to frustrate the FAA—a law governing private arbitrations.”¹³⁸ And in turn, *Concepcion* “does not provide that a public right, such as that created under the PAGA, can be waived if such a waiver is contrary to state law.”¹³⁹ Thus the court concluded, “representative actions under the PAGA do not conflict with the purposes of the FAA. If the FAA preempted state law as to the unenforceability of the PAGA representative action waivers, the benefits of private attorney general actions to enforce state labor laws would, in large part, be nullified.”¹⁴⁰

It is somewhat hard to understand why this distinction should make a difference. While it may be true that the purpose of PAGA is different than the purpose of the *Discover Bank* rule, PAGA’s authorizing representative actions on the part of aggrieved employees does conflict with arbitration agreements that incorporate class action waivers. In turn, if *Concepcion* held that the *Discover Bank* rule is preempted by the FAA because it undermines the enforceability of otherwise valid arbitration agreements, it is hard to see why the different purpose of PAGA should prevent the FAA from rendering it preempted.¹⁴¹

In its decision, the California Court of Appeal appeared to acknowledge the tenuousness of its arguments. Indeed, somewhat candidly, the court “recognize[d] that the United States Supreme Court has held that the FAA preempts certain California statutory dispute resolution mechanisms.”¹⁴² However, the court was unwilling to expand the logic of *Concepcion* – and other similar Supreme Court decisions – insisting that “United States Supreme Court authority does not address a statute such as the PAGA.”¹⁴³ In a somewhat explicit show of judicial defiance, the court stated “Until the United States Supreme Court rules otherwise, we continue to follow what we believe to be California law.”¹⁴⁴

This refusal to expand *Concepcion* beyond its narrow circumstances captures much of the strategic judging dynamic. Aware that the Supreme Court is unlikely to reverse its decision, the California Court of Appeal was willing to push back against *Concepcion*’s logic and reassert the authority of the state to require judicial resolution of PAGA claims. It did so by highlighting a

¹³⁷ *Id.* at 862.

¹³⁸ *Id.* at 861.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 863.

¹⁴¹ Indeed, another recent California Court of Appeal reached the opposite conclusion. *Iskanian*, 2012 Cal. App. LEXIS 650, at *27 (“Respectfully, we disagree with the majority’s holding in *Brown*. We recognize that the PAGA serves to benefit the public and that private attorney general laws may be severely undercut by application of the FAA. But we believe that United States Supreme Court has spoken on the issue, and we are required to follow its binding authority.”).

¹⁴² *Brown*, 128 Cal. Rptr. 3d at 863.

¹⁴³ *Id.*

¹⁴⁴ *Id.* It is also worth highlighting that the California Court of Appeal noted that the Supreme Court had granted certiorari in *Greenwood v. CompuCredit Corp.* 615 F.3d 1204 (9th Cir. 2010), *cert. granted*, 79 U.S.L.W. 3627 (U.S. May 2, 2011) (No. 10-948) (in order to consider whether claims arising under the Credit Repair Organization Act must be arbitrated under valid arbitration agreements). See *id.* at 861 n.5. Such cases represent opportunities for the Supreme Court to address the preemptive effect of the FAA without implicating the division among the justices regarding the applicability of the FAA to federal courts.

distinction with little difference between the *Discover Bank* rule and PAGA, presumably aware that state court decisions are unlikely to receive significant scrutiny from the Supreme Court given the fractured nature of the Court’s majority regarding the applicability of the FAA to state courts. In turn, the California Court of Appeal sticks to its doctrinal guns, daring the Supreme Court to “rule[] otherwise.”¹⁴⁵ And until the Supreme Court does in fact rule otherwise, the California Court of Appeal has clearly stated who makes the law in state court: “we continue to follow what *we believe to be California law*.”¹⁴⁶

This is, of course, not to say that all California state courts – or all state courts generally – will uniformly resist the implications of *Concepcion*. Indeed, some court decisions might embrace *Concepcion* and apply the Supreme Court’s holding more conventionally.¹⁴⁷ But bold responses to *Concepcion* – like the court’s decision in *Brown* – may become increasingly typical for state courts that wish to resist the expansion of the FAA’s preemptive scope. Such courts are undoubtedly aware of how tenuous the Supreme Court’s majority is and are therefore likely dubious of the Supreme Court’s ability to strike down state court decisions rejecting the expansive reading of the FAA embodied in *Concepcion*. While as a matter of technical doctrine such decisions may be flawed, state courts are likely to erect more hurdles to the Supreme Court’s broad interpretation of the FAA’s preemptive scope than their federal counterparts. And such willingness presumably draws, at least in part, from the inability of the Supreme Court to marshal a unified majority to quash state court decisions that reject the Supreme Court’s pro-arbitration trajectory.¹⁴⁸ As a result, there is good reason to believe that *Concepcion* will have a more limited impact on state court decisions than we might otherwise think.

V. CONCLUSION

Concepcion was undoubtedly a landmark decision that will have broad impact on the ability of courts to deploy common law contract defenses to void arbitration agreements. Indeed, the decision, by its terms, limits the use of unconscionability as a doctrine of last resort – a doctrine that had become increasingly popular in recent judicial decisions.¹⁴⁹

That being said, there are reasons to believe that *Concepcion*’s reach will not be quite as broad as some might think. First, the Court’s decision may be read as simply rejecting the creation of overly-broad rules that apply common law doctrines to void arbitration agreements. On such an account, the *Discover Bank* rule undermined the purpose of the FAA by voiding too wide a swath of arbitration agreements – including arbitration agreements that incorporated pro-consumer terms to counterbalance the impact of class action waivers. Second, Justice Thomas’s concurrence in *Concepcion* may be used by lower courts to limit the precedential value of the

¹⁴⁵ *Brown*, 128 Cal. Rptr. 3d at 863.

¹⁴⁶ *Id.* (emphasis added).

¹⁴⁷ See, e.g., *Iskanian*, 2012 Cal. App. LEXIS 650 at *30 (holding *Concepcion*’s preemption of various California state laws, including PAGA).

¹⁴⁸ Indeed, in light of this analysis, it is not surprising that the Supreme Court recently denied certiorari in *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854 (Ct. App. 2011), *cert. denied*, No. 11-880, 2012 WL 136923 (U.S. Apr. 16, 2012). While the decision clearly flies in the face of the Supreme Court’s pro-arbitration trajectory, the Court cannot marshal a unified majority to reverse the decision because of continued division among the justices as to whether the FAA applies in state courts.

¹⁴⁹ See *supra* notes 108-111 and accompanying text.

Court's holding to instances where the implicated defense speaks to the revocation of an otherwise valid arbitration agreement – as opposed to instances where the implicated defense speaks to the formation of the agreement. And third, state courts may engage in strategic judging in light of the division within the five-justice *Concepcion* majority over the applicability of the FAA to state courts. In this way, while *Concepcion* may have changed the landscape of arbitration doctrine, resources remain for plaintiffs to resist the most recent manifestation of the Court's pro-arbitration jurisprudence.