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## Legal Process in a Box, or What Class Action Waivers Teach Us about Law-Making

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## Legal Process in a Box, or What Class Action Waivers Teach Us about Law-making

*Rhonda Wasserman\**

*The Supreme Court's decision in AT&T Mobility LLC v. Concepcion advanced an agenda found in neither the text nor the legislative history of the Federal Arbitration Act. Concepcion provoked a maelstrom of reactions not only from the press and the academy, but also from Congress, federal agencies, and lower courts, as they struggled to interpret, apply, reverse, or cabin the Court's blockbuster decision. These reactions raise a host of provocative questions about the relationships among the branches of government and between the Supreme Court and the lower courts. Among other questions, Concepcion and its aftermath force us to grapple with the relationship between law and politics, the role of legislative history in statutory interpretation, the meaning of legislative primacy, the influence of federal agencies on the development of the law, and competing conceptions of the relationship between the Supreme Court and the lower courts.*

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\* Professor of Law, University of Pittsburgh School of Law. I would like to thank Ian Everhart and Nikolay Markov for diligent research assistance and perennial good cheer. I am grateful to the editors of the *Loyola University Chicago Law Journal* for inviting me to participate in the "Future of Class Actions and Its Alternatives" symposium, at which I presented this Article, and to the symposium participants for their constructive feedback. Finally, I dedicate this Article with much love to my parents, Deborah and Marvin Wasserman, on the occasion of their sixtieth wedding anniversary.

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## INTRODUCTION

For many years, I taught a course called Legal Process, in which first-year law students explored the roles played by Congress, the Supreme Court, the President, administrative agencies, and state governments in the law-making process. Among other topics, we discussed federalism and the allocation of law-making authority between state and national governments; institutional competency and the unique skills that each branch of government brings to the law-making process; the role of legislative history in statutory interpretation; and the deference that courts owe to administrative agency interpretations of legislation within their regulatory authority.

It is not much of an exaggeration to say that one could structure an entire Legal Process course around class action waivers: contractual provisions embedded in pre-dispute arbitration agreements by which a consumer, employee or other party waives the right to present her claim together with others (in a Rule 23 class action, a collective action under the Fair Labor Standards Act or some other form of representative action). Such a course could begin with an examination of the Federal Arbitration Act (“FAA” or “Act”)<sup>1</sup> and its legislative history, and then present different theories of statutory interpretation. The students could then read the Supreme Court’s blockbuster decision in *AT&T Mobility LLC v. Concepcion*,<sup>2</sup> which invoked a “breathhtakingly broad view of implied preemption”<sup>3</sup> to conclude that the FAA preempts state unconscionability law upon which lower courts had relied to invalidate class action waivers.<sup>4</sup> After examining the majority, concurring and dissenting opinions, the students could debate whether the legal model or the attitudinal model of judicial decision-making best explains the result in *Concepcion*.<sup>5</sup> Finally, the course could present the reactions of Congress, the federal agencies and the lower courts, as they have sought to interpret, apply, reverse and cabin *Concepcion*. The students could then debate a host of issues that these reactions raise. This Article will present just three of the fascinating questions about law-making raised by *Concepcion* and the governmental responses it provoked.

Part I will sketch the competing efforts by Congress and the Supreme Court to regulate arbitration and collective action in the arbitration

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1. 9 U.S.C. §§ 1–16 (2012).

2. 131 S. Ct. 1740 (2011).

3. Suzanna Sherry, *Hogs Get Slaughtered at the Supreme Court*, 2011 SUP. CT. REV. 1, 5.

4. *Concepcion*, 131 S. Ct. at 1753.

5. See *infra* notes 303–16 and accompanying text (discussing the attitudinal model, legal model, and principal-agent model of Supreme Court decision-making).

context. While the conventional model vests ultimate lawmaking authority in Congress, the actual relationship between Congress and the Court is more complicated where, as here, the Court disregards legislative intent in interpreting the law and Congress lacks the political will to correct the mistake.

Next, Part II will examine the efforts by federal agencies to preserve a right to participate in a class action notwithstanding *Concepcion*, and the dilemma these agency actions present for the Court. Must the Supreme Court accord *Chevron* deference to agency rulings and rules that seek to preserve a right to collective action, or may the Court strike down agency actions that it deems inconsistent with the FAA, as interpreted by the Court itself?

Finally, Part III will present several lower court decisions rendered after *Concepcion* and suggest that they challenge the traditional view that the Supreme Court announces the law and the lower courts obediently follow its precedents.

## I. CONGRESS AND THE SUPREME COURT

In my Legal Process course, we began with the basic proposition that Congress has primary authority to craft social policy for the nation and to *make* law,<sup>6</sup> while the Supreme Court has primary authority to *interpret* the law when adjudicating cases.<sup>7</sup> But we then examined the tension in the dynamic relationship between Congress and the Court, as the Court decides whether to credit or ignore legislative history in the interpretative process and as Congress considers whether to legislatively overrule judicial decisions that interpret the law in a manner with which Congress disagrees. This tension between Congress and the Court has been acute as they have grappled with the enforceability of arbitration agreements in general and class action waivers in particular.

### A. *Congress Makes Law: The Federal Arbitration Act*

Before Congress acted in 1925, a party could sign a pre-dispute

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6. See, e.g., Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 333 (“For all its shortcomings, Congress remains the legitimate source of national policy.”); Lawrence C. Marshall, “*Let Congress Do It*”: *The Case for an Absolute Rule of Statutory Stare Decisis*, 88 MICH. L. REV. 177, 201 (1989) (“One of the central premises of the Constitution’s division of powers, and the American system of government, is that primary federal lawmaking authority belongs to Congress.”).

7. See, e.g., William D. Araiza, *The Trouble with Robertson: Equal Protection, the Separation of Powers, and the Line between Statutory Amendment and Statutory Interpretation*, 48 CATH. U. L. REV. 1055, 1055 (1999) (distinguishing between “a legislature’s power to enact laws and a court’s authority to interpret them”); see also *id.* at 1089 (“[M]ajoritarian institutions enact rules that apply generally to society, while courts apply those rules to individual litigants.”).

arbitration agreement but then decline to honor it once a dispute arose.<sup>8</sup> Because courts declined to specifically enforce arbitration agreements,<sup>9</sup> parties had to litigate their disputes notwithstanding arbitration clauses. Concerned even then about court congestion and the costs of litigation,<sup>10</sup> Congress passed, and President Coolidge signed, the United States Arbitration Act,<sup>11</sup> as the FAA was then known, to empower courts to specifically enforce written arbitration agreements. The law took effect on January 1, 1926.<sup>12</sup> Its drafters perceived the Act to be procedural in nature, making the remedy of specific performance available, but leaving the substantive law governing the parties' contractual rights unaffected.<sup>13</sup> Modeled after statutes enacted in New Jersey and New York,<sup>14</sup> the FAA declared written arbitration clauses in commercial contracts to "be valid, irrevocable, and enforceable."<sup>15</sup> The goal "was to make arbitration agreements as enforceable as other contracts, but not more so."<sup>16</sup> To retain this parity, section two of the Act authorized courts to invalidate arbitration agreements "upon such grounds as exist at law or in equity for the revocation of any

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8. See, e.g., Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 265, 276–77, 284 (1926) (stating that without this statute, arbitration agreements would not be recognized and enforced by federal courts).

9. *Id.* at 276–77, 284. See also *Arbitration of Interstate Commercial Disputes: J. Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 14 (1924) [hereinafter *Joint Hearings*] (statement of Julius Henry Cohen, Gen. Counsel for the N.Y. State Chamber of Commerce); S. REP. NO. 68–536, at 2 (1924) [hereinafter *SENATE REPORT*]; IAN R. MACNEIL, *AMERICAN ARBITRATION LAW* 20 (1992); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 101, 104 (2006) (citing, *inter alia*, WESLEY A. STURGES, A TREATISE ON COMMERCIAL ARBITRATION AND AWARDS 239–40 (1930)).

10. Cohen & Dayton, *supra* note 8, at 265, 269. See also *Joint Hearings*, *supra* note 9, at 6–7 (statement of Charles L. Bernheimer); *id.* at 21 (letter from Herbert Hoover); *id.* at 26 (statement of Alexander Rose); *id.* at 34–35 (brief submitted by Julius Henry Cohen); *Sales and Contracts to Sell in Interstate and Foreign Commerce, and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the Comm. on the Judiciary*, 67th Cong. 2 & 5 (1923) (statement of Charles L. Bernheimer) [hereinafter *1923 Senate Hearing*]; *SENATE REPORT*, *supra* note 9, at 3.

11. U.S. Arbitration Act, Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–14 (1947)).

12. 9 U.S.C. § 15. The law was codified and enacted into positive law in 1947. Act of July 30, 1947, ch. 392, 61 Stat. 669.

13. H.R. REP. NO. 68–96, at 1 (1924) [hereinafter *HOUSE REPORT*]; *Joint Hearings*, *supra* note 9, at 37–38 (brief submitted by Julius Henry Cohen).

14. Cohen & Dayton, *supra* note 8, at 266 nn.3–4, 269 (citing 1923 N.J. Laws 291 and 1920 N.Y. Laws 803).

15. U.S. Arbitration Act § 2, 43 Stat. at 883 (codified at 9 U.S.C. § 2).

16. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967). See also *HOUSE REPORT*, *supra* note 13, at 1 ("An arbitration agreement is placed upon the same footing as other contracts . . .").

contract,”<sup>17</sup> including fraud, duress or unconscionability.<sup>18</sup>

Congress intended the Act to govern arbitration agreements between merchants; that is, “parties presumed to be of approximately equal bargaining strength . . . .”<sup>19</sup> According to Julius Henry Cohen, general counsel for the New York State Chamber of Commerce and principal drafter of the Act,<sup>20</sup> arbitration was

peculiarly suited to the disposition of the ordinary disputes between merchants as to questions of fact—quantity, quality, time of delivery, compliance with terms of payment, excuses for non-performance, and the like. It has a place also in the determination of the simpler questions of law—the questions of law which arise out of these daily relations between merchants as to the passage of title, the existence of warranties, or the questions of law which are complementary to the questions of fact which we have just mentioned.<sup>21</sup>

When Charles L. Bernheimer, Chair of the Committee on Arbitration of the New York State Chamber of Commerce, testified before Congress in favor of the Act, he too advocated arbitration as a means to reduce the high litigation costs incurred by “merchants” or others “engaged in business” who encounter “trade disputes.”<sup>22</sup> The legislative history makes clear that the Act was not intended to govern employment contracts.<sup>23</sup> Congressional power under the Commerce Clause was “then thought to be far narrower than we have subsequently come to see it,”<sup>24</sup> and Supreme Court case law at the time restricted it to those “employment relationships “in which workers were actually engaged in

17. U.S. Arbitration Act § 2, 43 Stat. at 883 (codified at 9 U.S.C. § 2).

18. *See, e.g.,* Doctor’s Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (stating that generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements).

19. Moses, *supra* note 9, at 106; accord Amalia D. Kessler, *Stuck in Arbitration*, N.Y. TIMES, Mar. 7, 2012, at A27 (“[T]he arbitration act was initially envisioned as applying primarily to disputes between commercial equals . . .”).

20. *Joint Hearings, supra* note 9, at 10 (statement of W.H.H. Piatt) (“Mr. Cohen . . . has had charge of the actual drafting of the work.”); Moses, *supra* note 9, at 102.

21. Cohen & Dayton, *supra* note 8, at 281.

22. *Joint Hearings, supra* note 9, at 6–7 (statement of Charles L. Bernheimer); *see also id.* at 12 (statement of R.S. French) (noting that the bill advances the interests of “large exporters and importers”); 1923 *Senate Hearing, supra* note 10, at 3 (statement of Charles L. Bernheimer) (advocating arbitration for the “disposition of all business disputes”).

23. *See* Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 126 (2001) (Stevens, J., dissenting) (stating that the legislative history “contain[s] [no] evidence that the proponents of the legislation intended it to apply to agreements affecting employment”); *id.* at 128 (“[N]o one interested in the enactment of the FAA ever intended or expected that § 2 would apply to employment contracts.”); *id.* at 129 (concluding that the Act “was not intended to apply to employment contracts at all”).

24. *Id.* at 133 (Souter, J., dissenting).

interstate commerce.”<sup>25</sup> While most workers were therefore believed to be beyond congressional reach and their contracts beyond the scope of the proposed legislation, seamen and railroad workers worked in interstate or foreign commerce. Representatives of the Seamen’s Union expressed concern that employers would exploit their superior bargaining power to place arbitration clauses in collective bargaining agreements with seamen and the proposed law would require courts to enforce them.<sup>26</sup>

During the 1923 Senate hearing, W.H.H. Piatt, the chair of the American Bar Association (“ABA”) Committee that drafted the bill, acknowledged the union’s concern that the law would compel arbitration of disputes between stevedores and their employers.<sup>27</sup> Mr. Piatt made clear, however, that

*[i]t is not intended that this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.*<sup>28</sup>

To address the union’s concern, Mr. Piatt proposed adding language to clarify that the law would not “apply to seamen or any class of workers in interstate or foreign commerce.”<sup>29</sup> Then-Secretary of Commerce Herbert Hoover submitted a letter to Senator Thomas Sterling, who chaired the subcommittee holding the hearing, proposing similar language.<sup>30</sup> SB 1005, a revised bill introduced during the next session of Congress in 1924, expressly stated that “nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>31</sup> Congress passed the law with that language intact,<sup>32</sup>

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25. *Id.* at 136. See also *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating a federal child labor law and holding that Congress’s Commerce power did not extend to employees working intrastate to produce goods shipped interstate), *overruled by* *United States v. Darby*, 312 U.S. 100 (1941).

26. See Proceedings of the Twenty-sixth Annual Convention of the International Seaman’s Union of America 203–04 (1923) (statement of the president of the International Seaman’s Union of America) (contending that “[t]he personal hunger of the seaman, and the hunger of the wife and children of the railroad man will surely tempt them to sign” such agreements), *quoted in Circuit City*, 532 U.S. at 126 n.5 (Stevens, J., dissenting).

27. *1923 Senate Hearing*, *supra* note 10, at 9 (statement of W.H.H. Piatt).

28. *Id.* (emphasis added).

29. *Id.*

30. See *id.* at 14 (letter from Herbert Hoover) (proposing language to exclude employment contracts of “seamen, railroad employees, or any other class of workers engaged in interstate or foreign commerce”).

31. S. 1005, 68th Cong. § 1 (1924), *quoted in Joint Hearings*, *supra* note 9, at 2. See also Donna Meredith Matthews, *Employment Law after Gilmer: Compulsory Arbitration of Statutory Antidiscrimination Rights*, 18 BERKELEY J. EMP. & LAB. L. 347, 368 (1997) (“[T]his exclusion



explicitly exempting from the Act's scope all employees then subject to federal power under the Commerce Clause and assuming that all other employees were beyond the law's scope.

Just as the legislative history reveals congressional intent to exclude employment agreements from the Act's purview, so too does it reveal a concern for voluntariness and an intent to exclude contracts of adhesion, otherwise known as "take-it-or-leave-it" contracts. Senator Thomas Walsh of Montana, a member of the Senate Subcommittee, expressed concern during the 1923 Senate Hearing about contracts of adhesion, identifying a variety of contracts "that are . . . really not voluntar[y],"<sup>33</sup> including insurance policies, shipping contracts, and building contracts.<sup>34</sup> W.H.H. Piatt shared this concern, stating, "Speaking for myself, personally, I would say I would not favor any kind of legislation that would permit . . . forcing a man to sign that kind of a contract."<sup>35</sup> He went on to concede that contracts of adhesion "ought to be protested against, because it is the primary end of this contract [sic] that it is a contract between merchants one with another . . ."<sup>36</sup> In other words, the point of the statute was to enforce arbitration agreements between merchants of roughly equal bargaining power, *not* arbitration clauses in contracts of adhesion.

Senator Thomas Sterling of South Dakota, Chair of the Senate Committee, reiterated concern regarding contracts of adhesion during the 1924 Joint Hearings. He posited that a railroad might include an arbitration clause in a shipping contract and then tell the shipper, "'You can take it or leave it, just as you please; but unless you sign you can not ship.'"<sup>37</sup> Julius Cohen, the principal drafter of the bill, dismissed the concern.<sup>38</sup> Seeking to assuage the Senator's concern, Cohen cited the

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clause was intended to assuage concerns by the very employees who might be affected—those engag[ing] in interstate commerce. Because the Commerce Clause did not reach other employment contracts, they were unaffected by the FAA."); Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259, 294 ("The evidence suggests . . . that the 1925 Congress would have considered all workers subject to the commerce power as within the employment exception.").

32. See U.S. Arbitration Act, Pub. L. No. 68-401, § 1, 43 Stat. 883, 883 (1925) (containing the exception for seamen and workers in interstate commerce).

33. 1923 Senate Hearing, *supra* note 10, at 9 (colloquy by Sen. Walsh during statement of W.H.H. Piatt).

34. *Id.* at 9–11 (colloquy by Sen. Walsh during statement of W.H.H. Piatt).

35. *Id.* at 10 (statement of W.H.H. Piatt).

36. *Id.*

37. *Joint Hearings, supra* note 9, at 15 (statement of Sen. Thomas Sterling).

38. *Id.* (statement of Julius Henry Cohen) ("There is nothing to that contention . . .").

Bills of Lading Act,<sup>39</sup> which he claimed protected shippers by prescribing the terms of a bill of lading. More generally, he suggested that government regulations protect people “to-day as never before.”<sup>40</sup>

[W]e have the regulation of the Federal Government, through its regularly constituted bodies, and they protect everybody. Railroad contracts and express contracts and insurance contracts are provided for. You can not get a provision into an insurance contract to-day unless it is approved by the insurance department.<sup>41</sup>

In other words, the Act was not intended to validate arbitration clauses in contracts of adhesion, but rather to render enforceable voluntary arbitration agreements between merchants.<sup>42</sup> Cohen emphasized this focus on voluntary agreements in a law review article he co-wrote immediately after the law went into effect: “No one is required to make an agreement to arbitrate. Such action by a party is entirely voluntary.”<sup>43</sup>

The FAA is silent on the issue of class-wide arbitration, and for good reason. When Congress passed the Act in 1925, the Federal Rules of Civil Procedure had not yet been promulgated and class action litigation for damages was virtually unknown.<sup>44</sup> Thus, Congress gave no apparent thought to the right of a group of similarly situated parties to proceed collectively in arbitration or the enforceability of class action waivers at the time it enacted the FAA.<sup>45</sup> There is no support whatsoever in the legislative history for the proposition that Congress intended the Act to displace state laws seeking to preserve the right of consumers and others to proceed collectively.

### *B. The Court Interprets the Law*

In the near-century since Congress enacted the FAA, the Supreme Court through its interpretation of the Act has advanced its own agenda, disregarding legislative history and congressional intent. Individual Justices have openly bemoaned this development. In 1995, for

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39. Billing of Lading Act, ch. 415, 39 Stat. 538 (1916) (codified as amended at 49 U.S.C. §§ 80101–80116 (1994)).

40. *Joint Hearings*, *supra* note 9, at 15 (statement of Julius Henry Cohen).

41. *Id.*

42. *Moses*, *supra* note 9, at 107. *See also* *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 42 (1991) (Stevens, J., dissenting) (“When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to . . . form contracts between parties of unequal bargaining power . . .”).

43. *Cohen & Dayton*, *supra* note 8, at 279.

44. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

45. *Id.*

example, Justice Sandra Day O'Connor noted: "[T]he Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."<sup>46</sup> Even earlier, Justice John Paul Stevens commented that the Court has done more than "put its own imprint" on the FAA:

[W]hen its refusal to look beyond the raw statutory text enables it to disregard countervailing considerations that were expressed by Members of the enacting Congress and that remain valid today, the Court misuses its authority . . . . When the Court simply ignores the interest of the unrepresented employee, it skews its interpretation with its own policy preferences.<sup>47</sup>

Even prior to *Concepcion*, the Court's arbitration decisions were replete with examples of judicial interpretation divorced from congressional intent. In 2001, for example, the Court rejected the contention that the Act should be limited to commercial deals or merchant's sales,<sup>48</sup> even though the chair of the ABA committee that drafted the bill stated that its "primary end" was "a contract between merchants one with another."<sup>49</sup> The Court upheld the enforceability of arbitration clauses in employment contracts<sup>50</sup> notwithstanding the Act's express exclusion of contracts of those working in foreign or interstate commerce (the only employment contracts believed to be within congressional control in 1925).<sup>51</sup> And the Court enforced arbitration clauses in a variety of circumstances in which the parties had unequal

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

47. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 132–33 (2001) (Stevens, J., dissenting); *see id.* at 132 (stating that "the Court's interpretation of the Act has given it a scope far beyond the expectations of the Congress that enacted it"). *See also Moses*, *supra* note 9, at 99–100 (noting that the FAA as interpreted by the Court today "would not likely have commanded a single vote in the 1925 Congress"); *Carrington & Haagen*, *supra* note 6, at 402 ("[I]f the FAA had been presented to Congress, as legislation having the effects ascribed to [it] by the Court . . . [it would not] have been assured of a single vote of approval.").

48. *See Circuit City*, 532 U.S. at 113 (rejecting the Ninth Circuit's interpretation in *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1085 (9th Cir. 1999), which read the phrase "transaction involving commerce" in section two of the Act to connote "a commercial deal or merchant's sale").

49. *1923 Senate Hearing*, *supra* note 10, at 10 (statement of W.H.H. Piatt).

50. *See Circuit City*, 532 U.S. at 109 (interpreting the FAA to govern all employment contracts except those of transportation workers, which are explicitly exempted by section one of the Act); *cf. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 23, 25 n.2 (1991) (holding that a claim under the Age Discrimination in Employment Act "can be subjected to compulsory arbitration pursuant to an arbitration agreement in a securities registration application" that plaintiff was required to submit as a condition of employment, while disclaiming that the application constituted an employment contract).

51. *See supra* notes 23–32 and accompanying text (discussing the legislative history of the FAA).

bargaining power.<sup>52</sup> In the Court's view, "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are [not] enforceable . . . ."<sup>53</sup> While the Act explicitly declines to require enforcement where "such grounds as exist at law or in equity for the revocation of any contract,"<sup>54</sup> and while the Court initially cautioned the lower courts to "remain attuned to well-supported claims that the agreement to arbitrate resulted from . . . fraud or overwhelming economic power,"<sup>55</sup> it has dismissed claims of workers and consumers who maintained that they had little choice but to accept an arbitration clause buried in a form contract in the absence of proof of fraud or coercion.<sup>56</sup>

In just the last two years, the Court has continued to substitute its policy preferences for Congress's, reading into the FAA its current skepticism about class actions and collective litigation, notwithstanding a complete dearth of evidence that Congress intended to mandate enforcement of class action waivers. Although the Court has interpreted the Act quite a few times in the last two years,<sup>57</sup> two decisions

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52. See, e.g., *Gilmer*, 500 U.S. at 32–33 (rejecting plaintiff's concern about unequal bargaining power in the employment context); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 478, 484 (1989) (upholding the enforceability of an arbitration clause in a "standard" brokerage agreement, which the customer suggested "was adhesive in nature," as applied to Securities Act claims); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 230 (1987) (upholding the enforceability of an arbitration clause in a brokerage agreement as applied to Securities Exchange Act and RICO claims, notwithstanding the customers' general concern for "broker overreaching").

53. *Gilmer*, 500 U.S. at 33. See also *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (upholding the enforceability of an arbitration clause in a contract for termite removal between an international company and a homeowner).

54. *Gilmer*, 500 U.S. at 33 (quoting 9 U.S.C. § 2 (2012)).

55. *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)).

56. See *supra* notes 50 and 52 and accompanying text (discussing case law upholding arbitration clauses in employment contracts).

57. See *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (per curiam) (holding that a state's "prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA" and is therefore preempted); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 673 (2012) (holding that when a federal statute "is silent on whether claims under the Act can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms"); *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 26 (2011) (per curiam) ("[W]hen a complaint contains both arbitrable and nonarbitrable claims, the Act requires courts to 'compel arbitration of pendent arbitrable claims . . . even where the result would be the possibly inefficient maintenance of separate proceedings in different forums.'" (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 217 (1985))); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (holding that the FAA preempts a state rule that class action waivers in contracts of adhesion are unconscionable); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772 (2010) (holding that when a contract vests an arbitrator with exclusive authority to resolve any dispute relating to the enforceability of the

addressing class-wide arbitration are particularly noteworthy: *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* and *AT&T Mobility LLC v. Concepcion*.

1. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*

*Stolt-Nielsen* involved a dispute between shipping companies and their customers.<sup>58</sup> Following a criminal investigation by the government that revealed the shipping companies were engaged in illegal price-fixing, numerous charterers filed lawsuits against the companies. One of these charterers, AnimalFeeds, filed a putative class action in federal court against the shipping company, Stolt-Nielsen. After the Second Circuit held that the contracts contained enforceable arbitration clauses,<sup>59</sup> AnimalFeeds served upon Stolt-Nielsen a demand for class arbitration.<sup>60</sup> While Stolt-Nielsen contested AnimalFeeds's right to represent a class in the arbitration, the parties entered into a supplemental agreement to submit the question of class arbitration to a panel of three arbitrators, who were to "follow and be bound by"<sup>61</sup> the American Arbitration Association's Supplementary Rules for Class Arbitrations ("AAA Class Rules"). AAA Class Rule 3 authorizes the arbitrator to "determine as a threshold matter . . . whether the applicable arbitration clause permits the arbitration to proceed on behalf of or against a class."<sup>62</sup>

Although the parties had stipulated that the arbitration clause was silent regarding class arbitration,<sup>63</sup> the panel of arbitrators concluded that the clause permitted class-wide arbitration,<sup>64</sup> accepting AnimalFeeds's argument that "the clause should be construed to permit class arbitration as a matter of public policy."<sup>65</sup> Stolt-Nielsen challenged the arbitrators' decision in court, and the Supreme Court held that the arbitrators had, in the language of the Act, "exceeded their

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contract, it is for the arbitrator, not a court, to determine whether the contract is unconscionable). *See also* *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010) (holding that parties that are silent on the issue of class-wide arbitration "cannot be compelled to submit their dispute to class arbitration"). *Cf.* *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2855–60 & n.6 (2010) (applying FAA precedents to an arbitration dispute in a labor case under the Labor Management Relations Act "because they employ the same rules of arbitrability").

58. *Stolt-Nielsen*, 130 S. Ct. at 1764–65.

59. *JLM Indus., Inc. v. Stolt-Nielsen SA*, 387 F.3d 163, 175, 181 (2d Cir. 2004).

60. *Stolt-Nielsen*, 130 S. Ct. at 1765.

61. *Id.* (quoting the supplemental agreement).

62. AAA Class Rule 3 (effective Oct. 8, 2003).

63. *Stolt-Nielsen*, 130 S. Ct. at 1766.

64. *Id.*

65. *Id.* at 1768 (internal citation omitted) (emphasis omitted).

powers.”<sup>66</sup> Finding that its prior decision in *Green Tree Financial Corp. v. Bazzle*<sup>67</sup> did not establish “the rule to be applied in deciding whether class arbitration is permitted,”<sup>68</sup> the Court concluded that “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”<sup>69</sup>

If an arbitration agreement is silent on the issue, the arbitrator cannot infer an implicit agreement to submit to class-wide arbitration “because class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”<sup>70</sup> Class-wide arbitration not only dramatically increases the scope and “commercial stakes” of the proceedings, the Court maintained, but it also deprives parties of the “presumption of privacy and confidentiality” that ordinarily shrouds arbitration.<sup>71</sup> These “differences between bilateral and class-action arbitration are too great for arbitrators to presume . . . that the parties’ mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings.”<sup>72</sup>

## 2. *AT&T Mobility LLC v. Concepcion*

In 2011, just one year after *Stolt-Nielsen*, the Court decided *AT&T Mobility LLC v. Concepcion*.<sup>73</sup> The underlying claim in *Concepcion* arose in 2002, when Vincent and Liza Concepcion purchased cell phone service from AT&T. The Conceptions received free phones as advertised by AT&T, but they were charged \$30.22 in sales tax based on the retail price of the phones.<sup>74</sup> They filed a suit against AT&T in a

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66. *Id.* at 1767–68 (quoting 9 U.S.C. § 10(a)(4)).

67. 539 U.S. 444, 453 (2003) (concluding that the arbitrator, rather than a court, should interpret the arbitration clause to determine whether it forbade or was silent on class-wide arbitration) (plurality opinion).

68. *Stolt-Nielsen*, 130 S. Ct. at 1772 (footnote omitted).

69. *Id.* at 1775.

70. *Id.*

71. *Id.* at 1776 (citing AAA Class Rule 9(a)).

72. *Id.* (footnote omitted).

73. 131 S. Ct. 1740 (2011). For analyses of *Concepcion* and its implications, see Michael A. Helfand, *Purpose, Precedent, and Politics: Why Concepcion Covers Less Than You Think*, 4 Y.B. ARB. & MEDIATION (forthcoming 2012), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2022564](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2022564); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 633, 636–39 (2012); Sherry, *supra* note 3, at 3, 5–21; Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 705–17 (2012); Maureen A. Weston, *The Death of Class Arbitration after Concepcion?*, 60 U. KAN. L. REV. 767, 776–81 (2012).

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

federal court in California, which was later consolidated with a putative class action.<sup>75</sup> AT&T moved to compel arbitration, invoking the contract between the parties, which contained an arbitration provision requiring the parties to proceed in their “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.”<sup>76</sup> Opposing the motion to compel arbitration, the plaintiffs argued that the arbitration agreement was unconscionable under California law because it barred class-wide procedures.<sup>77</sup>

The district court denied the motion to compel arbitration, applying the California Supreme Court’s decision in *Discover Bank v. Superior Court*<sup>78</sup> and finding that the arbitration provision was unconscionable because it did not “provide an ‘adequate substitute for class litigation or arbitration.’”<sup>79</sup> The Ninth Circuit affirmed.<sup>80</sup>

The *Discover Bank* rule applied by the lower federal courts provided as follows:

[W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party “from responsibility for [its] own fraud, or willful injury to the person or property of another.” Under these circumstances, such waivers are unconscionable under California law and should not be enforced.<sup>81</sup>

The *Concepcions* argued that the *Discover Bank* rule was not preempted by the FAA because it barred waivers of class action litigation as well as class-wide arbitration, and therefore did not discriminate against arbitration.<sup>82</sup>

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75. *Id.*

76. *Id.* (quoting the arbitration provision) (conversion from all capital letters by the Court).

77. *Id.* at 1745.

78. *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by Concepcion*, 131 S. Ct. 1740 (2011).

79. *Laster v. T-Mobile USA, Inc.*, No. 05CV1167 DMS AJB, 2008 WL 5216255, at \*9 (S.D. Cal. Aug. 11, 2008), *aff’d sub nom. Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev’d sub nom. Concepcion*, 131 S. Ct. at 1740, *on remand sub nom. Laster v. T-Mobile USA, Inc.*, 06CV675 DMS NLS, 2012 WL 1681762 (S.D. Cal. May 9, 2012) (granting AT&T’s motion to compel arbitration). *See also Laster*, 2012 WL 1681762, at \*14 (concluding that plaintiffs had established the unconscionability of the class action waiver).

80. *Laster*, 584 F.3d at 855–59.

81. *Discover Bank*, 113 P.3d at 1110 (quoting CAL. CIV. CODE § 1668).

82. Brief for Respondents at 21–24, *Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893) (citing *Am. Online, Inc. v. Superior Court*, 108 Cal. Rptr. 2d 699, 699, 708, 712 (Cal. Ct. App. 2001)).

The Supreme Court disagreed. While noting that section two of the FAA “permits arbitration agreements to be declared unenforceable ‘upon such grounds as exist at law or in equity for the revocation of any contract,’” the Court clarified that this saving clause permits invalidation of arbitration clauses only by “generally applicable contract defenses,” *not* “by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>83</sup>

Obviously, when state law bars the arbitration of a particular type of claim completely, the FAA preempts the state law.<sup>84</sup> The Court held, however, that the FAA’s preemptive force may also extend to generally applicable grounds for the revocation of a contract, such as unconscionability, where they are “applied in a fashion that disfavors arbitration.”<sup>85</sup> For example, the Court hypothesized, if state law characterized as unconscionable any contract that eschewed application of the Federal Rules of Evidence, the rule might formally apply to all contracts but it “would have a disproportionate impact on arbitration agreements . . . .”<sup>86</sup> More generally, section two’s saving clause was not intended “to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>87</sup>

While conceding that the “‘principal purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms,’”<sup>88</sup> the Court emphasized a subsidiary goal: “‘encouragement of efficient and speedy dispute resolution.’”<sup>89</sup> Class-wide arbitration imposed by a court applying the *Discover Bank* rule interferes with this goal, the Court opined, in three material respects. First, “the switch from bilateral to 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.”<sup>90</sup> The Court cited evidence from the AAA that the median time for resolution of a class-wide arbitration was 583 days, more than three times longer than the average disposition

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83. *Concepcion*, 131 S. Ct. at 1746 (citations omitted).

84. *Id.* at 1747 (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)). *See also* *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203–04 (2012) (per curium) (holding that the FAA preempts West Virginia case law, which treats pre-dispute agreements to arbitrate personal injury or wrongful death claims against nursing homes as categorically unenforceable).

85. *Concepcion*, 131 S. Ct. at 1747 (citing *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

86. *Id.*

87. *Id.* at 1748.

88. *Id.* (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

89. *Id.* at 1749 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

90. *Id.* at 1751.



time for bilateral consumer arbitrations.<sup>91</sup> Second, “class arbitration requires procedural formality” in order to bind absentees by the award, which, the Court suggested, is at odds with the goal of resolving disputes efficiently and speedily.<sup>92</sup> Third, “class arbitration greatly increases risks to defendants” by multiplying the potential cost of a losing award while denying effective appellate review, thereby pressuring defendants to settle even questionable claims and discouraging the use of arbitration altogether.<sup>93</sup> The Court concluded that California’s *Discover Bank* rule is preempted by the FAA because it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress”<sup>94</sup>

In dissent, Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, focused on the basic purpose of the FAA—to ensure judicial enforcement of arbitration agreements<sup>95</sup>—and downplayed the importance of providing “procedural and cost advantages.”<sup>96</sup> Breyer rejected the majority’s assumption that individual, rather than class, arbitration is a “fundamental attribute” of arbitration,<sup>97</sup> maintaining instead that “class arbitration is consistent with the use of arbitration.”<sup>98</sup> To the extent that Congress envisioned arbitration as a tool for resolving factual disputes between parties of roughly equal bargaining power, California’s unconscionability law may actually further congressional objectives.<sup>99</sup> And since class arbitration proceedings may take less time than class actions in court, the *Discover Bank* rule may even serve the FAA’s (subsidiary) objective of facilitating speedy resolution of disputes.<sup>100</sup> In response to the dissent, the majority rejoined that “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”<sup>101</sup>

### C. *The Meaning of Legislative Inaction in the Face of Judicial (Mis)interpretation*

As demonstrated in Part I.A above, the FAA’s legislative history strongly suggests that Congress intended to limit the Act’s provisions to

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91. *Id.* (citation omitted).

92. *Id.*

93. *Id.* at 1752 & n.8.

94. *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

95. *Id.* at 1757 (Breyer, J., dissenting).

96. *Id.*

97. *Id.* at 1759.

98. *Id.* at 1758.

99. *Id.* at 1759 (citations omitted).

100. *Id.* at 1759–60.

101. *Id.* at 1753 (majority opinion).

contracts between companies of roughly equal bargaining power, and never intended it to apply to employment agreements or take-it-or-leave-it consumer contracts.<sup>102</sup> Moreover, it is extremely unlikely that Congress even contemplated class action litigation at the time it enacted the FAA, let alone that it specifically intended to permit class action waivers.

But if the Court has “trespass[ed] on the institutions of democratic government”<sup>103</sup> by disregarding congressional intent, surely Congress has the prerogative to amend the FAA and to legislatively overrule *Stolt-Nielsen*, *Concepcion* and the Court’s decisions extending the FAA to employment and consumer contracts.<sup>104</sup> After all, Congress has primary law-making authority and “Congress remains free to alter what [the Court] ha[s] done.”<sup>105</sup> As the late Harvard Law professors Hart and Sacks maintained in their legendary teaching materials, *The Legal Process*, “court and legislature are in some sense in competition, with the legislature having the *last word* for the future.”<sup>106</sup> Or as Columbia Law professors Gluck and Graetz put it even more directly in a recent New York Times op-ed piece, “It is Congress, not the court, that has the constitutional power and responsibility to make difficult legislative policy decisions . . . .”<sup>107</sup>

At least some members of the current Congress would like to reassert legislative primacy by amending the FAA to limit its reach, consistent with the legislature’s original intent. Indeed, the very day that the Supreme Court decided *Concepcion*, Senator Al Franken (D-Minn.), Senator Richard Blumenthal (D-Conn.) and Representative Hank Johnson (D-Ga.) announced that they would reintroduce the Arbitration

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102. See *supra* notes 19–43 and accompanying text (discussing the legislative history of the FAA).

103. Carrington & Haagen, *supra* note 6, at 402.

104. See, e.g., *Preston v. Ferrer*, 552 U.S. 346 (2008) (applying the FAA to an employment contract; superseding state law); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265 (1995) (applying the FAA to a consumer contract).

105. *Allied-Bruce*, 513 U.S. at 284 (O’Connor, J., concurring) (quoting *Patterson v. McLean Credit Union*, 419 U.S. 164, 173 (1989)).

106. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 165 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (emphasis added); see also *id.* at 166 (describing the legislature’s discretion to intervene “to determine changes appropriate for the future”).

107. Abbe R. Gluck & Michael J. Graetz, *The Severability Doctrine*, N.Y. TIMES, Mar. 23, 2012, at A29 (writing about the Affordable Care Act before the Supreme Court had issued its decision upholding the law in *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012)). See also Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 317 (2005) (describing “legislative supremacy” as “the belief that Congress, rather than the Supreme Court, bears primary responsibility for shaping policy through statutory law”).

Fairness Act (“AFA”).<sup>108</sup> Their press release explicitly stated that the proposed law would “help rectify the Court’s most recent wrong [in *Concepcion*] by restoring consumer rights.”<sup>109</sup> The proposed bill would do far more than just ensure that groups can band together to proceed collectively against employers or other companies.<sup>110</sup> If signed into law, the AFA would invalidate all pre-dispute agreements that require the arbitration of an employment dispute, a consumer dispute or a civil rights dispute and would vest authority to determine the validity of such agreements in “a court, rather than an arbitrator.”<sup>111</sup>

In its “Findings” section, the AFA states that the FAA was “intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power,”<sup>112</sup> not to consumer disputes or employment disputes. The AFA seeks to legislatively overrule a “series of decisions by the Supreme Court” that “have changed the meaning of the Act.”<sup>113</sup> Although the bill has been referred to the House Committee on the Judiciary,<sup>114</sup> earlier versions<sup>115</sup> never made it out of committee<sup>116</sup> and the current version is not expected to be adopted.<sup>117</sup>

108. Arbitration Fairness Act, S. 987, 112th Cong. (2011); H.R. 1873, 112th Cong. (2011).

109. Press Release, Sens. Franken, Blumenthal, Rep. Hank Johnson Announce Legislation Giving Consumers More Power in the Courts against Corporations (Apr. 27, 2011), available at [http://www.franken.senate.gov/?p=press\\_release&id=1466](http://www.franken.senate.gov/?p=press_release&id=1466).

110. Christopher Drahozal, *Concepcion and the Arbitration Fairness Act*, SCOTUSBLOG (Sept. 13, 2011, 11:46 AM), <http://www.scotusblog.com/2011/09/concepcion-and-the-arbitration-fairness-act> (arguing that the AFA “would be an overbroad response to the Court’s decision in *Concepcion*”). See also John D. Wood, *Opening the Door to Justice: Amending the Federal Arbitration Act to Remedy the Unjust Use of Predispute Arbitration Agreements* (Feb. 2011) (unpublished student paper, N.Y.U. Law School), available at <http://ssrn.com/abstract=2014428> (espousing an earlier version of the AFA).

111. S. 987 § 3(a); H.R. 1873 § 3(a). The section that would authorize courts, rather than arbitrators, to determine the “validity and enforceability” of arbitration agreements would overrule *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003), which concluded that an arbitrator, rather than a court, should interpret the arbitration clause to determine whether it forbade or was silent on class-wide arbitration. A narrower legislative fix to address only class action waivers might be (mis)read to suggest that Congress actually endorses the application of the FAA in employment and consumer contracts and other contracts between parties of unequal bargaining power. Kathryn A. Eidmann, *Ledbetter in Congress: The Limits of a Narrow Legislative Override*, 117 YALE L.J. 971, 972, 979 (2008).

112. S. 987 § 2; H.R. 1873 § 2.

113. S. 987 § 2; H.R. 1873 § 2.

114. See H.R. 1873, GOVTRACK, <http://www.govtrack.us/congress/bills/112/hr1873> (last visited Nov. 18, 2012) (noting that the bill was referred to the House Committee on the Judiciary on May 12, 2011).

115. S. 1782, 110th Cong. (2007); H.R. 3010, 110th Cong. (2007); S. 931, 111th Cong. (2009); H.R. 1020, 111th Cong. (2009).

116. See S. 1782 (110th): *Bill Overview*, GOVTRACK, <http://www.govtrack.us/congress/bills/110/s1782> (last visited Sep. 30, 2011) (listing S. 1782, 110th Cong. (2007) as introduced on July 12, 2007, but never enacted); H.R. 3010 (110th): *Bill Overview*, GOVTRACK,

In some cases, Congress's failure to legislatively overrule a judicial interpretation of a statute has been read to signify acquiescence in the Court's interpretation,<sup>118</sup> although many reasons apart from congressional approval may explain legislative inaction.<sup>119</sup> For example, when Congress is unaware of the Court's interpretation of a statute, it is not reasonable to ascribe an intention to affirm the judicial interpretation.<sup>120</sup> Here, however, given that members of Congress have introduced the AFA in three successive sessions of Congress in an effort to overrule some of the Court's FAA precedents, it would be difficult to maintain that Congress lacks knowledge of the Court's decisions.<sup>121</sup>

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<http://www.govtrack.us/congress/bills/110/hr3010> (last visited Sep. 30, 2011) (listing H.R. 3010, 110th Cong. (2007) as introduced on July 12, 2007, but never enacted); *S. 931 (111th): Bill Overview*, GOVTRACK, <http://www.govtrack.us/congress/bills/111/s931> (last visited Sep. 30, 2011) (listing S. 931, 111th Cong. (2009) as introduced on April 29, 2009, but never enacted); *H.R. 1020 (111th): Bill Overview*, GOVTRACK, <http://www.govtrack.us/congress/bills/111/hr1020> (last visited Sep. 30, 2011) (listing H.R. 1020, 111th Cong. (2009) as introduced on February 12, 2009, but never enacted).

117. See, e.g., Drahozal, *supra* note 110 (“[T]he political realities are such that Congress is unlikely to enact the AFA.”); Gilles & Friedman, *supra* note 73, at 629 (“[S]imilar bills have died in committee before, and the prospects for this one appear no brighter.”). In fact, GovTrack.us gives it only a 2% chance of passage. *H.R. 1873: Bill Overview*, GOVTRACK, <http://www.govtrack.us/congress/bills/112/hr1873> (last visited Sep. 30, 2011). A proposed California state bill that would have barred class action waivers died in committee in July 2012. Cheryl Miller, *Legislation to Blunt “Concepcion” is Killed in State Assembly*, THE RECORDER (July 3, 2012, 3:26:14 PM), <http://www.law.com/jsp/ca/PubArticleFriendlyCA.jsp?id=1202561826154>.

118. See, e.g., *Flood v. Kuhn*, 407 U.S. 258, 283–84 (1972) (“Congress, by its positive inaction, has allowed [the Court’s] decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively.”); Barrett, *supra* note 107, at 322 (describing “the belief that congressional inaction following the Supreme Court’s interpretation of a statute reflects congressional acquiescence in it”) (footnote omitted); William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 69, 71 (1988) [hereinafter Eskridge, *Interpreting Legislative Inaction*] (describing the acquiescence rule, the reenactment rule and the rejected proposal rule, all of which read meaning into legislative inaction); Marshall, *supra* note 6, at 184 (“[C]ongressional failure to enact legislation reversing a judicial decision indicates Congress’ approval of the Court’s interpretation of an earlier statute.”).

119. See, e.g., Barrett, *supra* note 107, at 335–36 (identifying alternative explanations for legislative inaction; “[e]quating the failure to act with agreement reflects a simple and complete misunderstanding of the legislative process.”); Eskridge, *Interpreting Legislative Inaction*, *supra* note 118, at 69 (questioning “whether legislative inaction really does tell the Court, or us, anything about legislative intent”); William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 GEO. L.J. 1361, 1404–06 (1988) [hereinafter Eskridge, *Overruling Statutory Precedents*] (identifying a variety of reasons why Congress might have failed to overrule judicial interpretations of a federal statute); Marshall, *supra* note 6, at 190–91 (identifying a number of reasons “why Congress might decline to overrule a decision with which most members disagree”).

120. See, e.g., Barrett, *supra* note 107, at 331–35 (discussing ignorance as a reason for rejecting the acquiescence rationale); Eskridge, *Interpreting Legislative Inaction*, *supra* note 118, at 75–76 (same); Marshall, *supra* note 6, at 186–90 (same).

121. *But see* Marshall, *supra* note 6, at 189 (questioning the assumption “that just because . . .

Even where Congress is aware of a judicial (mis)interpretation of a statute and fails to correct it, its inaction may reflect “preoccupation, or paralysis”<sup>122</sup> rather than acquiescence or affirmation. Indeed, the Supreme Court has frequently questioned the wisdom of reading acquiescence or approval into legislative inaction.<sup>123</sup> As Professor Eskridge has noted, because many obstacles impede the passage of legislation by Congress, “even if a majority of the members of Congress disagree with a judicial or administrative interpretation of a statute, it is very unlikely that they will be able to amend the statute quickly, if at all.”<sup>124</sup>

Moreover, whatever little legislative inaction tells us about congressional intent, it reveals only the intent of the Congress that failed to act, not the intent of the enacting Congress, whose intent is traditionally viewed as most relevant for purposes of statutory interpretation.<sup>125</sup> As the Court has noted, “the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.”<sup>126</sup> Therefore, even if the 113th Congress declines to pass the AFA, it does not mean that the Court in *Concepcion* correctly

a bill is proposed, a great many members of Congress are aware of the issue”).

122. *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969); accord Marshall, *supra* note 6, at 190–91. Given the recent “hyperpolarization of Congress,” there have been fewer Congressional overrides and a dramatic increase in the Supreme Court’s power. Adam Liptak, *In Congress’s Paralysis, A Mightier Supreme Court*, N.Y. TIMES, Aug. 21, 2012, at A10 (quoting N.Y.U. School of Law Professor Richard H. Pildes).

123. See, e.g., *Sampson v. Murray*, 415 U.S. 61, 78 (1974) (“The search for significance in the silence of Congress is too often the pursuit of a mirage . . .”) (quoting *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942)). See also *Helvering v. Hallock*, 309 U.S. 106, 119–20 (1940) (“To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities.”) (footnote omitted); *id.* at 121 (“[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.”).

124. Eskridge, *Interpreting Legislative Inaction*, *supra* note 118, at 99.

125. See *id.* at 94–95 (describing Congress as a “discontinuous decisionmaker” and identifying the “traditional proposition that the legislative ‘intent’ relevant to statutory interpretation is the intent of the enacting Congress”); Marshall, *supra* note 6, at 188, 193 (noting the courts generally adhere to an “originalist model of statutory construction,” trying to understand what the enacting Congress intended with the words it chose). In addition to debating the meaning of legislative inaction, the Legal Process students could debate whether it is the enacting Congress’s intent that is most relevant for purposes of statutory interpretation, or whether statutes should be interpreted “dynamically,” that is, “in light of their present societal, political, and legal context.” William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1479 (1987). See also T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 46 (1988) (“[S]tatutes ought to be responsive to today’s world.”); Eric Schnapper, *Statutory Misinterpretations: A Legal Autopsy*, 68 NOTRE DAME L. REV. 1095, 1144 (1993) (“[P]ost-enactment developments would have provided a reliable tool for interpreting the statutes at issue.”).

126. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989) (quoting *United States v. Price*, 361 U.S. 304, 313 (1960)).

interpreted the FAA or furthered the intent of the Congress that enacted the law in 1925.

Finally, even if legislative inaction tells us little, if anything, about the enacting Congress's actual intent, in some cases it may support a finding of presumed intent. Professor Eskridge has reformulated the Court's "legislative inaction" cases to impose upon Congress a responsibility to correct authoritative interpretations with which it disagrees.<sup>127</sup> On this reading, Congress's failure to legislatively overrule "building block" judicial interpretations upon which others reasonably rely gives rise to a rebuttable presumption that the Court's interpretation was correct.<sup>128</sup> But Eskridge maintains that the "presumption of correctness should be a weak one [if the interests harmed by the Court's interpretation] do not have effective access to the political process."<sup>129</sup> Unlike small, well-defined, wealthy groups (e.g., phone companies) that have resources to invest in the legislative process to secure concentrated benefits and to avoid concentrated costs, consumers (such as the Concepcions and other subscribers to AT&T phone service) are too diffuse, disorganized and poor to lobby Congress to change (an interpretation of) the law with which they disagree.

In sum, the class action waiver material would invite the Legal Process students to consider the competing roles of Congress and the Court in law-making; the traditional view that Congress has primary responsibility for federal law- and policy-making while the Court has primary responsibility for interpreting federal legislation; the proper role of legislative history in the interpretive process; and the meaning of legislative inaction in the face of judicial (mis)interpretation.

We *say* that Congress makes the law and the Court interprets the law; but if the Court can ignore legislative intent and interpret legislation in such a way as to render it unrecognizable to the Congress that enacted the law, and if Congress lacks the political will to correct the Court's action, is it accurate to maintain that Congress retains primary law-making power? At least regarding class action waivers, it sure looks like the Court, not Congress, is making the law.

## II. FEDERAL AGENCIES AND THE SUPREME COURT

Just as class action waivers provide a window into Congress's

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127. Eskridge, *Interpreting Legislative Inaction*, *supra* note 118, at 108–13.

128. *Id.* at 108.

129. *Id.* at 114. See also Eskridge, *Overruling Statutory Precedents*, *supra* note 119, at 1406–07 (applying public choice theory to explain legislative inaction); Marshall, *supra* note 6, at 190 (discussing public choice theory).

struggle to retain primary law-making authority vis-à-vis the Court, they offer an opportunity to consider the role that administrative agencies play in law-making and the extent to which courts must defer to agency interpretations of the laws within their purview.<sup>130</sup> This Part of the Article focuses on two federal agencies, the National Labor Relations Board (“NLRB” or “Board”) and the Financial Industry Regulatory Authority (“FINRA”), which have invalidated class action waivers in the context of labor and securities disputes, respectively.<sup>131</sup> In the words of Professor Paul Kirgis: “These agencies are, in effect, telling the courts to reopen the doors and start hearing cases. The result is a through-the-looking-glass moment in which agencies defend rights to

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130. See *infra* Part II.C (applying *Chevron*, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984) and its progeny).

131. I first learned of these agency actions in an on-line essay by Professor Paul Kirgis. See Paul F. Kirgis, *The Roberts Court vs. the Regulators: Surveying Arbitration's Next Battleground*, 10 MAYHEW-HITE REP. ON DISP. RESOL. & CTS. (May 2012), <http://moritzlaw.osu.edu/epub/mayhew-hite/report/volume-10/issue-3/>. In addition to the efforts by the NLRB and FINRA to regulate class action waivers, at least one other agency has sought to regulate pre-dispute arbitration agreements. The Federal Trade Commission (“FTC”), which enforces the Magnuson-Moss Warranty Act (“MMWA”), 15 U.S.C. §§ 2301–12 (2012), has interpreted the MMWA to bar “pre-dispute mandatory binding arbitration provisions covering written warranty agreements” and has promulgated a regulation to prohibit “judicial enforcement of such provisions with respect to consumer claims brought under the MMWA.” *Kolev v. Euromotors West/The Auto Gallery*, 658 F.3d 1024, 1025 (9th Cir. 2011) (citing 16 C.F.R. 703.5), *withdrawn*, 676 F.3d 867 (9th Cir. 2012). Until recently, the Courts of Appeals were split on whether the FTC’s interpretation of the MMWA is entitled to *Chevron* deference. Compare *Kolev*, 658 F.3d at 1031 (deferring to the FTC’s interpretation), with *Walton v. Rose Mobile Homes LLC*, 298 F.3d 470, 478 & n.14 (5th Cir. 2002) (concluding that Congress spoke directly to the issue of binding arbitration in the FAA and declining to even reach the second step of the *Chevron* analysis), and *Davis v. S. Energy Homes, Inc.*, 305 F.3d 1268, 1280 (11th Cir. 2002) (determining “that the FTC’s interpretation of the MMWA is unreasonable” and declining to defer to the FTC regulation). The Ninth Circuit withdrew its opinion in *Kolev* in April 2012. See also Jonathan D. Grossberg, *The Magnuson-Moss Warranty Act, the Federal Arbitration Act, and the Future of Consumer Protection*, 93 CORNELL L. REV. 659, 661 (2008) (“[T]he MMWA and its interpretation by the FTC preclude binding arbitration agreements . . . . [T]he courts owe *Chevron* deference to the FTC in this area . . . .”); *Arbitration—Fifth Circuit Holds Magnuson-Moss Warranty Act Claims Arbitrable Despite Contrary Agency Interpretation*.—*Walton v. Rose Mobile Homes LLC*, 298 F.3d 470 (5th Cir. 2002), 116 HARV. L. REV. 1201, 1202 (2003) (criticizing *Walton*’s “flawed rationale,” but not its conclusion). Moreover, in the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress authorized the Consumer Financial Protection Bureau (“CFPB”) to study the use of pre-dispute arbitration agreements in consumer transactions and to promulgate regulations prohibiting such agreements if it “finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.” 12 U.S.C. § 5518(b) (2006). In April 2012, the CFPB solicited comments from the public in an effort to “identify the appropriate scope, methods, and sources of data for the Study” required by Dodd-Frank. Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25148 (Apr. 27, 2012). Comments were due on June 23, 2012.

court adjudication against incursions by the Supreme Court.”<sup>132</sup> Following an examination of the steps taken by these agencies, this Part analyzes the obligation, if any, of courts to defer to them and the Supreme Court’s particular dilemma: must it defer to agency interpretations that conflict with its own powerfully pro-arbitration agenda?

*A. The NLRB Interprets the National Labor Relations Act to Preclude Class Action Waivers*

In a decision of first impression issued in a proceeding against D.R. Horton, Inc. (“Horton”),<sup>133</sup> the NLRB considered whether Horton could require its employees, as a condition of employment, to agree to refrain from pursuing any claims against it other than through individual arbitration. The Board held that an employer violates section 8(a)(1) of the National Labor Relations Act (“NLRA”) when it “requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial.”<sup>134</sup> In other words, the NLRB held that the class action waiver Horton required its employees to sign violated the NLRA.

In so ruling, the Board relied on section 7 of the NLRA, which assures employees a right to engage in “concerted activities for the purpose of collective bargaining or other mutual aid or protection,”<sup>135</sup> and which has been interpreted to protect their right to join together to collectively pursue workplace grievances through litigation<sup>136</sup> or arbitration.<sup>137</sup> Since the agreement at issue explicitly barred employees from bringing collective claims in any forum, and since section 8(a)(1) of the NLRA “makes it an unfair labor practice for an employer ‘to interfere with . . . employees in the exercise of the rights guaranteed in’

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132. Kirgis, *supra* note 131.

133. D.R. Horton, Inc., 357 N.L.R.B. No. 184, at \*10 & n.18 (Jan. 3, 2012) (distinguishing two cases that had held that class action waivers do not violate the NLRA: *Slawienski v. Nephron Pharm. Corp.*, No. 1:10-CV-0460-JEC, 2010 WL 5186622 (N.D. Ga. Dec. 9, 2010); and *Webster v. Perales*, No. 3:07-CV-00919-M, 2008 WL 282305 (N.D. Tex. Feb. 1, 2008)).

134. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184, at \*1 (Jan. 3, 2012).

135. 29 U.S.C. § 157 (2012).

136. *D.R. Horton*, 357 N.L.R.B. No. 184, at \*2 (citing, *inter alia*, *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–66 (1978), and *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948–49 (1942)).

137. *Id.* at \*3 (citing, *inter alia*, *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 836 (1984)). *See also id.* at \*9 (construing employees’ class and collective actions as protected concerted activity because their goal is concerted activity for mutual aid or protection).



Section 7,”<sup>138</sup> the Board held that the contract violated section 8 of the NLRA.<sup>139</sup> In short, “the prohibition of individual agreements imposed on employees as a means of requiring that they waive their right to engage in protected, concerted activity lies at the core of the prohibitions contained in Section 8.”<sup>140</sup>

The NLRB rejected the company’s principal argument that its decision conflicted with the FAA and the Supreme Court’s opinion in *Concepcion*. Cognizant of its obligation to seek to accommodate the policies underlying both the NLRA and the FAA, the Board offered four reasons why its finding that the class action waiver was unlawful did not conflict with the FAA or its underlying policies.<sup>141</sup>

First, ruling that a class action waiver violates the NLRA does not discriminate against arbitration because it “does not rest on ‘defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’”<sup>142</sup> Even a contract that failed to mention arbitration, but which barred employees from pursuing class actions in court, would violate the NLRA under the Board’s reasoning.<sup>143</sup>

Second, Supreme Court precedents make clear that agreements to arbitrate federal statutory claims “may not require a party to ‘forgo the substantive rights afforded by the statute.’”<sup>144</sup> Here, even though the charging party, Michael Cuda, ultimately claimed the protection of the Fair Labor Standards Act (“FLSA”), he first claimed a right to present the FLSA claim *collectively*, a substantive right itself secured by the NLRA.<sup>145</sup> Since the class action waiver interfered with the exercise of this substantive right, the FAA did not require enforcement of the waiver.<sup>146</sup>

Third, under the FAA, arbitration agreements may be invalidated upon any “grounds as exist at law or in equity for the revocation of any contract,”<sup>147</sup> and the Board noted that “it is a defense to contract

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138. *Id.* at \*4 (quoting 29 U.S.C. § 158(a)(1) (2012)).

139. *Id.* at \*6 (opining that the agreement at issue here “implicates prohibitions that predate the NLRA and are central to modern Federal labor policy”).

140. *Id.* at \*5.

141. *Id.* at \*7–12.

142. *Id.* at \*9 (quoting *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011)).

143. *Id.*

144. *Id.* at \*12 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). See also *infra* Part III.B.2 (discussing *In re Am. Express Merchants’ Litig.*, 667 F.3d 204 (2d Cir. 2012)).

145. *D.R. Horton*, 357 N.L.R.B. No. 184, at \*12.

146. *Id.* at \*11–13.

147. 9 U.S.C. § 2 (2012).

enforcement that a term of the contract is against public policy.”<sup>148</sup> In cases raising this defense, courts must balance the “interest in favor of enforcing a contract term” against the public policy that would be violated by its enforcement.<sup>149</sup> The NLRA embodies a strong federal policy protecting employees’ rights to collectively pursue litigation or arbitration, as well as a strong policy against “yellow dog” contracts, which would require employees to waive rights to engage in collective action.<sup>150</sup> While recognizing that *Concepcion* emphasized a countervailing interest in facilitating streamlined proceedings, the Board distinguished the present case from *Concepcion*.<sup>151</sup> There, tens of thousands of consumers had potential claims against the phone company, whereas the average employer has only twenty employees. Thus, class-wide arbitration of an employment case would be far less costly and cumbersome than the massive class-wide proceeding feared by the Court in *Concepcion*. “[H]olding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.”<sup>152</sup>

Finally, the Board invoked an earlier labor statute, the Norris-LaGuardia Act (“NLGA”), which ensures workers “full freedom of association” and protects them “from the interference, restraint, or coercion of employers” in “concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>153</sup> Section 4 of the NLGA protects the rights of persons, singly or collectively, to aid any person interested or participating in any labor dispute who is prosecuting any action in any federal or state court.<sup>154</sup> Since the NLGA was enacted after the FAA, and since it explicitly repeals all acts and parts of acts in conflict with its provisions,<sup>155</sup> the Board concluded that the “FAA would have to yield” if there were a “direct conflict” between the FAA and the NLGA.<sup>156</sup>

Final orders of the NLRB, like its decision in *D.R. Horton*, are

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148. *D.R. Horton*, 357 N.L.R.B. No. 184, at \*11 (citing *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987)).

149. *Id.*

150. *Id.* at \*5.

151. *Id.* at \*12.

152. *Id.*

153. 29 U.S.C. § 102 (2012).

154. *Id.* § 104(d).

155. *Id.* § 115.

156. *D.R. Horton*, 357 N.L.R.B. No. 184, at \*12.

subject to review in the United States Court of Appeals for the Circuit in which the unfair labor practice occurred or a person aggrieved by the order resides or transacts business, or in the D.C. Circuit.<sup>157</sup> Horton's Petition for Review of the NLRB decision, filed in the Fifth Circuit on January 13, 2012, is still pending.<sup>158</sup>

Following discussion in Part II.B below of the action taken by FINRA to rein in class action waivers, Part II.C will consider the amount of deference to which these agency actions are entitled and the Court's current dilemma.

*B. FINRA Bars Securities Firms from Enforcing Class Action Waivers*

FINRA describes itself as "the largest independent regulator for all securities firms doing business in the United States."<sup>159</sup> It was formed in 2007, when the Securities and Exchange Commission ("SEC") approved the merger of the enforcement arms of the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD").<sup>160</sup> While both the NYSE and the NASD began as voluntary organizations of broker-dealers and operated for decades as self-regulating organizations ("SROs"),<sup>161</sup> the Securities Acts Amendments of 1975 gave the SEC greater authority to regulate and supervise them.<sup>162</sup>

From its inception, FINRA "was designed as a monopoly SRO under the active and direct oversight of the SEC."<sup>163</sup> Since 1987, when the Supreme Court held that pre-dispute agreements to arbitrate claims arising under the Securities Exchange Act of 1934 were enforceable,<sup>164</sup> virtually all disputes between broker-dealers and their customers have been arbitrated under FINRA supervision.<sup>165</sup>

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157. 29 U.S.C. § 160(f) (2012).

158. Petition for Review, *D.R. Horton, Inc. v. NLRB* (5th Cir. Jan. 13, 2012) (No. 12-60031) (on file with author).

159. *About FINRA*, FINRA, <http://www.finra.org/AboutFINRA/> (last visited July 10, 2012).

160. Carrie Johnson, *SEC Approves One Watchdog For Brokers Big and Small*, WASH. POST, July 27, 2007, at D1; Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151, 151-52 (2008). See also 15 U.S.C. § 78s (2012) (authorizing the SEC to grant the registration of self-regulatory organizations).

161. Karmel, *supra* note 160, at 153, 158.

162. Securities Acts Amendments of 1975, Pub. L. No. 94-29, 89 Stat. 97.

163. Karmel, *supra* note 160, at 152. See also *id.* at 169 (noting that FINRA is "very close" to qualifying as a government agency).

164. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227-38 (1987).

165. Kirgis, *supra* note 131. See also Karmel, *supra* note 160, at 153 (noting that the NYSE and the NASD "operated arbitration facilities for disputes between member firms and their employees and between member firms and their customers.").

FINRA Rule 2268(d)(3), effective December 5, 2011,<sup>166</sup> provides that no pre-dispute arbitration agreement shall include any condition that “limits the ability of a party to file a claim in court permitted to be filed in court under the rules of the forums in which a claim may be filed under the agreement.”<sup>167</sup> The FINRA Code of Arbitration Procedure, which contains “the rules of [a forum] in which a claim may be filed” under a securities-related arbitration agreement, bars member firms from

enforc[ing] any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until: The class certification is denied; The class is decertified; The member of the certified or putative class is excluded from the class by the court; or The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.<sup>168</sup>

Taken together, these provisions guarantee customers the right to bring class actions against brokerage firms in court and bar the enforcement of pre-dispute arbitration agreements regarding claims that are the subject of class litigation.<sup>169</sup>

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166. FINRA Regulatory Notice 11-19 (Apr. 2011); FINRA, *Rule Conversion Chart: NASD to FINRA*, <http://www.finra.org/ruleconversionchart/> (last updated Feb. 9, 2012). The predecessor to FINRA Rule 2268(d) was NASD Rule 3110, which was approved by the SEC in the late 1980s. *Charles Schwab & Co. v. FINRA*, No. C-12-518EDL, 2012 WL 1859030, at \*4 (N.D. Cal. May 11, 2012).

167. FINRA Code of Arbitration Procedure for Customer Disputes Rule 2268(d)(3), [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=9955](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9955).

168. FINRA Code of Arbitration Procedure for Customer Disputes Rule 12204(d), [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=4110](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4110). See also FINRA Code of Arbitration Procedure for Industry Disputes Rule 13204(d), [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=4207](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4207) (valid through July 8, 2012) (similar provision governing industry disputes). In April 2012, the SEC approved an amendment of Rule 13204 to preclude the arbitration under the FINRA Industry Code of collective claims under the FLSA, the Age Discrimination in Employment Act or the Equal Pay Act. See Notice of Filing of Amendment No. 1 and Order Granting Accelerated Approval of a Proposed Rule Change, As Modified By Amendment No. 1, Amending Rule 13204 of the Code of Arbitration Procedure for Industry Disputes to Preclude Collective Action Claims From Being Arbitrated, SEC Release No. 34-66774, 77 Fed. Reg. 22374, 22375 (April 13, 2012); see also FINRA Code of Arbitration Procedure for Industry Disputes Rule 13204, [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&record\\_id=14570](http://finra.complinet.com/en/display/display_main.html?rbid=2403&record_id=14570) (effective July 9, 2012).

169. Kirgis, *supra* note 131. See also FINRA Rule 2268(f), [http://finra.complinet.com/en/display/display\\_main.html?rbid=2403&element\\_id=9955](http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9955) (“All agreements shall include a statement that ‘No person shall . . . seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class . . . until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court.’”).

In approving the section of the NASD Code of Arbitration Procedure that was the predecessor to this section of the FINRA Code of Arbitration Procedure, the SEC commented

that the judicial system has already developed the procedures to manage class action claims. Entertaining such claims through arbitration . . . would be difficult, duplicative and wasteful . . . . The Commission agrees with the NASD's position that, in all cases, class actions are better handled by the courts and that *investors should have access to the courts to resolve class actions efficiently.*

The Commission finds that the proposed rule change . . . is consistent with the requirements of Section 15A(b)(6) of the [Securities Exchange] Act . . . [which] requires . . . that the rules of the NASD be designed to protect investors and the public interest . . . . The Commission believes that investor access to the courts should be preserved for class actions . . . .<sup>170</sup>

Notwithstanding the FINRA Rules assuring brokerage customers a right to pursue class litigation in court even in the face of a pre-dispute arbitration agreement, the brokerage firm Charles Schwab (“Schwab”) inserted a class action waiver in its account agreement in the aftermath of *Concepcion* and distributed it to almost seven million customers.<sup>171</sup> On February 1, 2012, the FINRA Department of Enforcement filed a disciplinary proceeding against Charles Schwab, alleging that its class action waiver violates FINRA Rule 2268(d)(3).<sup>172</sup> On the very same day, Schwab filed a declaratory judgment action against FINRA in federal court, maintaining that the FINRA Rule does not bar class action waivers, and even if it does, the Supreme Court's decisions in *CompuCredit Corp. v. Greenwood*<sup>173</sup> and *Concepcion* prevent FINRA from enforcing the Rule.<sup>174</sup>

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170. Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions From Arbitration Proceedings, Exchange Act Release No. 34-31371, 1992 WL 324491, at \*3 (Oct. 28, 1992) [hereinafter SEC Release] (emphasis added) (internal quotations omitted).

171. Complaint & Request for Expedited Hearing ¶¶ 12–13, Dep't of Enforcement v. Charles Schwab & Co., Disciplinary Proceeding No. 2011029760201 (Feb. 1, 2012) [hereinafter FINRA Complaint], <http://www.finra.org/web/groups/industry/@ip/@enf/@ad/documents/industry/p125516.pdf>.

172. *Id.* ¶¶ 3, 20, 26 & 32. The FINRA Complaint also alleges violations of FINRA Rules 2268(d)(1) and 2010. *Id.* ¶¶ 4–6, 20, 26 & 32. The filing of a complaint is just the first step in a five-stage disciplinary process for the regulation of broker-dealers, which includes administrative review of FINRA's ruling on the complaint by the SEC and judicial review by a federal appellate court. See *Charles Schwab & Co. v. FINRA*, No. C–12–518 EDL, 2012 WL 1859030, at \*2, \*5 (N.D. Cal. May 11, 2012).

173. 132 S. Ct. 665, 672–73 (2012) (holding that claims under the Credit Repair Organization Act are arbitrable notwithstanding a non-waiver provision in the statute).

174. Complaint for Declaratory and Preliminary and Permanent Injunctive Relief ¶¶ 34–39, *Charles Schwab & Co. v. FINRA*, No. 3:12-CV-00518-EDL, 2012 WL 1859030 (N.D. Cal.

On May 11, 2012, the United States District Court for the Northern District of California granted FINRA's motion to dismiss the complaint without leave to amend.<sup>175</sup> Schwab's failure to exhaust the FINRA administrative process, which culminates in administrative review by the SEC and then judicial review by a federal court of appeals, deprived the court of jurisdiction.<sup>176</sup> Schwab has not appealed the district court's dismissal.<sup>177</sup> Thus, the FINRA Rules have not been enjoined, and the FINRA complaint against Schwab is wending its way through the administrative process. The SEC, which earlier approved the FINRA Rules, may eventually be called upon to determine whether Schwab's class action waiver violates them, and a federal court of appeals may ultimately review the SEC's decision and determine the validity of the FINRA Rules.<sup>178</sup> In so doing, a court likely will need to determine the extent to which FINRA's (or the SEC's) interpretation of the federal securities laws is entitled to *Chevron* deference, as will the Supreme Court if it ultimately reviews the appellate court's decision.

*C. Chevron Deference, if Any, Owed to these Agency Actions*

Professor Paul Kirgis put his finger on the Legal Process issue that the NLRB decision and the FINRA Rules present: "they will likely pit the 'federal policy favoring arbitration' that the Supreme Court has divined from the [FAA] against the principle of deference to agency decision-making enshrined in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*"<sup>179</sup> In other words, since the NLRB ruling and the FINRA Rules invalidate class action waivers in certain circumstances, the Supreme Court may eventually have to determine whether these agency actions are entitled to deference under *Chevron* even if they conflict with *Concepcion* and the Court's other pro-arbitration precedents.<sup>180</sup>

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2012).

175. *Charles Schwab*, 2012 WL 1859030, at \*1.

176. *Id.* at \*5–10. *See also id.* at \*2, \*5 (providing an overview of the disciplinary process).

177. Email from Gilbert Serota, Attorney for Charles Schwab & Co., to author (June 13, 2012, 16:26 EDT) (on file with author).

178. *See supra* note 172 (discussing the administrative and judicial review steps in the disciplinary process).

179. Kirgis, *supra* note 131 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

180. The use of the generic phrase "*Chevron* deference" belies a continuum of deference regimes that the Supreme Court has applied over the years in various circumstances. *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098–1120 (2008) (describing the continuum of deference regimes); William N. Eskridge, Jr. & Kevin S. Schwartz, *Chevron and Agency Norm-Entrepreneurship*, 115 YALE L.J. 2623, 2629–30 (2006)

This Section begins with a brief introduction to the Court's decision in *Chevron*, which mandates deference to an agency's interpretation of legislation within its regulatory authority, and then turns to the interesting *Chevron*-related issues that the NLRB ruling and the FINRA Rules raise. In the words of Professor Cass Sunstein, the *Chevron* "decision has become foundational, even a quasi-constitutional text—the undisputed starting point for any assessment of the allocation of authority between federal courts and administrative agencies."<sup>181</sup>

1. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*

In *Chevron*, an environmental group, the Natural Resources Defense Council ("NRDC"), challenged a regulation promulgated by the Environmental Protection Agency ("EPA") under the Clean Air Act Amendments of 1977.<sup>182</sup> The D.C. Circuit Court of Appeals had struck down the EPA regulation, but the Supreme Court held that an agency's interpretation of a statute within its purview is entitled to deference:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.<sup>183</sup>

Under *Chevron*'s second step, regulations that an agency issues pursuant to an express delegation of authority from Congress are "binding in the courts unless procedurally defective, arbitrary or

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(noting a continuum); see also Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 836 (2001) (differentiating between *Chevron*'s two-step regime and the multi-factor approach embodied in the *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). For a recent look on *Chevron* and its history, see Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law*, 44 LOY. U. CHI L.J. 143 (2012).

181. Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 188 (2006). Professor Richard Pierce goes further, calling *Chevron* "one of the most important constitutional law decisions in history" Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225, 2227 (1997) [hereinafter Pierce, *Reconciling Chevron*]. But see Eskridge & Baer, *supra* note 180, at 1090 ("[T]he Court usually does not apply *Chevron* to cases that are . . . *Chevron*-eligible."); *id.* at 1120 ("*Chevron* is not the alpha and the omega of Supreme Court agency-deference jurisprudence.").

182. *Chevron*, 467 U.S. at 840.

183. *Chevron*, 467 U.S. at 842–43 (footnotes omitted).

capricious in substance, or manifestly contrary to the statute.”<sup>184</sup> Even where Congress has not expressly delegated authority to implement a particular statutory provision,

it can still be apparent from the agency’s generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which “Congress did not actually have an intent” as to a particular result.<sup>185</sup>

In the Legal Process class I used to teach, after reading *Chevron*, we considered the reasons why legislation is often ambiguous,<sup>186</sup> and we debated which institution of government should have authority to resolve the ambiguities. In considering whether and why agency interpretations are entitled to deference,<sup>187</sup> we observed that Congress not only expressly delegates authority to agencies to interpret statutes through the promulgation of regulations, but it impliedly delegates authority to agencies by leaving gaps or ambiguities in statutes they administer. We also noted that agency administrators often have greater subject matter expertise than generalist judges. We recognized that while agency administrators are not popularly elected, the heads of agencies are appointed (and confirmed) by elected officials and therefore have greater (if indirect) political accountability than federal judges. Finally, we debated whether deference to agency interpretations promotes legislative supremacy.<sup>188</sup> Thus, we discussed the extent to which implied congressional intent, differing institutional competencies,

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184. *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (citing, *inter alia*, *Chevron*, 467 U.S. at 844) (footnote omitted); *see also* *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 711 (2011) (citing the “arbitrary or capricious” standard under *Chevron*’s second step). Substantial deference is owed to an agency’s interpretation of its own regulations. *See, e.g.*, *Gonzales v. Oregon*, 546 U.S. 243, 255 (2006); *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997). In fact, an agency’s interpretation of its own regulations “must be given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’” *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) (citation omitted); *accord Auer*, 519 U.S. at 461.

185. *Mead*, 533 U.S. at 229 (quoting *Chevron*, 467 U.S. at 845).

186. *See Chevron*, 467 U.S. at 865 (identifying congressional preference to have expert agency decide specific issues, congressional inattention, and political stalemate). *See also* Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1244–47 (1989) (discussing congressional deference to expert agencies and an interest in retaining political cover).

187. Sunstein contends that the Court in *Chevron* “announced its two-step approach without giving a clear sense of the theory that justified it.” Sunstein, *supra* note 181, at 195.

188. *Chevron*, 467 U.S. at 843–44, 865–66. *See also* Eskridge & Schwartz, *supra* note 180, at 2626–27 (observing that agencies are in many ways more accountable than the judiciary because they issue rules following both notice and public comment, and are directly accountable to both the President and Congress); Pierce, *Reconciling Chevron*, *supra* note 181, at 2228–37.



and separation of powers concerns counsel in favor of deference to agency action.<sup>189</sup>

The NLRB ruling and the FINRA Rules would not only facilitate a discussion of the theoretical rationales underlying *Chevron* deference, but they would provide the Legal Process students with an opportunity to apply the *Chevron* analysis to discrete new sets of facts. The students could scrutinize the texts of the NLRA and the Securities Exchange Act and their legislative histories to determine whether the laws “directly spoke” to the question of the enforceability of class action waivers.<sup>190</sup> If the first step was satisfied, the students could move onto the second step, debating whether the NLRB decision in *Horton* offered a well-reasoned explanation why class action waivers frustrate the rights of employees to engage in “concerted activities for . . . mutual aid or protection,”<sup>191</sup> and whether the SEC reasonably concluded that the FINRA Rules or their predecessors were designed “to protect investors and the public interest.”<sup>192</sup>

While the NLRB ruling and FINRA Rules would provide great vehicles for exploring these *Chevron* basics, the Legal Process students could dig deeper into the *Chevron* analysis, puzzling over a few of the dicier issues raised by these administrative actions, namely: (1) when an entity is considered a governmental agency entitled to *Chevron* deference; (2) when a ruling has the force of law or procedural formality required to qualify for *Chevron* deference; and (3) whether agency actions are entitled to deference if they address matters beyond the agency’s subject matter expertise. In other words, the students could consider the scope of “*Chevron*’s domain.”<sup>193</sup> This Part will briefly examine these issues in turn.

## 2. Is FINRA a Government Agency Eligible for *Chevron* Deference?

In most cases involving *Chevron* deference, the agency’s status as a governmental agency is unquestioned. Typically, Congress creates an administrative agency and delegates to it certain responsibilities by statute. The NLRB fits into this standard mold: Congress enacted the

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189. See Merrill & Hickman, *supra* note 180, at 836 (“*Chevron* rests on an implied delegation from Congress . . . Congress has ultimate authority over the scope of the *Chevron* doctrine, and . . . the courts should attend carefully to the signals Congress sends about its interpretive wishes.”).

190. Accord Kirgis, *supra* note 131.

191. 29 U.S.C. § 157 (2012), cited in D.R. Horton, Inc., 357 N.L.R.B. No. 184, at \*2 (Jan. 3, 2012). See also *supra* Part II.A (discussing *Horton*).

192. 15 U.S.C. § 78o-3(b)(6) (2012), cited in SEC Release, *supra* note 170, at \*3.

193. Merrill & Hickman, *supra* note 180, at 835.

NLRA in 1935, creating the NLRB and delegating to it authority to make rules and regulations necessary to carry out its provisions.<sup>194</sup> Other agencies, such as the EPA (the focus of *Chevron* itself), are created by executive order.<sup>195</sup>

FINRA's status as a government agency is less obvious than either the NLRB or the EPA because the NYSE and the NASD, the enforcement arms of which were merged to create FINRA,<sup>196</sup> began as voluntary organizations of broker-dealers and operated for decades as SROs.<sup>197</sup> Yet today, FINRA conducts disciplinary actions and promulgates rules that govern the industry—functions that appear to be governmental.<sup>198</sup> So is FINRA a government agency eligible for *Chevron* deference?

To qualify as an agency under the Administrative Procedures Act, an entity or person must be an “authority of the Government of the United States.”<sup>199</sup> The question then becomes in what circumstances does a person or entity qualify as an “authority”? According to one leading treatise, an agency must have the power to take legally binding action, to make final dispositions, or to perform governmental functions.<sup>200</sup> Does FINRA meet these standards?

Professor Roberta Karmel, former Commissioner of the SEC, former director of the NYSE and former member of the National Adjudicatory Council of the NASD,<sup>201</sup> has written a thoughtful article on FINRA's status *vel non* as a government agency.<sup>202</sup> Karmel does not focus on the *Chevron* deference issue per se, but rather on FINRA's immunity from suit, the preemptive force of its rules and the constitutional rights of

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194. Pub. L. No. 74-198, §§ 3, 6, 49 Stat. 449, 451–52 (1935) (codified as amended at 29 U.S.C. §§ 153, 156 (2012)). See also Exec. Order 6763 (June 29, 1934), available at <http://www.presidency.ucsb.edu/ws/index.php?pid=14708#axzz1yMf4r3PI> (stating that prior to enactment of the NLRA, President Franklin Roosevelt had issued an executive order creating an NLRB).

195. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15623 (July 9, 1970), reprinted in 5 U.S.C. app. at 202 (2006). See also Executive Order 11,548, 35 Fed. Reg. 11,677 (July 20, 1970) (specifying responsibilities to be vested in the Administrator of the EPA).

196. See *supra* note 160 and accompanying text (describing the creation of FINRA).

197. Karmel, *supra* note 160, at 153, 158.

198. *Id.* at 159.

199. 5 U.S.C. § 551(1) (2012).

200. I RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 1.2, at 4–5 (5th ed. 2010).

201. Karmel, *supra* note 160, at 151 n.1.

202. See *id.* at 152 (“[C]ategorizing FINRA as a government agency, at this time, would not necessarily be useful . . . but when FINRA is exercising investigative and disciplinary functions it should be treated like a government agency.”); *id.* at 159 (“[W]ith respect to at least some of its activities, and in particular disciplinary actions and rule-making, FINRA will be performing functions that can be considered governmental.”).

persons it investigates and prosecutes.<sup>203</sup> Karmel notes that the origins of FINRA's regulatory authority were contractual, not governmental—"a matter of private contract between the NYSE and its members."<sup>204</sup> Moreover, with respect to its disciplinary actions and rule-making, "FINRA [performs] functions that can be considered governmental."<sup>205</sup>

In all likelihood, the courts will sidestep the question of FINRA's status as a government agency because the SEC, created by Congress in the Securities Exchange Act of 1934<sup>206</sup> and whose status as a governmental agency is unquestioned, has expansive power to oversee the arbitration procedures employed by FINRA.<sup>207</sup> FINRA Rules must receive SEC approval before they become effective.<sup>208</sup> Moreover, the SEC has statutory authority to "abrogate, add to and delete from" existing FINRA and other SRO rules,<sup>209</sup> as well as de novo authority to cancel, reduce or set aside sanctions imposed by FINRA.<sup>210</sup> For these reasons, courts have treated FINRA Rules as having the "force and effect" of federal regulations,<sup>211</sup> and as a result it seems quite likely that the FINRA rules are eligible for *Chevron* deference.<sup>212</sup> The Legal

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203. *Id.* at 171–98.

204. *Id.* at 196. *See also id.* at 168 ("[I]t is no[] longer a voluntary SRO." (emphasis omitted)).

205. *Id.* at 159.

206. Pub. L. No. 73-291, § 4, 48 Stat. 881, 885 (codified as amended at 15 U.S.C. § 78d (2012)).

207. *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227–33 (1987) (describing the SEC's "expansive power to ensure the adequacy of the arbitration procedures employed by the SROs").

208. 15 U.S.C. § 78s(b)(1) (2012). *See also Charles Schwab & Co. v. FINRA*, No. C-12-518EDL, 2012 WL 1859030, at \*1 (N.D. Cal. May 11, 2012) (noting that FINRA "file[d] proposed rules with the SEC, which then had authority to approve or disapprove all proposed rules").

209. 15 U.S.C. § 78s(c) (providing that the SEC "by rule, may abrogate, add to, and delete from . . . the rules of a [SRO] . . . as the Commission deems necessary or appropriate to insure the fair administration of the [SRO], to conform its rules to requirements of this chapter . . . , or otherwise in furtherance of the purposes of this chapter").

210. *Id.* § 78s(d)–(e); Kenneth B. Orenbach, *A New Twist to an On-Going Debate about Securities Self-Regulation: It's Time to End FINRA's Federal Income Tax Exemption*, 31 VA. TAX REV. 135, 151 (2011).

211. *Charles Schwab*, 2012 WL 1859030, at \*1 ("Because of the SEC's oversight, FINRA Rules approved by the SEC are expressions of federal legislative power and have the force and effect of a federal regulation."). *See also Credit Suisse First Bos. Corp. v. Grunwald*, 400 F.3d 1119, 1132 (9th Cir. 2005) ("[T]he NASD arbitration procedures . . . have preemptive force over conflicting state law."); Karmel, *supra* note 160, at 183 (noting that in certain cases, "SRO rules were essentially treated as SEC rules, and the SROs were therefore essentially regarded as state actors").

212. *See* Karmel, *supra* note 160, at 196 (noting that none of the cases where SRO rules have been held to preempt federal antitrust laws "focused on the fact that an SRO rule was displacing the antitrust laws. Rather, the focus was on the SEC's authority and the SEC's oversight of the

Process students might nevertheless relish the opportunity to consider the nature of government and why the classification as a government agency matters.

### 3. Does the NLRB Ruling Have the Force of Law or Procedural Formality to Qualify for *Chevron* Deference?

Even if the NLRB and FINRA (or the SEC) qualify as governmental agencies, their rulings and rules are not entitled to *Chevron* deference unless they have authority “to make rules carrying the force of law” and their interpretations were “promulgated in the exercise of that authority.”<sup>213</sup> According to the Supreme Court in *United States v. Mead Corp.*, tariff classifications issued by the United States Customs Service “are beyond the *Chevron* pale,”<sup>214</sup> as are interpretations in opinion letters, policy statements, agency manuals, and enforcement guidelines,<sup>215</sup> although these classifications and interpretations may be “entitled to respect” to the extent they have the “power to persuade.”<sup>216</sup>

In concluding that tariff classifications are ineligible for *Chevron* deference, the Court in *Mead* noted that 46 different Customs Service offices churned out between 10,000 and 15,000 tariff classifications per year, suggesting a lack of intent that its cursory rulings, issued without great deliberation and care, would have the force of law.<sup>217</sup> This threshold inquiry into a rule’s “force of law,” which logically precedes the *Chevron* two-step analysis, is part of the *Chevron* “step zero” inquiry,<sup>218</sup> which asks “whether the *Chevron* framework applies at all.”<sup>219</sup>

In determining whether Congress delegated an agency authority to “make rules carrying the force of law,” the Court observed that

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conduct in question”).

213. *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001); *see also id.* at 232 (“[I]nterpretive rules . . . enjoy no *Chevron* status as a class.”); Eskridge & Schwartz, *supra* note 180, at 2627 (“*Chevron* does not apply unless Congress has delegated authority to create binding legal orders or rules.”); Merrill & Hickman, *supra* note 180, at 837 (“Congress impliedly delegates the power to interpret only when it grants the agency power to take action that binds the public with the force of law.”).

214. *Mead*, 533 U.S. at 234.

215. *Christensen v. Harris Cnty.*, 529 U.S. 576, 587 (2000).

216. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

217. *Mead*, 533 U.S. at 233–34.

218. *See, e.g.*, Merrill & Hickman, *supra* note 180, at 836 (coining the phrase); Sunstein, *supra* note 181, at 191 & n.19 (borrowing the phrase for the article’s title).

219. Sunstein, *supra* note 181, at 191. A separate part of the “step zero” inquiry asks whether a fundamental issue that goes to the heart of the regulatory scheme is involved, in which case the amount of deference owed is reduced on the theory that Congress has not delegated agencies authority to resolve such fundamental issues. *Id.* at 193.

“[d]elegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.”<sup>220</sup> For example, in a 2011 decision, the Court concluded that a Treasury Department rule was entitled to *Chevron* deference, noting that “[t]he Department issued the . . . rule only after notice-and-comment procedures, . . . a consideration identified in our precedents as a ‘significant’ sign that a rule merits *Chevron* deference.”<sup>221</sup> The FINRA Rules at issue here were adopted after a notice-and-comment period<sup>222</sup> and therefore appear to satisfy *Chevron* “step zero.”

But what of the NLRB ruling? While rules adopted after a notice-and-comment period may exemplify the type of administrative formality that merits *Chevron* deference, the Court has frequently accorded such deference to formal agency adjudications as well.<sup>223</sup> The

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220. *Mead*, 533 U.S. at 226–27; see also *id.* at 230–31 (“[T]he overwhelming number of our cases applying *Chevron* deference have reviewed the fruits of notice-and-comment rulemaking or formal adjudication. That said, and as significant as notice-and-comment is in pointing to *Chevron* authority, the want of that procedure . . . does not decide the case, for we have sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded . . .”) (footnote and citations omitted); Sunstein, *supra* note 182, at 223 (“[T]he relationship among ‘force of law,’ formal procedure, and *Chevron* deference is confusing.”). Thomas Merrill and Kathryn Tongue Watts are careful to differentiate between rules that have the force of law (violations of which subject the violator to a sanction) and interpretive rules or procedure rules, which lack the force of law and impose no sanction. Thomas W. Merrill & Kathryn Tongue Watts, *Agency Rules with the Force of Law: The Original Convention*, 116 HARV. L. REV. 467, 472, 474, 582–87 (2002) (discussing Congress’s original convention for distinguishing between legislative and housekeeping rules and advocating that it be adopted as a canon of interpretation).

221. *Mayo Found. for Med. Educ. & Research v. United States*, 131 S. Ct. 704, 714 (2011) (citations omitted).

222. See Order Approving a Proposed Rule Change Adopting FINRA Rules Regarding Books and Records in the Consolidated FINRA Rulebook, Exchange Act Release No. 34-63784 (Jan. 27, 2011) (approving FINRA Rule 2268 following a notice-and-comment period); SEC Approves Consolidated FINRA Rules Governing Books and Records, Regulatory Notice 11-19 (Apr. 2011) (announcing the implementation date of FINRA Rule 2268); Order Approving Proposed Rule Change Relating to the Adoption of NASD Rules 12000 Through 14000 Series as FINRA Rules in the New Consolidated FINRA Rulebook, Exchange Act Release No. 34-58643 (Sept. 25, 2008) (approving a proposal to include the Code of Arbitration Procedure for Customer Disputes in the consolidated FINRA Rulebook following a notice-and-comment period); SEC Approves New Consolidated FINRA Rules, FINRA Announces SEC Approval and Effective Date for New Consolidated FINRA Rules, Regulatory Notice 08-57 (Oct. 2008) (announcing the implementation date for the first phase of the new consolidated FINRA Rules). See also Eskridge & Baer, *supra* note 180, at 1186 & n.321 (identifying “almost two dozen statutes that regularly trigger *Chevron* deference,” including the Securities Exchange Act).

223. *Mead*, 533 U.S. at 230 & n.12 (citing cases). The Court has deferred to agency interpretations adopted through even less formal means. See *Barnhart v. Walton*, 535 U.S. 212, 221–22 (2002) (“[T]he fact that the Agency previously reached its interpretation through means less formal than ‘notice and comment’ rulemaking does not automatically deprive that interpretation of the judicial deference otherwise its due. . . . [T]he interstitial nature of the legal

Supreme Court in *Mead* explained, “[i]t is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.”<sup>224</sup>

The NLRA, which sets out the NLRB’s adjudicatory process, requires that testimony be reduced to writing and that the Board “state its findings of fact”; it authorizes individuals to seek review in the court of appeals if they are aggrieved by a final Board order.<sup>225</sup> These statutorily required procedural protections are designed to ensure deliberation and the fairness of the process. Interestingly, while the NLRB’s adjudicatory process affords these protections, the Board must petition a court to enforce its orders,<sup>226</sup> suggesting that its rulings may nevertheless lack the force of law.<sup>227</sup> The Supreme Court has regularly deferred to NLRB rulings notwithstanding the non-self-executing nature of NLRB rulings.<sup>228</sup> In fact, *Mead* cited cases deferring to NLRB rulings to illustrate that agency adjudications may be sufficiently formal to qualify for *Chevron* deference.<sup>229</sup>

Is it enough, then, that Congress has authorized the NLRB to engage in formal adjudication or must it have power to enter self-executing orders? The answer may depend on the theoretical rationale for *Chevron* deference. On the one hand, if *Chevron* rests principally on

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question, the related expertise of the Agency, the importance of the question to the administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate lens through which to view the legality of the Agency interpretation . . .”). See also Sunstein, *supra* note 181, at 216–19 (discussing *Barnhart* and its case-by-case inquiry into the interpretative method used).

224. *Mead*, 533 U.S. at 230.

225. 29 U.S.C. § 160(c) (2012).

226. *Id.* § 160(e).

227. See Eskridge & Baer, *supra* note 180, at 1123–24 & n.152 (explaining that the Supreme Court has assumed the NLRB has law-making authority despite lacking the ability to enforce its own orders); Merrill & Hickman, *supra* note 180, at 838–39 n.23 (“NLRB adjudications are not entitled to *Chevron* deference because NLRB orders are not self-executing.”); Sunstein, *supra* note 181, at 223, 247–48 & n.252 (“As I have noted, some agency actions do not have force of law, even if based on formal procedures (e.g., the decisions of the NLRB).”).

228. See, e.g., *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 408–09 (1996) (according *Chevron* deference to a decision of the NLRB that classified “live-haul” workers as covered employees rather than as exempt agricultural laborers); *ABF Freight Sys., Inc. v. NLRB*, 510 U.S. 317, 324–25 (1994) (according *Chevron* deference to a decision of the NLRB that ordered the reinstatement of an employee who had provided false testimony before the administrative law judge). See also Eskridge & Baer, *supra* note 180, at 1124 n.152 & 1186 & n.321 (identifying the NLRA as a statute “that regularly trigger[s] *Chevron* deference”).

229. *Mead*, 533 U.S. at 230 n.12 (citing, *inter alia*, *Holly Farms*, 517 U.S. at 408–09; *ABF Freight Sys.*, 510 U.S. at 324–25).

implied congressional intent, and if “the decision by Congress to require agencies to seek judicial enforcement of their orders . . . [implies] that Congress did not intend to delegate primary interpretational authority to such an agency,”<sup>230</sup> then only agencies with power to enter self-executing orders should be entitled to *Chevron* deference. On the other hand, if the principal rationale for deference is institutional competency or agency expertise, then agency actions that are the product of procedures formal enough to ensure deliberation should be entitled to deference, even if they are not self-executing. Surely the NLRB’s decision in *Horton* would provide the Legal Process students with a meaningful opportunity to explore *Chevron*’s “step zero” and to consider the types of agency actions that qualify for *Chevron* deference.

4. Do the NLRB Ruling and the FINRA Rules Trench upon Federal Policies beyond the Agencies’ Authority?

While these “step zero” issues would provoke lively discussions in the Legal Process class, the issue that really would engage the students, I think, is the *scope* of *Chevron* deference. Assuming that both the NLRB and FINRA (or at least the SEC) qualify as agencies and their rules and rulings have the force of law or are the product of sufficient procedural formality to qualify for *Chevron* deference, what happens if their rules or rulings conflict with policy objectives underlying other federal laws? Stated differently, is the portion of the NLRB decision that concluded that it did not conflict with the FAA entitled to *Chevron* deference? To the extent that FINRA (or the SEC) concluded that its Rules are valid notwithstanding *Concepcion*, is its reading entitled to deference? Here, several formidable arguments against deference deserve mention.

First, the Supreme Court has declined to defer to the NLRB’s interpretation of a statute “far removed from its expertise”<sup>231</sup> and has “never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies *unrelated to the NLRA*.”<sup>232</sup> For example, in *Hoffman Plastic Compounds, Inc. v. NLRB*, the Board had ordered a company, Hoffman Plastic Compounds, to offer reinstatement and back pay to four employees it had fired due to union organizing activity in violation of

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230. Merrill & Hickman, *supra* note 180, at 892.

231. *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143–44 (2001) (citing *S. S. Co. v. NLRB*, 316 U.S. 31, 40–46 (1942)).

232. *Id.* at 144 (emphasis added); *see id.* at 147 (“[W]here the Board’s chosen remedy trenches upon a federal statute or policy outside the Board’s competence to administer, the Board’s remedy may be required to yield.”).

the NLRA.<sup>233</sup> One of the employees, Jose Castro, was an undocumented worker, who had initially gained employment with Hoffman by offering a friend's birth certificate to establish his eligibility.<sup>234</sup> Castro's use of another person's documents to obtain employment violated the Immigration Reform and Control Act ("IRCA"), which bars both an employer's knowing hiring of unauthorized aliens and a prospective employee's use of false documents, or the documents of another, to obtain employment.<sup>235</sup> Since "awarding back pay to illegal aliens runs counter to the policies underlying IRCA, *policies the Board had no authority to enforce or administer*,"<sup>236</sup> the Court held that the "award lies beyond the bounds of the Board's remedial discretion."<sup>237</sup>

Here, the NLRB ruling and the FINRA Rules involve more than exercises of "remedial discretion." The FINRA Rules are prophylactic measures designed to ensure that brokerage customers have the opportunity to pursue class action litigation in court (rather than a particular remedy should they prove their claim). Likewise, the NLRB ruling clarifies the right of employees to press their claims collectively (regardless of the remedy sought), and defines an unfair labor practice. Even if these rules and ruling are not remedial in nature, however, they may "trench upon" the policies that the *Concepcion* Court has read into the FAA, and their entitlement to deference may be questioned on that ground.

Second and related, where statutes—like the Freedom of Information Act or the Administrative Procedures Act—apply to all or most administrative agencies, it is "universally agreed that no single agency with enforcement power has been charged with administration of these statutes, and hence that *Chevron* does not apply."<sup>238</sup> Since the FAA applies broadly and neither the NLRB nor FINRA (nor the SEC) is charged with its enforcement, the FINRA Rules and the NLRB ruling are not entitled to *Chevron* deference to the extent they interpret the FAA. Thus, the Board's conclusion that its decision accommodates the

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233. *Id.* at 140 (citing 29 U.S.C. § 158(a)(3)).

234. *Id.* at 141.

235. 8 U.S.C. § 1324a (2012).

236. *Hoffman Plastic*, 535 U.S. at 149 (emphasis added).

237. *Id.* See *id.* at 151 ("[A]llowing the Board to award back pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in IRCA.").

238. Merrill & Hickman, *supra* note 180, at 893. See also Sunstein, *supra* note 181, at 209 ("Agencies are not given *Chevron* deference when they are interpreting the Freedom of Information Act, the National Environmental Policy Act, and other statutes that cut across a wide range of agencies.").



FAA is likely not entitled to *Chevron* deference because the NLRB is not charged with administration of the FAA.

But even if the NLRB's or FINRA's interpretations of the FAA are not themselves entitled to *Chevron* deference, portions of their respective ruling and rules may be. In particular, the portion of the NLRB ruling finding that class action waivers violate the NLRA should be eligible for deference under *Chevron* and *Mead* because the agency has authority to adjudicate claims arising under the labor statute. Likewise, the FINRA Rules may be eligible for *Chevron* deference because they embody a permissible interpretation of the Securities Exchange Act, a statute within the SEC's purview. If this much is correct, however, a court will still have to decide how to resolve the conflict between the NLRA, as interpreted by the NLRB in *Horton*, or the Exchange Act, as interpreted in the FINRA Rules, and the FAA, as interpreted by the Supreme Court in *Concepcion*.

Here, a third argument comes into play: *Chevron* deference "does not trump prior interpretations of statutes adopted by the Court itself."<sup>239</sup> Not only has the Supreme Court held that its own interpretations of a statute are entitled to stare decisis effect and form the backdrop against which agency actions are assessed,<sup>240</sup> but the Courts of Appeals have declined to defer to agency decisions interpreting Supreme Court precedent.<sup>241</sup> As the D.C. Circuit explained (in a case involving a decision of the Federal Election Commission):

We are not obliged to defer to an agency's interpretation of Supreme Court precedent under *Chevron* or any other principle. The Commission's assertion that Congress and the Court are equivalent in

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239. Merrill & Hickman, *supra* note 180, at 839. See also *Neal v. United States*, 516 U.S. 284, 295 (1996) ("Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.") (citations omitted); Merrill & Hickman, *supra* note 180, at 915 ("The Supreme Court has consistently ruled that agency interpretations of statutes that deviate from the Court's own precedents are not entitled to *Chevron* deference."); Pierce, *Reconciling Chevron*, *supra* note 181, at 2226 (describing the Supreme Court's "mechanical rule" that its own "precedents always trump the deference owed under *Chevron*"); *id.* at 2259-62 (criticizing the Court's mechanical rule and proposing an alternate methodology for reconciling conflicts between *Chevron* and *stare decisis*); Rebecca Hanner White, *The Stare Decisis "Exception" to the Chevron Deference Rule*, 44 FLA. L. REV. 723, 726-29 (1992) (proposing an approach for resolving tension between *Chevron* and *stare decisis*).

240. *Neal*, 516 U.S. at 295; *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992)..

241. See, e.g., *NLRB v. U.S. Postal Serv.*, 660 F.3d 65, 68-69 (1st Cir. 2011) ("[A] court of appeals is 'not obligated to defer to an agency's interpretation of the Supreme Court precedent under *Chevron*.'" (citations omitted)); *New York New York, LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002) (repeating the principle that "the Board's judgment is not entitled to judicial deference"); *Univ. of Great Falls v. NLRB*, 278 F.3d 1335, 1341 (D.C. Cir. 2002) (finding that agency interpretation of Supreme Court precedent is not entitled to deference).

this respect is inconsistent with *Chevron*'s basic premise. *Chevron* recognized that Congress delegates policymaking functions to agencies, so deference by the courts to agencies' statutory interpretations of ambiguous language is appropriate. But the Supreme Court does not, of course, have a similar relationship to agencies, and agencies have no special qualifications of legitimacy in interpreting Court opinions. There is therefore no reason for courts—the supposed experts in analyzing judicial decisions—to defer to agency interpretations of the Court's opinions.<sup>242</sup>

Thus, the NLRB's and FINRA's interpretations of *Concepcion* may not be entitled to *Chevron* deference.

If portions of the NLRB ruling and FINRA Rules (interpreting the NLRA and the Securities Exchange Act of 1934, respectively) remain eligible for *Chevron* deference, how will the apparent conflict with the FAA be resolved and by whom? Which statute's policy must give way? Neither the NLRB nor FINRA (nor the SEC) has authority to enforce the FAA, and their interpretations of the Supreme Court's decision in *Concepcion* are not likely entitled to deference.<sup>243</sup> Thus, it appears likely that the courts (and ultimately the Supreme Court itself) will be called upon to resolve this conflict between federal policies. Given its strong pro-arbitration policy, it would not be surprising if the Court ultimately concludes that the NLRB ruling and the FINRA Rules "trench" upon the pro-arbitration policy that the Court has read into the FAA.

In all events, the class action waiver materials would offer the Legal Process students a wonderful opportunity to explore a host of issues lying under the surface of *Chevron*, and to reflect upon the nature of administrative agencies, their relationships with both Congress and the Court, and their role in the interpretation and development of law.

### III. THE LOWER FEDERAL COURTS AND THE SUPREME COURT

My Legal Process course not only examined the dynamic relationships among Congress, the Supreme Court and administrative agencies, but it analyzed the uses of precedent,<sup>244</sup> the values of adhering to precedent,<sup>245</sup> and the reasons for occasionally overruling

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242. *Akins v. FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996), *vacated on other grounds*, 524 U.S. 11 (1998).

243. *See supra* notes 231–34 and accompanying text (discussing the Court's reluctance to defer to agency decisions that conflict with prior interpretations of statutes by the Court).

244. *See, e.g.*, KARL N. LEWELLYN, *THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY* 72–76 (1960) (differentiating between strict and loose views of precedent).

245. *See, e.g.*, Eskridge, *Overruling Statutory Precedents*, *supra* note 119, at 1364–67 (citing institutional competency, legislative acquiescence and practical reliance as rationales for adhering

precedent.<sup>246</sup> Because this was a first-semester, first-year course, we began with an examination of the judicial system—of parallel state and federal court systems, each with appellate courts that review lower court decisions. We assumed that when the Supreme Court announces an interpretation of the law, the lower courts follow its decision, whether the Court gets it right or not. As Professors Frank Cross and Emerson Tiller asserted, lower courts “are presumed to adhere to the self-enforcing principle of stare decisis and to apply the doctrines of higher courts to the particular facts of the underlying case.”<sup>247</sup> As political scientist John Gruhl described the hierarchical model over thirty years ago, the Supreme Court renders “authoritative decisions” and we assume that the lower courts “obey[] the dictates of the Supreme Court.”<sup>248</sup>

Once the students examined the hierarchical model, we considered whether the courts’ respective roles in interpretation and law-making might be more complex than the conventional wisdom suggests. Does the actual relationship among the courts differ from the traditional hierarchical model, and if so, how?

#### A. *The Lower Courts as Change Agents*

Professor Hillel Levin suggests that the Supreme Court’s recent pleading decisions in *Bell Atlantic Corp. v. Twombly*<sup>249</sup> and *Ashcroft v. Iqbal*,<sup>250</sup> as well as its earlier summary judgment trilogy,<sup>251</sup> confound

to statutory precedents); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854 (1992) (“[T]he very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable.”) (citation omitted).

246. See, e.g., Eskridge, *Overruling Statutory Precedents*, *supra* note 119, at 1369–84 (analyzing procedural laxity, implied delegation of law-making authority by Congress to the Court, and lack of reliance as reasons why the Supreme Court occasionally reconsiders its own statutory precedents). See also *Planned Parenthood*, 505 U.S. at 854–55 (“[W]hen this Court reexamines a prior holding, . . . we may ask whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend . . . hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.”).

247. Frank B. Cross & Emerson H. Tiller, *Judicial Partisanship and Obedience to Legal Doctrine: Whistleblowing on the Federal Courts of Appeals*, 107 *YALE L.J.* 2155, 2155 (1998).

248. John Gruhl, *The Supreme Court’s Impact on the Law of Libel: Compliance by Lower Federal Courts*, 33 *W. POL. Q.* 502, 502 (1980). Gruhl’s study of lower court compliance with Supreme Court decisions on libel law supports the hierarchical model: “The Court drastically altered doctrine which had remained relatively stable throughout most of the country’s history, and it got the lower courts to comply immediately and overwhelmingly.” *Id.* at 518–19.

249. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

250. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). See also Edward Brunet, *The Efficiency of Summary Judgment*, 43 *LOY. U. CHI. L.J.* 689, 694 (stating that *Iqbal* and *Twombly* cast a “sea of

the common wisdom regarding the relationship between the Supreme Court and the lower federal courts.<sup>252</sup> In both sets of cases, he posits, the changes in the law were not initiated by the Supreme Court, but rather by the lower courts, which had long been pushing for heightened pleading requirements and had been using summary judgment “expansively to dismiss apparently meritless cases for quite a long time before the Court jumped on the bandwagon.”<sup>253</sup> In neither case, Levin argues, did the Supreme Court pronounce a bold change in procedural law, which the lower courts then meekly followed.<sup>254</sup> Levin believes that “[a]t most, the Supreme Court has been a lag indicator for what was already happening in the lower courts.”<sup>255</sup>

Levin generalizes from the summary judgment and pleading examples to question whether

our general view of the relationship between the Supreme Court and the lower courts may be backwards. It is not necessarily, as we tend to assume, that if we read Supreme Court opinions we can deduce what lower courts will do (under the assumption that they follow precedent); rather it is that we can read lower court opinions and deduce where the Supreme Court may end up.<sup>256</sup>

Thus, Levin presents two competing views of the relationship between the Supreme Court and the lower courts. In the conventional hierarchical view, the Supreme Court announces changes in the interpretation of the law and the lower courts obediently follow. In Levin’s alternative view, it is the lower courts, motivated by docket pressures perhaps, that push for changes in the law and the Supreme Court that eventually follows their lead.

### *B. The Lower Courts as Brakes on Change*

The class action waiver cases suggest yet a third view of the lower courts’ role vis-à-vis the Supreme Court. Rather than obedient followers or catalysts for change, the lower courts are sometimes reluctant, even recalcitrant, forces that *resist* the Supreme Court’s

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doubt” around Rule 12(b)(6) motions and caused commentators to “reexamine summary judgment in the context of major pleading changes”).

251. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

252. Hillel Y. Levin, *Iqbal, Twombly, and the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143, 144–45, 149–52 (2010).

253. *Id.* at 150.

254. *Id.* at 149.

255. *Id.*

256. *Id.* at 152.

attempts to change law on an issue.<sup>257</sup>

In the years preceding *Concepcion*, a number of lower courts invalidated class action waivers in arbitration clauses on the theory that they were unconscionable under state law<sup>258</sup> or interfered with the enforcement of statutory rights.<sup>259</sup> The Supreme Court called both of these theories into question in the last year. In *Concepcion*, the Supreme Court made clear—or attempted to make clear—that class action waivers are enforceable notwithstanding state unconscionability law because collective action interferes with the FAA objective of “encourag[ing] efficient and speedy dispute resolution.”<sup>260</sup> In the Court’s words, “Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”<sup>261</sup> The Court in *Concepcion* concluded that California’s unconscionability case law is preempted by the FAA because it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>262</sup>

Likewise, in *CompuCredit Corp. v. Greenwood*, decided less than a year after *Concepcion*, the Supreme Court made clear that the FAA

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257. Perhaps the most recent notable illustration of a “resistant” court is the Montana Supreme Court. See *W. Tradition P’ship, Inc. v. Attorney Gen.*, 271 P.3d 1 (Mont. 2011) (upholding a Montana law that prohibited independent political expenditures by corporations, notwithstanding the Supreme Court’s decision in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010)), *rev’d sub nom.* *Am. Tradition P’ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012) (per curiam). See *id.* at 13 (finding that Montana has a compelling interest in prohibiting certain political expenditures). In a per curiam opinion, the Supreme Court summarily reversed, stating that “Montana’s arguments in support of the judgment below either were already rejected in *Citizens United*, or fail to meaningfully distinguish that case.” *Am. Tradition P’ship*, 132 S. Ct. at 2491.

258. See, e.g., *Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1110 (Cal. 2005) (“[W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the . . . waivers are unconscionable under California law and should not be enforced.”), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

259. See, e.g., *In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 320 (2d Cir. 2009) (“*AmEx I*”) (“[T]he class action waiver . . . cannot be enforced . . . because to do so would grant Amex de facto immunity from antitrust liability by removing plaintiffs’ only reasonably feasible means of recovery. . . . [W]e have relied here on a vindication of statutory rights analysis, which is part of the federal substantive law of arbitrability.”), *vacated sub nom.* *Am. Express Co. v. Italian Colors Rest.*, 130 S. Ct. 2401 (2010).

260. *Concepcion*, 131 S. Ct. at 1749 (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)); see also *supra* Part I.B.2 (discussing the *Concepcion* Court’s focus on efficiency).

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

262. *Id.* at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

requires the enforcement of arbitration agreements even when the claimants present federal statutory claims, “unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’”<sup>263</sup> Even where a federal statute requires companies to inform consumers that they “have a right to sue”<sup>264</sup> in the event of a statutory violation and even where the statute invalidates any waiver by a consumer of any protection under the law,<sup>265</sup> the Court concluded that a pre-dispute arbitration agreement is enforceable because the disclosure provision creates no right to sue *in court*.<sup>266</sup> Instead, the Court read the “right to sue” language in the statute as describing the consumer’s right to enforce the law’s requirements, but not necessarily in court.<sup>267</sup>

In light of these recent Supreme Court decisions, and applying the traditional hierarchical model, one would expect that when employees or consumers challenge the enforceability of class action waivers, trial courts and intermediate appellate courts would reject unconscionability defenses, citing *Concepcion*, and would be skeptical of arguments claiming a statutory right to sue in court or to proceed collectively, in light of *CompuCredit*. And while most lower courts have followed these courses and have upheld class action waivers,<sup>268</sup> interestingly, not all have. The following Sections focus on a few decisions that either have struck down a class action waiver notwithstanding *Concepcion*, or at least have read the Court’s recent opinions narrowly. These cases suggest that the lower courts do not always obediently follow Supreme

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263. *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (quoting *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)).

264. Credit Repair Organizations Act, 15 U.S.C. § 1679c(a) (2012).

265. *Id.* § 1679f(a).

266. *CompuCredit Corp.*, 132 S. Ct. at 669–70.

267. *Id.* at 670.

268. See, e.g., *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1158 & n.2, 1161 (9th Cir. 2012) (viewing *Concepcion* as “broadly written”; reading the Court’s “statutory rights” cases as “limited to federal statutory rights”; and concluding that “*Concepcion* controls, [and] the FAA preempts the Washington state law invalidating the class-action waiver”) (emphasis added); *Quilloin v. Tenet Healthsystem Phil., Inc.*, 673 F.3d 221, 232 (3d Cir. 2012) (“[T]he Pennsylvania law prohibiting class action waivers is surely preempted by the FAA under *Concepcion* . . .”) (citation omitted). See also PUBLIC CITIZEN & NAT’L ASS’N OF CONSUMER ADVOCATES, JUSTICE DENIED: ONE YEAR LATER: THE HARMS TO CONSUMERS FROM THE SUPREME COURT’S *CONCEPCION* DECISION ARE PLAINLY EVIDENT 4 (April 2012), available at <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf>

(“[C]orporations have frequently invoked *Concepcion* to argue that consumers’ claims should not be pursued collectively but, rather, individually. Courts have usually accepted these arguments.”); Sternlight, *supra* note 73, at 708 (“Most courts are rejecting all potential distinctions and are instead applying *Concepcion* broadly as a ‘get out of class actions free’ card.”); Weston, *supra* note 73, at 115–18 (surveying cases enforcing class action waivers post-*Concepcion*).

Court precedents, but rather sometimes resist changes in the law by reading the Court's decisions narrowly, drawing fine distinctions or otherwise seeking to limit the extent of the change in the law wrought by Supreme Court decisions.

### 1. State and Federal Courts Invalidate Representative Action Waivers in PAGA Cases

Both state and federal courts in California<sup>269</sup> have held that *Concepcion* does not govern representative actions brought under the California Private Attorney General Act of 2004 ("PAGA").<sup>270</sup> In *Brown v. Ralphs Grocery Co.*, the employment application completed by store employees incorporated by reference the company's arbitration policy, which barred any dispute from being "heard or arbitrated on a class action basis, as a private attorney general, or on bases involving claims or disputes brought in a representative capacity . . . ."<sup>271</sup> PAGA permits an employee to sue an employer for violations of the state labor code "on behalf of himself or herself and other current or former employees" to recover a civil penalty.<sup>272</sup> In PAGA representative actions, the named plaintiff acts as a private attorney general.<sup>273</sup> The primary goal of a PAGA action is not restitution—prevailing employees receive only 25% of the recovery<sup>274</sup>—but rather enforcement of a public right that otherwise would be enforced by a state agency.<sup>275</sup>

Reading *Concepcion* narrowly to permit waivers of "the private individual right of a consumer to pursue class action remedies in court or arbitration,"<sup>276</sup> the California Court of Appeals in *Brown* concluded that it did "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."<sup>277</sup> The state court eschewed the unconscionability doctrine (which had been preempted in *Concepcion*), relying instead on the public nature of the

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269. See *Brown v. Ralphs Grocery Co.*, 128 Cal. Rptr. 3d 854, 856 (Ct. App. 2011), cert. denied, 132 S. Ct. 1910 (2012) (discussing PAGA); *Urbino v. Orkin Servs. of Cal., Inc.*, No. 2:11-cv-06456-CJC(PJWx), 2011 WL 4595249, at \*10–12 (C.D. Cal. Oct. 5, 2011).

270. CAL. LAB. CODE § 2698 *et seq.* (West 2012).

271. *Brown*, 128 Cal. Rptr. 3d at 857 (quoting the company's arbitration policy, which was incorporated by reference into the employment application).

272. CAL. LAB. CODE § 2699(a). See also *Franco v. Athens Disposal Co.*, 90 Cal. Rptr. 3d 539, 555–56 (Ct. App. 2009) (noting that PAGA authorizes the recovery of civil penalties on behalf of others).

273. *Brown*, 128 Cal. Rptr. 3d at 860. Standard class action requirements need not be satisfied. *Id.* (citing *Arias v. Super. Ct.*, 209 P.3d 923, 927 & n.2 (Cal. 2009)).

274. CAL. LAB. CODE § 2699(i).

275. *Brown*, 128 Cal. Rptr. 3d at 860–62.

276. *Id.* at 861 (emphasis added).

277. *Id.* (emphasis added) (citations omitted).

representative action. In short, the California state court opined, “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.”<sup>278</sup> Thus, the court refused to enforce the representative action waiver.

In *Urbino v. Orkin Services of California, Inc.*, a federal district court in California reached the same result, albeit on a different theory, finding that a “PAGA waiver is unconscionable because it both deprives the individual of the right to bring a representative action and deprives the LWDA [(Labor and Workforce Development Agency)] the benefits of the enforcement action brought by aggrieved employees.”<sup>279</sup>

## 2. Federal Appeals Court Invalidates Class Action Waiver in Antitrust Case

Relying on neither state unconscionability doctrine nor the public nature of the right at issue, the Second Circuit invalidated a class action waiver in *In re American Express Merchants’ Litigation* because its practical effect would have been to deny plaintiffs the opportunity to press claims against the American Express Company (“AmEx”) that arose under federal antitrust statutes.<sup>280</sup> The form agreement between the merchants and AmEx contained a mandatory arbitration clause,

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278. *Id.* at 863 (citation omitted). It remanded the action to the trial court to determine whether the waiver provision, waiving the right to pursue a representative action under PAGA, should be severed from the rest of the arbitration agreement, or whether the entire arbitration agreement should be stricken. *Id.* at 864. In a footnote, the court raised the question whether PAGA representative actions might be arbitrable. *Id.* at 864 n.9 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758 (2010)).

279. *Urbino v. Orkin Servs. of Cal., Inc.*, 2011 WL 4595249, at \*10 (C.D. Cal. Oct. 5, 2011). The court acknowledged that a prior decision of the same court had upheld a class action/collective action waiver applied to PAGA claims because “the arbitration of a representative PAGA action would, like a class claim, require a more cumbersome and costlier process in contravention to the streamlined, informal arbitral process envisioned by the FAA, and because there is also the increased risk that erroneous decisions on a PAGA claim would go uncorrected.” *Id.* at \*11 (discussing *Quevedo v. Macy’s, Inc.*, 798 F. Supp. 2d 1122, 1142–43 (C.D. Cal. 2011)).

280. *In re Am. Express Merchs.’ Litig. (AmEx III)*, 667 F.3d 204 (2d Cir. 2012), *reh’g en banc denied*, 681 F.3d 139 (2d Cir. 2012), *cert. granted sub nom. Am. Express Co. v. Italian Colors Rest.*, No. 12-133, 81 U.S.L.W. 3070 (U.S. Nov. 9, 2012). *See also* Gilles & Friedman, *supra* note 73, at 640–47 (maintaining that the vindication of federal statutory rights doctrine survives *Concepcion* but questioning its real-world impact); David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 746–67 (2012) (drawing on inalienability theory to “recalibrate the vindication of rights doctrine”); Weston, *supra* note 73, at 788–91 (citing cases that invoke the need to vindicate federal statutory rights).



which barred the merchants from participating as either class representatives or as members of a class of claimants regarding any claims subject to arbitration.<sup>281</sup> The Second Circuit invalidated the waiver because the plaintiffs had demonstrated that they could not vindicate their rights under the Sherman and Clayton antitrust statutes through individual arbitrations.<sup>282</sup>

The *AmEx* court invoked a body of Supreme Court case law upholding the arbitrability of federal statutory claims “*unless* Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”<sup>283</sup> Noting the Supreme Court’s recognition ““that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum,””<sup>284</sup> the Second Circuit placed heavy emphasis on an affidavit submitted by the plaintiffs’ expert, establishing that it would be so expensive for the plaintiffs to arbitrate their disputes individually that they would have to forfeit their rights under the antitrust laws.<sup>285</sup> Here, because plaintiffs could not afford to pursue their federal antitrust claims individually, the court held that the class action waiver was unenforceable. Carefully avoiding a categorical rule,<sup>286</sup> the Second Circuit declined to hold that class action waivers in antitrust actions are per se unenforceable, concluding instead that each waiver must be considered on its own merits.<sup>287</sup> Because class arbitration cannot be ordered in the absence of an agreement,<sup>288</sup> the court instructed the district court to deny AmEx’s motion to compel arbitration.<sup>289</sup>

The Second Circuit declined to rehear the case *en banc*.<sup>290</sup> In her opinion concurring in the denial of rehearing *en banc*, Judge Pooler

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281. *AmEx III*, 667 F.3d at 209.

282. *Id.* at 207 n.3, 215–16. *See also* *Herrington v. Waterstone Mortg. Corp.*, No. 11-cv-779-bbc, 2012 WL 1242318, at \*1 (W.D. Wis. Mar. 16, 2012) (“[T]he arbitration agreement violates the NLRA because it includes a provision that requires [plaintiff] to give up her right under the statute to bring claims collectively.”); *id.* at \*6 (deferring to the NLRB’s decision in *Horton* and concluding that *Concepcion* “is not on point because the class action waiver in that case did not conflict with the substantive right of a federal statute”).

283. *AmEx III*, 667 F.3d at 215 (emphasis added) (citations omitted).

284. *Id.* at 216 (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).

285. *Id.* at 217–18.

286. *See infra* Part III.B.3 (discussing how lower courts read *Concepcion* narrowly as precluding only categorical rules).

287. *AmEx III*, 667 F.3d at 219.

288. *See Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1776 (2010) (holding that parties that are silent on the issue of class-wide arbitration “cannot be compelled to submit their dispute to class arbitration”); *supra* Part II.B.1 (discussing *Stolt-Nielsen*).

289. *AmEx III*, 667 F.3d at 219.

290. *In re Am. Express Merchs.’ Litig. (AmEx IV)*, 681 F.3d 139, 139 (2d Cir. 2012).

(who authored the panel opinion in *AmEx*) emphasized that the case was not governed by *Concepcion*, which focused on preemption of state laws hostile to arbitration.<sup>291</sup> Rather, the Second Circuit’s analysis in *AmEx* “rests squarely on a vindication of statutory rights analysis—an issue untouched in *Concepcion*.”<sup>292</sup>

### 3. Lower Courts Read *Concepcion* Narrowly to Preclude Categorical Rules

Lower courts have sought to preserve the right to sue collectively, not only to promote public rights (under PAGA) and federal statutory rights (under the federal antitrust laws), but also to preserve a right to bring a class action (notwithstanding a contractual waiver) by reading *Concepcion* narrowly to preclude only categorical rules that ban class action waivers.<sup>293</sup> This Section focuses on a federal district court opinion in *Coiro v. Wachovia Bank* to illustrate this approach.

In a putative class action filed in federal district court in New Jersey, the plaintiff challenged on unconscionability grounds a class action waiver in an arbitration clause in a bank’s Deposit Agreement.<sup>294</sup> The court in *Coiro* declined to read *Concepcion* as rendering class action waivers per se enforceable.<sup>295</sup> Instead, it read *Concepcion* narrowly to bar only categorical rules that invalidate such waivers, and concluded that “*Concepcion* does not control this case.”<sup>296</sup> Having declined to read *Concepcion* as demanding the enforcement of all class action waivers, the court further concluded that it had to perform a “fact-sensitive analysis” to determine whether the particular class action waiver at issue was unconscionable under New Jersey law.<sup>297</sup>

To support its narrow reading of *Concepcion*, the court invoked a

291. *Id.* (Pooler, C.J., concurring); see also *id.* at 140 (“While *Concepcion* addresses state contract rights, *Amex III* deals with federal statutory rights—a significant distinction.”).

292. *Id.* at 139.

293. See, e.g., *Valentine v. WideOpen W. Fin. LLC*, No. 09-C-07653, 2012 WL 1021809, at \*5–6 (N.D. Ill. March 26, 2012) (declining to read *Concepcion* as foreclosing challenges to arbitration agreements or class action waivers on state law unconscionability grounds); *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 491–92 (Mo. 2012) (en banc) (stating that “the Supreme Court’s preemption of [the categorical rule in] *Discover Bank* does not preempt all state law defenses to contract formation,” and that “*Concepcion* permits state courts to apply state law defenses to the formation of the particular contract at issue on a case-by-case basis”); *Coiro v. Wachovia Bank, N.A.*, Civ. No. 11-3597, 2012 WL 628514, at \*4 (D.N.J. Feb. 27, 2012) (“The Supreme Court’s opinion in *Concepcion* made clear that categorical rules do not appropriately fit within [section two’s] savings clause . . . . *Concepcion* does not control this case.”).

294. *Coiro*, 2012 WL 628514, at \*1–2.

295. *Id.* at \*4 (citing *AmEx III*, 667 F.3d at 212).

296. *Id.*

297. *Id.* at \*4–5.

February 2012 United States Supreme Court decision, *Marmet Health Care Center, Inc. v. Brown*.<sup>298</sup> *Marmet* vacated a decision of the West Virginia Supreme Court of Appeals, which had held “unenforceable all predispute arbitration agreements that apply to claims alleging personal injury or wrongful death against nursing homes.”<sup>299</sup>

In concluding that the FAA preempted West Virginia’s policy against compelled arbitration of personal injury and wrongful death claims against nursing homes, the United States Supreme Court in *Marmet* held that “West Virginia’s prohibition against predispute agreements to arbitrate personal-injury or wrongful-death claims against nursing homes is a *categorical rule* prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.”<sup>300</sup> As the district court in *Coiro* saw it, the Supreme Court in *Marmet* remained open to the state court’s alternative ruling that the *particular* arbitration clause was unconscionable and remanded to the West Virginia court to “consider whether, absent [the state’s categorical policy], the arbitration clauses [here] are unenforceable under state common law principles that are not specific to arbitration and preempted by the FAA.”<sup>301</sup> Thus, the district court in *Coiro* relied on *Marmet* to reinforce its conclusion that *Concepcion* does not bar a fact-intensive analysis of the unconscionability *vel non* under state law of a class action waiver.<sup>302</sup>

#### 4. Placing the Lower Court Decisions within a Broader Theoretical Context

That some lower courts have resisted *Concepcion* and *CompuCredit*, or at least have read them narrowly, should not come as a surprise. After all, more than sixty years ago the late Professor Karl Llewellyn wrote that “there is no single right and accurate way of reading one case, or of reading a bunch of cases.”<sup>303</sup> In his famous collection of

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298. 132 S. Ct. 1201 (2012) (per curiam). The district court in *Coiro* mistakenly refers to the Court’s decision in *Marmet Health Care* as “*Allen v. Lasalle Bank, N.A.*” *Coiro*, 2012 WL 628514, at \*4.

299. *Marmet Health Care*, 132 S. Ct. at 1202 (describing the opinion below, *Brown ex rel. Brown v. Genesis Healthcare Corp.*, 724 S.E.2d 250 (W. Va. 2011)).

300. *Id.* at 1203–04 (emphasis added) (citations omitted).

301. *Id.* at 1204.

302. *Coiro*, 2012 WL 628514, at \*4. After performing a fact-sensitive analysis under New Jersey unconscionability law, the court concluded that the waiver at issue was neither unconscionable nor otherwise unenforceable. *Id.* at \*4–7 (noting that plaintiff could recover treble damages and citing a lack of evidence regarding the prohibitive cost of litigating the case).

303. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 VAND. L. REV. 395, 395 (1950).

lectures, *The Bramble Bush*, Llewellyn noted that courts observing a “strict” view of precedent employ “the recognized, legitimate, honorable technique for whittling precedents away, for making . . . the court, in its decision, free of them. It is a surgeon’s knife.”<sup>304</sup> Applying this “knife,” judges can read prior opinions narrowly, limiting “the picture of what was actually before the court and . . . hold[ing] that the ruling made requires to be understood as thus restricted.”<sup>305</sup> While Llewellyn was not speaking specifically about the means by which lower courts can “free” themselves of unwelcome Supreme Court precedents, the class action waiver cases demonstrate that lower courts can (and have) employ(ed) this technique to put the brakes on even a fast-moving train like *Concepcion*.

Political scientists and other scholars have sought to explain *why* lower courts decline to follow, or read narrowly, certain Supreme Court precedents. Perhaps most obviously, lower court judges may have “personal or partisan policy preferences” that conflict with Supreme Court decisions.<sup>306</sup> For example, an N.Y.U. Law Review Note published in 1984, which found that the United States Court of Appeals for the D.C. Circuit had the lowest affirmance rate of all of the courts of appeals,<sup>307</sup> concluded that “the most obvious explanation—that the Supreme Court and the D.C. Circuit are ideologically incompatible—completely accounts for the low affirmance rate.”<sup>308</sup> A 1998 study by Professors Cross and Tiller published in the Yale Law Journal also found that “there is a significant political determinant to judicial decisionmaking.”<sup>309</sup> This explanation is consistent with the attitudinal model for Supreme Court decision-making, which posits that the Justices themselves decide disputes in light of their own “ideological

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304. LLEWELLYN, *supra* note 244, at 73.

305. *Id.* at 72.

306. Cross & Tiller, *supra* note 247, at 2156. See also Roy W. McLeese III, Note, *Disagreement in D.C.: The Relationship between the Supreme Court and the D.C. Circuit and Its Implications for a National Court of Appeals*, 59 N.Y.U. L. REV. 1048, 1048 (1984) (citing ideological differences between the D.C. Circuit Court of Appeals and the Supreme Court).

307. McLeese, *supra* note 306, at 1048–50 (examining the 1980–1983 Terms and finding that the average affirmance rate for the other courts of appeals was 39.2%, while the D.C. Circuit’s affirmance rate was only 10.4%).

308. *Id.* at 1048. See also *id.* at 1050–60 (examining three areas of ideological disagreement: the costs and benefits of federal judicial supervision; the importance of judicial protection of federal governmental interests; and the importance of judicial protection of individual interests); *id.* at 1060–73 (considering but rejecting alternative explanations for the D.C. Circuit’s particularly low affirmance rate); Cross & Tiller, *supra* note 247, at 2159 (“In those cases in which [Supreme Court] doctrine does not support the partisan or ideological policy preferences of the court majority, we expect somewhat more disobedience.”).

309. Cross & Tiller, *supra* note 247, at 2169.

attitudes and values.”<sup>310</sup>

If lower court judges are influenced by their political beliefs, why do they *ever* adhere to Supreme Court precedents with which they disagree? The most obvious explanation is “a sense of responsibility or role orientation.”<sup>311</sup> As Judge Harry T. Edwards of the D.C. Circuit explained, “it is the law—and not the personal politics of individual judges—that controls judicial decision-making in most cases resolved by the court of appeals.”<sup>312</sup> This explanation comports with the legal model for Supreme Court decision-making, which posits that the Justices themselves (like lower court judges) decide cases based upon the plain meaning of the statute or constitutional provision at issue, the intent of the Framers, and prior precedents, rather than on their own personal political or ideological beliefs.<sup>313</sup>

Alternatively, lower courts may follow precedents because they fear reversal by the Supreme Court.<sup>314</sup> But when the likelihood of appellate review is low, judges on the courts of appeals may be less inclined to follow Supreme Court precedents at odds with their policy preferences. Scholars have invoked principal-agent theory to explain this dynamic, casting the federal courts of appeals as agents of the Supreme Court.<sup>315</sup>

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310. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED* 86 (2002). See also Frank B. Cross, *Political Science and the New Legal Realism: A Case of Unfortunate Interdisciplinary Ignorance*, 92 NW. U. L. REV. 251, 265–79 (1996) (describing the attitudinal model).

311. Cross & Tiller, *supra* note 247, at 2157; see also *id.* at 2158 (positing that lower courts may comply with Supreme Court precedents because they “are dutifully performing their roles as sincere jurists, applying the principles in an ideologically (or politically) neutral manner”) (footnote omitted).

312. Harry T. Edwards, *Public Misperceptions Concerning the “Politics” of Judging: Dispelling Some Myths about the D.C. Circuit*, 56 U. COLO. L. REV. 619, 620 (1985).

313. SEGAL & SPAETH, *supra* note 310, at 48–49. See Cross, *supra* note 310, at 255–63 (describing the traditional legal model).

314. See Cross & Tiller, *supra* note 247, at 2158 (“[T]he lower courts fear exposure of any noncompliance and consequent reversal.”); McNollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law*, 68 S. CAL. L. REV. 1631, 1644 (1995) (assuming that lower courts are “rational optimizers,” and will “not necessarily pick their preferred decision” if they anticipate that the Court will agree to review and then reverse their decision).

315. See, e.g., Tom S. Clark, *A Principal-Agent Theory of En Banc Review*, 25 J.L. ECON. & ORG. 55, 76 (2008) (“By considering the role of the Supreme Court in the judicial hierarchy and its power to review decisions from the courts of appeals, I have presented considerable evidence that the judicial hierarchy operates within the context of a principal-agent relationship.”); Donald R. Songer et al., *The Hierarchy of Justice: Testing a Principal-Agent Model of Supreme Court-Circuit Court Interactions*, 38 AM. J. POL. SCI. 673, 675 (1994) (applying principal-agent theory to the judicial hierarchy); cf. Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 538 (2011) (“[T]he interaction between the Supreme Court and the lower federal courts might be more productively modeled as a type of mixed-motive coordination game rather than a traditional principal-agent relationship.”).

“If the circuit courts consisted of faithful agents, they would obediently follow the policy dictates set down by the Supreme Court. But utility maximizing appeals court judges also have their own policy preferences, which they may seek to follow to the extent possible.”<sup>316</sup> The Supreme Court cannot monitor the courts of appeals effectively because it only learns of those courts of appeals decisions that are appealed and it lacks the resources to review all of them.<sup>317</sup> Thus, there is an opportunity for lower court judges to shirk their responsibility to the Court and to advance their own policy preferences.

But lower court judges are monitored not only by the Supreme Court itself, but also by litigants, who may appeal if the lower courts engage in flagrant shirking,<sup>318</sup> and by fellow members of the appellate court panel, whose monitoring prevents the majority from manipulating or disregarding Supreme Court precedent.<sup>319</sup> Cross and Tiller refer to these fellow circuit judges as “whistleblowers.”<sup>320</sup>

One study of courts of appeals’ compliance with, and responsiveness to, Supreme Court case law on search and seizure concluded that lower court judges “appear to be relatively faithful agents of their principal, the Supreme Court,”<sup>321</sup> but nevertheless pursued their own policy preferences and frequently had “room to maneuver.”<sup>322</sup> The researchers, Professors Songer, Segal and Cameron, found that “the appeals court judges were able to shirk, thereby partially advancing their own policy preferences, by interpretations of Supreme Court doctrine in ambiguous situations that were not directly noncompliant.”<sup>323</sup>

The Supreme Court recently granted AmEx’s petition for a writ of certiorari<sup>324</sup> and will soon have an opportunity to review the Second Circuit’s opinion, which invalidated a class action waiver notwithstanding *Concepcion* and *CompuCredit*. While the Court declined to grant certiorari in the *Brown* case,<sup>325</sup> it may ultimately review some or all of the theories advanced in *Brown*, *Urbino*, and *Coiro*. In the meantime, these cases provide a rich opportunity to

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316. Songer et al., *supra* note 315, at 675.

317. *Id.*

318. *Id.* at 693.

319. Cross & Tiller, *supra* note 247, at 2156.

320. *Id.* at 2156, 2159.

321. Songer, *supra* note 315, at 690.

322. *Id.* at 692–93.

323. *Id.* at 693.

324. *Am. Express Co. v. Italian Colors Rest.*, No. 12-133, 81 U.S.L.W. 3070 (U.S. Nov. 9, 2012).

325. *Ralphs Grocery Co. v. Brown*, 132 S. Ct. 1910 (2012).

debate whether the lower courts' readings of *Concepcion* and *CompuCredit* were careful and appropriate or unduly narrow and cramped, and to consider different models for judicial decision-making and monitoring.

#### CONCLUSION

The Supreme Court's decision in *Concepcion* advanced an agenda found in neither the text nor the legislative history of the FAA. *Concepcion* therefore invites a close examination of the relationship between law and politics, as well as the role of legislative history in statutory interpretation. Moreover, reactions to the Court's decision by Congress, federal administrative agencies, and lower courts raise a host of provocative questions about the relationships among the branches of government, and between the Supreme Court and the lower courts. In particular, these reactions provoke us to rethink the meaning of legislative primacy, the influence of federal agencies on the development of the law, and competing conceptions of the relationship between the Supreme Court and the lower courts.