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**Conference Paper**

## Continuing erosion of consumer protection remedies for telecommunications services in the U.S.

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Continuing Erosion of Consumer Protection Remedies  
For Telecommunications Services in the U.S.

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## I. Introduction

Deregulatory policies have reduced or eliminated industry-specific regulatory power, shifting reliance to economic competition and legal remedies available under other bodies of state and federal law applicable to general businesses. The shift away from industry-specific regulation of telecommunications and broadband access services has created legal gaps, as general antitrust and consumer protection laws did not evolve to address industry-specific problems in telecommunications (Cherry, 2010).

The U.S. Supreme Court's interpretation of the Federal Arbitration Act (FAA) is further narrowing the scope of available state judicial remedies for consumers of telecommunications services. The U.S. regulatory regime in the U.S. relies on private litigation to complement public enforcement of various laws. Since the 1980's, the U.S. Supreme Court's interpretation of the FAA – asserting a federal liberal policy favoring arbitration agreements - has triggered efforts to curtail mechanisms of private enforcement. More specifically, through a form of self-deregulation, corporations are increasingly using consumer contracts that impose mandatory arbitration and ban class-wide arbitration.

In a controversial 5-4 decision,<sup>1</sup> the U.S. Supreme Court recently extended this judicial expansion of the original intent of the FAA in *AT&T Mobility v. Concepcion* (2011), which is of particular significance to the telecommunications sector. In *AT&T Mobility v. Concepcion*, the Court holds that the savings clause in § 2 of the FAA preempts California's law classifying most collective-arbitration waivers in consumer contracts as unconscionable. AT&T Mobility, a cellular common carrier, can thus enforce the provision of its consumer contract that requires binding arbitration yet also prohibits arbitration by classes of consumers.

This paper considers the impact of the U.S. Supreme Court's expansion of the FAA's original intent, culminating in *AT&T Mobility v. Concepcion* and its subsequent application by lower courts, on the telecommunications industry. It critiques analysis in *AT&T Mobility v. Concepcion* and preceding case law upon which it relies, emphasizing the Court's failure to consider the historical context of the enactment of FAA as part of landmark developments in federal civil procedure as well as the historical, regulatory context of the telecommunications industry.

This paper also stresses the need to consider the systemic effects of *AT&T Mobility v. Concepcion*. In general, the American regulatory regime relies, in part, on private enforcement mechanisms; and, more specifically, the telecommunications regulatory regime has a unique history as to the inadequacy of private enforcement mechanisms. Deregulatory telecommunications policies have already created uncertainties as to the scope of permissible consumer protection remedies permitted under the § 414 savings clause of the FCA (Cherry, 2010). *AT&T Mobility v. Concepcion*, which fails to even acknowledge the existence of § 414, exacerbates this uncertainty and further erodes availability of private enforcement remedies under state law.

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<sup>1</sup> Justice Scalia delivered the opinion of the Court, in which Justices Roberts, Kennedy and Thomas, and Alito joined ("Opinion"). Justice Thomas filed a concurring opinion. Justice Breyer filed a dissenting opinion, in which Justices Ginsburg, Sotomayor and Kagan joined ("Dissent").

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By failing to interpret the FAA in appropriate historical context - both as to when it was enacted as well as to the industry to which it is being applied - the Court in *AT&T Mobility v. Concepcion* fails to recognize both the uniqueness and the severity of the loss of consumers' legal remedies against common carriers resulting from its decision. In this respect, *AT&T Mobility v. Concepcion* is similar to the ahistorical, non-contextual analysis of the U.S. Supreme Court in *Citizens United v. Federal Election Commission* (2010), which held that corporations have the same constitutional rights for political speech as individuals. Moreover, as *Citizens United v. FEC* diminishes the *federal* government's ability to protect consumers with regard to potential network neutrality principles (Cherry, 2011), so does *AT&T Mobility v. Concepcion* disable *state* governments' ability to protect consumers of telecommunications services.

## **II. The Majority Opinion's Analysis in *AT&T Mobility v. Concepcion***

The FAA was enacted in 1925, and § 2 provides a savings clause that preserves certain causes of action with regard to written contracts under which parties agree to settle disputes by arbitration. Sec. 2 provides:

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

(9 U.S.C.A. § 2, emphasis added). In *AT&T Mobility v. Concepcion*, the Court “consider[ed] whether the FAA prohibits States from conditioning the enforceability of certain arbitration agreements on the availability of classwide arbitration procedures” (131 S.Ct. at 1744). More specifically, “[t]he question in this case is whether § 2 preempts California’s rule classifying most collective-arbitration waivers in consumer contracts as unconscionable. We refer to this rule as the *Discover Bank* rule” (131 S.Ct. at 1746).<sup>2</sup>

In this case, the Concepcions filed a complaint against AT&T Mobility in federal district court, which was later consolidated with a putative class action, alleging (among other things) that AT&T Mobility had engaged in false advertising and fraud. The federal district court denied AT&T Mobility’s motion to compel arbitration pursuant to the terms of the consumer contract with the Concepcions, finding the mandatory arbitration provision that also prohibited classwide arbitration to be unconscionable under California’s *Discover Bank* rule. The Ninth Circuit Court of Appeals affirmed, and held that the *Discover Bank* rule was not preempted by the FAA because it was simply a refinement of the unconscionability analysis applicable to contracts generally in California.

The majority Opinion in *AT&T Mobility v. Concepcion* notes that, based on its previous cases, the FAA preempts state law that prohibits outright the arbitration of particular claims, “[b]ut the inquiry becomes more

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<sup>2</sup> The *Discover Bank* rule refers to the California Supreme Court’s decision in *Discover Bank v. Superior Court* (2005), applying California’s well-establish unconscionability doctrine and statutory law, that class action bans in small-dollar, consumer contracts of adhesion can be found substantively unconscionable in certain circumstances.

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complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration” (131 S.Ct. at 1747). The Court then states “[a]lthough § 2’s saving clause preserves generally applicable contract defenses, nothing in it suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives” (131 St. Ct. at 1748). The Court proceeds to find that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA. The ‘principal purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms’” (131 S.Ct. at 1748, citations omitted). In this regard, “[a]lthough the [*Discover Bank*] rule does not *require* classwide arbitration, it allows any party to a consumer contract to demand it *ex post*. The rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long past” (131 S.Ct. at 1750, emphasis in original, citations omitted, footnote omitted).

The Court then explains why imposing nonconsensual class-arbitration is inconsistent with the FAA. First, class arbitration sacrifices the advantages of bilateral arbitration, such as its informality, and makes the process slower and more costly (131 S. Ct. at 1751). Second, class arbitration requires procedural formality, as the American Arbitration Association’s rules for class arbitration are similar to the Federal Rules of Civil Procedure for class litigation (131 S.Ct. at 1751). Third, class arbitration increases risks to defendants because the absence of judicial review will likely lead to more uncorrected errors. Fourth, the federal policy favoring arbitrations overrides other state policy concerns. More specifically, “[t]he dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons” (131 S.Ct. at 1753, citation omitted).<sup>3</sup>

### **III. Lower Courts’ Application of *AT&T Mobility v. Concepcion* in Subsequent Telecommunications Cases**

Some lower courts subsequently applied *AT&T Mobility v. Concepcion* in cases involving the provision of telecommunications services. When a consumer agreement for wireless telecommunications service contains an *express* class action waiver, the Ninth and Eleventh Circuit Courts of Appeals upheld such waivers pursuant to *AT&T Mobility v. Concepcion*.<sup>4</sup> However, if a consumer agreement is *silent* as to class arbitration, one federal district court held that an arbitrator does not exceed his authority in determining whether the arbitration clause in the parties’ agreement *permits* class arbitration.

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<sup>3</sup> In addition, the Court noted that the arbitration agreement in this case “provides that AT&T will pay claimants a minimum of \$7,500 and twice their attorney’s fees if they obtain an arbitration award greater than AT&T’s last settlement offer. The District Court found this scheme sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be ‘essentially guaranteed[d]’ to be made whole” (p. 1753, citation omitted).

<sup>4</sup> As discussed below, the Ninth Circuit distinguished and disagreed with a contrary holding by the Second Circuit in a case concerning a credit card agreement issued by American Express.

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### **A. Rejecting applicability of the “vindication of statutory rights” doctrine**

Prior to *AT&T Mobility v. Concepcion*, the U.S. Supreme Court established a “vindication of statutory rights” doctrine under the FAA that provides a means for a party to “argue that an arbitration agreement is unenforceable because an unfair aspect of the arbitration process would preclude that party from vindicating its statutory rights” (Gross, 2012, p. 16, footnote omitted). This doctrine was derived from the Court’s statement in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* (1985) that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the [federal] statute [providing that case of action] will continue to serve both its remedial and deterrent function ” (Gross, 2012, p. 16, footnote omitted).

Since *AT&T Mobility v. Concepcion*, the Ninth and Eleventh Circuit Courts of Appeals refused to apply the vindication of statutory rights doctrine to block enforcement of class action waivers in mandatory arbitration, consumer contracts of wireless telecommunications service providers. In addition, a federal district court within the Ninth Circuit reached the same result upon remand from the U.S. Supreme Court. These cases will be discussed in the order in which they were decided.

#### **I. *Cruz v. Cingular Wireless* (11<sup>th</sup> Cir. 2011)**

In *Cruz v. Cingular Wireless*, Plaintiffs challenged the class action waiver in the mandatory arbitration contract provision under Florida’s Deceptive and Unfair Trade Practices Act (FDUTPA) (648 F. 3d at 1207). The contract in this case is the same as that in *AT&T v. Concepcion*, except for the dollar amount of the premium award to the customer if the arbitral award is greater than AT&T’s last written settlement offer (648 F. 3d at 1210-1211 & fn.11). The plaintiffs claimed that the arbitration provision was unenforceable because it “hindered the remedial purposes of FDUTPA by effectively immunizing [AT&T] from liability for unlawful business practices, in violation of public policy” (648 F.3d at 1208).

The Eleventh Circuit rejects various plaintiffs’ arguments, holding “that, in light of [*AT&T Mobility v. Concepcion*], the class action waiver in the Plaintiffs’ arbitration agreements is enforceable under the FAA” (648 F.3d at 1207). First, the court rejects plaintiffs’ argument that the class action waiver is unenforceable because of its exculpatory effect in violation of public policy. “[T]he [*AT&T Mobility v. Concepcion*] Court specifically rejected this public policy argument, which was expressly made by the dissent in that case....Thus, in light of [*AT&T Mobility v. Concepcion*], state rules mandating the availability of class arbitration based on generalizable characteristics of consumer protection claims ... are preempted by the FAA, even if they may be ‘desirable’” (648 F.3d at 1212, citation omitted).<sup>5</sup> Second, rejecting plaintiffs’ attempt to distinguish *AT&T Mobility v. Concepcion* based on factual differences, the court states “[e]ven if the *Mitsubishi* vindication principle applies to state as well as federal statutory causes of action, and even if it could be applied to strike down a class action waiver in the appropriate circumstance, such an argument is foreclosed here, because the [*AT&T Mobility v.*]

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<sup>5</sup> Those generalizable characteristics are: that claims predictably involve a small amount of damages; that the company’s deceptive practices may be replicated across a large number of consumers; and that many potential claims may go unprosecuted unless they may be brought as a class (648 F.3d at 1212).

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*Concepcion* Court examined *this very arbitration agreement* and concluded that it did not produce such a result” (648 F. 3d at 1215, emphasis in original, citations omitted, footnote omitted).

## 2. *Coneff v. AT&T Corp.* (9<sup>th</sup> Cir. 2012)

In *Coneff v. AT&T Corp.*, the plaintiffs claimed that there is a tension between the vindication of statutory rights doctrine in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* and the ruling in *AT&T Mobility v. Concepcion* because the latter “permits state law to invalidate class-action waivers when such waivers preclude effective vindication of statutory rights” (673 F.3d at 1158). The Ninth Circuit finds no inconsistency between the U.S. Supreme Court cases for statutory rights under either state or federal law (673 F.3d at 1159 & fn. 2). “Although Plaintiffs argue that the claims at issue in this case cannot be vindicated effectively because they are worth much less than the cost of litigating them, the [*AT&T Mobility v.*] *Concepcion* majority rejected that premise” (673 F.3d at 1159). In fact, “the Court’s majority expressly rejected the dissent’s argument regarding the possible exculpatory effect of class-action waivers” (673 F.3d at 1158).<sup>6</sup> The Ninth Circuit also notes the Eleventh Circuit’s agreement on this point in *Cruz v. Cingular Wireless* (673 F.3d at 1160).

The Ninth Circuit also disagrees with and distinguished its case from that decided by the Second Circuit on a similar question in *Amex III* (2012), concerning credit card agreements issued by American Express.<sup>7</sup> In *Amex III*, the Second Circuit found the class action waiver in an arbitration provision unenforceable under the vindication of statutory rights doctrine because “forcing plaintiffs to bring their claims individually here would make it impossible to enforce their rights under the Sherman Act and thus conflict with congressional purposes manifested in the provision of a private right of action in the statute” (p. 667 F.3d at 213, fn.5). The Ninth Circuit notes “[t]here, the Second Circuit specifically found that ‘the only *economically feasible means* for plaintiffs enforcing their statutory rights is via a class action’” (673 F.3d at 1159, fn. 3).<sup>8</sup> By contrast, the Ninth Circuit states that the arbitration agreement at issue before it, as in *AT&T Mobility v. Concepcion*, has a number of fee-shifting and otherwise pro-consumer provisions that essentially guaranteed to make whole those aggrieved customers who file claims (673 F.3d at 1159).

Furthermore, the Ninth Circuit discusses the argument, raised by the dissent in *AT&T Mobility v. Concepcion*, that even if customers would be made whole as to damages and counsel fees, most customers would not file claims because the amounts are too small to be worth doing so. The court notes that this argument differs from that before the Second Circuit, in that “the concern is not so much that customers have no effective *means* to vindicate their rights, but rather than customers have insufficient *incentive* to do so. That

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<sup>6</sup> In support, the Ninth Circuit quotes the majority in *AT&T Mobility v. Concepcion*: “The dissent claims that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system. *But States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons*” (673 F.3d at 1158, citation omitted, emphasis added).

<sup>7</sup> The case is *Italian Colors Rest. v. Am. Express Travel Related Servs. Co. (In re Am. Express Merchants’ Litigation)* (2d Cir. 2012), otherwise known as *Amex III* (in light of multiple stages of litigation of this case). *Amex III* was decided by the Second Circuit upon reconsidering a pending decision in light of the U.S. Supreme Court’s ruling in *AT&T Mobility v. Concepcion*.

<sup>8</sup> The emphasis was added by the Ninth Circuit in quoting the Second Circuit opinion.

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concern is, of course a primary policy rationale for class actions, as discussed by the district court in terms of deterrence. But as the Supreme Court stated in *[AT&T Mobility v.] Concepcion*, such unrelated policy concerns, however worthwhile, cannot undermine the FAA” (673 F.3d at 1159, emphasis in original, footnote omitted, citations omitted). It is on this reasoning that the Ninth Circuit distinguishes its case from that of the Second Circuit, and, even if not distinguishable, disagrees with the Second Circuit in *Amex III* and instead agrees with the Eleventh Circuit in *Cruz v. Cingular Wireless* (673 F.3d at 1159, fn. 3).

It is noteworthy that, prior to *AT&T Mobility v. Concepcion*, a divided panel of the Ninth Circuit in *Greenwood v. CompuCredit* (2010) did apply the vindication of statutory rights doctrine in upholding the federal district court’s conclusion that the arbitration agreement between plaintiffs and CompuCredit was void because the Credit Repair Organization Act (CROA) specifically prohibits waiver by any consumer of any protection provided by or *any right of the consumer* under the Act. The Ninth Circuit observed that the Supreme Court had held in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* that “[h]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue” (615 F.3d at 1207, quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 128). The Ninth Circuit then found that “the plain language of the CROA provides consumers with the ‘right to sue’... [and] [t]he right to sue protected by the CROA cannot be satisfied by replacing it with an opportunity to submit a dispute to arbitration” (615 F.3d at 1208, citation omitted). In so doing, the Ninth Circuit expressly disagrees with the reasoning of the Third and Eleventh Circuits in other cases interpreting the CROA (615 F.3d at 1211). In March 2011, the U.S. Supreme Court agreed to review *Greenwood v. CompuCredit*, and the case is still pending.

### **3. *Laster v. T-Mobile USA, Inc.* (S.D. Cal. 2012)**

In 2008, the federal district court for the Southern District of California (S.D. California) denied AT&T Mobility’s motion to compel arbitration under the *Discover Bank* rule, which was affirmed in 2009 by the Ninth Circuit Court of Appeals. The U.S. Supreme Court subsequently reversed and remanded for further proceedings consistent with its opinion in *AT&T Mobility v. Concepcion*. Upon remand, in May of 2012, the district court reexamines its prior ruling regarding AT&T Mobility’s motion to compel. It notes that “[s]ince *[AT&T Mobility v.] Concepcion* courts have re-examined decisions that relied on *Discover Bank*, or other similar state law principles to deny arbitration” (2012 WL 1681762 (S.D.Cal.) at \*3, citations omitted). The district court then grants AT&T Mobility’s motion to compel, finding that the arbitration agreement was not substantively unconscionable given the Ninth Circuit’s consideration of the same agreement in *Coneff v. AT&T*, and, even if substantively unconscionable, the unconscionability argument was preempted by *AT&T Mobility v. Concepcion*.

### **B. Exception when the agreement is silent as to class arbitration**

In *Southern Communications Services, Inc. d/b/a SouthernLinc Wireless v. Thomas* (2011), the plaintiff SouthernLinc argued that the arbitrator exceeded his authority when determining that the arbitration clause in the parties’ agreement *permits* class arbitration. The federal district court of the Northern District of Georgia states “[t]he crux of this dispute was whether the parties intended to permit class proceedings. ... The parties



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took ‘opposite positions on whether the arbitration clauses’ [sic] silence on class arbitration does or does not create an ambiguity” (2011 WL 5386428 at \*2, citation omitted). For several reasons, the district court finds that the arbitrator did not exceed his authority. Two reasons are of particular relevance here.

First, the district court distinguishes its case from *Cruz v. Cingular Wireless*, which was decided after the arbitrator issued his award. “Importantly, *Cruz* has limited applicability to the present case because it dealt with an arbitration agreement containing an *express* class action waiver, not interpretation of state contract law where the written arbitration agreement is *silent* as to class arbitration” (2011 WL 5386428 at fn. 2, emphasis in original).

Second, the district court also distinguishes its case from *AT&T Mobility v. Concepcion*. “SouthLINC ignores the fact that [*AT&T Mobility v.*] *Concepcion* is inapplicable to situations where consumers may be forced to abandon unknown rights simply because a mandatory arbitration agreement is silent on class arbitration. In fact, the Court in [*AT&T Mobility v.*] *Concepcion* recognizes how important it is for class action waivers to be explicit in mandatory arbitration agreements and points out that states may require ‘class-action-waiver provisions in adhesive arbitration agreements to be highlighted” (2011 WL 5386428 at fn. 14, citation omitted).

### **C. Resultant effect on customers’ legal remedies**

Under *AT&T Mobility v. Concepcion* and its application by lower courts, customers now have fewer legal remedies against wireless telecommunications service providers. Mandatory arbitration clauses in consumer agreements block judicial claims by customers, whether by individuals or class actions, under common law as well as federal or state statutory law. Furthermore, rejecting the public policy rationale of the exculpatory effect of class-action waivers in contracts of adhesion, clauses in consumer agreements that ban class arbitration also block aggregation of customers’ claims in arbitral forums. Finally, that class arbitration could be imposed when the contract is silent on the issue will be of little help to customers in the long run, as wireless carriers can avoid this result by simply including express class arbitration waivers in consumer agreements.

### **IV. Flaws Identified by the Dissent in *AT&T Mobility v. Concepcion***

The Dissent asserts that the *Discover Bank* rule under California law, which sets forth certain circumstances in which class action waivers in *any* contract are unenforceable, represents application of a more general unconscionability principle that is consistent with the FAA’s language and primary purpose (131 S.Ct. at 1756-1757). More specifically, the *Discover Bank* rule applies equally to class action litigation waiver and class arbitration waivers in contracts, and is consistent with the basic purpose behind the FAA that was enacted in response to judicial hostility to arbitration and sought to place agreements to arbitrate “upon the same footing as other contracts” (131 S.Ct. at 1757).

The Dissent also stresses potential, conflicting goals of the FAA. Although the Court has previously explained that Congress was aware that arbitration could provide procedural and cost advantages, “we have cautioned against thinking that Congress’ primary objective was to guarantee these particular procedural advantages. Rather, that primary objective was to secure the ‘enforcement’ of agreements to arbitrate. ...Thus,

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insofar as we seek to implement Congress' intent, we should think more than twice before invalidating a state law that does just what § 2 requires, namely, puts agreements to arbitrate and agreements to litigate 'upon the same footing'" (131 S.Ct. at 1758, citations omitted).

Yet, the Dissent asserts, "[t]he majority's contrary view ... rests primarily upon it claims that the *Discover Bank* rule increases the complexity of arbitration procedures, thereby discouraging parties from entering into arbitration agreements, and to that extent discriminating in practice against arbitration. These claims are not well founded" (131 S.Ct. 1758, citation omitted).

This section provides an overview of the Dissent's reasons for why the majority's claims are not well founded. These reasons resonate with the nature of the flaws identified in subsequent sections, examining the majority opinion in *AT&T Mobility v. Concepcion* in historical context of the FAA and its systemic effects on the role of private enforcement mechanisms in the U.S.

#### **A. Majority engages in ahistorical, nonempirical analysis**

The Dissent criticizes the majority for engaging in ahistorical, nonempirical analysis. The Dissent notes that the American Arbitration Association "has found class arbitration to be 'a fair, balanced and efficient means of resolving class disputes.' And, unlike the majority's examples [claiming that the California rule is like requiring disposition by a jury or judicially monitored discovery], the *Discover Bank* rule imposes equivalent limitations on litigation; hence it cannot fairly be characterized as a targeted attack on arbitration" (131 S.Ct. at 1758-1759, citations omitted). Thus, the Dissent asks, "[w]here does the majority get its contrary idea—that individual, rather than class, arbitration is a 'fundamental attribut[e]' of arbitration? It does not explain. And it is unlikely to be able to trace its present view to the history of the arbitration statute itself" (131 S. Ct. at 1759).

The Dissent also stresses the need to understand the historical context in which the FAA was enacted.

When Congress enacted the [FAA], arbitration procedures had not yet been fully developed. Insofar as Congress considered detailed forms of arbitration at all, it may well have thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries, where the parties possessed roughly equivalent bargaining power. ...[With regard to roughly equivalent bargaining power,] California's statute is consistent with, and indeed may help to further, the objectives that Congress had in mind.

(131 S. Ct. at 1759, citations omitted). Thus, "if neither the history nor present practice suggests that class arbitration is fundamentally incompatible with arbitration itself, then on what basis can the majority hold California's law preempted?" (131 S. Ct. at 1759).

The Dissent also states that "[t]he majority's related claim that the *Discover Bank* rule will discourage the use of arbitration because '[a]rbitration is poorly suited to ... higher stakes' lacks empirical support. Indeed, the majority provides no convincing reason to believe that parties are unwilling to submit high-stake disputes to arbitration. And there are numerous counterexamples" (131 S.Ct. at 1760, citations omitted).

#### **B. Majority makes the wrong comparison**

The Dissent asserts that the majority's analysis is based upon the wrong comparison. "The majority compares the complexity of class arbitration with that of bilateral arbitration. And it finds the former more complex. But,

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if incentives are at issue, the *relevant* comparison is not ‘arbitration with arbitration’ but a comparison between class arbitration and judicial class actions. After all, in respect to the relevant set of contracts, the *Discover Bank* rule similarly and equally sets aside clauses that forbid class procedures—whether arbitration procedures or ordinary judicial procedures are at issue” (p. 1759, emphasis in original, citations omitted). The Dissent then discusses data from California that class arbitrations are speedier than class actions in court. Asking whether a typical defendant would prefer a judicial class action to class arbitration, the Dissent asserts “if speedy resolution of disputes were all that mattered, then the *Discover Bank* rule would reinforce, not obstruct, that objective of the Act” (131 S.Ct. at 1759-1760).

### **C. Majority’s view is inconsistent with federalism**

The Dissent criticizes the majority’s view for being inconsistent with federalism. Federal arbitration law normally leaves consideration of contract defenses to the States.

Further, even though contract defenses, *e.g.*, duress and unconscionability, slow down the dispute resolution process, federal arbitration law normally leaves such matters to the States. A provision in a contract of adhesion ... might increase the speed and efficiency of arbitrating a dispute, but the State can forbid it. The *Discover Bank* rule amounts to a variation on this theme. California is free to define unconscionability as it sees fit, and its common law is of no federal concern so long as the State does not adopt a special rule that disfavors arbitration.

(131 S.Ct. at 1760, citations omitted). Thus, state law may reflect concerns that trump procedural efficiency, which is enforceable as long as it does not specifically disfavor arbitration. Thus, because California law applies the same legal principles of unconscionability to class arbitration waivers as well as to any other contractual provisions, “the merits of class proceedings should not factor into our decision. If California had applied its law of duress to void an arbitration agreement, would it matter if the procedures in the coerced agreement were efficient?” (131 S.Ct. at 1760).

Furthermore, the Dissent observes that the majority highlights disadvantages of class arbitration, as it sees them, but does not address the countervailing advantages of class proceedings (131 S.Ct. at 1760). In this regard, the Dissent states “forbid[ding] the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate” (131 S.Ct. at 1760). But the *Discover Bank* rule is meant to address the exculpatory effect of manipulating “the terms of consumer contracts ... to insulate an agreement’s author from liability for its own frauds by ‘deliberately cheat[ing] large numbers of consumers out of individually small sums of money.’ Why is this kind of decision—weighing the pros and cons of all class proceedings alike—not California’s to make?” (131 S. Ct. at 1761, citation omitted).

### **D. Majority view is not based on precedent**

Finally, the Dissent claims “the majority can find no meaningful support for its views in this Court’s precedent” (131 S.Ct. at 1761). For nearly a century, the Court has decided cases about the requirements of the FAA, “reach[ing] results that authorize complex arbitration procedures [and] uph[o]ld nondiscriminatory state laws that slow down arbitration proceedings. But we have not, to my knowledge, applied the Act to strike down a state statute that treats arbitrations on par with judicial and administrative proceedings” (131 S. Ct. at 1761,

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citations omitted). Moreover, “[a]t the same time, we have repeatedly referred to the Act’s basic objective as assuring that courts treat arbitration agreements ‘like all other contracts’” 131 S.Ct. at 1761). After reviewing several prior U.S. Supreme Court cases, the Dissent states “[t]hese cases do not concern the merits and demerits of class actions; they concern equal treatment of arbitration contracts and other contracts. Since it is the latter question that is at issue here, I am not surprised that the majority can find no meaningful precedent supporting its decision” (131 S.Ct. at 1762).

#### **E. Dissent’s conclusion**

In its concluding section, the Dissent argues that, in the FAA’s savings clause in § 2, “Congress retained for the States an important role incident to agreements to arbitrate. . . . and reiterated a basic federal ideal that has long informed the nature of this Nation’s laws. . . . But federalism is as much a question of deeds as words. It often takes the form of a concrete decision by this Court that respects the legitimacy of a State’s action in an individual case. Here, recognition of that federalist ideal, embodied in specific language in this particular statute, should lead us to uphold California’s law, not to strike it down. We do not honor federalist principles in their breach” (131 S. Ct. at 1762, citations omitted).

#### **V. Further Flaws: Court’s Failure to Analyze the FAA in Historical Context**

Cherry (2010) discusses the importance of understanding the coevolution of industry-specific and general business legal regimes and its impact on consumer sovereignty.<sup>9</sup> In particular, Cherry (2010) describes how deregulatory telecommunications policies are adversely affecting consumer sovereignty by redrawing the boundaries between industry-specific telecommunications regulation and the general business regimes of antitrust and consumer protection laws. One of these adverse consequences is the uncertainty as to the scope of permissible legal remedies available to consumers under the § 414 savings clause of the Federal Communications Act (FCA).<sup>10</sup>

Sections V-VII expand on the analysis in Cherry (2010) by explaining how the U.S. Supreme Court’s expansive interpretation of the FAA, culminating in its recent decision *AT&T Mobility v. Concepcion*, represents further evolution in a general business regime – here, a federal arbitration statute – that is further eroding available legal remedies for consumers of telecommunications services. Moreover, as explained in Section VII, the further coevolution of the FAA and the FCA is unclear, increasing uncertainty as to the scope of legal remedies still available to consumers under the FCA’s § 414 savings clause.

As Cherry (2010) explains, determining the impact of the coevolution of industry-specific and general business legal regimes on consumer sovereignty requires an understanding of historical context and temporal sequencing of the relevant bodies of law. Therefore, this section examines the legislative history of the FAA,

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<sup>9</sup> Consumer sovereignty is described “as the state of affairs in which consumers have an unimpaired ability to make decisions in their individual interests and markets operate efficiently in responding to the collective effect of those decisions” (Averitt & Lande, 1997, pp. 722-723).

<sup>10</sup> Section 414 provides: “Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.”

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and how the U.S. Supreme Court has expanded interpretation beyond the FAA's original intent. Such interpretation has already triggered some backlash in Congress, yet the Court has further extended the federal preemptory effect of the FAA in *AT&T Mobility v. Concepcion*.

Section VI then examines the Court's failure to consider the systemic effects of *AT&T Mobility v. Concepcion* on private enforcement mechanisms, which play a basic structural role in the American regulatory regime. Finally, Section VII examines the Court's failure to consider systemic effects of *AT&T Mobility v. Concepcion* on the telecommunications industry.

#### **A. FAA as part of landmark developments in civil procedure**

Szalai (2010) explores the history of the FAA and its original purpose. In so doing, he attempts to fill gaps in prior scholarship regarding the FAA that have resulted from the segregation of the fields of civil procedure and alternative dispute resolution in legal academia as well as the insufficient attention to history in the study of civil procedure (Szalai, 2010, p. 394). His historical analysis reveals that the enactment of the FAA in 1925 was a part of landmark developments in civil procedure of the federal court system in the U.S. Other developments included the enactment of the Judiciary Act of 1925, the enactment of the Rules Enabling Act of 1934 and the related adoption of the Federal Rules of Civil Procedure in 1938, and the U.S. Supreme Court's expansion of personal jurisdiction in a case decided in 1945. Some important aspects of Szalai's analysis are reviewed here.

First, procedural reforms were made to alleviate an overburdened federal judiciary. "[T]he same Congress that passed the Judiciary Act of 1925 simultaneously enacted the FAA, which would help relieve this problem of overcrowded dockets in the lower federal courts ... and ... [thereby] approved a two-pronged approach to help relieve an overburdened federal judiciary" (Szalai, 2010, pp. 400-401). The Judiciary Act of 1925 lessened the workload of the U.S. Supreme Court, permitting appeals as a matter of right in only limited circumstances and giving the Court the discretion to grant review in virtually all other cases. The FAA provided the means for parties to resolve disputes by arbitration rather than judicial litigation; and Congressional action was necessary because "[p]rior to the enactment of the FAA, 'agreements to arbitrate future disputes were almost always unenforceable in the United States'" (Szalai, 2010, p. 397 fn. 51, citation omitted).

Second, procedural reforms were made to address dissatisfaction with the system of federal court procedure that had developed, in part from previous Congressional legislation, during the 19<sup>th</sup> century. In addition to alleviating problems of an overburdened judiciary, both the FAA and the Rules Enabling Act of 1934 "were intended, at least in part, to respond to dissatisfaction with the confusing, technical procedural landscape during the early 1900s, and both statutes, at their core, deal with dispute resolution" (Szalai, 2010, p. 418, footnote omitted). The Rules Enabling Act gave the U.S. Supreme Court power to prescribe general rules for cases in equity and at law, under which the Supreme Court adopted the Rules of Civil Procedure (FRCP) for the federal court system that became effective in 1938. Thus, "[b]oth the Rules Enabling Act, which led to the creation of uniform, simplified procedure, and the FAA, by allowing parties to create their own simplified procedure, were intended to help alleviate such dissatisfaction" (Szalai, 2010, pp. 424 -425, footnote omitted).

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As a result of these procedural reforms, “[l]itigation and the system of arbitration supported by the FAA are, to some extent, interrelated systems, and *there are potential benefits in having these systems coexist*” (Szalai, 2010, p. 425, emphasis added). One of these benefits is the experimentation with procedure that occurs with arbitration, “which is a flexible system, [that] can in effect serve as a laboratory for procedure. Arbitration can help show what is possible and give ideas for future changes in court procedure” (Szalai, 2010, p. 425, footnote omitted). Conversely, “features of the Federal Rules of Civil Procedure or other court rules can serve as a model, if desired, when parties are designing procedures for arbitration proceedings. For example, when the American Arbitration Association began administering class action arbitrations, the [AAA] generally patterned its arbitration procedures regarding class certification after Rule 23 of the Federal Rules of Civil Procedure” (Szalai, 2010, p. 426, footnote omitted). Thus, “[b]y borrowing from each other, the existence of two robust systems of arbitration and litigation can help with the assessment and improvement of procedures in both systems” (Szalai, 2010, p. 426).

As litigation and arbitration thus coevolve, it is important to recognize that enactment of FAA temporally preceded the establishment of the general availability of class action lawsuits under Rule 23 of the Federal Rules of Civil Procedure. Hutchinson (1983) explains that the origins of class actions preceded Rule 23 in cases at equity. As the U.S. Supreme Court explained, “[t]he class suit was an invention of equity to enable it to proceed to a decree in suits where the number of those interested in the subject of the litigation is so great that their joinder as parties in conformity to the usual rules of procedure is impracticable” (*Hansberry v. Lee*, 1940, 311 U.S. at 32). Only “[c]ertain types of cases or patterns or representation were recognized to be legitimate class actions, and the [U.S. Supreme] Court was hesitant to extend the form to other, newer patterns” (Hutchinson, 1983, pp. 462-463).<sup>11</sup> The original Rule 23 (which was later modified in 1966) broadened the application of class actions to suits at law (not just equity) and provided functional categories of class actions that transcended the historical, factual settings for which they had previously been permitted (Hutchinson, 1983, pp. 469-470).

### **B. Judicial expansion of FAA’s original intent to preempt state law**

Although “[t]he FAA has not been significantly amended since its enactment in 1925. Over time, the uses of the FAA and the Supreme Court’s interpretation of the FAA have expanded beyond the original intent of the drafters” (Szalai, 2010, p. 392). One example is the Court’s decision in *Southland Corp. v. Keating* (1984),<sup>12</sup> holding “that the FAA is substantive federal law that preempts state laws regulating arbitration agreements” (Schwartz, 2004, p. 5). This decision is considered by legal scholars to be an egregious error, if not unconstitutional (Szalai, 2010, p. 392; Schwarz, 2004, pp. 7-8). As *Southland Corp. v. Keating* lays the

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<sup>11</sup> The types of cases recognized as legitimate class actions were those affecting creditors’ bills, fraternal benefit associations, and estates.

<sup>12</sup> Three justices dissented in *Southland Corp. v. Keating*. “Although five Justices of the current Supreme Court [in 2004] have at some point dissented from *Southland*’s basic conclusion, their opposition has never been unified in a single case” (Schwartz, 2004, p. 44).

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foundation for the Court's decision in *AT&T Mobility v. Concepcion*, we will see that the flaws in the latter rest atop an even deeper layer of error in the former.

Conducting an in-depth analysis of *Southland Corp. v. Keating*, Schwartz states “[i]f original congressional intent is the touchstone of a statute’s preemptive effect, Southland was plainly wrong. The historical record clearly shows that the FAA was intended to be a procedural statute for the federal courts, that it was not intended to preempt state law, and that it was designed to ... preserve all applicable state contract law” (2004, p. 8).<sup>13</sup> In *Southland Corp. v. Keating*, the Court asserted that “[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration” (465 U.S. at 10). However, Schwartz counters that the correct interpretation of § 2 is that “[t]he savings clause was intended to reinforce the principle that substantive contract law in general would not be affected by the FAA and would govern the question whether a valid arbitration agreement exists in the first instance” (2004, p. 27, footnote omitted).

Schwartz explains how *Southland Corp. v. Keating* undermines federalism by preempting state autonomy. “Southland ... has done considerable violence to the notion of the states as ‘laboratories for experimentation’ by *shutting down state experiments* in the regulation of arbitration agreements and inhibiting state case law development in this field” (Schwartz, 2004, p. 13, emphasis added). Moreover, “[i]n general, preemption of state law stifles state ‘experimentation,’ not only by nullifying laws on the books, but also by discouraging proposals to change the law” (Schwartz, 2004, p. 15). Thus, in this regard, the inconsistency with federalism identified by the Dissent in *AT&T v. Concepcion* is an extension of the original error in *Southland Corp. v. Keating*.

Schwartz also considers, prior to *AT&T Mobility v. Concepcion*, what room is left for state law in federal courts after *Southland Corp. v. Keating*. Although noting room for disagreement, he advocates the preservation of state anti-arbitration policy based on contract law because it is different from the old judicial hostility to arbitration agreements under the common law. “For example, a state legislature or court might determine that given the nature of the rights waived and the disparity between the parties in information and bargaining power, predispute arbitration agreements are always unconscionable as a matter of law. As long as arbitration-specific regulation is based on such concerns, ... the state rule should be deemed saved within the savings clause” (Schwartz, 2004, p. 52). However, the Court’s decision in *AT&T Mobility* expressly eliminates this option.

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<sup>13</sup> Similarly, Szalai asserts “the FAA was never intended to apply in state courts. However, the Supreme Court in what has been called a ‘worse mistake’ than the infamous constitutional error in *Swift v. Tyson*, has held that the FAA is applicable in state courts” (2010, p. 392, footnotes omitted).

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### **C. General backlash against expanded interpretation of FAA's intent**

Given the U.S. Supreme Court's expansionary interpretation of the FAA's intent and the increased usage of arbitration agreements in a wide variety of contexts, "there has been a backlash against the FAA over the last few years" (Szalai, 2010, p. 392, footnote omitted). For example, in 2010 Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act that prohibits arbitration in certain contexts. More generally, Congress is debating how to amend the FAA. Current legislation pending before the 112<sup>th</sup> Congress is the Arbitration Fairness Act of 2011, an earlier version of which was considered but not passed by the 111<sup>th</sup> Congress.

Section 2 of the proposed Arbitration Fairness Act of 2011 sets forth Congress' findings.<sup>14</sup> Review of these findings reveals aspects of U.S. Supreme Court decisions interpreting the FAA that members of Congress have found to be particularly problematic. The findings in Sec. 2 are:

- (1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.
- (2) A series of decisions by the Supreme Court of the United States have changed the meaning of the Act so that it now extends to consumer disputes and employment disputes.
- (3) Most consumers and employees have little or no meaningful choice whether to submit their claims to arbitration. Often, consumers and employees are not even aware that they have given up their rights.
- (4) Mandatory arbitration undermines the development of public law because there is inadequate transparency and inadequate judicial review of arbitrators' decisions.
- (5) Arbitration can be an acceptable alternative when consent to the arbitration is truly voluntary, and occurs after the dispute arises.

As further discussed, of particular relevance here is the finding that U.S. Supreme Court decisions have extended the FAA to consumer disputes, where the parties are not of generally similar sophistication and bargaining power, resulting in ex ante imposition of mandatory arbitration in consumer agreements.

### **D. Further judicial expansion of FAA's intent under *AT&T Mobility v. Concepcion***

Prior to the Court's decision in *AT&T Mobility v. Concepcion*, Sternlight and Jensen (2004) discuss the use of the unconscionability defense to mandatory arbitration under the FAA. They observe that "[c]ompanies are increasingly drafting arbitration clauses worded to prevent consumers from bringing class actions against them in either litigation or arbitration." (Sternlight & Jensen, 2004, p. 75, footnote omitted). Moreover, "[t]hroughout the pro-arbitration era that commenced in the 1980s, the Court has emphasized that unconscionability, along with other generally applicable contract defenses, is an appropriate ground for revoking an arbitration agreement" (Sternlight & Jensen, 2004, p. 77, footnotes omitted). In this regard, they refer to the Court's recognition of the vindication of statutory rights doctrine when construing the § 2 savings clause of the FAA.

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<sup>14</sup> The Arbitration Fairness Act of 2011 was introduced in the House as HR 1873, and an identical bill was introduced in the Senate as S 987.



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Sternlight and Jensen then surmise “[w]hile all the claims raised in the Supreme Court to date have involved federal statutory claims, there is no reason to believe that the Court would treat the use of arbitration to eliminate common law or state statutory claims any differently” (2004, p. 77-78, footnote omitted). In this regard, they provide an extensive discussion as to why state law claims of unconscionability should be permitted under the FAA to block enforcement of class action waivers in arbitration agreements.

In support of their view, Sternlight and Jensen examine the federal district court decision in *Ting v. AT&T* (2002), which held that a class action prohibition in AT&T’s consumer services agreement for long distance was unconscionable under California consumer protection laws. As we have seen, however, the U.S. Supreme Court in *AT&T Mobility v. Concepcion* and lower courts in subsequent telecommunications cases have expressly rejected the outcome supported by Sternlight and Jensen. However, it is instructive to briefly review why Sternlight and Jensen favored preservation of unconscionability claims under state law in order to appreciate what is forgone by the Court’s decision in *AT&T Mobility v. Concepcion*.

Sternlight and Jensen claim that arguments for finding unconscionability are well supported by the facts in *Ting v. AT&T*. For example, the plaintiffs provided evidence to support the assertion that individual claims would not be financially feasible, so that enforcement of the class action waiver would create an enforcement gap by allowing a company to escape liability for perpetrating small-dollar illegal acts against numerous consumers (Sternlight & Jensen, 2004, pp. 86-88). The plaintiffs also provided empirical evidence of actual FCC activity to refute AT&T’s assertion that administrative enforcement actions would adequately protect consumers’ rights and substitute for a class action (Sternlight & Jensen, 2004, pp. 91-93). Sternlight and Jensen also stress the federal district court’s finding that “even if an individual were to successfully arbitrate a claim against AT&T, it is highly unlikely that the arbitrator could order the kind of declaratory or injunctive relief that would put a stop to a widespread illegal practice” (2004, p. 90). Furthermore, the federal district court rejected AT&T’s argument that lower prices would be passed on to consumers, thereby rejecting the argument that class action prohibitions are more efficient (Sternlight & Jensen, 2004, p. 98).<sup>15</sup>

Curiously, Sternlight and Jensen do not discuss the Ninth Circuit’s decision reviewing *Ting v. AT&T* upon appeal. The Ninth Circuit stated that federal courts may under the FAA enforce state law defenses concerning the validity, revocability, and enforceability of contracts so long as they are generally applied to all contracts (319 F.3d at 1148). The Ninth Circuit then held that § 2 of the FAA preempted application of California’s Consumer Legal Remedies Act (CLRA), which would have rendered unenforceable the ban on class actions in the consumer services agreement, because the statute was not of general applicability.<sup>16</sup> On this basis, the Ninth Circuit reversed the federal district court’s holding that the CLRA renders the class action ban

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<sup>15</sup> More generally, Sternlight and Jensen argue “economic theory alone raises significant doubts that companies pass on to consumers the entire cost-savings from using arbitration clauses to eliminate class actions. It is not surprising that, to date, no published studies show that the imposition of mandatory arbitration leads to lower prices” (2004, p. 95, footnote omitted).

<sup>16</sup> The CLRA applied only to noncommercial and consumer contracts, not to commercial or government contracts (319 F.3d at 1148).

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void. Yet, the Ninth Circuit upheld the district court's conclusion that the class-action ban violates California's unconscionability law under California's *Discover Bank* rule because it is a generally applicable contract defense. Sternlight and Jensen were likely influenced by the Ninth Circuit's holding in *Ting v. AT&T*, for which interestingly the U.S. Supreme Court declined to grant a petition for certiorari. However, as discussed in Section II, the U.S. Supreme Court later held in *AT&T Mobility v. Concepcion* that the *Discover Bank* rule is preempted by the FAA.<sup>17</sup>

Finally, Sternlight and Jensen conclude their analysis with the observation that “the United States relies on affected individuals bringing their own lawsuits and calls them *private attorneys general*. In such a system, the elimination of class actions is far more worrisome than it would be in a system in which well-financed government bureaucracies also protect consumers' rights” (2004, pp. 98-99, emphasis added, footnote omitted). In fact, “European Union countries, in addition to using various government agencies to protect consumers' rights, have also prohibited companies from imposing mandatory arbitration on consumers” (p. 99 fn. 140, citation omitted).

For all the foregoing reasons, Sternlight and Jensen conclude that companies' increasing use of “arbitral class action prohibitions to insulate themselves from class action liability... are detrimental not only to potential class members but to the public at large in that they are preventing the law from being adequately enforced” (2004, p. 103). Likely detrimental, systemic effects on private enforcement mechanisms, by preempting unconscionability claims pursuant to *AT&T Mobility v. Concepcion*, are discussed in the next section.

#### **VI. Further Flaws: Court's failure to consider systemic effects of *AT&T Mobility v. Concepcion* on private enforcement mechanisms**

Section V focuses on the enactment of the FAA as a part of landmark developments in civil procedure of the federal court system, the U.S. Supreme Court's expansive interpretation of the FAA beyond its original intent to preempt state law, and the Court's further expansion of the FAA's intent under *AT&T Mobility v. Concepcion* to preempt state law claims of unconscionability of mandatory arbitration clauses containing class-action waivers. Yet, as Sternlight and Jensen (2004) assert, arbitration is only one means of dispute resolution, and the preemptory effect of *AT&T Mobility v. Concepcion* disrupts the broader American regime of private enforcement mechanisms with detrimental effects not only for potential litigants but the public at large. Discussion now turns to the impact of *AT&T Mobility v. Concepcion* on the more basic structural role of private enforcement mechanisms — for their application to consumers generally in this section, and for their unique evolution for consumers within the telecommunications industry in Section VII.

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<sup>17</sup> The Ninth Circuit also held, in the context of interpreting the FCA's §414 savings clause under a detariffing regime, that the customers' unconscionability claim as to contract provisions banning class actions is not preempted by the filed rate doctrine. As is further discussed in Section VII, the U.S. Supreme Court fails to discuss § 414 in *AT&T Mobility v. Concepcion*.

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#### **A. American regulatory regime relies, in part, on private enforcement mechanisms**

Glover (2012) “observe[s] that private litigation serves as a complement – often a crucial one – to public enforcement of various laws, and that restrictions of the mechanisms that make such litigation possible may, as a general matter, lead to undesirable consequences for the vindication of substantive rights of the deterrence of socially undesirable conduct” (Glover, 2012, p. 1142, footnotes omitted). However, Glover (2012) also observes that legal scholars have had the tendency to evaluate debates regarding the restrictions on the use of private enforcement mechanisms “in isolation from one another and without attention to the structural role that these mechanisms play in a particular regulatory framework” (p. 1143). She offers a more systemic view, “[e]valuating private enforcement as a structural feature of the American regulatory state [which] has only quite recently begun to develop in political science literature, and little of [which] has penetrated the legal academy” (Glover, 2012, p. 1141 fn. 7).

Glover’s analysis starts with recognition that “[t]he unique regulatory regime in the United States, with its pronounced reliance on private enforcement through litigation ... is in large part an outgrowth of America’s inherited regulatory design, which relied largely on private suits brought pursuant to common law doctrines, as opposed to ex ante public regulation of wrongdoing by governmental bodies” (2012, pp. 1146-1147). This unique regulatory regime coexists with regulation by federal administrative agencies, which Congress began to create “[a]t the turn of the twentieth century, and partly in response to industrial modernization and the nationalization of various types of harms.... But even then, Congress’s reliance on centralized bureaucracies was circumscribed in that it left a great deal of ex post regulation to the already functioning common law system” (Glover, 2012, p. 1147). For the telecommunications industry, the role of private law enforcement is preserved by the § 414 savings clause in the FCA.

Within this unique U.S. regulatory regime, Glover stresses the functional role of private enforcement. First, she discusses the role of private litigants as primary regulators “within various areas of law because of limitations on public bodies that circumscribe their effectiveness in achieving regulatory goals”, such as scarce resources, informational disadvantages, geographical distance, and regulatory capture (Glover, 2012, p. 1153). She also discusses the role of private litigants as supplementary regulators where “[e]ven when public enforcement is relatively robust, private enforcement may serve a complementary regulatory role in the achievement of various substantive goals” (Glover, 2012, p. 1158, footnote omitted).

An important private enforcement mechanism is the “[m]odern class action practice [which] emerged at the same time that the American regulatory system was coming to rely more on private enforcement of a number of laws” (Glover, 2012, p. 1163, footnote omitted). Functionally, “[t]he modern class action facilitates the aggregation of small claims that are not economically viable on an individual basis; realigns asymmetric investment incentives often present in one-on-one litigation; and enables enforcement of large-scale, market-wide wrongs. The class action device has evolved as a central mechanism of enforcement for a broad range of laws, including ... consumer fraud[ ] and antitrust violations” (Glover, 2012 pp. 1162-1163, footnotes omitted).

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Thus, the class action device has been an important private enforcement mechanism for achieving consumer sovereignty within general business legal regimes. However, as discussed in Section V, the modern class action did not become available until its creation in 1938 by adoption of Rule 23 of the Federal Rules of Civil Procedure. A similar mechanism has since been incorporated into arbitrations, whereby the procedure for class arbitrations adopted by the American Arbitration Association is based on Rule 23.

#### **B. Recent efforts to curtail private enforcement mechanisms**

Yet, as Glover (2012, pp. 1143-1144) describes, the U.S. is being flooded with efforts to curtail private enforcement mechanisms, particularly of class actions in both judicial litigation and arbitrations. The most controversial efforts are those by private parties in arbitration agreements, encouraged by the U.S. Supreme Court's expansive interpretation of the FAA.

The most recent and controversial efforts to restrict the class action have come from private parties, who have used arbitration agreements – often contained in consumer ... contracts – to ban the use of class-wide dispute resolution. ...[T]hese waivers emerged in the wake of the Supreme Court's burgeoning jurisprudence under the Federal Arbitration Act (FAA), which gives little heed to the Act's history regarding its scope. Building on its proclamation in 1983 that the FAA sets forth a "liberal federal policy favoring arbitration agreements," the Supreme Court, in a series of decision, expanded the FAA's reach to statutory claims and to ... consumer ... contracts of adhesion, which both the Court and Congress once considered as beyond the FAA's reach.

(Glover, 2012, p. 1165, footnotes omitted). Importantly, Glover refers to the U.S. Supreme Court's interpretation of the FAA as reaching state law related to consumer contracts of adhesion. (The unconscionability doctrine, at issue in *AT&T Mobility v. Concepcion*, is an important component of longstanding common law principles related to contracts of adhesion.) Underscoring this point, Glover stresses that *corporations* are using contracts that include mandatory arbitration clauses and often ban classwide arbitration (2012, p. 166). Moreover, "[s]ome scholars argue that potential defendants, keenly aware of the class action's significant impact on the economics of claiming, use mandatory arbitration and prohibitions on the class device to eliminate private enforcement altogether" (Glover, 2012, p. 1166, footnote omitted).

It is at this juncture that Glover discusses the decision in *AT&T Mobility v. Concepcion*, which held that § 2 of the FAA preempted the use of state unconscionability law to declare some class waivers unenforceable.

Although ... AT&T's particular arbitration class ... contains provisions designed to address criticisms that arbitration is too costly for consumers - one thing is quite clear under the current landscape: the class action mechanism will not be available to most consumers ... whose contracts are governed by arbitration clauses with class waivers.

(Glover, 2012, pp. 1166-1167, footnote omitted). In support of her claim that the class action mechanism will not be available to most consumers, Glover refers to a "recent study of contracts imposed by financial services and telecommunications firms on their customers [which] found that 75 per cent contained mandatory arbitration clauses, and 80 per cent contained class action waivers" (2012, p. 1167, footnote omitted). Thus, Glover concludes "to the extent the class action mechanism is necessary to private regulation of wrongdoing,

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such waivers may subvert the operation of significant portions of our regulatory state” (2012, p. 1167, footnote omitted).

It is the U.S. Supreme Court’s failure in *AT&T Mobility v. Concepcion* to consider the systemic effects of its decision on the telecommunications industry, in particular, that will be discussed in the next subsection. However, before embarking on that discussion, the institutional impact of efforts to curtail private enforcement mechanisms on the relationship of *corporations and individuals* bears emphasizing here. Smith and Moyé (2012) also stress the role of corporate power in contracts of adhesion to achieve waiver of individual constitutional rights.

In consumer contracts, problems arise when large corporate entities insist upon arbitration agreements in contracts that consumers have no ability to negotiate. The result is a contract of adhesion, in which the consumer is forced to “take it or leave it.” This inequity is particularly acute when an entire industry demands arbitration. If every industry player requires arbitration of all contractual disputes, the consumer loses all bargaining power and is forced to succumb and sign away his or her rights in order to meaningfully participate in the marketplace. Most do not understand that by agreeing to arbitration, they are essentially waiving their constitutional right to a jury trial.

(pp. 296-297, footnotes omitted). Thus, although the right to contract is important and parties should have the ability to resolve conflicts outside of judicial litigation, “[t]he problem arises, however, when the Court’s national policy favoring arbitration is applied to relationships of grossly disparate bargaining power” (Smith & Moyé, 2012, p. 301). It is for this reason that Smith & Moyé consider the result in *AT&T Mobility v. Concepcion* to be unfair, because “[t]he law, including the FAA, should be a shield for the weak and powerless and not a hammer for the strong and powerful” (2012, p. 301). They conclude, similar to Glover, that *AT&T Mobility v. Concepcion* “sounds a death knell for consumer class actions” (Smith & Moyé, 2012, p. 295).

## **VII. Further Flaws: Failure to Consider Systemic Effects on the Telecommunications Industry**

The Court’s failure to consider the systemic effects of *AT&T Mobility v. Concepcion* on private enforcement mechanisms for consumers is particularly problematic for consumers of telecommunications services. As this section explains, the Court does not consider the historical context in which the industry-specific regulatory regime for telecommunications evolved. Had it done so, the Court would have discovered that the inadequacy of customers’ common-law judicial remedies was a critical factor for the development of a unique, industry-specific regulatory framework for transportation and communications common carriers. This industry-specific regime is based on the coexistence of regulation by a federal administrative agency, state administrative agencies, and private enforcement mechanisms. For telecommunications services, Congress expressly preserved certain private enforcement mechanisms in the § 414 savings clause of the FCA. Unfortunately, in *AT&T Mobility v. Concepcion*, the Court does not even acknowledge the existence of §414, much less consider the historical reasons for its existence as well as its functional role within the industry-specific regime for telecommunications services.

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#### **A. Need to consider coexistence of FAA and FCA savings clauses**

As discussed in Section III, the vindication of statutory rights doctrine under the FAA provides a means for a party to argue that an arbitration agreement is unenforceable because it precludes that party from vindicating its statutory rights. A party could argue that an arbitration agreement precludes common law or statutory remedies preserved by the §414 savings clause of the FCA. In such a case, the court would have to recognize the coexistence of two *federal* savings clauses, one under the FAA and the other under the FCA, and determine how to resolve any tension or conflict between them.

To apply such a legal argument to the circumstances in *AT&T Mobility v. Concepcion*, the plaintiffs would need to assert that their unconscionability claim under California law should not be preempted by the FAA in order to preserve their *federal* statutory right under §414 of the FCA to pursue a state judicial remedy.<sup>18</sup> It appears that the plaintiffs in *AT&T Mobility v. Concepcion* did not raise this argument.<sup>19</sup> Similarly, it appears that the relevant parties did not raise analogous claims in the subsequent lower court cases discussed in Section III.<sup>20</sup> As a result, to date the courts have not yet squarely addressed how to determine the scope of permissible remedies available to consumers under both the FAA and FCA savings clauses simultaneously.

One can certainly argue that the Court's failure to consider the FCA's § 414 savings clause in *AT&T Mobility v. Concepcion* is merely the result of plaintiffs' failure to assert vindication of their statutory rights under the FCA. Yet, the U.S. Supreme Court does have some discretion as to the legal basis on which it chooses to rule, and in this respect has the authority to ask parties to brief additional issues. For this reason, the Court's failure to consider the unique regulatory regime for the wireless telecommunications carriers is a significant omission in its own right.

#### **B. Need to consider historical context of FCA savings clause**

To properly consider the preemptory effect of § 2 of the FAA in the context of a claim arguably preserved by § 414 of the FCA, a court will need to understand the functional role of private enforcement mechanisms within the industry-specific, telecommunications regulatory regime. Moreover, the functional role itself has changed over time, most recently through adoption and implementation of deregulatory telecommunications policies.

Cherry (2012) discusses the evolution of institutional governance in the U.S., from the common law origins of industry-specific and general business regimes, to the general rise of statutorification and corporate power, and to the statutory evolution in particular of common carriage and antitrust law. It is not possible to reiterate the full analysis here. However, of importance to the current paper is the recognition that the federal

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<sup>18</sup> Note that claiming vindication of a *federal* statutory right would avoid the problem – the Court's earlier error – of preempting state law in *Southland Corp. v. Keating* discussed in Section V.B.

<sup>19</sup> The author can find no reference to such an argument in Concepcions' brief in response to AT&T Mobility's petition for certiorari to the U.S. Supreme Court, nor in various briefs filed by others (as amici curiae) in support of Concepcions' position after the Court granted the petition. However, the author has not yet reviewed all relevant briefs in this regard.

<sup>20</sup> For convenience of reference, these cases are *Cruz v. Cingular Wireless* (11<sup>th</sup> Cir. 2011), *Coneff v. AT&T Corp.* (9<sup>th</sup> Cir. 2012), and *Laster v. T-Mobile USA, Inc.* (S.D. Cal. 2012).

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statutory regime of common carriage established by Congress – initially for railroads and later extended to telegraph and telephone carriers – evolved in large part from the inadequacy of common law remedies and the lack of States’ jurisdiction over interstate commerce. Furthermore, the framework of this regulatory regime is based on the coexistence of federal agency, state agencies and private enforcement mechanisms. As discussed in Cherry (2010), the initial role of the FCA’s savings clause within this framework was more constrained under tariffing but should expand under deregulatory policies of detariffing.

### ***1. Scope of the FCA savings clause under tariffing***

In the late 19<sup>th</sup> century, Congress created a special Senate Select Committee on Interstate Commerce, popularly known as the Cullom Committee (after its Chair, Senator Cullom) to review economic abuses of large corporations, particularly railroad companies. In 1886, the Committee issued its report, known as the *Cullom Report*, which provided a comprehensive record of the Committee’s investigation and recommendation for federal legislation. Based on the recommendations in the *Cullom Report*, Congress enacted the Interstate Commerce Act of 1887 (ICA), initially applicable to railroads and later extended to telegraph and telephone companies in 1910. The Federal Communications Act of 1934 (FCA), creating the FCC with jurisdiction over telecommunications carriers, was based on the framework of the ICA. The § 414 savings clause in the FCA was copied verbatim from the savings clause in the ICA. For these reasons, the findings of the *Cullom Report* underlying the recommendation for the federal statutory regime of railroads are also relevant for the federal statutory regime of telecommunications carriers.

As Cherry (2012, pp. 12-14) describes, the *Cullom Report* concluded, among other things, that common law legal remedies are inadequate to protect customers from arbitrary or oppressive rates or unjust discrimination, that competition is insufficient to protect customers other than large shippers in commercial centers or localities where competition is most active, that States lack jurisdiction to protect customers in interstate commerce, and that only federal legislation could provide the necessary uniformity of regulation required for the railroad transportation industry in interstate commerce. The resultant statutory framework under the ICA consisted of regulation of interstate services under oversight of the (newly created) Interstate Commerce Commission, regulation of intrastate services by the States (which may or may not create their own state regulatory commissions), and the preservation under the ICA savings clause of certain common law and statutory remedies through private enforcement.

Another key component of the federal statutory regime was the imposition of tariffing to ensure public disclosure and uniformity of application of rates, terms and conditions of service among customers. All carriers had to file tariffs – printed schedules of rates, terms and conditions of services – with the federal Commission and make them available for public inspection.<sup>21</sup> *Such tariffs replaced the use of contracts.* In fact, any deviations from the tariffed rates, terms and conditions in dealings or contracts with customers were

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<sup>21</sup> States similarly adopted tariffing requirements, constraining the scope of legal remedies available for intrastate regulatory purposes as well.

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unenforceable under the filed rate doctrine (Cherry, 2012, pp. 14-15). Therefore, under tariffing, the scope of legal remedies preserved by the savings clause was constrained by the filed rate doctrine. Furthermore, given the absence of contracts to enforce, unconscionability claims fell into disuse with respect to the provision of telecommunications services.

## **2. Reinterpreting the scope of the FCA savings clause under detariffing**

Deregulatory telecommunications policies have modified the federal statutory regime, requiring reinterpretation of the FCA's § 414 savings clause. After enactment of the Telecommunications Act of 1996 (modifying the FCA), the FCC issued a mandatory detariffing order in 1996 (which given various courts stays did not become effective until 2001). Under federal detariffing, telecommunications carriers are required to establish contracts with consumers governing rates, terms and conditions of interstate long distance services. In its Order on Reconsideration, the FCC states "consumers may have remedies under state consumer protection and contract laws as to issues regarding the legal relationship between the carrier and customer in a detariffed regime" (12 FCCR 15,014 (1997), ¶ 77). Thus, it would appear that state law remedies, such as unconscionability claims, should now be available after detariffing.

However, the expected expansion of permissible state law remedies under detariffing has not been consistently recognized by the courts, creating uncertainty (Cherry, 2010, p. 17). One area of uncertainty arises from conflicts among the Circuit Courts of Appeals as to whether the uniformity of rates, terms and conditions of service underlying the filed rate doctrine still apply under detariffing.

For example, the Seventh Circuit Court of Appeals in *Boomer v. AT&T Corp.* (2002) concludes that §§ 201 and 202 of the FCA demonstrate Congressional intent that customers receive uniform rates, terms and conditions of service and thus still impliedly preempt state law claims of unconscionability in consumer contracts for interstate long distance services. In support, the Seventh Circuit states "detariffing does not alter the fundamental design of the Communications Act, nor modify Congress's objective of uniformity in terms and conditions for all localities. Accordingly, we reject Boomer's argument and his reliance on *Ting*" (309 F.3d at 422, footnote omitted)(referring to the federal district court decision in *Ting v. AT&T* (2002)). Confusingly, however, the court also states "[i]t would seem ... that under the new detariffed regime federal law no longer completely preempts state law. But we need not resolve this issue today as Boomer's state law challenges to the arbitration clause are nonetheless preempted under the doctrine of impliedly conflict preemption" (309 F.3d at 424).

By contrast, in *Ting v. AT&T* (2003)<sup>22</sup> the Ninth Circuit Court of Appeals expressly disagrees with the Seventh Circuit's decision in *Boomer v. AT&T Corp.* As to the Seventh Circuit's implied preemption argument, the Ninth Circuit states "[s]ave for *Boomer*, no court has ever interpreted §§ 201(b) or 202(a) independently to

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<sup>22</sup> As explained in Section V.D., this is the same case discussed by Sternlight and Jensen (2004), upon appeal to the Ninth Circuit Court of Appeals.



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preempt state law” (319 F.3d at 1140 fn. 8, citations omitted). As to the role of private enforcement of state remedies under the FCA within a detariffing regime, the Ninth Circuit states:

The FCC’s detariffing orders provide ... confirmation that Congress intended to replace the filing mechanism with a market-based mechanism that expressly encompassed state law. In numerous passages, the FCC makes clear that the availability of state law remedies in the newly-detariffed telecommunications marketplace is an essential part of protection for consumers.

(319 F.3d at 1144). Thus, “[i]n the absence of significant conflict between federal policy and the use of state law, we hold that state contract and consumer protection laws form part of the framework for determining the rights, obligations, and remedies of the parties to the [Consumer Services Agreement]” (319 F.3d at 1146).

As a result of this conflict between the Circuit Courts, “*under federal law*, legal remedies available to protect consumer sovereignty now vary by the state in which customers reside. At this juncture, only the US Supreme Court or an act of Congress can resolve the conflict” (Cherry, 2010, p. 17).

In *AT&T v. Concepcion*, the U.S. Supreme Court fails to address this conflict among the Circuit Courts, and instead *increases* uncertainty as to the scope of available state law remedies. The Court’s holding is troublesome not only because it fails to expressly consider the FCA’s § 414 savings clause, but also because it fails to consider the change in the role of private enforcement mechanisms under detariffing.

At best, the Court only implicitly acknowledges the existence of § 414 in *AT&T Mobility v. Concepcion* when citing *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.* (1998) to support the assertion that a federal statute’s saving clause – here, the § 2 of the FAA – cannot be construed to allow a common law right that is inconsistent with the provisions of the act (131 S.Ct. at 1748). But, importantly, in *American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, the Court held that *under tariffing* the century-old filed rate doctrine preempted state law claims for breach of contract and tortious interference with contract by a reseller of long-distance communications services against AT&T. First, it is unclear how the Court would determine the scope of permissible state remedies preserved by the FCA’s § 414 savings clause under detariffing. Second, it is unclear how the Court would determine whether federal law preempts an unconscionability claim if it expressly considered: (1) the scope of permissible state remedies preserved by the FCA’s § 414 savings clause, (2) under detariffing, (3) to challenge an mandatory arbitration clause banning class-actions in a consumer contract, (4) under the FAA’s § 2 savings clause. As a result, lower courts must struggle with the lack of legal clarity. Meanwhile, private enforcement mechanisms are hindered – and inconsistently so among state jurisdictions – from fulfilling their intended functional role in the telecommunications regulatory regime.

### **VIII. Conclusion**

Deregulatory telecommunications policies are adversely affecting consumer sovereignty due to legal gaps created by shifting boundaries between industry-specific telecommunications and general business legal regimes. Meanwhile, the U.S. Supreme Court’s expansive interpretation of the FAA’s original intent to preempt state law has encouraged a form of corporate self-deregulation through use of mandatory arbitration agreements

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that ban class arbitration. Both of these trends have converged with powerful consequences for the telecommunications industry in the Court's recent decision in *AT&T Mobility v. Concepcion*, rewarding telecommunications carriers' efforts to curtail private enforcement mechanisms by imposing provisions that ban class arbitration in consumer contracts.

In *AT&T Mobility v. Concepcion*, the Court interprets the FAA's § 2 savings clause to preempt longstanding public policy underlying states' unconscionability doctrine with respect to contracts of adhesion. As a result, this decision further erodes available legal remedies for consumers of telecommunications services, disrupting an industry-specific regulatory regime that developed to address a legacy of inadequate legal protection for consumers. Furthermore, the significance of this erosion is heightened under the more recent deregulatory policy of detariffing.

Perhaps more egregious than the result in *AT&T Mobility v. Concepcion* is the analysis – or lack thereof – by which the Court reached its decision. The Court's analysis suffers from numerous flaws. The Dissent identifies some of these flaws, such as the Court's reliance on claims that are not well founded – engaging in ahistorical and nonempirical analysis, making wrong comparisons, and proceeding from a view that is inconsistent with federalism and not based on precedent. However, identifying the scope of the flaws in the Court's analysis is broadened by understanding its systemic effects on private enforcement mechanisms, both generally and for the telecommunications industry in particular.

The Dissent begins such inquiry of systemic effects by identifying the majority view's inconsistency with federalism. By preempting state law contract defenses under the FAA's § 2 savings clause, the Court is forcing society to forgo the advantages of the class action device to prevent the exculpatory effect of corporate use of consumer contracts of adhesion. As we have seen, in so doing, the Court in *AT&T Mobility v. Concepcion* extends its original error of inconsistency with federalism in interpreting the FAA in *Southland Corp. v. Keating*.

Further inquiry of systemic effects reveals that in failing to analyze the FAA in appropriate historical context, the Court also ignores *its own role* through judicial interpretation of undermining the American regulatory regime that relies, in part, on private enforcement mechanisms. Beyond the impact generally to the unique role of private enforcement mechanisms in the U.S., yet even further inquiry reveals that the impact is potentially more acute for the telecommunications industry. The Court also ignores *its own role* in undermining the role of private enforcement mechanisms within the industry-specific regulatory regime for telecommunications services. The Court fails to consider the coexistence of two federal statutory savings clauses under the FAA and FCA, and how to resolve any tension of conflict between them – all under the more recent deregulatory regime of detariffing.

To correct this state of affairs requires either act(s) of Congress or future decision(s) by the U.S. Supreme Court. By either means, the preemptory effect of the FAA on private enforcement mechanisms needs to be revisited, both generally and for applicability to the telecommunications industry.

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Comparing the analysis in this paper with that in Cherry (2011) reveals that *AT&T Mobility v. Concepcion* contains many of the same flaws as the Court's ahistorical, non-contextual analysis in *Citizens United v. Federal Election Commission* (2010), which held that corporations have the same constitutional rights for political speech as individuals. Both create substantial systemic effects by curtailing available legal remedies for consumers. As *Citizens United v. FEC* diminishes the federal government's ability to protect consumers with regard to potential network neutrality principles (Cherry, 2011), so does *AT&T Mobility v. Concepcion* disable state governments' ability to protect consumers of telecommunications services.

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