Arbitration is probably the oldest and best known branch in what we, in modern practice, have come to know as "ADR," also known as "alternative dispute resolution." The efficacy of arbitration has been established over the decades; specifically, its economy, swiftness, and less formal nature. A methodology in motting out justice stands in sharp contrast to the ever-burgeoning delays and costs inherent in litigation.

Indeed, the budgetary constraints now imposed on the court systems in many jurisdictions, including our own, work to make arbitration the forum of choice for many disputants. In short, arbitration has been embraced by many, including the courts, as a worthy alternative to full-blown trial practice.

But this was not always the case. In its nascent years, arbitration faced unrelenting hostility from the judicial system. Decades ago, state courts, in particular, proudly proclaimed their opposition to arbitration, and placed significant obstacles in the way of those seeking to resolve their differences without resort to the judicial process.

It took the strong hand of the federal government in promulgating the Federal Arbitration Act (the "FAA") in 1925 to once and for all establish the availability of arbitration, and the even stronger hand of the United States Supreme Court over the ensuing years to demolish parochial obstacles to arbitration, thereby opening the path to the broad acceptance of arbitration that we enjoy today.

Notwithstanding, remnants of this "litigation-only" ideology crop up, and take the form of anti-ADR mechanisms that would derail otherwise valid arbitrations. One such recent example piled a judicially created theory of the California state courts against the broad policy favoring arbitration, and became a subject of interest to the Supreme Court this term. Intervening in favor of ADR, the Supreme Court utilized its arsenal of precedents to dismantle this contrary state court theory, and thus give us this newest landmark advancing arbitration. We now discuss this timely decision.

Procedural History

AT&T Mobility LLC v. Concepcion is rooted in a rather prosaic set of circumstances. The Concepcions, California residents, contracted with AT&T for wireless service. As part of that package, they received free cell phones. But, to their apparent chagrin, they still had to pay $50-52 in sales tax based upon the phones' nominal retail price. Clearly offended that their ostensibly "free" phones were not precisely free, the Concepcions commenced litigation. AT&T opposed, based upon the Concepcions' waiver of their right to litigate as class members.

The service contract between the
Concepcions and AT&T contained a notable arbitration clause. First, arbitration was required, which the customer could initiate. Second, AT&T was required to pay all costs of the arbitration (unless the customer's claim was later deemed to be frivolous). Third, the arbitration had to be conducted closest to the customer's home, not the company's.

In addition, an "escape hatch" gave the customer the right to forego arbitration and go straight to small claims court instead. However, protective damages were allowed, AT&T was forbidden to seek attorneys' fees, and even if the event the arbitrator awarded the customer an amount that exceeded AT&T's last written settlement offer, the phone company had to pay the prevailing party no less than a minimum of $7,500 and twice the customer's attorney's fees.

Authentically, we note that, in a time when consumer arbitration agreements are often subject to harsh criticism because they sometimes favor the very people who are the ordinary citizen, the terms herein provided a fair degree of solicitude to the customer.

Yet there was one provision of this accord that proved to be the crux of the ensuing controversy: the contract for-bade arbitration of claims as a class, and by opening the path to the broad acceptance of arbitration that we enjoy today.

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The Purpose of the FAA

Writing for the majority, Justice Scalia succinctly set forth the precise
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issue before the Supreme Court; does the FAA prohibit the States from denying the enforceability of agreements to arbitrate when those accords restrict or deny arbitration as a class?14

To obtain access to the Justices' analysis would be Section 2 of the FAA, which while wholeheartedly decreeing that agreements to arbitrate are forevermore "valid, irrevocable, and enforceable," nonetheless reserves to the courts the capability to usurp such agreements to arbitrate "upon such grounds as exist at law or in equity for the revocation of any contract."10

As he is wont to do, Justice Scalia commenced with a careful recitation of precedents. Drawing from the rise of arbitration as a valuable mode of dispute resolution, and tracking the countervailing eradiation of narrow minded judicial obstacles to the enforcement of agreements to arbitrate,11 the majority noted how the FAA was enacted over 85 years ago to squelch "widespread judicial hostility to arbitration," and replace that animosity with a "liberal federal policy favoring arbitration."12 Such notions were affirmed only a year ago by the Supreme Court in Rent-A-Center, West, Inc. v. Jackson,8 where the Justices once more stated that arbitration is a matter of contract and not of federal substantive law. To enforce such contractual arrangements that call for arbitration as the parties' chosen means of dispute resolution.

Marking back to the venerable precedent of Volt Information Sciences v. buckman,6 the AT& T majority reminds that an agreement to arbitrate, be it independent or part of a larger accord, stands on the same footing as any other contract, and thus is to be enforced according to its terms, free of judicial revisionism.10

To be sure, Section 2 of the FAA contains the aforementioned provision, a provision by which an otherwise enforceable agreement to arbitrate can be negated on the basis of such legal or equitable principles that could be employed to revoke any contract. The force of that legislative carve-out was previously recognized by the Supreme Court, insofar as an agreement to arbitrate can be voided pursuant to state law, as a matter of public policy, as fraud, duress or unconscionability. Nevertheless, the statute does not invalidated an arbitration agreement for reason of a defense that supplies only to arbitration or derives its meaning from the happenstance that the agreement in controversy is one to arbitrate.11

State Efforts to Curtail Arbitration Agreements

Having thus marshaled the linchpins of the strong federal policy favoring arbitration, Justice Scalia now turned to the state law that was obstructing its application here.

As an underlying principle, California has empowered its courts to refuse to enforce the whole or part of any contract that is found to be have been unconscionable when it was made.12 Against this statutory backdrop, the California Supreme Court (the highest court in the Golden State) has decided the aforementioned Discover Bank case, finding invalid any waiver of the right to invoke class action procedures in an arbitration setting.

In the wake of Discover Bank, California state courts "frequently applied this rule to find arbitration agreements unconscionable."13 On that basis, the California Supreme Court held the contracts arbitral only to the extent that it was individually arbitrable solely as individuals dispute over the "free" cell phone contract.14

Justice Scalia immediately recognized the conflict presented by the California Supreme Court's decision, stating that the referendum was "not to bar, on the one hand, it was beyond peradventure that when a state law prohibits outright the arbitration of a particular type of claim, it is preempted as matter of federal law and the strong federal policy favoring arbitration."12

But not every situation is such a clear cut case of federal supremacy knocking to the side a state-created obstacle to arbitration. "The inquiry becomes more complex," noted the Court.15 Justice of course generally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied as the basis for barring arbitration.16

The Supreme Court took a nuanced approach, warning that a lower court could not simply invoke the talisman of unconscionability and thereafter invalidate an arbitration accord, for that would allow the judiciary to effect what a state legislature could not.15 A coherent illustration would be negating a consumer arbitration agreement because it failed to permit judicially monitored discovery, and was, thus, purportedly, unconscionable.

Justice Scalia hypothesized that a state tribunal might rationalize that no ordinary citizen would knowingly give up the right to uncover a company's wrongdoing via the discovery process. Another example would be declaring as unconscionable an arbitration agreement that did not adopt the Federal Rules of Evidence.17

These are not fanciful musings, proclaimed the learned Justice, since the FAA itself was born out of a very real judicial hostility toward arbitration that manifested itself in a great variety of impediments disguised as rules and legal doctrines.

The majority stated its paramount concern was to ensure the enforcement of arbitration agreements according to their terms.18 Invalidating an agreement to arbitrate because of a prohibition against the conduct of a class, as was the case here, "interferes with the fundamental attributes of arbitration" and is thus inconsistent with Congress' purpose.19

Arbitrating Class Actions

The AT&T Court reminds that parties may fashion their agreement to arbitrate in numerous and diverse ways, such as to limit the issues subject to arbitration, to arbitrate under specific rules, to assure confidentiality, to maintain informality, and otherwise personalize the arbitral process via efficient, streamlined procedures of their own choosing.20 Since the overarching confronted the even small chance of suffering a devastating loss, a defendant might well feel compelled to settle a questionable class claim that it otherwise would have readily arbitrated had it been submitted on an individual basis. The majority declared that "arbitration is poorly suited to the higher stakes of class litigation."23

Nearing its conclusion, the Supreme Court reiterating that the FAA requires courts to honor parties' expectations.24 In the case at bar, aqquiescence to the California rule would wrongfully negate the bargain the parties had originally struck.25

Put in that light, concluded the majority, the doctrine espoused by California's state courts contradicted and frustrated the strong federal policy favoring arbitration.26

Justice Trump's Concurrence

While the majority opinion is certainly concise enough, the concurrning opinion of Justice Thomas is also worth considering.

Expressing reluctance in joining his brethren, for reasons of the case charted by the majority to reach its holding, Justice Thomas preferred a different route to the same conclusion. Surely, he wrote, if the FAA meant what the majority seems to think it means that courts cannot refuse to enforce arbitration agreements because of a state public policy against alternative means of dispute resolution, even if the state dressed such opposition in the form of a generic contract law defense,28 Justice Thomas proposed reading the FAA such that agreements to arbitrate are upheld unless the challenge is based on the enforcement of the contract, such as the conventional defenses of fraud, duress or mutual mistake.29

Roundly criticizing California's Discover Bank rule because it does not rule to defects in contract formation, Justice Thomas opined that "contract defenses unrelated to the making of the contract agreement, such as public policy, are no basis for declining to enforce an arbitration clause."30

At the end of the day, Justice Thomas was as unequivocal as the majority in finding the rule created by judicial fiat to be wholly preempted by the FAA.31

Arbitration Agreements After AT&T

Having exposed the reasoning of the majority of AT&T, and further given due consideration to the worthwhile addition of Justice Thomas' concurrence opinion, let us step back and review what the decision means.

In recent decades, and, moreover, in very recent terms, the Supreme Court has provided many notable landmarks that unequivocally uphold the rightful place of arbitration in our modern legal system.32 The precedent is like a great stone, increasing the size of the fortifications that defend arbitration as a worthy alternative to the slow judicial process.33

AT&T is another great block added to those ramparts. It cannot be doubted that the state courts of California attempted to go their own way in postulating Discover Bank as a valid state law that preempted any federal policy favoring arbitration. From the first, California's perspective was on a collision course with the FAA; similarly, the outcome was never seriously in doubt. As California's Supreme Court said in the case of this provides an object lesson to lower courts, both state and federal: do not encroach obstacles in the path of arbitration without very good cause.

Next, we turn to Justice Scalia's erudite reclamation of the FAA's savings clause with the absolute need for protection when the supremacy of federal law is challenged. Justice Scalia did not unnecessarily finesse the issue. How can a state that seeks to encroach on States' rights to maintain nominal contract defenses, even in the face of such favored arbitration agreements, were not compensated by this holding.

Next, we turn to Justice Thomas' contention that Section 2 of the FAA would resurrect the Discover Bank rule, the majority patientsly demonstrates that California's judicial construct was not a proper exercise of its traditional power of allocating defenses in a state law contract disputes. Justice Scalia made a comprehensive exhibition of how this provincial rule was a not so-subtle attack upon the arbitration process itself, and
in turn, the supremacy of the FAA. Put another way, the rule created by California’s highest court ranged far afield from mere contract law; it was a blatant obstruction to a decades-old national policy favoring arbitration. Preemption was therefore the only just outcome.

Furthermore, Justice Thomas’ concurring opinion is not insignificant. Indeed, we find it to be meritorious in its own fashion, for two main reasons. First, it runs true to the majority in its staunch defense of federal preemption, and thus validating ADR. Second, it presents its own cogent methodology by cabining the application of the FAA’s saving clause to defenses truly grounded in contract formation. In this way, it commits no offense against the States’ rights to apply their own longstanding principles of contract law, yet nonetheless is an effective preventive against interference in a realm where federal law reigns supreme.

In conclusion, we return to our opening observations. Arbitration has long been recognized as a vital component of our system of justice, providing an alternative to costly and time consuming litigation. Its rightful role has been assured via decades of Supreme Court precedents. AT&T is the most recent addition to that solid wall of decisions favoring arbitration. Today, as our court systems, federal, state, and local, suffer from overcrowding, delays, and budgetary restraints, AT&T shall play a vital role in assuring that justice, via the alternative means of arbitration, will still be done.

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1. 9 U.S.C. § 1, et seq.
3. AT&T, slip op. at 2.
5. AT&T, slip op. at 1.
6. Id.
8. 130 S.Ct. 2772 (2010).
11. Id.
12. Id. (citing Cal. Civ. Code Ann. § 1670.5(a) (West 1985)).
13. Id. at 6.
14. Id. at 3-4. See also id. at 17-18 (reversing sub nom. 584 F.3d 849 (2009)).
15. Id. at 7.
16. Id.
17. Id. at 8.
18. Id. at 9.
19. Id. at 10.
20. Id. at 11.
21. Id. at 14.
22. Id. at 15.
23. Id. at 16.
24. Id. at 17.
25. Id.
26. AT&T, slip op. at 1. (Thomas, J., concurring).
27. Id. at 3-4. (Thomas, J., concurring).
29. Id. at 6. (Thomas, J., concurring).
31. As this article went to press the Supreme Court issued a per curiam opinion in KPMG LLP v. Cocchi, No. 10–1521 (Nov. 7, 2011), available at <www.supremecourt.gov> among the 2011 Term opinions. The Court reaffirmed that “the emphatic federal policy in favor of arbitral dispute resolution” demands that state and federal courts “enforce the bargain of the parties to arbitrate.”