

2013

## Mis-Concepcion: Why Cognitive Science Proves the Emperors Have No Robes

John Campbell

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/blr>

---

### Recommended Citation

John Campbell, *Mis-Concepcion: Why Cognitive Science Proves the Emperors Have No Robes*, 79 Brook. L. Rev. (2013).  
Available at: <https://brooklynworks.brooklaw.edu/blr/vol79/iss1/3>

This Article is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Law Review by an authorized editor of BrooklynWorks.

# Mis-Concepcion

## WHY COGNITIVE SCIENCE PROVES THE EMPERORS HAVE NO ROBES

*John Campbell*<sup>†</sup>

Every judge comes to the bench with personal experiences. If you assume that your personal experiences define the outcome, you're going to be a very poor judge, because you're not going to convince anybody of your views . . . We have to know those moments when our personal bias is seeping in to our decision-making. If we're not, then we're not being very good judges. We're not being fair and impartial.<sup>1</sup>

Justice Sonia Sotomayor

[P]eople make choices for reasons unknown to them and they make up reasonable-sounding justifications for their choices, all the while remaining unaware of their actual motives and subsequent rationalizations.<sup>2</sup>

Joshua D. Greene

### INTRODUCTION

In a blunt article appearing in *The New Republic*, Judge Posner criticized Justice Scalia asserting that he is not really a textual originalist at all, and that instead, he relies on whatever canon of construction will allow him to support his conservative views on abortion, states' rights, guns, and other issues.<sup>3</sup> Indirectly, Judge Posner suggested that Scalia is either unwilling or incapable of engaging in the personal reflection

---

<sup>†</sup> Lawyering Process Professor – University of Denver Sturm College of Law. Thanks to Justice Posner for the inspiration that led to this piece—both for his article and for his comments to me and other attorneys years ago regarding arbitration. Thanks to Alicia Campbell and Erich Vieth.

<sup>1</sup> Interview by Gwen Ifill with Sonia Sotomayor, Supreme Court Justice, on PBS NEWSHOUR (Feb. 20, 2013), *transcript available at* [http://www.pbs.org/newshour/bb/law/jan-june13/justice\\_02-20.html](http://www.pbs.org/newshour/bb/law/jan-june13/justice_02-20.html).

<sup>2</sup> Joshua D. Greene, *The Secret Joke of Kant's Soul*, in 3 MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY: EMOTION, DISEASE, AND DEVELOPMENT 35, 36 (Walter Sinnott-Armstrong ed., 2007).

<sup>3</sup> Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), <http://www.newrepublic.com/article/magazine/books-and-arts/106441/scalia-garner-reading-the-law-textual-originalism#>.

that Justice Sotomayor suggests is essential to decision making.<sup>4</sup> The title of Judge Posner's article alone would be enough to raise eyebrows; Posner titled his work: *The Incoherence of Antonin Scalia*.<sup>5</sup> For many who have wrestled with some of Scalia's decisions—both those he wrote and those in which he joined the majority—Posner's words echoed their own criticisms that Scalia is prone to inaccuracy in his recitation of case law, that his commitment to textual originalism is questionable, and that in all, Scalia seems to use his “interpretative principles” to reach results that fit more with his political and social views than they do with the law he claims he relies upon.<sup>6</sup> These same assertions are often made more broadly about the conservative majority of the United States Supreme Court (Justices Scalia, Thomas, Roberts, Alito, and Kennedy).<sup>7</sup>

This article asks two questions that grow out of this discussion. First, is there any evidence that the conservative majority is actually bending the law to the majority's common business-friendly beliefs? And second, if Judge Posner is right, and it applies to more than Scalia, why and how is this happening? To get at these questions, this article examines two split decisions in which the conservative majority won the day: *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,<sup>8</sup> and *AT&T Mobility LLC v. Concepcion*.<sup>9</sup> The first opinion was written by Justice Alito<sup>10</sup> and the second by Justice Scalia.<sup>11</sup> An analysis of these cases leads to one conclusion: these opinions are fundamentally, legally unsound.

But this article offers more than a mere conclusion that the “emperors have no robes.” As the title suggests, the article employs cognitive science to attempt to explain *why* the conservative majority got it so wrong, and, maybe more importantly, why the conservative majority did not seem to notice. It addresses *how* the opinions can cite precedent extensively if it is indeed true that they are inconsistent with it. The somewhat surprising conclusion, at least to those who would

---

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Connor D. Deverell, Note, *Defining a Corporation's “Principal Place of Business”*: *The United States Supreme Court Decision in Hertz Corp. v. Friend*, 56 LOY. L. REV. 733, 755 (2010); David L. Franklin, *What Kind of Business Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019, 1056 (2009); A.E. Dick Howard, *Out of Infancy: The Roberts Court at Seven*, 98 VA. L. REV. IN BRIEF 76, 80-82 (2012).

<sup>8</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1763 (2010).

<sup>9</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1743 (2011).

<sup>10</sup> See *Stolt-Nielsen*, 130 S. Ct. at 1763.

<sup>11</sup> See *Concepcion*, 131 S. Ct. at 1743.

simply bash the majority, is that it is entirely possible that those in the majority *believe* they are being rational, considering both sides of the argument, and following precedent when in reality they are being driven by intuition and emotion.<sup>12</sup> This is true because many cognitive errors, some of which are discussed below, are invisible to those who fall prey to them.

Analyzing the Court's opinions from a legal standpoint is doable, but scrutinizing them as to why the majority missed the mark is more difficult. A powerful tool for rooting this out lies in cognitive science. It is useful because it provides (1) an explanation for how beliefs could drive rationalizations,<sup>13</sup> and (2) some hints on how to identify when this is happening.

A growing body of literature regarding decision making concludes that intuition drives reason. In fact, the emotive process, which is wrapped up with intuition, often drives our fundamental beliefs, but because we live in a social world and because we must defend our beliefs, we construct rationales for them.<sup>14</sup> The result is that humans are prone to provide reasons for beliefs in a manner that suggests the reasons caused the beliefs, even though, in truth, the beliefs caused the reasons.<sup>15</sup> This article coins a phrase for this phenomenon, calling it "intuition rationalization" or "IR."

Cognitive science goes beyond identifying the phenomenon. It also suggests that highly intelligent people are especially adept at constructing *post hoc* justifications for these intuitive beliefs, making it more likely that others with the same underlying beliefs can latch onto the purported "justifications."<sup>16</sup> This is a possible explanation for why the majority's opinions are at least facially rational and why they can garner majorities. Finally, cognitive science teaches that when people engage in intuition rationalization, they genuinely believe that they are working through the problem; it is not a ruse or a lie, it is a form of self-talk that leads to self-delusion.<sup>17</sup>

But, if it is true that IR can and does occur everywhere, including legal opinions, and if it is equally true that, at least on its face, it looks like rationality, how can it be identified? Relying on cognitive science, this article identifies a checklist for

---

<sup>12</sup> JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION 41-47 (2012).

<sup>13</sup> *Id.* at 38.

<sup>14</sup> *Id.* at 39.

<sup>15</sup> *See id.* at 46.

<sup>16</sup> *See id.*

<sup>17</sup> *See generally id.* at 39.

some of the most common traits of IR. This list is the first of its kind to be applied to legal reasoning. These markers prove useful for testing Posner's hypothesis that Justice Scalia's reasoning is really a malleable act of intuition rationalization,<sup>18</sup> and for testing the broader hypothesis that the conservative majority is engaging in *post hoc* reasoning to justify opinions that align with their fundamental goals and beliefs. The telltale signs of IR include:

- Strained reasoning – because *post hoc* reasoning is a justification, not a driving force for the actual belief, the justifications offered for the belief are often logically flawed or inconsistent. This is especially true when the belief is driven by a response to taboo or deeply held, but never examined, beliefs;<sup>19</sup>
- Confirmation bias – a tendency to cherry-pick facts that support an already-formed belief;<sup>20</sup>
- Substitution – substituting an easy question that can be answered for more complex, difficult questions;<sup>21</sup>
- Creation of “my-side” arguments – the creation of supporting arguments without a parallel effort or ability to consider “other-side” arguments.<sup>22</sup> Interestingly, the ability to create longer and longer “my-side” lists correlates positively with intelligence, but intelligence does not produce longer “other-side” lists;<sup>23</sup>
- Persistence (or stubbornness) – a belief that persists in the face of counterarguments that should be persuasive;<sup>24</sup> and
- Overconfidence – often displayed by unnecessarily strong wording, a failure to identify weaknesses, or a willingness to disregard other opinions or ideas out-of-hand.<sup>25</sup>

---

<sup>18</sup> See Posner, *supra* note 3.

<sup>19</sup> See HAITT, *supra* note 12 at 39.

<sup>20</sup> DANIEL KAHNEMAN, THINKING, FAST AND SLOW 81 (2011).

<sup>21</sup> See *id.* at 97-98.

<sup>22</sup> HAITT, *supra* note 12 at 80-81.

<sup>23</sup> See *id.* at 94.

<sup>24</sup> See *id.* at 69.

<sup>25</sup> KAHNEMAN, *supra* note 20 at 87.

If the opinions written by Justices Alito and Scalia are a product of IR, that is, if they are intuition dressed as cold rationality, then a close examination of the opinions should reveal some or all of the indicia described above. To this end, *Stolt-Nielsen* and *Concepcion*, both handed down within the last two years, provide ideal specimens for dissection.

These opinions are particularly well-suited for analysis for several reasons. First, they both produced business-friendly results, which some allege is a fundamental belief of the conservative majority.<sup>26</sup> Second, the opinions are suitable because they, at least on their face, announce no fundamental alteration to existing precedent.<sup>27</sup> Instead, they are written as if they are the inevitable result of the application of immutable principles. Third, some scholars have already suggested that they are fundamentally inconsistent with existing law.<sup>28</sup> Fourth, the opinions each include a vigorous dissent. These dissents serve as both a means for considering how the majority dealt with potential counter-arguments, and as a check on whether it omitted information that would have called the conclusions into question.<sup>29</sup> Finally, the opinions fit nicely in my knowledge base and skill set.<sup>30</sup> I briefed, and in some cases argued, appellate cases dealing with both opinions at a variety of appellate courts, including the United States Supreme Court. As a result, I am intimately aware of the precedential value ascribed to the two selected decisions by those who seek to use them to insulate businesses from class actions, and I am aware of the real world results the opinions have produced.

Before going further, I offer a few concessions. First, I readily concede that IR is not limited to conservative jurists.

---

<sup>26</sup> See Mark Koba, *Chamber of Commerce Keeps Scoring With High Court*, CNBC (June 28, 2013, 6:00 AM), <http://www.cnbc.com/id/100846493>.

<sup>27</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010).

<sup>28</sup> See, e.g., William W. Park, *The Politics of Class Action Arbitration: Jurisdictional Legitimacy and Vindication of Contract Rights*, 27 AM. U. INT'L L. REV. 837 (2012); Jonathon L. Serafini, Note, *The Deception of Concepcion: Saving Unconscionability after AT&T Mobility LLC v. Concepcion*, 48 GONZ. L. REV. 187 (2012–2013).

<sup>29</sup> See *Concepcion*, 131 S. Ct. at 1756; *Stolt-Nielsen*, 130 S. Ct. at 1777.

<sup>30</sup> The most obvious example of my involvement in cases that turn on questions of arbitrability is *Brewer v. Missouri Title Loans*, 364 S.W.3d 486 (Mo.) *cert. denied*, 133 S. Ct. 191, *reh'g denied*, 1333 S. Ct. 684 (2012). In that case, I served as lead counsel representing a putative class of borrowers who received high interest title loans. The case ultimately led me to argue before the Missouri Court of Appeals once and the Missouri Supreme Court twice. It also required two separate sets of filing and review by the United States Supreme Court. The case involved arbitration and presented the tension between Missouri's dislike for some class action waivers in arbitration clauses and the Court's approval of arbitration.

Anyone can certainly find intuition dressed as reason in liberal opinions, and if one digs hard enough, they may find indicia of IR in this article. The point is not to condemn IR; it is part of human cognition. Rather, the purpose is to identify IR and to begin to address its existence. I focus on the conservative majority because its members purport to engage in pure reasoning based on where the appropriate legal precedent, statutory language, and Constitutional provisions lead. I feel comfortable suggesting that Justice Scalia would adamantly dispute that he engages in cognitive shortcuts, is driven by his beliefs rather than by textual analysis, or that his interpretative principles are really more like loose guidelines. But, as I prove in this article, IR is deeply embedded in at least the two conservative majority's opinions examined in this article. I contend that identifying this truth is useful for examining errant decisions and understanding how those decisions went off the rails. I also contend that until judges recognize that they, like everyone else, could be subject to IR, they will remain blind to it. This leads to overconfidence in decisions as impersonal acts of cold reason, which, as demonstrated in this article, can lead to fundamentally unsound decisions with dangerous real world impacts. I leave for others to discuss what the proper judicial interpretation methods should be; for now, I am content to assert only that it merits illumination if judges contend they employ pure reason, but in reality they do not.

The remainder of the article unfolds by first considering Posner's critiques, then putting them in the context of principles of cognitive science. Next, I apply legal analysis and cognitive science to evaluate the conservative majority opinions in *Stolt-Nielsen* and *Concepcion*. I note that this treatment is relatively detailed. This proved necessary to do justice to the legal reasoning required to unravel the decisions and to reveal enough about the decisions to flesh out how IR was at play. Finally, I offer some takeaways from the analysis and offer some suggestions for training judges to better consider the role of IR in their thinking and decisions.

Part I sets out in more detail some of Posner's critiques. These are useful because they provide a thoughtful third-party take on the reasoning of Scalia, considered by many to be the ringleader of the conservative majority. Because Posner's article describes a number of perceived fallacies in Scalia's reasoning and then concludes that these are evidence that Scalia is bending reason to his will, Posner's article serves as a starting

point for observing in action some of the telltale logical fallacies that are the markers of IR.

Part II provides an intellectual underpinning for Posner's article by correlating the flaws Posner identified with cognitive science. The purpose is to familiarize the reader with common cognitive fallacies and to identify theories on how gut-feelings and moral beliefs drive reasoning. To do this, I rely heavily on the work of Daniel Kahneman, the author of *Thinking, Fast and Slow*,<sup>31</sup> and Jonathan Haidt, the author of *The Righteous Mind: Why Good People Are Divided by Politics and Religion*.<sup>32</sup> These works are extraordinary because they are written in plain English for the non-cognitive science reader and they draw their conclusions from hundreds of other studies. As a result, by relying on these two texts, I was able to learn from the wisdom of dozens of other cognitive and behavioral scientists, while relying on Kahneman and Haidt to do the hard work of pulling the studies together.

Part III examines the test cases, and then it identifies IR within those cases. First, I summarize the holdings of the two test cases, *Stolt-Nielsen* and *Concepcion*. Then I put on my lawyer hat in order to analyze a variety of holdings and sub-holdings in the cases in light of the substantive law that should have been applied. I conduct my investigation by treating the decisions as if they were a law school exam answer. What was the applicable law? What did the majority say? Does this analysis hold water? I conclude that the majority often reached conclusions that were not supported by fact, applied the wrong law, applied the right law wrongly, or implicitly overruled past Supreme Court precedent without acknowledging that it did so. I also note that the decisions produce both illogical and inequitable results in the real world, adding support to the conclusion that they are products of IR. After each section in Part III, I correlate the legal analysis to my identified markers of IR. In doing so, I establish that the reasoning of the majority is rife with indicia of IR. The results are discussed, and then provided in a simple table for reference.

Because I conclude that IR is at play, this suggests that emotion and intuition are driving the decisions. In Part IV I venture a suggestion as to what may be driving the conservative majority. Some basic data regarding how the cases have affected

---

<sup>31</sup> See generally KAHNEMAN, *supra* note 20.

<sup>32</sup> See generally HAIDT, *supra* note 12.

filing rates of class actions is considered as well as the views of some other scholars who have considered the opinions.

Part V briefly discusses the implications of my findings, suggesting that since IR is at play in the conservative majority's decisions, and since IR is a common human condition, it should be further studied. I pose a list of questions—a research agenda of sorts—for future authors (including me). I also suggest that identifying IR explicitly and incorporating cognitive science lessons into judicial training would be wise.

#### I. POSNER'S CRITIQUE OF "THE INCOHERENT ANTONIN SCALIA"

Posner's article created a buzz in the legal community. It isn't every day that an intellectual heavyweight like Posner, who is also considered a conservative jurist by many, takes a swing at a sitting Supreme Court Justice who happens to be undoubtedly conservative. For this article, Posner's criticisms serve as a warm-up. Although he did not relate his conclusions to cognitive science, they match up nicely with many of the markers identified herein and help introduce the concepts. For example, Posner says that Scalia cherry-picks information, ignores counterarguments, displays internal inconsistencies, and writes opinions that are overconfident but under-supported.<sup>33</sup> Part II will show that these characteristics are predicted by cognitive science.

Judge Posner's article was written in response to a book written by Scalia and the well-known legal writing expert, Bryan Garner.<sup>34</sup> In the book, titled *Reading Law: The Interpretation of Legal Texts*, Scalia and Garner claim to set out a defense for textual originalism.<sup>35</sup> They describe originalists as those who "look for meaning in the governing text, ascribe to that text the meaning that it has borne from its inception, and reject judicial speculation about both the drafters' extratextually derived purposes and the desirability of the fair reading's anticipated consequences."<sup>36</sup> To this end, they applaud cases that apply literal meaning, and they somewhat idly speculate about how to interpret everyday language, such as a sign at the

---

<sup>33</sup> Posner, *supra* note 3.

<sup>34</sup> *Id.*

<sup>35</sup> See generally ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); see also Posner, *supra* note 3, ascribing the name "textual originalism" to Scalia and Garner's work.

<sup>36</sup> SCALIA & GARNER, *supra* note 35 at xxvii; see also Posner, *supra* note 3.

entrance to a butcher shop that reads “No dogs, cats, and other animals allowed.”<sup>37</sup> Along the way, they also invoke the name of well-known Justices who they claim were also originalists, and in general, they decry the work of the “so-called consequentialis[t],” who they assert inappropriately engages in the practice of asking, “is this decision good for the little guy?”<sup>38</sup>

The book might be considered a *tour de force* by conservatives but for the work of Judge Posner. Unfortunately for Scalia and Garner, Judge Posner chose to read the book as only he could. He apparently was not impressed. In his critique, he refutes most of the positions advanced in the book.<sup>39</sup>

To begin, he points out that although professing to believe in originalism, Scalia and Garner set out no less than 57 principles of interpretation.<sup>40</sup> He documents that many of the judges who were alleged “originalists” actually relied on common sense, legislative history, and other resources that should be anathema to Scalia and Garner.<sup>41</sup> And perhaps most interestingly, he carefully examines the wide range of cases set out by Scalia and Garner and determines that many of them simply do not say what Scalia and Garner say they do.<sup>42</sup>

Posner recounts the moment when he decided to start putting the authors to their proof.<sup>43</sup> He writes:

Scalia and Garner ridicule a decision by the Supreme Court of Kansas (*State ex rel. Miller v. Claiborne*) that held that cockfighting did not violate the state’s law against cruelty to animals. They say that the court, in defiance of the dictionary, “perversely held that roosters are not ‘animals.’” When I read this, I found it hard to believe that a court would hold that roosters are not animals, so I looked up the case. I discovered that the court had not held that roosters are not animals. It was then that I started reading the other cases cited by Scalia and Garner.<sup>44</sup>

From this starting point, Posner reviewed several more cited cases and concluded they were inconsistent with how Scalia and Garner presented them.<sup>45</sup> In some cases he notes that although Scalia and Garner criticize the decision, it could

---

<sup>37</sup> Posner, *supra* note 3. A literal reading of this sign could prohibit humans from entering.

<sup>38</sup> *Id.*

<sup>39</sup> Posner, *supra* note 3. Garner wrote an eloquent comeback to Posner. Bryan A. Garner, *Response to Richard A. Posner*, LAW PROSE (Sept. 5, 2012), <http://www.lawprose.org/blog/?p=570>. The debate continues.

<sup>40</sup> Posner, *supra* note 3.

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

be justified by textual originalism.<sup>46</sup> In others, he points out that Scalia and Garner, to advance their assertions, ignore other rationales provided by courts.<sup>47</sup> In all, Posner suggests, not too subtly, that Scalia and Garner have not faithfully read or recited the cases.<sup>48</sup>

Perhaps emboldened, or annoyed, by this fact, Posner also turns to the authors' treatment of other interpretive theories.<sup>49</sup> He calls the authors' characterization of these theories "disingenuous."<sup>50</sup> And finally, in a compelling set of paragraphs, Posner chronicles how Scalia and Garner, in only a few pages in their books, flip flop between embracing "dynamic" interpretation to repudiating it, to embracing it again.<sup>51</sup>

All this leads Posner to a conclusion that reads more like a rather serious accusation. Posner writes:

A problem that undermines their entire approach is the authors' lack of a consistent commitment to textual originalism. They endorse fifty-seven "canons of construction," or interpretive principles, and in their variety and frequent ambiguity these "canons" provide them with all the room needed to generate the outcome that favors Justice Scalia's strongly felt views on such matters as abortion, homosexuality, illegal immigration, states' rights, the death penalty, and guns.<sup>52</sup>

Put plainly, Posner asserts that Scalia's commitment to textual originalism is a sham, used to justify results that are in keeping with Scalia's political and personal opinions. Posner concludes his article with a jab:

Justice Scalia has called himself in print a "faint-hearted originalist." It seems he means the adjective at least as sincerely as he means the noun.<sup>53</sup>

Judge Posner's article is a powerful critique, and it cries out for follow-up. But piling on is of no value. Instead, I see in Posner's article the seeds of a larger understanding of how Scalia, the conservative majority, and many other judges can believe they are employing reason when in reality they are acting as slaves to their own deeply held beliefs. I use Posner as a jumping-off point for this work, in no small part because he points out

---

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

many of the same IR characteristics identified in the introduction and described in the following section.<sup>54</sup>

## II. DECISION MAKING

Two of the most profound books on how we form beliefs and how we justify them were written in the last two years.<sup>55</sup> The first is titled *Thinking, Fast and Slow*, by Daniel Kahneman.<sup>56</sup> The second, written by Jonathan Haidt, is titled *The Righteous Mind: Why Good People Are Divided by Politics and Religion*.<sup>57</sup> Kahneman's book focuses largely on decision making and the many mistakes humans make in forming their decisions.<sup>58</sup> Haidt covers some of the same ground, but his orientation is different. He examines not only how people make decisions, but how this relates to reason and peoples' ability, or inability, to relate to those who have differing views.<sup>59</sup> In the following paragraphs, the literature of Haidt and Kahneman is examined. Along the journey, as we come across markers of IR, they are gathered and noted.

Haidt advances the Social Intuitionist Model, in which intuitions come first and reasoning is usually produced after a judgment is made, in order to influence other people.<sup>60</sup> He does not suggest that reason can never influence judgment or intuition, but he suggests it is rare.<sup>61</sup> He proves this a number of ways, including by interviewing people and asking them about things they will almost certainly think are morally wrong, but that they cannot reasonably support.<sup>62</sup>

I examine findings by authors below in order to identify IR markers used throughout the rest of this article.

### A. *Strained Reasoning*

In an especially clever study, Haidt and his colleagues presented people with scenarios they knew are "disgusting" but in which it is hard to suggest, at least based on reason, that the

---

<sup>54</sup> *Id.*

<sup>55</sup> HAIDT, *supra* note 12; KAHNEMAN, *supra* note 20.

<sup>56</sup> KAHNEMAN, *supra* note 20.

<sup>57</sup> HAIDT, *supra* note 12.

<sup>58</sup> *See* KAHNEMAN, *supra* note 20.

<sup>59</sup> *See* HAIDT, *supra* note 12, at 221-22.

<sup>60</sup> HAIDT, *supra* note 12, at 55.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 42-48.

people in the stories did something objectively wrong. For example, in one study, subjects were told a story about Jennifer.<sup>63</sup>

Jennifer works in a hospital pathology lab. She's a vegetarian for moral reasons—she thinks it is wrong to kill animals. But one night she has to incinerate a fresh human cadaver, and she thinks it's a waste to throw away edible flesh. So she cuts off a piece of flesh and takes it home. Then she cooks it and eats it.<sup>64</sup>

Only 13% of the people surveyed said that what Jennifer did was acceptable.<sup>65</sup>

In another study, people were presented with a brother and sister pair traveling together in France.<sup>66</sup> The two were alone in a cabin one night and decided to have sex.<sup>67</sup> They told no one, they were safe, and they agreed to never do it again.<sup>68</sup>

Only 20% of the survey participants deemed the behavior of the brother and the sister appropriate.<sup>69</sup> But, Haidt reports that people struggled with providing reasons.<sup>70</sup> When people did provide reasons, they were often strained.<sup>71</sup> For instance, regarding the brother and sister, a study subject argued that children from incest were more likely to be deformed. When the experimenter pointed out that birth control and condoms were used, the subject strained to answer why incest was still wrong.<sup>72</sup> The same subject wondered aloud if the brother or sister were too young (apparently considering statutory rape), then recognized they weren't, and seemed disappointed.<sup>73</sup> When pushed for another reason, the subject said, "I mean, there's just no way I could change my mind but I just don't know how to – how to show what I'm *feeling*, what I *feel* about it."<sup>74</sup>

Haidt illustrates the paradox of intuition driving reasoning by discussing the rider and the elephant.<sup>75</sup> In this metaphor, the elephant is our intuition, and the rider is reason.<sup>76</sup> Haidt points out that the elephant has been developed

---

<sup>63</sup> *Id.* at 45.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 38.

<sup>67</sup> *Id.* at 45.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 45-46.

<sup>72</sup> *Id.* at 46.

<sup>73</sup> *Id.* at 46-47.

<sup>74</sup> *Id.* at 47 (emphasis added).

<sup>75</sup> *Id.* at 53.

<sup>76</sup> *Id.*

over hundreds of millions of years of evolution.<sup>77</sup> It is very good at doing most things.<sup>78</sup> However, it is not all that good at being steered by reason.<sup>79</sup> Haidt suggests that although the rider can sometimes help the elephant anticipate problems or make decisions that are better in the long term, all too often, the rider is used to “fabricat[e] *post hoc* explanations for whatever the elephant . . . wants to do next.”<sup>80</sup>

Haidt’s work draws from the findings of others to support his conclusion. For example, in *The Secret Joke of Kant’s Soul*, Joshua Greene of Princeton relies upon neuroscience to demonstrate that people make decisions through emotional processing, not careful reasoning.<sup>81</sup> In his experiments, Greene presented people with the opportunity to prevent harm to a group of people by causing harm to another, single person.<sup>82</sup> Many of his experiments were variations of the “trolley dilemma.” In the trolley dilemma, subjects are asked whether or not they would push one person off a bridge and onto a track in front of a trolley if it were the only way to stop the trolley from running off the track and killing five people.<sup>83</sup> Testing this and other variations, Greene learned through MRIs that with few exceptions, the regions of the brain related to emotional processing showed greater activity, activating almost immediately.<sup>84</sup> The author concluded that “across the various stories, the relative strength of these emotional reactions predicted the final moral judgment.”<sup>85</sup>

Greene further established the role of emotional processing by altering the design so that the subject could, instead of shoving someone onto the tracks, simply flip a switch that would divert the trolley onto a safer track, but would eventually terminate at a spot where one person was on the track, thereby killing them.<sup>86</sup> Greene found that people were more willing to flip the switch than they were to shove a person off a bridge.<sup>87</sup> This is presumably because flipping a switch triggered a far less intense initial, emotional response.<sup>88</sup> This clarified that

---

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 53-54.

<sup>80</sup> *Id.* at 54.

<sup>81</sup> *Id.* at 76-78.

<sup>82</sup> *Id.* at 76.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 77-78.

<sup>85</sup> *Id.* at 77.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

emotion—such as an aversion to directly shoving another to her death—drove decision making. A purely rational mind would conclude that whether you shove a person onto the track or flip a switch, the result is the same.<sup>89</sup> One life is lost in order to save five. But that is not what the study revealed, suggesting that emotion plays a powerful role in decision making.<sup>90</sup>

Perhaps most interestingly, when Greene talked to the subjects, they did not relate their decisions to intuition or emotion.<sup>91</sup> Instead, they sought to provide rational justifications for their decisions.<sup>92</sup> Of course, these justifications were often strained, as they were not the real reason for the belief. Again, *strained reasoning* is one of the markers of IR.

Greene summarized these studies:

We have strong feelings that tell us in clear and certain terms that some things simply cannot be done and that other things simply must be done. But it's not obvious how to make sense of these feelings, and so we . . . make up a rationally appealing story.<sup>93</sup>

These findings paint a picture. Subjects react emotionally, especially to things they find taboo or disgusting. Then, they use reason to justify their initial response. The point is not that people could never think of a reason why eating human flesh or incest is wrong. As a lawyer, one may immediately think of laws against desecrating bodies, the tort of conversion, statutory rape, etc. The point is that the initial reaction as to whether what was done was wrong or right was not intellectual. It was intuition.<sup>94</sup> Only after the belief was formed did the intellect kick in to justify the emotional response. Or as Haidt explains, “[t]he intuition launched the reasoning, but the intuition did not depend on the success or failure of the reasoning.”<sup>95</sup>

### B. *Persistence*

Building on his conviction that decision making is rooted in emotive processing and intuition, Haidt turns again

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 76-79.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 78.

<sup>94</sup> I'm careful here to use “intuition” and not emotional. As Haidt later explains, “moral judgment is a cognitive process, as are all forms of judgment. The crucial distinction is really between two different kinds of cognition: intuition and reasoning.” *Id.* at 53.

<sup>95</sup> *Id.* at 51.

to cognitive science to prove the next reasonable inference: if the mind is not driven by reason, then carefully articulated arguments probably will not change people's minds.<sup>96</sup> This provides us with another of the fundamental markers of intuition-based decision making: *persistence*.<sup>97</sup> A decision that is formed through IR is rarely altered through counterarguments.<sup>98</sup> Even when study subjects were not to respond immediately, but were instead given two minutes to consider their decision and reasoning, most participants went with their original conclusion, and often had thought of stronger support arguments.<sup>99</sup>

### C. *My-Side Arguments*

Haidt identifies yet another related marker. He recounts an experiment in which subjects were asked to think of a social issue, such as whether schools should receive more funding.<sup>100</sup> The people were asked to write down their initial judgment and then to write down all the arguments for and against their position.<sup>101</sup> These "my-side" and "other-side" arguments were then counted. Unsurprisingly, people came up with far more "my-side" arguments than "other-side" arguments.<sup>102</sup> Perhaps even more importantly, the higher the IQ of the participant, the more "my-side" arguments they created.<sup>103</sup> Significantly, however, IQ did not improve one's ability to think of "other-side" arguments.<sup>104</sup> And here we find another marker of IR: creation of *my-side arguments*.<sup>105</sup> The study suggests that intuition-based decision making might include a significant number of supporting arguments, but it will probably do a poor job of fairly considering "other-side" arguments and dealing with them.<sup>106</sup>

Haidt is not alone in suggesting that most of our decision making is intuitive rather than calculative. In *Thinking, Fast and Slow*, Daniel Kahneman reaches similar

---

<sup>96</sup> *Id.* at 69.

<sup>97</sup> *See generally id.*

<sup>98</sup> *Id.* at 58-59.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 94.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 94-95.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 94.

conclusions.<sup>107</sup> Kahneman illustrates the separation in the mind between snap-judgments and reason by talking about System 1 (intuition) and System 2 (complex reasoning).<sup>108</sup> He provides examples of what each system does.<sup>109</sup> System 1 work includes: detecting hostility in a voice, determining which object is closer, answering the question, “What is 2+2,” and driving a car on an empty road.<sup>110</sup> “System 2 engages in things like searching the memory to identify a surprising sound, comparing two washing machines for overall value, or checking the validity of a complex logical argument.”<sup>111</sup> Kahneman asserts, based on extensive research, that engaging System 2 requires serious work.<sup>112</sup> In one simple example, Kahneman suggests an experiment anyone can try. He says that the next time you are walking with a friend, ask that friend to multiply 17 x 24 in her head.<sup>113</sup> Your friend will almost certainly stop in her tracks.<sup>114</sup> People do this because we struggle to use System 1 while engaging System 2.<sup>115</sup>

But, why does it matter that System 2 requires work? It matters because Kahneman’s research and study suggests that we will not use System 2 any more than we have to because we prefer “cognitive ease.”<sup>116</sup> We are perfectly content to rely on intuition (System 1) in many cases. He suggests a new term—the “law of least effort.”<sup>117</sup> This “law” states that people typically take the path of least resistance in solving problems.<sup>118</sup> He concludes that in order for us to manage the thousands of decisions that we face every day, we rely heavily on heuristics.<sup>119</sup> Throughout the rest of his book, he proves that this “laziness” and reliance on our intuition, although effective in many ordinary situations, means that in other settings we make decisions in irrational ways that lead to irrational results.<sup>120</sup> From Kahneman’s work, we are able to identify several more markers of IR.

---

<sup>107</sup> KAHNEMAN, *supra* note 20, at 80-81.

<sup>108</sup> *Id.* at 20-21.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 21.

<sup>111</sup> *Id.* at 22.

<sup>112</sup> *Id.* at 24.

<sup>113</sup> *Id.* at 39.

<sup>114</sup> *Id.* at 20, 39-40.

<sup>115</sup> *Id.* at 39-40.

<sup>116</sup> *Id.* at 25, 59.

<sup>117</sup> *Id.* at 35.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 31, 49, 81.

#### D. *Confirmation Bias*

Kahneman suggests that one of the most pervasive cognition errors is the “*confirmation bias*.”<sup>121</sup> Kahneman explains that the confirmation bias is a “deliberate search for confirming evidence . . . .”<sup>122</sup> He writes that “contrary to the rules of philosophers of science, who advise testing hypotheses by trying to refute them, people (and scientists, quite often) seek data that are likely to be compatible with the beliefs they currently hold.”<sup>123</sup>

Kahneman also chronicles a phenomenon he calls, What You See Is All There Is, or *WYSIATI*.<sup>124</sup> He describes this as the mind’s willingness, even preference, to focus on the information readily available without reference to what is missing.<sup>125</sup> For example, the leader of a non-profit organization might search for an event planner in the hopes of putting on a lecture series.<sup>126</sup> The planner’s references are good, and at the meeting with the planner, the planner is prepared and smart. The planner points out that her last three non-profit events have led to significant fundraising. Based on this information, the leader selects the event planner. But, think what the leader may not have considered. How does the event planner’s price compare to what other event planners charge? Are there other event planners with more experience? Were the past fundraisers that the event planner mentioned successful because of the event planner, or were the charities well-established with a plethora of wealthy donors? Considering what the event planner and event will cost, what else could the non-profit do to raise funds for the same or less money? These are all valid questions, but they were not in the field of mental vision of the leader. Instead, the non-profit leader made a decision that felt like it was fully informed, based only on what was seen.<sup>127</sup> The non-profit leader, in selecting the event planner, engaged in *WYSIATI*.<sup>128</sup>

Because *WYSIATI* is the other-side of the confirmation bias coin, in this article, I use the term confirmation bias to describe both. In other words, I treat the confirmation bias as both the

---

<sup>121</sup> *Id.* at 81.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* at 85.

<sup>125</sup> *Id.*

<sup>126</sup> *See generally id.* at 85-88.

<sup>127</sup> *Id.* at 85-88.

<sup>128</sup> *Id.*

desire to find confirming information and the willingness to ignore other information, or more importantly, gaps in information.

*E. Substitution*

Kahneman identifies another intriguing indicator of IR. He suggests that when System 1 is being relied upon instead of the careful thinking of System 2, individuals tend to engage in *substitution*.<sup>129</sup> Specifically, when individuals are asked to answer difficult questions that would require lengthy deliberation, they often simply substitute a simpler question and answer it.<sup>130</sup> Kahneman suggests this substitution is invisible to the person who does it.<sup>131</sup>

For example, Susan is asked if Candidate Davis would make a good president. This requires detailed analysis. To answer this question, Susan needs to know the detailed history of Candidate Davis, she needs to know and understand the problems facing the country, she needs to know Candidate Davis's proposed solutions to those problems, and many other facts. Then she needs to consider all the information together. This could take months of thinking. What Susan might do instead is substitute the question. For example, she may ask, "Is Davis a Democrat?" If he is, and Susan is too, she may decide he'd make a good president. Or she might ask, "Is Davis a nice guy," or as some studies suggest, "Is Davis good looking?" This substitution of one question for another is seamless, and it creates cognitive ease. As Kahneman explains, "the target question is the assessment you intend to produce. The heuristic question is the simpler question that you answer instead."<sup>132</sup>

Finally, although not a definitive marker of IR, Kahneman provides a predictor of when heuristics in general are especially likely to be deployed in place of System 2 reasoning. He suggests that "[t]he dominance of conclusions over arguments is most pronounced where emotions are involved."<sup>133</sup> Although this is not a marker in and of itself, it does suggest IR might be marked by an overall tone, or perhaps more subtle signs, of emotion. It also suggests that Posner might be right: if IR is most likely to arise in conjunction with emotion, topics like abortion, homosexuality, and gun control could certainly trigger it.

---

<sup>129</sup> *Id.* at 97-99.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 99.

<sup>132</sup> *Id.* at 97.

<sup>133</sup> *Id.* at 103.

With these principles in mind and with our markers identified, Part III engages in a legally rigorous analysis of the conservative majority's conclusions.

### III. ANALYZING THE CONSERVATIVE MAJORITY

In this part I examine the conservative majority's conclusions and reasoning in *Stolt* and *Concepcion*. First, I analyze the decisions from a legal perspective. Following the analysis, I note and discuss the markers of IR. The analysis begins with two substantive areas of law that play a significant role in the cases: the standard of review for arbitration decisions and preemption. These are particularly fruitful because they are fully developed and established bodies of law. For each, I discuss the applicable law, explain the majority's opinion, and then scrutinize the majority's decision under existing law. This discussion serves as a medium for identifying IR markers. I then turn to other aspects of the decisions. Specifically, the majority's factual and legal assertions about class arbitration are considered. Relying on my own reasoning and drawing from the dissents' arguments, I analyze the majority's justification, again with an eye out for IR's fingerprints. Finally, I examine the majority's opinions to determine if they are consistent with past precedent.<sup>134</sup>

#### A. Overview of *Stolt-Nielsen* and *Concepcion*

This section provides a general summary of *Stolt-Nielsen* and *Concepcion*. The summary is not meant to be comprehensive. Rather, more specific parts of the holdings are included as appropriate through the remaining analytical sections. The purpose of this section is only to familiarize the reader with the basic facts and holdings.

##### 1. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*

*Stolt-Nielsen* was written by Justice Alito.<sup>135</sup> It was a 5-3 decision.<sup>136</sup> Justice Ginsburg wrote a vigorous dissent that was

---

<sup>134</sup> I considered organizing by case instead of by topic. However, because the cases relate to one another and have significant topical overlap, it was more efficient to organize in that way.

<sup>135</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1763 (2010).

<sup>136</sup> *Id.* at 1763.

joined by Justices Breyer and Stevens.<sup>137</sup> The essential facts and legal holdings follow.

Stolt-Nielsen S.A. (Stolt) served much “of the world market for parcel tankers—seagoing vessels with compartments that are separately chartered to customers,” such as respondent (AnimalFeeds), who “wish[] to ship liquids in small quantities.”<sup>138</sup> “AnimalFeeds ship[ped] its goods pursuant to a standard contract known in the maritime trade as a charter party.”<sup>139</sup> The charter party that AnimalFeeds used contained an arbitration clause.<sup>140</sup> AnimalFeeds brought a class action antitrust suit against Stolt for price fixing, and that suit was consolidated with similar suits brought by other charterers.<sup>141</sup> After a court ruling on arbitrability, the parties agreed that they “must arbitrate their antitrust dispute.”<sup>142</sup> AnimalFeeds sought arbitration on behalf of a class of purchasers of parcel tanker transportation services.<sup>143</sup> The parties agreed to submit the question whether their arbitration agreement allowed for class arbitration to a panel of arbitrators bound by class rules developed by the American Arbitration Association following *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003).<sup>144</sup>

One of the Class Arbitration Rules at AAA required an arbitrator to determine whether the arbitration clause permitted class arbitration.<sup>145</sup> The parties selected an arbitration panel, designated New York City as the arbitration site, and stipulated that their arbitration clause was “silent” on the class arbitration issue.<sup>146</sup> The panel determined that the arbitration clause allowed for class arbitration.<sup>147</sup> AnimalFeeds filed for the court to vacate the arbitrators’ award.<sup>148</sup>

The district court vacated the award.<sup>149</sup> It concluded that the arbitrators’ award was made in “manifest disregard” of the law, asserting that had the arbitrators conducted a choice-of-law analysis, they would have applied the rule of federal maritime law requiring “contracts be interpreted in light of

---

<sup>137</sup> *Id.* at 1777.

<sup>138</sup> *Id.* at 1764.

<sup>139</sup> *Id.* (footnote omitted).

<sup>140</sup> *Id.* at 1764-65.

<sup>141</sup> *Id.* at 1765.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 1765-66.

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

custom and usage.”<sup>150</sup> The Second Circuit reversed, holding that “because petitioners had cited no authority applying a federal maritime rule of custom and usage *against* class arbitration, the arbitrators’ decision was not in manifest disregard of federal maritime law”; and that the arbitrators had not “manifestly disregarded New York law,” which had no established rule against class arbitration.<sup>151</sup>

The conservative majority held that imposing class arbitration on parties who have not explicitly agreed to authorize class arbitration is inconsistent with the Federal Arbitration Act.<sup>152</sup> Justice Alito wrote that the arbitration panel “exceeded its powers” by imposing its own policy choice “instead of identifying and applying a rule of decision derived from the FAA or [from] maritime or New York law.”<sup>153</sup> He asserted that the arbitration panel rested its decision on AnimalFeeds’s public policy argument for permitting class arbitration under the charter party’s arbitration clause instead of determining “whether the FAA, maritime, or New York law contain[ed] a ‘default rule’ permitting an arbitration clause to allow class arbitration absent express consent.”<sup>154</sup>

The majority acknowledged that under FAA § 10(b), it could direct a rehearing by the arbitrators on the issue, but it concluded that since there could be only one possible outcome based on the facts, there was no need to direct a rehearing by the arbitrators.<sup>155</sup>

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

Here, the majority opinion was written by Justice Scalia.<sup>156</sup> Justice Thomas wrote a concurrence and joined in the majority’s decision.<sup>157</sup> Justice Breyer wrote the dissent.<sup>158</sup> The decision was 5-4.<sup>159</sup>

The cellular telephone contract between the Concepcions and AT&T “provided for arbitration of all disputes,” but did not permit classwide arbitration.<sup>160</sup> After the Concepcions were

---

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 1766-67.

<sup>152</sup> *Id.* at 1775.

<sup>153</sup> *Id.* at 1770.

<sup>154</sup> *Id.* at 1768-69.

<sup>155</sup> *Id.* at 1770.

<sup>156</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1743 (2011).

<sup>157</sup> *Id.* at 1740.

<sup>158</sup> *Id.* at 1756.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 1744.

charged sales tax on the retail value of phones provided free under their service contract, they sued AT&T in a California federal district court.<sup>161</sup> Their suit was consolidated with a class action alleging that AT&T “engaged in false advertising and fraud by charging sales tax” on “free” phones.<sup>162</sup> The district court denied AT&T’s motion to compel arbitration. “[R]elying on the California Supreme Court’s [*Discover Bank*] decision,”<sup>163</sup> it found the arbitration provision unconscionable because it disallowed classwide proceedings.<sup>164</sup> The Ninth Circuit agreed that the provision was unconscionable under California law and held that the Federal Arbitration Act (FAA), which makes arbitration agreements “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract,” did not preempt its ruling.<sup>165</sup>

Justice Scalia wrote the majority opinion, which reversed in full. The majority concluded that because the *Discover Bank* rule “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . . [it] is preempted by the FAA.”<sup>166</sup>

#### B. *Reviewing an Arbitrator’s Decision – Standard of Review*

In this section, the majority’s opinion in *Stolt* is analyzed with an eye toward the standard of review. In *Stolt*, the majority concluded that the arbitrators exceeded their authority in reaching their conclusion.<sup>167</sup> The dissent criticized the majority for applying what the dissent characterized as a *de novo* review.<sup>168</sup> The dissent also pointed out that the Court reviewed the arbitrators’ decision despite the fact that it was not a final judgment.<sup>169</sup> This section examines whether the majority deferred to the arbitrators as the law required, or if it instead sat as the arbitrator, engaging in the *de novo* review the dissent suggested.<sup>170</sup>

---

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, (2011).

<sup>164</sup> *Concepcion*, 131 S. Ct. at 1745 (citing *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005)).

<sup>165</sup> *Id.*

<sup>166</sup> *Id.* at 1753.

<sup>167</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1762 (2010).

<sup>168</sup> *Id.* at 1777 (Ginsburg, J., dissenting).

<sup>169</sup> *Id.* at 1778.

<sup>170</sup> *Id.* at 1777.

### 1. The Law Relating to Review of an Arbitrator's Decision

The most detailed description of how courts typically reviewed the award of an arbitrator prior to *Stolt* is, ironically, found in the Second Circuit decision handed down in *Stolt* that was ultimately reversed. The Second Circuit details that at law there were two paths recognized to overturn an arbitrator's decision.<sup>171</sup> The first set of reasons to overturn an arbitrator's decision was rooted in Section 10 of the FAA.<sup>172</sup> That section provides:

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced[.]<sup>173</sup>

Courts have also recognized that an arbitrator's award can be vacated if the arbitrator demonstrates a "manifest disregard for the law or exceeds his authority."<sup>174</sup> "Arbitrators exceed their powers when . . . they issue an award that is completely irrational."<sup>175</sup> Either way, both standards required extreme deference to the arbitrator.

In fact, prior to the final decision in *Stolt*, the idea of overturning an arbitrator's decision was somewhat novel. For example, the Second Circuit in *Stolt* summarized the law regarding the review of an arbitrator's decision as follows:

The party seeking to vacate an award on the basis of the arbitrator's alleged "manifest disregard" of the law bears a heavy burden. Our review under the [judicially constructed] doctrine of manifest

---

<sup>171</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 90-91 (2d Cir. 2008), *rev'd and remanded*, 559 U.S. 662, 130 S. Ct. 1758 (2010).

<sup>172</sup> *Id.* at 90-91.

<sup>173</sup> 9 U.S.C. § 10 (a)(1-3) (2012).

<sup>174</sup> *See, e.g.*, *GMS Group, LLC v. Benderson*, 326 F.3d 75, 81 (2d Cir. 2003).

<sup>175</sup> *Bosack v. Soward*, 586 F.3d 1096, 1104 (9th Cir. 2009).

disregard is severely limited. It is highly deferential to the arbitral award and obtaining judicial relief for arbitrators' manifest disregard of the law is rare. The manifest disregard doctrine allows a reviewing court to vacate an arbitral award only in those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent.<sup>176</sup>

The Second Circuit cited to other courts that suggested even more extreme deference to arbitrators. For example, the Seventh Circuit held:

It is tempting to think that courts are engaged in judicial review of arbitration awards under the Federal Arbitration Act, but they are not. When parties agree to arbitrate their disputes they opt out of the court system, and when one of them challenges the resulting arbitration award he performs so not on the ground that the arbitrators made a mistake but that they violated the agreement to arbitrate, as by corruption, evident partiality, exceeding their powers, etc.—conduct to which the parties did not consent when they included an arbitration clause in their contract. That is why in the typical arbitration, . . . the issue for the court is not whether the contract interpretation is incorrect or even wacky but whether the arbitrators had failed to interpret the contract at all, for only then were they exceeding the authority granted to them by the contract's arbitration clause.<sup>177</sup>

After reviewing the law, the Second Circuit landed on a deferential standard, holding that there need only be “a *barely colorable justification* for the outcome reached.”<sup>178</sup>

This standard was not new, and had previously proved to be an almost insurmountable hurdle for those who sought to overturn an arbitrator's decision. For example, in a previous opinion, the Second Circuit stated that since 1960 it considered arbitral awards in 48 cases, and vacated all or part of the award in only four.<sup>179</sup>

The extreme deference shown to arbitrators should be anything but surprising to those who practice in the field. It is widely acknowledged by those who handle arbitrations that if a client loses in arbitration, the case is all but over.<sup>180</sup> Courts generally do not second-guess arbitrators even when the

---

<sup>176</sup> *Stolt-Nielsen*, 548 F.3d at 91-92 (citations omitted) (internal quotation marks omitted).

<sup>177</sup> *Wise v. Wachovia Sec., LLC*, 450 F.3d 265, 269 (7th Cir.) (citations omitted), *cert. denied*, 549 U.S. 1047 (2006).

<sup>178</sup> *Stolt-Nielsen*, 548 F.3d at 92.

<sup>179</sup> *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003).

<sup>180</sup> 9 U.S.C. § 10 (2012) details when arbitration can be overturned and it is typically only in cases of severe wrongdoing.

arbitrator's decision is truly mindboggling. Instead, arbitration's very efficiency has often been attributed to streamlined procedures and the fact that there is essentially no court review.<sup>181</sup> Or as the Second Circuit articulated the rationale prior to *Stolt*, “[t]o interfere with [the arbitral] process would frustrate the intent of the parties, and thwart the usefulness of arbitration, making it the commencement, not the end, of litigation.”<sup>182</sup>

It was based on this law that the Second Circuit held that the arbitration panel's decision to allow class arbitration in *Stolt* was appropriate.<sup>183</sup> The court reasoned that although there may be arguments against the interpretation given by the arbitration panel, it was certainly at least “colorable” and therefore passed muster.<sup>184</sup>

## 2. The Majority's Opinion Reviewing the Arbitration Panel's Decision

The majority opinion reversed the Second Circuit outright, and then concluded that although the Court certainly could send the case back to the arbitrators with guidance to apply the proper standard, there was no need because “there [was] only one possible outcome” under the facts.<sup>185</sup>

Justice Alito began the majority analysis by explaining the general standard of review.

It is not enough for petitioners to show that the panel committed an error—or even a serious error. It is only when an arbitrator strays from interpretation and application of the agreement and effectively dispenses his own brand of industrial justice that his decision may be unenforceable. In that situation, an arbitration decision may be vacated under § 10(a)(4) of the FAA on the ground that the arbitrator exceeded his powers, for the task of an arbitrator is to interpret and enforce a contract, not to make public policy.<sup>186</sup>

It is worth noting here that the Court did not mention manifest disregard at all. Instead, the Court addressed manifest disregard only in a footnote, suggesting that it did not decide whether the standard of review survived, but then asserting

---

<sup>181</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 648-49 n.14 (1985) (Stevens, J., dissenting) (“Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution.”).

<sup>182</sup> *Duferco Int'l Steel Trading*, 333 F.3d at 389 (internal quotation marks omitted).

<sup>183</sup> *Stolt-Nielsen*, 548 F.3d at 99.

<sup>184</sup> *Id.*

<sup>185</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1770 (2010).

<sup>186</sup> *Id.* at 1767 (citations omitted) (internal quotation marks omitted).

that if it did survive, the test was met.<sup>187</sup> It characterized the manifest disregard test, based on AnimalFeeds's brief, as requiring a showing that the arbitrators "knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it."<sup>188</sup> As such, in reversing the arbitration panel, the Court held that the arbitration panel "willfully flouted the governing law by refusing to apply it."<sup>189</sup>

It did so by concluding that the panel rested its decision on a "public policy" argument, thereby exceeding its authority.<sup>190</sup> The Court stated that the arbitrators' job was to look into the appropriate law to apply, but that it made no such undertaking.<sup>191</sup> The Court chastised the arbitrators for reading *Green Tree Financial Corp. v. Bazzle*<sup>192</sup> as allowing for class arbitration and suggested that the arbitrators never looked at the FAA, maritime law, or New York law.<sup>193</sup>

To reach its result, the Court noted that state law did not apply.<sup>194</sup> This was a necessary move by the majority because state law might have allowed class arbitration (which allegedly would have violated the spirit of the FAA).<sup>195</sup> With state law put aside, the majority held that no party could be coerced into class arbitration and found that the parties did not agree to class arbitration.<sup>196</sup>

### 3. Analyzing the Conservative Majority's Reasoning

A close look at the majority opinion reveals it to be fundamentally flawed. As the dissent points out, it fails in at least three significant ways. First, it is essentially *de novo* review.<sup>197</sup> Second, the majority engaged in the review of an arbitral decision that was not a final judgment because the arbitrator had not even considered a motion for class certification yet, much less made any decisions on the merits.<sup>198</sup> And third, rather than remanding the case to the arbitrator to decide the issue (even if one agrees

---

<sup>187</sup> *Id.* at 1768 n.3.

<sup>188</sup> *Id.* (internal quotation marks omitted).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 1767-68.

<sup>191</sup> *Id.*

<sup>192</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003).

<sup>193</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1768-69 (2010).

<sup>194</sup> *Id.* at 1773.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 1775.

<sup>197</sup> *Id.* at 1777 (Ginsburg, J., dissenting).

<sup>198</sup> *Id.* at 1778.

the Court was right to vacate), the Court inserted its judgment, something the parties never agreed to.<sup>199</sup>

The dissent also provides information that suggests that Justice Alito may have cherry-picked facts to support his argument. Indeed, the dissent points out that although the majority claims the arbitrators' decision rested on "policy," the word policy is "not so much as mentioned" in the arbitrators' award.<sup>200</sup> What is mentioned, in direct contradiction to Justice Alito's fundamental reason for reversing the arbitration panel, is an explicit consideration of New York and maritime law.<sup>201</sup> Specifically, the dissent points out that far from ignoring these sources of law, the arbitration panel wrote that "[c]oncentrating on the wording of the arbitration clause . . . is consistent with New York law as articulated by the [New York] Court of Appeals . . . and with federal maritime law."<sup>202</sup>

Under the deferential review required, these facts alone should have ended the inquiry. The decision by the panel cannot be called wacky, and it certainly did not intentionally disregard the law. Instead, the contract interpretation decision appears reasonable. Although it is beyond the scope of this article to dive into the contract analysis fully, it is black letter contract law that ambiguous terms (such as "arbitration") can be and are interpreted by decision makers.<sup>203</sup> There is nothing improper about that. This fact, combined with even a common sense consideration of the case, suggests that there was at least a "colorable justification" for reading the arbitration clause to allow for class arbitration.

After all, the parties were sophisticated entities. They had to know about class arbitration, and they should have known that only a few years earlier the United States Supreme Court suggested that class arbitration could be appropriate.<sup>204</sup> In addition, the parties agreed to have their disputes resolved under the AAA Class Arbitration Rules. The willingness by Stolt to have the claim resolved in such a forum, and the stipulation that the clause was "silent" as to class arbitration—as opposed to prohibiting it—meant that the arbitrator certainly could have concluded that when the parties referred to "arbitration," they

---

<sup>199</sup> *Id.* at 1782.

<sup>200</sup> *Id.* at 1780.

<sup>201</sup> *Id.* at 1768-69 (majority opinion).

<sup>202</sup> *Id.* at 1781 (Ginsburg, J., dissenting) (citing App. to Pet. for Cert. 49a).

<sup>203</sup> In fact, if the term is ambiguous, common law generally requires that the term be construed against the drafter. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995).

<sup>204</sup> *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451-52 (2003).

were referring to all arbitration, not just individual arbitration. This was supported all the more by the fact that the arbitration clause's language was broad, covering "any dispute arising from the making, performance or termination of this Charter Party."<sup>205</sup>

As such, if the question the United States Supreme Court considered in *Stolt* was whether there was a "colorable justification" for the arbitration panel's decision, then the panel's express reference to appropriate facts and applicable law coupled with the common sense conclusion that the word "arbitration" might include all forms of arbitration should have been enough to affirm the decision.

Affirming the Second Circuit should have been routine. This would have been in step with the purpose of arbitration—to avoid extensive judicial entanglement.<sup>206</sup> Yet, here, after agreeing to let the arbitrator decide what the term "arbitration" meant, the majority allowed *Stolt* to back out of the deal, go to court, and obtain a *de novo* review.<sup>207</sup>

To make sure the arbitration panel did not get any more ideas about making *Stolt* engage in class arbitration, the majority reversed in full rather than allowing the arbitration panel to consider the applicable law.<sup>208</sup> These errors are hard to justify. If the *Stolt* case were a law school exam, it likely would have been considered by the professor administering it as one of the easier questions. But the majority got it wrong.

#### 4. Indicia of IR Are Present Throughout the Court's Reasoning

This section builds upon the analysis above by looking for indicia of IR. All six indicia noted in the introduction are found.

##### *a. Confirmation Bias*

The majority opinion is rife with examples of confirmation bias. As noted, the majority cherry-picked information about the dangers of class arbitration but failed to note the benefits.<sup>209</sup> This included ignoring the potential efficiencies of class arbitration and ignoring the fact that many businesses view arbitration in

---

<sup>205</sup> *Stolt-Nielsen*, 130 S. Ct. at 1781 (Ginsburg, J., dissenting) (internal quotation marks omitted).

<sup>206</sup> *Id.* at 1773.

<sup>207</sup> *See generally id.*

<sup>208</sup> *Id.* at 1777.

<sup>209</sup> *Id.* at 1775.

general as an efficient way to resolve significant disputes. Similarly, the majority ignores the fact that the parties stipulated to the class rules of AAA even though this suggests the parties knew that arbitration could include class arbitration.<sup>210</sup> And finally, the Court chose small quotes from the arbitration panel to suggest that “policy” drove decision making, but failed to include portions of the award that suggested the panel considered the proper law.<sup>211</sup>

*b. Substitution*

The majority’s analysis also provides one of the clearest examples of substitution. In *Stolt*, the majority was supposed to be deciding whether the arbitration panel completely disregarded the facts and the law in reaching its conclusion.<sup>212</sup> The majority was supposed to consider the fact that even if the arbitrator got it wrong, that isn’t enough to reverse.<sup>213</sup> In fact, the Court should have recognized that even if the arbitrators’ decision was only “colorable,” it was enough to withstand scrutiny.<sup>214</sup>

However, after a quick recitation of these rules, the majority never mentioned them again.<sup>215</sup> Instead, as the dissent suggests, the majority engaged in what was really a *de novo* review.<sup>216</sup> This facilitated cognitive ease because it let the majority substitute an easy question for the much more difficult questions described above.<sup>217</sup> Specifically, it let the majority ask, “Do we agree with the arbitration panel?” The answer was “no,” and so the majority vacated the arbitrators’ award. In keeping with the way substitution typically works,<sup>218</sup> the majority did not acknowledge the switch. Instead, it plugged in the answer to the easy question as if it were the answer to a series of far more difficult ones.

---

<sup>210</sup> *Id.* at 1765.

<sup>211</sup> *Id.* at 1767-68.

<sup>212</sup> *See id.* at 1766.

<sup>213</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 548 F.3d 85, 91 (2d Cir. 2008), *rev’d*, 130 S. Ct. 1758 (2010) (citations omitted) (internal quotation marks omitted).

<sup>214</sup> *Stolt-Nielsen*, 548 F.3d at 92.

<sup>215</sup> *Stolt-Nielsen*, 130 S. Ct. at 1766-67.

<sup>216</sup> *Id.* at 1777.

<sup>217</sup> *See* KAHNEMAN, *supra* note 20, at 97-98.

<sup>218</sup> *Id.*

*c. Creation of My-Side Arguments*

As discussed, the majority built an impressive list of things the arbitration panel did wrong.<sup>219</sup> However, the majority was unable to recognize the many things that the arbitration panel seemed to do right, such as considering maritime law and New York law, and engaging in a fair recitation of the facts and an application of general contractual principles regarding the interpretation of ambiguous terms. Given the appropriate standard of review, which required the majority to affirm if the arbitrator made a good faith effort to consider the law and the facts, the inability to list and consider “other-side”<sup>220</sup> arguments led the majority to the wrong decision.

*d. Strained Reasoning*

Strained reasoning is the hardest indicia of IR to define precisely, but as the Supreme Court once famously wrote, “I know it when I see it.”<sup>221</sup> At a minimum, strained reasoning collapses under logical consideration. It is certainly evident from the analysis above.

For example, the majority suggested that the arbitration panel made a policy decision.<sup>222</sup> Yet, to justify this conclusion the majority had to assert that the arbitration panel ignored various bodies of law and instead substituted its own “policy” judgment.<sup>223</sup> In reality, the dissent demonstrated that the opposite was true: the arbitration panel specifically referenced the applicable law while never using the word “policy.”<sup>224</sup> Similarly, the majority displayed an unwillingness to even decide on a standard of review. Rather than state whether or not “manifest disregard” is the official test, the majority relegated the standard to a footnote.<sup>225</sup> It then asserted that the test for reversal, which it did not adopt or analyze, was met.<sup>226</sup> It is strained reasoning to decide a case based on an undecided standard of review.

---

<sup>219</sup> *Stolt-Nielsen*, 130 S. Ct. at 1772.

<sup>220</sup> HADT, *supra* note 12, at 94.

<sup>221</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

<sup>222</sup> *Stolt-Nielsen*, 130 S. Ct. at 1768.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.* at 1780 (Ginsburg, J., dissenting).

<sup>225</sup> *Id.* at 1768 n.3 (majority opinion).

<sup>226</sup> *See id.* at 1777.

*e. Persistence*

The majority opinion demonstrated persistence. The dissent pointed out that this was not a final judgment, that the majority was showing no deference to the arbitration panel, and that even the alleged justifications for the decision were belied by the factual record.<sup>227</sup> But the majority was not swayed by the requirements for appellate review, the law, or any facts inconsistent with its conclusions.<sup>228</sup>

*f. Overconfidence*

The majority could have let the arbitrators consider the case in light of the Court's guidance. Even if the majority thought the arbitrators applied the wrong law, it did not have to substitute its judgment for the arbitrators', especially since the parties affirmatively agreed to have the question of what the word "arbitration" meant resolved by the panel.<sup>229</sup> Yet, the Court vacated, holding that there was no other possible result.<sup>230</sup> This is classic overconfidence.

In sum, the scorecard for this section looks like this:

Confirmation Bias	X
Substitution	X
Creation of "my-side" arguments	X
Strained reasoning	X
Persistence	X
Overconfidence	X

*C. Preemption*

In this section, I examine the majority's conclusion in *Concepcion* that the Federal Arbitration Act preempts California's *Discover Bank* rule and can preempt some general contract law defenses.<sup>231</sup>

---

<sup>227</sup> See *id.* at 1778-80 (Ginsburg, J., dissenting).

<sup>228</sup> See *id.* at 1777 (majority opinion).

<sup>229</sup> *Id.* at 1766.

<sup>230</sup> *Id.* at 1770.

<sup>231</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1746 (2011).

The *Discover Bank* rule was developed based on California's unconscionability law.<sup>232</sup> However, its primary application was to arbitration clauses. The rule invalidated a clause if it prohibited class actions in a context in which it was alleged that there was widespread illegality that resulted in small damages to each class member.<sup>233</sup> The rule articulated these requirements, but it was rooted in the holding in *Discover Bank* that enforcing arbitration clauses in the consumer context when damages are small but the illegal behavior is class-wide would provide the defendant a "get-out-of-jail-free" card.<sup>234</sup> In short, California concluded that class action waivers were unconscionable because they kept consumers, as a class, from pursuing their rights.<sup>235</sup>

### 1. Scalia's Preemption Analysis

I now turn to the majority's preemption analysis. When possible, the majority is not paraphrased so that there is no chance for distortion. However, it is worth noting at the outset that very little preemption law or preemption principles can be quoted from the majority opinion. Justice Scalia, writing for the majority, simply did not include them.<sup>236</sup> Instead, Scalia began by acknowledging that the FAA contains a significant carve out from any preemptive power it might have.

The final phrase of § 2, however, permits arbitration agreements to be declared unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract." This saving clause permits agreements to arbitrate to be invalidated by "generally applicable contract defenses, such as fraud, duress, or unconscionability," but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.<sup>237</sup>

These preliminary statements are important because they recognize that the plain language of Section 2 contains a clear and unequivocal savings clause that allows states to refuse to enforce arbitration clauses if they run afoul of general state contract law.<sup>238</sup> This is consistent with the idea that the

---

<sup>232</sup> *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108 (Cal. 2005), abrogated by *Concepcion*, 131 S. Ct. 1740.

<sup>233</sup> *Id.* at 1108-09.

<sup>234</sup> *Id.* at 1108.

<sup>235</sup> *Id.* at 1110.

<sup>236</sup> See generally *Concepcion*, 131 S. Ct. at 1746.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

purpose of the FAA was to put arbitration clauses on “equal footing” with other contracts.<sup>239</sup> Justice Scalia continued:

When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA. But the inquiry becomes more 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. In *Perry v. Thomas*, for example, we noted that the FAA’s preemptive effect might extend even to grounds traditionally thought to exist “at law or in equity for the revocation of any contract.” We said that a court may not “rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.”<sup>240</sup>

This is where things get interesting. Within a page of having acknowledged that the FAA allows for state law defenses, Justice Scalia articulated that perhaps even those defenses are subject to preemption.<sup>241</sup> In keeping with this, he ultimately concluded that California’s *Discover Bank* rule is preempted because it falls too heavily on arbitration clauses.<sup>242</sup> He rejected the argument that although the rule is typically applied to arbitration clauses, it also applies to any contract that prohibits class actions regardless of whether or not the contract contains an arbitration clause.<sup>243</sup>

Scalia asserted that “the overarching purpose of the FAA, evident in the text of §§ 2, 3, and 4, is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.”<sup>244</sup> Scalia rooted his conclusion in the text of the FAA, which he noted often refers to enforcing the terms of the arbitration agreement.<sup>245</sup> Then, in an important moment, he argued with the dissent that the purpose of the FAA is more than just enforcing an agreement according to its terms. He asserted that it is clear that there is a second goal—to produce efficient resolution of disputes.<sup>246</sup> He stated that “a prime objective of an agreement to arbitrate is to achieve streamlined proceedings and expeditious results . . . .”<sup>247</sup>

---

<sup>239</sup> *Id.* at 1745.

<sup>240</sup> *Id.* at 1747.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 1748.

<sup>243</sup> *Id.* at 1750-51.

<sup>244</sup> *Id.* at 1748.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 1749.

<sup>247</sup> *Id.* (internal quotation marks omitted).

Having laid out these principles, Scalia concluded that “California’s *Discover Bank* rule . . . interferes with arbitration.”<sup>248</sup> He asserted that the rule would essentially allow any consumer to demand class arbitration because the rule would work to strike the class action ban.<sup>249</sup> He argued that the requirement that damages be small in order for the *Discover Bank* rule to apply is too malleable and that the requirement that there be assertions of class-wide harm means nothing because it only requires an allegation.<sup>250</sup> He asserted that attorneys will no longer seek to resolve individual claims if they can resolve class claims and earn “higher fees.”<sup>251</sup> He argued that businesses will no longer resolve individual claims either if they are faced with class arbitrations.<sup>252</sup>

He also responded to the dissent’s assertion that enforcing the arbitration clause would prohibit consumers from pursuing their claims, because each would be forced to pursue a small dollar claim individually. He wrote:

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.<sup>253</sup>

Based on these arguments, Justice Scalia concluded that “[b]ecause it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, California’s *Discover Bank* rule is preempted by the FAA.”<sup>254</sup>

## 2. Analysis

Justice Scalia’s analysis has some serious holes. The first curious thing to note is that Justice Scalia did not cite the basic law addressing preemption.

The basic law that one would have expected to find in the opinion is uncontroversial. When addressing questions of express or implied preemption, a court should begin its analysis

“with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” That assumption applies

---

<sup>248</sup> *Id.*

<sup>249</sup> *Id.* at 1750.

<sup>250</sup> *Id.*

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* at 1753 (citation omitted).

<sup>254</sup> *Id.* (citation omitted).

with particular force when Congress has legislated in a field traditionally occupied by the States. Thus, when the text of a preemption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption.<sup>255</sup>

However, it is true that just because a clause contains a “savings clause,” exempting some areas of law from preemption, this does not mean that conflict preemption cannot be found. “We now conclude that the saving clause . . . does *not* bar the ordinary working of conflict preemption principles.”<sup>256</sup> This is especially true if enforcing the savings clause would allow state law to interrupt complex federal regulation.<sup>257</sup>

It is curious that none of this basic language appeared in the majority opinion at all. Since the law makes clear that preemption is especially inappropriate when (1) there is a direct savings clause;<sup>258</sup> (2) the body of law being considered is a field typically left to states;<sup>259</sup> or (3) there is no reason to believe that the operation of state law would interfere with any federal regulatory scheme,<sup>260</sup> and since in *Concepcion* each of these traits was present, failing to even mention them is hard to explain.

However, giving Scalia and the majority their best day, perhaps they assumed that everyone knows the law, and so only an analysis regarding conflict preemption was needed. To this end, the majority held that although the savings clause would normally allow state contract law defenses, there was a risk that the clause would be read so broadly that it would conflict with the purpose of the FAA.<sup>261</sup> There is some reasonableness to this argument. It is certainly true that too broad a reading of the savings clause could allow states to effectively prohibit all arbitration clauses by, for example, making it general state law that all disputes must be resolved by a jury or must allow for a full appeal.

As a result, to determine the proper result in *Concepcion*, one must consider the purpose of the FAA and what result enforcing the *Discover Bank* rule would produce. In other words, does *Discover Bank* really conflict with the FAA?

---

<sup>255</sup> *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)) (citations omitted).

<sup>256</sup> *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 870 (2000).

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008).

<sup>260</sup> *Geier*, 529 U.S. at 870.

<sup>261</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

The majority made clear what it believed the purpose of the FAA is by disputing the dissent's position.<sup>262</sup> Specifically, the majority argued that in addition to enforcing arbitration agreements, the FAA has a second goal—to promote the expeditious resolution of disputes.<sup>263</sup> This recognition of the second goal is certainly more in line with the statute's text. If the FAA were merely designed to enforce all arbitration clauses as written, there would be no need for a savings clause. The FAA could directly state that all arbitration clauses are enforceable, or at a minimum, the FAA could omit the savings clause. This did not happen, and that implies that the drafters of the FAA intended, at a minimum, to let states weed out especially offensive arbitration clauses.

This also seems to be what the United States Supreme Court indicated in the past when it held that the FAA put arbitration clauses on equal footing with other contracts.<sup>264</sup> In this framework, states retained the right to protect consumers from duress, unconscionability, and other basic defenses to contracts, but they could not generally view arbitration clauses, merely because they were arbitration clauses, with hostility.

Taking the majority at its word then, the purpose of the FAA is to enforce arbitration agreements in order to encourage the efficient resolution of disputes.<sup>265</sup> If this is true, all that remains is to determine if the *Discover Bank* rule somehow thwarted this purpose.

The *Discover Bank* rule allowed for class arbitration.<sup>266</sup> So, as a starting point, it is a given that if the majority had enforced the *Discover Bank* rule, then the case would have proceeded to arbitration with the possibility of class certification. To be fair, certification was not guaranteed, as the class arbitrators consider all the typical class action factors in considering a motion for class certification, and the burden of proving the elements rests with the party filing the arbitration.<sup>267</sup> But, assuming the class was certified and either a settlement was reached or a decision was reached by the arbitrator, the

---

<sup>262</sup> *Id.* at 1749.

<sup>263</sup> *Id.* at 1743.

<sup>264</sup> *See, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443-44 (2006).

<sup>265</sup> *Concepcion*, 131 S. Ct. at 1749, 1758.

<sup>266</sup> *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by Concepcion*, 131 S. Ct. 1740.

<sup>267</sup> AM. ARBITRATION ASS'N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS § 4 CLASS CERTIFICATION (effective Oct. 8, 2003), <http://www.adr.org/> (follow "Rules & Procedures" and "Search Rules" to access rules).

claims of thousands, or maybe hundreds of thousands of people, would have been resolved.

As a result, enforcing the *Discover Bank* rule would have encouraged the efficient resolution of disputes in many consumer claims involving small damages and allegations of widespread fraud. Conversely, the majority's decision guaranteed that any dispute that was resolved would be resolved individually, and it guaranteed that tens of thousands of claims, if resolved at all, would have taken tens of thousands of arbitrations and arbitrators, instead of just one. Of course, in truth, it also guaranteed that most claims would never be resolved at all, as individuals will rarely pursue claims for small amounts of money due to a variety of factors including the cost of an attorney, missed work time, travel time, and the very limited potential reward for the effort spent.<sup>268</sup> Consequently, the second goal, of encouraging the efficient resolution of disputes, weighs in favor of enforcing the *Discover Bank* rule, not striking it down.

Scalia might counter that class arbitration is not efficient. However, this argument does not hold water. According to data in *Concepcion*, the average class arbitration takes about 600 days, whereas the average in-person individual arbitration takes about six months.<sup>269</sup> Reason dictates then, that 10 individual arbitrations would require 60 months of arbitrator time (and 10 arbitrators in most cases), whereas resolving the claims of 10,000 individuals in class arbitration would take about 20 months (and one to three arbitrators, depending on the rules). It is tough to justify demanding individual arbitration in the name of efficiency.

Based on the facts, the result is not in doubt. By enforcing AT&T's arbitration clause as written, Justice Scalia squelched the efficient resolution of thousands or hundreds of thousands of claims.<sup>270</sup> He ensured that even if AT&T were

---

<sup>268</sup> There is good evidence that consumers cannot pursue individual arbitrations in a small damage setting. For example, in a case in which I was lead counsel, discovery revealed that a payday lender who was charging over 400% interest on loans had over 200,000 customers. See *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90, 98 (Mo. Ct. App. 2008). The arbitration clause prohibited class actions. The business had never engaged in a single arbitration. Experts in the case testified that consumers would never find representation for claims of only a few hundred dollars. A Missouri court struck the class action waiver as unconscionable because it would keep people from pursuing claims. This is still the law of Missouri, but under *AT&T*, that law can no longer apply to arbitration clauses, meaning they are on decidedly unequal footing from other contracts.

<sup>269</sup> *Concepcion*, 131 S. Ct. at 1751.

<sup>270</sup> *Id.* at 1759-60.

breaking the law, it would not answer to most of the people it harmed. He fractionalized what resolution would occur into individual arbitrations that will be private so that there is no precedent for others to follow and there is no reporting of the result that could encourage others to pursue their claims. And finally, since not all consumers know the law, by eliminating a chance for class notice, Justice Scalia ensured that most consumers would simply remain in the dark, with no knowledge that their rights may have been violated.

Justice Scalia and the majority did all this in the name of enforcing the purpose of the FAA.<sup>271</sup> But it is hardly consistent with the goal of encouraging the resolution of disputes to stop the resolution of disputes. It is also strange that although Justice Scalia lauds the efficiency of individual arbitration,<sup>272</sup> his decision guaranteed that individual arbitrations will not occur.

*Concepcion* is also unsound from another perspective. Justice Scalia, as mentioned early in this article, claims to be a textual originalist.<sup>273</sup> He derides those who would put the purpose they ascribe to an act over the actual text of the act. Yet, he does just that. The text of the FAA explicitly exempts general state contract law defenses from preemption.<sup>274</sup> As such, the purpose of the FAA cannot merely be to enforce all arbitration clauses. Instead, the purpose is to enforce clauses when they are consistent with general state contract law.<sup>275</sup> Similarly, the purpose is limited, as Scalia admitted, by the desire to encourage the resolutions of disputes, not to stymie them.<sup>276</sup> Yet, Justice Scalia used the “purpose” of the FAA to override its plain language. He held that because the FAA says it does not preempt general state contract law, it sometimes does.<sup>277</sup> Reading the purpose of the law to be something other than what its text states is a difficult decision for a textual originalist to defend.

It should also be noted that in order to reach the conclusion that what California asserts as general state contract law is not really general state contract law, and is instead a law that is hostile only to arbitration, the majority

---

<sup>271</sup> *Id.* at 1753.

<sup>272</sup> *Id.* at 1751.

<sup>273</sup> Posner, *supra* note 3.

<sup>274</sup> 9 U.S.C. § 2 (2011).

<sup>275</sup> *Id.*

<sup>276</sup> *Concepcion*, 131 S. Ct. at 1748.

<sup>277</sup> *Id.*

had to second-guess the California legislature and the California Supreme Court. It is hard to imagine a reading of the FAA that puts federal judges in the position of deciding what state law really is. It is even stranger that Scalia, a states' rights advocate, engaged in such second-guessing.<sup>278</sup>

These inconsistencies did not escape the dissent. Justice Breyer wrote:

The Federal Arbitration Act says that an arbitration agreement “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. § 2 (emphasis added). California law sets forth certain circumstances in which “class action waivers” in *any* contract are unenforceable. In my view, this rule of state law is consistent with the federal Act’s language and primary objective. It does not “stan[d] as an obstacle” to the Act’s “accomplishment and execution.”<sup>279</sup>

Justice Breyer also explained that by striking down the *Discover Bank* rule, Justice Scalia did the opposite of what the plain language of Section 2 requires. “[I]nsofar 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.’”<sup>280</sup>

In sum, the majority’s discussion regarding conflict preemption failed to set out the appropriate preemption law. The majority also reached a conclusion at war with its own stated rules. While professing that arbitration clauses should be on equal footing with other contracts, *Concepcion* privileges arbitration clauses in California, ensuring that in the future, a class action waiver in an arbitration clause will be treated differently than the same clause in a contract.<sup>281</sup> Similarly, Justice Scalia, who believes in focusing on the actual language of a statute, managed to use the “purpose” of the statute to overrule its own text, causing one to wonder how the purpose can be different than the plain language.

These fundamental flaws in reasoning suggest that on the issue of preemption, the majority got the question almost entirely wrong. The decision reflects a significant departure from existing preemption precedent, it runs afoul of the plain language

---

<sup>278</sup> Harold Meyerson, *Who’s Sovereign Now?*, AM. PROSPECT (June 26, 2012), <http://prospect.org/article/who%E2%80%99s-sovereign-now> (detailing Scalia’s comments regarding the recent immigration reform and the impingement upon state sovereignty).

<sup>279</sup> *Concepcion*, 131 S. Ct. at 1756 (Breyer, J., dissenting).

<sup>280</sup> *Id.* at 1758.

<sup>281</sup> *Id.* at 1761.

of the very FAA that the majority says it is relying upon, and it ignores the upside down results the decision produces.

### 3. Indicia of IR Abound

#### *a. Confirmation Bias*

The confirmation bias is probably most evident in Justice Scalia's failure to include any of the law about preemption that would have undercut his arguments. As discussed above, there is a significant body of law that would suggest preemption is disfavored based on the facts of *Concepcion*. At a minimum, one would have expected the majority opinion to at least confront this law. Justice Scalia does not. Instead, his opinion gravitated toward anything and everything that could be used to support his result. Similarly, when discussing the inefficiencies of class arbitration, Justice Scalia picked only facts that support his argument while completely failing to consider or acknowledge data that suggest class arbitration is more efficient than class actions or that a single class arbitration is more efficient than multiple individual claims about the same underlying facts.

#### *b. Substitution*

The preemption issue required the majority to ask a number of questions. For example, the majority should have asked:

- 1) Is this an issue that relates to a field typically policed by states?
- 2) Does the FAA contain a savings clause?
- 3) Is there any federal regulatory scheme that the *Discover Bank* rule interferes with?
- 4) What is the purpose of the FAA?
- 5) What impact will the *Discover Bank* rule have on the FAA's purpose?
- 6) Is it possible that class arbitration will serve the FAA's purpose?
- 7) What does our past arbitration precedent teach about how to handle a clause that, if enforced, will ensure some people cannot pursue their claims?

Instead, it appears the majority simply asked, “Do businesses like class arbitration,” and then answered with a definitive “no.”<sup>282</sup> This provides an explanation for why the majority dove headfirst into describing the problems with class arbitration and then concluded that enforcing the *Discover Bank* rule would be unacceptable. The majority concluded that businesses do not want to go to class arbitration and substituted that as an answer to a series of far more difficult questions about preemption.<sup>283</sup>

*c. Creation of My-Side Arguments*

With relation to preemption, the majority did not produce a significant number of “my-side” arguments. Instead, it provided very little direct support for preemption at all. The only exception is the majority’s list of all the ways that class arbitration is fundamentally different from bilateral arbitration.<sup>284</sup> This list of my-side arguments is discussed in the following section, which focuses exclusively on the majority’s treatment of class arbitration in both decisions.

*d. Strained Reasoning*

The clearest example of strained reasoning in *Concepcion* is Justice Scalia’s abandonment of his own principles. When a textual originalist overrules the text of an act, thereby turning an act that is anti-preemptive on its face into a preemptive one, IR is apparent. There is no explanation for how a carve out for states’ rights could lead to a conclusion that the FAA preempts states’ rights other than the fact that the majority engaged in its reasoning only after it reached its decision.

There is also a fundamental inconsistency in the majority’s reasoning. Although it argued that the goal of the FAA is to put arbitration clauses on an equal footing with contracts, in reality, the decision privileges arbitration clauses. California law explicitly allowed for a determination that any contract or clause within it was unconscionable; this was generally applicable law that could apply to arbitration clauses but did not target them.<sup>285</sup> Yet, after *Concepcion*, if a business prohibits class actions in an arbitration clause, the provision is

---

<sup>282</sup> *Id.* at 1750.

<sup>283</sup> *See id.* at 1750-51.

<sup>284</sup> *Id.* at 1750.

<sup>285</sup> CAL. CIV. CODE §§ 1668, 1670.5(a) (West 2012).

enforceable. If the same company were to ban class actions in a contract, the provision would fail. As such, the majority opinion violates its own guidelines by favoring arbitration clauses.

*e. Persistence*

Persistence is especially prevalent in the majority's consideration of preemption. The dissent forcefully pointed out that the majority's decision (1) will stop people from resolving disputes, and (2) is in conflict with a plain reading of the statute.<sup>286</sup> The majority said the first concern does not matter and never even addressed the second issue. The majority's inability to meaningfully consider points that reasonably challenged the alleged rationale for its opinion is a classic marker of IR.

*f. Overconfidence*

The majority's opinion displays a certitude that is hard to justify. Perhaps the most telling sign of overconfidence is the majority's need to state that many class actions are *in terrorem*.<sup>287</sup> The assertion that many class actions are just a way to extort money from businesses through frivolous claims is completely unnecessary in the case. If the majority knew that its result was shaky, it would almost certainly avoid any language that would suggest that the opinion was driven by a bias against class claims. However, the majority was so convinced that its reasoning was sound that it included superfluous language. This displays the majority's lack of awareness of the logical fallacies in its argument.

In the end, the scorecard looks like this:

Confirmation Bias	X
Substitution	X
Creation of "my-side" arguments	
Strained reasoning	X
Persistence	X
Overconfidence	X

<sup>286</sup> *Concepcion*, 131 S. Ct. at 1757-62 (Breyer, J., dissenting).

<sup>287</sup> *Id.* at 1752 (majority opinion).

*D. The Majority's Unsupported Remarks Regarding Arbitration*

In both *Stolt* and *Concepcion*, the majority discussed (1) why class arbitration is so fundamentally different from arbitration, and (2) why a business could not possibly desire class arbitration.<sup>288</sup> In making these arguments, the majority departs from reasoning that is supported by the facts, providing some of the starkest examples of IR.

1. The Majority's Statements Regarding Class Arbitration and Class Actions

The majority began its critique of class arbitration in *Stolt*. Close on its heels came *Concepcion*, which, relatively gratuitously, returned to the topic of class arbitration. Along the way, the majority also managed to assert that class actions are often frivolous and an unfair burden to businesses.<sup>289</sup>

*a. The Majority's Assertions in Stolt*

In *Stolt*, Justice Alito wrote for the majority that “[a]n implicit agreement to authorize class-action arbitration, however, is not a term that the arbitrator may infer solely from the fact of the parties’ agreement to arbitrate.”<sup>290</sup> In doing so, as discussed above, he took the issue away from the arbitrator, where the parties agreed it would be decided, and made it an issue for the Court to decide. He supported his assertion that class arbitration can never be inferred from the word arbitration by suggesting that class arbitration changes the very “nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”<sup>291</sup> Alito explained further:

In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. But the relative benefits of class-action arbitration are much less assured, giving reason to doubt the parties’ mutual consent to resolve disputes through class wide arbitration.

---

<sup>288</sup> *Id.* at 1750-51; *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1776 (2010).

<sup>289</sup> *Stolt*, 130 S. Ct. at 1776.

<sup>290</sup> *Id.* at 1775.

<sup>291</sup> *Id.*

Consider just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration. An arbitrator chosen according to an agreed-upon procedure no longer resolves a single dispute between the parties to a single agreement, but instead resolves many disputes between hundreds or perhaps even thousands of parties. Under the Class Rules, “the presumption of privacy and confidentiality” that applies in many bilateral arbitrations “shall not apply in class arbitrations,” thus potentially frustrating the parties’ assumptions when they agreed to arbitrate. The arbitrator’s award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well. And the commercial stakes of class-action arbitration are comparable to those of class-action litigation even though the scope of judicial review is much more limited.<sup>292</sup>

The quoted text above, giving the majority its fair due, identifies three specific reasons why class arbitration is so different that it would be irrational to assume any party would ever agree to it. (The majority actually lists four, but the first and third—that the arbitrator considers and decides the claims of more than one person—are exactly the same thing.)

The issues identified are:

- 1) An arbitrator “no longer resolves a single dispute.” Instead, the decision could apply to hundreds or thousands of disputes.<sup>293</sup>
- 2) Under the class rules, there is less of a presumption of privacy and this could frustrate the will of the parties.<sup>294</sup>
- 3) The stakes of a class arbitration are like those of a class action, but there is less judicial review of a class arbitration.<sup>295</sup>

*b. Analyzing the Majority’s Assertions in Stolt*

The first thing that may jump out at a reader is that while the majority couched its concerns about class arbitration in terms of frustrating the intent of the parties, what the majority really meant is that they will frustrate the defendant. The plaintiff in this case was asking for class arbitration, suggesting it would not have been frustrated at all. Below, each alleged problem with class arbitration is considered in turn.

---

<sup>292</sup> *Id.* at 1775-76 (citations and references omitted).

<sup>293</sup> *Id.* at 1776.

<sup>294</sup> *Id.*

<sup>295</sup> *Id.*

i. Resolution of Multiple Disputes

As discussed in the section relating to preemption, arguing that resolving multiple claims at once is somehow worse than resolving individual claims one-by-one is strange. If it is true that the goal of the FAA is to enforce agreements to facilitate informal, streamlined proceedings, then why would it be assumed that when a party refers to arbitration, that party can never mean arbitration of more than one dispute at a time? At a sheer mathematical level, class arbitration is far more efficient at resolving disputes than individual arbitration.

But the majority might respond by suggesting that although it may be good policy to encourage class arbitration, what matters is what the parties intended. Does this argument win the day? If we are to assume that the parties included an arbitration clause in order to resolve disputes quickly and efficiently, then why would we assume the parties eschewed class arbitration? This assumption seems even stranger given that class arbitration was becoming common by the time *Stolt* was decided, meaning parties certainly must have known it existed. In the end, the assertion that no one could think arbitration includes class arbitration is dubious at best.

ii. The Presumption of Privacy Is Eroded in Class Arbitration

Justice Alito suggested that the lack of privacy could “potentially” frustrate the parties.<sup>296</sup> This tepid statement was as far as he could go. In truth, not all parties demand privacy in arbitration and although AAA rules require the publication of the class action complaint and final award, they do not require the publication of most documents, including the most potentially sensitive documents, such as dispositive motions or motions for class certification.<sup>297</sup> Similarly, the right to seal documents exists in arbitration, just as it does in court. As a result, the suggestion that the parties “potentially” could be worried about privacy is largely advisory.

Alito’s focus on the potential frustration of the actual parties in *Stolt* was especially strange. This is because in *Stolt*,

---

<sup>296</sup> *Id.* at 1776.

<sup>297</sup> AM. ARBITRATION ASS’N SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS §§ 9 & 10 CONFIDENTIALITY CLASS ARBITRATION DKT & FORM AND PUBLICATION OF AWARDS (effective Oct. 8, 2003), *available at* [http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg\\_004129.pdf](http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf).

the parties *agreed* to have their dispute resolved under the AAA Class Arbitration Rules.<sup>298</sup> Those rules provide for limited disclosures.<sup>299</sup> Apparently, neither of the parties was troubled by this because if they were, they did not have to stipulate to it. Why, then, did Justice Alito step in and express a concern the parties did not and could not have had?

Finally, the willingness to worry about “potential” problems, even though they were not proven, is new to the Court. In a previous case, the Court was asked to invalidate an arbitration clause that required a mobile home purchaser to arbitrate.<sup>300</sup> In that case, the plaintiff argued that the costs of arbitration could overwhelm her and prevent her from pursuing her statutory rights.<sup>301</sup> The Court rejected her challenge, holding that “[t]he ‘risk’ that [Plaintiff] will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement.”<sup>302</sup> Why is an individual plaintiff’s fear of high arbitration costs speculative if the invented fears of a company like *Stolt* are sufficient to merit the Court’s attention? In the end, the majority’s concerns about limited privacy prove more fiction than fact.

*iii. The Stakes Are High in Class Arbitration and There Is Not Sufficient Judicial Review*

The final concern about class arbitration is that there is simply no way businesses would agree to class arbitration because it is not subject to judicial review but could involve large sums of money.<sup>303</sup> This argument is probably the hardest of the trilogy of less-than-convincing reasons to defend. First, the mere assertion that arbitration is insufficient to handle some claims was roundly rejected as a losing argument in *Gilmer v. Interstate Johnson*, in which the Court struck down a challenge to an arbitration clause, explaining that concerns about the arbitrator’s qualification, lack of process, or discovery were inconsistent with the FAA.<sup>304</sup> As such, when the majority argued that the stakes are too high in class arbitration, it is

---

<sup>298</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1765 (2010).

<sup>299</sup> AM. ARBITRATION ASS’N, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS, §§ 9 & 10 (effective Oct. 8, 2003).

<sup>300</sup> *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 82 (2000).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 91.

<sup>303</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (asserting that the risks of class arbitration are too significant for defendants).

<sup>304</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27 (1991).

essentially stating a position hostile to arbitration, and this is a position the same majority has consistently said is preempted by the FAA.<sup>305</sup>

There are additional concerns. The majority implicitly expresses a belief that class arbitration is almost never attractive to businesses because it would require risking too much with too little judicial review.<sup>306</sup> This is an inherently biased position. The majority is concerned that businesses would never agree to class arbitration given the stakes, but where was this reasoning in any case in which an individual was being compelled to arbitrate?

Assume a female is fired from her job. She believes it is because she refused to have sex with her manager. She wants to sue to either get her job back or recover damages because she cannot find work and has two kids. However, the employer asked her to sign an arbitration clause when she began working. It applies to “any and all disputes.”

Can anyone honestly suggest that for this mother, the stakes of her arbitration are lower than those of the parties in *Stolt*? She gets one shot at her claim. Winning might be the difference between long-term unemployment (and all that comes with it) and gainful employment. The arbitrator might not be that qualified. There is no meaningful judicial review. Discovery might be limited. And if anything goes wrong, she has no other options for pursuing her rights. Yet, the Supreme Court has routinely held that these concerns, far from being barriers to enforcing the clause, are actually questions that are hostile to arbitration and are therefore preempted. If the stakes do not matter when the party is a person, why do they matter when the party is a business?

In any event, even if there is reason to have sympathy for businesses that might lose too much in class arbitration, the assumption that no business would agree to high stakes arbitration is simply unsupportable. Many businesses view arbitration as a reasonable forum where large claims can be resolved once and for all.<sup>307</sup> The growth of international

---

<sup>305</sup> *Id.* at 30. “Such generalized attacks on arbitration ‘res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,’ and as such, they are ‘far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.’”

<sup>306</sup> *Id.* at 32 n.4.

<sup>307</sup> Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY’S L.J. 259, 277 (1990) (demonstrating the growth as arbitration began to become a more attractive option).

arbitration to resolve business disputes is well documented.<sup>308</sup> Justice Breyer pointed out other examples.<sup>309</sup> For example, he noted in his dissent that several businesses voluntarily entered into arbitrations in which the stakes exceeded \$500 million and in one case topped \$1 billion.<sup>310</sup>

In the end, the majority's concerns about the risks of class arbitration reveal more about the majority than about class arbitration. The reasons given for conclusively holding that no business would ever read the word "arbitration" to include class arbitration are unsound and unpersuasive.

*c. The Majority's Statements about Class Arbitration in Concepcion*

The majority returned to its discussion of class arbitration in *Concepcion*. While making some of the same observations as in *Stolt*, Justice Scalia took the opportunity to add a few new statements about class arbitration. He asserted that "the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment."<sup>311</sup> He argued that this is true because in class arbitration the arbitrator has to decide whether the class will be certified, whether the named parties are sufficiently representative (which is actually just one of the elements of class certification), and how discovery will occur.<sup>312</sup>

The first two concerns articulated by Scalia are the same thing said two different ways; both relate to the need for the arbitrator to decide if class certification is appropriate. The fact that the arbitrator engages in rigorous analysis as to whether class certification is appropriate is only a concern if one agrees with Justice Scalia that making sure a class is appropriate, as opposed to certifying all cases as class actions, is somehow harmful to businesses. Of course, in reality, the very mechanisms Justice Scalia criticized actually provide procedural safeguards. Similar procedural matters can and do occur in individual arbitrations. For example, motions to compel

---

<sup>308</sup> See Robert B. Kovacs, *A Transnational Approach to the Arbitrability of Insolvency Proceedings in International Arbitration*, 21 J. BANKR. L. & PRAC. 5 ART. 3 (2012).

<sup>309</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1760 (2011) (Breyer, J., dissenting).

<sup>310</sup> *Id.*

<sup>311</sup> *Id.* at 1751.

<sup>312</sup> *Id.*

discovery, motions to dismiss, and even motions for partial summary judgment are entertained in some complex individual arbitrations.<sup>313</sup>

The next concern articulated by Scalia is that the arbitrator must oversee discovery.<sup>314</sup> However, this is no different than in many individual arbitrations. For example, some individual arbitrations are between two giant, multinational companies. These will often involve a panel of three arbitrators and have complex rules for administering the claim.<sup>315</sup> Justice Scalia omitted this information.

As mentioned previously, he suggested that a “cursory” review of bilateral versus class arbitration reveals that class arbitration takes longer.<sup>316</sup> He complained that no AAA class arbitrations, at the time *Concepcion* was handed down, had resulted in final judgments.<sup>317</sup> These are strange criticisms. First, the amount of time spent per claim resolved is obviously lower in class arbitrations. If a class arbitration resolved a meager 100 claims in 600 days, that is six days per claim. There was no evidence that any individual arbitration lasts only six days; instead, evidence before the Court suggested that the average individual arbitration takes six months.<sup>318</sup> The dissent also provided reason to believe Scalia’s data was incomplete. The dissent pointed to AAA’s amicus brief in *Concepcion*, in which AAA provided proof that class arbitrations are resolved faster than class actions in courts.<sup>319</sup> This apples-to-apples comparison, instead of comparing an individual arbitration to a class arbitration, suggests that class arbitration provides the same efficiencies that individual arbitration does.

But the majority opinion ignored all of this. Just as in *Stolt*, the majority’s errors seem to derive from the fact that the

---

<sup>313</sup> International arbitration is complex and can involve only two “individuals.” *But see* Commercial Arbitration Rules & Mediation Procedures Including Procedures for Large, Complex Commercial Disputes. *See* AM. ARBITRATION ASS’N, INTERNATIONAL DISPUTE RESOLUTION PROCEDURES (2009), available at <http://www.adr.org/> (follow “Rules & Procedures” and “Search Rules” to access rules) referencing discovery, depositions and other features common to litigation.

<sup>314</sup> *Concepcion*, 131 S. Ct. at 1747.

<sup>315</sup> For example, Dow Chemical recently announced it received almost \$2.5 billion in an international arbitration, demonstrating that even complex international matters with high dollar stakes are often resolved by businesses via arbitration. *Dow Announces Closure of Proceedings in K-Dow Arbitration*, INVESTOR CENTER (Mar. 4, 2013 8:35 AM), <http://www.dailyfinance.com/2013/03/04/dow-announces-closure-of-proceedings-in-k-dow-arbi/>.

<sup>316</sup> *Concepcion*, 131 S. Ct. at 1751.

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.* at 1759 (Breyer, J., dissenting).

majority focused exclusively on the defendants' perspective, not on the claimant and class, all of whom would almost certainly be happier with class arbitration.

Justice Scalia also bemoaned the fact that class arbitration “requires procedural formality.”<sup>320</sup> Specifically, he cited the fact that the class would need to receive class notice.<sup>321</sup> Besides the fact that class notice often lets people recover damages without participating in the day-to-day litigation of the case—the most efficient resolution of claims possible—it is also a safeguard for all involved. Class notice lets people object to bad settlements, and it lets people who do not want to be involved in a lawsuit against a business opt out. In this light, Justice Scalia’s concern with procedural formality was at war with the majority’s criticism in *Stolt*—namely that businesses were being asked to risk too much with too little protection. In the end, the majority criticized class arbitration on the one hand for having too much procedure, and on the other hand, for having too little.

But these concerns were merely precursors. It is Scalia’s “third” set of concerns, as he numbers them, that is most confounding. Justice Scalia overtly stated that “class arbitration greatly increases risks to defendants. Informal procedures do of course have a cost: The absence of multilayered review makes it more likely that errors will go uncorrected.”<sup>322</sup> This criticism, that businesses will be at risk, echoes the criticism Justice Alito raised in *Stolt*. It is, by all measures, inappropriate. For two decades before *Concepcion*, the Court explicitly prohibited individuals from suggesting arbitration was not a good place to resolve some claims.<sup>323</sup>

The Court, including Justice Scalia, suggested that such challenges to the very nature of arbitration were preempted by the FAA, as they demonstrated hostility toward arbitration. Yet, when Justice Scalia feared that businesses might be forced to face the realities of arbitration, he openly conceded that arbitration can cause errors and then sought to let the business escape from the very system he previously lauded.

Scalia’s inconsistencies did not stop there. He then suggested that because businesses could seek appellate review of

---

<sup>320</sup> *Id.* at 1751 (majority opinion).

<sup>321</sup> *Id.*

<sup>322</sup> *Id.* at 1752.

<sup>323</sup> *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991). In *Gilmer*, the plaintiff argued that arbitrators might be biased, that they were not trained to handle some matters, that discovery was limited, and that there was no written decision required. The Court rejected each of these arguments as running afoul of the FAA’s presumption in favor of arbitration.

class certification in court under a *de novo* review, but under arbitration rules the review would be severely limited, businesses are further prejudiced. He argued that the Court can almost never effectively review an arbitration decision because it must show extreme deference to the arbitrator. This irony is palpable. In *Stolt*, issued only one year earlier, the Court vacated an arbitrator's decision, showing seemingly no deference at all. It is equally ironic that the very thing that Justice Scalia previously said makes arbitration efficient (lack of judicial involvement) quickly became one of his arguments for why businesses should not have to arbitrate at all.

In all, the majority's treatment of class arbitration is shifting sand. The majority suggested businesses would never choose class arbitration despite proof that they do so all the time.<sup>324</sup> The majority simultaneously lamented the lack of procedural review in class arbitration and then criticized its procedural protections relating to class certification.<sup>325</sup> The majority asserted that class arbitration is inefficient, but then failed to compare class arbitration to class actions in court, instead comparing it to the resolution of one individual claim. These inconsistencies, and many more, suggest that something besides cold rationality is going on in the decisions.

## 2. Markers of IR

### a. *Confirmation Bias*

Confirmation bias consumes the majority's discussion of class arbitration. For example, the majority focused on statistics provided by AAA to prove class arbitration takes longer than an individual arbitration.<sup>326</sup> Although these facts, presented in isolation, might support the majority's conclusion, it is clear the majority ignored the other statistics, also from AAA, that noted that class arbitrations were faster than class actions.<sup>327</sup>

Similarly, Scalia's decision to criticize class arbitration for having procedural safeguards like discovery or a class certification hearing was illogical. The conservative majority suggested in *Stolt* and again in *Concepcion* that one of the problems with class arbitration was that businesses were not

---

<sup>324</sup> *Concepcion*, 131 S. Ct. at 1750.

<sup>325</sup> *Id.* at 1752.

<sup>326</sup> *Id.* at 1751 (citing *Hall Street Assocs. LLC v. Mattel, Inc.*, 552 U.S. 576, 578 (2008)).

<sup>327</sup> *Id.* at 1759 (Breyer, J., dissenting).

protected.<sup>328</sup> Under this logic, giving a business real discovery and requiring the plaintiff to prove all the elements of class certification would ensure a fairer result. And for this reason, this extra “procedure” should be a positive. Scalia did not see this. Instead, he was focused on anything that might support his argument.

The same is true of the lists of “facts” about class arbitration that were provided by the majority. The first explained why no business would choose class arbitration. The second list is similar, and detailed just how different class arbitration is from bilateral arbitration. The first list completely ignored the potential benefits of resolving large claims quickly and with arbitrators specifically trained in the area of law at issue. The second list ignored a host of ways that class arbitration is exactly like bilateral arbitration.

Finally, the majority grasped for supporting arguments in *Concepcion* when criticizing characteristics of arbitration, such as an arbitrator’s potential lack of understanding of the law or subject matter and the lack of the right to a full appeal. As discussed, the Court explicitly rejected these arguments in earlier decisions. They should have been preempted, as they express hostility toward arbitration.

#### *b. Substitution*

The Court, to its credit, does not engage in substitution when talking about class arbitration.

#### *c. Creation of “My-Side” Arguments*

Some of the most obvious examples of creating “my-side” arguments exist in the discussion of class arbitration. As discussed, in *Stolt* the majority produced a list of four different things about class arbitration that made it unlikely anyone would agree to it. However, an examination of the list reveals that one reason was listed twice (that the arbitrator considers and decides the claims of more than one person), another was a concern that the parties could not reasonably have (that class arbitration could allow the disclosure of some information about the arbitration), and the third was inherently biased and inaccurate (that the company just has too much to lose to ever agree to class arbitration). As cognitive science predicts, smart

---

<sup>328</sup> *Id.* at 1749 (majority opinion).

people like the members of the majority are adept at producing ever-longer lists of support for their beliefs, but they are not good at producing or considering “other-side” arguments.<sup>329</sup>

This one-sided discussion of the merits of arbitration is painfully obvious because even spending a few minutes thinking about class arbitration reveals a bevy of reasons a business might chose it. For example, unlike in court, parties in arbitration are able to vet arbitrators at AAA.<sup>330</sup> They can strike people they think would be unfair after reviewing their resumes and the cases they have worked on in the past. Similarly, many businesses might benefit from finality instead of prolonged litigation costs. And certainly the somewhat limited nature of discovery in arbitration could actually benefit a business that is facing a class action. Similarly, Justice Alito never acknowledged that AAA requires all arbitrators who handle class arbitrations be specially trained in this area, unlike courts, which do not require judges be specifically trained in class action litigation to handle such cases in court.

Justice Scalia engaged in the same one-sided argument creation in *Concepcion*. He provided a list of all the ways that class arbitration fundamentally changes arbitration.<sup>331</sup> Yet, he did not acknowledge even one of the ways that class arbitration is identical to bilateral arbitration (unless it was to suggest that suddenly the trait was bad). For example, he could have created an “other-side” list that recognized the following similarities between bilateral arbitration and class arbitration: less formal rules of evidence, arbitrators trained in the specific field that the case involves, narrower discovery, limited judicial review, lack of precedent, informal hearings (including phone hearings, etc.), and faster resolution times than similar cases in court. If Justice Scalia had acknowledged how very similar class arbitration is to individual arbitration, the analysis might have been much different.

#### *d. Strained Reasoning*

Strained reasoning appeared throughout the discussion of class arbitration. It appeared when Justice Alito asserted that businesses hate arbitration when it is high stakes but failed to mention that some businesses choose arbitration to resolve

---

<sup>329</sup> HADT, *supra* note 12, at 80-81.

<sup>330</sup> AM. ARBITRATION ASS'N, INTERNATIONAL ARBITRATION RULES (2009).

<sup>331</sup> *Concepcion*, 131 S. Ct. at 1748.

enormous business-to-business disputes.<sup>332</sup> Similarly, faulty reasoning occurs when the majority carefully considered the risks businesses face in class arbitration, but never considered the risks individuals face when their entire claim is before an arbitrator. Strained reasoning occurred when the court invented arguments for businesses (like concerns about privacy that could not have been present in *Stolt*) or when it actually criticized class arbitration for having procedural safeguards but then argued class arbitration is bad precisely because it does not have more procedural safeguards in the form of appeals. Similar contradictions occurred when the majority criticized class arbitration for resolving multiple claims at once, while simultaneously arguing that the purpose of the FAA is to promote efficient resolution of claims. And one cannot help but wonder how the majority can argue that arbitrators might not be qualified to handle class arbitration when this argument (1) was not only hostile to arbitration and therefore preempted but also (2) completely ignored the fact that some courts are unqualified whereas arbitrators at AAA are trained in class arbitration.

*e. Persistence*

The dissent pointed out that class arbitration is faster than a class action and that in the absence of class arbitration, consumers will not resolve their disputes at all, much less efficiently do so.<sup>333</sup> The majority never even addressed the first point, and as for the second, it suggested that it does not matter whether consumers can vindicate their rights, because even a concern like that cannot get in the way of enforcing the purpose of the FAA.<sup>334</sup> This provides another example of when a thoughtful counterargument is totally ignored, consistent with IR.

*f. Overconfidence*

Although it is clear the majority thinks it is right, there is not an overt showing of overconfidence when discussing class arbitration.

---

<sup>332</sup> See *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1776 (2010).

<sup>333</sup> *Concepcion*, 131 S. Ct. at 1758 (Breyer, J., dissenting).

<sup>334</sup> *Id.*

In the end, the scorecard looks like this:

Confirmation Bias	X
Substitution	
Creation of “my-side” arguments	X
Strained reasoning	X
Persistence	X
Overconfidence	

*E. Concepcion Overrules Past Precedent, But It Never Acknowledges It*

This section briefly outlines the “vindication of rights” doctrine that existed in Supreme Court decisions since at least 1985.<sup>335</sup> This section concludes that although the vindication of rights doctrine would have suggested that the *Discover Bank* rule was legally appropriate, Justice Scalia did not even mention it. This section also concludes that his decision effectively overrules the vindication of rights doctrine. This is problematic because Justice Scalia was part of the majority who recognized the doctrine in the past.<sup>336</sup>

1. Vindication of Rights

As late as the 1970s, the United States Supreme Court treated arbitration as appropriate to resolve contract disputes in the labor setting, but inappropriate for almost anything else. For example, in *Alexander v. Gardner-Denver*, the Court held that “if an arbitral decision is based solely upon the arbitrator’s view of the requirements of enacted legislation, rather than on an interpretation of the collective-bargaining agreement, the arbitrator has exceeded the scope of the submission.”<sup>337</sup> In other words, an arbitrator was not supposed to serve as an interpreter of complex statutory law; an arbitrator was limited to deciding the rules of the shop.<sup>338</sup> This led the Court to the conclusion that

---

<sup>335</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-27 (1985).

<sup>336</sup> *See, e.g.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), in which Scalia joined the majority opinion, including the section that asserted that “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.”

<sup>337</sup> *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 53 (1974).

<sup>338</sup> *Id.*

even if an employee arbitrated discrimination claims, the employee was still free to pursue those claims in Court, as courts were the final word on such important issues.<sup>339</sup>

This view held sway until the 1980s and was not fully eradicated until 1991—the date when the Supreme Court began to regularly demonstrate its adoration of arbitration. It was then that *Gardner-Denver* was essentially overruled. This happened in *Gilmer v. Interstate/Johnson Lane Corp.*, in which the Supreme Court was asked to consider whether it should enforce an arbitration clause that would require the plaintiff, a securities trader, to arbitrate his employment dispute.<sup>340</sup> In the opinion, the Court specifically rejected assertions that the arbitrator might be biased, that discovery was too limited in arbitration, and that the lack of a written opinion was problematic.<sup>341</sup> Instead, the Court strongly held that claims, even serious ones, could be resolved in arbitration.<sup>342</sup> In a footnote, the Court implicitly overruled *Gardner-Denver*. It wrote:

The Court in *Alexander v. Gardner-Denver Co.*, . . . expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That mistrust of the arbitral process, however, has been undermined by our recent arbitration decisions. We are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.<sup>343</sup>

For support, the Court cited to *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, (1985).<sup>344</sup> This change from suspicion of arbitration to a full embrace of its use in all settings is important because although the Court decided that any claim could be sent to arbitration, it did reiterate a safeguard.<sup>345</sup> Again citing to *Mitsubishi*, the Court noted that an arbitral forum was appropriate for all sorts of claims, but only “[s]o long as the prospective litigant effectively may vindicate [its] statutory cause of action in the arbitral forum . . . .”<sup>346</sup>

This safeguard was critical. It meant that arbitration was acceptable for any claim, no matter how serious, but this

---

<sup>339</sup> *Id.* at 59-60.

<sup>340</sup> *Gilmer*, 500 U.S. at 23-24.

<sup>341</sup> *Id.* at 30-32.

<sup>342</sup> *Id.* at 26.

<sup>343</sup> *Id.* at 34 n.5.

<sup>344</sup> *Id.*

<sup>345</sup> *Id.* at 26, 28.

<sup>346</sup> *Id.* at 28 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985)).

presumption was qualified by the recognition that if an arbitration clause prevented a party from vindicating statutory rights, the clause could fail. This seemed reasonable since arbitration was supposed to be an alternative method of resolving disputes, not a place where disputes could not be resolved at all.

The “vindication of rights” doctrine was reiterated in subsequent cases. For example, in *Green Tree Fin. Corp.-Alabama v. Randolph*, the plaintiff asserted that the cost of arbitration would prohibit her from pursuing her claim.<sup>347</sup> The Court rejected her assertion as unsupported by evidence.<sup>348</sup> However, the Court’s opinion strongly suggested that the “vindication of rights” theory was alive and well. The Court concluded that “a party seek[ing] to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive . . . bears the burden of showing the likelihood of incurring such costs.”<sup>349</sup> This statement implicitly recognized that if proven, the inability to vindicate rights is a bar to enforcing arbitration clauses.<sup>350</sup>

This doctrine was reinforced by state court decisions. This included the California Supreme Court, when it handed down *Discover Bank*. In *Discover Bank* the California Supreme Court explained that consumers could not pursue small dollar claims individually.<sup>351</sup> The Court noted that lawyers could not afford to take such small claims, and similarly, it would often be irrational for consumers to pursue such claims. The problem, as the court aptly noted, was that if no one could sue businesses for small dollar claims, then businesses could profit from illegality.

Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because, as discussed above, damages in consumer cases are often small and because a company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit the class action is often the only effective way to halt and redress such exploitation.<sup>352</sup>

Based on this reasoning, the California Supreme Court struck the arbitration clause because it was unconscionable. However, what is clear is that the California Supreme Court’s reasoning also fit well with the vindication of rights doctrine.

---

<sup>347</sup> *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 83-84 (2000).

<sup>348</sup> *Id.* at 90-92 & n.6.

<sup>349</sup> *Id.* at 92.

<sup>350</sup> *See id.*

<sup>351</sup> *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108-09 (Cal. 2005), *abrogated by AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

<sup>352</sup> *Id.* (citations omitted) (internal quotation marks omitted).

The California Supreme Court concluded that if it enforced the clause, consumers could not enforce their rights. Calling this unconscionable, or concluding that it bars the vindication of rights, are really two sides of the same coin.

Other courts more explicitly made this connection. For example, in *Whitney v. Alltel*, a Missouri court stated:

“Even claims arising under a statute designed to further important social policies may be arbitrated because so long as the prospective litigant effectively may vindicate his or her statutory cause of action in the arbitral forum, the statute serves its functions.” However, in some instances, where the arbitration provision is so prohibitive as to effectively deprive a party of his or her statutory rights, the arbitration agreement may be invalidated.<sup>353</sup>

That court went on to find a class action waiver unconscionable after concluding that the waiver would deprive consumers of the right to pursue their claims.<sup>354</sup>

Subsequent to *Whitney* and *Discover Bank*, many other states also struck down class action waivers after concluding that they would exculpate defendants from liability.<sup>355</sup> As a result, when *Concepcion* reached the Supreme Court, many believed that the *Discover Bank* rule was merely a rephrasing of the vindication of rights doctrine and therefore, rather than being preempted, advanced the purpose of the FAA.

## 2. Scalia's Position in *Concepcion*

Despite what some viewed as an alignment between California's law and the vindication of rights doctrine, in *Concepcion* the majority concluded that California law stood as a barrier to enforcing the purpose of the FAA.<sup>356</sup>

The dissent's response was to point out that since any customer who arbitrated against AT&T was likely to receive about \$30, enforcing the class action waiver would simply ensure that no one pursued claims against AT&T.<sup>357</sup> In essence, the dissent was invoking the vindication of rights doctrine. This argument is persuasive. But Justice Scalia dismissed it out of

---

<sup>353</sup> *Whitney v. Alltel Commc'ns., Inc.*, 173 S.W.3d 300, 311 (Mo. Ct. App. 2005) (quoting *Green Tree Fin. Corp.-Ala v. Randolph*, 531 U.S. 79, 90 (2000) (alterations omitted)).

<sup>354</sup> *Id.*

<sup>355</sup> *See, e.g.*, *Kinkel v. Cingular Wireless, LLC*, 857 N.E.2d 250, 274 (Ill. 2006); *Muhammad v. Cnty. Bank of Rehoboth Beach, Del.*, 912 A.2d 88, 99 (N.J. 2006); *Fiser v. Dell Computer Corp.*, 188 P.3d 1215, 1221 (N.M. 2008); *Scott v. Cingular Wireless*, 161 P.3d 1000, 1007-08 (2007).

<sup>356</sup> *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1742 (2011).

<sup>357</sup> *Id.* at 1760-61.

hand. He wrote: “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.”<sup>358</sup> And with those two sentences, Justice Scalia wrote away the dissent and struck the *Discover Bank* rule.

### 3. Analysis

What is interesting to note at the outset is that Justice Scalia never mentioned the vindication of rights doctrine at all in *Concepcion*. Much like he did with the preemption issue, he simply left out huge pieces of law as if they did not exist. This relieved him of explaining how it would advance the purpose of the FAA to stymie valid claims. Instead, without explanation, and ignoring the dissent’s point, Justice Scalia either (1) overruled the vindication of rights doctrine without admitting it, or (2) forgot it existed.

By any measure, failing to reference an established doctrine and then dismissing the same doctrine when raised by the dissent is an example of reasoning infected by IR. The result is a decision with troubling implications. By ignoring binding precedent about the vindication of rights doctrine, Justice Scalia made the FAA stand as a tool for eliminating claims, not efficiently resolving them. He made the FAA a tool for businesses who seek to avoid answering to thousands of plaintiffs at once—a result that hardly seems consistent with the purpose of the FAA. The result is that now businesses include beautifully written arbitration clauses in their contracts, not with the purpose of using them, but with the assurance that such clauses can eliminate class actions altogether.

### 4. Indicia of IR

#### *a. Confirmation bias*

The majority displayed confirmation bias by selecting language from the FAA about the value of arbitration without paying any attention at all to the vindication of rights doctrine. Specifically, the majority is quick to quote law that says that there is a “liberal federal policy favoring arbitration,”<sup>359</sup> but it fails to consider the Court’s own recent assertions that an arbitration

---

<sup>358</sup> *Id.* at 1753 (citation omitted).

<sup>359</sup> *Id.* at 1745 (citation omitted).

clause is enforceable “so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum.”<sup>360</sup>

*b. Substitution*

The majority did not engage in substitution. It never addressed the question of whether its decision was in line with the vindication of rights doctrine.

*c. Creation of My-Side Arguments*

My-side arguments abound in the majority’s opinion. The majority invented many reasons why striking the class action waiver would hurt AT&T.<sup>361</sup> And it invented multiple justifications for how consumers could try to resolve their claims individually.<sup>362</sup> For example, the majority asserted that it is unlikely the claims will go unresolved because AT&T’s clause obligates it to pay a large sum of money if the settlement award exceeds AT&T’s settlement offer.<sup>363</sup> Similarly, the majority pointed out AT&T’s clause requires it to pay attorney fees and lets consumers file their claims online for free.<sup>364</sup> Yet, the majority never discussed the fact that most consumers will never find representation, that it is economically irrational for consumers to pursue \$30 claims, or the fact that consumers have to read and understand AT&T’s complicated arbitration clause to even know their rights to begin with.<sup>365</sup>

Although dozens of arguments that support enforcing the *Discover Bank* rule spring to mind, the majority failed to acknowledge or think of even one. Indeed, while the majority invented a parade of horrible events for companies if they are forced to class arbitrate, the majority never even discussed the detailed findings in the *Discover Bank* case, namely that if class action waivers are enforced in small damage consumer cases, consumers will lose their rights while businesses, because they can print their own “get-out-of-jail-free card,” will make millions even if their behavior is demonstrably illegal. All of this points to one-sided thinking that blinded the majority to a litany of arguments that would have undermined its holding.

---

<sup>360</sup> *Green Tree Fin. Corp.–Ala. v. Randolph*, 531 U.S. 79, 90 (2000) (citations omitted) (internal quotation marks omitted).

<sup>361</sup> *Concepcion*, 131 S. Ct. at 1752.

<sup>362</sup> *Id.* at 1751.

<sup>363</sup> *Id.* at 1753.

<sup>364</sup> *Id.* at 1744.

<sup>365</sup> *Id.* at 1760-61 (Breyer, J., dissenting).

*d. Strained Reasoning*

There is little reasoning more strained than reaching a decision that implicitly overrules decades of precedent without even mentioning the relevant precedent or recognizing the tension in the law. And it is certainly hard to square the argument that the purpose of arbitration is to resolve disputes efficiently with the majority's decision, which essentially assured that far fewer arbitrations will occur, and of those that do, they will always resolve only one claim at a time.

*e. Persistence*

The dissent specifically asserted that the majority decision would prevent consumers from pursuing their claims—a violation of the vindication of rights doctrine and the fundamental purpose of the FAA. The majority should have been persuaded, but instead it implicitly asserted that the vindication of rights doctrine did not matter. This was overt evidence that reason could not change the majority's mind, as it had already made a decision.

*f. Overconfidence*

Completely failing to mention an entire body of law that is precisely on point, and then refusing to do so even when faced with it by the dissent, is extreme overconfidence.

The scorecard looks like this:

Confirmation Bias	X
Substitution	
Creation of "my-side" arguments	X
Strained reasoning	X
Persistence	X
Overconfidence	X

#### IV. WHAT IS THIS REALLY ALL ABOUT?

If by now you are convinced that the majority's decisions in *Stolt* and *Concepcion* are examples of the elephant leading the rider, that is, examples of intuition rationalization at work, then the only remaining question is what swayed the elephant.<sup>366</sup>

---

<sup>366</sup> HAIDT, *supra* note 12, at 79-80.

Some scholars have suggested the answer, implying that it was the majority's distaste for class actions and its sympathy for businesses (really two sides of the same coin) that drove the decision. For example, Alan Scott Rau wrote an article that details the new limits on arbitrable power.<sup>367</sup> In his article, he notes that Scalia and the majority seem to have a "visceral" response to class actions.<sup>368</sup> He also remarks that businesses do not include arbitration clauses because they like resolving disputes or because they fear judicial review; instead, they include them to avoid claim aggregation in which they could be required to answer to multiple consumers.<sup>369</sup> He suggests that Justice Scalia was sympathetic to this goal, and points to Scalia's mention of "*in terrorem*" class actions—which Justice Scalia suggests are class actions that force businesses to settle what are essentially frivolous claims.<sup>370</sup>

In addition to pointing out this language in *AT&T*, Rau notes how unusual the result in *Stolt* truly is.

One would have to invest a good deal of time and effort before being able to identify cases – which in the end amount only to a trivial number – in which the Supreme Court has been willing to mandate or approve the annulment of an arbitral award. (And before now these have been strictly outliers, grounded either on the lack of any agreement at all, or on some impropriety in the composition of the arbitral tribunal). But then we come to *Stolt-Nielsen*: It can hardly be accidental that the specter of class relief in arbitration is just about the only feature of the arbitration process that has been anathema to the business community – or that this rare decision restrictive of arbitral power happens, wonder of wonders, to be one in which a business-oriented court manages more or less to relieve it of any such anxiety.<sup>371</sup>

Following up on this assertion, Rau also suggests that "*Stolt-Nielsen* is in this sense entirely unprincipled" because "avoidance of class relief is the engine driving the machine."<sup>372</sup>

Rau has it right. The common threads in the opinions are (1) a dislike for class actions and class arbitrations and (2) a genuine concern for businesses and their well-being. And the opinions do far more than express the majority's feelings. The decline of class actions saved, and will continue to save, businesses millions of dollars per year, all at the expense of individual

---

<sup>367</sup> See generally Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435 (2011).

<sup>368</sup> *Id.* at 545-46.

<sup>369</sup> *Id.* at 543.

<sup>370</sup> *Id.*

<sup>371</sup> *Id.* at 484-85.

<sup>372</sup> *Id.* at 485.

consumers.<sup>373</sup> *Stolt* largely eliminates class arbitration and *Concepcion* eviscerates many contract-based class actions, including claims that might arise in any lending context or employment setting. As a result, businesses can now include an arbitration clause that prohibits class actions and be almost certain it will be enforced. Businesses are immunized from certain liabilities, even for crystal clear violations of the law.

Considering the real world results of *Stolt* and *Concepcion* drives home the detrimental impact on class action litigation. Because of these decisions, although many states have cases and statutes recognizing that some class action waivers are unconscionable, these laws cannot be enforced in the arbitration context. The result is that an arbitration clause is treated differently from other contract provision. This is a legal absurdity that encourages businesses to pile their most questionable provisions into arbitration clauses, where it seems they will receive special treatment.

A shining example of this exists in a case I have worked on for six years. In *Brewer v. Missouri Title Loans*, Plaintiff asserted that Defendant was violating Missouri law relating to title loans.<sup>374</sup> Missouri Title Loan's contract contained an arbitration clause that prohibited class actions.<sup>375</sup> Plaintiff conducted discovery, hired experts, and proved to the trial court that the class action waiver would create immunity for the defendant because consumers could not find representation to bring individual claims for only a few hundred or a few thousand dollars.<sup>376</sup> The defendant produced no contrary evidence.<sup>377</sup> The Missouri Supreme Court affirmed the trial court's holding that the class action waiver was unconscionable.<sup>378</sup> The Missouri Supreme Court also noted that the clause was a *de facto* exculpatory clause and failed under general Missouri law.<sup>379</sup> The result was clear: in Missouri, if there was evidence that a contract provision would prevent a consumer from pursuing his or her

---

<sup>373</sup> See John Campbell, *Unprotected Class: Five Decisions, Five Justices, and Wholesale Changes to Class Action Law*, 13 WYO. L. REV. 463 (2013) (discussing how decisions by the conservative majority of the United States Supreme Court have dramatically reduced the number of class actions that can be pursued, even when the activity is demonstrably illegal).

<sup>374</sup> *Brewer v. Mo. Title Loans*, 364 S.W.3d 486, 488 (Mo. 2012), *cert. denied*, 133 S. Ct. 191 (2012).

<sup>375</sup> *Id.* at 487.

<sup>376</sup> *Id.* at 493-94.

<sup>377</sup> *Id.* at 494.

<sup>378</sup> *Id.* at 496.

<sup>379</sup> *Id.* at 487-88.

rights, then it was too one-sided—and thus unconscionable—to be enforced.<sup>380</sup>

However, after *Concepcion*, the United States Supreme Court vacated the decision.<sup>381</sup> On remand, the Missouri Supreme Court struck the arbitration clause because it contained a number of other offensive provisions, but it did not and could not rely upon the existence of the class action waiver.<sup>382</sup> Indeed, on the same day, the Missouri Supreme Court was forced to remand a different case for further consideration because the trial court had rested its finding of unconscionability on the existence of a class action waiver.<sup>383</sup> The result was that the case was remanded to the trial court and was never pursued as a class action.

The result in Missouri is now clear. If a party presents decisive evidence that a contract term prevents him from pursuing his legal rights, that term is unconscionable. This is true for class action waivers in small damage cases. However, despite the fact that this is general Missouri law, if the business is clever enough to put the class action waiver under the heading of “arbitration,” the clause magically becomes enforceable. This holds true no matter how much evidence there is that enforcing the clause will prevent the resolution of disputes. While in private practice, my class action team alone passed on dozens of cases in which we concluded that businesses were acting unethically but that a class action waiver in an arbitration clause would prevent us from pursuing the claim.

This included claims against businesses like payday lenders, who in Missouri, charge over 400% interest on loans.<sup>384</sup> This is a salient example of the need for class actions because, prior to the errant decisions of the majority, two payday lenders in Missouri were sued in class actions. They settled the lawsuits for over \$30 million in cash and debt relief to the affected individuals.<sup>385</sup> These lawsuits impacted about 200 payday loan stores, but there are roughly 1,000 payday lenders in Missouri.<sup>386</sup> It is an absolute certainty that more lawsuits

---

<sup>380</sup> *Id.* at 493-95.

<sup>381</sup> *Mo. Title Loans, Inc. v. Brewer*, 131 S. Ct. 2875 (2011).

<sup>382</sup> *Brewer*, 364 S.W.3d at 490-91.

<sup>383</sup> *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 517 (Mo. 2012).

<sup>384</sup> Letter from Richard J. Weaver, Comm’r of Fin., State of Mo., to Hon. Jeremiah W. Nixon, Governor, State of Mo. (Feb. 7, 2013), *available at* <http://finance.mo.gov/Contribute%20Documents/2013PaydayLenderSurvey.pdf>.

<sup>385</sup> *Hooper v. Advance America*, 589 F.3d 917 (8th Cir. 2009); *Woods v. QC Fin. Servs., Inc.*, 280 S.W.3d 90 (Mo. Ct. App. 2008).

<sup>386</sup> Letter from Richard Weaver, *supra* note 384.

would have been filed to challenge the practices of the other payday lenders, but *Concepcion* intervened, and in doing so ensured that payday lenders could continue to engage in questionable legal practices with no concern that they would ever have to answer to all their customers. Further, no individuals were likely to pursue claims because the payday loans were only \$500 or less.<sup>387</sup>

These results are not anomalous. A year after the Supreme Court handed down *Concepcion*, Public Citizen, a group that monitors a variety of constitutional and national issues impacting citizens, wrote a report entitled *Justice Denied*, in which it chronicled the impact *Concepcion* had on class actions.<sup>388</sup> The report concluded that “the decision provided corporations with a tool to insulate themselves from facing meaningful accountability for cheating large numbers of consumers out of amounts too small to make pursuing individual cases economically feasible.”<sup>389</sup> The report used Westlaw’s KeyCite function to identify 76 potential class actions that were dismissed by courts who cited to *Concepcion*.<sup>390</sup> And of course, the report could not capture the hundreds of cases that were not filed or were voluntarily dismissed for the same reason.

To further illustrate how the *Concepcion* immunity blanket works, consider a hypothetical. A national cell phone company with 20 million customers includes a class action waiver in its arbitration clause in its contract with each customer. That company could, tomorrow, add a \$1 questionable fee to each customer’s bill. The fee would generate roughly \$20 million dollars in revenue the next month. If the fee were illegal, each customer’s only choice would be to file an arbitration action for \$1 in damages. Under the majority’s holdings in *Stolt* and *Concepcion*, there is simply no way to hold this company accountable for all the potentially illegal gains. As a result, a company is far more likely to test the boundaries of illegality. If it gets it wrong and breaks the law, it is almost certain to answer to no one. Even if a few zealots do file individual

---

<sup>387</sup> *Id.*

<sup>388</sup> *Justice Denied: One Year Later: The Harms to Consumers from the Supreme Court’s Concepcion Decision are Plainly Evident*, PUB. CITIZEN & NAT’L ASS’N CONSUMER ADVOCATES (April 2012), available at <http://www.citizen.org/documents/concepcion-anniversary-justice-denied-report.pdf>.

<sup>389</sup> *Id.* at 4.

<sup>390</sup> *Id.*

claims, the company's gains still greatly exceed the money it pays to settle claims—cheating becomes profitable business.<sup>391</sup>

These results are ironic. Because the majority eliminated both class arbitration and class actions in many contexts, and because this was accomplished by favoring arbitration clauses that require individual arbitration, arbitrations are less likely to happen, and the purpose of the FAA has been eroded. Yet all of this occurred in the name of the FAA. As a result, a statute designed to encourage the resolution of disputes now stands as an obstacle to pursuing the claims at all. Because of this, the prophecy of *Discover Bank* is now entirely true:

Class action and arbitration waivers are not, in the abstract, exculpatory clauses. But because, as discussed above, damages in consumer cases are often small and because a company which wrongfully exacts a dollar from each of millions of customers will reap a handsome profit . . . the class action is often the only effective way to halt and redress such exploitation.<sup>392</sup>

## V. MOVING FORWARD

The analysis above highlights the dangers of unchecked IR. It suggests that decisions with wide-ranging implications can be hijacked by IR without judges even knowing it. In the test cases, the majority asserted, and probably believed, that it reached an inevitable result driven by immutable reason. It was blind to its own IR. And as discussed above, this led to Court decisions that should immediately be overruled because they do not display the legal reasoning one should demand from the highest court in the United States and because they produce real world results that are equally out of step with the law.

But this is not an article about reversing two court cases. It is an article about the broader implications of IR. If IR truly pops up most when strong emotions are present, then IR can be expected to turn up in some of the most contentious and important cases in the country. Debates over abortion, gun rights, whether companies can give money to political campaigns, whether companies can be held responsible for their human rights behavior in other countries, the rights of

---

<sup>391</sup> For more on the Court's wholesale changes to class action law since 2010, see Campbell, *supra* note 373.

<sup>392</sup> *Discover Bank v. Superior Court*, 113 P.3d 1100, 1108-09 (Cal. 2005), *abrogated by* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

homosexuals, and even who should be named President could all be (and may have already been) compromised by IR.

What can be done? I see two initial steps. First, there is already a great deal known about cognitive science and decision making in particular. This field of inquiry needs to be pointed out more precisely to the judiciary. Presently, although there are increasing numbers of scholars studying how jurors are impacted by a variety of cognition principles,<sup>393</sup> I am aware of few large scale studies to determine how judges reach their conclusions. Parsing out the role IR already plays in decision making, and doing this with some empirical rigor, would be a significant advance.

But identifying what role IR is playing in decision making is only a beginning. There are larger questions implicated. Justice Scalia criticizes judges who ask, "Is this decision good for the little guy?"<sup>394</sup> But my analysis reveals that Scalia asks similar questions, at least internally, such as, "Is this decision good for big business?" Serious debate could and should be had about what role emotion and moral value determinations should play in decision making. In other words, is it necessary to eliminate emotion, or is it simply necessary to overtly name it when it plays a role? After all, if deeply held beliefs will, at least in some cases, play a role even when unacknowledged, it may be that transparent discussion of these beliefs is the better course.

The question above will be informed by yet another query. Can IR be eliminated? Can people be taught to avoid it? There is already some literature on this, but I know of none in the judicial realm. Controlled studies in which people are educated about IR, then asked to engage in cognitive tasks, could reveal how much IR can be tamed. These studies could prove especially interesting if applied to judges. Imagine educating judges about IR, then asking them to review their own past decisions

At a minimum, cognitive science should have a seat at the table in judicial training programs. Judges are in the business of making decisions; they should be acutely aware of the cognition challenges that all people face when doing so. If this education occurs, could judges identify IR in their own decisions? Would they recognize a need for peer input to at least curb the influence

---

<sup>393</sup> See, e.g., Christopher Tarver Robertson, *Blind Expertise*, 85 N.Y.U. L. REV. 174, 176 (2010). Bernard Chao, a colleague of mine, Christopher Robertson, and I are also working on an article that will study the anchor effect on jury verdicts.

<sup>394</sup> SCALIA & GARNER, *supra* note 35, at 18.

of their own feelings? These are unanswered questions that demand answers.

My intuition (and I recognize the irony) is that education about IR is like what many defenders used to say about Michael Jordan. “You can’t stop him, you can only hope to contain him.” We cannot eliminate cognitive errors, especially in the fast-flow of everyday life. But, in judicial opinions—which can be considered and revised—we can hope to reduce IR’s influence by making it more transparent. This would produce more consistent judicial opinions, reduce the risk that opinions are driven by quiet undercurrents, and, in all, be more consistent with the common law tradition.

#### CONCLUSION

IR abounds. We all engage in it, and this includes the conservative majority. These are important truths. Many have lambasted the conservative majority for business-friendly decisions, but more is needed. Beyond conservative or liberal viewpoints, we must understand what drives judicial decision making. We must ask *why* and *how*?

IR is most likely to appear when deeply held beliefs are at issue, and that has serious implications for the work of judges, whether they sit in trial courts or on the Supreme Court. An analysis of *Stolt* and *Concepcion* reveals that IR binds and blinds, bringing those with like views together and then preventing them from seeing their own logical fallacies. In doing so, it lets the elephant run amok, reducing the rider to a *post hoc* justifier. As discussed, this can have real world consequences of immense proportions.

The solution is to study the IR undercurrent, to educate those who are most impacted by it, and hopefully in doing so, to heed the advice of Justice Sonia Sotomayor. It is only by knowing and understanding when “personal bias is seeping in to our decision-making” that we can hope to be “fair and impartial.”<sup>395</sup>

---

<sup>395</sup> Interview by Gwen Ifill with Sonia Sotomayor, *supra* note 1.