THE LITIGATION-ARBITRATION DICHOTOMY MEETS THE CLASS ACTION

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Introduction

Observers typically cast litigation and arbitration in contrast to one another. Litigation takes place under off-the-rack rules prescribed by public law—for the federal courts, the Federal Rules of Civil Procedure. By contrast, arbitration is a creature of the private law of contracts and part of the larger realm of alternative dispute resolution (ADR). The term "alternative" highlights the contrast with litigation. One prominent concern in recent years posits that ADR mechanisms have given rise to a troubling body of "contract procedure"[1] that shunts off to an opaque, privatized forum many kinds of civil disputes that previously would have formed the grist for the open, public process of litigation. On this account, litigation and arbitration

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At the district court level, I served as an expert witness in support of AT&T Mobility LLP's motion to compel arbitration in one of the cases discussed herein: Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 WL 5216255 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom.* Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom.* AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010). The analysis presented in this Article in light of subsequent developments—particularly, the Supreme Court's decisions in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010) and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010)—stands as my independent assessment as a commentator, not necessarily the position of any interested party in *Concepcion*.

1 *See* Judith Resnik, *Procedure as Contract*, 80 Notre Dame L. Rev. 593, 598–600 (2005).

comprise dichotomous, even rivalrous, regimes for the resolution of civil claims.

Two decisions from the October 2009 Term of the Supreme Court—*Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*[2] in the context of litigation and *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*[3] in the setting of arbitration—frame a need for more systematic dialogue across the two domains. The engine behind the need for dialogue stems from one of the most distinctive and controversial features of the U.S. civil justice landscape: the possibility of procedural aggregation through the mechanism of a class action or its ADR counterpart, class arbitration. Indeed, the atypical nature of many features of U.S. civil litigation from a comparative standpoint—the U.S.-style class action included—sheds light on the Court's arbitration jurisprudence in ways not yet fully appreciated.

At their cores, both *Shady Grove* and *Stolt-Nielsen* turn crucially upon characterization of the essential nature of the class mechanism. Is it merely a super-sized form of joinder (which permits multiple plaintiffs to combine in a single lawsuit)[4] or is it more transformative in nature?[5] At first glance, one might have expected the Court to arrive at a similar view of class treatment across the two decisions. That, however, is not so. The affinity between the questions in the two cases and the divergent answers that the Court provides accentuate the pressure on the litigation-arbitration dichotomy.

In *Shady Grove*, the Court confronted a question that first-year Civil Procedure students would find familiar. In section 901(b) of its Civil Practice Law and Rules, the New York state legislature specifies that an action to recover statutory damages—in *Shady Grove*, "statutory interest penalties" for overdue payments of insurance benefits[6]—"may not be maintained as a class action" unless the law that provides for such damages "specifically authorizes" the class format.[7] Insofar as legislative materials reveal, the notion behind section 901(b) is to

2 130 S. Ct. 1431 (2010).

3 130 S. Ct. 1758 (2010).

4 *See* FED. R. CIV. P. 20(a) ("Persons may join in one action as plaintiffs if: (A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action.").

5 For a prescient early framing of this question, see Diane Wood Hutchinson, *Class Actions: Joinder or Representational Device?*, 1983 SUP. CT. REV. 459.

6 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 549 F.3d 137, 140 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1431 (2010).

7 N.Y. C.P.L.R. 901(b) (McKinney 2006).

avoid remedial "overkill"[8]—the addition of class treatment to a remedy already designed to "provide[ ] an aggrieved party with a sufficient economic incentive to pursue a claim," so as to generate a whopping level of potential liability in the aggregate.[9] By the terms of section 901(b), the proposed class action in *Shady Grove* clearly could not have been maintained in New York state court. The question for the Court, however, was whether section 901(b) categorically bars the maintenance of a class action in federal court on the basis of diversity of citizenship.[10] By a 5-4 vote, the Court answered "no."[11]

The Court holds that Rule 23 of the Federal Rules of Civil Procedure exclusively governs the conditions under which a class action "may be maintained"[12] in federal court. Specifically, Rule 23 displaces New York section 901(b) to the contrary by the terms of the federal Rules Enabling Act, as long as Rule 23 itself is proper under that statute.[13] The Rules Enabling Act famously authorizes the Supreme Court "to prescribe general rules of practice and procedure" for the federal courts, subject to the caveat that "[s]uch rules shall not abridge, enlarge or modify any substantive right."[14]

The prospect of a class action in a case like *Shady Grove* is far from a mere technical matter. The Court's holding positions class counsel to "attempt to transform a $500 [individual] case into a $5,000,000 award" on a class basis.[15] The Court acknowledges this dramatic real-world effect, but the Court nonetheless concludes that Rule 23 does not "enlarge" substantive rights in contravention of the Rules Enabling Act.[16]

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8 *Shady Grove*, 130 S. Ct. at 1464 (Ginsburg, J., dissenting) (quoting Attachment to Letter from G. Perkinson, N.Y. State Council of Retail Merchs., Inc., to J. Gribetz, Exec. Chamber (June 4, 1975) (Legislative Report), Bill Jacket, L. 1975, ch. 207).

9 *Id.* (quoting Sperry v. Crompton Corp., 863 N.E.2d 1012, 1015 (N.Y. 2007)).

10 The procedural posture in which *Shady Grove* reached the Supreme Court—on a grant of the defendant's motion to dismiss on the pleadings, rather than a denial of a motion for class certification—cast the question concerning New York section 901(b) in a stark, categorical form. As a result, the Court did not have occasion to discuss specifically the role, if any, that section 901(b) might play as a discretionary matter in a federal court's class certification analysis under Rule 23. *See infra* Part I.A.2.

11 *See Shady Grove*, 130 S. Ct. at 1438.

12 *See* FED. R. CIV. P. 23(b).

13 *See Shady Grove*, 130 S. Ct. at 1442; *id.* at 1456–57 (Stevens, J., concurring in part and concurring in the judgment).

14 28 U.S.C. § 2072(a)–(b) (2006). The Act goes on to displace "[a]ll laws in conflict with such rules" of practice and procedure for the federal courts. *Id.* § 2072(b).

15 *See Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting).

16 *Id.* at 1457 (Stevens, J., concurring in part and concurring in the judgment).

Writing for a four-member plurality, Justice Scalia remarks that Rule 23, "no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once."[17] On this view, "[t]he likelihood that some (even many) plaintiffs will be induced to sue by the availability of a class action is just the sort of 'incidental effec[t]' we have long held does not violate [the Rules Enabling Act]."[18] Even while diverging from the plurality at points, the concurring opinion of Justice Stevens takes the same view of the class action. For Justice Stevens, "the class vehicle may have a greater practical effect on who brings lawsuits than do low filing fees, but that does not transform" the class action into something like a state law cap on damages available in any civil action—something that might present a closer case under the Rules Enabling Act caveat.[19]

With *Shady Grove* on the books, one might have expected the same view of class treatment to obtain less than a month later in *Stolt-Nielsen*. Yet the enabling of claiming that the *Shady Grove* Court deems a nontransformative, incidental effect with no bearing on substantive rights suddenly becomes something different in kind for the *Stolt-Nielsen* Court. Writing there in the context of the Federal Arbitration Act (FAA),[20] the Court invokes the enabling of claiming occasioned by class treatment as the decisive ground to explain why arbitrators may not infer from contractual silence in an arbitration clause that a class-wide format is permissible.[21]

Writing for a five-Justice majority in *Stolt-Nielsen*, Justice Alito acknowledges that "procedural questions which grow out of the dispute and bear on its final disposition are presumptively not for the judge, but for an arbitrator, to decide."[22] But the *Stolt-Nielsen* Court then proceeds to explain that the choice to employ class arbitration is not a mere "procedural" matter within the gap-filling authority of the arbitrator.[23] Rather, "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties

17 *Id.* at 1443 (plurality opinion).

18 *Id.* (second alteration in original) (quoting Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946)).

19 *Id.* at 1459 (Stevens, J., concurring in part and concurring in the judgment); *see also id.* at 1439 n.4 (majority opinion) ("[W]e express no view as to whether state laws that set a ceiling on damages recoverable in a single suit are pre-empted [under the Rules Enabling Act]." (citation omitted)).

20 9 U.S.C. §§ 1–16 (2006).

21 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1776 (2010).

22 *Id.* at 1775 (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002)) (internal quotation marks omitted).

23 *Id.*

consented to it by simply agreeing to submit their disputes to an arbitrator."[24]

Rhetoric is revealing here. The Court repeatedly describes a shift from one-on-one arbitration to class arbitration as transformative in nature—as a "crucial difference[ ]," a "fundamental change[ ]," and hence something "too great" to be presumed to lie within the gap-filling power of the arbitrator absent more specific contractual language.[25] The fundamental difference consists of the capacity of class arbitration to resolve not just a bilateral dispute but, rather, "many disputes between hundreds or perhaps even thousands" that implicate "the rights of absent parties."[26] For the *Stolt-Nielsen* Court, the distinctive reach of class arbitration to absent parties means that one may not cast the question of its use "as being merely [about] what 'procedural mode' is available."[27]

Shady Grove makes a fleeting appearance in *Stolt-Nielsen*, but only in the way that director Alfred Hitchcock was apt to appear inconspicuously in the background of scenes within his suspense films.[28] The *Stolt-Nielsen* majority does not mention *Shady Grove* at all. That precedent appears in Justice Ginsburg's *Stolt-Nielsen* dissent and, even then, merely as a "cf." citation for her view that the arbitrators there simply decided "the procedural mode available for presentation of [the] antitrust claims" on the merits.[29] This view itself contrasts with Justice Ginsburg's own dissent in *Shady Grove*, in which she characterizes the New York bar on class actions for statutory damages as having a substantive dimension and therefore as binding in a federal diversity action.[30] Thus, although the majorities and the dissents across the two cases have overlapping membership,[31] each camp appears to

24 *Id.*

25 *See id.* at 1776.

26 *Id.*

27 *Id.*

28 For a detailed list, see *List of Hitchcock Cameo Appearances*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_Hitchcock_cameo_appearances (last visited Feb. 1, 2011).

29 *Stolt-Nielsen*, 130 S. Ct. at 1781 (Ginsburg, J., dissenting).

30 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1464 (2010) (Ginsburg, J., dissenting) (characterizing New York section 901(b) as an embodiment of state "regulatory policy"); *id.* at 1466 (describing section 901(b) as designed "to control the size of a monetary award a class plaintiff may pursue").

31 Three members of the Court were in the majority in both cases: Chief Justice Roberts and Justices Scalia and Thomas. Two Justices dissented in both cases: Justices Ginsburg and Breyer. Three Justices notably maintained consistent positions as to class treatment across the two cases. Justices Kennedy and Alito dissented in *Shady Grove* but joined the majority in *Stolt-Nielsen*, whereas Justice Stevens concurred in *Shady Grove* and dissented in *Stolt-Nielsen*. Justice Sotomayor joined the portion of the

adopt diametrically opposing views about the nature of class treatment.

If litigation and arbitration really are dichotomous modes for civil dispute resolution, then that dichotomy would seem to be doing considerable work. What *Shady Grove* deems an incidental effect that poses no categorical bar to class litigation morphs, in *Stolt-Nielsen*, into the fundamental difference that bars class arbitration in the face of contractual silence on the question. Across the two cases, the Court maintains an almost studied avoidance of any explanation for the difference of view as to class treatment. Based simply on what the Court says, one seemingly could transpose the remarks about the nature of class treatment from one decision into the other and flip the outcomes.

This Article takes the contrast between *Shady Grove* and *Stolt-Nielsen* as a point of departure for a broader engagement of the relationship between litigation and arbitration. In our modern world of globalized commerce, arbitration is less an "alternative" dispute resolution mode and more commonplace, such that its relationship to litigation is apt to exhibit less dichotomy and more doctrinal convergence. In urging a more synthetic understanding of litigation and arbitration, this Article advances three main claims.

First, for all their salient differences, the Court's accounts of class treatment under the Rules Enabling Act and the FAA evidence a deep, underlying convergence between litigation and arbitration doctrine. This convergence remains unnoticed—certainly, undertheorized—by both the Court itself and commentary to date. The Court's decisions in *Shady Grove* and *Stolt-Nielsen* afford an opportunity to expose this convergence and to assess its merits.

Shady Grove continues the Court's longstanding effort to police the line between questions in federal diversity cases properly treated under the doctrine of *Erie Railroad Co. v. Tompkins*[32] and those appropriately analyzed under *Hanna v. Plumer*.[33] For the majority in *Shady Grove*, the existence of Rule 23 on when a class action may be maintained in federal court places *Shady Grove* squarely in the *Hanna* column. The result—the Court holds—is the displacement of New York section 901(b) to the contrary, as long as Rule 23 itself is "rationally

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Shady Grove plurality opinion concerning the nature of the class action, but was recused in *Stolt-Nielsen*.

32 304 U.S. 64 (1938).

33 380 U.S. 460 (1965).

capable of classification" as governing "procedure" within the meaning of the Rules Enabling Act.[34]

I initially situate *Shady Grove* within a longstanding debate over the interaction of the class action device with remedies in the nature of statutory damages, explaining how the peculiar posture of the case leaves undisturbed a valuable line of lower court decisions—precedents that speak to the required determination under Rule 23(b)(3) that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[35] As to the superiority requirement of Rule 23(b)(3), there is room for federal court consideration of guidance found in state law, even if it is not strictly binding in the *Erie* sense.

Beyond the particulars of *Shady Grove*, the upshot of the *Hanna* doctrine has been to lend a formalistic, categorical quality to the Court's treatments of conflicts between the Federal Rules and state law in diversity cases. Put bluntly, since *Hanna*, if the Federal Rule truly conflicts with state law, then the real-world effects of that Rule upon claiming are deemed merely incidental and, hence, short of the Rules Enabling Act stricture against the alteration of substantive rights.[36] Placement of a given case in the *Erie* column, by contrast, prompts a more functional inquiry that deems state law binding as against the creation of federal common law based on the "touchstone" of whether the choice between the two is outcome-determinative, considered in retrospect.[37]

The Rules Enabling Act and the Federal Arbitration Act are clearly not the same. As I shall explain, nonetheless, the Court's FAA jurisprudence has come substantially to replicate key structural features of the *Hanna* and *Erie* doctrines, respectively. The demarcation between the two in the arbitration setting tracks the line between cases focused on the command of FAA § 2 to validate arbitration agreements in private contracts and cases focused on the caveat at the

34 *See id.* at 472.

35 *See* FED. R. CIV. P. 23(b)(3).

36 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010) (plurality opinion) ("Applying th[e] test [of *Hanna* and related precedents], we have rejected every statutory challenge to a Federal Rule that has come before us."). Like the Court, I speak here of cases in which it is not possible to avoid the conflict through judicial construction of the Federal Rule in question. *See, e.g.*, Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415 (1996) (avoiding conflict between Rule 59 for new trials and state standard for judicial review of jury awards); Walker v. Armco Steel Corp., 446 U.S. 740 (1980) (avoiding conflict between Rule 3 on commencement of actions and state statute of limitations).

37 *See Shady Grove*, 130 S. Ct. at 1442 (plurality opinion) (citing Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945)).

end of § 2 that preserves generally applicable contract defenses in state law. "Command" cases are governed by a counterpart to the *Hanna* doctrine, whereas "caveat" cases follow a counterpart to *Erie*.

Specifically, when the Court has considered the categories of civil claims that arbitration may encompass, the arbitration clause wins on *Hanna*-like terms,[38] with the opportunity for the claimant to vindicate her substantive rights in the arbitral forum regarded as undisturbed. This *Hanna* counterpart for the FAA—if one will—is susceptible to criticism for effectively equating the institutional authority of private contracts with that of the rulemaking process prescribed by the Rules Enabling Act. As I shall elaborate, however, the emerging parallels between litigation and arbitration here flow from a deeper structural similarity that recasts the institutional question.

The Court's *Hanna* doctrine for the Rules Enabling Act speaks to the relationship between federal and state law. Its unarticulated counterpart for the FAA speaks to the relationship among rival lawmakers at a different level: the relationship of U.S. law to that of other nations in our increasingly globalized world of commerce. Recent scholarly accounts express consternation over the Court's steady expansion of the types of civil claims that arbitration may encompass but, in so doing, have obscured the transnational dimension of the Court's jurisprudence.[39]

Seen in a transnational light, the wide array of civil claims that may be subject to arbitration under the Court's FAA decisions reflects not so much a sense of hubris about private contracting as, instead, a welcome modesty about the capacity of U.S. law—including the processes of U.S. civil litigation—to govern the world. The Rule 23–style class action is a fixture of the U.S. landscape at both the federal and state levels, but that device remains decidedly anomalous from a comparative perspective.[40] This comparative perspective, I

38 My characterization here remains confined to the allocation of particular categories of civil claims across litigation and arbitration. The arbitration clause does not win, insofar as it purports to provide for judicial review of arbitral awards on grounds more extensive than those prescribed by the FAA itself. *See* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 578 (2008). But, even then, only "the expeditious judicial review" provided by the FAA is lost; the ordinary modes for enforcement of private contracts remain available. *Id.* at 590.

39 *See, e.g.*, David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605 (2010); Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431 (2010); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005); Resnik, *supra* note 1.

40 *See infra* note 149 and accompanying text.

argue, lends to the holding in *Stolt-Nielsen* the needed explanation that the Court there failed to supply.

By contrast, for situations in which state law unconscionability doctrine is in play and the federal law command to validate the arbitration clause is correspondingly in doubt, per the caveat in FAA § 2, a counterpart to the *Erie* doctrine applies. This similarity—once noted—should not be surprising, for the *Erie* doctrine within its own domain seeks to manage the relationship between state law and a body of would-be federal law of dubious provenance (general federal common law). Under the FAA counterpart to the *Erie* doctrine, the question becomes not the formal, categorical one of "substance" versus "procedure" but, instead, the functional one of whether the arbitration clause—evaluated in real-world, operational terms—makes claiming "prohibitive[ ],"[41] so as to be tantamount to the kinds of exculpatory clauses long deemed unconscionable in ordinary contracts, apart from any arbitration clause. The distinction between the arbitration counterparts to the *Hanna* and *Erie* doctrines lends organization to the Court's FAA jurisprudence in a way not previously recognized.

Second, a clearer understanding of litigation and arbitration along the foregoing lines sheds light on a fiercely contested question before the Court during its October 2010 Term. *AT&T Mobility LLC v. Concepcion*[42] concerns the permissibility, under the FAA, of arbitration clauses that are not silent as to class treatment (as in *Stolt-Nielsen*) but, instead, include "class waivers"—provisions that purport to waive any opportunity to participate in a class arbitration or a class action in court. The central argument against class waivers is that they purport to do something that public legislation may do but that private contracts may not—namely, operate as exculpatory clauses by repealing, in practical effect, a private right of action contained in existing law.[43]

As I shall detail, the particulars of the arbitration clause in *Concepcion* frame this issue in a stark form—in terms of whether a class waiver is impermissible in the face of claimants' "acknowledge[ment]"

41 Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000).

42 Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom.* AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010).

43 For earlier framings of the pre-*Concepcion* debate over class waivers in terms of institutional allocation between public legislatures and private contracts, see Samuel Issacharoff & Erin F. Delaney, *Credit Card Accountability*, 73 U. CHI. L. REV. 157, 172–75 (2006); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1902 (2006); and J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1764–67 (2006).

that other features of the arbitration clause "prompt[ ] [the defendant company] to *accept liability*, rather than 'escape liability.'"[44] For the Ninth Circuit in *Concepcion*, the problem nonetheless remains that "not every aggrieved customer will file a claim,"[45] as effectively would occur in a class-wide proceeding that would confront the defendant with the full scope of its alleged wrong in such a manner as to be fundamentally different from joinder.

I explain how the particulars of *Concepcion* call for careful attention to the line between the FAA counterparts to the *Hanna* and *Erie* doctrines. Properly understood, *Concepcion* does not present a bona fide FAA § 2 caveat case under the FAA counterpart to the *Erie* doctrine but, rather, a § 2 command case under the counterpart to *Hanna*. The conception of unconscionability on the part of the lower courts—one decoupled from notions of exculpation—actually replicates in the FAA context the same misstep that warranted Supreme Court reversal in *Shady Grove*. It bears emphasis, nonetheless, that this account of *Concepcion* leaves ample room for judicial scrutiny of class waivers in cases that really do implicate the caveat in FAA § 2—specifically, when class waivers stand unadorned by other features to remove the arbitration clause from the category of the exculpatory.

Third, I step back from doctrine to reflect in broader institutional terms upon the litigation-arbitration dichotomy. Pinpointing of the deep similarities between the *Hanna* and *Erie* doctrines in their own context of civil-litigation federalism and their counterparts under the FAA raises the prospect of greater dialogue, rather than dichotomy, across the two domains. Such a dialogue, I contend, is much needed to inform both judicial decisions and any future engagement by Congress with proposed amendments to the FAA.

This Article elaborates these points in three Parts, which correspond to the matters at issue in *Shady Grove*, *Stolt-Nielsen*, and *Concepcion*, respectively.

I. CLASS ACTIONS AND THE RULES ENABLING ACT

Questions about the legitimacy of the modern class action under the Rules Enabling Act have not escaped the attention of commentary.[46] As this Part initially explains, the odd posture of *Shady Grove*

44 Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *10 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom.* Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom.* AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010).

45 *Laster*, 584 F.3d at 856 n.9.

46 *See* MARTIN H. REDISH, WHOLESALE JUSTICE ch. 3 (2009).

cast the Rules Enabling Act question in a manner that obscured—for both the lawyers and, seemingly, the Court itself—the significance of lower court decisions with the potential to make the question unnecessary to resolve for purposes of class certification. This Part then analyzes the Court's answer to the Rules Enabling Act question, taking as given its peculiar framing in *Shady Grove*.

A. Statutory Damages and Remedial Overkill in the Aggregate

The Rules Enabling Act question in *Shady Grove* presents a permutation of a larger, ongoing question surrounding the class action device—namely, its proper interaction with remedies in the nature of statutory damages. The starting point here consists of the recognition that a legislature might opt to authorize a damages remedy unlike the familiar forms of compensatory damages keyed to actual loss on the plaintiff's part. New York section 901(b) in *Shady Grove* captures this category through its reference to "a statute creating or imposing . . . a minimum measure of recovery."[47]

Statutory damages are far from an oddball feature of New York law. Numerous federal statutes also provide for damages on a per-violation or per-claimant basis, apart from any showing of actual loss.[48] The federal courts, moreover, have long grappled with efforts to seek certification of class actions for such relief.

1. The Problem of Double Counting

The class certification question is easy enough when the underlying statute expressly contemplates such treatment and imposes an aggregate cap on the statutory damages obtainable via a class action.[49] The more difficult scenario arises when underlying law is silent as to the interaction of its statutory damages remedy with the class action

47 N.Y. C.P.L.R. 901(b) (McKinney 2006).

48 *See, e.g.*, Fair Credit Transaction Act, 15 U.S.C. § 1681n(a)(1)(A) (2006) (providing for "any actual damages sustained by the consumer as a result of [a] failure [to comply with a requirement imposed under the Act] or damages of not less than $100 and not more than $1,000 . . ."); Cable Communication Policy Act, 47 U.S.C. § 551(f)(2)(A) (2006) (providing for "actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher").

49 The Fair Debt Collection Practices Act, for example, provides for statutory damages "not exceeding $1,000" in "the case of any action by an individual," but caps such damages at "the lesser of $500,000 or 1 per centum of the net worth of the debt collector" in "the case of a class action." 15 U.S.C. § 1692k(a)(2)(A)–(B); *see also id.* § 1640(a)(2)(B) (instating same aggregate cap for class actions seeking statutory damages under the Truth in Lending Act).

mechanism. The point of trepidation here consists of the fear voiced in the legislative materials canvassed by *Shady Grove* dissenters: the notion that the addition of class treatment on top of statutory damages would not effectuate underlying law but, rather, distort it into a form of remedial "overkill."[50] Put differently, the concern is that class treatment would amount to a form of double counting by adding the formidable claim facilitation of that device to a statutory regime already designed to provide incentives for claiming on an individual basis.[51]

The mode of individual claiming for statutory damages warrants explication here, for it shall surface again in connection with class waivers in arbitration. Statutory damages characteristically come along with authorization for the court to award "reasonable" attorneys' fees and "costs" upon a determination of liability.[52] In this regard, regimes for statutory damages exist in continuity with other settings for fee shifting that clearly do encompass the possibility of class actions—most prominently, civil rights litigation,[53] in which the remedy for claimants might not necessarily take a monetary form but, instead, might consist of injunctive or declaratory relief.

As to lawsuits over both statutory damages and civil rights, one might say the legislative framework embodies a goal of incentivizing claiming, but without thereby creating a litigation bonanza. In fact, shortly before its decision in *Shady Grove*, the Court underscored the delicate balance of legislative objectives as to claiming in these terms, when addressing fee shifting in civil rights class actions specifically.[54] There, fee-shifting statutes notably do not encompass expenses for expert witnesses,[55] notwithstanding their practical importance for the development of complex civil rights claims.

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50 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1464 (2010) (Ginsburg, J., dissenting).

51 *See id.*

52 *E.g.*, 15 U.S.C. § 1681n(a)(3); 47 U.S.C. § 551(f)(2)(C). The claims in *Shady Grove* likewise were subject to fee shifting. *See* N.Y. INS. LAW § 5106(a) (McKinney 2006).

53 *See* Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 624 n.1 (2001) (Ginsburg, J., dissenting) (listing major federal fee-shifting statutes).

54 *See* Perdue v. Kenny A. *ex rel.* Wynn, 130 S. Ct. 1662, 1673 (2010) (noting that "the aim" of fee-shifting provisions "is to enforce the covered civil rights statutes, not to 'provide a form of economic relief to improve the financial lot of attorneys'" (quoting Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986))).

55 *See* Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy, 548 U.S. 291, 301 (2006) ("[N]o [fee-shifting] statute will be construed as authorizing the taxation of witness

2. The Superiority Requirement of Rule 23(b)(3)

Over time, decisions of the lower federal courts have accumulated on class certification for statutory damages. Even in the face of silence in underlying law concerning the interaction of statutory damages with the class action mechanism, it is far from clear that certification should be forthcoming under Rule 23. A 2003 case from the Second Circuit—*Parker v. Time Warner Entertainment Co.*[56]—lends context to this point. The plaintiff class in *Parker* alleged that the defendant cable television company had disclosed customer information to third parties, without informing the customers themselves.[57] One thousand dollars in statutory damages to each of the estimated twelve million customers of Time Warner for each unauthorized disclosure would have made for a firm-threatening liability of twelve billion dollars.[58]

This is not to say that high-stakes claims somehow are always inappropriate for class certification. Nor it is to suggest that unauthorized disclosure of customer information somehow is unworthy of legal regulation. But how plausible is it to think that Congress really wished to threaten firms like Time Warner with bankruptcy in the absence of actual harm? In particular, how plausible is that inference upon recognition of the potential alternatives of public regulatory enforcement or an individual consumer action, induced by the prospect of fee shifting to cover her attorney's fees and costs? The specific concern, again, is that the whopping difference in liability exposure occasioned by class treatment would distort, rather than effectuate, underlying law not calibrated with the notion of market-wide private enforcement in mind. Statutory damages are in play, after all, only when claimants' actual losses—if any—fall below the specified sum. The *Parker* class did not seek actual damages for, say, any manner of identity theft.

As the Second Circuit cautioned, "[i]t may be that the aggregation in a class action of large numbers of statutory damages claims potentially distorts the purpose of both statutory damages and class actions" by "creat[ing] a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may

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fees as costs unless the statute 'refer[s] explicitly to witness fees.'" (third alteration in the original) (quoting Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987))).

56 331 F.3d 13 (2d Cir. 2003).

57 *See id.* at 14.

58 *See id.* at 25–26.

induce unfair settlements."[59] In this regard, the Second Circuit's language in *Parker* carries forward the concern voiced in an oft-cited 1972 treatment of class certification for statutory damages by a district court within the same circuit in *Ratner v. Chemical Bank New York Trust Co.*[60] The significance of *Ratner* is to pinpoint within Rule 23 the basis for judicial discretion to decline certification.

Rule 23(b)(3) calls for, among other things, a judicial determination that the proposed class action "is superior to other available methods for fairly and efficiently adjudicating the controversy."[61] Class certification may well not be "superior" to individual litigation—indeed, it may be inferior—on "fair[ness]" grounds due to the lack of need for aggregation of the prescribed dollar sum in order to provide a sufficient incentive for claiming within the meaning of the statute.[62] In its treatment of the Rule 23(b)(3) superiority requirement, *Ratner* is far from an outlier. Many other lower court decisions since *Ratner* have taken the same view, though the case law—to be sure—is not strictly uniform.[63] The important point remains that, even without a bar on class certification for statutory damages, the terms of Rule 23 make class certification far from a sure thing.[64]

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59 *Id.* at 22.

60 54 F.R.D. 412 (S.D.N.Y. 1972).

61 FED. R. CIV. P. 23(b)(3). Subsection (b)(3) provides, by far, the most commonly invoked basis for certification of class actions for damages. The other subsection amenable to class treatment of damages claims—Rule 23(b)(1)(B)—affords certification only in the narrowly circumscribed scenario of a limited fund available for the satisfaction of competing claims. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 838–40 (1999) (discussing stringency of requirements for Rule 23(b)(1)(B) class certification).

62 *Ratner*, 54 F.R.D. at 412, 416.

63 For more detailed discussion, see Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 146–51 (2009).

64 Denial of class certification is not always the right outcome, because all provisions for statutory damages are not alike. When the terms of the statutes themselves afford judicial discretion—say, by providing for statutory damages "not exceeding" a specified sum, 15 U.S.C. § 1692k(a)(2)(A) (2006), or within a prescribed dollar range, *id.* § 1681n(a)(1)(A)—certification of a class action for a nondraconian aggregate level of statutory damages may well be "superior" to no certification at all. The superiority problem arises most acutely when the underlying statute affords no latitude for avoidance of remedial overkill in the aggregate, as in both *Parker* and *Ratner*. The underlying statute in *Parker* provided for "liquidated damages computed at the rate of $100 a day for each day of violation or $1,000, whichever is higher." 47 U.S.C. § 551(f)(2)(A); *see* Parker v. Time Warner Entm't Co., 331 F.3d 13, 25 (2d Cir. 2003) (Newman, J., concurring). The overkill concern in *Ratner* arose from "provisions for a $100 minimum recovery." *Ratner*, 54 F.R.D. at 416 (analyzing the Truth in Lending Act, prior to addition of aggregate cap on statutory damages for class actions thereunder).

Recognition of the potential superiority problem under Rule 23 serves to highlight the odd posture in which *Shady Grove* reached the Supreme Court. New York section 901(b) came up in a way that framed the question of its applicability in a federal diversity case in on-or-off terms. In *Shady Grove*, the district court had granted the defendant's motion to dismiss, on the ground that section 901(b) is binding in a federal diversity action and, so the court believed, comprises a determinative, nondiscretionary basis on which to dismiss the case entirely.[65] As such, neither the district court nor the Second Circuit

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When the underlying statute itself affords no discretion to avoid remedial overkill in the aggregate, class counsel might attempt to invoke one or another problematic line of argument. Invoking the absurdity doctrine of statutory interpretation, class counsel might suggest to the court a source of judicial authority to deviate from the statutorily specified dollar sum to the extent needed to facilitate class certification. *See Parker*, 331 F.3d at 23 (Newman, J., concurring). This view belies the premise of the absurdity doctrine itself that the absurd result—here, class certification for firm-threatening liability—otherwise is unavoidable. That result is readily avoidable, without deviation from the specified statutory sum, via decertification on the basis of the superiority requirement of Rule 23(b)(3). *See* FED. R. CIV. P. 23(b)(3).

A similar line of argument seeks to draw, by analogy, on the practice of remittitur, whereby a reviewing court may offer the recipient of an unreasonably high jury award of conventional damages the option of accepting a lesser amount, within permissible bounds, in lieu of having to undergo a new trial. *See* 11 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2815, at 160 (2d ed. 1995). Remittitur, however, stems from the supervisory authority of the court over the jury to avoid unreasonable damage awards. *See id.* at 159. The court does not have comparable supervisory authority vis-à-vis the legislature to rewrite a specified dollar sum for statutory damages. But the court does have discretion under the superiority requirement of Rule 23(b)(3) to deny certification. *See* FED. R. CIV. P. 23(b)(3).

65 *See* Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 466 F. Supp. 2d 467, 470–72, 476 (E.D.N.Y. 2006), *aff'd*, 549 F.3d 137 (2d Cir. 2008), *rev'd*, 130 S. Ct. 1431 (2010). Even on the district court's own terms, outright dismissal is the wrong disposition. New York section 901(b) provides that an action for statutory damages "may not be maintained *as a class action*," absent specific authorization of that format in underlying law. N.Y. C.P.L.R. 901(b) (McKinney 2006) (emphasis added). The usual disposition of an action that cannot be maintained as a class action is not outright dismissal but, rather, continuation of the individual action of the would-be class representative, if she so wishes.

The inclination of the district court to dismiss the lawsuit outright appears to stem from a misunderstanding as to subject matter jurisdiction. The proposed class action in *Shady Grove* clearly satisfied the requirements for federal diversity jurisdiction over class actions set forth in the Class Action Fairness Act of 2005 (CAFA)—namely, minimal diversity of citizenship and more than five million dollars in controversy in the aggregate. *See Shady Grove*, 466 F. Supp. 2d at 469 (citing 28 U.S.C. § 1332(d)(2)(A) (2006)). The district court appears to have believed that the inability of the action to be maintained as a class action due to New York section 901(b) threw this basis for subject matter jurisdiction into doubt. *See id.* at 472. The individual action of the class representative would not have satisfied the usual amount in

on appeal in *Shady Grove* considered whether the proposed class action would have satisfied Rule 23, even if New York section 901(b) were not binding under the *Erie* doctrine.[66] Indeed, none of the briefs submitted to the Supreme Court in *Shady Grove* appears to have flagged the potential superiority obstacle under Rule 23, notwithstanding its frequency in lower court decisions, including precedents from within the circuit from which the case arose.

The peculiar posture of *Shady Grove* is no mere detail. It influences the way that one should understand the Court's holding that New York section 901(b) is not binding in a federal diversity case—that is, as a ruling that section 901(b) does not comprise a determinative, open-and-shut reason for the federal court to withhold class treatment, not as a decision that endangers the distinct, discretionary inquiry into superiority under Rule 23(b)(3) in cases involving statutory damages. Passing language in *Shady Grove* has a tendency to convey the mistaken impression that section 901(b) stood as the only meaningful obstacle to class certification, with satisfaction of Rule 23 being a foregone conclusion, once section 901(b) is deemed nonbinding.[67]

If silence in a statutory damages provision concerning the availability of class treatment runs into a potential superiority problem under Rule 23—as in *Ratner* and its progeny—then surely the pres-

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controversy for diversity jurisdiction of $75,000. *See* 18 U.S.C. § 1332(a); *Shady Grove*, 466 F. Supp. 2d at 469.

It is now clear, however, that a denial of class certification in a case in federal court on the basis of the special diversity standard for class actions under CAFA does not mean that the remaining individual action of the class representative then must satisfy the usual diversity standard. Rather, the individual action may remain in federal court, with its jurisdictional propriety still governed by the special CAFA standard. *See* USW v. Shell Oil Co., 602 F.3d 1087, 1091–92 (9th Cir. 2010) ("Had Congress intended that a properly removed class action be remanded if a class is not eventually certified, it could have said so. We think it more likely that Congress intended that the usual and long-standing principles apply—post-filing developments do not defeat jurisdiction if jurisdiction was properly invoked as of the time of filing."). *Accord* Cunningham Charter Corp. v. Learjet, Inc., 592 F.3d 805, 806–07 (7th Cir. 2010); Vega v. T-Mobile USA, Inc., 564 F.3d 1256, 1268 n.12 (11th Cir. 2009).

66 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

67 The superiority requirement of Rule 23(b)(3) makes no appearance in any of the opinions in *Shady Grove*. Insofar as the Court refers to subsection (b) of Rule 23 at all, the Court does so only to deem the specifications of that subsection "irrelevant for present purposes." Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1436 n.2 (2010). The Court goes on to describe Rule 23 as "creat[ing] a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," with no inkling that those criteria might form an obstacle, once New York section 901(b) is deemed nonbinding. *Id.* at 1437.

ence of a state law specification against class treatment can only accentuate the problem. Even if New York section 901(b) is not strictly binding in a federal diversity case in the *Erie* sense, the court should not treat that state provision as if it were chopped liver. Rather, section 901(b) properly informs the discretionary judicial inquiry into superiority under Rule 23(b)(3), adding to the doubts about superiority that would arise even without such a state law stricture.[68] Comity properly operates, even without the presence of compulsion.[69]

At a minimum, recognition of the superiority problem for class certification under the terms of Rule 23 raises the prospect that the Court's *Shady Grove* holding may well have resolved an abstract question, with no ultimate, practical consequence for the certification question in similar situations. The district court might have deferred a ruling on the motion to dismiss[70] and, instead, denied class certification on superiority grounds under Rule 23(b)(3), with New York section 901(b) taken to inform the court's discretion, if not necessarily to be binding. One seriously doubts whether the case would have garnered Supreme Court review, had the district court—sitting within the circuit of *Parker* and *Ratner*, no less—so proceeded.

B. Hanna v. Plumer *Redux*

Whatever one might say about the peculiar posture of *Shady Grove*, the Court's decision in the case bears attention for its characterization of the class action in light of the Rules Enabling Act. As subse-

68 The presence of a state law specification against class certification addresses the concern on the part of courts prepared to certify statutory damages claims notwithstanding whopping liability exposure in the aggregate—namely, that courts have no legal authority to recoil from the aggregation of the statutorily specified sum on a class-wide basis. *See* Murray v. GMAC Mortg. Corp., 434 F.3d 948, 953–54 (7th Cir. 2006).

69 In still another variation, a right of action in federal law may incorporate state law limitations, including those found in state procedural rules. The federal Telephone Consumer Protection Act (TCPA) provides a cause of action to recover a statutory penalty of $500 for each instance of junk fax transmission "if otherwise permitted by the laws or rules of court of a State." 47 U.S.C. § 227(b)(3) (2006). In a post–*Shady Grove* decision, the Second Circuit held that New York section 901(b) bars a federal court diversity class action for statutory penalties under the TCPA for New York consumers—not because of any *Erie* compulsion but, rather, as a matter of statutory interpretation, based on the reference to state "rules of court" in the underlying federal right of action. *See* Holster v. Gatco, Inc., 618 F.3d 214, 217 (2d Cir. 2010).

70 This would have been an option had the district court correctly understood the relationship of the special diversity jurisdiction standard for class actions under CAFA and the ordinary diversity jurisdiction standard for nonclass cases. *See supra* note 65 and accompanying text (discussing confusion over subject matter jurisdiction under CAFA in *Shady Grove*).

quent Parts of this Article shall elaborate, this characterization has implications beyond the confines of *Shady Grove* itself. The upshot of the Court's treatment is easy enough to summarize: Given the existence of Rule 23, which specifies when an action may be maintained in federal court as a class action, the district court erred by "wad[ing] into *Erie*'s murky waters."[71] Analysis instead should proceed under the distinct doctrinal line of *Hanna v. Plumer* and related precedents.[72]

Under *Hanna*, the only question is whether Rule 23 is valid under the Rules Enabling Act. If so, then Rule 23 displaces New York section 901(b) to the contrary.[73] One way to approach this question is to focus on the capacity of Rule 23 to alter dramatically the incidence of claiming by encompassing in the class absent persons who have not sued individually and, indeed, might never do so. For both the Scalia plurality and the Stevens concurrence, however, this real-world effect on claiming is merely incidental.[74]

But there is also a more nuanced distinction drawn under the Rules Enabling Act itself. The Act authorizes the Court "to prescribe general rules of practice and procedure" but prohibits the promulgation of rules that "abridge, enlarge or modify any substantive right."[75] The plurality and the concurrence part company over the relationship between these two aspects of the Act and thus over the room that they leave, in general, for displacement of state law by the Federal Rules.

The plurality affords a wide berth for the Federal Rules. Quoting the most expansive language from *Hanna*, the *Shady Grove* plurality validates under the Rules Enabling Act caveat all Federal Rules that "regulate matters 'rationally capable of classification' as procedure."[76] On this account, "[t]he test is not whether the [federal] rule affects a litigant's substantive rights; most procedural rules do."[77] For the plu-

71 *Shady Grove*, 130 S. Ct. at 1437.

72 *See id.* at 1442 (plurality opinion); *id.* at 1456–57 (Stevens, J., concurring in part and concurring in the judgment).

73 The Court concludes correctly, in my view, that the language of New York section 901(b)—which provides that an action for statutory damages "may not be maintained as a class action" absent specific authorization of that format in underlying law—unavoidably conflicts with the specifications of Rule 23(b) as to when a class action "may be maintained." *See id.* at 1437–38 (majority opinion) (construing FED. R. CIV. P. 23(b); N.Y. C.P.L.R. 901(b) (McKinney 2006)).

74 *See id.* at 1443 (plurality opinion); *id.* at 1459 (Stevens, J., concurring in part and concurring in the judgment).

75 28 U.S.C. § 2072(a)–(b) (2006).

76 *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion) (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965)).

77 *Id.* (citing Miss. Publ'g Corp. v. Murphree, 326 U.S. 438, 445 (1946)).

rality, "[w]hat matters is what the rule itself regulates: If it governs only 'the manner and the means' by which the litigants' rights are 'enforced,' it is valid; if it alters 'the rules of decision by which [the] court will adjudicate [those] rights,' it is not."[78] And application of Rule 23 alters neither the legal elements for the *Shady Grove* plaintiffs' claims on the merits nor the $500-apiece sum for the remedy sought.[79]

By contrast, the Stevens concurrence calls attention to the possibility that "[a] 'state procedural rule, though undeniably procedural in the ordinary sense of the term,' may exist 'to influence substantive outcomes,' and may in some instances become so bound up with the state-created right or remedy that it defines the scope of that substantive right or remedy."[80] Even under this view, however, "the bar for finding an Enabling Act problem is a high one. . . . The mere possibility that a federal rule would alter a state-created right is not sufficient. There must be little doubt."[81]

Still, for all their jousting with one another, the Scalia plurality and the Stevens concurrence coalesce on the proposition that *Hanna*, not *Erie*, controls with regard to class certification standards in *Shady*

78 *Id.* (alteration in original) (quoting *Miss. Publ'g Corp.*, 326 U.S. at 446).

79 The $500 sum stemmed from specification in New York insurance law of "a penalty of two percent interest calculated monthly" for overdue insurance payments. Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 466 F. Supp. 2d 467, 471 (E.D.N.Y. 2006), *aff'd*, 549 F.3d 137 (2d. Cir. 2008), *rev'd*, 130 S. Ct. 1431 (2010). There was no dispute that this sum came within the reference in New York section 901(b) to class actions for "a penalty, or minimum measure of recovery." N.Y. C.P.L.R. 901(b) (McKinney 2006).

80 *Shady Grove*, 130 S. Ct. at 1450 (Stevens, J., concurring in part and concurring in the judgment) (citation omitted) (quoting S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 310 (7th Cir. 1995)) (internal quotation marks omitted); *see also id.* at 1455 n.13 ("[W]hat is procedural in one context may be substantive in another.").

81 *Id.* at 1457. The Stevens concurrence identifies no example of such a state rule. One possible candidate consists of provisions in the area of wage-and-hour regulation that replicate the opt-in format for class actions in the federal Fair Labor Standards Act (FLSA). *See* D.C. CODE ANN. § 32-1012(b) (Lexis-Nexis 2007) ("No employee shall be a party plaintiff to any [class] action brought under this subchapter [concerning minimum wages] unless the employee gives written consent to become a party and the written consent is filed in the court in which the action is brought.").

The FLSA opt-in class action provision appears in 29 U.S.C. § 216(b) (2006). *Cf.* Dolan v. Project Constr. Corp., 725 F.2d 1263, 1267 (10th Cir. 1984) (discussing congressional objective to limit representative litigation under FLSA through adoption of opt-in class mechanism). In a federal court class action for FLSA claims, the opt-in format of the FLSA governs as to those claims, not the opt-out format of Rule 23(b)(3) for damages class actions generally. *See* Cameron-Grant v. Maxim Healthcare Servs., Inc., 347 F.3d 1240, 1249 (11th Cir. 2003).

Grove. In hindsight, it has become apparent how sweeping the category of Federal Rules "rationally capable of classification" as governing procedure really is. Within a decade of *Hanna* itself, an iconic scholarly article observed that the Court's decision there has amounted to "a singularly hard-hearted" doctrine, whereby any Federal Rule "that is even arguably procedural is to be applied in a diversity action, state law to the contrary notwithstanding."[82] In effect, *Hanna* and its progeny amount to a Will Rogers theory of the Rules Enabling Act caveat—one whereby the Court has never yet met a Federal Rule that it didn't like.[83] The Court "ha[s] rejected every statutory challenge to a Federal Rule that has come before [it],"[84] and *Shady Grove* continues the streak.

This is not necessarily bad, at least for ease of judicial administration. The formal—even mechanical—quality of the *Hanna* doctrine celebrated by the *Shady Grove* plurality effectively avoids the need "to assess the substantive or procedural character of countless state rules that may conflict with a single Federal Rule."[85] The Stevens concurrence and the Ginsburg dissent would open the door to such inquiry, to varying degrees.[86] And any such opening would not remain confined to Rule 23, which might explain the inclination to deem even the formidable claim-enabling effect of that rule to be merely incidental and no different in kind from joinder. If even Rule 23 does not contravene the Rules Enabling Act caveat in the face of a state law like New York section 901(b), then the other Rules would seem very safe indeed.

The debate among the Justices in *Shady Grove* goes beyond the usual choice between relatively formal rules and more contextual standards in Supreme Court jurisprudence.[87] The inclination of the plurality to foreclose fine-grained consideration of state law effectively

82 John Hart Ely, *The Irrepressible Myth of* Erie, 87 HARV. L. REV. 693, 697 (1974).

83 The allusion is to Will Rogers's response, when asked about Leon Trotsky. *See* BEN YAGODA, WILL ROGERS 234 (1993).

84 *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion).

85 *Id.* at 1447 (criticizing the limited parameters for inquiry that the Stevens concurrence would leave open). The plurality ridicules even more strongly the broader latitude for inquiry urged by the *Shady Grove* dissenters as an approach focused on "the subjective intentions of the state legislature" and thus "an enterprise destined to produce 'confusion worse confounded.'" *Id.* at 1440–44 (quoting Sibbach v. Wilson & Co., 312 U.S. 1, 14 (1941)).

86 The replacement of Justice Stevens with Justice Kagan injects an additional layer of uncertainty.

87 *See generally* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992) (offering discussion and examples of how the Justices split on results and methods).

places the guardianship of state autonomy not in the courts but, instead, in the rulemaking process prescribed by the Rules Enabling Act.[88] As the *Hanna* Court observed, a judicial decision to invalidate a Federal Rule as an alteration of substantive law effectively would say that "the [Rules] Advisory Committee, this Court, and Congress erred."[89]

When this rulemaking process has occurred, it governs, such that the federal courts will declare, in so many words: "We have our Rule, and we're sticking to it." This upshot of the *Hanna* doctrine contrasts with the more functional inquiry undertaken in a bona fide *Erie* situation. There, the choice is not between state law and federal law, as already adopted by Congress or one of its rulemaking delegates. Under the *Erie* doctrine, the choice instead lies between state law and the creation of federal "judge-made rules."[90] As to the latter choice, the *Erie* doctrine directs attention not to formal categorization of the judge-made rule as "substance or procedure" but, instead, to the real-world, functional question of "whether it 'significantly affect[s] the result of a litigation' " as compared to what it would be under the state law in question.[91] What is a mere incidental effect on a formal analysis may well "affect[ ] the result of a litigation" under such a functional inquiry.[92]

As the next Part shall explain, the contrast between categorical and functional analysis under the *Hanna* and *Erie* doctrines, respectively, helps to organize the debate over arbitration clauses in ways not otherwise apparent. The next Part situates the view of class arbitration in *Stolt-Nielsen* within the Court's larger Federal Arbitration Act jurisprudence—a body of learning with features strikingly similar to those of the *Hanna* doctrine but previously unnoticed in those terms. The reasons for this convergence across the litigation-arbitration dichotomy cast in a new light the seemingly divergent accounts of class treatment across the two domains in *Shady Grove* and *Stolt-Nielsen*.

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88 In this respect, one might say that the practical implications of the *Hanna* doctrine operate in continuity with accounts of federalism more broadly that emphasize political safeguards over judicially enforced doctrines as the main guardians of state autonomy. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175–83 (1980); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

89 *See* Hanna v. Plumer, 380 U.S. 460, 471 (1965).

90 *See Shady Grove*, 130 S. Ct. at 1442 (plurality opinion).

91 *Id.* (alteration in original) (quoting Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945)).

92 *Id.* (quoting *Guar. Trust Co.*, 326 U.S. at 109).

II. CLASS ARBITRATION AND FEDERAL ARBITRATION ACT

The view of class actions in *Shady Grove* contrasts sharply with the account of class arbitration in *Stolt-Nielsen*. The formidable claim-enabling effect of class treatment that the *Shady Grove* Court deems incidental in litigation becomes a fundamental difference in *Stolt-Nielsen*—what the Court there invokes to explain why arbitrators lack authority to pursue class arbitration when the arbitration clause is silent on the availability of that format.[93]

This Part offers a revisionist defense of the holding in *Stolt-Nielsen*. The first subpart highlights a transnational dimension to Court's FAA jurisprudence, situating that dimension by comparison to the relations between the federal government and the states in the U.S. domestic sphere to which *Erie* and *Hanna* speak. The second subpart then explains how this transnational dimension to the FAA lends support to the Court's view of class arbitration—albeit, on grounds not explained by the Court itself. This is not to suggest that arbitration in the international sphere somehow should be treated differently than in the domestic setting. Quite the opposite: it is precisely because the two cannot be separated in our globalized world that courts should calibrate the interpretive principles for the FAA with attention to their operation in both domains.

A. Federalism, Globalism, and the Need for Governance

The *Hanna* doctrine at issue in *Shady Grove* polices the authority of the federal rulemaking process in matters of procedure vis-à-vis the authority of states to craft substantive law. On its face, the FAA does not focus so much on vertical lawmaking authority in the federal-state sense as on the allocation of authority across public and private lines. Subject to an important caveat that shall warrant close attention in the next Part, the command of FAA § 2 consists of a declaration that a contract "to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable" as a matter of federal law.[94] In institutional terms, § 2 empowers private

93 *Compare id.* at 1443 ("[A class action] leaves the parties' legal rights and duties intact and the rules of decision unchanged."), *and id.* at 1459 (Stevens, J., concurring in part and concurring in the judgment) (purporting that the arguments concerning class certification enlarging substantive rights "rest on extensive speculation"), *with* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1776 (2010) (noting the "fundamental changes" by shifting from a bilateral to class action arbitration).

94 9 U.S.C. § 2 (2006). I speak here of arbitration not governed by treaty. For treaty-governed arbitration—essentially, international commercial arbitration—the source of enforcement technically is not FAA § 2 but, rather, a separate chapter of the

contracting to reallocate civil disputes in advance—to take them out of the background regime of litigation (including extant rules of civil procedure) and into the private realm of arbitration.

In a long-running series of decisions, the Court has deemed the FAA to establish a "federal policy favoring arbitration" with such strength that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."[95] The universe of civil disputes that arbitration clauses may encompass is not confined to claims concerning the contract itself—those most naturally seen as controversies "arising out of" the contract within the meaning of the § 2 command. Arbitration clauses also may encompass claims under public laws overlaid on the contractual relationship.[96] As a result, arbitration may encompass claims under antidiscrimination law for employment contracts,[97] securities law for contracts concerning the sale of stock,[98] and antitrust law for business contracts,[99] among other examples from the Court's decisions.

The FAA validates these reallocations of claims from the public to the private sphere, as long as they are not transformative in a particular sense: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[100] Arbitration clauses are, "in effect, a specialized kind of forum selection clause" in private contracts.[101] As the Court put the point most recently: "The decision to resolve [age discrimination in employment] claims by way of arbitration instead of litigation does not waive the

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statute that directs courts to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), Aug. 26–Dec. 31, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention]. *See* 9 U.S.C. §§ 201–202. As discussed below, the New York Convention nonetheless has influenced the Court's understanding of arbitration in the U.S. domestic sphere, in which arbitration agreements within § 2 extend beyond the commercial setting. *See infra* Part II.B.

95 Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983).

96 For criticism of this development, see Markovits, *supra* note 39, at 480–81.

97 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

98 *See* Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

99 *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 616 (1985).

100 *Id.* at 628.

101 *Scherk*, 417 U.S. at 519. On the transnational dimension of the comparison to forum-selection clauses, see *infra* note 120.

statutory right to be free from workplace age discrimination; it waives only the right to seek relief from a court in the first instance."[102]

The now-extensive body of Court decisions along the foregoing lines has met largely with consternation in scholarly commentary.[103] This Part offers a different account. When situated alongside the *Hanna* doctrine, the Court's rhetoric on the types of civil claims arbitrable under the FAA starts to sound curiously familiar. Commenting on *Hanna* within its own domain, John Hart Ely remarked that "shadows on cave walls have a way of shifting."[104] By this, Ely sought to capture the Court's efforts to refine and circumscribe the potential reach of the *Erie* doctrine in subsequent decisions, of which *Hanna* is arguably the most significant. The shadows have become long indeed. In effect, there has emerged a *Hanna*-like quality to the Court's FAA decisions. The allocation of civil claims to the private realm of arbitration holds sway, as long as that allocation is "rationally capable of classification"[105] as a mere change of forum that leaves intact "substantive rights."[106]

Here, too, there is a Will Rogers quality to case outcomes. As to the types of claims that may be allocated to arbitration, the modern Court has never yet met an arbitration clause that it didn't like. This was not always so in the Court's FAA decisions.[107] But the modern Court has cast aside its FAA decisions from the early decades of the twentieth century as embodying a "timeworn 'mistrust of arbitration' . . . as a method of weakening the protections afforded in the substantive law."[108] Mistrust of arbitration has yielded to the view that "[t]he right to a judicial forum is not the nonwaivable 'substantive' right protected by" securities law, antidiscrimination law, and the like.[109]

The shadows of *Hanna* for the FAA naturally prompt the question: What is the object that is casting those shadows in the arbitration context? One source is apparent in the Court's decisions, but the

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102 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1469 (2009) (citation omitted). The Court's distinction here resembles the contrast drawn in tort theory between primary rights (for example, to be free from negligently caused injury) and secondary rights (to sue the tortfeasor in the event of such injury). *See* Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349, 367 (1992).

103 *See supra* note 39 and accompanying text.

104 Ely, *supra* note 82, at 696.

105 Hanna v. Plumer, 380 U.S. 460, 472 (1965).

106 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

107 *See* Wilko v. Swan, 346 U.S. 427, 430 (1953) (holding claims under the Securities Act of 1933 not arbitrable).

108 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1470 (2009).

109 *Id.* at 1464 n.5.

other is less so. The first source consists of the recognition that the FAA is no less of a public law than those that confer other sorts of rights. The decisions that confirm the arbitrability of public law claims address a question of statutory interpretation: whether the substantive rights afforded by public law stand apart from the statutorily specified process for their assertion by way of litigation. By its nature, this question calls for an answer in categorical terms of whether arbitration is inherently at odds with the substantive rights in a given underlying statute, such as to support an inference that the prescribed litigation process is the exclusive mode for dispute resolution.

In answering "no" to this question in a long-running string of decisions, the Court reminds us that the validation of arbitration contracts under the command of FAA § 2 is itself a statutory matter—one that Congress is free to turn off for a given public law by specifically proscribing arbitration of the relevant claims.[110] Like implied repeals of statutes generally, implied repeals of the FAA are disfavored, such that the inclusion of a private right of action in another statute—even an unwaivable right[111]—will not operate to displace the FAA. Arbitration in and of itself will not amount to a prohibited waiver.

Still, seen strictly in public-versus-private terms, the disinclination toward implied repeals of the FAA gives rise to an odd institutional implication. As noted earlier, the *Hanna* doctrine reposes trust in the rulemaking process of the Rules Enabling Act, such that its products govern the federal courts, with their real-world effects on claiming consistently deemed to be incidental.[112] Yet this *Hanna*-like quality to the Court's FAA jurisprudence initially seems inapt, because it effectively affords to private contracting a sweep and legal authority to reallocate civil claims that are tantamount to duly promulgated Federal Rules. But private contracts do not go through anything like the Rules Enabling Act process.

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110 *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991). Illustrative statutes operate in a hodgepodge of contexts. *See* 7 U.S.C. § 197c(a) (2006 & Supp. II 2009) (livestock and poultry contracts); 10 U.S.C. § 987(f)(4) (2006) (consumer credit contracts for military personnel); 15 U.S.C. § 1226(a)(2) (2006) (motor vehicle franchise contracts); *see also* Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 8116(a), 123 Stat. 3409, 3454–55 (2009) (prohibiting use of appropriated funds for defense contracts in excess of one million dollars, unless contractor agrees neither to enter into nor to enforce arbitration agreements with employees regarding employment discrimination and torts "related to or arising out of sexual assault or harassment").

111 *See, e.g.*, 29 U.S.C. § 626(f)(1)(C) (2006) (prohibiting advance waiver of "rights or claims" under the Age Discrimination in Employment Act).

112 *See supra* note 36 and accompanying text.

The *Hanna*-like quality of private contracts under the FAA takes on a different cast when one probes deeper into the origins of the Court's approach. There is more going on here than just disinclination toward implied repeals of statutes or, worse, a raw preference for privatization of civil disputes. The way that one reads the FAA implicates not only the line between public and private realms in the domestic sphere but also the authority of U.S. law—both U.S. procedure and U.S. conceptions of substantive rights—vis-à-vis the world.

Simply by the terms of the statute, the validation of arbitration clauses under FAA § 2 extends to "a contract evidencing a transaction involving commerce."[113] The term "commerce," in turn, "means commerce among the several States or with foreign nations."[114] This language is far from accidental. It replicates the phrasing of the Commerce Clause in Article I of the Constitution, which empowers the federal Congress to "regulate commerce with foreign nations, and among the several states."[115]

There is more to the connection between domestic and international commerce than just statutory language, however. The refer-

113 9 U.S.C. § 2 (2006).

114 *Id.* § 1.

115 U.S. CONST. art. I, § 8, cl. 3. At the time that the FAA was enacted in 1925, the understanding of the Commerce Clause had yet to undergo its transformation into a wide-ranging source of federal regulatory authority. *See* Gonzales v. Raich, 545 U.S. 1, 17 (2005) (reaffirming the approach to the Commerce Clause in Wickard v. Filburn, 317 U.S. 111 (1942)). For criticism of this view, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION ch. 11 (2004).

The more circumscribed conception of commerce amenable to federal regulation circa 1925 places in context the oft-made observation that congressional debate over the FAA focused on the commercial setting, rather than consumer or employment contracts. *See, e.g.*, David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 78. The tenor of the debate in this respect is consonant with the pre–New Deal conception of the Commerce Clause. For a more detailed account of the FAA along similar lines, see Christopher R. Drahozal, *In Defense of* Southland*: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 127–30 (2002).

In moving from businesses to consumers, the Court applies to the FAA phrase "commerce among the states" the same meaning as under its modern Commerce Clause jurisprudence. *See* Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 275 (1995) (noting that the scope of the FAA "expand[s] along with the expansion of the Commerce Clause power itself," even though "[t]he pre-New Deal Congress that passed the Act in 1925 might well have thought the Commerce Clause did not stretch as far as has turned out to be the case"). To say otherwise now would be to revive a miniature FAA version of the dreaded "Constitution in Exile." *Cf.* Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES MAG., Apr. 17, 2005, at 42 (discussing the increasingly active conservative movement known as the "Constitution in Exile" movement).

ence to international commerce in the FAA is consonant with the observation that contracting parties may choose to provide not merely for arbitration but, more specifically, for arbitration pursuant to the FAA. The arbitration clause in *Stolt-Nielsen* took such a form[116]—what commentators aptly describe as a facet of the larger "law market," whereby private contracts may select among competing national legal regimes with regard to the mode for dispute resolution, the choice of forum for disputes, and the choice of substantive law.[117] As a result, cases concerning the command of FAA § 2—cases on the types of claims amenable to arbitration thereunder—have transnational implications, even aside from the terms of the statute itself.

Recognition of the international dimension of the FAA and its linkage to the domestic sphere under that statute, together, explain the Court's path away from its previous "timeworn 'mistrust of the arbitral process.'"[118] The Court decisions that initiated this shift, beginning in the 1970s, involved not domestic transactions but, instead, international commerce.[119] In the international setting, a need for specification arises as to a whole host of matters that contracts in the domestic sphere easily might leave open: which nation's law shall govern disputes, where claiming may ensue, what procedures

116 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1765 (2010).

117 *See* ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 3–17 (2009).

118 14 Penn Plaza LLC v. Pyett, 129 S. Ct. 1456, 1470 (2009) (quoting Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 231 (1987) (referencing the holding in Wilko v. Swan, 346 U.S. 427 (1953))).

119 Taking the first step along this path in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Court dealt with arbitration of claims under U.S. securities law arising from the acquisition by a U.S. company of various European business entities. *Id.* at 508–09. Decades earlier, the Court had invalidated an agreement to arbitrate claims under U.S. securities law of the sort in *Scherk*. *See* Wilko v. Swan, 346 U.S. 427, 438 (1953). The *Scherk* Court confined those suspicions to the domestic context in which they had arisen, explaining that the international sphere "involves considerations and policies significantly different." *Scherk*, 417 U.S. at 515. The Court described the difference in terms of the greater need for private ordering—particularly, over choice of law and the forum for dispute resolution—as "an almost indispensible precondition to the achievement of the orderliness and predictability essential to any international business transaction." *Id.* at 516.

The Court returned to the same theme when addressing antitrust claims arising from a franchise contract between a Japanese automaker and a Puerto Rican distributor. *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 616–17 (1985). The Court again pointed to "the need of the international commercial system for predictability in the resolution of disputes" as among the considerations that favored enforcement of the arbitration agreement, "even assuming that a contrary result would be forthcoming in a domestic context." *Id.* at 629.

may be used, and how any resulting resolutions (by court judgment or arbitral award) are to be treated.

This is not to suggest that U.S. domestic law has completely worked out answers to these questions in the absence of contractual specification. Questions concerning conflicts of law, jurisdiction and venue, *Erie* and *Hanna*, and the treatment of judgments across different domestic court systems remain fixtures of the law school curriculum. But at least the domestic realm has a decently elaborated body of doctrine on such matters, such that contracting parties need not necessarily come up with their own. And, perhaps even more importantly, there is a single court with well-established authority to resolves disputes among different domestic jurisdictions and their respective court systems.

The international sphere does not bear the same description—not at the time that the Court embarked on its rethinking of the FAA and, to a fair degree, even today. Chronology is telling here. The change in the Court's view of arbitration as of the 1970s followed upon greater Court receptiveness to international forum selection clauses in litigation.[120] Here, developments in litigation and arbitration intertwine. Even more tellingly, the Court's shift away from distrust of arbitration with regard to federal statutory rights gathered momentum well before the emergence of guidance from the Court itself concerning the extraterritorial reach of those same statutes in the early 1990s.[121] The sorting out of the international sphere by private contract thus precedes by decades its sorting out via principles of statutory interpretation as to extraterritoriality. If anything, the sorting out of extraterritoriality continues to the present day. During the same Term as *Shady Grove* and *Stolt-Nielsen*, the Court at long last resolved the applicability of U.S. securities law to f-cubed situations: those involving foreign investors suing a foreign issuer with respect to shares sold on a foreign exchange.[122] In the course of its opinion, the Court went so far as to deem "justified" the criticism that lower court

120 *See* Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 8–9 (1972). In deeming arbitrable the securities claims in *Scherk*, the Court emphasized the enforcement of the choice-of-forum agreement in *Bremen*. *See Scherk*, 417 U.S. at 519. The Court later would extend the same receptiveness to choice-of-forum provisions in adhesive contracts. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991).

121 *See* EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 246–47 (1991) (holding that Title VII of the Civil Rights Act of 1964 does not apply extraterritorially to regulate employment abroad of U.S. citizens by U.S. firms); F. Hoffman-La Roche Ltd. v. Empagran S.A., 542 U.S. 155, 158 (2004) (analyzing extraterritorial application of the Sherman Act in light of limitation in the Foreign Trade Antitrust Improvements Act).

122 *See* Morrison v. Nat'l Austl. Bank, Ltd., 130 S. Ct. 2869, 2888 (2010) (holding that § 10(b) of the Securities and Exchange Act of 1934 reaches fraud "only in con-

decisions on the topic from decades past had yielded "unpredictable and inconsistent" guidance.[123]

Apart from the debate over extraterritoriality, standards for the recognition and enforcement of judgments across nations remain in flux.[124] An important treatment of the topic by the American Law Institute (ALI) was completed only in 2006,[125] and efforts at an international treaty on the subject have proven unavailing.[126]

On its own terms, the *Hanna* doctrine speaks to the allocation of governing authority as between an applicable Federal Rule and conflicting state law. But the choice remains one between competing rules duly adopted by different sovereigns. Recognition of the international dimension to the Court's FAA jurisprudence, if anything, casts its *Hanna*-like qualities in a light more favorable than the "hard-hearted"[127] dominance of the Federal Rules observed in *Hanna*'s own domain.

As to international contracts, the choice is not so much one between regimes of governance, each set by a different sovereign. Rather, the choice lies between governance through private ordering by contract, on the one hand, and formidable uncertainty in the absence of such ordering. The source of uncertainty consists of the still-fledgling elaboration of transnational doctrines concerning extraterritoriality, judgment recognition and enforcement, and the like. In embarking on its endorsement of private governance for public law claims in 1974, the Court underscored the concern that "the dicey atmosphere of . . . a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willing-

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nection with the purchase or sale of a security on an American stock exchange, and the purchase or sale of any other security in the United States").

123 *Id.* at 2880–81.

124 On the wide variety of approaches to judgment recognition and enforcement questions from a comparative perspective, see Rhonda Wasserman, *Transnational Class Actions and Interjurisdictional Preclusion*, 86 NOTRE DAME L. REV. 311 (2011). Principles of "full faith and credit" that organize such questions in the U.S. domestic sphere do not obtain internationally. *See id.* at 369–75.

125 *See* AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006). The ALI proposal builds on European developments, spurred by a 2000 European Union regulation on judgment recognition and enforcement. *See* Council Regulation 44/2001, on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 12) 1.

126 *See* Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT'L L. REV. 173, 182–83 (2008) (describing the "impasse" over the treaty).

127 Ely, *supra* note 82, at 697 (noting the argument that *Hanna* gives a hard-hearted "rendition" of *Erie* because "any federal rule . . . that is even arguably procedural is to be applied . . . , state law to the contrary notwithstanding").

ness and ability of businessmen to enter into international commercial agreements."[128] To be sure, the Court's rhetoric is an overstatement today, as the law has made a start toward working out questions surrounding the transnational dimensions of litigation. No-man's land has begun to have some road signs.

That arbitration should have seemed a desirable alternative to a "legal no-man's-land" in the mid-1970s, nonetheless, is no historical accident. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention) had entered into force in the United States in 1970.[129] No counterpart international regime for the recognition and enforcement of judgments in litigation exists even today,[130] a point of contrast with arbitration that lends context to the Court's championing of the latter as a source of governance for a globalized world of commerce.[131]

With its endorsement of arbitration for public law claims on the books for international contracts, the Court then extended the same notion to the domestic realm—ultimately disavowing its early-twentieth-century skepticism of arbitration in that setting.[132] To be sure, the international sphere is not the domestic sphere. But the encompassing of the two in the same term—"commerce," as defined in the FAA[133]—counsels against differentiation. As a practical matter, moreover, a two-tiered FAA regime for contracts divided along foreign-versus-domestic lines is increasingly untenable in the age of globalization that pervasively blurs the line between the two. Commentators add the further observation that, "[o]nce international parties get the benefits of arbitration," there remains "little reason to hamper the ability of domestic parties, which might be competing with international parties in world markets, to obtain the same benefits."[134]

On this account, the sweep afforded by the modern Court's FAA decisions on the types of rights that arbitration may encompass reflects not so much a sense of hubris about private contracting in

128 Scherk v. Alberto-Culver Co., 417 U.S. 506, 517 (1974).

129 *See* New York Convention, *supra* note 94; *see also Scherk*, 417 U.S. at 520 n.15 (noting the entry into force in U.S. law of the New York Convention in 1970 as among the "international developments and domestic legislation in the area of commercial arbitration subsequent to" *Wilko*).

130 *See supra* note 126 and accompanying text (citing article discussing the lack of such a treaty).

131 *See* O'HARA & RIBSTEIN, *supra* note 117, at 95–96.

132 *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (expressly overruling *Wilko*).

133 *See supra* note 115 and accompanying text (providing the definition of "commerce" under the FAA).

134 O'HARA & RIBSTEIN, *supra* note 117, at 102.

preference to public law but, rather, a well-taken sense of humility about the capacity of U.S. law—in both its procedural and substantive forms—to govern an interconnected globe. The Court's FAA decisions effectively say that one cannot have such humility for international commerce without also applying the same principles to domestic commerce when the FAA itself and the broader forces of globalization have rolled the two into one. As the next subpart reveals, awareness of the transnational dimension of the FAA casts in a new light the Court's decision in *Stolt-Nielsen* about what arbitrators may infer from contractual silence.

B. Explaining Stolt-Nielsen

Read strictly in public-versus-private terms, the reasoning in *Stolt-Nielsen* is puzzling. The Court deems arbitrators to lack authority to pursue class arbitration, even though the underlying claims there were such as to make a class action in litigation readily available.[135] If ever there were a situation in which arbitration would appear to make for a mere change of forum—from class action to class arbitration—then *Stolt-Nielsen* would seem to be it.

The dispute in *Stolt-Nielsen* arose after a U.S. Department of Justice (DOJ) criminal investigation had revealed a price-fixing conspiracy among shipping companies that operate "seagoing vessels with compartments that are separately chartered to customers wishing to ship liquids in small quantities."[136] For all the controversy surrounding class actions generally, their certification in antitrust cases has become relatively routine.[137] If anything, such claims present a paradigm scenario for class treatment, as they characteristically present such small stakes as to be unviable individually yet often call for the incurring of high fixed costs for the development of expert economic analysis.[138] Though the DOJ criminal investigation may have eased

135 *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758, 1776 (2010) ("[Where there is] 'no agreement' on this question . . . , parties cannot be compelled to submit their dispute to class arbitration.").

136 *Id.* at 1764.

137 *See* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.01 cmt. c, at 78 (2010) (noting the relative ease of class certification for claims of "upstream" economic injuries focused on market misconduct of the defendant, as in many antitrust class actions). I served as one of the Associate Reporters for this project.

138 Lower court decisions concerning class waivers in arbitration clauses underscore these economic dimensions for the plaintiffs' side. *See, e.g.*, Italian Colors Rest. v. Am. Express Travel Related Servs. (*In re* Am. Express Merchs.' Litig.), 554 F.3d 300, 316–17 (2d Cir. 2009) (alleged unlawful tying arrangement), *cert. granted, vacated, and*

the burden of the latter for the *Stolt-Nielsen* plaintiffs,[139] class counsel noted that the "vast majority" of their claims remained unviable individually.[140]

With class certification in litigation likely, the notion that arbitration might proceed on a class basis would not seem such a dramatic development at first glance. As the American Arbitration Association (AAA) noted in its amicus brief, the rules that the AAA has drafted in recent years for use in class arbitration "largely track the provisions of Rule 23"[141]—including its opt-out mechanism.[142] To have class arbitration along Rule 23–like lines rather than a class action under that Rule thus would seem a straightforward change of forum alone. Yet, in *Stolt-Nielsen*, this similarity is not a basis for comfort but, instead, the source of the problem. The reason why enables one to locate the holding in *Stolt-Nielsen* within the Court's FAA jurisprudence.

The Court starts from the recognition in its own FAA precedents that arbitrators have gap-filling authority to resolve '"procedural'

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remanded sub nom. Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010); Kristian v. Comcast Corp., 446 F.3d 25, 58 (1st Cir. 2006) (alleged price-fixing conspiracy).

139 *See* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 2 (2000) (noting the economic attractiveness for private class actions to ride on the coattails of a public enforcement action).

140 *Stolt-Nielsen*, 130 S. Ct. at 1770 n.7 (quoting Joint Appendix at 82a–83a, *Stolt-Nielsen*, 130 S. Ct. 1758 (No. 08-1198) (excerpting the record of the arbitration panel)).

141 Brief of American Arbitration Association as Amicus Curiae in Support of Neither Party at 17, *Stolt-Nielsen*, 130 S. Ct. 1758 (No. 08-1198). The Court noted, however, that the AAA developed its rules for class arbitration after the shipment contracts at issue in *Stolt-Nielsen* had been drafted. *See Stolt-Nielsen*, 130 S. Ct. at 1768 n.4. The AAA rules themselves arose in the aftermath of the Court's own inconclusive opinion in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 447 (2003), which left open whether class arbitration is permissible under an arbitration clause that is silent as to class treatment—that is, the question that the Court granted review in *Stolt-Nielsen* to resolve. *See Stolt-Nielsen*, 130 S. Ct. at 1764.

142 The AAA rules provide that "[t]he Class Determination Award shall state when and how members of the class may be excluded from the class arbitration." *Supplementary Rules for Class Arbitrations*, AM. ARB. ASS'N, at R. 5(c), http://www.adr.org/sp.asp?id=21936 (last visited Feb. 1, 2011). The opportunity to request exclusion need not be provided in "exceptional circumstance[s]," as for "claims seeking injunctive relief or claims to a limited fund." *Id.* In this regard, the AAA rules replicate the distinction in class action law between opt-out classes for damages and mandatory classes for "indivisible" relief, with injunctions, declaratory judgments, and damages from a limited fund comprising illustrations of the latter. *See* AM. LAW INST., *supra* note 137, § 2.07(c) & cmts. h–i.

questions."[143] This authority applies to contracts under the FAA the general principle that, "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."[144] In this regard, arbitrators may do in arbitration what a court may do in contract litigation.

The Court then proceeds to catalogue the "fundamental changes" that class arbitration would bring, ultimately characterizing the "differences between bilateral and class-action arbitration" as "too great" to lie within the gap-filling power of the arbitrators as to procedural matters.[145] The upshot of *Stolt-Nielsen* is that some matters that we might label as procedural elsewhere endanger the underlying agreement to arbitrate in the first place. But the Court does not explain why the claim-enabling effect of the class mechanism—it "adjudicates the rights of absent parties" beyond those already at hand[146]—is game changing for arbitration but merely incidental in litigation, per *Shady Grove*.[147]

Here is where the deep symmetry between the international and domestic contexts in the Court's FAA jurisprudence yields the explanation that the *Stolt-Nielsen* opinion fails to provide. U.S.-style class actions are far from anomalous in the domestic setting of concern for the *Erie* and *Hanna* doctrines.[148] But U.S.-style class actions—in par-

143 *Stolt-Nielsen*, 130 S. Ct. at 1775 (quoting Howsam v. Dean Witter Reynolds, Inc., 537 U.S. 79, 84 (2002)).

144 *Id.* (alteration in original) (quoting RESTATEMENT (SECOND) OF CONTRACTS § 204 (1979)).

145 *Id.* at 1776.

146 *Id.* The main thrust of the differences catalogued by the Court concerns the encompassing of absent parties. To be fair, however, the Court does add a related point at the end of its list of differences: "[T]he 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." *Id.* (citations omitted). The reference appears to be to judicial review on the merits, given the *Stolt-Nielsen* Court's citation to *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576, 588 (2008), on that subject. It is not clear, however, how weighty the difference in scope of review on the merits actually is for the question of what arbitrators may do in the face of contractual silence as to class treatment. As to both class actions and class arbitrations, the occasions for review of a class-wide determination of the merits are rare due to the predominance of settlements over trials in both domains.

147 *See supra* notes 13–19 and accompanying text (discussing the holding in *Shady Grove*).

148 The substantial majority of states either replicate Rule 23 in their respective class action rules or at least look to federal precedents concerning Rule 23 to inform interpretation of the state counterpart. *See* Thomas D. Rowe, Jr., *State and Foreign*

ticular, class actions in their most common domestic form of an opt-out process—are considerably more anomalous within the broader landscape of global regimes for civil disputes.[149] The point goes beyond concern about the defendant having to face a unitary, all-the-marbles proceeding. The much larger stumbling block for the notion of an opt-out class proceeding in comparative law terms consists of the steadfast refusal of many nations—especially, those in the civil law tradition—to countenance the disposition of claimants' rights without their affirmative consent.[150]

Disinclination on this score is no minor quibble across nations. When considering whether U.S.-style class actions may encompass class members abroad, U.S. courts have identified other Western industrialized nations that would regard those proceedings as presenting such a fundamental affront as to warrant a refusal to recognize a resulting U.S. class judgment.[151] Here, too, as in the Court's early expansions of the arbitral domain from the 1970s forward, considerations of judgment recognition and enforcement in litigation shed light on the Court's approach to the FAA.[152]

What is "fundamental" to arbitration in *Stolt-Nielsen* is that which would impede judgment recognition and enforcement in litigation across the international sphere. Again, the point here is not to treat

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Class-Action Rules and Statutes: Differences from—and Lessons for?—Federal Rule 23, 35 W. ST. U. L. REV. 147, 147–48 (2007).

149 *See* John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 298–304 (2010); Richard A. Nagareda, *Aggregate Litigation Across the Atlantic and the Future of American Exceptionalism*, 62 VAND. L. REV. 1, 20–25 (2009) (highlighting the "exceptionalism of U.S.-style class actions within the realm of aggregate litigation").

150 *See* Coffee, *supra* note 149, at 302 ("In contrast to the coolness shown by U.S. courts to the concept of the opt-in class action, Europe has been reluctant to accept any collective litigation remedy that does not require individual consent by class members.").

The United Kingdom, the common law nation with the deepest historical ties to the United States, notably declined a recent recommendation from its Civil Justice Council to adopt an opt-out class mechanism. *See* U.K. MINISTRY OF JUSTICE, THE GOVERNMENT'S RESPONSE TO THE CIVIL JUSTICE COUNCIL'S REPORT: 'IMPROVING ACCESS TO JUSTICE THROUGH COLLECTIVE ACTIONS' 11 (2009), *available at* http://www.justice.gov.uk/publications/docs/government-response-cjc-collective-actions.pdf.

151 *See In re* Alstom SA Sec. Litig., 253 F.R.D. 266, 286 (S.D.N.Y. 2008) ("A French court would likely conclude that any judgment rendered by this Court involving absent French class members offends public policy because absent French investors did not consent . . . ."); *In re* Vivendi Universal, S.A. Sec. Litig., 242 F.R.D. 76, 102 (S.D.N.Y. 2007) ("[T]he class action model is not so contrary to French public policy . . . .").

152 *See supra* Part II.A.

differently domestic and international contracts that contain arbitration clauses but, rather, to recognize that the interpretive principles for such clauses—in particular, what silence on a given matter empowers arbitrators to do—should be selected with an eye toward smooth operation in both spheres.

Stolt-Nielsen holds that silence as to class treatment in arbitration does not amount to an agreement to such treatment and, therefore, that arbitrators lack authority so to proceed.[153] The holding in *Stolt-Nielsen* effectively eases what otherwise would be potential for tension between the obligation of other nations to recognize and enforce arbitral awards under the New York Convention and the principles that those same nations would use to recognize and enforce judgments in litigation.[154] In both domains, obligations of recognition and enforcement remain conditioned upon the "public policy" of the would-be recognizing nation.[155] The resulting similarity as to matters of recognition and enforcement carries forward the broader notion of arbitra-

153 *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct 1758, 1776 (2010).

154 *See* New York Convention, *supra* note 94, art. III ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.").

155 *Compare id.* art. V(2)(b) (espousing a public policy exception to recognition and enforcement of awards in international commercial arbitration), *with* AM. LAW INST., *supra* note 125, § 5 cmt. h, at 62–63 (noting inclusion of a public policy exception "in every statute or treaty the world over concerned with recognition and enforcement of foreign judgments or arbitral awards").

The status of the New York Convention as a treaty, nonetheless, may make it more difficult as a practical matter for a given nation to invoke the public policy exception in the arbitration context, as distinct from judgment recognition, which is not presently covered by an international treaty. Writing prior to *Stolt-Nielsen*, one commentator suggested that class arbitration pursued in the face of contractual silence might give rise to enforceable awards under the New York Convention in some situations. *See* S.I. Strong, *The Sounds of Silence: Are U.S. Arbitrators Creating Internationally Enforceable Awards When Ordering Class Arbitration in Cases of Contractual Silence or Ambiguity?*, 30 MICH. J. INT'L L. 1017, 1083–91 (2009); *see also* S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT'L L. 1, 91–95 (2008) (arguing that class arbitration should encounter no "blanket" prohibition under the New York Convention). Strong readily acknowledges, however, the resistance of civil-law nations to representative actions in the nature of opt-out proceedings. *See id.* at 23. In focusing on arbitration law, moreover, her argument understandably does not take account of the skepticism about judgment recognition and enforcement with regard to U.S.-style class actions in *Alstom* and *Vivendi* specifically. *See* cases cited *supra* note 151.

tion and litigation as interchangeable fora for civil disputes. The same point also operates to cabin the reach of *Stolt-Nielsen*, such that it does not open up the gamut of mundane "procedural" determinations by arbitrators as grounds on which to resist enforcement of arbitral awards.[156]

In short, awareness of the international perspective that started the Court on its modern FAA jurisprudence decades ago supplies the missing explanation for the holding in *Stolt-Nielsen*. More broadly, this view of *Stolt-Nielsen* explains why the claim-enabling effect of class treatment makes for a fundamental change in arbitration but for something that is merely incidental doctrine in litigation. Yet this is not to say that all is entirely well in the Court's FAA jurisprudence.

The next step for the Court after *Stolt-Nielsen* concerns contractual agreements to arbitrate that are not silent as to the class mechanism but, instead, purport to waive its use in both arbitration and litigation. As the next Part explains, this scenario presents an occasion for refinement of the Court's FAA jurisprudence in a manner that, once more, benefits from juxtaposition with the treatment of the *Erie* and *Hanna* doctrines in *Shady Grove*.

III. CLASS WAIVERS IN ARBITRATION

The debate over class waivers presents the Court with a body of lower court decisions in recent years that take anything but a deferential, *Hanna*-like view of what arbitration clauses may do. The trend has been decidedly the opposite, with a spate of decisions from federal appellate courts and state supreme courts invalidating class waivers.[157] By its terms, FAA § 2 qualifies its validation of contractual agreements to arbitrate by reference to "such grounds as exist at law or in equity for the revocation of any contract."[158] In a nutshell, the

156 I am grateful to Peter Rutledge for underscoring the importance of cabining the interpretation of *Stolt-Nielsen* in this regard.

157 *See, e.g.*, *In re* Am. Express Merchs.' Litig., 554 F.3d 300, 304 (2d Cir. 2009), *cert. granted, vacated, and remanded sub nom.* Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010); Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 986 (9th Cir. 2007); Dale v. Comcast Corp., 498 F.3d 1216, 1217 (11th Cir. 2007); Kristian v. Comcast Corp., 446 F.3d 25, 60 (1st Cir. 2006); Discover Bank v. Superior Court, 113 P.3d 1110 (Cal. 2005); Kinkel v. Cingular Wireless LLC, 857 N.E.2d 250, 278 (Ill. 2006); Muhammad v. Cnty. Bank of Rehoboth Beach, Del., 912 A.2d 88, 90 (N.J. 2006).

158 9 U.S.C. § 2 (2006). Again, I speak here of arbitration not governed by treaty. For treaty-governed arbitration, the question is whether the arbitration agreement is "null and void, inoperative or incapable of being performed." New York Convention, *supra* note 94, art. II(3). The "null and void" category "encompass[es] only those situations—such as fraud, mistake, duress, and waiver—that can be applied neutrally

caveat in § 2 preserves "generally applicable contract defenses" under state law.[159] The focal point for debate over the validity of class waivers has consisted—at least nominally—of state unconscionability doctrine.

The first subpart of this Part begins by framing the controversy over class waivers by comparison to the previous treatment of *Stolt-Nielsen*. The Court's decision in *Stolt-Nielsen* that silence in an arbitration clause does not permit the use of class arbitration understandably garners attention with regard to class waivers. This subpart explains why *Stolt-Nielsen*, properly read, does not predetermine the legitimacy of class waivers. Interestingly enough, the reason why harks back to the line between the kind of formalistic, categorical analysis reflected in both the *Hanna* doctrine and its FAA counterpart, on the one hand, and the more functional analysis prescribed by the *Erie* doctrine, on the other hand. Simply put, the lower court decisions on class waivers seek to introduce a more functional mode of analysis focused on the real-world impact of those waivers. In this regard, one might say that the lower courts seek to cabin what otherwise would be an overextension of the Court's *Hanna*-like approach to the FAA, in much the same way that *Hanna* itself conversely addressed the potential overreach of the *Erie* doctrine.

The second subpart then speaks to the particular case—*AT&T Mobility LLC v. Concepcion*[160]—that the Court has selected for its first foray into the debate over class waivers. *Concepcion* notably does not present the Court with an arbitration clause that contains a class waiver alone. Rather, the clause at issue also provides a contingent bonus for both the claimant and her counsel in the event that the claimant fares better in arbitration than under the last pre-arbitration settlement offer she received.[161] This subpart explains why the particulars of the lower court decisions under review in *Concepcion* call for Supreme Court application of its FAA counterpart of the *Hanna* doctrine, not the FAA version of *Erie*—unlike for many other situations

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on an international scale." Ledee v. Ceramiche Ragno, 684 F.2d 184, 187 (1st Cir. 1982); *accord* Riley v. Kingsley Underwriting Agencies, Ltd., 969 F.2d 953, 959–60 (10th Cir. 1992); Rhone Mediterranee Compagnia Francese di Assicurazioni e Riassicurazoni v. Lauro, 712 F.2d 50, 53 (3d Cir. 1983). The category of "null and void" contracts does not encompass "parochial interests of the nation," *Ledee*, 684 F.2d at 187, a description that might include the unconscionability defense in domestic contract law.

159 Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681, 687 (1996).

160 Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *cert. granted sub nom.* AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010).

161 *See infra* notes 204–06 and accompanying text.

involving class waiver provisions. As in *Shady Grove* for litigation, the reasoning of the lower courts in *Concepcion* miscategorizes as an *Erie*-type question what is actually a *Hanna*-type situation under the FAA. As such, *Shady Grove*—not *Stolt-Nielsen*—is the crucial guide among the Court's precedents with regard to its forthcoming decision in *Concepcion*. This second subpart then steps back from doctrine to reflect more broadly on the questions of institutional design presented for litigation and arbitration in the future.

A. An Erie *Doctrine for (Most) Class Waivers*

Just as all provisions for statutory damages are not alike, so, too, do arbitration clauses vary. The Court's FAA precedents have focused to date on what one might describe as first-generation arbitration clauses—that is, contractual provisions that simply oblige the parties to arbitrate rather than litigate disputes, with no discussion of class treatment. *Stolt-Nielsen* concerned such a first-generation clause. Second-generation arbitration clauses fill the silence in first-generation clauses by adding class waivers.[162] And third-generation clauses, in turn, attempt to respond in various ways to the lower-court invalidations of second-generation clauses. In moving from *Stolt-Nielsen* to *Concepcion* in successive terms, the Court effectively leapfrogs from first- to third-generation arbitration clauses. This move seems one of conscious choice, as the Court has bypassed numerous opportunities to opine on class waivers in second-generation clauses.[163]

With *Stolt-Nielsen* now decided, an understandable temptation arises to regard it as having predetermined the validity of both second- and third-generation arbitration clauses. The logic of such a view is alluring: if silence effectively operates as a waiver of class arbitration, then surely an express waiver, too, must operate as a waiver.

As explained in the first section that follows, the peculiar posture in which *Stolt-Nielsen* came to the Court counsels against the acceptance of such tempting logic. The attention devoted here to the pos-

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162 The distinction here between first- and second-generation arbitration clauses draws on Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL'Y 477, 503–09 (2009).

163 Shortly after deciding *Stolt-Nielsen*, the Court granted the writ of certiorari, but simply to vacate the judgment and remand, in a case from the Second Circuit involving a second-generation arbitration clause. *See In re* Am. Express Merchs.' Litig., 554 F.3d 300 (2d Cir. 2009), *cert. granted, vacated, and remanded sub nom.* Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010). For examples of certiorari denials in other cases involving second-generation clauses, see Respondents' Brief in Opposition at 1, *Concepcion*, 130 S. Ct. 3322 (No. 09-893).

ture of *Stolt-Nielsen* so as to understand its proper reach stands as the counterpart to the discussion earlier about how the odd posture of *Shady Grove* influenced the framing of the issue there.[164] Speaking more broadly, the second section explains how the debate over class waivers presents the Court with a dispute different in kind from those that the vast majority of its FAA decisions have engaged. Clear demarcation of the class waiver question, in turn, helps to explain why the lower court decisions on that subject have taken a different and less deferential tack—one that benefits from consideration in light of the distinction between the *Hanna* and the *Erie* doctrines in litigation.

1. The Too-Easy Inference from *Stolt-Nielsen*

Simply put, there was no issue in *Stolt-Nielsen* concerning the obligation to arbitrate. In particular, the question there was not whether a move from litigation to arbitration would exculpate the defendants as a practical matter. Upon the filing of a class action complaint in litigation, the Second Circuit had concluded that the antitrust price-fixing claims on the merits in *Stolt-Nielsen* were subject to arbitration by the terms of the underlying shipping contracts.[165] In particular, the Second Circuit noted that it "d[id] not understand [the would-be plaintiff class] to be making any argument to the effect that its assertion of class claims should serve as a bar or deterrent to sending the instant case to an arbitral panel."[166] The notion of class treatment as something that somehow was necessary to prevent the arbitration clause from being unconscionable simply was not before the court.[167]

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164 *See supra* Part I.A.2.

165 *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1757, 1765 (citing JLM Indus., Inc. v. Stolt-Nielsen S.A., 387 F.3d 163, 183 (2d Cir. 2004)).

166 *JLM Indus., Inc.*, 387 F.3d at 180 n.9.

167 The closest that the would-be plaintiff class came to such a contention was in a suggestion that "marketwide horizontal" price-fixing conspiracies differ categorically in terms of their complexity from "vertical" ones involving "a manufacturer and its distributor." Brief for Plaintiffs-Appellees at 13, *JLM Indus., Inc.*, 387 F.3d 163 (No. 03-7683). Urging such a distinction, plaintiffs contended that "to require individual arbitration by each of the 500 to 700 customers [in a horizontal price-fixing case] would so splinter the incentive to sue, and would so burden the claimants with duplicative burdens and expenses, that it inevitably would frustrate important interests of United States antitrust law in both compensation and deterrence." *JLM Indus. Inc.*, 387 F.3d at 180 (quoting Brief for Plaintiffs-Appellees, *supra*, at 26–27). The Second Circuit declined to distinguish between horizontal and vertical price-fixing on grounds of complexity, noting that the Supreme Court in *Mitsubishi Motors v. Soler Chrysler-Plymouth Inc.* had concluded that "the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust

In light of the Second Circuit's decision, the contending sides then "agree[d] that . . . AnimalFeeds and [the defendant shipping companies] must arbitrate their antitrust dispute."[168] At that point, the question became whether the arbitration proceeding could take a class-wide form, as AnimalFeeds sought, with the contending sides stipulating that "the arbitration clause was 'silent' with respect to class arbitration" in the sense of evidencing "no agreement . . . on that issue."[169] *Stolt-Nielsen* thus came to the Supreme Court not for review of the Second Circuit's recognition of an obligation to arbitrate but, instead, later in the sequence of events—in what Justice Ginsburg, in dissent, accurately described as "an abstract and highly interlocutory" posture.[170]

The arbitration award under review in *Stolt-Nielsen* neither disposed of the merits on a class-wide basis nor spoke to any allegation of unconscionability,[171] just as the lower courts in *Shady Grove* had not actually ruled on the class certification question there.[172] The arbitration award consisted simply of the intermediate conclusion that silence permitted the arbitrators to inquire, at some later point, into whether class arbitration would be suitable for the antitrust dispute on practical grounds.[173]

Because of the supposition all around as to the existence of an obligation to arbitrate, one may not properly read *Stolt-Nielsen* as resolving the circumstances under which such an obligation arises. *Stolt-Nielsen* is a further permutation on the usual sort of case concerning the command in FAA § 2, not the caveat therein. It is precisely the caveat in § 2 to which the usual sorts of challenges to class waivers speak.[174] As the next subsection explains, the lower court decisions

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matter." *Id.* (quoting Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633–34 (1985)).

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

169 *Id.* at 1766 (internal quotation marks omitted).

170 *Id.* at 1778 (Ginsburg, J., dissenting).

171 In the absence of contractual specification, the unconscionability of an arbitration clause under FAA § 2 is a matter for judicial determination. *See* Rent-A-Center, W., Inc. v. Jackson, 130 S. Ct. 2772, 2778 (2010). An arbitration clause, however, may provide for a different institutional allocation of the unconscionability question by calling for its initial consideration by the arbitrator, rather than a court. *See id.* at 2779.

172 *See supra* notes 65–67 and accompanying text.

173 *Stolt-Nielsen*, 130 S. Ct. at 1777–78 (Ginsburg, J., dissenting).

174 Under general contractual principles, a determination that a class waiver is unconscionable would raise a further question about its severability from the arbitration clause in which it appears. *See* Rent-A-Center, 130 S. Ct. at 2778–79. A contractual obligation to forego class treatment is distinct from a contractual obligation to

that have emerged on class waivers in recent years highlight a need for clarification in the Court's FAA jurisprudence along lines that resonate in the *Hanna* and *Erie* doctrines.

2. Formalism and Functionalism Under the FAA

As the preceding Part has observed, the proposition that "a party does not forgo [her] substantive rights" by agreeing "to their resolution in an arbitral, rather than a judicial, forum"[175] has become something of a mantra in the Court's FAA decisions. The Court has steadily expanded the types of civil claims that may be subject to arbitration, moving from disputes under the contract itself to disputes under public laws overlaid on the contractual relationship.[176] In making these moves, the Court has only rarely had occasion to consider whether arbitration would make unviable the claims in question as a practical matter.

The structure of FAA § 2 itself distinguishes questions about the categories of claims that an arbitration clause may encompass from questions about the practical viability of those claims in the arbitral

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arbitrate. As a practical matter, however, the two obligations effectively merge into one.

Unconscionability questions about class waivers arise via a well-trod series of moves: Claimants file a conventional class action complaint in litigation, and the defendant responds with a motion to compel arbitration under the terms of the contract—that is, one-on-one arbitration, given the class waiver. Upon a determination that the class waiver is unconscionable, prudent courts do not leap to decide the severability question but, instead, afford the party that has filed the motion to compel arbitration to withdraw that motion. *See, e.g.*, *In re* Am. Express Merchs. Litig., 554 F.3d 300, 321 (2d Cir. 2009). At that point, now faced with the choice of a class action in court and class arbitration, defendants' oft-noted move is to opt for the proverbial devil-you-know: defense of a class action under the well elaborated strictures of civil procedure, rather than defense of a class arbitration with parameters that are less well understood. *See* Issacharoff & Delaney, *supra* note 43, at 179. Indeed, some arbitration clauses state such a stance in advance by declaring the class waiver not to be severable from the arbitration clause as a whole. *See* Jack Wilson, *"No-Class-Action Arbitration Clauses," State Law Unconscionability, and the Federal Arbitration Act: A Case for* Federal *Judicial Restraint and Congressional Action*, 23 QUINNIPIAC L. REV. 737, 779–80 (2004).

The consequence is that a determination whether a class waiver is unconscionable effectively operates as a determination whether there is an obligation to arbitrate at all. As for contractual rights generally, invocation of an arbitration clause within a contract is not compulsory. A defense withdrawal of the motion to compel arbitration leaves no one in the position of making such an invocation and, hence, no obligation capable of enforcement by a court. One is back to the world of litigation.

175 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985).

176 *See supra* Part II.A.

forum. As suggested earlier, the first question calls for an exercise in statutory interpretation to reconcile the validation of the arbitration contract under the command of § 2 with the rights set forth in some other statute.[177] The starting point, nonetheless, remains that the validation of the contract to arbitrate is indeed in play, such as to generate a need for reconciliation vis-à-vis other statutes.

Viewed in this light, *Stolt-Nielsen* is cut from the same cloth as the succession of Court decisions that deem arbitrable claims under an array of public laws.[178] In both settings, the underlying obligation to arbitrate under the command of FAA § 2 was operational, such that the question then becomes whether some other statute somehow turns off that command implicitly—or, for *Stolt-Nielsen*, the content of that command, in the face of contractual silence about class arbitration.

Cases on the interaction between the command of § 2 and some other statute are not the same as cases concerning the caveat in § 2 itself. The starting point of most lower court decisions on class waivers in arbitration clauses is precisely that the validation of those provisions is in doubt, due to the § 2 caveat. The Supreme Court heretofore has not directly engaged the § 2 caveat. The Court has come closest in its 2000 decision in *Green Tree Financial Corp.-Alabama v. Randolph*.[179] The dispute in *Green Tree* did not stem from any purported categorical incompatibility between arbitration and the public law claims involved[180] but, rather, presented a more circumstantial concern.

Because arbitration is a private mode of dispute resolution, the cost of running that decision making apparatus is not borne by the public fisc, unlike the cost of judges and court personnel in conventional litigation. The first-generation arbitration clause in *Green Tree* was silent as to who would bear the cost of arbitration. That feature, in turn, had led the court of appeals to deem the arbitration clause unenforceable out of fear that cost considerations might disable claiming entirely.[181] One may understand this concern as a kind of as-applied challenge to the arbitrability of the public-law claims in *Green Tree*, as distinct from a facial challenge to their arbitrability of the sort presented in the bulk of the Court's decisions under the command of

177 *See supra* notes 107–10 and accompanying text.

178 *See supra* notes 96–102 and accompanying text (discussing arbitrable claims under public laws).

179 531 U.S. 79 (2000).

180 *See id.* at 83 (noting claims under the Truth in Lending Act and Equal Credit Opportunity Act).

181 *See id.* at 84 (noting that the lower court found the arbitration clause unenforceable because it was silent on payment of expenses).

§ 2.[182] In reversing, the Supreme Court eschewed a categorical approach to the asserted cost barriers, looking instead to matters of real-world functionality.

The *Green Tree* Court acknowledged that "[i]t may well be that the existence of large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum."[183] But, "where . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs."[184] For cost barriers to claiming, in short, the answer does not call for statutory interpretation but, rather, affirmative proof that goes beyond "speculative" assertions.[185]

The lower court decisions invalidating class waivers in second-generation arbitration clauses proceed in keeping with the guidance on cost-related barriers in *Green Tree*.[186] This is fitting, for the crux of the usual contention that class waivers are unconscionable under applicable state contract law[187] is a permutation of a cost-based argument—namely, that the underlying claims are economically viable only in the aggregate, such that the class waiver functions as an exculpatory clause. Two observations bear attention in connection with this cost-based thread of the unconscionability argument.

First, the unconscionability argument is consonant with the latitude afforded to state law by the § 2 caveat. In historical terms, the overarching notion behind § 2 was "to replace judicial indisposition to arbitration" of the sort prevalent in the early twentieth century.[188] In qualifying the validation of arbitration by reference to generally applicable contract defenses, the caveat in § 2 places arbitration contracts

182 I am grateful to Christopher Drahozal for suggesting this way to understand *Green Tree*.

183 *Green Tree*, 531 U.S. at 90.

184 *Id.* at 92. For empirical analysis of cost-based challenges to arbitration clauses in the lower courts, see Christopher R. Drahozal, *Arbitration Costs and Contingent Fee Contracts*, 59 VAND. L. REV. 729, 752–57 (2006).

185 *Green Tree*, 531 U.S. at 90.

186 This is not to suggest that the lower court case law is uniform. Some courts have deemed class waivers to be categorically valid on the ground that class treatment is merely a matter of procedure. *See, e.g.*, Strand v. U.S. Bank Nat'l Ass'n ND, 693 N.W.2d 918, 926 (N.D. 2005) ("[L]imitation of use of a class action or class arbitration does not prohibit any substantive remedy . . . .").

187 A distinct line of questions surrounding class waivers concerns the identification of which body of state contract law governs the unconscionability question. Some second-generation arbitration clauses couple class waivers with choice-of-law clauses. For further discussion, see Nagareda, *supra* note 43, at 1907–09.

188 Hall St. Assocs., LLC v. Mattel, Inc., 552 U.S. 576, 581 (2008).

"on an equal footing with other contracts"[189]—no less valid, but also no more.

The attention devoted to cost barriers in functional terms connects the lower court decisions on the unconscionability of class waivers in arbitration to longstanding rejections of exculpatory clauses in contracts generally—say, an advance agreement to waive any claim for negligence as a condition for admittance to a hospital.[190] This recognition of the critical connection to exculpatory clauses in contracts generally coheres with the "equal footing" perspective prescribed by the § 2 caveat. At the very least, if a court could not properly find unconscionable a class waiver in a contract without an arbitration clause, then so, too, should that court not find the same waiver unconscionable in a contract with an arbitration clause.[191] To anticipate the discussion to come in the next subpart, the misstep described here is precisely the one implicated in *Concepcion*.

Second, the state law basis for the § 2 caveat reveals a deeper connection between the Court's FAA jurisprudence and the previous discussion of the *Hanna* and *Erie* doctrines that govern federal-state relations in litigation.[192] At the outset, one must take care not to overplay the connection between the two areas. The relationship here is in the nature of analogy, rather than identity in all particulars. Still, it is not surprising that the lower court decisions on class waivers should look to matters of function and real-world operation, not to the for-

189 Rent-A-Center W., Inc., v. Jackson, 130 S. Ct. 2772, 2776 (2010).

190 *See* Tunkl v. Regents of Univ. of Cal., 383 P.2d 441, 441–42 (Cal. 1963). The exculpatory character of the waiver deemed unconscionable in *Tunkl* existed independently of the possibility that a regulatory agency might undertake some manner of public enforcement action against the hospital in the event of negligence. Contentions that a given arbitration clause is tantamount to such an exculpatory clause likewise are appropriately evaluated without regard to the possibility of public enforcement. *See* Nagareda, *supra* note 43, at 1903–04. What matters is the exculpatory character of the contract vis-à-vis private claiming.

191 For a forceful argument that the "equal footing" perspective dictated for the § 2 caveat goes further—to disable state unconscionability doctrine from casting as general contract defenses what are, in practical operation, misgivings peculiar only to some narrow subset of contracts that includes those for arbitration—see Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 IND. L.J. 393, 408–11 (2004). As the next subpart shall elaborate, my argument here does not require the Court to come definitively to rest on the outer reaches of the § 2 caveat. Under any plausible conception of the "equal footing" perspective, the inability of a court to deem unconscionable a class waiver in an ordinary contract should disable the court from doing so with respect to an arbitration contract. *Concepcion* does not require engagement of the more difficult questions surrounding when an ostensibly general contract defense really is not general.

192 *See supra* notes 32–41 and accompanying text (discussing *Hanna* and *Erie*).

mality that the waiver appears within an arbitration clause. Cases under the caveat of FAA § 2 exhibit an important structural similarity to situations that present bona fide *Erie* questions.

Faced with a choice between state law and judicial creation of federal common law, the *Erie* doctrine dictates that "state law must govern because there can be no other law."[193] Under *Erie*, the "touchstone" consists of an inquiry not into the formal question of whether the federal judge-made rule is "technically one of substance or procedure" but, rather, into the functional question of whether the choice between that rule and state law "'significantly affect[s] the result of a litigation.'"[194]

The important structural similarity is this: the unconscionability argument against class waivers likewise presents a situation in which state law is in play and the provenance of the would-be competing body of federal law is in doubt. That body of federal law consists of FAA § 2, with its command qualified by the state law caveat that limits the delegation of authority under the FAA for private parties to reallocate civil claims to arbitration.[195] When the caveat of § 2 is properly triggered, the federal law command of § 2 is turned off. As a result, state unconscionability law governs, because "there is no other law"—that is, no competing FAA command to validate the class waiver. The functionalism of the unconscionability argument flows from the notion that enforcement of the class waiver would affect "the result of a litigation" as "significantly" as one could imagine: by replacing the possibility of class-wide claiming with outright exculpation.[196] Though decided before the current debate over class waivers and not with reference to the § 2 caveat specifically, the doctrinal yardstick that the Court described in *Green Tree* actually captures the point surprisingly well by asking whether arbitration would involve "prohibitively expensive . . . costs."[197]

By contrast, the *Hanna*-like character observed in most of the Court's FAA decisions to date stems from the recognition that the § 2 caveat was not in play there. Rather, when there is an arbitration agreement that would encompass a given statutory claim and there is

193 Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1447–48 (2010) (plurality opinion) (quoting Hanna v. Plumer, 380 U.S. at 460, 472–73 (1965)).

194 *Id.* at 1442 (alteration in original) (quoting Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945)).

195 *See* 9 U.S.C. § 2 (2006); *see also supra* notes 186–90 and accompanying text (discussing § 2 and arguments against class waiver in the state law context).

196 *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion).

197 Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000).

no allegation of unconscionability under state law, resolution of the arbitrability question presents a matter of statutory interpretation—of reconciling the right of action conferred by the relevant statute with the equally statutory command of FAA § 2 to make valid and enforceable the arbitration agreement.[198] The inclination of the Court to say that the arbitration clause governs here is the analogue to the formalism of *Hanna*, which dictates that the Federal Rules govern the matters to which they speak, even if those Rules incidentally "affect[ ] a litigant's substantive rights" in practical terms.[199]

The condition of the Court's FAA jurisprudence today, one might say, is roughly the opposite of the Court's *Erie* jurisprudence prior to *Hanna*. The upshot of *Hanna* was to cabin the potential overbreadth of application accorded to the *Erie* doctrine by the Court's pre-*Hanna* decisions. When a Federal Rule applies, *Hanna* replaces the functional inquiry into outcome determinativeness with a formal, categorical one.[200] The lower court decisions on class waivers effectively seek to cabin what otherwise would be an overbreadth of application as well, just one arising from the Court's *Hanna*-like approach in the bulk of its FAA decisions to date. Just as *Hanna* circumscribes the *Erie* doctrine when a Federal Rule applies, so too—conversely—should an FAA version of the *Erie* doctrine now circumscribe the breadth of the Court's previous, *Hanna*-like approach to that statute.

When there is a viable market for claiming—either because the case arises in the context of an individual claim whose filing evidences its viability in itself or because the existence of such a market is otherwise not at issue (or is conceded)—a formal, *Hanna*-like analysis applies. But when the existence of a market for claiming is the crux of the dispute because the state law caveat of FAA § 2 is at issue, then a functional, *Erie*-type analysis should govern. The question becomes whether the arbitration clause stands to "significantly affect the result of a litigation" in the sense of operating as an exculpatory clause.[201]

In *Shady Grove*, the Supreme Court corrected the lower courts' misapprehension that New York section 901(b) presented an *Erie* question rather than a *Hanna* question in the presence of Rule 23.[202] So, conversely, should the Court itself shift from a *Hanna*-type analysis to one more akin to *Erie* when analyzing the exculpation question as to class waivers under the FAA?

198 *See supra* notes 94–96 and accompanying text.

199 *Shady Grove*, 130 S. Ct. at 1442 (plurality opinion).

200 *See supra* notes 36–37 and accompanying text (discussing the "categorical quality" found in Hanna's approach).

201 Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945).

202 *See Shady Grove*, 130 S. Ct. at 1437; *id.* at 1442–43 (plurality opinion).

B. Concepcion *and Beyond*

The usual question about class waivers concerns their proximity to exculpatory clauses in contracts without the arbitration veneer. But recognition of that point does not mean that all third-generation arbitration clauses present such a question. The proper line between the *Erie* and *Hanna* doctrines can be tricky to discern within their own sphere, as *Shady Grove* demonstrates. So, too, does the line between their counterparts under the FAA warrant careful attention.

As this subpart explains, the particular third-generation clause before the Court in *Concepcion* calls for exactly such discernment. This section initially situates the question presented by *Concepcion* within the framework for FAA analysis from the preceding subpart. *Shady Grove* recategorized as a *Hanna* question what the lower courts have mistakenly regarded as one under *Erie*. *Concepcion* presents the converse misstep in FAA analysis: the mischaracterization as a question under the FAA counterpart to *Erie* what is—on the lower courts' own premises—a question under the counterpart to *Hanna*. This account thus reveals the significance of *Shady Grove*—much more than *Stolt-Nielsen*—for the proper disposition of *Concepcion*. This subpart then explains how exposition of the connection between *Concepcion* and *Shady Grove* nonetheless leaves ample room for a functional, *Erie*-like analysis of other class waivers in arbitration clauses.

1. Exculpation or Optimal Deterrence

As noted earlier, third-generation arbitration clauses go beyond the inclusion of class waivers that define second-generation clauses.[203]

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203 *See supra* note 162 and accompanying text. Third-generation clauses are not all alike. Some couple class waivers with features that lend more of a volitional feel to the agreement to arbitrate—say, by calling for consumers to opt into the agreement, along with its class waiver, in exchange for a discount or other benefits with respect to the product or service placed under contract. *See* Lampley, *supra* note 162, at 510–12 (discussing examples of similar opt-out provisions). Approaches along these lines misapprehend the misgivings about second-generation arbitration clauses, however.

For all the attention that the adhesive character of class waivers has garnered, particularly in consumer contracts, that adhesive quality is not the nub of the controversy. Adhesive contracts are not invalid per se. *See Discover Bank v. Superior Court*, 113 P.3d 1100, 1108, 1110 (Cal. 2005) ("We do not hold that all class action waivers are necessarily unconscionable."). In the parlance of unconscionability doctrine in contract law, the main focus of the argument against class waivers is not that they arise via an adhesive process—a point hardly disputed—but, rather, that they are invalid in their substance due to their operational equivalence to exculpatory clauses. *See id.* at 1107–10 (discussing the exculpatory nature of class action waivers). Only by focusing on the exculpation point—not simply by introducing a volitional dimension to the

With an apparent nod to the kinds of cost-related concerns that the Court discussed in *Green Tree*, the particular third-generation clause in *Concepcion* categorically provides that AT&T Mobility ("ATTM") shall bear '"all . . . filing, administration and arbitrator fees,'" absent a determination by the arbitrator that the claim '"is frivolous or brought for an improper purpose (as measured by . . . Federal Rule of Civil Procedure 11(b)).'"[204] The controversy in *Concepcion* centers not on the treatment of arbitration costs as such but, rather, on a bonus provision triggered in the event of an arbitration award to the claimant "greater than" ATTM's last pre-arbitration settlement offer.[205] This contingent bonus consists of a minimum of $7,500 for the claimant and, for her attorney—if any—double the amount of attorneys' fees, plus reimbursement of "any expenses . . . reasonably accrue[d] for investigating, preparing, and pursuing" the claim in arbitration.[206]

Though unprecedented in arbitration insofar as I am aware, the ATTM bonus provision combines attributes of mechanisms already familiar in litigation. As Part I observed, regimes for statutory damages typically couple small-stakes damages on an individual basis with fee-shifting provisions.[207] Fee-shifting by statute remains contingent on the plaintiff "prevailing" in the sense of "be[ing] awarded some relief by the court,"[208] rather than on improving upon the last settlement offer. Statutory fee shifting, however, does not encompass expenses for expert witnesses,[209] unlike the ATTM bonus provision.

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contracting process—do third-generation clauses stand to address the crux of concern about their second-generation forebearers.

204 Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *2 n.2 (S.D. Cal. Aug. 11, 2008) (quoting arbitration clause). The version of the ATTM arbitration clause at issue in *Concepcion* stands as a unilateral modification of the clause in the Concepcions' original cellular phone service agreement, which contained no bonus provision. *See id.* at *2–3.

For criticism of unilateral modifications to consumer contracts in the arbitration setting, see Horton, *supra* note 39, at 645–60.

205 *See T-Mobile USA*, 2008 WL 5216255, at *2 (quoting arbitration clause).

206 *Id.* (quoting arbitration clause). The reference to "expenses" in the ATTM bonus provision extends to "expert witness fees and costs." *See Wireless Customer Agreement*, AT&T, § 2.2(4), http://www.wireless.att.com/cell-phone-service/legal/service-agreement.jsp?q_termsKey=postpaidServiceAgreement&q_termsName=Service+Agreement (last visited Feb. 1, 2011) (making explicit the treatment of "expenses" under bonus provision).

207 *See supra* note 52 and accompanying text.

208 Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health & Human Res., 532 U.S. 598, 603 (2001).

209 *See supra* note 52 (citing, as an example, 15 U.S.C. § 1681n(a)(3) (2006), which does not explicitly grant expenses for expert witnesses).

The crafting of the contingency under the ATTM bonus provision in terms of whether the claimant fares better than under the last settlement offer, likewise, sounds a familiar note. On this score, the bonus provision operates as a more claimant-friendly version of Rule 68.[210] Under that rule and state law counterparts for litigation, a defendant may make an offer of judgment during the run-up to trial.[211] In the event that the plaintiff declines the offer and does not fare better at trial, Rule 68 requires the plaintiff to pay the defendant's post-offer court costs.[212] Rather than impose a light contingent tax on the claimant for not improving on a pre-arbitration settlement offer, the ATTM bonus provision provides a subsidy for achievement of such an improvement.

The claim on the merits in *Concepcion* consists of a garden-variety allegation of deceptive trade practices under applicable state law—specifically, the charging of "sales tax on the full retail value of cellular phones that were advertised as 'free' or at substantial discounts."[213] The nature of the claim notably is such as to be inferable based on scrutiny of the cell phone bill, not necessarily based only on the kind of expert-intensive analysis typical of, say, complex antitrust claims for consumer overcharges. The disputed sales tax amounts to roughly thirty dollars for the Concepcions,[214] who did not sue individually but, instead, initiated the usual sequence of moves[215] in disputes over class waivers by filing a class action complaint in federal district court.[216] The jurisdictional basis for the federal forum consists of the expan-

210 FED. R. CIV. P. 68.

211 *See id.* R. 68(a) ("At least 14 days before the date set for trial, a party defending against a claim may serve an opposing party an offer to allow judgment on specified terms . . . ."); *see also* Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155, 157 (2006) (noting that most states have offer-of-judgment rules modeled on Rule 68).

212 *See* FED. R. CIV. P. 68(d). If anything, the usual criticism of Rule 68 is that the tax for not improving on the settlement offer is too low. *See* Yoon & Baker, *supra* note 211, at 158 (2006) ("The cost-shifting mechanism of Rule 68 and the state rules modeled thereafter are usually limited to post-offer court costs (e.g., docket and printing fees), which, in most cases, are trivial, thereby diminishing the rules' potency." (footnote omitted)).

213 Laster v. T-Mobile USA, Inc., No. 05cv1167 DMS (AJB), 2008 WL 5216255, at *1 (S.D. Cal. Aug. 11, 2008). California substantive law governs the merits based on the Concepcions' entry into a cellular phone service contract with a corporate predecessor of ATTM in that state. *See id.*

214 Laster v. AT&T Mobility LLC, 584 F.3d 849, 852 (9th Cir. 2009), *cert. granted sub nom.* AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010).

215 *See supra* note 174 (discussing typical challenges to class action waivers).

216 *T-Mobile USA*, 2008 WL 5216255, at *1.

sion in federal diversity jurisdiction afforded by the Class Action Fairness Act of 2005 (CAFA),[217] the significance of which shall emerge momentarily.

ATTM predictably responded to the filing of the class complaint with a motion to compel arbitration under the terms of its arbitration clause.[218] The ATTM arbitration clause includes a severability provision, whereby any invalidation of the class waiver would take with it the underlying obligation to arbitrate.[219] As a result, the dispute over the validity of the class waiver in *Concepcion* effectively frames the possible outcomes in terms of either a class action (as if no arbitration agreement existed at all) or bilateral arbitration (under the terms of the ATTM clause).

The analysis of the lower courts in *Concepcion* bears close attention, for it implicates the line between a *Hanna*-type analysis under the command of FAA § 2 and an *Erie*-like analysis under the caveat of that section. The claimants in *Concepcion* contended that the bonus provision in the ATTM arbitration clause is "illusory," because "ATTM will simply *pay* its customers' demand in full rather than incur costs of arbitration . . . as well as Premium-based damages ($7,500) and double attorney's fees."[220] The irony of this argument, for the district court, lies in claimants' "acknowledge[ment] that the [bonus] provision prompts ATTM to *accept liability*, rather than 'escape liability,' for small dollar claims . . . (even for claims of questionable merit and for claims it does not owe)."[221] As the district court further noted, "ATTM has an incentive to include reasonable attorney's fees in its settlement offers."[222]

For the district court, the fatal defect of the class waiver lies not in the exculpatory character of the bonus provision but, rather, in the disabling of the Concepcions' desired class action as a vehicle for what commentators describe as "optimal deterrence"[223]—that is, confrontation of the defendant with the full aggregate scope of its alleged mis-

217 *See* 28 U.S.C. § 1332(d)(2) (2006) (providing for federal diversity jurisdiction over proposed class actions involving state law claims based on minimal diversity of citizenship and more than $5 million in controversy).

218 *See T-Mobile USA*, 2008 WL 5216255, at *1.

219 *See Wireless Customer Agreement*, *supra* note 206, § 2.2(6) ("If [class waiver] is found to be unenforceable, then the entirety of this arbitration provision shall be null and void.").

220 *T-Mobile USA*, 2008 WL 5216255, at *10.

221 *Id.* at *11.

222 *Id.* at *10 n.7.

223 *See* David Rosenberg, Response, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 843 (2002).

deeds.[224] Crediting claimants' argument, the district court observed that "prohibiting class litigation and requiring individual actions would leave many consumers 'like the class members Plaintiffs represent with no recovery at all for violations of their rights, *even if there would be attorneys willing to take their cases*.'"[225] For this point, the district court relied heavily on an influential 2005 California Supreme Court decision—*Discover Bank v. Superior Court*[226]—that deemed unconscionable a second-generation arbitration clause with a class waiver alone, based on identification of a California state policy "favoring" class treatment in both litigation and arbitration in order "to deter alleged fraudulent conduct in cases involving large numbers of consumers with small amounts of damages."[227]

On appeal, the Ninth Circuit readily affirmed, again underscoring the California policy in favor of class treatment as a deterrence vehicle, per *Discover Bank*, and pinpointing the unconscionability of the class waiver in those terms.[228] As the Ninth Circuit observed, "[t]he [bonus] provision does essentially guarantee that the company will make any aggrieved customer whole who files a claim. Although this is, in and of itself, a good thing, the problem with it under California law . . . is that *not every* aggrieved customer will file a claim."[229]

In short, *Concepcion* asks whether the ATTM arbitration clause is unconscionable not because it exculpates but, instead, because it disables an individual claimant from seeking to represent the universe of other, similarly situated persons. On the lower courts' account, it is the distinctiveness of the class mechanism under California law as a vehicle for representative litigation—its operation as something different from the joinder of claims already on file—that the arbitration clause disables. As I now explain, the key to proper disposition of

224 *T-Mobile USA*, 2008 WL 5216255, at *12–14 (discussing deterrent value of allowing class actions).

225 *Id.* at *12 (emphasis added) (quoting Plaintiffs' Memorandum of Points & Authorities in Opposition to Motion to Compel Individual Arbitration by Defendant AT&T Mobility LLC at 21, *T-Mobile USA*, 2008 WL 5216255 (No. 06CV0675 DMS (NLS))).

226 113 P.3d 1100 (Cal. 2005).

227 *T-Mobile USA*, 2008 WL 5216255, at *14–15 (citing *Discover Bank*, 113 P.3d 1100).

228 *See* Laster v. AT&T Mobility LLC, 584 F.3d 849, 855–56 (9th Cir. 2009). The Ninth Circuit drew on one of its own precedents that had relied on *Discover Bank* to hold unconscionable a second-generation predecessor of the third-generation ATTM arbitration clause at issue in *Concepcion*. *See* Shroyer v. New Cingular Wireless Servs., Inc., 498 F.3d 976, 981 (9th Cir. 2007) (holding class arbitration waiver unconscionable under *Discover Bank* test).

229 *AT&T Mobility LLC*, 584 F.3d at 856 n.9 (emphasis added).

Concepcion lies in the account of the relationship between Rule 23 and state law views of class treatment found in none other than *Shady Grove*.

2. *Shady Grove* Redux

The lower courts in *Concepcion* lacked the benefit of the Supreme Court's guidance in *Shady Grove*. Viewed in doctrinal hindsight, nonetheless, the lower courts' analysis in *Concepcion* replays the move overturned in *Shady Grove*.

The nature of the class action mechanism is not "a brooding omnipresence in the sky" unconnected to some particular body of law; it flows, instead, from "the articulate voice of some sovereign or quasi-sovereign that can be identified."[230] And identification here is not difficult. There is no dispute that Rule 23 governs the proposed *Concepcion* class action in federal court. As a result, it is the opportunity to bring a class action under the parameters of Rule 23—not under California class action law—that the class waiver would disable, if deemed enforceable under the FAA.[231]

The lower courts in *Concepcion* attribute to the class mechanism the force of a state law policy favoring the kind of optimal deterrence achievable only because that mechanism does something different in kind from joinder. The class mechanism effectively brings into the dispute claims that are not already on file and, indeed, may well never be filed individually. Yet the trait that supplies the critical source of unconscionability for the lower courts in *Concepcion*—the nature of the class mechanism as something different in kind from joinder—is precisely what may not be attributed to Rule 23 after *Shady Grove*, at least not without shedding considerable doubt upon the legitimacy of that rule under the Rules Enabling Act. For all their quibbles with each other, the *Shady Grove* plurality opinion and the Stevens concurrence coalesce on the firm conviction that the Rule 23 class action is not different in kind from a whole host of other Federal Rules that may affect claiming.[232]

True enough, the caveat in FAA § 2 affords latitude for generally applicable contract defenses in state law.[233] But the § 2 caveat does so

230 *Cf.* S. Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) (describing the common law).

231 Again, recall that the choice in *Concepcion* lies between a class action and bilateral arbitration. *See supra* note 219 and accompanying text.

232 *See supra* notes 76–81 and accompanying text.

233 The § 2 caveat preserves generally applicable contractual defenses in state law rather than preempting them entirely, but that preservation carries with it adherence to an equal-footing perspective. *See* 9 U.S.C. § 2 (2006). If the state deviates from

only on an equal-footing basis,[234] such that a class waiver in an arbitration agreement is, at the very least, no worse off than a class waiver with regard to litigation contained in a contract with no mention of arbitration.[235] In the case of a class waiver in a contract without an arbitration clause, there would be no hook for the importation into a federal court action of state law views concerning the class action mechanism, for the caveat of FAA § 2 would not be in play. If a state law policy *against* the confronting of a defendant with the full force of class-wide deterrence beyond the plaintiff's individual claim (recall New York section 901(b)) cannot govern in a federal court class action controlled by Rule 23, then a state law policy running the opposite way—a state policy in *favor* of a deterrent punch beyond that of mere joinder (per the California Supreme Court's opinion in *Discover Bank*)—likewise cannot govern such an action.

A state law policy concerning the confrontation of the defendant with the full force of class-wide deterrence—whether thumbs up or thumbs down in its policy inclination—cannot control in federal court, even if the claims on the merits sound in state law. Rather, Rule 23—*and only Rule 23*, per *Shady Grove*—governs a proposed class action in the federal system. That was the error rightly corrected in *Shady Grove* itself, outside of arbitration. The equal-footing perspective of the caveat in FAA § 2 compels the same result in arbitration. If *Shady Grove* is right about the nature of Rule 23, then the lower courts in *Concepcion* must be wrong. More broadly, the Court may use *Concepcion* as the vehicle for greater doctrinal integration of the litigation and arbitration realms, in keeping with the synthetic perspective urged here.

States remain free within their own court systems to regard the class action mechanism in a manner different from Rule 23—as some-

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that perspective, then the situation is governed by the command of § 2, because the caveat therein does not apply. *See id.*

For a game theoretic explanation of why judges may tend to overreach in unconscionability analysis under the § 2 caveat, see Aaron-Andrew P. Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1422 (2008), which states, "[I]t is extremely difficult for a reviewing court to tell if a decision invalidating an arbitration agreement on unconscionability grounds obeys [the equal-footing] rule. This difficulty creates opportunities for lower courts to misapply, or perhaps even manipulate, state contract doctrines so as to nullify arbitration agreements while simultaneously frustrating the ability of reviewing courts to reverse."

234 *See supra* note 191 and accompanying text.

235 As previously noted, the setting of *Concepcion* does not require the Court to engage the larger questions surrounding when an ostensibly general contract defense is not general. *See supra* note 191.

thing more like a component of available remedies in substantive law, rather than as a procedural mechanism whose effect on substantive rights remains incidental. The California class action rule applicable in *Discover Bank* itself, for example, takes the form of duly enacted state legislation,[236] not a rule promulgated under strictures of the Rules Enabling Act. But what courts may not do under the rubric of state law unconscionability doctrine is to attribute to Rule 23 a character that would invalidate—or, at least, shed considerable doubt on—that rule itself. Although state law has latitude to craft its own view of unconscionability, that latitude stops when it comes to opining on something that is not a matter of state law to define—just as New York section 901(b) could not redefine the conditions under which a class action "may be maintained" in federal court.[237]

The kinship between *Shady Grove* and *Concepcion* should come as little surprise, once it is revealed. The lower courts in *Concepcion* effectively sought to treat the case as one under the caveat of FAA § 2, even in the face of their own recognition that the ATTM arbitration clause does not exculpate but, instead, simply bars the claimant at hand from seeking to represent the universe of similarly situated persons.[238] As such, on the lower courts' own premise, the appropriate framework is the categorical, *Hanna*-like one under the command of § 2, not its caveat. And that mode of analysis, in turn, brings into play the conception of Rule 23 under the *Hanna* doctrine, as understood in *Shady Grove*, which state law may not displace with respect to a federal diversity case.

One cannot help but remark on the sense of irony here. What was sauce for the plaintiff geese in *Shady Grove* is now sauce for the defendant gander in *Concepcion*.[239] What enabled the *Shady Grove* plaintiffs "to attempt to transform a $500 case into a $5,000,000 award"[240]—the nature of Rule 23—is, at bottom, what means that the thirty dollar claim in *Concepcion* may not transform into the multimil-

236 *See* CAL CIV. PROC. CODE § 382 (West 2004).

237 FED. R. CIV. P. 23(b). Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1437 (2010) ("Rule 23 provides a one-size-fits-all formula for deciding the class-action question. Because § 901(b) attempts to answer the same question . . . it cannot apply in diversity suits unless Rule 23 is ultra vires.").

238 *See supra* note 229 and accompanying text.

239 The involvement of the same organization as counsel of record for the would-be plaintiff class before the Supreme Court in both *Shady Grove* and *Concepcion* accentuates the sense of irony. *See Shady Grove*, 130 S. Ct. at 1435–36; Respondents' Brief in Opposition, AT&T Mobility LLC v. Concepcion, 130 S. Ct. 3322 (2010) (No. 09-893).

240 *Shady Grove*, 130 S. Ct. at 1460 (Ginsburg, J., dissenting).

lion dollar stakes of the proposed class action based on the faux unconscionability analysis of the lower courts.

The role of CAFA in all this bears note. The upshot of the jurisdictional change made by CAFA is, by now, familiar: to get high-stakes proposed class actions involving state law claims of nationwide (or, at least, broadly interstate) scope into the federal system, rather than to allow them to remain in a state court likely chosen for an anomalous inclination to grant class certification.[241] The odd consequence of CAFA in *Shady Grove* is to "make federal courts a mecca" for state law claims "that would be barred from class treatment in the State's own courts."[242] When combined with *Shady Grove* in the arbitration context, however, CAFA has a different effect, more in keeping with its proponents' desire for greater federal law influence over class treatment.

As a practical matter today, the kinds of proposed class actions likely to elicit defense motions to compel one-on-one arbitration will stand to be filed in (or quickly removed to) federal court. CAFA drives this jurisdictional result for state law claims,[243] and the long-standing existence of federal question jurisdiction does the same for federal law claims.[244] Either way, Rule 23, as understood in *Shady Grove*, governs the function and force that the court may attribute to the class mechanism under the rubric of state unconscionability doctrine, for it is Rule 23 treatment that the class waiver in such a case would waive. The occasions for state courts to opine on waivers vis-à-vis counterpart state class action rules—a la *Discover Bank* and contemporaneous state decisions in actions filed pre-CAFA—are apt to become much rarer post-CAFA.[245]

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241 *See* Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1664–66 (2008) (framing the main thrust of CAFA in terms of disabling the anomalous certifying state court).

242 *Shady Grove*, 130 S. Ct. at 1473 (Ginsburg, J., dissenting).

243 ABA SECTION OF ANTITRUST LAW, ANTITRUST CLASS ACTIONS HANDBOOK 19 (2010) (noting a "study by the Federal Judicial Center found a 72 percent increase in class action activity after CAFA").

244 *See* 28 U.S.C. § 1331 (2006).

245 The class action for state law claims in *Discover Bank* was filed in 2001, for example, well before the effective date of CAFA. *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.) (applying CAFA to actions filed after February 18, 2005); Discover Bank v. Superior Court, 113 P.3d 1100, 1104 (Cal. 2005). In fact, all state supreme court decisions that invalidate class waivers of which I am aware predate CAFA.

By its terms, CAFA does leave some modest room for class actions involving state law claims to remain in state court. *See* 28 U.S.C. § 1332(d) (providing both mandatory and discretionary carve-outs from federal diversity jurisdiction for class

3. After *Concepcion* in the Courts and Congress

At the same time, an understanding of *Concepcion* as a version of *Shady Grove* redux contains its own significant points of self-limitation. A decision regarding the particular third-generation arbitration clause in *Concepcion* along the lines sketched here would not operate as anything like an undifferentiated green light for class waivers—much less, in their more common, second-generation form. The critical feature of *Concepcion* consists of the lower courts' odd framing of the unconscionability problem: not in terms of equivalence to an exculpatory clause but, instead, by reference to optimal deterrence, predicated on the existence of a fundamental difference between class actions under Rule 23 and other procedural rules that may influence claiming. It is the latter difference—said to comprise a difference in kind—that leads the reasoning of the lower courts in *Concepcion* to run headlong into the holding in *Shady Grove*.

By contrast, when the question of unconscionability concerns the operation of the class action not to enable additional claiming on behalf of others but, instead, to avoid exculpation of the defendant entirely, *Shady Grove* fades in significance. On the exculpation question, the proper analytical framework for a class waiver is that which would govern a waiver of any other aspect of civil litigation, whether in an ordinary contract or one for arbitration. Equivalence in the analytical framework for class waivers and waivers of any other attribute of civil litigation is consonant with the view of Rule 23 in *Shady Grove*, unlike the lower courts' approach in *Concepcion*. In short, one is back to the framework for contentions that an arbitration clause of any sort—with class waivers or without, or with a waiver of something else—is tantamount to an exculpatory clause: the burden-allocation framework of *Green Tree*.

The question under *Green Tree* is whether the difference between litigation and arbitration at hand makes the latter forum cost "prohibitive"—a term that, again, targets the inquiry on the exculpation question.[246] A given arbitration clause with a class waiver may flunk this criterion, but waivers of other matters might not. The law can, in other words, distinguish waivers of things that make a decisive func-

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actions of a more localized character). In addition, insofar as federal courts like the Ninth Circuit have (mistakenly) brought to bear state law conceptions of class treatment in cases governed by Rule 23, the choice between determination of the unconscionability question in California state court, rather than in a federal court sitting in that state, might be seen as so inconsequential as to discourage removal by defendants, even in a case to which CAFA applies.

246 *See* Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 90–92 (2000).

tional difference from waivers of specifications about trivial matters, such as the required color of briefs. In this sense, the functionalism of *Green Tree* partakes of the functionalism found in the *Erie* doctrine, albeit with more weight afforded to arbitration under the general command of FAA § 2 than *Erie* affords to federal common law.

Comparison of *Concepcion* to a prominent case involving a second-generation arbitration clause lends specificity to the preceding discussion. Shortly after deciding *Stolt-Nielsen*, the Supreme Court granted the writ of certiorari in *In re American Express Merchants Litigation* ("*Amex Merchants*"),[247] only to vacate the judgment and remand for reconsideration by the Second Circuit.[248] *Amex Merchants* involved an alleged unlawful tying arrangement under the Sherman Act—antitrust claims that, as a practical matter, entail the incurring of expert expenses "from about $300 thousand to more than $2 million" for sophisticated economic analysis,[249] unlike the read-the-bill kind of claim on the merits in *Concepcion*. The evidence from class counsel on the whopping magnitude of expert expenses needed in *Amex Merchants* stood unopposed in the record by any defense-side analysis.[250]

Writing prior to *Stolt-Nielsen*, the Second Circuit had deemed unconscionable the unadorned class waiver in *Amex Merchants* due to the prohibitive fixed costs associated with the preparation of even a single claim.[251] Although it remains to be seen what the Second Circuit will say on remand, the analysis sketched here points the way. Credible, unopposed evidence that a class waiver will operate as an exculpatory clause with regard to the particular kinds of claims at issue discharges the burden placed by *Green Tree* on the opponent of arbitration "of showing the likelihood of" incurring "prohibitive" costs.[252]

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247 554 F.3d 300, 304 (2d Cir. 2009), *cert. granted, vacated, and remanded sub nom.* Am. Express Co. v. Italian Colors Rest., 130 S. Ct. 2401 (2010).

248 *Id.*

249 *Id.* at 316 (quoting expert affidavit of Dr. Gary L. French, economist).

250 *See id.* at 318–19.

251 *See id.*

252 Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000). A further twist in *Amex Merchants* stems from the observation that Congress considered and rejected a proposal to include in the original Sherman Act what would have amounted to an opt-in mechanism for the aggregation of private claims. *See* Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 24–27 (1989). Were the proper analysis in *Amex Merchants* a formal, categorical one directed to whether the modern Rule 23 class action is a matter of "procedure" or "substance," this feature in the original Sherman Act would have significance. In a case properly under the caveat of FAA § 2, however, a categorical, *Hanna*-type analysis is inapplicable, and the more functional,

In short, the treatment urged here for *Concepcion* still leaves ample room for nuanced, circumstantial analysis of other class waivers. Nuance is desirable not just to lend needed precision to the Court's FAA jurisprudence. From a broader institutional standpoint, nuance from the Court with respect to class waivers holds the promise of forestalling much more blunderbuss moves in Congress. The FAA language of greatest concern today dates from 1925, before economic globalism as we now know it. Over time, moreover, the kind of "legal no-man's-land"[253] that animated the Court's steady embrace of arbitration from the 1970s forward is likely to diminish. It comes as no surprise, then, that the notion of amending the FAA should surface in a changed world.

The many policy questions presented by the proposed Arbitration Fairness Act of 2009[254] lie beyond the scope of this Article to treat in depth. Still, even a casual observer cannot help but remark on how the undifferentiated exclusion from the FAA contemplated under the proposed legislation for wide swaths of arbitration clauses—those in consumer, employment, and franchise contracts and with respect to civil rights[255]—partakes of the same kind of undifferentiated approach that its proponents see in the Supreme Court's FAA case law.[256] The lack of nuance and differentiation just runs in the opposite direction. The tenor of debate has heightened to such a degree that the legal press has gone so far as to warn that Congress and the Court "appear headed for collision over mandatory arbitration."[257]

The approach offered in this Article holds the promise of turning a potential collision into an opportunity for dialogue. The relationship between litigation and arbitration is not one susceptible to a unitary solution. Allocation of all civil claims to the private realm of arbitration, with a kind of willful blindness to its real-world operation, is unwarranted.[258] Amidst worldwide economic retrenchment,

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Erie-style analysis dictates attention to the real-world impact of the arbitration clause, apart from formal categories. *See supra* Part III.A. On the latter view, the absence of a class action–like mechanism in the original Sherman Act is not determinative when the arbitration clause would operate to waive such a mechanism in current law—if not part of the Sherman Act itself, even today.

253 Scherk v. Alberto-Culver Co., 417 U.S. 506, 517 (1974).

254 H.R. 1020, 111th Cong.

255 *Id.* § 4 (proposed exclusion of the specified types of disputes from the command of FAA § 2).

256 Marcia Coyle, *Colliding on Arbitration*, NAT'L L.J., June 14, 2010, at 1, 1–3 (noting the "pro-arbitration" stance of the Court across various types of contracts).

257 *Id.* at 1.

258 For a statement of this view with respect to class waivers specifically, see Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class*

unquestioned faith in the operation of the private marketplace in arbitration is wildly out of kilter with reality.[259] But, so, too, is an equally undifferentiated sense of nostalgia,[260] predicated on the notion that the only way to do justice in civil law is via litigation along peculiarly American lines.

Like nostalgia in other forms, nostalgia about U.S.-style litigation stems from a valuable awareness of what is genuinely good about past. The litigation legacy of *Brown v. Board of Education*[261]—a class action, it bears note[262]—continues to loom large over the twenty-first century. Undifferentiated nostalgia about litigation, nonetheless, is out of line with what stands as arguably the signature development in the U.S. civil justice landscape since *Brown*: the emergence of private dispute resolution as a vibrant institutional alternative to litigation in court.[263]

Undifferentiated nostalgia is equally out of line with the emergence of serious interest in other Western industrialized societies—those that we would not regard as unconscionable—in the development of processes for the mass handling of civil claims, just not necessarily processes along the lines of the U.S.-style class action.[264] As the Supreme Court recognized as early as 1972, "[w]e cannot have trade

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Action, 104 MICH. L. REV. 373, 375, 378 (2005), arguing that class actions "will soon be virtually extinct," and that class actions "do far more good than harm."

259 On this view, a more textured account of private ordering in arbitration is of a piece with a larger rethinking of the role of the marketplace in the Supreme Court's public-law jurisprudence. *See* Noah Feldman, *Imagining a Liberal Court*, N.Y. TIMES MAG., June 27, 2010, at 38.

260 For similar use of the term "social nostalgia" to describe how rosy visions of governing arrangements from the Middle Ages have affected the design of modern administrative government, see EDWARD L. RUBIN, BEYOND CAMELOT 1–6 (2007).

261 347 U.S. 483 (1954).

262 *Id.* at 495. On the deep influence of *Brown* on the current civil justice system, see Stephen C. Yeazell, Brown*, the Civil Rights Movement, and the Silent Litigation Revolution*, 57 VAND. L. REV. 1975 (2004).

263 One may see the emergence of ADR as a civil justice version of the more general move toward privatization. *See generally* GOVERNMENT BY CONTRACT (Jody Freeman & Martha Minow eds., 2009).

264 On the efforts in Europe to develop a distinctively European approach for aggregate litigation, see Coffee, *supra* note 149, at 302, emphasizing the European inclination to rely on consumer and other standing organizations rather than entrepreneurial class counsel on the U.S. model; Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, 62 VAND. L. REV. 179, 180–81 (2009), questioning the ability of Europe ultimately to avoid entrepreneurial litigation; and Nagareda, *supra* note 149, at 28, noting European inclination to provide for more efficient handling of claims already in the civil justice system without enabling claiming en masse.

and commerce in world markets . . . exclusively on our terms, governed by our laws, and resolved in our courts."[265]

If the ethos of the 1938 revamping of the Federal Rules of Civil Procedure was to bring more claims into the litigation system, then the challenge for today lies in what to do with them.[266] And, on that score, an undifferentiated ban on arbitration in major subject areas would only heighten the challenge for the law to address. The emergence of nuance in Supreme Court doctrine for the FAA holds the promise of highlighting the need for similarly nuanced—not blunderbuss—management of the relationship between litigation and arbitration. On that score, there remains a pressing need for dialogue across regimes too often conceived as dichotomous.

CONCLUSION

The Supreme Court's divergent accounts of class treatment in litigation and arbitration across its 2010 decisions in *Shady Grove* and *Stolt-Nielsen* invite explanation. In the face of conventional accounts of litigation and arbitration as dichotomous regimes for the resolution of civil claims, this Article has urged a more synthetic perspective. Juxtaposition of *Shady Grove* and *Stolt-Nielsen* serves to highlight deep structural similarities between the Court's treatment of federal and state authority in litigation and the Court's now-extensive jurisprudence on arbitration.

For diversity cases, the *Erie* and *Hanna* doctrines mediate between federal and state authority, depending upon the presence of a Federal Rule of Civil Procedure on point. *Shady Grove* extends the *Hanna* framework to federal court cases governed by Rule 23. But, understood in context, *Shady Grove* leaves undisturbed the notion that contrary guidance in state law may inform the federal court's treatment of the Rule 23(b)(3) superiority requirement, even though state law is not strictly binding on the court in the *Erie* sense.

For the FAA, an unrecognized line of distinction lies embedded within the Court's decisions—one that bears a striking resemblance to the line that *Shady Grove* delineates between *Erie* and *Hanna*. When the question under FAA § 2 does not concern the prospect of exculpation for the defendant, the Court properly has taken a relatively categorical, *Hanna*-like view of the types of civil claims that arbitration may encompass. This view not only reconciles the existence of public-law claims in federal statutes with the equally statutory command to

265 Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 9 (1972).

266 *See* Judith Resnik, *Compared to What?: ALI Aggregation and the Shifting Contours of Due Process and of Lawyers' Powers*, 79 GEO. WASH. L. REV. 628, 637–38 (2011).

validate arbitration agreements in FAA § 2, it also—more fundamentally—makes sense of the broader international setting for contracting in the globalized world of commerce that has emerged in the recent decades. Only by situating arbitration in continuity with the chronology of transnational guidance for the recognition and enforcement of judgments does the logic of the Court's FAA decisions come to the fore. Such a transnational perspective, in particular, supplies the needed explanation for the holding of *Stolt-Nielsen* to disallow the use of class arbitration in the face of silence regarding such treatment in an arbitration clause.

But when the question under the caveat in FAA § 2 concerns the viability of claiming *vel non*—that is, the operation of an arbitration clause tantamount to an exculpatory clause—the command to validate arbitration under § 2 is placed into doubt at the same time that competing state law conceptions of unconscionability come into play. Resolution of the state law constraint written into the § 2 caveat properly has elicited a more functional, *Erie*-like approach for the rare occasion, thus far, in which the Court has faced such a scenario.

The Court's impending encounter with the class waiver included as part of the arbitration clause in *Concepcion* calls for careful attention to the FAA counterparts to the *Erie* and *Hanna* doctrines. Properly understood, the critical precedent that guides the disposition of *Concepcion* is not *Stolt-Nielsen* but, rather, *Shady Grove*. The unconscionability attributed by the lower courts to the arbitration clause in the federal court class action proposed in *Concepcion* lies not in its equivalence to an exculpatory clause but, instead, consists of a distinctive effect of class treatment different in kind from joinder—what *Shady Grove* disallows as a proper account of Rule 23. Such a disposition of *Concepcion*, guided by *Shady Grove*, nonetheless leaves ample room for appropriately differentiated treatment of other arbitration clauses with class waivers said not merely to bar claiming on behalf of others but to exculpate the defendant entirely.

Specifics of doctrine aside, the hard work for the future lies in nuanced mediation between the public sphere of litigation and the private one of arbitration—mediation attentive to federal-state lines of authority in the domestic sphere and the growing globalism in all segments of contemporary life. In this enterprise, the old chestnuts of *Erie* and *Hanna* for litigation federalism in the domestic realm—surprisingly enough—offer guidance for more nuanced approaches to the FAA in our globalized world.