

# JUSTICE SCALIA AND CLASS ACTIONS: A LOVING CRITIQUE

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## INTRODUCTION

I have been asked to write an essay on Justice Scalia’s class action jurisprudence and although I suspect many readers will find this surprising because the Justice is so often linked to constitutional law, I actually think that his class action jurisprudence may be where his opinions leave some of the biggest marks. To be as blunt about it as the Justice himself would have been: for better or for worse, I am not sure any other Justice of the Supreme Court in American history has done more to hinder the class action lawsuit than Justice Scalia did.<sup>1</sup>

The Justice did his damage not so much in his opinions interpreting the Federal Rules of Civil Procedure—there, his opinions gave both sides of the class action divide something to like—but in his opinions interpreting the Federal Arbitration Act (FAA). Under the auspices of the FAA, the Justice authored two majority opinions giving a green light to corporations that want to opt out of class-wide liability *entirely* so long as they do so using arbitration contracts.<sup>2</sup>

I am one of the Justice’s biggest fans. But his FAA opinions are not my favorites of his opinions. As many commentators have noted, it is very hard to square these opinions with either the text or the history of the FAA.

For these reasons, many commentators have assumed that Justice Scalia was more animated by his conservative ideological preferences in these cases

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1 See Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 390 (noting that Justice Scalia’s FAA decisions did more to undermine class actions than “even the most radical legislative proposals put forth by” Republican politicians).

2 See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308, 2312 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

than to his fidelity to the original understanding of the text. That may be—although the Justice tried very hard to separate his personal views from his jurisprudential views, he was not superhuman—but, if it is what motivated these decisions, I am not sure the Justice got it right on this point either. On a superficial level, of course, conservatives tend to side with the interests of corporations and liberals with the interests of plaintiffs’ lawyers. But not always. There are plenty of times when conservative principles deviate from corporate interests. As I explain, I wonder if class action waivers should be one of these times. In my view, it is hard to see how the conservative (and, often, libertarian) free market principles that Justice Scalia and I shared suggest that corporations should be allowed to opt out of class action lawsuits.

In Part I of this Essay, I review the Justice’s class action opinions; I give special emphasis to his opinions interpreting the FAA and explain why I think it is hard to square those decisions with either text or history. In Part II, I explain why I think even conservative and libertarian ideology may not be consistent with the Justice’s FAA opinions.

## I.

Justice Scalia authored dozens of opinions *in* class action cases, but only six of these opinions—five opinions for the Court and one dissent—were *about* class actions.<sup>3</sup> Four of these opinions interpreted the Federal Rules of Civil Procedure—*Wal-Mart Stores, Inc. v. Dukes*,<sup>4</sup> *Comcast Corp. v. Behrend*,<sup>5</sup> *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*,<sup>6</sup> and *Devlin v. Scardelletti*<sup>7</sup>—and two of them interpreted the FAA—*American Express Co. v. Italian Colors Restaurant*<sup>8</sup> and *AT&T Mobility LLC v. Concepcion*.<sup>9</sup> As I said, the former opinions are something of a mixed bag, but the latter opinions could not have done more to undermine class aggregation.<sup>10</sup>

## A.

Let me begin with the cases interpreting the Federal Rules. Here, Justice Scalia made things a bit harder for class actions in *Wal-Mart* and *Comcast*, but a bit easier in *Shady Grove*. And he would have made things even easier still in *Devlin* had he not ended up in the dissent.

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3 He also authored one opinion on class action’s little sister, the labor law collective action. See *Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 174 (1989) (Scalia, J., dissenting).

4 564 U.S. 338 (2011).

5 133 S. Ct. 1426 (2013).

6 559 U.S. 393 (2010).

7 536 U.S. 1, 15 (2002) (Scalia, J., dissenting).

8 133 S. Ct. 2304 (2013).

9 563 U.S. 333 (2011).

10 See Gilles, *supra* note 1, at 397 (arguing that “by far the most effective” tool to undermine class actions has been “arbitration provisions expressly waiving the right to any collective adjudication”).

1.

Of these opinions, *Wal-Mart* is by far the most famous. There, Justice Scalia decertified a nationwide class of 1.5 million current and former female employees of Wal-Mart who had sued the merchant for sex discrimination.<sup>11</sup> The opinion is most famous (or infamous, depending on your point of view)<sup>12</sup> for ratcheting up the requirement in Federal Rule 23(a)(2) that all members of a class have at least one question of fact or law in common before the class can be certified (known as the “commonality” prerequisite). But I have always found the account of this part of his opinion overstated. Despite the sharp ideological division in the judgment, there was really very little difference between how Justice Scalia interpreted “commonality” and how Justice Ginsburg did so in dissent;<sup>13</sup> the sharp disagreement rested more on how to interpret Title VII of the Civil Rights Act than on how to interpret Rule 23.<sup>14</sup>

Rather, I have always thought that the more important part of Justice Scalia’s opinion was the unanimous holding that class actions seeking both money damages and declaratory or injunctive relief (known as “hybrid” class actions) can be certified only under Rule 23(b)(3).<sup>15</sup> For many years, class

11 See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 343 (2011).

12 See Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 776 (2013) (“The majority decision in *Dukes* cannot be squared with the text, structure, or history of Rule 23(a)(2).”); A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 472 (2013) (“The Court’s commonality-as-centrality interpretation can thus draw no comfort from being derived from some other source, let alone from the text of the rule.”).

13 Compare *Wal-Mart*, 564 U.S. at 350 (“That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.”), with *id.* at 369 (Ginsburg, J., concurring in part and dissenting in part) (“Thus, a ‘question’ ‘common to the class’ must be a dispute, either of fact or of law, the resolution of which will advance the determination of the class members’ claims.”). See also *id.* at 359 (majority opinion) (“The dissent misunderstands the nature of the foregoing analysis. . . . We quite agree that for purposes of Rule 23(a)(2) ‘[e]ven a single [common] question’ will do.” (alterations in original) (quoting *Wal-Mart*, 564 U.S. at 376 n.9 (Ginsburg, J., concurring in part and dissenting in part))).

14 Compare *id.* at 355 (concluding that a company cannot be liable under Title VII for “giving discretion to lower-level supervisors” unless all supervisors exercise the discretion in a discriminatory way), with *id.* at 377 (Ginsburg, J., concurring in part and dissenting in part) (“Wal-Mart’s delegation of discretion over pay and promotions is a policy uniform throughout all stores. The very nature of discretion is that people will exercise it in various ways. A system of delegated discretion . . . is a practice actionable under Title VII when it produces discriminatory outcomes.” (citing *Watson v. Fort Worth Bank & Tr.*, 487 U.S. 977, 990–91 (1988))).

15 See *id.* at 360 (majority opinion) (“One possible reading of [Rule 23(b)(2)] is that it applies *only* to requests for such injunctive or declaratory relief and does not authorize the class certification of monetary claims at all. We need not reach that broader question in this case, because we think that, at a minimum, claims for *individualized* relief (like the backpay at issue here) do not satisfy the Rule.”).

action lawyers had been smuggling certification of money damages class actions into the Rule for declaratory and injunctive class actions (Rule 23(b)(2)) and thereby evading the more difficult prerequisites to class certification found in Rule 23(b)(3).<sup>16</sup> That practice has now come to a halt. Even still, the class action bar has not been much deterred.<sup>17</sup>

2.

Justice Scalia's opinion in *Comcast* is also less significant than the sharp ideological division in the case might make it seem. The upshot of his opinion was that class action lawyers could not rely on experts at the class certification stage whose models did not match the class's legal theory.<sup>18</sup> In *Comcast*, the expert attempted to show why damages could be proven on a class-wide basis (thereby satisfying the predominance prerequisite of Rule 23(b)(3)), but the expert's model was based on the aggregation of four different antitrust theories, and only one of the theories had survived in the case.<sup>19</sup> It is hard to argue with Justice Scalia's view here, and the dissent did not so much argue with it as it did with the procedural somersaults the Court performed to get to the question in the first place.<sup>20</sup> Again, if Justice Scalia's

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16 See, e.g., Jeffrey H. Dasteel & Ronda McKaig, *What's Money Got to Do with It?: How Subjective, Ad Hoc Standards for Permitting Money Damages in Rule 23(b)(2) Injunctive Relief Classes Undermine Rule 23's Analytical Framework*, 80 TUL. L. REV. 1881, 1882–83 (2006) (“[F]ederal appellate and district courts (picking up on some ambiguous language in the Advisory Committee Notes accompanying Rule 23(b)(2)), have permitted damages claims to be certified under Rule 23(b)(2) as long as the claims for injunctive or declaratory relief ‘predominate’ over the claims for damages.”).

17 See Michael C. Harper, *Class-Based Adjudication of Title VII Claims in the Age of the Roberts Court*, 95 B.U. L. REV. 1099, 1119 (2015) (“Since the *Wal-Mart* decision, however, numerous courts have held that (b)(3) Title VII plaintiffs’ classes can be certified. Some courts have continued to endorse the practice, approved by some courts of appeals and not rejected in *Wal-Mart*, of certifying a mandatory (b)(2) class to consider injunctive relief and an opt-out (b)(3) class to consider individual monetary relief.”).

18 See *Comcast Corp. v. Behrend*, 133 S. Ct. 1426, 1433 (2013) (“[A] model purporting to serve as evidence of damages in this class action must measure only those damages attributable to that theory. If the model does not even attempt to do that, it cannot possibly establish that damages are susceptible of measurement across the entire class for purposes of Rule 23(b)(3).”).

19 See *id.* at 1434 (“[T]he model assumed the validity of all four theories of antitrust impact initially advanced by respondents: decreased penetration by satellite providers, overbuilder deterrence, lack of benchmark competition, and increased bargaining power. . . . This methodology might have been sound, and might have produced commonality of damages, if all four of those alleged distortions remained in the case.”).

20 See, e.g., *id.* at 1436 (Ginsburg, J., dissenting) (“While the Court’s decision to review the merits of the District Court’s certification order is both unwise and unfair to respondents, the opinion breaks no new ground on the standard for certifying a class action under Federal Rule of Civil Procedure 23(b)(3).”).

opinion has had any effect on the plaintiffs' bar at all, it has been only a modest one.<sup>21</sup>

3.

On the other side of the ledger is *Shady Grove*, where Justice Scalia's plurality opinion decided that the famous doctrine from *Erie Railroad Co. v. Tompkins*<sup>22</sup> forbids states from exempting their statutory damages causes of action from the federal class action device.<sup>23</sup> Despite the lack of ideological division in the vote in this case, I think what Justice Scalia had to say here was actually more significant than what he said in either *Wal-Mart* or *Comcast*. I say this because corporate class action enemy number one at the moment is the statutory damages class action.<sup>24</sup> For good reason. By design, statutory damages overcompensate plaintiffs in order to induce enough of them to sue individually to deter defendants from misconduct.<sup>25</sup> No one enacting these

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21 See Robert H. Klonoff, *Class Actions in the Year 2026: A Prognosis*, 65 EMORY L.J. 1569, 1618 (2016) ("Thus far, defendants have had little success in selling their interpretation of *Comcast*."); Richard Marcus, *Bending in the Breeze: American Class Actions in the Twenty-First Century*, 65 DEPAUL L. REV. 497, 508–09 (2016) ("This decision also cast something of a pall over class certification efforts. But it was not a tsunami. Consider what happened with the cases in which the Court vacated earlier certifications and remanded for reconsideration consistent with the *Comcast* analysis. On remand, both the Sixth and Seventh Circuit Courts of Appeals held that predominance could be satisfied even if damages required some individual treatment." (footnotes omitted)) (first citing *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 854 (6th Cir. 2013); then citing *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013)); Megan Toal, Note, *The Future of Class Actions in the Wake of Comcast v. Behrend*, 26 LOY. CONSUMER L. REV. 545, 577 (2014) ("While at first glance the holding appears to place a greater burden on consumers, the future does not seem hopeless for potential consumer classes. The case in *Comcast* could have easily been decided the other way if the damage model presented matched the accepted theories of liability to their respective damages. This suggests that while *Comcast* will undoubtedly have an impact on future cases, the applicability may not be as detrimental to consumers as commentators have suggested.").

22 304 U.S. 64 (1938).

23 See *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 401 (2010) (plurality opinion).

24 See Brief of the Chamber of Commerce of the United States of America & the International Ass'n of Defense Counsel as Amici Curiae in Support of Petitioner at 2, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (explaining that statutory damages pose a "grave concern to the business community because (as this case illustrates) alleged technical violations of regulatory statutes can often affect large numbers of people without actually injuring them"); Brief for Amici Curiae eBay Inc., Facebook, Inc., Google Inc., & Yahoo! Inc. in Support of Petitioner at 12, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016) (No. 13-1339) (arguing that technology companies with millions of users are "particularly vulnerable to . . . class complaints seeking even modest statutory damages for each violation or user . . . which can threaten absurd potential damage awards").

25 See Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2072 (2010) ("[S]tatutory-damages claims . . . were *designed* to overassess damages because it was assumed that these actions would be brought only a small fraction of the times defendants caused harm . . .").

statutes wanted *every* plaintiff to sue; that would result in massive overdeterrence.<sup>26</sup> Yet, that is exactly what happens when statutory damages are sought in a class action, and Justice Scalia's opinion basically says that state legislatures are unable to do anything about it—even when the class actions are born of state law causes of action—short of repealing their statutory damages remedies altogether, for individual cases as well as class cases.<sup>27</sup> That is a tough sell in state legislatures. Thus, Justice Scalia's opinion would have left corporate America without relief from its number one complaint about the class action system. Thankfully for corporate America, Justice Scalia's opinion commanded only four votes; Justice Stevens's concurring opinion gives state legislatures more leeway.<sup>28</sup> In any event, *Shady Grove* reminds us that, even in the class action space, Justice Scalia was more sophisticated than a reflexive vote for corporate interests.

## 4.

Justice Scalia's dissenting opinion in *Devlin* is even more confirmation of that point. There, the Court decided that class members who did not like a class settlement and who filed objections thereto could take an appeal of the approval of settlement.<sup>29</sup> As Justice Scalia's dissent predicted,<sup>30</sup> the Court's decision spawned what is known as the "objector blackmail" industry, where class members file objections *only* in order to take appeals *only* in order to delay final resolution of the settlement *only* in order to induce class action lawyers—eager to get their fees as soon as possible—to pay them to drop their appeals.<sup>31</sup> Justice Scalia thought that absent class members who filed

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26 See Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 196 (2015) ("I have questioned . . . whether statutory damages should be recoverable in class actions because such class actions may systematically over-deter wrongdoing."); Sheila B. Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 111 (2009) ("Combining the litigation incentives of statutory damages and the class action in one suit . . . creates the potential for absurd liability and over-deterrence.").

27 See *Shady Grove*, 559 U.S. at 401 ("Rule 23 permits all class actions that meet its requirements, and a State cannot limit that permission by structuring one part of its statute to track Rule 23 and enacting another part that imposes additional requirements.").

28 See *id.* at 416–17 (Stevens, J., concurring in part and concurring in the judgment) (elevating "state procedural rules" over Rule 23 when they are "part of the State's definition of substantive rights and remedies").

29 See *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) ("We hold that nonnamed class members like petitioner who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening.").

30 See *id.* at 22 n.5 (Scalia, J., dissenting) (warning of "'canned' objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests" (quoting *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000))).

31 See Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1624 (2009).

objections had no right to appeal because they were not “parties” to the judgment as required by the Federal Rules of Appellate Procedure.<sup>32</sup>

I have always found it very hard to argue with his analysis—no doubt in large part because I worked on the case with him!—and, had his views prevailed, it would have been much more difficult for absent class members to extract side payments from class counsel. Because these side settlements are secret, it is hard to know exactly how much money Justice Scalia’s views might have saved class action lawyers, but, in my experience, the sums class action lawyers feel compelled to pay in big cases can be *very* substantial—sometimes into the seven figures for a single objector. Indeed, the objector blackmail problem has become so pervasive and expensive that the federal rule-makers have now proposed amending Rule 23 to make it more difficult (but not impossible, as I had hoped)<sup>33</sup> for objectors to collect these payments by requiring any side payment to be approved by the district court judge who approved the class action settlement.<sup>34</sup> Again, this was another case where Justice Scalia’s views would have given the plaintiffs’ bar reason to cheer had those views prevailed.

### B.

As such, both sides can find something to like in the Justice Scalia of the Federal Rules. Not so the Justice Scalia of the FAA. His two FAA decisions have done more to hobble the class action than any other legal development since the Rule 23 class action was created in 1938. No Act of Congress, no amendment to the Rules, and no administrative regulation has undercut the class action more than his FAA opinions. Indeed, if his opinions are not overruled or the FAA is not amended by Congress, his opinions could very

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32 See FED. R. APP. P. 3(c)(1) (“The notice of appeal must . . . specify the party or parties taking the appeal . . .”); *Devlin*, 536 U.S. at 15–18 (Scalia, J., dissenting) (“The Court holds that . . . a nonnamed member of the class in a class action litigated by a representative member of the class . . . is a ‘party’ to the judgment approving the class settlement. . . . This will come as news to law students everywhere.”).

33 See Fitzpatrick, *supra* note 31, at 1666 (arguing that “[a]n inalienability rule” is “the optimal solution to the blackmail threat”); Letter from Brian T. Fitzpatrick et al. to the Hon. Jeffrey S. Sutton, Chair, Advisory Comm. on Appellate Rules (Aug. 22, 2012), <http://www.uscourts.gov/rules-policies/archives/suggestions/brian-t-fitzpatrick-12-ap-f> (urging the Advisory Committee on the Federal Rules of Appellate Procedure to amend Rule 42 to “bar [completely] class action objectors from dropping their appeals of district court approvals of class action settlements and fee awards in exchange for money from class counsel or the defendant”).

34 See COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE 215–16 (2016), <http://www.uscourts.gov/rules-policies/proposed-amendments-published-public-comment> (proposing amendments to Federal Rule of Civil Procedure 23(e) that would require court approval for payment to an objector or objector’s counsel).

well eventually lead to the near elimination of class lawsuits against businesses.<sup>35</sup>

Why did Justice Scalia do it? As I explain below, it is hard to blame it on textualism.

1.

The first of these opinions was *Concepcion*. The Concepcions had sued AT&T Mobility for fraud in deceiving them about the price of the cell phone they were given.<sup>36</sup> The question there was whether AT&T could include in its contract with the Concepcions a provision that obligated them to pursue any disputes in arbitration *on their own*; that is, they had to waive the right to bring or join a class action in court or in an arbitration.<sup>37</sup> The California Supreme Court had held that class action waivers like this one were unconscionable under general contract law principles;<sup>38</sup> AT&T argued that the FAA—which says that “[a] written provision . . . to settle [a controversy] by arbitration . . . shall be valid, irrevocable, and enforceable”<sup>39</sup>—preempted state contract law.<sup>40</sup> In another case that divided sharply along ideological lines, Justice Scalia sided with AT&T.

Did the text of the FAA command this result? If the FAA included only the language I quoted above, perhaps one might be able to at least argue that it did<sup>41</sup>—but it does not. The FAA goes on to create an exception to its command that arbitration agreements shall be enforceable: “save upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>42</sup> Is not unconscionability a “grounds . . . for the revocation of any contract”?<sup>43</sup> Yes it is. Perhaps if California law said that a class action waiver was unconscionable *only* in an arbitration contract and not in other contracts the answer might be no, but that is not what California law said; California law said that class action waivers were unconscionable in any contract, arbitration and nonarbitration alike.<sup>44</sup> As such, I have trouble understanding how the text of the FAA could have led Justice Scalia to his conclusion.

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35 See Fitzpatrick, *supra* note 26, at 163 (“I still see every reason to believe that businesses will eventually be able to eliminate virtually all class actions that are brought against them, including those brought by shareholders.”).

36 See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 337 (2011).

37 See *id.* at 337–38.

38 See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005).

39 9 U.S.C. § 2 (2012).

40 See *Concepcion*, 563 U.S. at 340.

41 But see *infra* text accompanying notes 66–70.

42 9 U.S.C. § 2.

43 *Id.*

44 See *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005) (“[T]he law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration.”).



Which is probably why Justice Scalia did not rely much on the text of the FAA in his opinion. Instead, he relied on the purposes behind the FAA.<sup>45</sup> He held that forcing businesses to defend against class actions would frustrate the purposes of the FAA, and, on that basis, the FAA preempted California law.<sup>46</sup>

I have my doubts that frustration-of-purpose preemption is consistent with textualism in the first place.<sup>47</sup> Justice Thomas, for example, refuses to go along with it.<sup>48</sup> But Justice Scalia—perhaps as a matter of stare decisis—followed the doctrine in many cases.<sup>49</sup> Even still, I have a hard time understanding why it led him to override California’s unconscionability law. Why did Justice Scalia think that forcing businesses to defend against class actions would frustrate the FAA’s purposes? He gave two reasons. First, he said that forcing businesses to defend class actions *in arbitration* would bog down arbitrations whereas the entire purpose of arbitration was to streamline things.<sup>50</sup> Second, he said that forcing businesses to defend class actions *in arbitration* would make things so risky for businesses—because they generally have no right to appeal arbitrations if they lose<sup>51</sup>—that they would flee arbitration altogether;<sup>52</sup> the FAA, Justice Scalia said, sought to facilitate rather than discourage arbitration.<sup>53</sup>

But there are two problems with Justice Scalia’s reasons. The first problem is that both of these reasons presume, as my italics in the previous paragraph show, that striking the class action waiver in AT&T’s arbitration clause as unconscionable would have meant that AT&T would have been forced to

45 See, e.g., *Concepcion*, 563 U.S. at 343–52 (holding California law preempted because it “stand[s] as an obstacle to the accomplishment of the FAA’s objectives”).

46 *Id.* at 352 (“Because it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,’ California’s *Discover Bank* rule is preempted by the FAA.” (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941))).

47 See generally, e.g., Daniel J. Meltzer, *Preemption and Textualism*, 112 MICH. L. REV. 1 (2013); Note, *Preemption as Purposivism’s Last Refuge*, 126 HARV. L. REV. 1056 (2013).

48 See Catherine M. Sharkey, *Against Freewheeling, Extratextual Obstacle Preemption: Is Justice Clarence Thomas the Lone Principled Federalist?*, 5 N.Y.U. J.L. & LIBERTY 63 (2010).

49 See *id.* at 73–74 (“Justice Scalia . . . habitually votes to uphold implied preemption.”).

50 See *Concepcion*, 563 U.S. at 344, 348 (arguing that, because “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment,” “the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA”).

51 See *id.* at 350 (noting that the FAA allows courts to reverse arbitration awards only in very limited circumstances).

52 See *id.* at 350–51 (arguing that, because “class arbitration greatly increases risks to defendants,” it is “hard to believe that defendants would bet the company with no effective means of review”); *id.* at 351 n.8 (“It is not reasonably deniable that requiring consumer disputes to be arbitrated on a classwide basis will have a substantial deterrent effect on incentives to arbitrate.”).

53 See *id.* at 345 (“[O]ur cases place it beyond dispute that the FAA was designed to promote arbitration.”).

defend against a class action *in arbitration rather than in court*. But, as David Schwartz has shown, that is not in fact what would have happened.<sup>54</sup> AT&T's arbitration agreement included a clause that invalidated the entire arbitration agreement if the class action waiver was found unenforceable; thus, class arbitration would not have been possible unless both sides—including AT&T—came to a new agreement to do it.<sup>55</sup> Absent a new agreement, any class action would have occurred in court: that is where the Concepcions filed their class action, and, had the Supreme Court affirmed rather than reversed the denial of AT&T's motion to compel arbitration, that is precisely where the class action would have proceeded. Crisis averted.

The second problem is with Justice Scalia's notion that the FAA's purpose was to facilitate arbitration agreements. This is true as far as it goes, but it does not go very far. The FAA does not apply to all arbitration agreements; it applies only to arbitration agreements in a "maritime transaction or a contract evidencing a transaction involving commerce."<sup>56</sup> As scholars have demonstrated, this language was understood in 1925 to cover only transactions between *merchants*.<sup>57</sup> Indeed, members of Congress expressly disavowed touching either consumer or employment contracts—and even went so far as to make that explicit with respect to employment.<sup>58</sup> (In a prior

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54 See David S. Schwartz, *Justice Scalia's Jiggery-Pokery in Federal Arbitration Law*, 101 MINN. L. REV. HEADNOTES 75, 88 (2016).

55 See *id.*

56 See 9 U.S.C. § 2 (2012).

57 See, e.g., Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 271 (2015) ("Courts initially limited arbitration to use for resolving commercial disputes between merchants." (citing Andrea Doneff, *Is Green Tree v. Randolph Still Good Law? How the Supreme Court's Emphasis on Contract Language in Arbitration Clauses Will Impact the Use of Public Policy to Allow Parties to Vindicate Their Rights*, 39 OHIO N.U. L. REV. 63, 69 (2012))); Imre Stephen Szalai, *More than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31, 57 n.178 (2014) ("[T]he FAA was designed for simple contract disputes between merchants, not complex statutory claims of a public nature between parties of unequal bargaining power."); Imre S. Szalai, *The Federal Arbitration Act and the Jurisdiction of the Federal Courts*, 12 HARV. NEGOT. L. REV. 319, 359 (2007) ("Based on the examples given by commercial interests during the 1924 Hearings, it appears the FAA was intended to cover disputes arising in the 'daily business transactions' of 'merchants' who were citizens of different states . . ." (footnote omitted) (citing *id.* at 353–55 nn.164–69)).

58 See Leslie, *supra* note 57, at 309 ("Congress did not intend the FAA to facilitate firms imposing arbitration clauses on consumers through contracts of adhesion. . . . For example, in colloquy, when senators raised the issue of contracts of adhesion, the bill's supporters testified that the FAA would not apply to such situations."); *id.* at 310–11 ("During the earliest hearings for the FAA, concerns were expressed that the Act could cover employment . . . . The Act's text was amended [to exclude] 'contracts of employment of . . . any . . . class of workers engaged in foreign or interstate commerce.' . . . [T]he amendment appeased labor interests, who removed their opposition to the bill." (footnote omitted) (quoting 9 U.S.C. § 1 (2012))); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 147 (2006) ("[N]o one in 1925—not the drafters, the Secretary of Commerce, organ-

decision, an ideologically divided Court largely eviscerated this exception in the FAA for employment contracts.<sup>59</sup>)

It is true that much of this historical understanding of the FAA is found in legislative history, and we all know that Justice Scalia was no fan of legislative history. Indeed, he rejected in a footnote any reliance on legislative history in *Concepcion*.<sup>60</sup> But Justice Scalia was less insistent in his opposition to legislative history when gleaning legislative purpose than he was when construing the words of the statute.<sup>61</sup> As I noted, Justice Scalia's opinion in *Concepcion* did not rest on text; it rested on purpose. As such, I would not have expected him to dismiss the historical context of the FAA so quickly.

2.

In my view, his opinion in *Italian Colors* fares only little better. That case, too, involved a class action waiver, but it did not involve the FAA's preemption of state law. Instead, the question was whether the enforcement of the waiver would conflict with another *federal* law.<sup>62</sup> In *Italian Colors*, American Express entered into agreements with merchants that included arbitration clauses with class action waivers.<sup>63</sup> A class of merchants sued American Express in court for illegal tying in violation of the Sherman Antitrust Act<sup>64</sup> and argued that enforcing the class action waiver would undermine the purposes of the Sherman Act because, without the aggregation of claims in a class action, their antitrust claims would not be financially viable and the Act would go unenforced.<sup>65</sup>

Because the savings clause of the FAA was not at issue in *Italian Colors*, the only operative text was the clause that says “[a] written provision . . . to

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ized labor, nor members of Congress—believed that the FAA applied to employment contracts.”).

59 See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

60 *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 346 n.5 (2011).

61 *Compare, e.g., United States v. Fausto*, 484 U.S. 439, 444 (1988) (opinion of Scalia, J.) (using legislative history to determine the purpose of the Civil Service Reform Act of 1978), and *Edwards v. Aguillard*, 482 U.S. 578, 631 (1987) (Scalia, J., dissenting) (“The legislative history gives ample evidence of the sincerity of the Balanced Treatment Act’s articulated purpose.”), with ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 56 (2012) (“[T]he purpose must be derived from the text, not from extrinsic sources such as legislative history . . . .”), and *id.* at 376 (“[T]he use of legislative history to find ‘purpose’ in a statute is a legal fiction that provides great potential for manipulation and distortion.”).

62 See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013) (“We granted certiorari . . . to consider the question ‘[w]hether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.’” (second and third alterations in original) (quoting Petition for a Writ of Certiorari at i, *Italian Colors*, 133 S. Ct. 2304 (No. 12-133), 2012 WL 3091064)).

63 *Id.*

64 *Id.*

65 See *id.* at 2310.

settle [a controversy] by arbitration . . . shall be valid, irrevocable, and enforceable . . .”<sup>66</sup> As I noted above, one could take the view that this clause commands the enforcement of *whatever* is in an arbitration clause, including a class action waiver. But this was not Justice Scalia’s view. He suggested, for example, that the FAA would not compel the enforcement of provisions in arbitration agreements that make “filing and administrative fees . . . so high as to make access to the forum impracticable.”<sup>67</sup> As I noted, the plaintiffs in *Italian Colors* argued that barring class actions *would also* make access to the forum impractical, but Justice Scalia distinguished his filing fees from their class actions: the first, he said, involved getting in the door of the courthouse, whereas the other had to do with what happened once you were there.<sup>68</sup> Only the first was outside the FAA’s purview.<sup>69</sup>

Whatever else one may think of this distinction, it is hard to see anything in the text of the FAA that justifies it. Thus, *Italian Colors*, too, must have come down to a question of legislative purpose. On the one hand, there was the legislative purpose behind the FAA to facilitate arbitration. On the other hand, there was the legislative purpose of the Sherman Act to stamp out anti-competitive agreements.<sup>70</sup> What does one do when the purposes of two statutes conflict with one another?

I think this is actually a very interesting question. It is the kind of question you would expect Justice Scalia to dig into with a thoughtful analysis. For example, perhaps the Court should do the same thing when the purposes of two statutes conflict that it does when the texts of two statutes conflict: pick the more recent statute over the older one, or the more specific statute over the more general one.<sup>71</sup>

But that is not what Justice Scalia did. In the midst of the same sharp ideological divide as in *Concepcion*, he simply picked the FAA. Justice Scalia’s

66 9 U.S.C. § 2 (2012).

67 *Italian Colors*, 133 S. Ct. at 2310–11.

68 *See id.*

69 *See id.* at 2312.

70 There is nothing in the text of the Sherman Act that says anything about the right to proceed as a class. Only Rule 23 says that. FED. R. CIV. P. 23.

71 *See, e.g., RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (“The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.”); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 285 (2007) (holding that newer, securities-related statutes had impliedly repealed inconsistent provisions in older, antitrust-related statutes); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 834 (1976) (“[A] precisely drawn, detailed statute pre-empts more general remedies.”); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (“In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.” (citing *Georgia v. Pa. R.R. Co.*, 324 U.S. 439, 456–57 (1945))); *Wood v. United States*, 41 U.S. (16 Pet.) 342, 363 (1842) (“[T]here must be a positive repugnancy between the provisions of the new laws, and those of the old; and even then the old law is repealed by implication only pro tanto, to the extent of the repugnancy.”).

opinion started from the premise that only a “contrary congressional command” in the text of the Sherman Act could override the purpose of the FAA.<sup>72</sup> But why should we start from the premise that the FAA’s purpose should be vindicated unless Congress explicitly says otherwise instead of the premise that the Sherman Act’s purpose should be vindicated unless Congress explicitly says otherwise? The Justice did not say.

3.

It is difficult to overstate the significance of *Concepcion* and *Italian Colors*. As I have explained elsewhere, there is now little in either state or federal law that can stop businesses from including class action waivers in their arbitration agreements.<sup>73</sup> This is so significant because most of the class actions businesses face today come from plaintiffs who already must agree to—or easily can be made to agree to—contractual language that includes arbitration clauses.<sup>74</sup> Businesses can now insulate themselves from class actions brought by all of these plaintiffs. Indeed, the only significant group of class action plaintiffs who do not fall into this category are corporate shareholders. Shareholders have never been forced to arbitrate their securities fraud disputes.<sup>75</sup> But there is nothing in federal law that prevents them from being forced to do so, and it may be only a matter of time until they are.<sup>76</sup>

In short, if *Concepcion* and *Italian Colors* are not overruled or the FAA is not amended by Congress, I am not sure how many class actions we will have in future years.<sup>77</sup> This is why I believe that no other Supreme Court Justice has done more to hobble the class action than Justice Scalia.

## II.

Because it is so difficult to square the results in *Concepcion* and *Italian Colors* with textualism—and, unlike most of the critics of these decisions, I say

72 See *Italian Colors*, 133 S. Ct. at 2309 (upholding class action waiver because “[n]o contrary congressional command require[d]” otherwise).

73 See Fitzpatrick, *supra* note 26, at 179 (“[I]t is now clear that pre-dispute arbitration agreements can be enforced for virtually every cause of action that is brought against businesses in class actions today except for securities fraud, and it is hard to see how securities fraud will escape for much longer. . . . [A]fter *Concepcion* and *American Express*, it is hard to see how anything in the law can stop class action waivers imbedded in an otherwise enforceable arbitration clause.”).

74 See *id.* at 176 (“[A]t least in theory . . . businesses . . . can ask all of the[ ] plaintiffs [who sue them in class actions—i.e., consumers, employees, and shareholders] to consent to pre-dispute . . . arbitration clauses with class action waivers.”).

75 See *id.* at 181.

76 See *id.* at 182–83 (“[I]t is difficult to find something in federal securities law that says shareholder claims cannot be arbitrated. Indeed, the Supreme Court has held that claims brought under *the very same provisions of the securities laws* can be arbitrated when brought against brokers.” (emphasis in original)).

77 See *id.* at 198 (“At the end of the day, then, I remain pessimistic—pessimistic that either the law or the market can save class actions against businesses from a premature demise.”).

this as someone who is very sympathetic to textualism—many commentators have assumed that Justice Scalia was animated by his ideological preferences in these cases. This may very well have been. Although the Justice went to great lengths to separate his personal views from his jurisprudential ones—I witnessed this first hand as one of his law clerks—he was a human being and it was no more possible for the Justice than it is for any of the rest of us to entirely insulate his personal ideological views from seeping—even if only subconsciously—into the workplace.<sup>78</sup> Moreover, there is little doubt that Justice Scalia believed like many of his conservative brethren that there is too much litigation in our country and that modern litigation has sapped our economic growth and hampered our pursuit of happiness. Indeed, in some of his opinions in class action cases, he betrayed this view rather explicitly.<sup>79</sup>

But is it consistent with the conservative (and often libertarian)<sup>80</sup> principles that I shared with Justice Scalia to permit corporations to opt out of class action liability? I am not so sure. Corporations obviously want this freedom, but there is sometimes a difference between what is consistent with conservative and libertarian principles and what is good for corporate interests.<sup>81</sup> It is certainly true that conservatives and libertarians believe in the freedom of contract, and class action waivers are contracts freely agreed to between corporations and their customers and employees.<sup>82</sup> But most conservatives—and, yes, even libertarians—do not believe that *all* contracts should be enforced. For example, most conservatives and libertarians believe that con-

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78 See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 863 (1989) (“Now the main danger in . . . judicial interpretation of any law . . . is that the judges will mistake their own predilections for the law. Avoiding this error is the hardest part of being a conscientious judge; perhaps no conscientious judge ever succeeds entirely.”); *cf. id.* (“As for the fact that originalism is strong medicine, and that one cannot realistically expect judges (probably myself included) to apply it without a trace of constitutional perfectionism: I suppose I must respond that this is a world in which nothing is flawless, and fall back upon G.K. Chesterton’s observation that a thing worth doing is worth doing badly.”).

79 See, e.g., *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 4 (2010) (opinion of Scalia, J.) (citing “[n]ational concern over abuse of the class-action device”).

80 See, e.g., Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 184 (2005) (collecting cases to illustrate that “Justice Scalia has occasionally shown a libertarian, pro-defendant streak in the past”).

81 See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 429 (2003) (Scalia, J., dissenting) (rejecting substantive due process limits on punitive damages); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 598–607 (1996) (Scalia, J., dissenting) (same).

82 See Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT’L L. 1189, 1195 (2003) (“The freedom-of-contract reasoning that underlies the legal doctrine on arbitration . . . aligns itself with a conservative U.S. domestic political ideology.”); Robert B. Hillenbrand, Note, *Don’t Fear the Reaper: Class Arbitration After Sutter and Italian Colors*, 69 DISP. RESOLUTION J. 35, 61 (2014) (“The conservative wing of the Court, as a reflection of the political Right, has historically endorsed arbitration ‘as consistent with freedom of contract.’” (footnotes omitted) (quoting William W. Park, *The Politics of Class Action Arbitration: Jurisdictional Legitimacy and Vindication of Contract Rights*, 27 AM. U. INT’L L. REV. 837, 840–41 (2012))).

tracts to fix prices or contracts induced by fraudulent representations should be overridden.<sup>83</sup>

The reason most of us believe that these contracts should not be enforced is because even we believe markets need government regulation. We disagree with liberals not over *whether* there should be government regulation of markets but *when* that regulation is appropriate. Conservatives and libertarians tend to believe it is appropriate to regulate only to ensure that the market can function in the first place—e.g., to supply ground rules for competition.<sup>84</sup> We believe, for example, that the government should force

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83 See *infra* notes 86–87. Of course, it is not always easy to identify who is a conservative and who is a libertarian. In the pages that follow, I rely on the least demanding metric: people who describe themselves as such (or who describe themselves as “classical liberals,” the more academic term for libertarians). It is also true that conservatives and libertarians do not agree on everything, including many questions of economic policy. See, e.g., Symposium, *Constitutional Protections of Economic Activity: How They Promote Individual Freedom*, 11 GEO. MASON U. L. REV. 1 (1988). Nonetheless, we tend to agree much more often than we disagree on the issues that follow.

84 See, e.g., MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 34 (1962) (“A government which maintained law and order, defined property rights, served as a means whereby we could modify property rights and other rules of the economic game, adjudicated disputes about the interpretation of the rules, enforced contracts, promoted competition, provided a monetary framework, engaged in activities to counter technical monopolies and to overcome neighborhood effects widely regarded as sufficiently important to justify government intervention, and which supplemented private charity and the private family . . . would clearly have important functions to perform. The consistent liberal is not an anarchist.”); MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* 30 (1980) (“Th[e] role of government also includes facilitating voluntary exchanges by adopting general rules—the rules of the economic and social game that the citizens of a free society play.”); FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 222 (1978) [hereinafter HAYEK, *LIBERTY*] (“[I]t is the character rather than the volume of government activity that is important. A functioning market economy presupposes certain activities on the part of the state; there are some other such activities by which its functioning will be assisted; and it can tolerate many more, provided that they are of the kind which are compatible with a functioning market.”); F.A. HAYEK, *THE ROAD TO SERFDOM* 37 (1944) [hereinafter HAYEK, *ROAD*] (“[I]n order that competition should work beneficially, a carefully thought-out legal framework is required.”); *id.* at 40 (“An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other.”); LUIGI ZINGALES, *A CAPITALISM FOR THE PEOPLE: RECAPTURING THE LOST GENIUS OF AMERICAN PROSPERITY* xxv (2012) (“My . . . focus [is] on the power of competition. It is only from competition among conflicting economic interests that we improve everybody’s welfare. . . . Competition does not work, however, when legal protection is weak. . . . For this reason, I recognize the importance of rules.”); *id.* at 189 (“Nowadays, most economists who oppose regulation aren’t endorsing the idea that unregulated markets always deliver the best outcomes. Rather, they mistrust the political process that shapes regulation. If the regulatory process is captured by vested interests, the regulatory fixes may in fact be worse than the market failures.”); *id.* at 232 (“Many free-market economists think that well-functioning markets arise naturally in a laissez-faire economy. Unfortunately, this is not the case. A free market’s infrastructure and liquidity—the presence of many buyers and sellers at the same time—are the ultimate public good: everybody benefits with no cost.” (emphasis omitted) (footnote omitted)); *id.* at 242 (“[M]arkets do not arise spontaneously; they are human

people to pay up when they breach their (otherwise-enforceable) contracts with one another,<sup>85</sup> to pay up when they commit fraud against one another,<sup>86</sup> and to pay up when they agree with one another to fix prices.<sup>87</sup> We do not believe that the market alone can remedy these things with, say,

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constructs and depend on a functional legal framework. The design of the framework and its enforcement affect how markets function and how the surpluses they generate are distributed.”).

85 See, e.g., RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 20 (2014) (noting that government must “enforce contractual promises”); HAYEK, *LIBERTY*, *supra* note 84, at 140–41 (“It is one of the accomplishments of modern society that freedom may be enjoyed by a person with practically no property of his own . . . and that we can leave the care of the property that serves our needs largely to others. . . . That other people’s property can be serviceable in the achievement of our aims is due mainly to the enforceability of contracts.”); *id.* at 141 (“The rules of property and contract are required to delimit the individual’s private sphere wherever the resources or services needed for the pursuit of his aims are scarce and must, in consequence, be under the control of some man or another.”); CHARLES MURRAY, *WHAT IT MEANS TO BE A LIBERTARIAN* 9 (1997) (“The second legitimate use of the police power is to enable people to enter into enforceable voluntary agreements—contracts. . . . The right of contract means that a third party—ultimately the government—will guarantee that each party is held to account.”); Richard A. Epstein, *The Uneasy Marriage of Utilitarian and Libertarian Thought*, 19 QUINNIPIAC L. REV. 783, 786 (2000) [hereinafter Epstein, *The Uneasy Marriage*] (“These first four rules, autonomy, property, contract, and tort, . . . remain a part and parcel of every sensible system of legal rules.”); Richard A. Epstein, *The Libertarian Quartet*, REASON, Jan. 1999, at 62–63 (“[H]umans . . . must have a *law of contract* . . .”).

86 See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* 25 (1992) (“The exchange need only be monitored for the process whereby it takes place, that is, to ensure that force and fraud and incompetence are not involved.”); EPSTEIN, *supra* note 85, at 15–16 (“[T]he state [can] deal with the problems that call for government intervention even under the classical liberal view: . . . fraud in all its manifold forms; . . . the regulation of monopoly . . .”); *id.* at 303 (“[C]lassical liberal theory . . . limit[s] government intervention . . . to cases of force, fraud, and monopoly.”); *id.* at 407 (“Fraud in commerce poses a grave threat to the operation of voluntary markets. . . . When the incorrect estimations of value derive solely from the misleading acts of one party to the agreement, the willingness in common law to allow damages or rescission makes sense . . .”); HAYEK, *ROAD*, *supra* note 84, at 40–41 (noting that “the most essential prerequisite” of “[a]n effective competitive system” is “the prevention of fraud and deception”); MURRAY, *supra* note 85, at 60 (endorsing laws “against fraud and deceptive practice”); ZINGALES, *supra* note 84, at xxv (“When shareholders are not well protected, competition favors the most crooked managers . . . . When investors are ignorant, competition favors the biggest swindlers, not the best money managers. When customers are poorly informed, competition induces firms to exploit this ignorance rather than to improve efficiency.”); *id.* at 233 (“[S]ecurities markets need to be regulated because in anonymous markets, reputation cannot restrain fraud and abusive practices.”); Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 807 (2008) (“Without question the first order of public business is the control of fraud . . . .”); Epstein, *The Uneasy Marriage*, *supra* note 85, at 795 (“I am quite happy to recognize—indeed, to insist upon—limitations of freedom of contract [for] . . . fraud . . . [and that] restrain trade . . . .”); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 298 (1975) (“The case against fraudulent misrepresentation is easy to make out. . . . [N]o social good can derive from the systematic production of misinformation.”).



consumer boycotts; we believe the government should intervene with judicial remedies. Liberals believe this, too, but they believe much more: they believe it is appropriate to regulate the market in order to serve any number of other ends, such as to redistribute wealth, to correct people's misapprehensions about their own preferences, etc.<sup>88</sup>

87 Most conservatives and libertarians support at least those antitrust laws that prohibit horizontal price fixing (and many support the laws against monopolization, too), but there is a significant minority in dissent even on horizontal price fixing. See Michael E. DeBow, *What's Wrong With Price Fixing: Responding to the New Critics of Antitrust*, 12 REGULATION 44, 44–45 (1988) (noting that, although “scholars identified with the ‘Chicago school’ (particularly Robert H. Bork, Richard A. Posner, and Frank H. Easterbrook) . . . have defended the prohibition of horizontal price-fixing agreements” and “the prohibition on horizontal price-fixing has enjoyed consistent support from lawyers and economists across the American political spectrum,” there is a “small but tenacious group” “identified with the ‘Austrian school’ of economics” and “of libertarian origin” that argue “for the repeal of all antitrust statutes” (emphasis omitted)); Brandon Kressin, *The Debate Within Libertarianism on Antitrust Law*, N.Y.U. J.L. & LIBERTY BLOG (Nov. 8, 2011), <http://lawandlibertyblog.com/nyujll/ujll.com/2011/11/debate-within-libertarianism-on.html> (“[Although] the majority of libertarians subscribe to the ‘consequentialist’ or ‘utilitarian school,’ there is a “smaller . . . subset of . . . ‘deontological’ or ‘natural rights’ libertarians” who “take their cues from moral and ethical philosophy rather than economics,” and “[t]here is . . . one major area of public policy on which consequentialist and deontological libertarians are hopelessly split: antitrust law.”). Compare EPSTEIN, *supra* note 85, at 37 (noting that “antitrust laws . . . were all to the good when they restricted various territorial and price-fixing arrangements”), and ZINGALES, *supra* note 84, at 5 (noting that “antitrust law” is “promarket but sometimes antibusiness”), and *id.* at 37 (“The genius of capitalism is the continuous trial-and-error process it encourages. Without trial and error, it is exceedingly difficult to produce innovation and growth. Accordingly, the purpose of an antitrust law is to prevent excessive consolidation, which deprives consumers of the benefits of innovation [and growth].”), and *id.* at 47 (“[F]or markets to work . . . , the playing field must be kept level and open to new entrants. When these conditions fail, free markets degenerate into inefficient monopolies—and when these monopolies extend their power to the political arena, we enter the realm of crony capitalism.”), and Richard A. Epstein, *Monopoly Dominance or Level Playing Field? The New Antitrust Paradox*, 72 U. CHI. L. REV. 49, 49 (2005) (“[T]he wisest course of action is to confine the operation of antitrust law to cartels and mergers that have the consequence of raising prices and restricting output.”), and Epstein, *The Uneasy Marriage*, *supra* note 85, at 795 (“I am quite happy to recognize—indeed, to insist upon—limitations of freedom of contract [for] . . . fraud . . . [and for those that] restrain trade . . . .”), with DOMINICK T. ARMENTANO, ANTITRUST AND MONOPOLY: ANATOMY OF A POLICY FAILURE 32 (1982) (arguing that “[p]erfect competition theory is both illogical and irrelevant,” and, therefore, “the legitimacy of all antitrust policy must be open to the most serious question,” including the notion that “horizontal price agreements [are] inherently inefficient and antisocial”).

88 See, e.g., EPSTEIN, *supra* note 85, at 16 (describing the goals of non-classical liberals as “the equalization of wealth and the elimination of private forms of (invidious) discrimination”); JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION: THE HIDDEN LESSON OF THE SUBPRIME CRISIS 162–63 (2015) (arguing that “[m]ost regulations supported by liberals serve [one of] four purposes,” including ensuring “equal opportunity”); *id.* at 22 (“[L]iberals are not against markets. . . . What they want are just markets.”); *id.* at 91 (“One reason for . . . regulations is to protect us from mistakes we are likely to make and likely to regret.”); CLIFFORD WINSTON, GOVERNMENT FAILURE VERSUS MARKET FAILURE:

Are class action waivers sometimes inconsistent with these ground rules of the market? I think they very well may be and I say this for two reasons. First, if these are indeed *necessary* ground rules, then market participants cannot be permitted to opt out of them. Although it may be individually rational for any pair of market participants to do so, if too many pairs in fact do so, we all end up worse off because the market unravels. As Einer Elhauge has explained:

[C]ompetitive markets are a public good, from which each buyer in a market benefits, whether or not that buyer contributes to the creation of that public good by rejecting conduct or agreements that keep that market competitive. Thus, buyers inevitably have incentives not to contribute; instead they will predictably consent to conduct and arbitration waivers that result in uncompetitive markets.<sup>89</sup>

Although Professor Elhauge was writing about antitrust laws, I think his analysis applies just as well to the other ground rules needed for competitive markets to function, like rules against fraud and rules against breaching contracts. In modern markets, where participants often do not enter into bespoke transactions but standardized ones, if too many consumers sign liability waivers, merchants will know they will not be held accountable even for misconduct against the consumers who do not sign the waivers.<sup>90</sup> This may be why, when conservative and libertarian scholars endorse liability waivers, it is not for breach of contract, fraud, or price-fixing.<sup>91</sup>

Second, class action waivers are often tantamount to outright waivers of liability. Many—if not most—contractual breaches, frauds, and price-fixing schemes are not worth the money to pursue on a non-class basis.<sup>92</sup> Thus, in many cases, it is the class action, or it is nothing at all.<sup>93</sup> And, as I explained, “nothing at all” is *not* the conservative approach to regulating the market.

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MICROECONOMICS POLICY RESEARCH AND GOVERNMENT PERFORMANCE 10 (2006) (contrasting conservative regulation “to enhance microeconomic efficiency” with liberal “government interventions whose explicit objective is to redistribute income” or to “ensur[e] fairness”).

89 Einer Elhauge, *How Italian Colors Guts Private Antitrust Enforcement by Replacing It with Ineffective Forms of Arbitration*, 38 FORDHAM INT’L L.J. 771, 775 (2015).

90 See Keith N. Hylton, *The Economics of Class Actions and Class Action Waivers*, 23 SUP. CT. ECON. REV. 305, 324–26 (2015) (explaining why in the “common care setting” liability waivers may be inefficient).

91 See, e.g., Richard A. Epstein, *Contractual Principle Versus Legislative Fixes: Coming to Closure on the Unending Travails of Medical Malpractice*, 54 DEPAUL L. REV. 503, 509 (2005) (endorsing waivers for first-party tort liability); Keith N. Hylton, *Agreements to Waive or Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 218–19 (2000) (same). Compare Hylton, *supra* note 90, at 312 (endorsing waivers for first-party tort liability), with *id.* at 324 (casting doubt on waivers for fraud), and *id.* at 335 (casting doubt on waivers for price-fixing).

92 See, e.g., *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (“In most class actions . . . individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation.”).

93 See, e.g., Stephen Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. LEG. 711, 743–44, 746 (2016) (noting that “current law” effectively “converts

It is true that we could, as they do in Europe, rely on the government rather than the private bar to enforce the ground rules of the market. But, as I explain at great length elsewhere, there is nothing “conservative” about that, either.<sup>94</sup> Historically, it has been *liberals* and not conservatives who embraced the government over the private bar to enforce market rules. Thus, for example, in the late 1970s it was the *Carter Administration* and Senator *Ted Kennedy* who wanted to replace the small-stakes class action with government enforcement.<sup>95</sup>

For this reason, I was very surprised to see several conservative and libertarian academics sign an amicus brief in support of AT&T in the *Concepcion* case.<sup>96</sup> Their brief said we should not worry about companies exculpating themselves from legal liability because the government can bring suit when private litigants could not.<sup>97</sup> Nowhere does the brief explain why reliance on the government rather than the private bar is the more conservative way to enforce market regulations. I don’t think it is. And, if I am right about that, I am not sure Justice Scalia should have been so enthusiastic about class action waivers.

#### CONCLUSION

Justice Scalia decided thousands of cases, and, of course, he could not get all of them right. To his credit, he was quick to admit when he had made a mistake; he kept a mental list of the cases that he had second thoughts about. I would like to think that, if he had not left us so quickly, *Concepcion* and *Italian Colors* might have joined that list.

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some adhesive arbitration agreements into exculpatory clauses and enforces them in circumstances in which comparable non-arbitration agreements would be unenforceable”).

94 See BRIAN T. FITZPATRICK, *THE CONSERVATIVE CASE FOR CLASS ACTIONS* (forthcoming, University of Chicago Press).

95 See Stephen B. Burbank & Sean Farhang, *Class Actions and the Counterrevolution Against Federal Litigation*, University of Pennsylvania Law School Faculty Scholarship Paper No. 1555, at 12 (2015).

96 See Brief Amici Curiae of Distinguished Law Professors in Support of Petitioner at 30, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (No. 09-893) (“[T]he exculpatory clause rationale suffers from a flawed premise—that the alleged inability of consumers to pursue low-value claims will result in companies escaping liability and undermine general deterrence. This theory neglects the fact that state attorneys general . . . and appropriate federal agencies have oversight . . .”). At least one conservative scholar other than me has opposed AT&T’s position on class action waivers. See *Ware*, *supra* note 93, at 725, 751–52.

97 See *id.*

