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WINNING THE FLSA BATTLE: HOW CORPORATIONS USE ARBITRATION CLAUSES TO AVOID JUDGES, JURIES, PLAINTIFFS, AND LAWS

JULIUS GETMAN[†] & DAN GETMAN[‡]

INTRODUCTION

The two congressional statutes that most directly regulate labor relations are the National Labor Relations Act (“NLRA”)¹ and the Fair Labor Standards Act (“FLSA”).² Each of these statutes is based on the premise that working conditions should not be left to the market through unregulated individual contracts of employment.³ It was understood by Congress, in enacting these two statutes, that individually negotiated contracts would put workers at a significant bargaining disadvantage.⁴ Such contracts—drafted by the employer and enforced by it—are understood to reflect power and not the “meeting of minds” on which traditional contract law was based. The NLRA specifically states that the Act’s purpose is to achieve

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¹ 29 U.S.C. §§ 151–169 (2006).

² 29 U.S.C.A. §§ 201–219 (West 2011).

³ See E. Merrick Dodd, *The Supreme Court and Fair Labor Standards, 1941–1945*, 59 HARV. L. REV. 321, 366 (1946) (“[A]ny minimum wage law is necessarily an assertion of a legislative policy against leaving wage determination to unregulated freedom of contract.”); see also Jonathan Fox Harris, *Worker Unity and the Law: A Comparative Analysis of the National Labor Relations Act and the Fair Labor Standards Act, and the Hope for the NLRA’s Future*, 13 N.Y. CITY L. REV. 107, 123 (2009) (“While the NLRA contains *procedural* rights ‘essential to any effort to raise wages and improve working conditions beyond the minimums prescribed by law,’ the FLSA contains *substantive* rights that ‘set basic floors on workplace conditions.’” (citing JENNIFER LYNN GORDON, *SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS* 152 (2005))).

⁴ See 29 U.S.C. § 151; see also *Murray v. Noblesville Milling Co.*, 131 F.2d 470, 473 (7th Cir. 1942) (“[T]he Act has two major purposes: (1) to reinforce employee bargaining power concerning hourly wages by prohibiting wage rates below a certain level, and (2) to reinforce employee bargaining power concerning hours of labor by exerting financial pressure upon the employer to limit hours to a certain level.”).

“equality of bargaining power between employers and employees” by “encouraging the practice and procedure of collective bargaining.”⁵ The FLSA, because of “labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers[,]” requires that contracts of employment conform to a series of Federal Standards.⁶

Although it is inevitably difficult to offset bargaining-power imbalance through legislation, it is generally agreed that these statutes have played a significant role in upgrading the economic status and dignity of American workers.⁷

In recent years, however, employers supported by Congress, and the Courts, have been able to chip away at the policies of both statutes. The guarantees of the NLRA have been weakened as employers have learned to use the advantage that comes with management to defeat employee efforts at unionization and to render collective bargaining less effective and more dangerous for workers.

I. FLSA BASICS

As the NLRA has become less effective, the FLSA has become increasingly necessary to protect the working and living standards of employees. But the FLSA has itself been rendered less effective through management manipulation. Two significant illustrative areas of abuse are the garment and maritime industries. In the domestic garment industry, foreign workers are often excluded from the protection of the FLSA by virtue of the system of subcontracting, which makes them employees of small, marginal employers, either not covered by the FLSA or unable to meet its requirements.⁸ In the maritime

⁵ 29 U.S.C. § 151.

⁶ 29 U.S.C. § 202.

⁷ See, e.g., Daniel V. Yager & Sandra J. Boyd, *Reinventing the Fair Labor Standards Act To Support the Reengineered Workplace*, 11 LAB. LAW. 321, 323 (1996) (“The costs of failing to comply are significant. In fiscal year 1992 alone, the DOL assessed \$142 million in damages for overtime violations and settled claims for another \$119 million.”).

⁸ See JULIUS GETMAN, *RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT* (2010); see also Dennis Hayashi, *Preventing Human Rights Abuses in the U.S. Garment Industry: A Proposed Amendment to the Fair Labor Standards Act*, 17 YALE J. INT'L L. 195, 199 (1992).

industry, workers of U.S. ship owners can avoid the FLSA by flying flags of convenience.⁹ This simple technique renders U.S. seamen beyond the reach of U.S. law.¹⁰

The FLSA is also often avoided by employers who structure employee job functioning to permit enough employer discretion to declare the employee an independent contractor.¹¹ This technique is widespread. It is particularly easy to use in situations such as cab driving—another occupation often staffed by immigrants—where close monitoring is almost impossible. A new and possibly more effective technique for evading the FLSA has developed in recent years: the management-formulated arbitration clause that eliminates class and collective actions, which have been critical to the FLSA's effectiveness.¹²

II. FLSA ENFORCEMENT

The FLSA is enforced by two primary mechanisms of investigation and enforcement action: the Department of Labor and private lawsuits.¹³ The United States Department of Labor (“USDOL”) has an investigative staff that conducts field audits and investigates complaints.¹⁴ USDOL also can bring enforcement actions on behalf of workers in federal court.¹⁵ But the Department of Labor handles only a portion of FLSA cases

⁹ See generally R. Tali Epstein, Comment, *Should the Fair Labor Standards Act Enjoy Extraterritorial Application?: A Look at the Unique Case of Flags of Convenience*, 13 U. PA. J. INT'L BUS. L. 653 (1993).

¹⁰ See *id.* at 672.

¹¹ See Jeanne M. Glader, *A Harvest of Shame: The Imposition of Independent Contractor Status on Migrant Farmworkers and Its Ramifications for Migrant Children*, 42 HASTINGS L.J. 1455, 1456 (1991) (“By classifying workers . . . as independent contractors, . . . employers are able to avoid the expense and inconvenience of complying with worker protection provisions of the Fair Labor Standards Act . . .”).

¹² See, e.g., *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002).

¹³ See *Enforcement Under the Fair Labor Standards Act*, U.S. DEP'T OF LAB., <http://www.dol.gov/elaws/esa/flsa/screen74.asp> (last visited Oct. 4, 2012); see also 29 U.S.C. § 218c(b)(1) (2006 & Supp. IV 2010) (allowing employees to seek relief against employers they believe are in violation of the FLSA).

¹⁴ 29 U.S.C. § 211 (2006); U.S. DEP'T OF LAB., *supra* note 13.

¹⁵ See U.S. DEP'T OF LAB., *supra* note 13.

nationwide.¹⁶ The FLSA was enacted with the expectation that private attorneys would handle litigation for employees not paid the minimum wage.¹⁷ Currently, the FLSA is primarily enforced by legal action brought by affected individuals through class and collective actions.¹⁸

Originally, FLSA claims were brought as class actions by unions on behalf of all their members.¹⁹ The Portal-to-Portal Act, passed by Congress in 1947,²⁰ restricted the FLSA in at least two significant ways. First, it restricted the hours that would be considered work.²¹ Second, and more importantly here, it

¹⁶ DOL's enforcement statistics for 2008 show that minimum wage claims handled by DOL averaged only \$392 per worker, and overtime claims averaged only \$676:

	Violation Cases	Back Wages Collected	Percent of FLSA Back Wages	Employees Receiving Back Wages	Percent of Employees Receiving FLSA Back Wages
Minimum Wage	10,085	\$16,557,184	12%	42,199	21%
Overtime	10,105	\$123,686,617	88%	182,964	93%

U.S. DEP'T OF LABOR, EMP'T STANDARDS ADMIN., WAGE & HOUR DIV., WAGE AND HOUR COLLECTS OVER \$1.4 BILLION IN BACK WAGES FOR OVER 2 MILLION EMPLOYEES SINCE FISCAL YEAR 2001 (2008), *available at* <http://www.dol.gov/whd/statistics/2008FiscalYear.pdf>.

¹⁷ See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL FACTS AND FIGURES 2010, tbl.4.4, *available at* <http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table404.pdf>.

	2006	2007	2008	2009	2010	Total
FLSA filings in District Court	4,207	7,310	5,393	6,073	6,825	29,808

¹⁸ See 29 U.S.C. § 216(b) (2006 & Supp. II 2008) ("An action to recover . . . may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.").

¹⁹ See Fair Labor Standards Act of 1938, Pub. L. No. 676, § 16(b), 52 Stat. 1060, 1069 (1938) (current version at 29 U.S.C. § 216(b)) ("[S]uch employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated.").

²⁰ Pub. L. No. 52, 61 Stat. 84, 84–89 (1947) (codified at 29 U.S.C. § 216(b)).

²¹ *Id.* § 4, 61 Stat. at 86–87 (establishing that time spent traveling to and from work is non-compensable absent agreement to the contrary or the existence of a contrary custom or practice).

enacted the collective action procedures of 29 U.S.C. § 216(b), removing the availability of class actions and imposing a distinctive procedure referred to as a “collective action.”²²

In collective actions each individual who wants to be part of a case must affirmatively opt in.²³ This modification of the normal class action procedure—where individuals who do not wish to take part must affirmatively opt out—may seem slight, but the slight procedural hurdle has the significant effect of minimizing participation in FLSA actions. Since employees must take affirmative steps to join the case, current employees are reluctant to join out of fear of retaliation. The legal forms which must be filled out are confusing.²⁴ Immigrant workers who may speak languages other than English and less-educated workers are likely to pass on the daunting forms. Also, the mere practical burdens of filling out a form correctly, finding a stamp, and mailing it by deadlines all minimize participation rates. In FLSA opt-in cases, the opt-in rate seldom tops thirty percent of the class.²⁵ In typical opt-out class actions, the opt-out rate is very low, usually far less than one percent.²⁶ Inertia seems to be the largest factor in determining participation.²⁷ In collective actions, then, at most one-third of the affected workers will

²² See 29 U.S.C. § 216(b); see also Marc Linder, *Class Struggle at the Door: The Origins of the Portal-to-Portal Act of 1947*, 39 BUFF. L. REV. 53, 167 (1991) (outlining the procedural changes wrought by passage of the Portal-to-Portal Act).

²³ See Linder, *supra* note 22, at 167, 174.

²⁴ See Charlotte S. Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 MISS. L.J. 443, 471 (2010) (describing plaintiffs’ inability to read and comprehend complex legal language contained in opt-in notices).

²⁵ See, e.g., *id.* at 467–68 (using a case study based on opt-in rates in the Southern District of Florida as a proxy for nationwide opt-in rates and concluding that the average opt-in rate is fifteen percent); Andrew C. Brunsten, *Hybrid Class Actions, Dual Certification, and Wage Law Enforcement in the Federal Courts*, 29 BERKELEY J. EMP. & LAB. L. 269, 293–94 (2008) (analyzing 21 cases and concluding that the average opt-in rate in FLSA cases is 15.71%).

²⁶ Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1549 (2004).

²⁷ In practitioners’ experience, every additional practical step that is required to opt-in reduces the participation rate. For example, participation rates are incrementally higher with an easy to fill out opt-in form, self-addressed stamped or business reply mail, et cetera. For a comparative treatment of the impact of inertia in the FLSA opt-in context and in opt-out class actions, see Alexander, *supra* note 24, at 469.

receive back pay and liquidated damages.²⁸ The collective action process, with its drastic effect on the ultimate scope of relief, directly undercuts the FLSA's remedial goal of making sure that all affected workers receive the minimum wage and overtime that the statute requires.²⁹ Private FLSA attorneys frequently use state-law class actions in conjunction with FLSA collective actions to secure fuller relief to the affected class.

III. STATE WAGE AND HOUR LAWS SHORE UP THE FLSA

State wage and hour laws typically parallel the FLSA, providing minimum wages and overtime protections that largely duplicate the FLSA.³⁰ State wage laws often supplement the FLSA by adding protections, such as guarantees that the promised wages will be paid; guarantees that deductions will not be taken from pay for the employers' business expenses; higher minimum wages; spread-of-hours pay; break-time requirements; et cetera.³¹ Federal courts in districts around the country have allowed Rule 23 opt-out classes under supplemental jurisdiction

²⁸ *See id.* at 484 (identifying the impact of opt-in rules on overall plaintiff recoveries); *see also* Brunsden, *supra* note 25, at 298 (describing the implications of the opt-in regime for the efficacy of FLSA enforcement).

²⁹ The congressional purpose behind the Portal-to-Portal Act's opt-in provision (crafted in 1947) was concern that disinterested parties and unions were bringing actions in which employees might not wish to participate. *See Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 173 (1989).

³⁰ Brunsden, *supra* note 25, at 279.

³¹ *See id.*

to tag along with opt-in FLSA collective actions.³² Almost all jurisdictions, except those in the Third Circuit,³³ have certified state wage and hour class actions along with collective actions.

The effectiveness of FLSA and state wage and hour cases is tied to the combination of collective and class actions that facilitate suits on behalf of workers whose individual claims would not normally justify the expenses of a lawsuit. Individual minimum wage claims are typically small damages cases. For example, if an employee is cheated out of \$2 per hour, that sum represents nearly one-third of a minimum wage earner's yearly income. Yet few lawyers will bring a claim that might take \$50,000 to \$200,000 to litigate in federal court, only to collect a few thousand dollars in damages. And the courts are frequently

³² See, e.g., *Lindsay v. Gov't Emps. Ins. Co.*, 448 F.3d 416, 418 (D.C. Cir. 2006) (holding that the difference between FLSA and state law class actions did not prohibit supplemental jurisdiction over state claims); *Sjblom v. Charter Commc'ns, LLC*, No. 3:07-CV-0451-BBC, 2007 WL 4560541, at *5–6 (W.D. Wis. Dec. 19, 2007); *Freeman v. Hoffmann-LaRoche, Inc.*, No. 07-1503 (JLL), 2007 WL 4440875, at *2 (D.N.J. Dec. 18, 2007) (denying a motion to dismiss based on the argument that the class action claim is inherently incompatible with the FMLA collective action claim and instead conducting supplemental jurisdiction analysis); *Salazar v. AgriProcessors, Inc.*, 527 F. Supp. 2d 873, 879–80 (N.D. Iowa 2007) (excluding legal doctrine of inherent incompatibility within supplemental jurisdiction test); *Silverman v. Smithkline Beecham Corp.*, Nos. CV 06-7272 DSF(CTx), CV 07-2601-DSF(CTx), 2007 WL 3072274, at *2 (C.D. Cal. Oct. 16, 2007); *Lehman v. Legg Mason, Inc.*, 532 F. Supp. 2d 726, 731 (M.D. Pa. 2007) (denying motion to dismiss class claims because hybrid cases do not create impermissible conflict with congressional intent); *Marquez v. Partylite Worldwide, Inc.*, No. 07 C 2024, 2007 WL 2461667, at *6 (N.D. Ill. Aug. 27, 2007); *Brickey v. Dolencorp, Inc.*, 244 F.R.D. 176, 179 (W.D.N.Y. 2007); *Westerfield v. Wash. Mut. Bank*, No. 06-CV-2817, 2007 WL 2162989, at *3 (E.D.N.Y. July 26, 2007) (collecting cases); *Bamonte v. City of Mesa*, No. CV 06-01860-PHX-NVW, 2007 WL 2022011, at *3 (D. Ariz. July 10, 2007); *Cryer v. InterSolutions, Inc.*, No. 06-2032 (EGS), 2007 WL 1191928, at *3 (D.D.C. Apr. 20, 2007) (allowing a hybrid class collective because “there is even greater cause for concern about confusion of class members if the state law claims proceed in a separate court and class members thereby receive class action notices from two different courts”); *Lee v. ABC Carpet & Home*, 236 F.R.D. 193, 202 (S.D.N.Y. 2006); *Mascol v. E & L Transp., Inc.*, No. CV-03-3343 CPS, 2005 WL 1541045, at *3 (E.D.N.Y. June 29, 2005); *Velez v. Majik Cleaning Serv., Inc.*, No. 03 Civ 8698(SAS), 2005 WL 106895, at *1 (S.D.N.Y. Jan. 19, 2005); *Smellie v. Mount Sinai Hosp.*, No. 03Civ.0805(LTS)(DFE), 2004 WL 2725124, at *3 (S.D.N.Y. Nov. 29, 2004); *Noble v. 93 Univ. Place Corp.*, 224 F.R.D. 330, 340–41 (S.D.N.Y. 2004); *Ansoumana v. Gristede's Operating Corp.*, 201 F.R.D. 81, 84 (S.D.N.Y. 2001).

³³ *De Asencio v. Tyson Foods, Inc.*, 342 F.3d 301, 311 (3d Cir. 2003) (explaining that, because state class claims generally predominate over federal collective actions due to different class sizes and inconsistency with congressional purpose, state claims should be dismissed in federal court).

known to reduce attorney fees that are disproportionate to the underlying claim award.³⁴ Moreover, even collective actions on behalf of scores of workers will often yield damages funds of small enough sums that private attorneys risk receiving reduced fees due to the courts' proportionality concerns. Class actions are thus critical to FLSA enforcement, as they represent the only effective means for extending minimum wage and overtime protections to the bulk of the workforce.

But the ability of FLSA plaintiffs in the future to band together to make the Act effective has been put into doubt by two recent Supreme Court decisions dealing with the Federal Arbitration Act ("FAA").³⁵

IV. *STOLT-NIELSEN* AND CLASS ARBITRATION

The first of these cases, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*,³⁶ involved the construction of a general arbitration clause that did not specifically mention class actions. A panel of arbitrators construed the clause to authorize a class-wide action.³⁷ Its ruling was affirmed by the Court of Appeals for the Second Circuit, but reversed by the Supreme Court on the ground that the arbitrators' decision was not based on interpretation of the agreement.³⁸ The Court did not return the case to the arbitrator for a more specific determination.³⁹ It interpreted the agreement itself, concluding that "there c[ould] be only one possible outcome on the facts before [it]": "[T]he parties c[ould not] be compelled" to participate in a class action.⁴⁰

³⁴ See, e.g., *U.S. Football League v. Nat'l Football League*, 887 F.2d 408, 413–15 (2d Cir. 1989); *Thompson v. Int'l Ass'n of Machinists & Aerospace Workers*, 664 F. Supp. 578, 582–85 (D.D.C. 1987).

³⁵ The Supreme Court resolved any doubts about whether the FAA applied to FLSA claims in *Gilmer v. Interstate/Johnson Lane Corp.*, an Age Discrimination in Employment Act ("ADEA") case. See 500 U.S. 20 (1991). The ADEA and FLSA share the same procedural enforcement mechanism of 29 U.S.C. § 216(b) (2006 & Supp. II 2008). 500 U.S. at 26, 28–29; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625–26, 640 (1985) (arbitrations of statutory claims approved).

³⁶ 130 S. Ct. 1758 (2010).

³⁷ *Id.* 1765–66.

³⁸ *Id.* at 1766–67, 1775–76.

³⁹ *Id.* at 1770.

⁴⁰ *Id.* at 1770, 1776.

The Court's opinion took arbitration experts by surprise.⁴¹ For many years arbitrators have been permitted by the Supreme Court to interpret both collective and adhesive agreements to reflect notions of fair play and administrative convenience. But in *Stolt-Nielsen*, the Court, following a very different approach, was unwilling to accept an arbitrator's interpretation of an agreement without specific contractual language authorizing class-wide relief.⁴² The opinion either reflected a new, more stringent standard of review of arbitral decisions or else was a reflection of the Court majority's dislike of class actions. The latter interpretation seems by far the most persuasive.

As Alan Scott Rau states in his recently published article, *Arbitral Power and The Limits of Contract: The New Trilogy*⁴³:

One would have to invest a good deal of time and effort before being able to identify cases—which in the end amount only to a trivial number—in which the Supreme Court has been willing to mandate or approve the annulment of an arbitral award. (And before now these have been strictly outliers, grounded either on the lack of any agreement at all, or on some impropriety in the composition of the arbitral tribunal). But then we come to *Stolt-Nielsen*: It can hardly be accidental that the specter of class relief in arbitration is just about the only feature of the arbitration process that has been anathema to the business community—or that this rare decision restrictive of arbitral power happens, wonder of wonders, to be one in which a business-oriented court manages more or less to relieve it of any such anxiety.⁴⁴

V. *AT&T MOBILITY LLC v. CONCEPCION*

The Supreme Court's dislike of class actions and its concern for the interests of business enterprises was revealed even more clearly in *AT&T Mobility LLC v. Concepcion*.⁴⁵ In that case, the

⁴¹ See, e.g., John Elwood, *After Stolt-Nielsen v. AnimalFeeds Int'l Corp.: Deciding When Class Arbitration Is Permissible*, THE VOLOKH CONSPIRACY (Apr. 27, 2010, 5:35 PM), <http://volokh.com/2010/04/27/after-stolt-nielsen-v-animalfeeds-intl-corp-deciding-when-class-arbitration-is-permissible/>.

⁴² *Stolt-Nielsen*, 130 S. Ct. at 1775–76.

⁴³ Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 AM. REV. INT'L ARB. 435 (2011) (footnotes omitted).

⁴⁴ *Id.* at 484–85.

⁴⁵ 131 S. Ct. 1740 (2011).

plaintiffs sued AT&T as part of a class action for fraud.⁴⁶ The contract they had signed with AT&T provided that all disputes between the parties were to be arbitrated, but that any claims must be brought in the parties' "individual capacit[ies], and not as . . . plaintiff[s] or class member[s] in any purported class or representative proceeding."⁴⁷ The contract was entered into in California.⁴⁸ The federal district court in which the case was brought refused to enforce the arbitration clause on the grounds that it was unconscionable under California law.⁴⁹ The Court of Appeals for the Ninth Circuit affirmed.⁵⁰ Both the district court and the Ninth Circuit found the arbitration clause invalid under California law.⁵¹ Class action waivers in California are governed by the *Discover Bank* rule,⁵² according to which they are unconscionable when it is

found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money⁵³

The Supreme Court held that the California rule of unconscionability was preempted by the Federal Arbitration Act.⁵⁴

Upholding a contract deemed unconscionable under California law required something of a stretch, even for Justice Scalia, who wrote the majority opinion, since the Arbitration Act provides that arbitration agreements may be unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract."⁵⁵ Unconscionability would seem to be precisely the sort of rule that the Act permits states to apply. But the Court majority concluded that the California rule unduly

⁴⁶ *Id.* at 1744.

⁴⁷ *Id.*

⁴⁸ *See id.* at 1744–45.

⁴⁹ *Id.* at 1745.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005), *superseded by statute as stated in AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

⁵³ *Id.* at 1110.

⁵⁴ 131 S. Ct. at 1753.

⁵⁵ *Id.* at 1744.

conflicted with the fundamental policy of the Arbitration Act “to ensure the enforcement of arbitration agreements according to their terms”.⁵⁶ “Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”⁵⁷ Further, Justice Scalia argued, that the California rule is indistinguishable from other rules that might more clearly be inconsistent with the FAA, such as one finding unconscionable “arbitration agreements that fail to provide for judicially monitored discovery” or one that disallows “agreements that fail to abide by the Federal Rules of Evidence.”⁵⁸ Nor was the *Discover Bank* Rule saved by the requirement that the damages be “predictably small.”⁵⁹ Justice Scalia declared that the “requirement, however, is toothless and malleable.”⁶⁰

Much of the majority opinion is devoted to demonstrating that class-wide arbitration is an undesirable process:

Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.

First, 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.⁶¹

Justice Scalia’s concern with the problem of finding an arbitrator competent to deal with a complex legal issue is a

⁵⁶ *Id.* at 1748.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1747.

⁵⁹ *Id.* at 1750.

⁶⁰ *Id.* It would be relatively easy for a court to distinguish class action bars from the other agreements that Scalia mentions on the grounds of their impact on the basic statutory right being litigated. Any concept of “small damages” seems far easier to define and apply than such legal terms as “restraint of trade,” “concerted activities,” or “free exercise of religion.”

⁶¹ *Id.* at 1750–51.

significant departure from recent Court precedent and opinions, which have brushed off concerns with arbitral competence in complex legal areas such as anti-trust and employment discrimination.⁶² Although the American Arbitration Association (“AAA”) has been administering class actions for some time, without ill effect, the Court’s opinion cites no evidence of incompetence, and the longer process in class arbitrations is compared only with bilateral arbitration—as the dissent points out—and not with class actions in court.⁶³ The clear concern of the majority is that class actions burden employers. No one would deny that employer-drafted arbitration clauses are likely to be streamlined and efficient to the extent that they strip plaintiffs of procedural rights and allow corporations to craft procedures more to their liking. Justice Scalia does not discuss whether they are likely to achieve justice for consumers or workers or whether they utterly restrict the remedial schemes that Congress or state statutes intended.⁶⁴

The lower court opinions that Justice Scalia overruled in the *Concepcion* case permitted class actions presided over by a judge and not by an arbitrator.⁶⁵ He does not address the similarities and differences between the two.⁶⁶ Most of the problems that he associates with arbitral class actions are also problems when a judge presides, which suggests that his opposition is to class actions, however they are adjudicated. Employers aware of the decision are very likely to create their own clauses limiting class actions and imposing other requirements on the arbitration process.

To those of us concerned with the rights of employees, the opinion is deeply disturbing. Justice Scalia states the purpose of the Arbitration Act as “to ensure the enforcement of arbitration agreements according to their terms.”⁶⁷ This formulation enshrines employer dictates as supreme and strikes any counterbalancing state-limiting doctrine such as

⁶² *Id.*

⁶³ *Id.* at 1751.

⁶⁴ *Id.* at 1748–50.

⁶⁵ *Laster v. T-Mobile USA, Inc.*, No. 05 CV 1167 DMS (AJB), 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008), *aff’d*, 584 F.3d 849 (9th Cir. 2009), *cert. granted*, 130 S. Ct. 3322 (2010), *rev’d*, 131 S. Ct. 1740.

⁶⁶ *See Concepcion*, 131 S. Ct. at 1745, 1753.

⁶⁷ *Id.* at 1748.

unconscionability, which under section 2 of the FAA had previously been applicable.⁶⁸ Thus, even rules that come within the terms of section 2's "grounds as exist at law or in equity for the revocation of any contract" are almost certain to be inconsistent with the arbitration clauses yet to be written by corporations in the context of adhesive contracts set free by this opinion.⁶⁹ Justice Scalia reads the Arbitration Act as a sanctification of adhesion contracts which he regularly attributes to "the parties" even though one party had no voice in its framing.⁷⁰

By treating contracts of adhesion as representing the desire of "the parties" and by interpreting the Arbitration Act to insist on following their terms, no matter what Congress or state legislatures have limited, Justice Scalia has made a broad grant of power to employers. The *Concepcion* case suggests that any employer-imposed procedures will be enforced as expressing the will of "the parties."⁷¹ An employer can make the entire proceeding confidential, insist on or reject the use of a jury, limit discovery, and in any other way structure the process to its liking. Currently, companies lace arbitration agreements with clauses that shorten statutes of limitation, limit remedies, bar joinder, and set fees for the complainant. There is no suggestion of a limiting principle anywhere in *Concepcion*.⁷² If an arbitration agreement required a complainant to dress in purple, sing the star spangled banner, and shout "Heil!" to the company before bringing a claim, one wonders if the Court would insist that the agreement be "enforced according to [its] terms," as a reflection of the agreement of the parties.⁷³ If not, on what grounds would the Court reject it? The *Concepcion* decision permits employers to ban class actions against themselves

⁶⁸ See *id.* at 1753.

⁶⁹ 9 U.S.C. § 2 (2006).

⁷⁰ *Concepcion*, 131 S. Ct. at 1744, 1750 n.6.

⁷¹ *Id.* at 1748–49.

⁷² Justice Scalia does suggest that the legislature might help workers and consumers by "requiring class-action-waiver provisions in adhesive arbitration agreements to be highlighted." *Id.* at 1750 n.6. Even this minimal concession is followed immediately with the warning that "[s]uch steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *Id.*

⁷³ *Id.*

through the use of an arbitration clause—a startlingly exculpatory effect—but its impact is likely to be even greater.⁷⁴

This approach represents a return to 1920s master and servant law, where a company's unilateral decisions were understood to represent the benevolent workings of the market. It is the enshrinement of Chicago School economics, the very approach rejected by our labor laws.

To the extent that contracts requiring individual arbitration of employment claims become universal, as they are on their way to becoming, the FLSA, which is based on distrust of employer-imposed contract terms, becomes increasingly ineffective.

VI. UNCERTAIN FUTURE OF CLASS ACTIONS IN FLSA AND STATE WAGE CLAIMS

While it does not require special prognostication skills to know how Justice Scalia will rule on the questions of class and collective action waivers in FLSA cases, the entire Court's answer to those questions are uncertain at present.⁷⁵ It seems likely that even waivers of collective action rights will be affirmed in arbitration, given that anything interfering with an employer's incentive to use arbitration is to be stricken under the Scalia analysis.⁷⁶ If so, the *Concepcion* decision will even expand the restrictions of the Portal-to-Portal Act limitations prohibiting class-wide relief through the impediment of collective actions. The AAA currently administratively refuses to accept collective action arbitration complaints—unless the arbitration agreement clearly permits them, or they are mandated by the Court—though it permits an arbitrator to rule that collective actions are permissible, notwithstanding a waiver, once an individual demand has been filed.⁷⁷

⁷⁴ Exculpatory class action bans have generally been prohibited by courts outside of the arbitration process. *See, e.g., In re Am. Express Merchs. Litig.*, 554 F.3d 300, 304, 312, 317 (2d Cir. 2009), *vacated sub nom.*, 30 S. Ct. 2401 (2010).

⁷⁵ Justice Thomas's concurring decision, based upon an entirely different statutory analysis, suggests that the Court could reach a different result in a different case. *See Concepcion*, 131 S. Ct. at 1753–54 (Thomas, J., concurring).

⁷⁶ *See, e.g., Simpkins v. Pulte Home Corp.*, No. 6:08-cv-130-Orl-19DAB, 2008 WL 3927275, at *10 (M.D. Fla. Aug. 21, 2008) (holding that the FLSA collective action procedure was trumped by “public policy in favor of arbitration”).

⁷⁷ *See AAA Policy on Class Arbitrations*, AM. ARB. ASS'N (July 14, 2005), <http://www.adr.org/Classarbitrationpolicy>.

There are reasons to think that arbitrators or the courts may find that collective action waivers are legally impermissible.⁷⁸ The courts and the Department of Labor have long held that FLSA rights may not be waived by employees.⁷⁹

And there is a strong argument to the effect that an employer who demands a class or collective action waiver of employees is committing an unfair labor practice, under the well-established doctrine that such waivers are per se interference with concerted activity.⁸⁰ The ability of employers to unilaterally insulate themselves from class and collective actions through self-serving contract provisions has recently been rejected by the National Labor Relations Board in *D.R. Horton*.⁸¹ In that case, the Board reaffirmed its earlier holding that “the NLRA protects employees’ ability to join together to pursue workplace grievances, including through litigation.”⁸² The Board majority pointed out that “collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7.”

⁸³ In its careful, well-reasoned opinion, the Board sought to reconcile the NLRA with the Supreme Court’s holding in *Concepcion* by permitting employers to limit class arbitration but not to combine that limitation with a limitation on class action litigation.⁸⁴ It concluded that “employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial.”⁸⁵ The Board’s reasoning in *D.R. Horton* is careful and compelling. It permits employment contracts that waive class action arbitrations, but it makes that option far less appealing to employers. If accepted by the courts, the *D.R. Horton* holding will significantly reduce the potential damage to employee rights

⁷⁸ See, e.g., *Raniere v. Citigroup Inc.*, No. 11 Civ. 2448, 2011 WL 5881926, *15–17 (S.D.N.Y. Nov. 22, 2011).

⁷⁹ See, e.g., *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706–07 (1945); *FLSA Hours Worked Advisor: Collective Bargaining Agreements*, U.S. DEPT OF LAB., <http://www.dol.gov/elaws/esa/flsa/hoursworked/screen1c.asp> (last visited Oct. 5, 2012).

⁸⁰ See *D.R. Horton*, 357 N.L.R.B. 184, 2, 3, 5–6, 21, 23–24 (2012).

⁸¹ *Id.* at 1.

⁸² *Id.* at 2.

⁸³ *Id.* at 3.

⁸⁴ *Id.* at 11–16.

⁸⁵ *Id.* at 12.

contained in the *Concepcion* opinion—though it will not affect the *Concepcion* decision's effect on consumer cases and other non-employment issues. And while there have been precious few arbitrations which have implemented the FLSA's collective action process through a notice routinely used by the federal courts, at least one arbitrator has done so and that decision was approved upon review by the district court.⁸⁶

Ultimately, the most significant question that remains undecided by the Supreme Court is whether arbitration clauses that act as exculpatory clauses permitting a corporation to violate statutory rights with impunity will be condemned by any principle rooted in the substantive statutes' remedial purposes. The Supreme Court's vacatur of the Second Circuit's decision,⁸⁷ holding that exculpatory class waivers in arbitration clauses are prohibited, is ominous. In *American Express Co. v. Italian Colors Restaurant*,⁸⁸ the Supreme Court vacated and remanded the Second Circuit's decision striking a class action waiver as exculpatory even before the *Concepcion* decision, "for further consideration in light of *Stolt-Nielsen*."⁸⁹ Given that the decision bore no relation to the holding in *Stolt-Nielsen*, the vacatur perhaps illustrated that the Supreme Court intended to grant the decision—and the more expansive *Concepcion* case—unlimited effect.⁹⁰

CONCLUSION

The Supreme Court's arbitration decisions provide employers with a road map for gutting the remaining effectiveness of basic labor protections such as the FLSA, which have provided protections against employer abuse since the 1930s. The Court's rulings enshrine corporate power, expressed in adhesive

⁸⁶ *Veliz v. Cintas Corp.*, No. C 03-1180 RGS (SBA), 2009 WL 1766691, at *2 (N.D. Cal. June 22, 2009).

⁸⁷ *In re Am. Express Merchs. Litig.*, 554 F.3d 300, 320 (2d Cir. 2009), *vacated sub nom.*, 130 S. Ct. 2401 (2010).

⁸⁸ 130 S. Ct. 2401 (2010).

⁸⁹ *Id.*

⁹⁰ *Compare Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010) ("[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so."), *with In re Am. Express Merchs. Litig.*, 554 F.3d at 320 ("[T]he class action waiver . . . cannot be enforced in this case because to do so would grant Amex de facto immunity from antitrust liability . . .").

contracts applicable to consumers and employees, as “the will of the parties,” and this will is now held to override the remedial purposes implicit in state statutory causes of action such as state wage and hour laws which are designed to limit the “freedom of contract.” The future looks dim for workers and their advocates unless the Court changes its approach.