

# THE PROBLEM WITH CLASS ARBITRATION

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## INTRODUCTION

Much has been said about the incompatibility of class actions with arbitration. Class actions require all the process that can be afforded. Before class members' rights are extinguished we insist on many procedural safeguards. For example, class counsel have duties running to absent class members, people they do not know;<sup>1</sup> settlements require court approval and consideration of the public interest;<sup>2</sup> and the general public gets to chime in on whether they think things are fair.<sup>3</sup> If an absent class member is going to forfeit his right to sue without consent, it must be done in the fairest manner possible.<sup>4</sup>

Contrast this highly regimented system with arbitration. Arbitration is what the parties make it,<sup>5</sup> and the law governing arbitration, the Federal Arbitration Act (FAA),<sup>6</sup> has consistently been read to embody a deference to arbitrators<sup>7</sup> and a freedom of parties to resolve their disputes outside of the court system.<sup>8</sup> This laissez-faire environment is not one in which the class action vehicle belongs.

This is not news. A majority of the Supreme Court (through such recent cases as *AT&T Mobility v. Concepcion* and *Stolt-Nielsen v. AnimalFeeds*) sees class arbitration as problematic.<sup>9</sup> It recognizes that what

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1. See *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077-78 (2d Cir. 1995) (noting that court, class counsel, and class representatives all have a continuing duty to protect absent class members).

2. See, e.g., FED. R. CIV. P. 23(d)(1)(B).

3. See *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007) (stating that among the criteria for determination of whether a class action settlement is fair, courts consider "the reaction of absent class members" and "the public interest").

4. Cf. *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 953 (Tex. 1996) ("[C]lass actions are extraordinary proceedings with extraordinary potential for abuse.")

5. See *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (stating parties are "free to structure their arbitration agreements as they see fit." (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989))).

6. Federal Arbitration Act, 9 U.S.C. §§ 1-16 (2012).

7. See, e.g., *Frazier v. CitiFinancial Corp.*, 604 F.3d 1313, 1321 (11th Cir. 2010) ("There is a presumption under the FAA that arbitration awards will be confirmed, and 'federal courts should defer to an arbitrator's decision whenever possible.'" (quoting *B.L. Harbert Int'l, LLC v. Hercules Steel Co.*, 441 F.3d 905, 909 (11th Cir.2006))).

8. Cf. *Ehlen Floor Covering, Inc. v. Lamb*, 660 F.3d 1283, 1288 (11th Cir. 2011) ("[The] liberal federal policy favoring arbitration agreements . . . does not override the wishes of parties who have restricted the circumstances under which they agree to arbitrate disputes.")

9. See *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1750-51 (2011) (enumerating characteristics of class arbitration that fundamentally differentiate it from bilateral arbitration as encouraged by the FAA); *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 687 (2010) (stating

arbitration has to offer—speed, privacy, less cost, informality—does not jibe with the class action vehicle.<sup>10</sup> The Justices are right on this point. Class actions take time, are intentionally publicized,<sup>11</sup> cost more than bilateral suits, and are extremely rule-intensive.<sup>12</sup>

But there are scenarios in which class arbitration makes sense. Think of a toxic tort, for example, where there is no question as to liability and a large but bounded set of plaintiffs. Those injured might reasonably want to arbitrate their disputes on a class basis rather than proceed with a class action in court—to get matters resolved more quickly, perhaps, or to keep things confidential, or to ensure that a particular means of distribution of damages is employed. Parties can bargain for these characteristics (speed, confidentiality, a party-designed damages award model) in arbitration, but they cannot be ensured in litigation. Judges decide things on their own time table; there is a presumption of public access to courts,<sup>13</sup> and judges can tinker with class settlements (if they think they are not fair)<sup>14</sup> in ways that arbitrators can be contractually forbidden from doing. The tortfeasor defendant might also want class proceedings so that it can resolve all claims against it at once, with the assurance that any future suits will be barred.<sup>15</sup>

Should class arbitration be allowed, and should a class arbitration award enforced by courts with the same preclusive effect as a class award obtained in court? The current state of the law is: where the parties have consented to class arbitration, an arbitrator can enter a class award that a court will confirm and that will have the same *res judicata* effect as a class action judgment in court.<sup>16</sup>

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“that the differences between bilateral and class-action arbitration are too great for arbitrators to presume, consistent with their limited powers under the FAA . . .”).

10. *See, e.g., Concepcion*, 131 S. Ct. at 1749 (the “point” of arbitration is “efficient, streamlined procedures,” where “proceedings [can] be kept confidential to protect trade secrets,” and there is “informality,” thus “reducing the cost and increasing the speed of dispute resolution”).

11. *See* FED. R. CIV. P. 23(c)(2) (stating the specific requirements as to how the public must be put on notice when a court confirms a class).

12. *See generally* FED. R. CIV. P. 23.

13. *See* *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–99 (1978) (noting there is a strong presumption in favor of a common law right of public access to court proceedings).

14. FED. R. CIV. P. 23(e) (“The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court’s approval.”).

15. Class action judgments bind all class members from bringing suit. *See* *Kemp v. Birmingham News Co.*, 608 F.2d 1049, 1054 (5th Cir. 1979) (stating the general rule that a judgment in a class action binds members of the class). “Generally, principles of *res judicata*, or claim preclusion, apply to judgments in class actions as in other cases.” *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222, 1226 (11th Cir. 1998) (citing *Kemp*, 608 F.2d at 1054).

16. *E.g., Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 686 (2010) (noting in class arbitration, “[t]he arbitrator’s award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well.”); *Kelly v. Vons Cos.*, 67 Cal. App. 4th 1329, 1335 (Cal. Ct. App. 1998) (“[C]laims preclusion applies to arbitration awards as well.”); *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064, 2071 (2013) (stating that a participant in a class arbitration “does not get to rerun the matter in a court.”).

There is a problem with this. The problem is not the incompatibility of the class action's traits with those of the arbitral realm, however—which is how a majority of the Supreme Court currently sees things. It is instead that an arbitrator possesses what power he has only with the consent of the parties whose claim he will resolve. As a result, a class arbitration judgment should not be deemed to have preclusive effect on absent (i.e., non-consenting) class members, like a class judgment issued from a court. This is not the law, however.

Plaintiffs and defendants in the court system do not choose who will decide their dispute. A court can call an unwilling defendant before it, and judge and jury will decide the law and the facts relating to the claims brought against that defendant with or without his consent. But the power of an arbitrator to adjudicate is different. It comes into existence only by agreement of the parties, coupled with the FAA's core precept of giving effect to the parties' alternative dispute resolution (ADR) mechanism of their choosing.<sup>17</sup> Where a party has not consented to arbitration, no arbitration can take place. No one chooses his judge, but every arbitrator must be a wanted arbitrator, so to speak.

I argue that the FAA should be read as barring class arbitration, contrary to the current state of the law. Among the grounds by which courts can vacate an arbitration award, as set forth in section 10(a) of the FAA, is where arbitrators have "exceeded their powers."<sup>18</sup> This ground should be read literally to prevent courts from giving effect to class arbitration awards. If it is the parties' consent that gives an arbitrator the power to adjudicate parties' disputes, any act beyond the scope of the adjudicative authority allotted should be deemed an act in excess of an arbitrator's power, and so subject to vacatur under section 10(a)(4) of the FAA.

But the Supreme Court permits class arbitration awards to be enforced under the FAA. The cases that so hold—*Concepcion* and *Stolt-Nielsen*<sup>19</sup>—ignore the text of the FAA and read this statute in a manner at odds with many of the Court's past statements. This Article critiques *Concepcion* and *Stolt-Nielsen* as unfaithful to the statutory text and irreconcilable with long-standing (and sensible) FAA policy.

Part II of this Article examines *Concepcion*, which addresses a consumer's efforts to compel class arbitration. *Concepcion* allocates to

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17. *Roughneck Concrete Drilling & Sawing Co. v. Plumbers' Pension Fund, Local 130*, 640 F.3d 761, 766 (7th Cir. 2011) ("Ordinarily, just as two parties to a dispute can agree to settle it, thereby surrendering the procedural rights they would have had if they had litigated to judgment, they can agree to arbitration even if by agreeing they give up procedural rights they would otherwise enjoy.").

18. Federal Arbitration Act, 9 U.S.C. § 10(a)(4) (2012).

19. And, to some degree, *Oxford Health*, 133 S. Ct. at 2071 (holding that a court will uphold an arbitrator's determination unless the arbitrator acted outside the scope of his or her authority).

courts the ability to define arbitration and preempt state law inconsistent with that picture.<sup>20</sup> Thus, where state law has insisted that class proceedings be available (despite a class action waiver in the parties' agreement), the Court held that the FAA preempted state law because what arbitration had to offer—speed, informality, and less cost—could not be squared with the attributes of the class action. While this is true—class actions are not fast, informal, or cheap—it is not the point. Courts have no business insisting that parties resolve their disputes in arbitration in a particular way (fast, informally, etc.). Freedom of parties to design the alternative dispute resolution mechanism of their choosing is a central tenet of federal arbitration law, and the Supreme Court has insisted on this time and again.<sup>21</sup>

Part III turns to *Stolt-Nielsen* and its progenitor, *Green Tree v. Bazzle*. These cases address whether an award permitting class arbitration can be enforced where the contract between the parties is silent as to the availability of class proceedings.<sup>22</sup> *Bazzle* produced four opinions and no majority.<sup>23</sup> *Stolt-Nielsen* held that the consent of the parties was needed for class arbitration to go forward.<sup>24</sup> *Stolt-Nielsen*, like *Concepcion*, is difficult to reconcile with the Court's past FAA rulings. It is also difficult to reconcile with the language of the governing FAA provisions. *Stolt-Nielsen* is moreover problematic in that it vacates an arbitration award (which permitted class arbitration) not by examining the panel's conclusion (that class arbitration was allowed), but by focusing on the process by which the panel had arrived at its conclusion (acting like a common law court).<sup>25</sup> But the Supreme Court has reminded us countless times that judges are to review *what* arbitrators decide, not *how* they arrive at their decisions.<sup>26</sup> *Stolt-Nielsen* stands soundly for the proposition that class arbitration, where permitted by an arbitrator interpreting the contract before him, is allowed.

Part IV looks at the grounds for vacatur under the FAA in general, and section 10(a)(4), providing for vacatur where arbitrators have "exceeded their powers," in particular. Courts can deem an arbitrator to have exceeded

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20. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

21. *E.g.*, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (asserting that the parties have the freedom to structure their ADR agreements in any manner they choose (quoting *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989))).

22. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 666 (2010); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003).

23. *Bazzle*, 539 U.S. at 447, 454–55, 460.

24. *Stolt-Nielsen*, 559 U.S. at 687. A holding reinforced by *Oxford Health*, 133 S. Ct. at 2068.

25. *Oxford Health*, 133 S. Ct. at 2070 (explaining that the *Stolt-Nielsen* Court set aside the arbitrators' decision because they have abandoned their interpreted role).

26. *See, e.g.*, *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) (explaining courts' limited review of labor-arbitration decisions); *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000) (noting that even if a court disagrees with an arbitrator's decision it will accept the decision as long as it was within the arbitrator's scope of authority).

his powers in one of three ways, by focusing on: (1) the result he has reached; (2) the means by which that result was reached; or (3) the propriety of answering a particular question in the first instance. *Stolt-Nielsen*, for example, employs the second of these, a *process*-centric (and not a *results*- or *topic*-centric) analysis. I argue that this is improper, and only a focus on whether an arbitrator has the power to answer a question before it (a *topic*-centric analysis) is a proper means of analyzing whether arbitrators have exceeded their powers. Under this analysis, an arbitrator acts in excess of his powers when he issues an award that purports to bind absent class members, and so subject to vacatur under the FAA.

By giving effect to the straightforward language of the FAA, and by recognizing that arbitrators have limits on their adjudicative power that judges and courts do not, class arbitration awards should, as a matter of course, be deemed inconsistent with and subject to vacatur under the FAA.

#### I. TO COMPEL CLASS ARBITRATION

Can a court compel class arbitration? Where the contract between the parties allows for it, class arbitration remains permitted under the FAA and can be compelled under sections 3 and 4.<sup>27</sup> Most contracts, however, do not explicitly allow for class arbitration; indeed, many expressly prohibit it, especially in the consumer and employment contexts.<sup>28</sup>

The question of whether class arbitration could be compelled under the FAA was the subject of *Concepcion*, where state law purported to invalidate a class action waiver in a contract containing an arbitration clause. Can that state rule stand? or is it preempted under the FAA?

The FAA's preemption power is well established.<sup>29</sup> Section 2 of the FAA, the "primary substantive provision of the Act,"<sup>30</sup> makes agreements to arbitrate enforceable just like any other contractual agreement.<sup>31</sup> It provides:

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27. Federal Arbitration Act, 9 U.S.C. §§ 3–4 (2012).

28. Especially after *Bazzele*, the Court's first class arbitration ruling that did not foreclose the possibility of contracts prohibiting class arbitration. See discussion *infra* Part II.A; *Green Tree Fin. Corp. v. Bazzele*, 539 U.S. 444, 451 (2003).

29. See *Southland v. Keating*, 465 U.S. 1, 10 (1984) (explaining that enacting section 2 of the FAA allowed Congress to show how it favored arbitration in the judicial system).

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

31. Which was not always the case. See, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (noting the FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts . . .").

A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>32</sup>

Courts have interpreted this language as preventing states from singling out agreements to arbitrate and treating such agreements differently from other contractual provisions. The so-called “savings clause” of section 2 protects state court rules that are of general application—“grounds as exist at law or in equity for the revocation of any contract”—from preemption under the FAA as applied to arbitration agreements.<sup>33</sup> States cannot, among other things, outlaw arbitration,<sup>34</sup> forbid arbitration of certain claims,<sup>35</sup> or require special notice requirements in arbitration agreements.<sup>36</sup> State contract law controls the interpretation of arbitration agreements,<sup>37</sup> just as it does all contracts, but that law must treat arbitration agreements like all other agreements. Otherwise, the FAA’s section 2 preemption power kicks in and the state law is preempted.

*Concepcion* is an example of just such a flexing of the FAA’s preemption muscle. The *Concepcions* and AT&T entered into a contract,

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32. Federal Arbitration Act, 9 U.S.C. § 2 (2012).

33. *Kilgore v. KeyBank, N.A.*, 673 F.3d 947, 963 (9th Cir. 2012) (“[The FAA’s] savings clause preserves generally applicable contract defenses . . . so long as those doctrines are not ‘applied in a fashion that disfavors arbitration.’”) (quoting *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011)).

34. See *Southland*, 465 U.S. at 10 (section 2 “withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration”). See also *Allied-Bruce Terminex Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (discussing the preemptive effect of the FAA).

What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The [FAA] makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal ‘footing,’ directly contrary to the Act’s language and Congress’ intent.

*Id.*

35. *Preston v. Ferrer*, 552 U.S. 346, 349–50 (2008) (holding state law cannot require that certain claims be adjudicated in court and not before an arbitrator).

36. See *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (determining that Montana’s requirement of special notice requirements as a condition for enforcing arbitration agreements is consistent with the FAA).

37. See *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681 (2010) (stating that “interpretation of an arbitration agreement is generally a matter of state law.”).

agreeing to arbitrate their disputes but waiving the right to seek class relief.<sup>38</sup> The Concepcions sought just that, however, filing a lawsuit against AT&T in federal court that was later consolidated with a putative class action.<sup>39</sup> Their complaint alleged that AT&T had promised them a free phone but then required the Concepcions to pay \$30.22 in taxes.<sup>40</sup> AT&T moved to compel arbitration, and the Concepcions opposed, arguing that the arbitration provision was “unconscionable and unlawfully exculpatory under California law because it disallowed classwide procedures.”<sup>41</sup> The California courts agreed. They applied California’s *Discover Bank* rule, which provided that class action waivers were unenforceable as unconscionable in certain consumer contracts.<sup>42</sup> They then allowed the Concepcions to proceed against AT&T in arbitration along with a class of plaintiffs.<sup>43</sup>

The Supreme Court reversed. It began with the uncontroversial section 2 proposition that “agreements to arbitrate [can] be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.”<sup>44</sup> State law must treat arbitration agreements like other contract provisions; that is old-hat.<sup>45</sup> However, “[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.”<sup>46</sup> This is another well-established proposition, though one that has no application here.<sup>47</sup>

Then things get iffy. We are told that “the [preemption] inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.”<sup>48</sup> Facially arbitration-neutral, state-law contract doctrines that are applied in a manner that is hostile to arbitration cannot stand; but why is that “complex”? Moreover, why should it matter here? The *Discover Bank* rule, as the Court

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38. *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

39. *Id.*

40. *Id.*

41. *Id.* at 1745.

42. *Id.*

43. *Id.*

44. *Id.* at 1746 (quoting *Doctor’s Assocs., Inc. v. Casorotto*, 517 U.S. 681, 687 (1996)).

45. See *Standard Magnesium Corp. v. Fuchs*, 251 F.2d 455, 457 (10th Cir. 1957) (“Congress intended by § 2 of the Act to . . . place arbitration agreements on the same footing as other contracts.”).

46. *Concepcion*, 131 S. Ct. at 1747 (citing *Preston v. Ferrer*, 552 U.S. 346, 353 (2008)).

47. See, e.g., *Preston v. Ferrer*, 552 U.S. 346, 353 (2008) (acknowledging that the “FAA’s displacement of conflicting state law is ‘now well-established[.]’” (quoting *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995))).

48. *Concepcion*, 131 S. Ct. at 1747.

explicitly recognizes, is “applicable to all dispute-resolution contracts, since California prohibits waivers of class *litigation* as well.”<sup>49</sup> It therefore does *not* “apply only to arbitration or . . . derive [its] meaning from the fact that an agreement to arbitrate is at issue.”<sup>50</sup> Nonetheless, according to the Supreme Court, “a court may not rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable . . . .”<sup>51</sup> It is not clear how the courts’ rulings below can be so characterized.

Perhaps realizing that the explanation for its holding left unanswered questions, *Concepcion* gives examples of other types of rules of general applicability that improperly single out arbitration agreements and thus would be preempted like the *Discover Bank* rule at issue. We are told that these are rules that “would have a disproportionate impact on arbitration agreements; but . . . would presumably apply to contracts . . . in litigation as well,” such as (1) a state’s refusal to enforce contract provisions that provide for discovery without judicial oversight; and (2) a state’s refusal to enforce arbitration agreements that do not provide for application of the Federal Rules of Evidence at trial.<sup>52</sup>

But those are easy, and the intention to single out arbitration by means of what appears to be a facially arbitration-neutral rule is plain enough in the examples the Court provides. Every trial in federal court proceeds under the Federal Rules of Evidence (FRE), so a state rule requiring that the FRE apply to every dispute resolution would obviously be directed at singling out arbitration and would require parties to follow certain rules in an arbitration (since states can do with their evidence rules as they like). Such a law would be incompatible with the FAA and thus preempted under section 2. The same is true with judicially-monitored discovery. Discovery in court cases is by definition judicially-monitored, so requiring court-monitored discovery in *all* dispute resolution effectively forces only arbitrants to employ procedures other than those of their choosing. California’s *Discover Bank* rule, however, is not like these examples. It does not take a court procedural rule and (\*wink\*) require its use everywhere. Contrary to the Court’s insistence, it very much *is* “a far cry

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49. *Id.* at 1746 (emphasis added).

50. *Id.* (citing *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)). As the *Discover Bank* court explained in no uncertain terms, “the principle that class action waivers are, under certain circumstances, unconscionable . . . does not specifically apply to arbitration agreements, but to contracts generally.” *Discover Bank v. Superior Court*, 113 P.3d 1100, 1112 (Cal. 2005), *abrogated by* *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).

51. *Concepcion*, 131 S. Ct. at 1747 (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)).

52. *Id.* We are told that “[o]ther examples are easy to imagine.” *Id.*

from” the Court’s examples.<sup>53</sup> Nonetheless, *Concepcion* held, it was preempted under section 2 of the FAA.

What, then, is the basis for *Concepcion*’s holding? The Court begins by insisting that the “point” of arbitration—what it’s all about, presumably—is “efficient, streamlined procedures,” where “the decisionmaker [can] be a specialist in the relevant field,” the “proceedings [can] be kept confidential to protect trade secrets[,]” and the “informality . . . reduc[es] the cost and increas[es] the speed of dispute resolution.”<sup>54</sup>

Having so defined arbitration, the Court looks at the class action vehicle and decides that it is incompatible with this picture. It concludes that the “changes brought about by the shift from bilateral arbitration to class-action arbitration are fundamental,” involving “absent parties,” “additional and different procedures,” and “higher stakes.”<sup>55</sup> Further, “arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties.”<sup>56</sup> All of this, we are told, is “obvious as a structural matter.”<sup>57</sup> The Court wraps up the point thusly: “The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.”<sup>58</sup>

Is *Concepcion* right to paint a picture of arbitration and preempt state laws that are incompatible with that picture? No. Parties can choose a specialist to be their arbitrator, but they need not; they may want privacy, but they may also seek celebrity (or they may merely wish to have the last word on privacy/publicity, as opposed to proceedings in court, where there is a presumption of public access);<sup>59</sup> formality may be desired in some arbitration contexts, or not; and it is not uncommon for litigants to make strategic decisions that will cause a case to move more quickly (or slowly) when it is in their interest.

It is by defining arbitration as necessarily involving specialized decision-makers, privacy, informality, and speed that the Court is able to deem the class action inconsistent with arbitration and so the California rule requiring the availability of the class action vehicle preempted. But there is no authority, and the *Concepcion* Court provides none, for the proposition

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53. *Id.* at 1748.

54. *Id.* at 1749.

55. *Id.* at 1750 (internal quotation marks omitted) (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 686 (2010)).

56. *Id.*

57. *Id.*

58. *Id.* at 1750–51.

59. *See United States v. Amodeo*, 44 F.3d 141, 145–46 (2d Cir. 1995) (“The common law right of public access to judicial documents is said to predate the constitution.”).

that courts have any business declaring what the “point” of arbitration is in the first place. Indeed, it is well established that the FAA’s fundamental underlying policy—what the FAA *is* about, as both the text of the FAA and the case law interpreting it make clear—is a preference for permitting parties to design the ADR mechanism of their choosing.<sup>60</sup> Moreover, the Court has in the past expressly eschewed the principle that the FAA must be interpreted to provide for speedy and efficient resolution; it outright “reject[ed] the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims.”<sup>61</sup> Not here, however, though it is not clear why.

*Concepcion* is also problematic in that it ignores the language of the FAA applicable when a party seeks to compel arbitration, which is what AT&T Mobility sought to do. Section 3 of the FAA requires courts to determine if the “issue [presented is] referable to arbitration,” to decide whether the dispute falls within the scope of the arbitration agreement (in which case a court must stay an action).<sup>62</sup> Section 4 requires consideration of whether “the making of the agreement for arbitration . . . is not in issue”; and, where it is not, arbitration must be compelled.<sup>63</sup> But neither AT&T nor the *Concepcions* argued that the issue presented—were the *Concepcions* overcharged?—did not fall within the scope of the arbitration clause. Nor did anyone claim that some question existed as to whether the parties had entered into the agreement at issue or whether the arbitration clause was valid and enforceable. Under sections 3 and 4, when neither of these questions is presented, courts *must* compel arbitration. Thus, *Concepcion*

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60. See Federal Arbitration Act, 9 U.S.C. § 4 (2012) (“A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement.” (emphasis added)); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57 (1995) (referring to the federal policy “to ensure the enforceability, according to their terms, of private agreements to arbitrate.” (quoting *Volt Info. Scis, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)) (internal quotation marks omitted)); *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002) (describing the parties’ power to define “the scope of disputes subject to arbitration”).

61. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219 (1985).

62. 9 U.S.C. § 3. *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (expressing that a decision whether to stay litigation pending an arbitration outcome is left to the district court and that the Arbitration Act declares a liberal federal policy favoring arbitration agreements); see also *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 10 (1983) (explaining that a dispute does not fall within the scope of arbitration if the issue is precluded).

63. 9 U.S.C. § 4. Courts interpret section 4 grounds broadly: “[A]lthough section 4 . . . speaks only of challenges to ‘the making’ of the agreement to arbitrate, the term has been held to encompass any challenge to the validity of the agreement, even if there is no disagreement that it was ‘made.’” *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 868 (7th Cir. 1985) (citing *Hull v. Norcom, Inc.*, 750 F.2d 1547, 1549–50 (11th Cir. 1985)); see also *Mitchell v. Verizon Wireless*, No. 05-C-511, 2006 WL 862879, at \*1 (N.D. Ill. Mar. 31, 2006) (“Under [§ 4], the validity of an agreement cannot be at issue either.” (citing *Matterhorn, Inc. v. NCR Corp.*, 763 F.2d 866, 868 (7th Cir. 1985))).

answers a question best left to the arbitrators, and it does so by means of reasoning that is suspect at best.<sup>64</sup>

As discussed further below, *Concepcion* also allows parties to empower arbitrators to adjudicate *someone else's rights*, despite the lack of authority by which they can do so.

## II. TO CONFIRM OR TO VACATE

When a court reaches a decision, and that holding is appealed, it can be reversed by an appellate court for myriad reasons.<sup>65</sup> But the grounds for vacatur under section 10(a) of the FAA are few. The first looks at whether an award “was procured by corruption, fraud, or undue means.”<sup>66</sup> The second allows vacatur “where there was evident partiality or corruption in the arbitrators.”<sup>67</sup> Third, vacatur is possible “where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.”<sup>68</sup> The

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64. Courts in the wake of *Concepcion* differ where class action waivers and arbitration agreements are at issue. The Third Circuit, for example, sees *Concepcion's* holding as “both broad and clear: a state law that seeks to impose class arbitration despite a contractual agreement for individualized arbitration is inconsistent with, and therefore preempted by, the FAA, irrespective of whether class arbitration ‘is desirable for unrelated reasons.’” *Litman v. Celco P’ship*, 655 F.3d 225, 231 (3d Cir. 2011) (quoting *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011)). Giving effect to the class action waiver, *Litman* allowed bilateral arbitration to proceed. *Id.* The Second Circuit held that where a federal statutory right could not realistically be exercised bilaterally, the class action waiver and arbitration clause both must be invalidated for the case to proceed as a class action in court. *In re Am. Express Merchs. Litig.*, 667 F.3d 204, 219 (2d Cir. 2012). This ruling was reversed by the Supreme Court, answering the question “[w]hether the [FAA] permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim” in the negative. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013) (alterations and internal quotation marks omitted). The Ninth Circuit, in turn, interpreted *Concepcion* as barring only substantive state law unconscionability, sending the consolidated cases back to the lower court to determine if procedural unconscionability applied to invalidate the class action waiver. *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1161 (9th Cir. 2012).

65. There are several bases for reversal of a court decision. *See, e.g.*, *Maldonado v. U.S. Atty. Gen.*, 664 F.3d 1369, 1375 (11th Cir. 2001) (holding an appellate court’s *de novo* review of decisions of law was reversible); *In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65, 69 (1st Cir. 2011) (holding review of findings of fact under clear error standard was reversible); *United States v. Moody*, 664 F.3d 164, 166–67 (7th Cir. 2011) (holding a plain error standard in connection with evidence adduced at trial to which there was no objection was reversible); *Ferguson v. United States*, 484 F.3d 1068, 1074 (8th Cir. 2007) (holding abuse of discretion for other evidentiary rulings was reversible); *Walker v. Bd. of Regents of the Univ. of Wis. Sys.*, 410 F.3d 387, 393 (7th Cir. 2005) (holding review of a jury verdict for rational basis was reversible); *United States v. Harrod*, 168 F.3d 887, 892 (6th Cir. 1999) (holding review of erroneous jury instructions looking at whether they were, as a whole, confusing, misleading, or prejudicial was reversible).

66. 9 U.S.C. § 10(a)(1).

67. *Id.* § 10(a)(2).

68. *Id.* § 10(a)(3).

final ground is open ended: “where the arbitrators exceeded their powers.”<sup>69</sup> Where a court finds none of this, it must confirm an arbitration award under section 9.<sup>70</sup>

#### A. Green Tree Financial v. Bazzle

*Bazzle* was the Court’s first foray into class arbitration, and things did not go well. The Bazzles borrowed money from lender Green Tree by means of a contract that contained an arbitration clause that was silent on the availability of class actions.<sup>71</sup> They filed a class action lawsuit in court in connection with Green Tree’s lending practices.<sup>72</sup> The state trial court certified a plaintiff class and then compelled arbitration.<sup>73</sup> The arbitrator ultimately awarded \$10.9 million to the class of plaintiffs.<sup>74</sup> Green Tree appealed, arguing that the contract did not permit class arbitration.<sup>75</sup> The South Carolina Supreme Court held that, since the contract was silent on class arbitration, class arbitration was permitted.<sup>76</sup> The question presented to the Supreme Court was whether the arbitrator’s class arbitration award was subject to vacatur or could be confirmed.<sup>77</sup>

*Bazzle* produced four splintered opinions that offered little guidance. Justice Breyer, writing for himself and Justices Scalia, Souter, and Ginsberg, believed that whether class arbitration was allowed was not the proper question before the Court. Instead, the arbitrator, and not the court, had to make the initial class arbitrability decision.<sup>78</sup> The Breyer opinion took the simple task of noting that (1) the contract required all disputes to be resolved by an arbitrator; (2) whether class arbitration was allowed was in dispute; and, thus, (3) with all doubts resolved in favor of arbitration and with appropriate deference to the arbitrator, whether class arbitration could

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69. *Id.* § 10(a)(4). Section 10(a)(4) does not merely deal with exceeding powers; it also provides for vacatur where arbitrators “so imperfectly execute[] [their powers] that a mutual, final, and definite award upon the subject matter submitted was not made.” *Id.*

70. *See* 9 U.S.C. § 9 (stating that a court must confirm an award made pursuant to arbitration, “unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 . . .”). As it is said: In England, everything which is not forbidden is allowed, while in Germany, the opposite applies so everything which is not allowed is forbidden. This may be extended to France—everything is allowed even if it is forbidden—and to Russia, where everything is forbidden, even that which is expressly allowed.

71. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447–48 (2003).

72. *Id.* at 449.

73. *Id.*

74. *Id.*

75. This appeal was consolidated with a similar case and tried before the same arbitrator, who awarded that class \$9.2 million. *Id.*

76. *Id.* at 450.

77. *Id.*

78. *Id.* at 451.

proceed was for the arbitrator to decide.<sup>79</sup> Thus, Justice Breyer's opinion is one of threshold arbitrability (i.e., who decides who decides),<sup>80</sup> and it says nothing about whether class arbitration itself was proper under the parties' contract. The case thus went back to the arbitrator to decide whether class arbitration was allowed.<sup>81</sup>

From the parties' point of view, this must have seemed a curious result. The Court sent the question of whether class arbitration was permitted to the arbitrator, who had just tried two class arbitrations. The Court nonetheless concluded that "the record suggests that the parties have not yet received an arbitrator's decision" as to whether class arbitration was permitted.<sup>82</sup> That the arbitrator had already presided over class arbitrations did not enter into the equation.

Justice Stevens dissented in part and concurred in the judgment. He would have simply affirmed the South Carolina Supreme Court decision, which held that class arbitration was permitted under the contract, though he admitted that "[a]rguably the interpretation of the parties' agreement should have been made in the first instance by the arbitrator, rather than the court."<sup>83</sup> However, because "there would be no controlling judgment of the Court," and because Justice Breyer's opinion "expresse[d] a view of the case close to [his] own," Justice Stevens concurred in the judgment, sending the case back to South Carolina to be sent back to the arbitrator to decide whether he had had the power to conduct the two class arbitrations over which he had just presided.<sup>84</sup>

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79. "[T]he parties seem to have agreed that an arbitrator, not a judge, would answer the relevant question . . ." *Id.* at 451–52.

80. Threshold arbitrability questions require resolution of issues that are antecedent to the merits of the dispute between the parties. The parties do not ask the court to determine who wins, but rather who should decide who wins. Procedurally, threshold arbitrability questions arise where one party requests that a court stay litigation and compel arbitration (under sections 3 and 4 of the FAA) and the other raises a question relating to the whether the contract is enforceable. *See, e.g.,* *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967) (stating that a court can compel arbitration to occur).

81. The Justices *could* simply have held that class arbitration was not allowed unless the parties agreed to it (i.e., reversed the court below on a substantive question of interpretation of the FAA and the permissibility of class arbitration thereunder)—which it goes on to do in *Stolt-Nielsen*. Instead, the Justices issued a threshold arbitrability ruling allocating to the arbitrator the questions of the permissibility of class arbitration under the contract in question. *Bazze*, 539 U.S. at 454.

82. *Id.* at 447.

83. *Id.* at 455 (Stevens, J., concurring and dissenting in the judgment).

84. *Id.* It is clear that Justice Stevens was not fundamentally opposed to class arbitration. He stated that "the decision to conduct a class-action arbitration was correct as a matter of law," *id.*, and further that "nothing in the Federal Arbitration Act . . . precludes either" of the state court's rulings that (1) "that class-action arbitrations are permissible if not prohibited by the applicable arbitration agreement," and (2) "that the agreement between these parties is silent on the issue." *Id.* at 454–55. He disregarded these views in order to sign on the plurality because otherwise "there would be no controlling Judgment of the Court." *Id.* at 455.

The essence of Chief Justice Rehnquist's dissent (which Justices Kennedy and O'Connor joined) was that the threshold question, whether class arbitration was proper, was not for the arbitrator but instead for the court, contrary to what the state court had ruled.<sup>85</sup> As to whether class arbitration was allowed, according to Rehnquist, the language of the contract was clear, and class arbitration was *not* permitted.<sup>86</sup>

While the Justices disagreed as to whether class arbitration was permitted,<sup>87</sup> eight of the nine would have sent the case back to South Carolina, either for another call on the class arbitrability question or for bilateral arbitration to proceed instead.<sup>88</sup> None would have simply affirmed the arbitration award. What is astonishing, however, is that the Court vacated the arbitration award before it without *any* discussion (or recognition) of the statutory standards governing vacatur of class awards under section 10(a) of the FAA. The Court made no mention of these standards at all.

### B. *Stolt-Nielsen v. AnimalFeeds*

*Stolt-Nielsen* addressed the same question as *Bazzle*—could an arbitration award permitting class arbitration be confirmed, or was it subject to vacatur under section 10(a)?<sup>89</sup>

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85. *Id.* at 455 (Rehnquist, J., dissenting).

86. *See id.* at 458–59 (analyzing the plain language of the contract's provisions; provisions that the plurality allegedly ignores).

Here, the parties saw fit to agree that any disputes arising out of the contracts “shall be resolved by binding arbitration by one arbitrator selected by us with consent of you.” Each contract expressly defines “us” as petitioner, and “you” as the respondent or respondents named in that specific contract. Each contract also specifies that it governs all “disputes . . . arising from . . . *this* contract or the relationships which result from this contract.” These provisions, which the plurality simply ignores, make quite clear that petitioner must select, and each buyer must agree to, a particular arbitrator for disputes between petitioner and that specific buyer.

*Id.* (citations and parentheticals omitted).

87. Justice Thomas' three-sentence dissent merely notes that he “continue[s] to believe that the [FAA] . . . does not apply to proceedings in state courts.” *Id.* at 460 (Thomas, J., dissenting). He cites to two of his prior dissents as the only support for this proposition. *Id.*

88. Others have noted that *Bazzle* is implicitly anti-class arbitration as well. *See* Andrew Powell & Richard A. Bales, *Ethical Problems in Class Arbitration*, 2011 J. DISP. RESOL. 309, 313 (2011) (“By not holding outright that class arbitration is incompatible with the FAA, the plurality opinion it seems implicitly the assumption that the FAA disfavors class arbitration, which has led to numerous class arbitration filings.”).

89. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 666 (2010).

The parties in *Stolt-Nielsen* had a controversy arising under an agreement containing an arbitration clause whose scope included such controversy. AnimalFeeds served a demand for class arbitration on Stolt-Nielsen, and “the parties entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators,” and “stipulat[ing] that the arbitration clause was ‘silent’ with respect to class arbitration.”<sup>90</sup> The panel concluded that class arbitration was allowed under the contract and stayed the proceeding so the parties could seek judicial review of that decision.<sup>91</sup>

The Supreme Court’s majority opinion is inscrutable. The basis for the Court’s ruling was section 10(a)(4) of the FAA, which provides for court vacatur of an arbitration award where “the arbitrator ‘exceeded [his] powers.’”<sup>92</sup> The exceeded-their-powers ground for vacatur is difficult to satisfy. As the Court acknowledged, to obtain such relief a party “must clear a high hurdle”:

It is not enough for petitioners to show that the panel committed an error—or even a serious error. “It is only when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’ that his decision may be unenforceable.”<sup>93</sup>

“Industrial justice”—strong stuff.<sup>94</sup>

Under this stringent standard, the Court concluded that “what the arbitration panel did was simply to impose its own view of sound policy regarding class arbitration.”<sup>95</sup> In so doing, *Stolt-Nielsen* held, the arbitrators exceeded their powers in contravention of section 10(a)(4):

[T]he panel appears to have rested its decision on . . . public policy argument. . . . [T]he arbitrators’ proper task was to identify the rule of law that governs in that situation. . . . [T]he panel based its decision on post-*Bazze* arbitral decisions that “construed a wide variety of clauses in a wide variety of settings

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90. *Id.* at 668.

91. *Id.* at 669.

92. *See id.* at 671–72 (quoting Federal Arbitration Act, 9 U.S.C. § 10(a)(4) (explaining how petitioners may appeal an arbitral panel’s ruling as unenforceable)).

93. *Id.* at 671 (citations omitted).

94. Perhaps in recognition of the fact that “industrial justice” sounds somewhat post-apocalyptic, the case following *Stolt-Nielsen*, *Oxford Health*, replaces “industrial justice” with the more civilized “economic justice.” *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064, 2068 (2013).

95. *Stolt-Nielsen*, 559 U.S. at 672.

as allowing for class arbitration.” . . . The panel did not mention whether any of these decisions were based on a rule derived from the FAA . . . .<sup>96</sup>

This is a frustrating holding to say the least.<sup>97</sup> While what *Bazze* held was not completely clear, the *Bazze* Court sent back to the arbitrator the question whether class arbitration was allowed where the arbitration clause at issue was silent on that question.<sup>98</sup> So the parties in *Stolt-Nielsen* did just what they were told to do in *Bazze*—have the arbitrators decide in the first instance whether class arbitration was allowed.<sup>99</sup> For the *Stolt-Nielsen* court to review just such a situation and vacate the award as a decision made in excess of the arbitrators’ powers is akin to Charlie Brown, Lucy, and the football.

What *did* the *Stolt-Nielsen* majority hold? While the reasoning is murky, the rule handed down was clear:

[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. . . . An implicit agreement to authorize class-action arbitration . . . is not a term that [an] arbitrator may infer solely from the fact of the parties’ agreement to arbitrate.<sup>100</sup>

To consent to an arbitrator deciding the class arbitrability question is thus not the “consent” that lies at the heart of the FAA under *Stolt-Nielsen*.<sup>101</sup>

This makes no sense. For an arbitrator to exceed his powers can mean many things; one thing it *cannot* mean, however, is that an arbitration panel that issues an award on a question the parties have expressly and contractually empowered it to decide has acted in excess of its powers.

96. *Id.* at 672–73 (citations omitted).

97. Or, as the dissent put it, “hardly fair comment.” *Id.* at 694 (Ginsburg, J., dissenting). “[T]he opinions in *Bazze* appear to have baffled the parties in this case at the time of the arbitration proceeding.” *Id.* at 680 (majority opinion). The majority speaks as if the holding of *Bazze* were crystal clear. Courts and commentators have disagreed. *See, e.g., Dealer Computer Servs., Inc. v. Dub Herring Ford*, 623 F.3d 348, 356–57 n.4 (6th Cir. 2010) (referring to the “confusion” *Bazze* caused); David S. Schwartz, Claim-Suppressing Arbitration: The New Rules, 87 IND. L.J. 239, 258 (2012) (“*Bazze* thus contributes mightily toward a hopeless confusion . . . .”); Lawrence A. Cunningham, *Rhetoric Versus Reality In Arbitration Jurisprudence: How The Supreme Court Flaunts And Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 141 (2012) (“*Bazze* confused people (as much of the Court’s arbitration jurisprudence does).”).

98. *Green Tree Fin. Corp. v. Bazze*, 539 U.S. 444, 454 (2003).

99. *Stolt-Nielsen*, 559 U.S. at 667–68.

100. *Id.* at 684–85.

101. Consent is the cornerstone of the FAA. *See also Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“Arbitration . . . is a matter of consent, not coercion . . . .”).

Such an award may be wrong; it may misread the contract at issue (though it did not appear to do so here); but it is issued by a panel acting *within an express grant of authority by the parties* to do just what it has done. An arbitrator cannot exceed his powers when he answers a question he has been empowered to decide. This is essentially the *Stolt-Nielsen* dissent's position. As it aptly stated, "[t]he panel did just what it was commissioned to do. It construed the broad arbitration clause . . . and ruled, expressly and only, that the clause permitted class arbitration."<sup>102</sup> It is hard to argue with this point.

It is plain that the *Stolt-Nielsen* majority thinks class arbitration is a bad idea. *Stolt-Nielsen* makes this point with some emphasis, "[c]onsider[ing] just some of the fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration."<sup>103</sup> Further:

"[T]he presumption of privacy and confidentiality" that applies in many bilateral arbitrations "shall not apply in class arbitrations," thus potentially frustrating the parties' assumptions when they agreed to arbitrate. . . . And the commercial stakes of class-action arbitration are comparable to those of class-action litigation, even though the scope of judicial review is much more limited.<sup>104</sup>

But why should that matter? Why is that a sufficient basis to vacate an arbitrator's ruling allowing class arbitration under section 10(a)(4)? This is the same problem present in *Concepcion*—the Court defines arbitration as having certain traits, it finds those traits incompatible with a class proceeding, and it then vacates an award of a panel of arbitrators that allows class arbitration to proceed.

There is an inkling in *Stolt-Nielsen* of the problem with class actions' preclusive effect on absent (and, thus, non-consenting) class members. "The arbitrator's award no longer purports to bind just the parties to a single arbitration agreement, but adjudicates the rights of absent parties as well."<sup>105</sup> In so noting the Court hits the mark. But, in the end, the *Stolt-Nielsen* Court only observes the differing natures of class actions and consensual, bilateral arbitration and moves on. *Stolt-Nielsen* does not prevent class arbitrations from going forward, it merely tells you what you must do in order to have class arbitration.<sup>106</sup>

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102. *Stolt-Nielsen*, 559 U.S. at 693 (Ginsburg, J., dissenting).

103. *Id.* at 686 (majority opinion).

104. *Id.* at 686–87 (citations omitted).

105. *Id.* at 686.

106. *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064, 2067 (2013). *Oxford Health* came on the heels of *Stolt-Nielsen* and limited its holding, but it did little to repair the violence *Stolt-Nielsen* did to

### III. LIMITS ON ARBITRATORS' POWERS AND ACTS IN EXCESS OF THOSE POWERS

Arbitration awards are hard to reverse, and intentionally so. Three of the four grounds for vacatur are basic rules of fairness, as much process as Congress has seen fit to impose on arbitration. Subsections 10(a)(1)–(3) of the FAA thus provide that an arbitrator cannot engage in fraud, be corrupt, be partial, or engage in misconduct leading to prejudice, among other things. The fourth ground for vacatur is where arbitrators have “exceeded their powers.” This is not like the other three, and it must be given content. It begs the question—what are the sources and limits on arbitrators’ powers? Without defining the boundaries of what arbitrators can do, it cannot be determined whether an arbitrator has transgressed (i.e., exceeded) those limits.

Judges can exceed their powers, of course. They can resolve causes of action over which they lack subject matter jurisdiction.<sup>107</sup> They can adjudicate claims involving individuals over whom they lack personal jurisdiction.<sup>108</sup> But to say an arbitrator has exceeded his powers does not have anything to do with subject matter or personal jurisdiction. Arbitrators

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§ 10(a)(4). *Oxford Health* did not in any manner address *Stolt-Nielsen*’s holding that an arbitrator who answers a question the parties pose to him can somehow, under certain circumstances, exceed his powers. *Id.* *Oxford Health* reads *Stolt-Nielsen* on § 10(a)(4) as “permit[ing] courts to vacate an arbitral decision only when the arbitrator strayed from his delegated task of interpreting a contract.” *Id.* at 2070. The closest *Oxford Health* comes to recognizing (let alone correcting) the problem with *Stolt-Nielsen* is simply to observe that “[t]he arbitrator did what the parties requested.” *Id.* 2071. *Oxford Health* did not take the next step and rule that, under such circumstances, an arbitrator cannot by definition exceed his powers (as this Article argues). In *Oxford Health*, as in *Stolt-Nielsen*, “[t]he parties agreed that the arbitrator should decide whether the[] contract [which was silent as to class arbitration] authorized class arbitration.” *Id.* at 2067. As in *Stolt-Nielsen*, the arbitrator permitted class arbitration to move forward. Heeding the lesson of *Stolt-Nielsen*, however, the arbitrator made clear in his ruling that he was interpreting the contract before him, (unlike the *Stolt-Nielsen* panel, which, according to the Court, had acted like a common law court implementing policy). *Id.* at 2069–70. The party opposing class arbitration appealed under section 10(a)(4), and the post-*Stolt-Nielsen* federal courts confirmed the arbitrator’s ruling. *Id.* at 2067. The *Oxford Health* Court affirmed, reinforcing the core (and, I argue, troubling) holding of *Stolt-Nielsen*—that class arbitration is permitted where an arbitrator, construing the parties’ contract, finds that it permits class arbitration. *Id.* at 2071. *Oxford Health* also had nothing to say about *Stolt-Nielsen*’s insistence on the incompatibility of class actions and arbitrations.

107. Although a party can challenge subject matter jurisdiction for the *first time* on appeal, a court is obliged to notice its lack of jurisdiction *sua sponte*. 13 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3522 (3d ed. 2013) (citing *Johnson v. California*, 541 U.S. 428, 429 (2004)).

108. There are also the standing, ripeness, and mootness doctrines. *See, e.g.*, *Air Line Pilots Ass’n, Int’l. v. UAL Corp.*, 897 F.2d 1394, 1396 (7th Cir. 1990) (stating that a court exceeds its power under Article III of the Constitution where it decides a matter that is moot); *In re Baltimore Emergency Servs. II, Corp.*, 432 F.3d 557, 563 (4th Cir. 2005) (“A court greatly exceeds its power . . . by granting . . . a remedy to a party that has not demonstrated standing to request it.”).

can, with few exceptions, hear any kind of claim,<sup>109</sup> and a party's contacts with the forum in which the arbitration is to occur are generally irrelevant to whether the arbitrator is acting within the confines of the power allotted him.<sup>110</sup>

The sole source of an arbitrator's power to adjudicate is the agreement of the parties, as arbitration is a creature of contract.<sup>111</sup> It is the decision to arbitrate a dispute in the first instance that gives an arbitrator what power he possesses.<sup>112</sup> Therefore, "the limits of an arbitrator's authority are defined by the terms of the parties' own submission,"<sup>113</sup> which is the "the source and limit' of the arbitrator's power."<sup>114</sup> If the parties have not allowed it, the arbitrator cannot do it, as an arbitrator "has no independent source of jurisdiction apart from the consent of the parties."<sup>115</sup> For an arbitrator to exceed his powers should thus mean, simply and in the most literal sense, that an arbitrator has done something that the parties have not empowered him to do. Where that happens, such an award should be subject to vacatur

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109. There are exceptions to this rule. Congress can provide that a statutory cause of action preempts the FAA and thus arbitration is unavailable where such a cause of action is asserted. *See CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (The FAA "requires courts to enforce agreements to arbitrate according to their terms. [This] is the case . . . unless the FAA's mandate has been 'overridden by a contrary congressional command.'") (citation omitted). Nonetheless, while the term "subject matter jurisdiction" is at times used in discussing the propriety of an arbitrator adjudicating a certain claim, *Salim Oleochemicals v. M/V Shropshire*, 278 F.3d 90, 91 (2d Cir. 2002) (referencing arbitrator's dismissal for lack of subject matter jurisdiction), courts have noted that the analogy of arbitrability to subject matter jurisdiction is false because, among other reasons, parties may waive arguments as to an arbitrator's authority but cannot consent to a court's proceeding where subject matter jurisdiction is absent. *See, e.g., Fansteel, Inc. v. Int'l Assoc. of Machinists & Aerospace Workers Lodge 1777*, 708 F. Supp. 891, 903-04 (N.D. Ill. 1989) (stating that the analogy between subject matter jurisdiction and an arbitrator's jurisdiction is false because subject matter jurisdiction is not waivable).

110. While courts do at times evaluate whether a party can be required to arbitrate a dispute in terms of personal jurisdiction, *see Hicks v. Bank of America, N.A.*, 218 Fed. App'x. 739, 746 (10th Cir. 2007) (noting that the "argu[ment] that the arbitrator lacked personal jurisdiction" because the party was a non-signatory to the arbitration agreement had been waived), this is nothing like the contacts/fairness analysis that determines whether a court has personal jurisdiction over a party before it.

111. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)) (The FAA is "at bottom a policy guaranteeing the enforcement of private contractual arrangements."); *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (referencing the "fundamental principle that arbitration is a matter of contract." (quoting *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010)) (internal quotation marks omitted).

112. *I.S. Joseph Co., Inc. v. Mich. Sugar Co.*, 803 F.2d 396, 399 (8th Cir. 1986) ("[A]ny power that the arbitrator has to resolve the dispute must find its source in a real agreement between the parties."); *Fagnani v. Integrity Fin. Corp.*, 167 A.2d 67, 73-74 (Del. Super. Ct. 1960) ("[T]he authority of the arbitrators is derived from the mutual assent of the parties to the terms of the submission.")

113. *Richmond, Fredericksburg & Potomac R.R. Co. v. Transp. Commc'ns Int'l*, 973 F.2d 276, 279 (4th Cir. 1992).

114. *Bowater Carolina Co. v. Rock Hill Local Union 1924*, 871 F.2d 23, 25 (4th Cir. 1989) (quoting *Int'l Chem. Workers Union, Local No. 566 v. Mobay Chem. Corp.*, 755 F.2d 1107, 1110 (4th Cir. 1985)).

115. *I.S. Joseph Co.*, 803 F.2d at 399.

under section 10(a)(4). That is the only sensible way to read section 10(a)(4). But that is not the law.

*A. Three Ways Arbitrators Can Exceed Their Powers*

There are three ways in which an arbitrator could act in ways that exceed the power allotted him. He could arrive at an improper answer (a focus on *results*); he could resolve a question by reasoning that is not permitted (a focus on *process*); or he could reach a question that he is not permitted to answer (a focus on *topic*). *Stolt-Nielsen* and courts interpreting section 10(a)(4)'s exceeded-their-powers language employ the second of these, on the *process* and *reasoning* employed by an arbitrator.<sup>116</sup> They hold that an arbitrator can exceed his powers by arriving at a result by improper means. I argue, however, that only the first of these (a focus on *topic*, on the propriety of an arbitrator deciding a particular question) is a proper reading of this ground for vacatur under the FAA.

Under a *results-centric* view, an arbitrator does not have the power to get it wrong, and when he does a court will vacate his award. This reading can quickly be discarded. It is (and has long been) black-letter law that “[t]he fact that an arbitrator makes a mistake . . . does not provide grounds for vacating an award.”<sup>117</sup> Arbitration is “binding” precisely because it is enforceable *but for* the deferential vacatur standards set forth in section 10(a).<sup>118</sup>

The second possible reading of section 10(a)(4) is *process-centric*, focusing on *how* an arbitrator exercises his power, the *reasoning* on which an award rests. A process-centric view of an arbitrator exceeding his powers focuses on how the arbitrator arrived at his conclusion. *Stolt-Nielsen* took this approach, holding that the arbitration panel exceeded its powers by “impos[ing] its own view of sound policy regarding class arbitration.”<sup>119</sup>

This approach is problematic for a number of reasons. First, the plain language at issue—“exceeded [their] powers”—should mean just what it says: that an arbitrator made a decision beyond the scope of his delegated adjudicative power. “Exceed” means “to extend outside of.”<sup>120</sup> Thus, an arbitrator can do certain things, but when he makes a decision that extends

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116. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 671 (2010).

117. *Flexible Mfg. Sys., Ltd. v. Super Products Corp.*, 86 F.3d 96, 100 (7th Cir. 1996). For more than fifty years courts have insisted that vacatur is not proper for an error of law or fact. *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir. 1960).

118. See *Stolt-Nielsen*, 559 U.S. at 672 (explaining that “the task of an arbitrator is to interpret and enforce a contract”). Parties can (and do) agree to non-binding arbitration, which is like mediation with discovery.

119. *Id.*

120. MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 434 (11th ed. 2007).

outside of the realm of his power to decide, a court will vacate that decision. *Stolt-Nielsen* was wrongly decided under this view, because as noted above and as is hard to refute, the parties in *Stolt-Nielsen* had authorized the arbitrators to decide what they decided.<sup>121</sup> The arbitrators did exactly what had been asked of them. Further, parties should be entitled to ask their arbitrators for reasoned decisions, not merely summary awards.<sup>122</sup> But a focus on process is likely to make arbitrators say less. Reasoning never set forth cannot be scrutinized or relied on as a source of vacatur. Finally, *Stolt-Nielsen*'s process-centric approach flies in the face of past statements by the Court. The Supreme Court has consistently made clear that a court may not decline to enforce an award simply because it disagrees with the arbitrator's legal reasoning.<sup>123</sup> The Court did just that, however, in *Stolt-Nielsen*.

The third possible reading of the meaning of "exceeded [their] powers" is *topic-centric*. Under this view, an arbitration award is subject to vacatur where the question posed—for example, can the contract be read to allow the parties to resolve their dispute class-wide?—was not one the arbitration panel was empowered to answer. The problem was answering that question in the first place. This is the only sensible way to interpret section 10(a)(4).

If for arbitrators to exceed their powers is to have them do something that parties have not authorized, parties may be able to effectively expand the section 10(a) grounds for vacatur by including in their arbitration agreements more of what they do and do not want. For example, if there is a rule of law that the arbitrator gets wrong in his award, that is generally not subject to vacatur under the FAA.<sup>124</sup> If that same rule is memorialized in an arbitration agreement, however, an arbitration award contrary to that rule could be viewed as subject to vacatur as an arbitrator exceeding his powers under section 10(a)(4)—in getting wrong not just the rule of law, but the

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121. See *Stolt-Nielsen*, 559 U.S. at 668 ("The parties entered into a supplemental agreement providing for the question of class arbitration to be submitted to a panel of three arbitrators . . .").

122. See, e.g., AMERICAN ARBITRATION ASSOCIATION, COMMERCIAL ARBITRATION RULE 42(b) (an arbitration panel "need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate").

123. See, e.g., *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 509 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits." (citing *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36 (1987))); *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 62 (2000) ("[Even if] a court is convinced [an arbitrator] committed serious error[s], [that] does not suffice to overturn his decision." (quoting *United Paperworkers v. Misco, Inc.*, 484 U.S. 29, 36 (1987))).

124. E.g., *Flexible Mfg. Sys., Ltd. v. Super Products Corp.*, 86 F.3d 96, 100 (7th Cir. 1996) ("The fact that an arbitrator makes a mistake . . . does not provide grounds for vacating an award unless the arbitrator deliberately disregarded what she knew to be the law.").

command of the parties.<sup>125</sup> This suggests that the more rules parties put in their arbitration agreement, the more possible bases for vacating an arbitration award could exist. Punitive damages are generally not available for breach of contract, for example.<sup>126</sup> If an arbitrator got that wrong and awarded punitive damages in a breach of contract case he would presumably just be committing error that would not warrant vacatur.<sup>127</sup> But if an arbitration clause indicated that the arbitrator lacked the power to award punitive damages, and an arbitrator awarded them nonetheless, that could be deemed an act in excess of the arbitrator's powers (as contrary to the parties' command) and so subject to vacatur under section 10(a)(4).<sup>128</sup>

Allowing parties to effectively create more grounds for vacatur could be a good thing. After *Hall Street Associates v. Mattel, Inc.*, we know that parties cannot contract for *less deferential* standards of review than those set forth in section 10(a).<sup>129</sup> If parties contractually forbidding an arbitrator from doing certain things has the effect of providing additional grounds for vacatur on review of an arbitration award, however—making a court's review more deferential—so be it. Giving parties greater contractual freedom in connection with their ADR choices furthers the policy underlying the FAA.

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125. *Cf. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 57–58 (1995) (acknowledging that by command of the parties the arbitrator's authority may be limited).

[O]ur decisions . . . make clear that if contracting parties agree to *include* claims for punitive damages within the issues to be arbitrated, the FAA ensures that their agreement will be enforced according to its terms even if a rule of state law would otherwise exclude such claims from arbitration. Thus, the case before us comes down to what the contract has to say about the arbitrability of petitioners' claim for punitive damages.

*Id.* at 58.

126. See RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981) (stating punitive damages are not recoverable in an action for breach of contract).

127. *Publisher's Ass'n of New York City v. Newspaper and Mail Deliverers' Union*, 111 N.Y.S.2d 725, 730 (N.Y. App. Div. 1952) ("It is well settled that arbitrators, in the absence of an express requirement to the contrary in the submission to arbitration or in the contract providing for arbitration, need not follow legal principles as stated by judicial decisions."); *but see Complete Interiors, Inc. v. Behan*, 558 So. 2d 48, 50–51 (Fla. Dist. Ct. App. 1990) (absent agreement by the parties, arbitration award of punitive damages in breach of contract action exceeded scope of arbitrator's powers where such relief was not permitted under law).

128. See *Mastrobuono*, 514 U.S. at 60 (discussing this issue in the context of whether choice-of-law clauses in arbitration agreements incorporating state law rules (such as a ban on punitive damages) make an arbitrator's violation of those rules an act in excess of his power).

129. *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).

*B. Irrationality and Manifest Disregard of the Law*

While *Stolt-Nielsen*'s process-centric view of what it means for an arbitrator to exceed his powers is problematic, the Court's analysis—which found that the panel acted like a common law court making policy—is not one that has been applied much elsewhere. That is, courts are not following *Stolt-Nielsen* en masse, vacating arbitration awards for reaching results by improperly assuming the mantle of a common law court making policy.

Instead, courts, in general, in interpreting section 10(a)(4)'s exceeded-their-powers ground for vacatur, say: “[A]rbitrators exceed their powers . . . not when they merely interpret or apply the governing law incorrectly, but when the award [1] is *completely irrational*, or [2] *exhibits a manifest disregard of law*.”<sup>130</sup> Manifest disregard of the law, it is held, “means something more than just an error in the law or a failure on the part of the arbitrators to understand or apply the law.”<sup>131</sup> Rather, “[t]o vacate an arbitration award on this ground, ‘it must be clear from the record that the arbitrators recognized the applicable law and then ignored it.’”<sup>132</sup>

Thus, when determining whether an arbitrator has exceeded his powers by means of the general (non-*Stolt-Nielsen*) definition of “exceeded [their] powers,” it is not the result or the topic that matters, but the explanation and reasoning for that result. “Exceeded their powers” is, as a matter of course in the eyes of the courts, process-centric.

In addition to the reasons set forth above as to why the process-centric view of arbitrators exceeding their powers is problematic, it is difficult to reconcile the phrases “*manifest disregard the law*”<sup>133</sup> and “*completely irrational*” with the plain meaning of *exceeded their powers*. For an arbitrator to manifestly disregard applicable law—to say this is the law that applies but I will not apply it and shall reach my conclusion another way—looks nothing at all like an arbitrator exceeding his powers. “[E]xceeded [their] powers” means an arbitrator did something he was not supposed to do, that he did something beyond that which was permitted. “Manifest disregard”<sup>134</sup> means that he improperly failed to consider something he should have considered in reaching a conclusion, and what he failed to consider is manifest, plain to see. To act irrationally—that is, without

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130. *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 665 (9th Cir. 2012) (emphasis added) (quoting *Kyocera v. Prudential-Bache Trade Serv., Inc.*, 341 F. 3d 987, 997 (9th Cir. 2003)) (internal quotation marks omitted).

131. *Id.* (quoting *Lagstein v. Certain Underwriters at Lloyd's, London*, 607 F.3d 634, 641 (9th Cir. 2010)).

132. *Id.* (quoting *Lagstein*, 607 F.3d at 641).

133. *Id.*

134. *Id.*

reason, or “lacking usual or normal mental clarity or coherence”<sup>135</sup>—is also not to act in excess of power. It is instead to use a particular, non-rational method. This has nothing to do with transgressing limits on power. All of which is to say that, above and beyond *Stolt-Nielsen*, courts get it wrong in ascribing a process-centric analysis to section 10(a)(4).

#### CONCLUSION

If “exceeded [their] powers” is interpreted with a focus on topic (and not process or result), a class arbitration award should be subject to vacatur. Here’s why: the source of an arbitrator’s power to decide is the agreement of the parties to submit their dispute for resolution to an arbitrator, coupled with the FAA’s section 2 core power of ensuring that arbitration agreements are enforced according to their terms. Absent class members cannot by definition have empowered an arbitrator to adjudicate their claims.<sup>136</sup> An arbitrator thus exceeds his powers where he issues an award that purports to bind parties who have not consented to such adjudication.<sup>137</sup> In such an instance, an arbitrator has done something that someone whose rights the arbitrator adjudicates has not given him the power to do, and his award should be subject to vacatur under section 10(a)(4) of the FAA.<sup>138</sup>

Importantly, this is not the same preclusion issue present in court class actions (as to the propriety of foreclosing absent class members’ rights to sue). It instead concerns something more fundamental, the right of the decision-maker to preside over *any* party, present or absent. Courts call before them unwilling parties all the time—most people would prefer not to be defendants. But where a court has personal jurisdiction over such a party, that party must appear before the tribunal or suffer the consequences.

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135. MERRIAM-WEBSTER’S, *supra* note 120, at 662.

136. See 21 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 57:120 (4th ed. 2001) (“[T]he parties to the submission agreement are proper parties to an action to confirm an award . . . [and] [t]he assignee of an award is the real party in interest for the purpose of bringing an action on an award that properly has been assigned”).

137. *Stolt-Nielsen* thus gets it only partly right where it notes that arbitration “is a matter of consent, not coercion.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 681 (2010) (quoting *Volt Info. Sci., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)). The consent that matters, I argue, is the consent of parties to be bound by an arbitrator at all, not the consent to a certain type of arbitration.

138. As noted throughout this paper, this is not the law. However, in *Oxford Health*, the Supreme Court’s last word on class arbitration, Justice Alito, in a concurrence joined only by Justice Thomas, focused on precisely the problem this paper addresses. In class arbitration, he noted, “it is far from clear that [absent class members] will be bound by the arbitrator’s ultimate resolution of [a] dispute.” *Oxford Health Plans v. Sutter*, 133 S. Ct. 2064, 2071 (2013) (Alito, J., concurring). Until a majority of the Supreme Court joins in this sentiment, however, class arbitration awards will likely retain their preclusive effect on absent class members. The fact that seven of the nine Justices did *not* sign on to this concurrence further indicates that they do not see what Justice Alito had to say as the law either.

Arbitrators, unlike judges, do not have such innate power. It is only with the *consent* of the parties *before* the arbitrator—never mind absent parties—that an arbitrator possesses any power whatsoever. The problem with the preclusion of absent class members' rights in the arbitral realm is thus something more than the usual class action preclusion problem.

Arbitration is a system in which the essential attribute is the freedom of parties to choose whatever method of dispute resolution they wish. With few exceptions, there are (and should be) no limits on how parties' ADR must be structured (apart from the sections 10(a)(1)–(3) vacatur grounds).<sup>139</sup> Class actions, in turn, are by necessity regimented. They require court involvement to, among other things, ensure fairness,<sup>140</sup> obtain public input,<sup>141</sup> ensure strict adherence to rules,<sup>142</sup> and provide other procedural safeguards.<sup>143</sup> While class litigation allows adjudication of rights that might otherwise never be vindicated,<sup>144</sup> it also extinguishes absent class members' claims without their knowledge or consent. It does so, however, only by means of an elaborate set of rules that ensure that everything is as fair as possible.<sup>145</sup> Due process would not permit absent class members' rights to be compromised without adherence to all the rules that govern the entry of a court's class action judgment.<sup>146</sup>

Arbitration can be defined in many ways, but one thing it cannot mean—without rewriting a century of FAA case law—is that courts will

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139. See *Jones Dairy Farm v. Local No. P-1236, United Food and Commercial Workers Int'l Union*, 760 F.2d 173, 176 (7th Cir. 1985) (“If people want a question of law resolved by an arbitrator rather than a judge, there is nothing to stop them.”).

140. See *Kanter v. Casey*, 43 F.3d 48, 55 (3d Cir. 1994) (“The requirements of Rule 23(a) are meant to assure both that class action treatment is necessary and efficient and that it is fair to the absentees under particular circumstances.”).

141. See *UAW v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007) (stating that among the criteria for determination of whether a class action settlement is fair, courts consider “the reaction of absent class members” and “the public interest”).

142. See, e.g., FED. R. CIV. P. 23.

143. See, e.g., Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (amending procedures applied to interstate class actions to ensure fair outcomes for those involved).

144. Class actions are effective where the amount at issue for each plaintiff class member is insufficient to justify litigation, and where, absent class litigation, such harm would go without redress.

145. See *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940) (enunciating the general principle that a judgment does not bind nonparties, except in class actions, where the decision may bind nonparties); *General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 953 (Tex. 1996) (“[Class] actions are extraordinary proceedings with extraordinary potential for abuse.”); cf. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1077–78 (2d Cir. 1995) (noting that court, class counsel, and class representatives all have a continuing duty to protect absent class members). The “deep-rooted historic tradition that everyone should have his own day in court,” creates the core of due process: the rights to notice, to control one's own case, and to an opportunity to be heard. 18A CHARLES A. WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4449 (2d ed. 2002).

146. *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 436 (5th Cir. 1979) (“Before the bar of res judicata may be applied to the claim of an absent class member, it must be demonstrated that invocation of the bar is consonant with due process.”).

enforce an arbitration award where parties have not consented to arbitration. It is for this reason that courts should refuse to confirm class arbitration awards. A proper reading of section 10(a)(4) of the FAA—which courts do not employ—reaches just this result. *Stolt-Nielsen*, *Concepcion*, and other decisions implementing section 10(a)(4)'s exceeded-their-powers language cannot withstand scrutiny. This Article offers an alternative.