

AT&T v. CONCEPCION: THE PROBLEM OF A FALSE MAJORITY

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I. INTRODUCTION

In April 2011, the Supreme Court issued its decision in *AT&T v. Concepcion*, a case challenging California's rules for unconscionability in class-action waivers.¹ At the time many viewed the decision as the death knell for consumer class actions.² However, a reexamination of the opinions in the case, particularly the relationship between Justice Thomas's concurrence³ and Justice Scalia's majority opinion raises interesting questions about what, if any, precedential value the *Concepcion* decision carries.

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

2. Ashby Jones, *After AT&T Ruling, Should We Say Goodbye to Consumer Class Actions?* WALL ST. J. LAW BLOG (Apr. 27, 2011, 12:36 PM), <http://blogs.wsj.com/law/2011/04/27/after-att-ruling-should-we-say-goodbye-to-consumer-class-actions/>.

3. Although the term "concurrency" is no doubt familiar to the readers of this article, out of thoroughness we note that a simple or regular concurrence arises when a judge joins the decision of the court but feels the need to write separately for some reason. A regular concurrence often tries to limit the court's holding to the facts presented or to expand the majority opinion by expounding on the reasoning leading to the majority conclusion. See PAMELA C. CORLEY, CONCURRING OPINION WRITING ON THE U.S. SUPREME COURT 10-12 (2010) (showing analysis of the different purposes served by concurrences); Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 780 (1990). Special concurrences or concurrences in judgment arise when a judge agrees with the majority's result but not the reasoning in the majority opinion. The concurrence in judgment may be considered a throwback to the practice of seriatim opinions. These concurrences in a judgment are usually viewed as not having precedential value because they lack the requisite votes to create a majority opinion. See Note, *Plurality Decisions and Judicial Decisionmaking*, 94 HARV. L. REV. 1127, 1131 (1981).

In *Concepcion*, by a vote of 5-4, the majority found that California state law was pre-empted by the Federal Arbitration Act (FAA)⁴. Writing for the majority, Justice Scalia concluded that because the Discover Bank rule⁵ stood as an obstacle to the full purposes and objectives of Congress in passing the FAA, it was pre-empted by Federal law.⁶ Justice Thomas provided the fifth vote for the majority but wrote separately.⁷ In his carefully considered⁸ concurrence Justice Thomas not only lays out a rationale far removed from that of the putative majority, he specifically restates his adherence to his long held view that the Court's entire body of "purposes and objectives" pre-emption jurisprudence is inherently flawed.⁹ Since the "majority opinion" relies so heavily on the purposes and objectives doctrine¹⁰, Justice Thomas's rejection of that doctrine raises the question of whether a single rationale for the majority can be found. If there is no single majority rationale, the question is raised whether is *Concepcion* in fact a plurality decision? Furthermore, if *Concepcion* is a plurality decision can it be rehabilitated to find a majority holding? In *Marks v. United States*, the Supreme Court established a test for determining what the holding of a court is when the votes are splintered. "[W]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'"¹¹ However, it is unclear what holding is established when there are no narrowest grounds, no single rationale, and no commonality between a "majority" opinion and a regular concurrence. This

4. *Concepcion*, 131 S. Ct. at 1753.

5. See *infra* note 36.

6. *Concepcion*, 131 S. Ct. at 1753.

7. *Id.* (Thomas, J., concurring).

8. This article takes issue with the precedential value of *Concepcion* because of the Thomas opinion. This should not be interpreted as a criticism of the reasoning Justice Thomas employs. With respect to the opinions in *Concepcion*, Justice Thomas's has been the subject of some praise, in contrast to the opinions of Justice Scalia for the "majority" and Justice Breyer, writing for the dissenters. See Lawrence A. Cunningham, *Rhetoric versus Reality in Arbitration Jurisprudence: How the Supreme Court Flaunts and Flunks Contracts*, 75 LAW & CONTEMP. PROBS. 129, 144-45 (2012) ("Only Justice Thomas, as usual, offered any serious effort to engage in contract-law discussion and analysis. He struggled to map the statute onto the law of contracts. He took the statutory text literally, though, treating the word 'revocation' in its savings clause to recognize only those defenses to arbitration agreements that affect the making of a contract rather than its enforceability or validity. This enabled him to concur. Though flawed, it is a far better ground than the majority offered because it is faithful to contracts and contract law.").

9. See *Wyeth v. Levine*, 555 U.S. 555, 583 (2009) (Thomas, J., concurring) ("I cannot join the majority's implicit endorsement of far-reaching implied pre-emption doctrines. In particular, I have become increasingly skeptical of this Court's 'purposes and objectives' pre-emption jurisprudence. Under this approach, the Court routinely invalidates state laws based on perceived conflicts with broad federal policy objectives, legislative history, or generalized notions of congressional purposes that are not embodied within the text of federal law. Because implied pre-emption doctrines wander far from the statutory text are inconsistent with the Constitution . . .").

10. *Concepcion*, 131 S. Ct. at 1753.

11. *Marks v. United States*, 430 U.S. 188, 193 (1977) (citing *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976)).

article posits that because Justice Thomas explicitly rejects the rationale of the Scalia opinion, the two opinions share no common ground and therefore there is no majority rule. If there is no majority rule, under *Hertz v. Woodman*, the case is not binding precedent in any court.¹² Put simply it appears that *Concepcion* provides a result without a rule. The purpose of this article is to explore what if any precedential value can be derived when the deciding vote is accompanied by an opinion so at odds with the rationale of the majority.

This article is divided into three parts. The first part is a detailed examination of both Justice Scalia's and Justice Thomas's opinions in *Concepcion*. It includes a brief history of the Federal Arbitration Act to provide context to the *AT&T v. Concepcion* case. In exploring Justice Thomas's concurring opinion, the article will focus on to what degree the opinion conflicts with that of the majority and attempt to determine if a single *ratio decidendi* can be found in the two opinions.¹³ The second part offers a short history of precedent and stare decisis with a focus on how precedential value is determined. Finally, in part three of the article we compare and contrast *Concepcion* to other Supreme Court cases that were ostensibly majority opinions (5-4 votes with a regular concurrence) that have come to be considered plurality opinions by many courts and commentators. We also explain some of the problems with interpreting *Concepcion* as an opinion with a majority rule.

II. AT&T v. CONCEPCION AND THE FEDERAL ARBITRATION ACT

Like many high profile cases, *Concepcion's* origins lay in a relatively humble transaction — here, a consumer cell phone contract. In February 2002, Vincent and Liza Concepcion entered into a Wireless Service Agreement (WSA) with AT&T Mobility LLC (AT&T) for cellular phone service and the purchase of new cell phones.¹⁴ The Concepcions received the cell phones without charge because they agreed to a two-year contract term with AT&T.¹⁵ However, the Concepcions were charged \$30.22 in sales tax for the two phones, and this was based on a tax rate of 7.75% and the full retail value of

12. *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910).

13. Some commentators have noted differences between the Scalia and Thomas opinions but only superficially. For example, Michael A. Wolff, *Is There Life after Concepcion? State Courts, State Law, and the Mandate of Arbitration*, 56 ST. LOUIS U. L.J. 1269, 1271 (2012).

Justice Thomas's opinion is slightly narrower than Justice Scalia's majority, so the majority opinion should be read as being informed by the reasoning of the Thomas opinion. To do otherwise is to ignore the separately expressed views of one-fifth of the Court's majority. . . . In analyzing Justice Scalia and Justice Thomas's opinions, the reader can discern that the FAA, as applied in *Concepcion*, requires an individualized examination of the arbitration provision at issue because a state-law defense is preempted only when the defense 'stand[s] as an obstacle to the accomplishment of the FAA's objectives.

14. *Laster v. AT&T Mobility, LLC*, 584 F.3d 849, 852 (9th Cir. 2009).

15. *Id.*

the phones.¹⁶ The WSA that the Concepcions agreed to when receiving the phones required any disputes to be submitted to arbitration and included a class-action waiver requiring disputes be handled on an individual basis.¹⁷ The WSA authorized AT&T to make unilateral amendments, which it did to the arbitration provision on several occasions.

The Concepcions filed a complaint in the United States District Court for the Southern District of California, in March 2006, alleging the practice of charging sales tax on a cell phone advertised as “free” was fraudulent.¹⁸ In September of the same year, the district court consolidated the Concepcions’ case with a putative class action addressing the same issues.¹⁹ Late in 2006, AT&T revised the WSA’s arbitration agreement to add a new premium payment clause. Under the terms of the premium payment clause, AT&T agreed to pay a customer \$7,500 if the arbitrator issues an award in favor of a California customer that was greater than AT&T’s last written settlement offer made before the arbitrator was selected.

In March 2008, AT&T filed a motion to compel the Concepcions to submit their claims to individual arbitration under the revised arbitration agreement.²⁰ The District Court denied the motion, holding that the class waiver provision of the arbitration agreement is unconscionable under California law and that the FAA does not preempt California’s unconscionability law.²¹ AT&T appealed to the Ninth Circuit Court of Appeals.²² In affirming the District Court’s decision, the Ninth Circuit found that the provision unconscionable under California law as announced in *Discover Bank v. Superior Court*.²³ It also held the FAA did not preempt the Discover Bank rule because it was simply “a refinement of the unconscionability analysis applicable to contracts generally in California.”²⁴ AT&T appealed to the U.S. Supreme Court and certiorari was granted.²⁵

The Supreme Court in a 5-4 decision reversed the Ninth Circuit.²⁶ Justice Scalia authored the putative majority opinion (“the Scalia opinion”) finding California’s Discover Bank rule served to frustrate the full purposes and objectives of Congress and thus was preempted by the FAA.²⁷

16. *Id.*

17. *Id.* at 852-53. Class-action waivers in consumer adhesion contracts has been a topic of much discussion in the last decade. See Maria J. Glover, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735 (2006).

18. *Laster*, 584 F.3d at 853.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 855.

24. *Id.* at 857 (citing *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007)).

25. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

26. *Id.* at 1742.

27. *Id.* at 1753. The purpose and objectives prong of the preemption doctrine was established in *Hines v. Davidowitz*, 312 U.S. 52 (1941). Justice Hugo Black, in writing the

A. *The Scalia Opinion*

The putative majority opinion authored by Justice Scalia deals almost exclusively with the question of whether California's Discover Bank rule in particular, and state law tests for unconscionability in general, run counter to the purposes and objectives of the FAA. Writing for the majority Justice Scalia's opinion focuses on the legislative history and intent²⁸ of the FAA and quickly concludes that the Discover Bank rule interferes with the purposes and objectives of the FAA and thus is implicitly preempted by the Act.²⁹

Justice Scalia begins his opinion by exploring the limitations of the FAA's savings clause in Section 2. The savings clause of Section 2 states that, "[a] written provision . . . to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."³⁰ This provision has previously been interpreted to mean that the defenses of fraud, duress, and unconscionability are available to litigants seeking to avoid arbitration.³¹ While Section 2's savings clause may save some state laws from preemption, the Court has found that Section 2 still embodies the FAA's principle of a "liberal federal policy favoring arbitration"³² and the "fundamental principle that arbitration is a matter of contract."³³ Therefore, it has been established that Section 2 cannot and will not preserve state-law rules that "apply only to arbitration," . . . "derive their meaning from the fact that an agreement to arbitrate is at issue" or interfere with the fundamental attributes of arbitration.³⁴ The question then is whether Section 2 saves the Discover Bank rule from preemption.

majority opinion in *Hines*, made clear that "[w]hen the national government by treaty or statute has established rules and regulations. . . the treaty or statute is the supreme law of the land. No state can add to or take from the force and effect of such treaty or statute." Black went on to declare that "[the Court's] primary function is to determine whether, under the circumstances of this particular case, [a state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

28. Scalia has previously been critical of the use of legislative histories and legislative intent. See, e.g., *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring) (declaring the use of legislative histories "undermines the clarity of law. . ."); *Edwards v. Aguillard*, 482 U.S. 578, 636-37 (1987) ("For while it is possible to discern the objective 'purpose' of a statute (i.e., the public good at which its provisions appear to be directed), or even the formal motivation for a statute where that is explicitly set forth (as it was, to no avail, here), discerning the subjective motivation of those enacting the statute is, to be honest, almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite.").

29. *Concepcion*, 131 S. Ct. at 1753.

30. 9 U.S.C. § 2 (2011).

31. See *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 483-84 (1989); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

32. *Concepcion*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

33. *Id.* (quoting *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010)).

34. *Id.* at 1746, 1748.

California's Discover Bank rule originated from the case of *Discover Bank v. Superior Court*.³⁵ In *Discover Bank*, the California Supreme Court applied the provisions of the California code to conclude that when class-action waivers are "found in adhesion contracts and the disputes 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 money" they are unconscionable and void.³⁶ The California Civil Code allows courts to refuse to enforce any contract found "to have been unconscionable at the time it was made," or the court may "limit the application of any unconscionable clause."³⁷ As interpreted, "California's unconscionability doctrine contains both a substantive and procedural aspect . . . in order to be satisfied one must show 'oppression' or 'surprise' due to unequal bargaining power, the latter on 'overly harsh' or 'one-sided' results."³⁸ Thus, the California Supreme Court concluded that exculpatory contracts violate California public policy and as such are void as a matter of law.³⁹

Scalia noted that when the court is confronted with rules that prohibit arbitration or demand procedures incompatible with the FAA, they cannot be saved by Section 2 and are clearly preempted.⁴⁰ However, facially neutral rules like the Discover Bank rule present a more difficult issue.⁴¹ As articulated by the California Courts, the Discover Bank rule applied to all contracts, not just arbitration agreements.⁴² However, it was argued that its application was such as to disfavor arbitration; so, the question then is whether the Discover Bank rule frustrates the accomplishment of the FAA's objectives.

To divine the answer, Justice Scalia first identifies several of the purposes and objectives of the FAA that he finds relevant. Based on the case law, he concluded the principal purpose of the FAA is to make sure "that arbitration agreements are enforced according to their terms."⁴³ Scalia notes that the

35. *Discover Bank v. Superior Court*, 113 P.3d 1100 (Cal. 2005). In *Discover Bank*, the plaintiff alleged that Discover Bank represented to cardholders that late fees would not be assessed if payment was received by a certain date when in reality late fees were assessed if payments were not received by 1:00 p.m. of that date. The damages on an individual basis were small but large in aggregate.

36. *Id.* at 1110.

37. *Concepcion*, 131 S. Ct. at 1746 (citing CAL. CIV. CODE § 1670.5(a) (West 1979)). *See also* CAL. CIV. CODE § 1668 (West 2013) ("All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.").

38. *Discover Bank*, 113 P.3d at 1108.

39. *Id.*

40. *Concepcion*, 131 S. Ct. at 1747-48 (2011).

41. *Id.* at 1747.

42. *Id.* at 1746.

43. *Id.* at 1748 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)). However, it should be noted that the arbitration agreement process described in *Volt* is far different than the one at issue in *Concepcion*. In *Volt*, the Court described

Court has found that parties to arbitration agreements may limit the issues subject to arbitration, set the rules for arbitration, and choose who will arbitrate the dispute.⁴⁴ And that arbitration by its very nature, allows the parties to tailor the process to the type of dispute.⁴⁵ However, class-wide arbitration, Scalia argues, sacrifices the principal advantage of arbitration.⁴⁶ Citing *Stolt-Nielson*, Scalia notes that “changes brought about by the shift from bilateral to class arbitration” were “fundamental.”⁴⁷ Scalia bases his conclusion that class arbitration frustrates speedy resolution of claims on three grounds.

First, class arbitration “makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”⁴⁸ For support, Scalia turns to statistics from the American Arbitration Association (AAA) which found of 283 class arbitration claims, 121 remained active, 162 had been settled, withdrawn, or dismissed, and none had resulted in a final award on the merits.⁴⁹ Scalia also notes numerous statistics showing the benefits of bilateral arbitration over class arbitration, mostly due to the increased amount of pretrial work and time required for class arbitration.⁵⁰

Secondly, Scalia claims that the procedures for class arbitration are too formal.⁵¹ He bases this argument in large part on the fact that the AAA’s class arbitration procedures mirror the class litigation procedures found in the Federal Rules of Civil Procedure.⁵² Although he concedes that the parties could alter those procedures by contract.⁵³ Scalia reasons that due to the complexity of class-wide procedures, it was “unlikely” that Congress had intentionally left the “disposition of these procedural requirements to an arbitrator.”⁵⁴

Finally, Scalia argues that class arbitration greatly increases the risks to defendants.⁵⁵ For instance, the informal procedures associated with arbitration make it more likely that mistakes will go uncorrected.⁵⁶ With the large sums associated with class claims, Scalia concludes the risk of uncorrected error

arbitration as “a matter of consent, not coercion,” and noted that “the parties are generally free to structure their arbitration agreements as they see fit.” However, because the *Concepcion* case deals with a consumer contract of adhesion, there is no opportunity to “structure” the arbitration agreement.

44. *Id.* at 1750-51.

45. *Id.*

46. *Id.* at 1750-51.

47. *Id.* at 1750 (citing *Stolt-Nielsen v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1776 (2010)).

48. *Id.* at 1751.

49. *Id.*

50. *Id.* at 1751-52.

51. *Id.*

52. *Id.* at 1751.

53. *Id.*

54. *Id.*

55. *Id.* at 1752.

56. *Id.*

would pressure defendants into settling questionable claims.⁵⁷

Scalia concludes that while the Discover Bank rule does not require class arbitration, the fact that it allows consumers to elect class arbitration after the fact — when they are forbidden by the arbitration agreement to do so — runs counter to the FAA's purpose.⁵⁸ Scalia notes that the Discover Bank rule's three prongs were not a sufficient check on the rule's scope⁵⁹ and that a requirement to arbitrate in class-actions would “makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”⁶⁰

Examined as a whole, it is clear that Justice Scalia's opinion rests entirely on the purposes and objectives of the FAA. It is curious that Justice Thomas, who had previously denounced the Court's purposes and objectives implied preemption jurisprudence, reluctantly joined the “majority” opinion to “to give lower courts guidance from a majority of the Court.”⁶¹ Most importantly, although Thomas “joined” the majority, his concurrence rejects every part of Scalia's rationale.

B. The Thomas Opinion

In contrast to the Scalia opinion, Justice Thomas's concurring opinion forgoes attempting to divine the purposes and objectives of the FAA. Instead, Thomas comes to the same result based upon a textual analysis of the FAA. Thomas begins by reaffirming his adherence to his opinion in *Wyeth v. Levine* where he rejected purposes and objectives preemption.⁶² In *Wyeth v. Levine*, Justice Thomas wrote:

57. *Id.* Scalia's opinion about the dangers posed to the traditional notion of arbitration by class arbitration is far from universal. See S.I. Strong, *Does Class Arbitration “Change the Nature” of Arbitration? Stolt-Nielsen, AT&T, and a Return to First Principles*, 17 HARV. NEGOT. L. REV. 201, 204 (2012) (“Indeed, the flexibility inherent in arbitration is precisely what makes Stolt-Nielsen's conclusion that class arbitration ‘changes the nature of arbitration’ so troubling, since the statement is based on the unspoken premise that the nature of arbitration is something that can be both defined and universally agreed upon. This conclusion is particularly problematic because the jurisprudential nature of class arbitration has not been discussed with any rigor, academically or judicially.”). See also Daniel Higginbotham, *Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers*, 58 DUKE L.J. 103 (2008); Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and Cafu*, 106 COLUM. L. REV. 1872, 1901 (2006) (noting that foreclosing class procedures may have as great a distortion effect as allowing them); Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions From Arbitration Proceedings, 57 Fed. Reg. 52,659-02 (Nov. 4, 1992).

58. *Concepcion*, 131 S. Ct. at 1750.

59. *Id.* (concluding that in fact almost all consumer contracts were adhesion contracts, and that the two other requirements, that the damages be predictably small and the consumer allege a scheme to cheat consumers, were so easily met as to be “toothless”).

60. *Id.* at 1751.

61. *Id.* at 1754.

62. *Wyeth v. Levine*, 555 U.S. 555, 583 (2009); see also Roger Pilon, *Into the Pre-emption Thicket: Wyeth v. Levine*, 2009 CATO SUP. CT. REV. 85, 95-99 (2008-2009), for a discussion of the Constitutional foundations of Thomas's pre-emption understanding.

The origins of this Court’s “purposes and objectives” pre-emption jurisprudence in *Hines*, and its broad application in cases like *Geier*, illustrate that this brand of the Court’s pre-emption jurisprudence facilitates freewheeling, extratextual, and broad evaluations of the “purposes and objectives” embodied within federal law. This, in turn, leads to decisions giving improperly broad pre-emptive effect to judicially manufactured policies, rather than to the statutory text enacted by Congress pursuant to the Constitution and the agency actions authorized thereby. Because such a sweeping approach to pre-emption leads to the illegitimate—and thus, unconstitutional—invalidation of state laws, I can no longer assent to a doctrine that pre-empts state laws merely because they “stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives” of federal law, *Hines*, 312 U.S., at 67, 61 S.Ct. 399, as perceived by this Court.⁶³

Having made clear his rejection of purposes and objectives preemption, Justice Thomas begins his textual analysis of the FAA by focusing on the similarity and differences in language between the clauses of Section 2.⁶⁴ Thomas noted that “Section 2 provides that “[a] written provision in . . . a contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable.”⁶⁵ However, the clause immediately following — “save upon such grounds as exist at law or in equity for the revocation of any contract” — does not mirror the language of the proceeding clause.⁶⁶ Thomas finds this important because the inclusion of the term “revocation” and the omission of the terms “invalidation” and “nonenforcement” suggest that Section 2’s saving clause applies only to defenses that relate to the formation of the contract, not to general contract defenses.⁶⁷ Thomas concedes that revocability, validity, and enforceability are often used interchangeably. However, he argues this ambiguity “cannot justify ignoring Congress’s clear decision in §2 to repeat only one of the three concepts.”⁶⁸

Continuing his analysis Thomas seeks to answer the ambiguity of Section 2’s savings clause by examining the other parts of the FAA.⁶⁹ In particular, Thomas notes that Section 4 of the FAA requires that “upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue,” the court must order arbitration “in accordance with

63. *Wyeth*, 555 U.S. at 604.

64. *Concepcion*, 131 S. Ct. at 1754 (2011). See Nancie G. Marzulla, *The Textualism of Clarence Thomas: Anchoring the Supreme Court’s Property Rights Jurisprudence to the Constitution*, 10 AM. U. J. GENDER SOC. POL’Y & L. 351 (2002), for more on Justice Thomas’s textualism.

65. *Concepcion*, 131 S. Ct. at 1754.

66. *Id.*

67. *Id.* (“It is our duty to give effect, if possible, to every clause and word of a statute.” quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

68. *Id.* (“...the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

69. *Id.*

the terms of the agreement.”⁷⁰ Thomas concludes that because Section 4 relates to when a court shall enforce an arbitration agreement and Section 2 contains an exception to enforcement, that Section 4 clarifies Section 2’s saving clause.⁷¹ Thomas posits that when read harmoniously Section 4’s requirement for a court to be satisfied with the making of the contract indicates that Sections 2’s “grounds. . .for revocation” would mean grounds related to the making of the contract.⁷² Therefore under Thomas’s reading, Section 2’s saving clause would require an agreement to arbitrate be enforced, subject only to defenses related to the formation of the contract such as fraud, duress, or mutual mistake.⁷³

Having found a clear and concise rule from the FAA’s text, Thomas then applies it to the Concepcions’ claim. For Thomas, the only question about the Discover Bank rule is whether it relates to the making of the contract.⁷⁴ Thomas accepts that the basis of the Discover Bank rule is California’s public policy.⁷⁵ However, although California public policy has determined that these exculpatory contracts should not be enforced, the fact that it is against public policy is, in and of itself, not a defense to the formation but rather the enforcement of the contract.⁷⁶ Therefore, because the Discover Bank rule is not a defense to the formation of a contract, under Thomas’s textualist approach it is not a ground for revocation under the Section 2’s savings clause.⁷⁷

C. *The Dissenting Opinion*

Although not critical to understanding the key differences between the Thomas and Scalia opinions, the dissent authored by Justice Breyer provides insight into potential weaknesses in the majority’s argument. The dissent criticizes the Scalia opinion on three principles: 1) Scalia mistakenly treats the Discover Bank rule as a blanket policy against consumer class-action waivers; 2) Scalia focuses too heavily on the perceived procedural advantages of arbitration when that was not a purpose of the FAA; and 3) there is no basis for Scalia’s contention that the Discover Bank rule is an obstacle to the FAA’s objective because of the added complexity of class-arbitration procedures.⁷⁸

70. *Id.*

71. *Id.* at 1754-55.

72. *Id.*

73. *Id.* at 1755.

74. *Id.*

75. *Id.* at 1756.

76. *Id.*

77. *Id.* While in this case Thomas’s textual approach produces the same result as Scalia’s purposes and objectives preemption, it is not at all clear that this will always be the case. Thomas himself notes, “the Court’s test will *often* lead to the same outcome as my textual interpretation” (emphasis added).

78. *Id.* at 1756-59. (Breyer, J., dissenting). Justice Breyer notes that the Discover Bank rule applied equally to waivers against class-action litigation as it did to waivers of class-arbitration.

Although Scalia dismissed the Discover Bank rule's three prongs as not truly limiting, the dissent finds that the Discover Bank rule, as applied in California, had not been a blanket obstacle to the enforcement of class-action waivers.⁷⁹ The dissent found cases where class-action waivers were not unconscionable under Discover Bank's unconscionability standards.⁸⁰

The dissent then notes that although Congress was aware of the potential procedural advantages of arbitration, the Court in the past cautioned against thinking that the primary objective of the FAA was to guarantee those particular procedural advantages.⁸¹ Instead they state that the purpose of the act was to ensure arbitration agreements were treated the same in law and admiralty as other contracts.⁸²

Finally, the dissent criticizes the majority's analysis regarding the perceived complexity of class-arbitration procedures.⁸³ Justice Breyer takes note of the fact that the Discover Bank rule places the same limits on litigation and cannot be described as prejudicial against arbitration.⁸⁴ Nor does the dissent accept the majority position that individual arbitration is a fundamental attribute of the process. Instead Justice Breyer concludes that "class arbitration is consistent with the use of arbitration. It is a form of arbitration that is well known in California and followed elsewhere."⁸⁵ Justice Breyer further states that Justice Scalia, is "unlikely to be able to trace [the majority opinion's] present view to the history of the arbitration statute itself."⁸⁶ He then rejects the majority opinion's contention that the disadvantages of class-arbitration outweigh its advantages.⁸⁷ The dissent concludes that given these factors and the non-discriminatory manner in which the Discover Bank rule is applied means that the Discover Bank rule clearly falls under Section 2's "upon such grounds as exist at law or in equity for the revocation of any contract." Therefore, the FAA does not preempt California law.⁸⁸

Having examined all three opinions in *Concepcion* we can discern a clear pattern. The majority finds class-arbitration and the Discover Bank rule are preempted by the FAA because they interfere with the purposes and objectives of the FAA. Justice Thomas rejects the purposes and objectives rationale and believes that the Discover Bank rule is forbidden by the text of the FAA because it does not relate to the formation of the contract. The dissent believes

79. *Id.* at 1756-57.

80. *Id.* at 1757 (citing *Walnut Producers of Cal. v. Diamond Foods, Inc.*, 187 Cal. App. 4th 634, 647-50, 114 Cal. Rptr. 3d 449, 459-62 (2010); *Arguelles-Romero v. Superior Court*, 184 Cal. App. 4th 825, 843-45, 109 Cal. Rptr. 3d 289, 305-07 (2010); *Smith v. Americredit Fin. Servs.*, No. 09cv1076, 2009 U.S. Dist. LEXIS 115767, 2009 WL 4895280 (SD Cal., Dec. 11, 2009).

81. *Concepcion*, 131 S. Ct. at 1758.

82. *Id.*

83. *Id.* at 1758-60.

84. *Id.* at 1758-59.

85. *Id.* at 1758.

86. *Id.* at 1759; *see also* *Moses*, *infra* note 93.

87. *Concepcion*, 131 S. Ct. at 1759-60.

88. *Id.* at 1762.

that Scalia misreads the purposes and objectives of the FAA and the Discover Bank rule is consistent with the purposes and objectives of the act. In effect, the *Concepcion* court is equally divided on the question of whether the Discover Bank rule frustrates the purposes and objectives of the FAA, with one Justice rejecting the premise that the purposes and objectives of Congress are appropriate matters for the Court to even consider in resolving the case.

D. The Scalia and Thomas Opinions Compared

When comparing the Scalia and Thomas opinions, it becomes clear there is no single rationale that can be found in both opinions. The following chart demonstrates their differences:

Key Questions	The Scalia Opinion	The Thomas Opinion
Can unconscionability be a basis for a court to invalidate an agreement to arbitrate?	Yes. Under §2 of the FAA, unconscionability can be a basis to invalidate an agreement to arbitrate.	No. Under §2 of the FAA, unconscionability cannot be a basis to invalidate an agreement to arbitrate.
Is purposes and objectives preemption an appropriate method to decide FAA preemption questions?	Yes. Purposes and objectives analysis is appropriate to determine if the FAA preempts an unconscionability-based decision to invalidate an agreement to arbitrate.	No. As stated in <i>Wyeth</i> , “[t]his Court’s entire body of purposes and objectives preemption jurisprudence is inherently flawed.”
Is the Discover Bank rule preempted by the FAA for the same reasons?	No. California’s Discover Bank rule prohibiting class-action waivers interferes with the FAA’s purpose of promoting efficient and informal dispute resolution it is preempted by the FAA.	No. Because of the word revocation in the text of §2, only defenses relating to the formation of contracts may be used to invalidate arbitration agreements. The Discover Bank rule does not concern contract formation so it is preempted by the FAA.

Justices Scalia and Thomas differ on all of the critical issues in this case. The first is whether state laws may ever invalidate agreements to arbitrate on the grounds of unconscionability. Justice Scalia’s opinion accepts that proposition in general even as it concludes in this case the unconscionability

rule conflicts with the purposes and objectives of the FAA. Justice Thomas rejects the very idea that unconscionability could ever be the basis for invalidating an agreement to arbitrate. In his view, only those defenses that go to the formation of a contract are covered under section 2's savings clause, and they do not include unconscionability.

Justices Scalia and Thomas further disagree about the appropriateness of using purposes and objectives preemption. Scalia's opinion is framed entirely around the Discover Bank rule's frustration of the purposes and objectives of the FAA.⁸⁹ Thomas continues to reject the Court's whole body of purposes and objectives preemption jurisprudence and instead opts of a textual interpretation of the FAA.⁹⁰ Thomas's textual approach stands in stark contrast to Scalia's purposes and objectives divination. The two opinions share the same result but their paths share no commonality. Thomas focuses exclusively on the text of the FAA and the canons of statutory interpretation. Scalia relies on modern FAA precedent and his interpretation of the Congress's purposes and objectives in adopting the FAA. Both Scalia, via the purposes and objectives preemption, and Thomas, via textualism, come to a common conclusion, California's Discover Bank rule runs counter to the FAA. However, while they reach the same result, there appears to be no common rationale.

Although Thomas technically joins the majority, that, in and of itself, does not create a majority rationale.⁹¹ Instead, he expressly rejects the majority's reasoning.⁹² It is this lack of a common rationale that spurs this inquiry and raises question about the future influence of *Concepcion* on FAA jurisprudence. By allegedly joining the majority opinion but writing a contradictory concurring opinion Justice Thomas has created additional confusion, not guidance for the lower courts. Although there is a great body of scholarly work on the FAA, this article will quickly review the history of the adoption of the FAA, the most important cases in FAA jurisprudence, and why the *Concepcion* case was so closely watched.

E. The Federal Arbitration Act: From Modest Procedural Statute to Preemption Juggernaut

The FAA was passed in 1925, after a five-year campaign by Julius Cohen and Charles Bernheimer, to promote arbitration and seek a federal law to enforce arbitration agreements in interstate and foreign commerce and admiralty.⁹³ Prior to its passage, arbitration agreements were often ignored, and in cases of breach nominal damages awarded. This was especially a problem in courts sitting in admiralty that traditionally lacked the authority to

89. *Id.* at 1748.

90. *Id.* at 1753 (Thomas, J., concurring).

91. DUXBURY, *infra* note 173.

92. *Concepcion*, 131 S. Ct. at 1754.

93. See Margaret Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress* 34 FLA. ST. U. L. REV. 99, 99-102 (2006).

order the specific performance of contract terms.⁹⁴ Arbitration agreements violated in courts of admiralty resulted in awards of nominal damages but required traditional litigation.⁹⁵ To rectify this problem the FAA was presented as a procedural tool to allow federal courts to enforce these arbitration agreements.

The text of the original FAA statute was drafted by Cohen based largely on the New York arbitration statute.⁹⁶ In campaigning for the passage of the FAA, Cohen asserted that the statute would address long delays caused by congested courts and excessive motion practice, the expense of litigation, and that the FAA would lead to more just outcomes than the litigation process.⁹⁷ Furthermore, the scope of the FAA was seen as limited to agreements between merchants.⁹⁸ W.H.H. Piatt testified to Congress that the FAA would be “purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it.”⁹⁹ Cohen also explained that the FAA would be a limited procedural statute and would not impact state law.¹⁰⁰

For the next three decades the FAA remained just that, a modest procedural statute for federal courts.¹⁰¹ However, a turning point in FAA jurisprudence came in the 1967 case *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*¹⁰² There, the Supreme Court addressed the question of whether a Federal court sitting in diversity jurisdiction could apply the FAA.¹⁰³ In concluding that the FAA should be applied, the court arguably misstated the constitutional basis for the FAA. Although Cohen stated the FAA was based on Congress’s enumerated power to establish and control inferior federal courts, the Supreme Court concluded that the FAA was based on Congress’s powers to regulate ‘interstate commerce and over admiralty.’¹⁰⁴ Although the Court’s error might seem inconsequential, it was the first in a series of misinterpretations that formed a basis for a massive expansion of the FAA’s

94. See *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 123 (1924) (noting “AN AWARD WILL BE GIVEN FULL EFFECT. the agreement whether executory or executed, cannot be enforced in admiralty by specific performance; *merely because that court lacks the power to grant equitable relief*” (emphasis added)).

95. See *Hall St. Assocs., L.L.C. v. Mattel Inc.*, 552 U.S. 576, 581-82 n.2 (2008). (Stevens, J., dissenting).

96. *Moses*, *supra* note 93, at 102.

97. *Id.*

98. *Id.* at 106.

99. *Id.* W.H.H. Piatt was, at the time, the Chairman of the Committee of Commerce Trade and Commercial Law of the American Bar Association.

100. *Id.* at 120.

101. *Id.* at 121-22.

102. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967). In *Prima Paint*, Flood & Conklin declared bankruptcy one week after entering into a contract with Prima Paint. Because Flood & Conklin had represented itself as solvent during negotiations Prima Paint moved to rescind the contracts and enjoin Flood & Conklin from arbitration on the basis of misrepresentation.

103. *Id.* at 404-05.

104. *Moses*, *supra* note 93, at 125.

reach.

Sixteen years after *Prima Paint* the Supreme Court again expanded the FAA's reach in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*¹⁰⁵ Much has been written about *Moses H. Cone*, and for the purposes of this article the facts and the holding of the case are unimportant.¹⁰⁶ What is important, is the dicta for which *Moses H. Cone* has become famous or in some quarters infamous.¹⁰⁷ In *Moses H. Cone*, the Court ruled that the FAA applied in both state and federal courts, and that Section 2 of the FAA was a Congressional declaration of a "liberal federal policy favoring arbitration agreements."¹⁰⁸ This dicta, without citation or authority, has nonetheless become a mantra to those who would expand the scope of the FAA and a pillar of modern FAA jurisprudence. It is little surprise that one year after *Moses H. Cone*, the Court in *Southland Corp. v. Keating*, concluded that the FAA pre-empted state law.¹⁰⁹

Over the next 30 years the Court continued to expand the scope of FAA preemption, until the FAA was viewed to apply to almost every arbitration agreement.¹¹⁰ However, the FAA's Section 2 savings clause still provided a means for invalidating arbitration agreements. Under Section 2's saving clause, an agreement to arbitrate will be held valid only if it does not violate the "grounds that exist in law or equity for the revocation of any contract."¹¹¹ Thus the common law defense of unconscionability became a frequent tool for those seeking to invalidate arbitration agreements.¹¹² As the Discover Bank

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

106. *Id.* *Moses H. Cone* entered into a contract with Mercury Construction for construction of additions to the hospital building. Contract disputes were to be initially referred to the architect who was hired to design and oversee the construction project. Disputes decided by the architect or not decided within a specified time could be submitted to binding arbitration under an arbitration clause in the contract. Subsequently, during construction, respondent submitted claims to the architect for extended overhead or increase in construction costs due to petitioner's delay or inaction. But the claims were not resolved, and petitioner refused to pay them. Cone then filed an action in a North Carolina state court against respondent and the architect, seeking a declaratory judgment that there was no right to arbitration, that petitioner was not liable to respondent, and that, if it was liable it would be entitled to indemnity from the architect. A few days later, Cone obtained an ex parte injunction from the state court forbidding respondent to take any steps toward arbitration, but when Mercury objected, the stay was dissolved. Mercury then filed a diversity of citizenship action in Federal District Court, seeking an order compelling arbitration under § 4 of the United States Arbitration Act. The District Court stayed the action pending resolution of the state court suit because the two suits involved the identical issue of the arbitrability of Mercury's claims. The Court of Appeals, holding that it had jurisdiction under 28 U.S.C. § 1291, reversed the District Court's stay order, and remanded the case with instructions to enter an order to arbitrate. The Supreme Court concluded the District Court abused its discretion in granting the stay and upheld the decision of the Court of Appeals.

107. *Moses*, *supra* note 93, at 125.

108. *Moses H. Cone*, 460 U.S. at 24.

109. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984).

110. *See Moses*, *supra* note 93.

111. 9 U.S.C. § 2.

112. David Horton, *Unconscionability Wars*, 106 NW. U. L. REV. 387, 387 (2012) (finding that for decades, courts have invoked the contract defense of unconscionability to invalidate one-

rule at issue in *Concepcion* was based on California's unconscionability doctrine, many viewed the Supreme Court's review of the case as a serious blow to the viability of future claims of unconscionability in the arbitration context.¹¹³

With unconscionability often seen as the last state law based defense to arbitration agreements, understanding the precedent set by *Concepcion* becomes even more critical. Therefore, we must examine what makes historically makes precedent and what courts should do when there is no common rationale.

III. THE MAKING OF RULES OF LAW AND PRECEDENT IN THE AMERICAN LEGAL TRADITION

In order to properly understand our modern notion of precedent we must first examine the historical foundations on which the modern notions of precedent are based. We can then examine the competing theories of *ratio decidendi* and case holdings. In this section we will begin with an examination of precedent in English Common Law. Then there we will chart the transition from seriatim opinions to the opinion of the court. Finally there will be an exploration of competing theories of precedent and ratio decidendi.

A. English Common Law and the Preference for Seriatim Opinions

It is well known that the American notion of precedent and case law were borrowed from the common law of England.¹¹⁴ For hundreds of years the English legal tradition was based around oral opinions delivered from the bench by the individual judges seriatim without conference or consultation.¹¹⁵ Written opinions, which contained the legal rule of law, were not published

sided arbitration clauses); George A. Bermann, *The Supreme Court Trilogy and Its Impact on U.S. Arbitration Law*, 22 AM. REV. INT'L ARB. 551, 554 (2011) (“[U]nconscionability has emerged as the prime doctrinal basis for denying effect to arbitration agreements in consumer contracts.”) (citing Karen Cross, *Letting the Arbitrator Decide Unconscionability Challenges*, 26 OHIO ST. J. DISP. RESOL. 1 (2011)); Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609 (2009); Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185 (2004); Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006).

113. Melissa T. Lonegrass, *Finding Room For Fairness In Formalism – The Sliding Scale Approach To Unconscionability*, 44 LOY. U. CHI. L.J. 1, 20 n.96 (2012) (“The U.S. Supreme Court's recent ruling in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740 (2011), seriously curtails the use of the unconscionability doctrine to strike down arbitration agreements containing class action waivers.”).

114. Peter M. Tiersman, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1225 (2007). While there have traditionally been two major sources of law, statutes and court decisions, it has been noted that in the United States the common law has become more textual and “statute like” over the last one hundred years.

115. M. Todd Henderson, *From Seriatim to Consensus and Back Again: A Theory of Dissent*, 2007 SUP. CT. REV. 283, 292 (2007).

until the 17th century.¹¹⁶ Prior to that case reports consisted of the notes of individual attorneys.¹¹⁷ Because individual cases may be recorded by more than one attorney this system resulted in multiple and often conflicting reports.¹¹⁸ These reports although unedited and unabridged form became the source material for many attorneys and judges, but they did not present a coherent picture of the law.¹¹⁹ The first abridgments appeared in the fifteenth century but the quality varied widely and systematic court reports did not appear until Edward Coke issued his case notes in 1609.¹²⁰

The expansion of trade in commerce in the early 18th century also presented challenges to the judicial system.¹²¹ The law of merchants in England was unsettled and the common law courts were seen as unsuited for settling commercial disputes in a uniform manner.¹²² The divergence between formal and informal law, common and commercial law, became a problem for law courts.¹²³ Courts were seen as overly formal and out of touch with commercial realities.¹²⁴ The fact that different courts made different rules added to this view.¹²⁵ Furthermore, decisions by different courts were not seen as binding, but merely persuasive.¹²⁶ Perhaps more importantly, interpreting past cases had become exceedingly complex due to the number courts and the number of opinions on every subject and the often highly nuanced differences between them.¹²⁷ Further complicating matters was the sheer number of courts, with over seventy “law” courts operating in London alone, with almost 800 judges.¹²⁸ Winning was not of a binary character and determining winner, losers, and precedent involved interpreting all the judges’ individual opinions.¹²⁹ These factors made interpreting past cases against future ones

116. *Id.*

117. *Id.*

118. *Id.* Although multiple and conflicting reports were a problem they did not become a crisis until the rise of commerce and trade in the late-17th century.

119. *Id.*

120. *Id.* at 293. Sir Francis Bacon famously remarked that “[H]ad it not been for Sir Edward Coke’s reports...law by this time had been almost like a ship without ballast; for that the cases of modern experience are fled from those that are judged and ruled in former times.”

121. *Id.* at 294-95.

122. *Id.* at 296.

123. *Id.*

124. *Id.* at 296 -97.

125. *Id.* at 297.

126. *Id.* at 297-98.

127. *Id.* at 299.

128. *Id.* at 297. *See also* PATRICK COLQUHOUN, *A TREATISE ON THE POLICE OF THE METROPOLIS* 383-88 (5th ed. 1797) (Colquhoun described 9 supreme courts, 4 ecclesiastical courts, 17 courts for the City of London, 8 courts for the City of Westminster, 14 courts for the part of London lying in Middlesex, 8 courts in Southwark, 18 courts for small debts, 1 court of oyer and terminer, 4 courts of general and quarter sessions of the peace, 10 courts for petty matters, and 5 corners’ courts. This number does not include the innumerable merchants’ courts, private arbitration proceedings, and other methods for resolving disputes).

129. *Id.* at 298.

exceedingly complex.¹³⁰

In 1756, William Murray (Lord Mansfield) became Lord Chief Justice of the Kings Bench.¹³¹ As Lord Chief Justice, Mansfield introduced a procedure for generating consensus among judges and then issuing caucused opinions.¹³² Mansfield's changes were an attempt to bring clarity to the law in order to bring English commercial law in line with other nations.¹³³ At the time, the law in England had become fragmented and Mansfield's reforms were designed to make English courts more attractive to litigants.¹³⁴ In the "opinion of the court" Mansfield found a mechanism to achieve his goals.¹³⁵ The court could now reform the common the law by speaking with a single voice settling controversies without dispute or ambiguity and provide the stability needed for commercial transactions.¹³⁶ While Mansfield's reforms were influential, they were short-lived.¹³⁷ After Mansfield retired Lord Kenyon returned to the traditional approach of seriatim opinions.¹³⁸ However, while Mansfield's reforms did not survive in England, they found fertile ground in the nascent judicial system of the United States.¹³⁹

Unsurprisingly, given the relationship between the United Kingdom and the United States, the Supreme Court early in its history mirrored the British system with each justice writing seriatim opinions when more than a memorandum was issued.¹⁴⁰ While this left the Court without a single controlling opinion, early critics of the court saw this disunity of opinion as a critical check on court power.¹⁴¹

An example of the early Court's disunity can be seen in the landmark case *Chisholm v. Georgia*.¹⁴² In *Chisholm*, each of four Justices in the majority and the lone dissenter wrote their own opinion.¹⁴³ However, the individual

130. *Id.* at 299.

131. Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. REV. 186, 190 (1959).

132. *Id.*

133. Henderson, *supra* note 115, at 294.

134. *Id.* at 299.

135. *Id.* at 294.

136. *Id.*

137. *Id.* at 302.

138. *Id.*

139. Austin, *infra* note 141.

140. An examination of the early court reveals no set procedure for the issuances of opinions. In the sixty-three cases reported by Alexander Dallas between 1790-1800, the most common form were *per curiam*. The second most common form were individual opinions issued seriatim as in the English courts. The division between the *per curiam* and seriatim opinions seems to whether there was any division of opinion between the justices themselves. See John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L.Q. 137 (1999).

141. Joshua M. Austin, *The Law of Citations and Seriatim Opinions: Were the Ancient Romans and the Early Supreme Court on the Right Track?*, 31 N. ILL. U. L. REV. 19, 27, n. 81 (2010).

142. See generally *Chisholm v. Georgia*, 2 U.S. 419 (1793).

143. *Id.*

opinions of the majority show not only a divergence of the rationale for the judgment but also what the nature of the question before the court was. Justices Jay and Cushing examined the narrow question of whether a State be sued by a citizen of another state.¹⁴⁴ Justice Blair took the broader view that the case presented the question whether states have to submit to the jurisdiction of the Federal government, and thus have jurisdiction over controversies between the state and citizens from another state.¹⁴⁵ Not to be outdone, Justice Wilson concluded the question was not only whether states had to submit to the jurisdiction of the Supreme Court but also “do the people of the United States form a nation” (emphasis in the original).¹⁴⁶ Although the result in *Chisholm* is clear, States can be sued by non-residents, the *rationale* of that decision is not.

B. From Seriatim Opinions to an Opinion for the Court

After Lord Mansfield in England denounced the practice of seriatim opinions, experimentation with the form of opinions of the court began in the Americas. Chief Justice Edmond Pendleton of the Virginia Court of Appeals was the first to do away with seriatim opinions.¹⁴⁷ However, this change was criticized by Republican politicians and did not outlast Pendleton’s term as Chief Justice.¹⁴⁸ When John Marshall became Chief Justice of the U.S. Supreme Court he sought to reform the practice of seriatim opinions there.¹⁴⁹ Marshall thought the issuance of individual opinions ill advised.¹⁵⁰ He sought to strengthen the power of the court vis-à-vis the other branches of government and believed the practice of seriatim opinions led to precedential confusion that weakened its power.¹⁵¹ However, the change was controversial. Thomas Jefferson argued that seriatim opinions led to “(1) increased transparency and led to more accountability; (2) it showed that each judge had considered and understood the case; (3) it gave more or less weight to a precedent based on the vote of the judges; (4) and it allowed judges in the future to overrule bad law based on the reasoning of their predecessors.”¹⁵² Jefferson’s anti-federalist view conflicted with Marshall’s desire to strengthen the court. The politically charged case of *Talbot v. Seeman* gave Marshall the opportunity to begin the shift from seriatim opinions to an opinion of the court.¹⁵³

144. *Id.* at 466-79.

145. *Id.* at 450.

146. *Id.* at 453.

147. Austin, *supra* note 141, at 27.

148. *Id.*

149. Hon. Ruth Bader Ginsburg, *Remarks on Writing Separately*, 65 WASH. L. REV. 133, 138 (1990).

150. Hon. Ruth Bader Ginsburg, *The Role of Dissenting Opinions*, 95 MINN. L. REV. 1, 2 (2010).

151. See generally Albert J. Beveridge, *The Life of John Marshall* (1919).

152. Henderson, *supra* note 115, at 305.

153. *Id.* at 314-15.

At issue in *Talbot* was the sailing vessel *Amelia*.¹⁵⁴ The *Amelia* was owned by Seeman's employer a resident of Hamburg.¹⁵⁵ The French had seized the *Amelia* on the high seas and while under French control she had been captured by the *U.S.S. Constitution*, and brought to New York for adjudication.¹⁵⁶ Talbot, the captain of the *Constitution*, sued for salvage rights to the *Amelia*.¹⁵⁷ The district court of New York awarded Talbot a salvage award of one half the gross amount of the ship and cargo.¹⁵⁸ Seeman, in turn, argued that the ship was neutral and in no danger of being condemned by the French, thus no service was rendered and no salvage rights owed and appealed the judgment.¹⁵⁹ The Court had to determine if the seizure of the *Amelia* was legal and whether Talbot provided a "meritorious" service to Seeman.¹⁶⁰ However, these questions were [tainted] by the political environment of the day.¹⁶¹ Chief Justice Marshall convinced the other judges that such politically charged case could only be adequately resolved by a single unified opinion.¹⁶²

The decision itself was an exercise in compromise. It gave a salvage award to Talbot but reduced it to one-sixth from the traditional one-half, and it allowed Seeman to deduct his costs from the award, thus a nominal victory for the Federalist.¹⁶³ However, with this decision the Court affirmed its power to decide the breadth of Congressional statutes and the role of the executive in foreign affairs.¹⁶⁴

Although *Talbot* began a new era for the Court, the unanimity Marshall sought and often achieved was not absolute, as Marshall himself dissent in several opinions and wrote one special concurrence.¹⁶⁵ Following *Talbot*, Justice Samuel Chase wrote the first concurrence of Marshall's new era, a one sentence not in the case *Head & Armory v. Providence Ins. Co.*¹⁶⁶ As more cases came before the court, decisions containing at least one separate opinion

154. *Talbot v. Seeman*, 5 U.S. 1, 27 (1801).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 28. Seeman argued that because there was no state of war between France and Hamburg, the United States and Hamburg, or the United States and France, even though France had possession of the ship, no court would recognize that it had become French property.

160. *Id.*

161. The seizure of the *Amelia* occurred against the backdrop of the "quasi-war" with France which occurred mainly on the high-seas between 1798 and 1800. Federalists who were proponents of the war supported Talbot, while Republicans who wanted to avoid foreign entanglements and protect neutral shipping supported Seeman. See Henderson, *supra* note 115, at 314.

162. Henderson, *supra* note 115, at 314-15.

163. *Id.* at 315.

164. *Id.*

165. Ginsburg, *supra* note 149, at 136.

166. *Head & Armory v. Providence Ins. Co.*, 6 U.S. 127, 169 (1804). *Head & Armory*, like *Talbot*, had its origin in a vessel claimed as a prize. In *Head & Armory*, the dispute focused on an insurance policy purchased by Messer Head & Armory for the cargo of Spanish brig *Nueva Empresa*.

became more frequent as his term went on, including one special concurrence by Marshall himself.¹⁶⁷ Although dissents grew in number, the number of concurrences remained low. However, it is in the last fifty years that the dramatic increase in the number of concurrences has created a threat to traditional American concepts of precedent. As the number of concurrences has grown, so have the number of plurality decisions.¹⁶⁸ Plurality decisions have increased from a low of one in 1937 to of ninety-five in 1981.¹⁶⁹ By the 2007-2008 term, the number of concurring opinions made up more than half the number of opinions of the Court.¹⁷⁰

While the number of separate opinions has increased, the desire for a unanimous authoritative opinion still exists. Chief Justice Roberts has stated that one of his top priorities was to “reduce the number of dissenting opinions issued by members of the court.”¹⁷¹ Roberts has also sought to reduce the number of separate opinions written by court members in order to issue an opinion of the court rather than being more concerned with a “consistency and coherency of an individual judicial record.”¹⁷² Despite Justice Roberts’ desire, the number of concurrences remains historically high and shows no signs of abetting.

C. Theories of Precedent and Ratio Decidendi

Simply put, precedent is a past event that guides present or future action; in legal matters, this most often takes the form of a legal opinion.¹⁷³ John Salmond described the nature of precedent in English common law thusly: “a precedent, therefore is a judicial decision which contains in itself a principle.”¹⁷⁴ Beyond that it is the underlying principle which forms its authoritative element is often termed the *ratio decidendi*.¹⁷⁵ Although the exact meaning and form of the *ratio decidendi* has been the subject of much academic debate, it remains clear that *rationes* do exist for the purposes of understanding precedent.¹⁷⁶ The decision is binding in result between the parties to the case, but it is only “the abstract *ratio decidendi* which has the force of law as regards the world at large.”¹⁷⁷ In determining the *ratio*

167. Ginsburg, *supra* note 149, at 138.

168. Igor Kirman, *Standing Apart to Be a Part: The Precedential Value of Supreme Court Concurring Opinions*, 95 COLUM. L. REV. 2083, 2083 (1995).

169. *Id.* at 2084.

170. Linas E. Ledebur, *Plurality Rule: Concurring Opinions and a Divided Supreme Court*, 113 PENN ST. L. REV. 899, 904 (2009).

171. Henderson, *supra* note 115, at 283.

172. Austin, *supra* note 141, at 31.

173. NEIL DUXBURY, *THE NATURE AND AUTHORITY OF PRECEDENT* 1 (1st ed. 2008).

174. Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161, 161 (1930).

175. *Id.* at 161.

176. DUXBURY, *supra* note 173, at 75-77. Duxbury argues that precedents existing without supporting reasoning would be a worse situation than exists now when supported reasoning’s are often muddled and hidden.

177. JOHN W. SALMOND, *JURISPRUDENCE*, 201 (7th ed. 1924).

decidendi two things must concur: it must be, the first, an opinion given by a judge, and, in the second, “it must be an opinion the formation of which is necessary for the decision of a particular case; in other words, it must not be *obiter dictum*.”¹⁷⁸ While there are competing theories to determine the *ratio decidendi*, what is clear is that there is a distinct separation between the general legal principle of the case and the concrete decision.¹⁷⁹ Therefore it is not the judgment or decision on a particular issue that we must concern ourselves with but how that judgment was reached.¹⁸⁰ It is in determining the *ratio decidendi* is critical to understanding the rule which *stare decisis* would have us take from the case.¹⁸¹ It is the *ratio decidendi* which sets the precedent and is binding on future courts.¹⁸² It is by following this principle that we reach the most fundamental of legal axioms that like cases should be decided alike and dissimilar cases decided differently.¹⁸³

Given the divergence of rationales in the opinions in *Concepcion*, it is the method of determining the *ratio decidendi* that concerns us. Over time, legal theorists have developed many competing theories on how to determine the *ratio*. However, the two main competing theories of *ratio decidendi* are the Goodhart material facts theory and the so-called “classical” theory.¹⁸⁴

Arthur Goodhart famously put forward the proposition that the *ratio decidendi* was a principle to be determined by the material facts of the case.¹⁸⁵ Professor Goodhart’s construction involved first analyzing which facts were material and which were immaterial.¹⁸⁶ Once the material facts were determined it would then be a simple process to conclude that cases with similar material facts should be decided similarly.¹⁸⁷ Thus, under Goodhart’s theory, if precedent indicates that the material facts A, B, and C equal X, any future case(s) in which the facts are A, B and C, the court must also reach conclusion X.”¹⁸⁸ In cases where there are multiple opinions, the principle of the case is limited to the sum of all the facts held to be material by the various judges.¹⁸⁹

178. Goodhart, *supra* note 174, at 161.

179. *Id.* at 164-65.

180. Julius Stone, *The Ratio of the Ratio Decidendi*, 22 MOD. L. REV. 597, 600 (1959).

181. *Id.* at 599.

182. *Id.* at 600. Because of the confusion around the term *ratio decidendi*, some have chosen to divide the term into its descriptive and prescriptive senses. The descriptive sense refers to the reasoning by which the decision was reached, while the prescriptive sense “identifies and delimits” the reasoning binding on later courts.

183. Peter M. Tiersma, *The Textualization of Precedent*, 82 NOTRE DAME L. REV. 1187, 1214 (2007).

184. J.L. Montrose, *The Ratio Decidendi of a Case*, 20 MOD. L. REV. 587, 587 (1957).

185. Goodhart, *supra* note 174, at 182.

186. *Id.* at 169.

187. *Id.* at 179.

188. *Id.*

189. *Id.* Goodhart lays out a five pronged test for determining the principle of a case: (1) The principle of a case is not found in the reasons given in the opinion. (2) The principle is not found in the rule of law set forth in the opinion. (3) The principle is not necessarily found by a

However, Goodhart's position is far from universal and is followed by a minority today. Montrose defined the classical theory as "the principle of law propounded by the judge as the basis for his decision."¹⁹⁰ Cross and Harris refined this proposition as "the *ratio decidendi* of a case is the rule of law expressly or impliedly relied upon by the judge as a necessary step in reaching his conclusion."¹⁹¹ It is this classical understanding of *ratio decidendi* that has led to the common statement "that the *ratio* was the principle of law which the judge considered necessary to the decision."¹⁹² Under the classical theory the *ratio decidendi* of a case can be demonstrated thusly, "A driver of a motor vehicle owes no duty of care in respect of his driving to persons outside the area of potential danger which ought reasonably to have been contemplated as the result of his negligence."¹⁹³ Under the classical theory when a single member or a unanimous court issues a decision the principle is quiet easy to divine. However, when there are a proliferation of opinions and several *rationes decidendi* the controlling legal rationale can be more difficult to determine.¹⁹⁴ Thus, to become the binding legal precedent each *ratio decidendi* must receive the endorsement of a majority and that rationale must form a connection to the judgment by the majority.

Following either the classical or Goodhart's theories it remains clear, the *ratio decidendi* is created from the meeting of the minds. Either judges will agree on the facts that are material to their decision and that will form the ratio, or they will agree on a legal reasoning which will form a ratio. Absent this meeting of the minds there can be a *ratio decidendi* of individual opinions but there cannot be said to be a *ratio decidendi* of a case.

Having determined the *ratio* and thus the precedent courts must then have a framework to apply it to other cases. While there are several models of precedential application, the command or precedent model is the most widely accepted. The precedent model requires judges to decide cases based on their current understanding of the law.¹⁹⁵ To do this judges "must identify relevant sources of enacted law such as constitutional provisions, statutes, and

consideration of all the ascertainable facts of the case and the judge's decision. (4) The principle of the case is found by taking account (a) of the facts treated by the judge as material, and (b) his decision as based on them. (5) In finding the principle it is also necessary to establish what facts were held to be immaterial by the judge, for the principle may depend as much on exclusion as it does on inclusion. In *Concepcion* the lack of a common rationale defies finding precedent under this scheme. Goodhart, *supra* note 174, at 182.

190. J.L. Montrose, *The Ratio Decidendi of the House of Lords*, 20 MOD. L. REV. 124, 124-5 (1957).

191. Rupert Cross, *Precedent in English Common Law*, 72 (J.W. Harris ed., 4th ed. 1991).

192. Montrose, *supra* note 190, at 124.

193. Robert Scofield, *Goodhart's Concession: Defending Ratio Decidendi from Legal Positivism and Legal Realism in the First Half of the Twentieth Century*, 16 K.C.L.J. 311, 312 (2005).

194. Micheal Eber, Comment, *When Dissent Creates Law: Cross-Cutting Majorities and the Prediction Model of Precedent*, 58 EMORY L.J. 207, 216-17 (2008).

195. Evan H. Caminker, *Precedent and Prediction: The Forward-Looking Aspects of Inferior Court Decisionmaking*, 73 TEX. L. REV. 1, 9 (1994).

administrative regulations, and they must apply some combination of various methods of interpretation in order to discern the meaning of those sources.”¹⁹⁶ This model dictates that a decision establishes a legal rule with precedential status only if a majority of judges invoke the same dispositional rule to justify the same disposition.¹⁹⁷ As a result, as Justice Scalia has observed, “[T]he modern reality, at least, is that when the Supreme Court of the federal system, or of one of the state systems, decides a case, not merely the outcome of that decision, but the mode of analysis that it applies will thereafter be followed by the lower courts within that system, and even by that Supreme Court itself.”¹⁹⁸ The Court made a similar point about the mode of analysis being the critical factor in determining precedent over 100 years ago in *Hertz v. Woodman*:

Under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.¹⁹⁹

When there appears to be no majority agreement on a single rationale, the Supreme Court has provided guidance in how to find one in the 1977 case of *Marks v. United States*.²⁰⁰

There, the Supreme Court directly addressed how to find precedent when confronted with a case in which multiple opinions were written.²⁰¹ The petitioners in *Marks* argued they were entitled to jury instructions not under *Miller v. California*,²⁰² but under the more favorable formulation under *Memoirs v. Massachusetts*.²⁰³ However, in their analysis the Court notes that “the *Memoirs* standards never commanded the assent of more than three Justices at any one time, and [the District Court] apparently concluded from this fact that *Memoirs* never became the law.”²⁰⁴ The Court then went on to state a clear standard for dealing with multiple decisions: “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.”²⁰⁵ Based on this holding, courts have repeatedly looked to *Marks* when trying to determine a rule from competing rationales.²⁰⁶

196. *Id.*

197. *Id.* at 15.

198. *Id.* (citing Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1177 (1989)).

199. *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910).

200. *Marks v. United States*, 430 U.S. 188, 193 (1977).

201. *Id.* at 190.

202. *Id.*

203. *Memoirs v. Massachusetts*, 383 U. S. 413 (1966).

204. *Marks*, 430 U.S. at 192.

205. *Id.* at 193.

206. *See Rapanos v. United States*, 547 U.S. 715, 758 (2006) (Roberts, J., concurring).

Because not every case will have a clear single *ratio decidendi* that will carry with it precedential value the ability to find a precedent based on the narrowest grounds shared by the individual opinions is a valuable tool. However, even the narrowest grounds rule laid out in *Marks* cannot create consensus where there is none. In practice, the *Marks* rule means that a plurality opinion cannot be used as precedent if there are no grounds on which a majority of justices agree.²⁰⁷

Based on the history of the opinion of the court and the modern theories and rules on precedent, it is clear that whether it be the rationale or the facts that compose the *ratio decidendi*, when multiple opinions are authored it is the consensus on those facts or rationale that have precedential value. Having established that consensus is the key to precedent and that no consensus exists in *Concepcion*, we must now examine if *Concepcion* is an outlier or if other cases have such an unusual voting pattern.

IV. PUTATIVE MAJORITIES INTERPRETED AS PLURALITIES: COMPARING *AT&T v. CONCEPCION* WITH *BRANZBURG v. HAYES* AND *UNITED STATES v. VERDUGO-URQUIDEZ*

It is no small thing to conclude that a recent Supreme Court decision — which appears on its face to contain a majority rule — does not. It begs the question: has this ever happened before? To answer that question the authors searched Supreme Court decisions that, like *Concepcion*, were decided by a 5-4 vote with a regular concurrence being the fifth vote. To do this, the authors ran a query using the Supreme Court Database that identified all cases decided by the Supreme Court since 1946 that were decided by a 5-4 vote and had a regular concurrence.²⁰⁸

This search yielded 276 cases since 1946. All 276 cases were analyzed and in only a couple of instances were there cases where rationales in the concurring opinion and the majority opinion appeared to lack any narrowest ground to create a rule agreed to by five Justices. As it turns out, the two cases we found where the majority opinion and concurring opinion appear truly irreconcilable, *Branzburg v. Hayes*²⁰⁹ and *United States v. Verdugo-Urquidez*,²¹⁰ are considered by many courts to be plurality opinions.²¹¹

207. Chad Westerland, *Who Owns the Majority Opinion? An Examination of Policy Making on the Supreme Court*, Prepared for Presentation at the 2003 Annual Meeting of the American Political Science

Association, Philadelphia, PA.

208. Wash. Univ. St. Louis, THE SUPREME COURT DATABASE, <http://scdb.wustl.edu> (last visited Dec. 25, 2012) (visiting the analysis specifications page to set data parameters and run analysis).

209. See generally *Branzburg v. Hayes*, 408 U.S. 665 (1972).

210. See generally *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

211. For *Branzburg v. Hayes*, see *Ex parte Grothe* 687 S.W.2d 736, 738 (Tex. Crim. App. 1984); *United States v. Smith*, 135 F.3d 963, 968-69 (5th Cir. 1998); *In re Grand Jury 87-3 Subpoena Duces Tecum*, 965 F.2d 229, 232-33 (4th Cir. 1992); For *Verdugo-Urquidez*, see U.S. v. Guiterrez, 983 F.Supp. 905, 912-13 (N.D. Cal. 1998); *United States v. Esparza-Mendoza*, 265

A. *Branzburg v. Hayes*

Branzburg is the Supreme Court's only decision to date concerning whether there is a constitutional privilege that protects reporters from being forced to reveal confidential information and confidential sources in a grand jury investigation.²¹² *Branzburg* was a staff reporter for the Courier-Journal, a daily newspaper published in Louisville, Kentucky.²¹³ On November 15, 1969, the Courier-Journal ran a story written by Branzburg describing in detail his observations of two local men synthesizing hashish from marijuana, an activity that allegedly earned the men about \$5,000 in three weeks.²¹⁴ The article stated that Branzburg pledged to keep their identities secret.²¹⁵

Shortly after the story was published, Branzburg was subpoenaed by the Jefferson County grand jury.²¹⁶ Branzburg appeared before the grand jury but he refused to disclose the identities of the persons he observed making hashish from marijuana.²¹⁷ A state court judge rejected Branzburg's claims that state and federal law privileged him to refuse to testify and ordered him to divulge his sources before the grand jury.²¹⁸ Branzburg sought writs of prohibition and mandamus in the Kentucky Court of Appeals on the same ground, but the Court of Appeals denied the petition.²¹⁹

Another incident involving Branzburg arose out of a story he published on January 10, 1971, which detailed the "drug scene" in Frankfort, Kentucky.²²⁰ To get the story, Branzburg interviewed dozens of drug users in Frankfort and observed some of them smoking marijuana. Branzburg was again subpoenaed to appear before a grand jury "to testify in the matter of violation of statutes concerning use and sale of drugs."²²¹ This time Branzburg moved to quash the summons before appearing.²²² The motion was denied, "but an order was issued protecting Branzburg from revealing 'confidential associations, sources or information' but requiring that he 'answer any questions which concern or pertain to any criminal act, the commission of which was actually observed by [him].'"²²³

Thereafter Branzburg requested writs of mandamus and prohibition from the Kentucky Court of Appeals arguing that if he were forced to divulge the identity of his informants or disclose confidential information his effectiveness

F.Supp.2d 1254, 1261 (D. Utah 2003).

212. *Branzburg*, 408 U.S. 665.

213. *Id.* at 667.

214. *Id.*

215. *Id.* at 666-68.

216. *Id.* at 668.

217. *Id.*

218. *Id.*

219. *Id.* at 668-69.

220. *Id.* at 669.

221. *Id.*

222. *Id.*

223. *Id.* at 669-70.

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as a reporter would be unconstitutionally impaired.²²⁴ The Kentucky Court of Appeals denied the requested writs again. Branzburg sought a writ of certiorari to review both judgments of the Kentucky Court of Appeals. The Supreme Court granted review.²²⁵

Branzburg and the other reporters whose cases were consolidated by the Court for review did not claim “an absolute privilege against official interrogation in all circumstances, [but] they assert[ed] that the reporter should not be forced either to appear or to testify before a grand jury or at trial until and unless sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by the disclosure.”²²⁶

The Court began its analysis of this claim by explaining the difficulty Branzburg and the other reporters faced in advancing this argument.²²⁷ The Court noted that in our country reporters do not have unfettered access to information, and that the “great weight” of case law indicates that newsgatherers are to be treated like other citizens owing a duty to testify about relevant matters in criminal proceedings.²²⁸ The Court then noted that the Fifth Amendment privilege against compelled self-incrimination was the only constitutional privilege to apply to news gatherers heretofore.²²⁹

Then the Court went on to say, “[w]e are asked to create another [constitutional privilege] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do.”²³⁰ The Court rejected the claims of the reporters

[o]n the records now before us, we perceive no basis for holding [t]hat the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters [testify in] valid grand jury investigation[s] or criminal trial[s].²³¹ Thus, we cannot seriously entertain the notion that the First Amendment protects a newsman’s agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it.²³² Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question.²³³ The crimes of news sources

224. *Id.* at 670.

225. *Id.* at 671.

226. *Id.* at 680.

227. *Id.* at 681-84.

228. *Id.* at 685.

229. *Id.* at 689-90.

230. *Id.* at 690.

231. *Id.* at 692.

232. *Id.*

233. *Id.*

are no less reprehensible and threatening to the public interest when witnessed by a reporter than when they are not.²³⁴

Ultimately, the Court concluded that any infringement on first amendment rights of the reporters is amply justified by the government's obligation to investigate suspected crimes and requiring reporters to give testimony is reasonably related to fulfilling that obligation.²³⁵

The vote was 5 to 4 with Justice Powell joining Justice White's majority opinion, but also writing a concurring opinion of his own.²³⁶ Justice Powell introduced his concurring opinion by signaling that he interprets the Court's holding narrowly.²³⁷ "I add this brief statement to emphasize what seems to me to be the limited nature of the Court's holding."²³⁸ He then said, opaquely, "[t]he Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."²³⁹ Without explaining what these rights are or on what occasions they attach, Justice Powell's next sentence rejected the dissent's criticism that the Court has granted the government *carte blanche* to conscript the press into criminal investigations with impunity.²⁴⁰ "As indicated in the concluding portion of the opinion, the Court states that no harassment of newsmen will be tolerated. If a newsman believes that the grand jury investigation is not being conducted in good faith, he is not without remedy."²⁴¹ If Justice Powell's opinion had stopped there, then there would be nothing remarkable about the opinion. The decision would be more in the nature of an emphatic concurrence. However, Justice Powell did not stop there. He went on to say,

Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash, and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.²⁴² The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions. In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection.²⁴³

234. *Id.*

235. *Id.* at 700.

236. *Id.* at 709.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 709-10.

242. *Id.* at 710.

243. *Id.*

Courts, commentators and federal circuits are split over whether *Branzburg* is a plurality opinion.²⁴⁴ Many courts and scholars have construed Powell's statement that privilege claims should be adjudicated on a case-by-case basis as recognition of a qualified reporter's privilege that when combined with the four dissenting justices' opinions create a qualified reporter's privilege.²⁴⁵ Other courts and scholars disagree. Some courts and commentators read Justice Powell as saying that in appropriate cases, such as a bad faith grand jury investigation or a case in which the reporter's testimony was not really needed, a reporter could still seek a court's protection . . . "any 'asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.'"²⁴⁶ Under that reading, there is no conflict between Justice White and Justice Powell's opinions because both opinions accept that the 1st Amendment protects reporters from grand jury proceedings brought in bad faith.

Other courts and commentators rely on the fact that Justice Powell joined the majority opinion, which unequivocally rejects a qualified reporter's privilege.²⁴⁷ "In any event, whatever Justice Powell specifically intended, he joined the majority. Not only did he join the majority in name, but because of his joinder with the rest of a majority, the Court reached a result that rejected First Amendment privilege not to testify before the grand jury for reporters"²⁴⁸ Whatever the "correct" interpretation of whether *Branzburg* is a majority or plurality opinion, there no dispute that all of the courts and commentators who have grappled with the question have done so by trying to discern if there was some part of the putative majority opinion that Justice Powell agreed with in his concurring opinion.

244. Lisa Tripp, *Arbitration Agreements Used by Nursing Homes: An Empirical Study and Critique of AT&T Mobility v. Concepcion*, 35 AM. J. TRIAL ADVOC. 87, 119-21 n.104-05 (2011) ("Indeed, some courts and commentators erroneously interpreted Justice White's opinion to be a plurality opinion." (quoting Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 554 n.223 (2007))); Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441, 1452 n.60 (2002) (interpreting *Branzburg* as a majority decision, not a plurality decision). Compare *United States v. Smith*, 135 F.3d 963, 968-69 (5th Cir. 1998) (construing *Branzburg* as a plurality opinion), *remanded to* 1999 WL 1041909 (E.D. La. 1999), with *United States v. Wuterich*, 68 M.J. 511, 518 n.10 (N-M. Ct. Crim. App. 2009) (interpreting *Branzburg* as a majority opinion); *In re Scarce*, 5 F.3d 397, 400 (9th Cir. 1993) ("It is important to note that Justice White's opinion is not a plurality opinion"); Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1952 (2006) (citations omitted).

245. See *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981).

246. See *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003); *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972).

247. *In re Grand Jury Subpoena*, Judith Miller, 397 F.3d 964, 972 (D.C. Cir. 2005), *superseded by* 438 F.3d 1141 (D.C. Cir. 2006).

248. *Id.* at 972.

B. *United States v. Verdugo-Urquidez*

The other case the authors found where an ostensibly majority opinion has been interpreted as a plurality opinion is *United States v. Verdugo-Urquidez*.²⁴⁹ In *Verdugo-Urquidez*, the Court examined whether Fourth Amendment protections extend to the property of non-resident aliens located in a foreign country.²⁵⁰ Rene Martin Verdugo-Urquidez was a citizen and resident of Mexico.²⁵¹ The United States government obtained an arrest warrant for Verdugo-Urquidez and he was arrested by Mexican police.²⁵² Following the arrest and the transport of Verdugo-Urquidez to the United States, a DEA agent assigned to the Calexico, Mexico DEA office, decided to arrange a search of Verdugo-Urquidez's residence.²⁵³ The search of Verdugo-Urquidez's residence uncovered a tally sheet that the government believed reflected how much marijuana had been smuggled into the United States.²⁵⁴ The District Court granted Verdugo-Urquidez's motion to suppress, concluding that Fourth Amendment applied to the searches and the DEA agents had failed to justify searching the residence without a warrant.²⁵⁵ The Ninth Circuit Court of Appeals affirmed the District Court's ruling.²⁵⁶

The Supreme Court reversed the Court of Appeals' decision.²⁵⁷ Chief Justice Rehnquist wrote the majority opinion, which Justices White, O'Connor, Scalia, and Kennedy joined.²⁵⁸ The majority opinion concluded that the protections provided to "the people" extended only "to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community."²⁵⁹ Furthermore, the majority found that the history of the drafting of the Fourth Amendment suggested that its purpose was to restrict searches and seizures that might be conducted by the United States in domestic matters.²⁶⁰

Although Justice Kennedy joined the majority he wrote a concurring opinion.²⁶¹ In his opinion, Kennedy agreed that the Fourth Amendment had not been violated in Verdugo-Urquidez's case, but Kennedy did not embrace the majority's reasoning.²⁶² Instead, Kennedy rejected the majority's reliance on the phrase, "the people" in the Fourth Amendment as a restriction on its

249. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

250. *Id.* at 261.

251. *Id.* at 262.

252. *Id.*

253. *Id.*

254. *Id.* at 262-63.

255. *Id.* at 263.

256. *Id.*

257. *Id.* at 261.

258. *Id.* at 260.

259. *Id.* at 265.

260. *Id.* at 266.

261. *Id.*

262. *Id.* at 275.

protections.²⁶³ He also emphasized that the restrictions the United States must observe “with reference to aliens beyond its territory or jurisdiction depend, as a consequence, on general principles of interpretation, not on an inquiry as to who formed the Constitution or a construction that some rights are mentioned as being those of ‘the people.’”²⁶⁴

Under Justice Kennedy’s reasoning, the search in *Verdugo-Urquidez* did not violate the Fourth Amendment because of the specific conditions and considerations of the case.²⁶⁵ Kennedy concluded that although a non-resident alien may be entitled to some Constitutional protections in some cases, because of the lack of local judges or magistrates available to issue warrants, the differing and perhaps unascertainable conceptions of reasonableness and privacy that prevail abroad, and the need to cooperate with foreign officials make the Fourth Amendment’s warrant requirement impracticable.²⁶⁶

Although Justice Kennedy joined the majority, *Verdugo-Urquidez* was immediately and continues to be recognized as a plurality decision by numerous scholars.²⁶⁷ Some courts have followed suit, viewing *Verdugo-Urquidez* as a plurality opinion.²⁶⁸ Other courts have recognized that while *Verdugo-Urquidez* has five votes for the majority and that Justice Kennedy’s opinion is at odds with that of the majority, they feel compelled to follow the Chief Justice’s majority opinion.²⁶⁹

C. Comparing *Branzburg*, *Verdugo-Urquidez* and *Concepcion*

Whatever the appropriateness of considering *Branzburg* or *Verdugo-Urquidez* plurality opinions, it is evident after reading *Concepcion*, *Branzburg*, and *Verdugo-Urquidez* together, that a much stronger argument can be made that *Concepcion* is a plurality opinion than *Branzburg* or *Verdugo-Urquidez*. The following charts demonstrate why this is true.

263. *Id.*

264. *Id.*

265. *Id.* at 278.

266. *Id.*

267. See, e.g., Mary Lynn Nicholas, *United States v. Verdugo-Urquidez: Restricting the Borders of the Fourth Amendment*, 14 *FORDHAM INT’L. L.J.* 267, 283 (1991); John W. Guendelsberger, *Equal Protection and Resident Alien Access to Public Benefits in France and the United States*, 67 *TUL. L. REV.* 669 (1993); Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology after Rasul v. Bush*, 153 *U. PA. L. REV.* 2073, 2075 (2005); Jeffrey Kahn, *Zoya’s Standing Problem, or, When Should the Constitution Follow the Flag?*, 108 *MICH. L. REV.* 673, 689 (2010); The Honorable Karen Nelson Moore, *Aliens and the Constitution*, 88 *N.Y.U. L. REV.* 801, 808 (2013).

268. *Lamont v. Woods*, 948 F.2d 825, 835 (2d Cir. 1991); *U.S. v. Guitierrez*, 983 F.Supp. 905, 912-13 (N.D. Cal., 1998); *Kadi v. Geithner*, 2012 WL 898778 *36 (D.D.C. Mar. 19, 2012) (No. Civ. A. 09-0108 JDB).

269. *United States v. Esparza*, 265 F. Supp. 2d 1254, 1260-61 (D. Utah 2003).

AT&T Mobility v. Concepcion

Key Questions	The Scalia Opinion	The Thomas Opinion
Can unconscionability ever be a basis for a court to invalidate an agreement to arbitrate?	Yes. Under §2 of the FAA, unconscionability can be a basis to invalidate an agreement to arbitrate.	No. Under §2 of the FAA, unconscionability cannot be a basis to invalidate an agreement to arbitrate.
Is purposes and objectives preemption an appropriate method to decide FAA preemption questions?	Yes. Purposes and objectives analysis provides an appropriate vehicle to determine if the FAA preempts an unconscionability-based decision to invalidate an agreement to arbitrate.	No. Adheres to his views in <i>Wyeth</i> that “[t]his Court’s entire body of purposes and objectives preemption jurisprudence is inherently flawed.”

Verdugo-Urquidez

Key Questions	The Rehnquist Opinion	The Kennedy Opinion
Are the Fourth Amendment protections limited by the phrase “the people”?	Yes. The text of the Fourth Amendment extends its reach only to “the people.”	No. “I cannot place any weight on the reference to ‘the people’ in the Fourth Amendment as a source of restricting its protections.
Can the Fourth Amendment ever provide protection to non-resident alien property located in foreign countries?	No. The Majority embraces a categorical rejection of Fourth Amendment protections for non-resident alien property located in foreign countries.	Possibly. Fourth Amendment not applicable in <i>Verdugo-Urquidez</i> ’s case because of the “conditions and considerations of this case.”

Branzburg v. Hayes

Key Questions	The White Opinion	The Powell Opinion
<p>Is a balancing of interests test the appropriate means of resolving the question of whether the First Amendment affords reporters a limited privilege not to have to appear or testify in criminal grand jury proceedings regarding matters arising from their investigations as reporters?</p>	<p>Yes. Whether the Constitution protects reporters' appearance or testimony before a grand jury in a criminal case should be determined by balancing the government's interest in investigating criminal activity and effective grand jury proceedings and the reporter's interest in protecting sources who provide information about criminal activities they or others are engaging in.</p>	<p>Yes. Whether a Constitutional reporter's privilege exists should be determined by balancing the "freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct."</p>
<p>Should this type of First Amendment claim be answered on a case-by-case basis?</p>	<p>No. "[W]e cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question."</p>	<p>Arguably yes. "If a newsman believes that the grand jury investigation is not being conducted in good faith, he is not without remedy. . . . Indeed, if the newsman is [being harassed] . . . he will have access to the court on a motion to quash, and an appropriate protective order may be entered. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."</p>

In comparing the charts, a few things jump out immediately. First, the

Branzburg opinions do not disagree about how the issue of a reporter's privilege should be resolved. Both White and Powell agree that interest balancing between freedom of the press and the government's interest in investigating, prosecuting and the proper functioning of grand juries is the appropriate analytical method for deciding whether there is a constitution-based reporter's privilege not to appear/testify before a grand jury. In *Verdugo-Urquidez*, Rehnquist and Kennedy agree on the conclusion, the Fourth Amendment will not apply in this case, however their paths to this conclusion differ. The Rehnquist opinion embraces the "the people" reasoning. Kennedy rejects it. The Rehnquist opinion is a categorical denial of Fourth Amendment rights. Kennedy's opinion rejects Fourth Amendment protection as not practical given the facts of that case only.

Compare this to the decisions in *Concepcion*. Justices Scalia and Thomas do not agree on the appropriate method for resolving the savings clause issue under the FAA. Under Scalia's view, unconscionability can be a ground for invalidating an agreement to arbitrate.²⁷⁰ Thomas does not believe unconscionability can ever be used to avoid arbitration under the FAA because it does not relate to the formation of a contract.²⁷¹ Justice Scalia believes purposes and objectives preemption analysis is a proper way to determine if the FAA preempts an unconscionability-based decision to invalidate an agreement to arbitrate.²⁷² Justice Thomas explicitly rejects purposes and objectives preemption, but arrives at the same outcome as Scalia, using textualism.²⁷³

Branzburg and *Concepcion* are also much different with respect to the clarity of the concurring opinions. In *Branzburg*, there is room for debate about what Justice Powell was trying to communicate, which is why quotes are used in the chart and so much of his opinion is quoted in this article. A plausible reading of the opinion is that Justice Powell is simply making the point that the current case before the Court did not involve the government acting in bad faith or harassing the reporters, but if those facts were present, the majority opinion did not foreclose the application of the privilege. Under that reading, Powell could be described as agreeing that there is no constitutional privilege protecting reporters, except when the government is acting in bad faith. However, another plausible reading of Justice Powell's opinion is that he thought the majority opinion did not reject a constitutional reporter's privilege per se, and simply required case-by-case adjudication. Another reading of his opinion is that he, for whatever reason, disagreed with the majority that there was no qualified privilege for the reporters under the First Amendment, but joined the opinion anyway.

Concepcion is not plagued by such interpretative uncertainty as there is no ambiguity in the Thomas concurrence. Justice Thomas makes it clear that he

270. AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1746 (2011).

271. *Id.* at 1753.

272. *Id.* at 1748.

273. *Id.* at 1756.

adheres to his views stated in *Wyeth* that purposes and objectives preemption is a flawed method of judicial interpretation and he explains how textualism appropriately resolves the matter.²⁷⁴

D. The Problem with Construing *Concepcion* as a Majority Opinion

All of these considerations lead to the conclusion that there is a much stronger case for construing *Concepcion* as a plurality than *Branzburg* and at least as strong as *Verdugo-Urquidez*. Whether Justice Powell disagreed with Justice White's deciding rationale is debatable given the imprecision of the Powell opinion. While this makes *Branzburg* problematic in a sense, it pales in comparison to the way in which *Concepcion* is problematic. *Concepcion* is not a case whose meaning is complicated because the language used by the concurrence is sloppy and could be interpreted differently. Justice Thomas's opinion in *Concepcion* is more like that of Justice Kennedy's in *Verdugo-Urquidez* as it regards the question of whether the Fourth Amendment's reach is limited by the phrase "the people" in the text. Just as Kennedy clearly rejected Rehnquist's "the people" reasoning, Thomas is crystal clear. He rejects purposes and objectives preemption and he decides the case using an entirely different analytical method — textualism.²⁷⁵

If Justice Thomas's concurrence in *Concepcion* marked the end of his battle against purposes and objectives preemption, then a plausible argument could be made that, despite the reference to *Wyeth*, Justice Thomas was waiving the white flag and abandoning his lonely anti-purposes and objectives crusade. Justice Thomas has not done that. Most recently Justice Thomas reiterated his opposition to purposes and objectives preemption in the much anticipated *Arizona v. United States* immigration case.²⁷⁶

In *Arizona v. United States* the Supreme Court addressed the constitutionality of Arizona's controversial immigration law.²⁷⁷ The Supreme Court struck down provisions in the law that made it a state crime for an immigrant to fail to carry federal registration papers, that authorized jail time for illegal immigrants who seek work in Arizona and that gave state and local police more power to arrest immigrants suspected of offenses.²⁷⁸ The Court upheld the facial challenge to the part of the law that allowed police to check the immigration status of people they stop for traffic or other offenses.²⁷⁹ Justice Thomas concurred in part and dissented in part and would have upheld the state law in its entirety.²⁸⁰ He stated:

Despite the lack of any conflict between the ordinary meaning of the

274. *Id.* at 1754.

275. *Id.*

276. *Arizona v. United States*, 132 S. Ct. 2492, 2522 (2012) (Thomas, J., concurring in part and dissenting in part).

277. *Id.* at 2496-97.

278. *Id.* at 2501-07.

279. *Id.* at 2507-10.

280. *Id.* at 2524.

Arizona law and that of the federal laws at issue here, the Court holds that various provisions of the Arizona law are pre-empted because they “stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” . . . I have explained that the “purposes and objectives” theory of implied pre-emption is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text. . . . Under the Supremacy Clause, pre-emptive effect is to be given to congressionally enacted laws, not to judicially divined legislative purposes.²⁸¹

Justice Thomas’s consistent writings about purposes and objectives preemption further undercut the notion that there were five Justices who agreed with the deciding rationale in *Concepcion*. Justice Thomas rejected purposes and objectives preemption before *Concepcion* in the *Wyeth* case, during *Concepcion* itself by explicitly stating that he adheres to *Wyeth* and he powerfully rejected it after *Concepcion* in *Arizona v. United States*.

Perhaps most interestingly for this article is Justice Thomas’s rejection of purposes and objectives preemption in *Williamson v. Mazda Motor of America*,²⁸² a case decided just two months before *Concepcion*.²⁸³ In *Williamson*, the Court unanimously held that the Federal Motor Vehicle Safety Standard (FMVSS) 208 did not preempt a California state product liability suit.²⁸⁴ FMVSS 208 allowed automobile manufacturers a choice of what type of seatbelt (lap belt or lap belt with shoulder belt) to use in a car’s inner rear seat(s).²⁸⁵ Mazda claimed that under the Supreme Court’s decision in *Geier v. American Honda Motor Co.*, the suit was preempted.²⁸⁶ The Court held that FMVSS 208 allowed manufacturers a choice of seatbelts for some seats and a tort suit eliminating that choice would not frustrate the purposes and objectives of the regulatory scheme because the seatbelt choice in the regulation was there for cost cutting reasons and was not significant, unlike the air bags at issue, which was significant, in *Geier*.²⁸⁷

Like *Concepcion*, Justice Thomas wrote separately to express his dissatisfaction with the Court’s use of purposes and objectives preemption.²⁸⁸ He wrote:

As in *Geier*, rather than following the plain text of the statute, the majority’s analysis turns on whether the tort lawsuit here “ ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives’ “ of FMVSS 208. . . . I have rejected purposes-and-objectives pre-emption as inconsistent with the Constitution because it turns entirely on extratextual “judicial suppositions.” . . .

281. *Id.*

282. *Williamson v. Mazda Motor of Am., Inc.*, 131 S. Ct. 1131 (2011).

283. *Id.*

284. *Id.* at 1134.

285. *Id.*

286. *Id.* at 1135.

287. *Id.* at 1137, 1139-40.

288. *Id.* at 1141.

Purposes-and-objectives pre-emption—which by design roams beyond statutory or regulatory text—is . . . wholly illegitimate. It instructs courts to pre-empt state laws based on judges’ “conceptions of a policy which Congress has not expressed and which is not plainly to be inferred from the legislation which it has enacted.”

...

“[F]reeranging speculation about what the purposes of the [regulation] must have been” is not constitutionally proper in any case. . . . The Supremacy Clause commands that the “[l]aws of the United States,” not the unenacted hopes and dreams of the Department of Transportation, “shall be the supreme Law of the Land.” U.S. Const., Art. VI, cl. 2. The impropriety is even more obvious here because the plain text of the Safety Act resolves this case.²⁸⁹

Justice Thomas’s concurring opinions in *Williamson* and *Concepcion* are analytically mirror images. In both cases he rejects purposes and objectives preemption and he resolves the cases using textualism. There is one difference however. In *Williamson* he concurs in the judgment;²⁹⁰ in *Concepcion* he joined the putative majority opinion and filed a regular concurrence.²⁹¹

If Thomas’s opinion in *Concepcion* is taken as the fifth vote in favor of the outcome of that case, but not the purposes and objectives rationale supporting it, then that is consistent with all of his opinion in *Wyeth, U.S. v. Arizona* and *Williamson*. If Thomas is viewed as supporting the *ratio decidendi* of Justice Scalia in *Concepcion* then that creates significant problems. It would appear that courts would have to conclude that Thomas rejected purposes and objectives preemption before *Concepcion* (*Wyeth* and *Williamson*), during *Concepcion*, and after *Concepcion* (*Arizona v. United States*). Thus, courts must pretend that doesn’t matter in *Concepcion* because he joined the Scalia opinion. This makes no sense. It disturbs the well-established American practice that when a justice rejects the rationale of the opinion she should join only in the judgment if she agrees with the outcome.

V. CONCLUSION

There is no doubt that *Concepcion* is an important decision that has precedential value when it comes to the application of the Discover Bank rule in class action waiver cases arising in Federal Courts in California where there is an agreement to arbitrate. But it need not have any greater precedential value. Traditional theories of jurisprudence have established that legal rules are established not solely by the result, but also legal reasoning that leads to this result. It is this *ratio decidendi* that is critical in establishing the precedent binding upon lower courts. Therefore, when we look at *Concepcion* it is not simply the outcome but also the *ratio decidendi* with which we should concern

289. *Id.* at 1142-43.

290. *Id.* at 1142.

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

ourselves. By any objective measure and under any widely accepted theory of jurisprudence, there are but four votes for the majority's *ratio decidendi* and under *Marks* there is no narrowest ground with which all five justices in the putative majority agree. Without five votes for some element of the deciding rationale, there is no majority opinion and as uncomfortable as it may be to confront the idea that a putative majority opinion is really a plurality, it has happened before. Many courts construing *Branzburg* and *Verdugo-Urquidez* have construed those cases as plurality decisions and that is certainly appropriate for *Concepcion*.

The Supreme Court issues its opinions and it is left for lower courts to closely scrutinize them to determine what the rule of law is that comes from those decisions. Sometimes the Court provides a majority rule and sometimes it does not. *AT&T v. Concepcion* is a case where the Court lacks five members who agree on the essential reasoning for the result reached. The fact that the concurring opinion is labeled a regular concurrence and the fact that Justice Thomas says he joins the majority does not change the reality that Justice Thomas rejects every aspect of the "majority" opinion's reasoning. When that happens there simply are not five votes and there is no majority rule. The Court explained this over 100 years ago in *Hertz v. Woodman*:

Under the precedents of this court, and, as seems justified by reason as well as by authority, an affirmance by an equally divided court is, as between the parties, a conclusive determination and adjudication of the matter adjudged; but the principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases, either in this or in inferior courts.²⁹²

There is considerable scholarship that examines the proliferation and impact of Supreme Court cases featuring a multitude of splintered opinions.²⁹³ Most of the focus is on plurality opinions. *Concepcion* certainly has multiple conflicting opinions, and the authors of this article think *Concepcion* ought to be interpreted as a plurality opinion. But *Concepcion* is even more problematic. *Concepcion* is the only case found by the authors where it appears that a Supreme Court Justice has written a concurrence in the judgment and failed to identify it as such for the purpose of avoiding a plurality opinion. Can a Justice do that and still have lower courts treat the case as precedential? *Marks* and *Hertz* strongly suggests the answer is no.

292. *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910). Courts have relied on this language. *E.g.*, *Commonwealth v. James*, 427 A.2d 148, 149 n.4 (Pa. 1981); *Council of Forest Industries of British Columbia v. International Commerce Commission*, 570 F.2d 1056, 1061 n.12 (D.C. Cir. 1978); *Berlin v. E.C. Publications, Inc.*, 329 F.2d 541, 545 n.3 (2d Cir.), *cert. denied*, 379 U.S. 822 (1964).

293. *E.g.*, Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1952 (2006) (citations omitted); Adam S. Hochschild, Note, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J.L. & POL'Y 261, 261 (2000); Laura Krugman Ray, *The Justices Write Separately: Uses of the Concurrence by the Rehnquist Court*, 23 U.C. DAVIS L. REV. 777, 780 (1990).

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Marks and *Hertz* are clear that precedent is only made when five justices agree on some common aspect of a deciding rationale. The part or parts of the deciding rationale that is common among the five becomes the rule from the case. What appears to be an effort to convert what genuinely appears to be nothing more than a concurrence in the judgment (like the *Williamson* case) into an opinion that can create a majority rule — confounds *Marks* and *Hertz* and adds a new type of confusion for courts, scholars and litigants.

Lower court judges must closely read the two opinions and decide for themselves if there is any commonality between Scalia and Thomas opinions to create a governing rule agreed by five Justices. The authors of this article have done just that and we cannot find one. While we believe our conclusion that there is no majority rule in *Concepcion* is well-supported, our effort is in some ways beside the point. What matters is that lower courts take this challenge seriously because majority rules in our legal system are not created simply because we prefer clarity from important Supreme Court cases. When the Justices issue multiple opinions precedent is not automatic and lower courts must scrutinize the opinions carefully to see if they satisfy *Hertz* and *Marks*. When they do not, the rules of law in *Hertz* and *Marks* show the way. If there are not five votes for some element of a deciding rationale, then the opinion is not a majority opinion and lower courts are not obliged to follow a rationale agreed to by only four members of the Court.