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AT&T v. Concepcion and Adherence to Minority Views

Last week the Supreme Court decided [AT&T Mobility v. Concepcion](#), in which it held (5-4, along the "usual" ideological lines) that the Federal Arbitration Act preempted a state-law rule deeming an arbitration clause's ban on class proceedings unconscionable. The case came from the Ninth Circuit, which was applying California unconscionability law. That the case came from a federal court rather than a state court was important. Had the case come from a state court, it might have turned out differently. That is because Justice Thomas believes that the FAA does not apply in state courts, and he has continued to adhere to this view despite multiple precedents to the contrary. See, e.g., his dissents in *Preston v. Ferrer* (2008); *Buckeye Check Cashing v. Cardegna* (2006); *Doctor's Assocs. v. Casarotto* (1996). (For other reasons, he also had problems with the majority's implied preemption analysis in *AT&T v. Concepcion* itself, but he reluctantly joined the opinion.) In an alternate universe where the case came from a state court, he presumably would have joined the four dissenters in *AT&T v. Concepcion* in voting not to reverse a state court's unconscionability holding, though for different reasons. (Here I leave aside the possibility that the Court would overrule itself on whether the FAA applies in state courts, but see more on that below.)

Let's return to the actual universe and suppose that tomorrow a state court issues an opinion striking down a class waiver in circumstances that are not materially distinguishable from those in *AT&T v. Concepcion*. If the Supreme Court took the case, how would it come out? Would Thomas adhere to his prior views on the FAA in state courts? Would the four dissenters adhere to their *AT&T v. Concepcion* dissent?

There are a few possibilities:

1. Nobody adheres to their prior dissents. FAA preemption wins 9-0.
2. Thomas adheres as usual, the four dissenters do not adhere. FAA preemption wins 8-1.
3. The four dissenters adhere, Thomas does not. Same 5-4 as *AT&T v. Concepcion*. One might wonder why Thomas would not adhere here, when he has repeatedly in the past. One possibility is that, even though he thinks the FAA shouldn't apply in state courts at all, that view has been rejected by the Court and, for the sake of enforcing lower court obedience to Supreme Court law (even incorrect law), a state court that deviated on indistinguishable facts couldn't be allowed to get away with that.
4. An even more interesting one: all adhere. FAA preemption loses 5-4, though perhaps not with a majority opinion. The result flips, in other words.

Now, my scenario is perhaps a bit unrealistic. When is a case not really distinguishable? Why are we assuming the Supreme Court would decide such a case rather than denying cert? Nonetheless, I think it is an interesting question. What do you think would happen? Any state courts out there who would like to help us find out?!

Oh, and I suppose there is at least one more option:

5. The Court revisits the question whether the FAA applies in state courts and overrules its precedents. Thomas and Scalia are votes in favor of that. We don't know for sure how the new justices feel about it. It would strike me as pretty extraordinary for the Court to overrule here. This is a statutory precedent (well, very loosely anyway!), and those are supposed to be stronger. And there are multiple cases, not just one. Seems like a "super precedent," as Arlen Specter might put it.

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