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# Class Dismissed: Compelling a Look at Jurisprudence Surrounding Class Arbitration and Proposing Solutions to Asymmetric Bargaining Power Between Parties

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CLASS DISMISSED: COMPELLING A LOOK AT  
JURISPRUDENCE SURROUNDING CLASS ARBITRATION AND  
PROPOSING SOLUTIONS TO ASYMMETRIC BARGAINING POWER  
BETWEEN PARTIES

MATTHEW R. HAMIELEC\*

I. INTRODUCTION

Every Thanksgiving season—after the family stuffs itself with a turkey that itself had only been stuffed a few hours beforehand—my mother and I satiate our inner shopaholic with some Black Friday bargain hunting. Last year was no exception. However, rather than purchasing each family member a few tchotchkes we would find while window shopping, this year featured us braving long lines, shiny signage, and the occasional shopping cart crash at Costco. After years of suffering at the hands of our “dumb” LG slide phones, we decided to equip the family with the latest Lyft-hailing and Snapchat-posting smartphone swag from that one company’s newly minted inventory. I think their logo is a pear? No! An orange. I forget . . .

With Costco poised as our Black Friday Olympiad’s closing ceremony, I expected to walk into a store that had devolved into a consumer-themed *Hunger Games*. A short line in front of the kiosk initially raised my spirits, but my hopes were short-lived, as the gentleman directly in front of us whined that he had been standing there for hours. Glancing past his shoulder, I understood why: each transaction was a mini treaty negotiation that consisted of selecting a phone, finding the perfectly colored protective Otterbox in which to encase one’s purchases, signing and initialing contracts, orally accepting said contracts by phone, printing and signing receipts, and receiving triplicate copies of everything. No wonder the line was short. This wasn’t *The Hunger Games*; this was a live-action version of *The Oregon Trail*—everyone else had died of dysentery.

Finally, we reached the salesperson. “Which provider does your family use?” AT&T, we informed her. She opened a drawer and withdrew sev-

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eral stapled packets that radiated a contractual aura. My law-school skills primed, I shoved the papers off to my mother for her signature, and inquired about the phone number I needed to dial to orally accept the new contractual terms. The salesperson gave me a slip of paper, and I thumbed in the digits on my phone. The familiar AT&T tone greeted me, followed by an automated voice. “Welcome to the AT&T wireless contract menu. Para español, oprima el dos . . . if you’re here to accept the terms of your new AT&T wireless contract, press one.” BEEP. “Great! Please listen to the following recording, as it describes important components of your new wireless contract. Your new wireless device number is (384) 791-4 . . .”

My mind glazed over, and I became entranced in the nearest 4K TV’s broadcast of a bark-colored chameleon hunting its prey. Just as the reptile whipped out its tongue at a languishing fly, the automated recording shrilly pierced my eardrum. “Please note that by accepting this contract, you agree to AT&T’s method of dispute resolution, which includes a mandatory arbitration provision. To accept these terms, press one. To repeat—” BEEP.

Though flawed in many respects, the class action mechanism accords litigants a balance between justice and efficiency.<sup>1</sup> Theoretically, both plaintiffs and defendants benefit. For the former, class actions aggregate individuals’ claims and—perhaps more importantly—pool financial resources under one lawsuit.<sup>2</sup> Rather than burdening one named representative with paying for a litany of experts and steep court costs, law firms initially bankroll class litigation, and then pocket a portion of a settlement or judgment’s proceeds to cover costs before distributing the remainder amongst claimants.<sup>3</sup> This claim-aggregation synergy converges financial inequities between claimants and commercial defendants. On the flipside, a court that grants defendants a settlement, motion for summary judgment, or judgment on the merits curtails those defendants’ long-term risk exposure from individual suits.<sup>4</sup> Effectively, class actions possess the proverbial power to kill dozens of birds (potential plaintiffs) with one, preclusive stone (an order or settlement agreement).<sup>5</sup>

1. RICHARD L. MARCUS ET AL., *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 7 (5th ed. 2010).

2. *Id.* at 224–25.

3. *Id.* at 579, 581; *In re Cardinal Health, Inc. ERISA Litigation*, 225 F.R.D. 552, 555 (S.D. Ohio 2005).

4. MARCUS ET AL., *supra* note 1, at 782.

5. *Id.*

### A. *The Growth of Alternative Dispute Resolution*

The past thirty years have played host to an unprecedented proliferation of quasi-privatized forms of alternative dispute resolution (“ADR”).<sup>6</sup> Part of this growth stems from the United States Supreme Court’s shifting outlook on ADR; whereas the Court once carried a disdain for arbitration much like Dr. Frankenstein did his humanoid, by the end of the twentieth century, the Court scrutinized the process with more measured glance.<sup>7</sup> In 1984, the Burger Court buried the antiquated notion that ADR did not adjudicate parties’ legal rights, and championed a “national policy favoring arbitration.”<sup>8</sup>

Parties flocked to mediations and arbitrations, keen to take advantage of their informal, efficient, and economical services.<sup>9</sup> Why not, after all? If those parties can avoid the bureaucratic nightmare of a lumbering court system with a faster and cheaper alternative, then more power to them! Many bought into this mantra; between 1997 and 2002, arbitrations doubled in frequency, and demand for the entire suite of ADR services more than quadrupled.<sup>10</sup> The commercial world was no exception: noticing everyone else strutting in Jordans, the Converse-wearing corporations swiftly fitted pre-dispute arbitration provisions in many of their standard form contracts distributed to consumers, shareholders, and employees.<sup>11</sup>

Businesses incorporated pre-dispute arbitration clauses into their contracts believing that those clauses would provide for individual dispute resolution with aggrieved claimants.<sup>12</sup> However, plaintiffs who signed such clauses (or their attorneys, at least) saw litigation’s tectonics shifting, and sought to bring the benefits of suing as a class into arbitration’s auspices. They unconventionally amalgamated Federal Rule of Civil Procedure 23<sup>13</sup>

6. Thomas Stipanowich, *ADR and the ‘Vanishing Trial’: The Growth and Impact of ‘Alternative Dispute Resolution’*, 1 J. EMPIRICAL LEGAL STUD. 843, 872 (2004) (delineating that growth of ADR has exploded within a decade’s time).

7. See *Southland Corp. v. Keating*, 465 U.S. 1, 7–8 (1984).

8. *Id.* at 10.

9. Stipanowich, *supra* note 6, at 872.

10. *Id.* at 872 tbl.13.

11. Jessica Silver-Greenberg & Robert Gebeloff, *Beware the Fine Print Part I: Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?action=click&contentCollection=DealBook&module=RelatedCoverage&region=Marginalia&pgtype=article> [https://perma.cc/K8NN-TP7V].

12. See generally *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013); *Am. Express Co. v. Italian Colors Rest.* 133 S. Ct. 2304, 2308 (2013).

13. FED. R. CIV. P. 23.

with the Federal Arbitration Act's ("FAA") provision requiring arbitration clause's enforcement,<sup>14</sup> and created a new type of proceeding: class arbitration, a class action conducted within an arbitration proceeding's confines.

The commercial sector did not warm to this untested novelty, and vigorously asserted that arbitration clauses were for *mano-a-mano* dispute resolution.<sup>15</sup> Certain courts interpreted these clauses as allowing class arbitration.<sup>16</sup> Others did not.<sup>17</sup> Eventually, these circuit-splitting lawsuits wound their way up the appellate channels to the U.S. Supreme Court.<sup>18</sup>

### *B. Litigation Concerning Arbitration Clauses and Class Arbitration*

The Court considered class arbitration's efficacy in a series of cases starting with *Green Tree Financial Corp. v. Bazzle*.<sup>19</sup> Over a decade, the justices methodically sculpted class arbitration's creeping tendrils, allowing certain cases to bloom into full-blown, private class arbitrations or public class actions, while pruning others to individual ADR proceedings.<sup>20</sup> The Court continued this case-by-case analysis until its splintered decision in *AT&T Mobility LLC v. Concepcion*, in which a five-justice majority concluded that the Federal Arbitration Act virtually preempted class arbitrations' formation.<sup>21</sup> Despite repeated challenges to its central holding—including an opinion in late 2015<sup>22</sup> and a recently-argued case in October 2017<sup>23</sup>—*Concepcion* remains largely unaltered.

Claimants who wish to aggregate their claims into a class arbitration face a Sisyphean task.<sup>24</sup> Often, these parties—most of them consumers and

14. 9 U.S.C. § 2 (2012).

15. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 444–45 (2003).

16. *Brennan v. ACE INA Holdings, Inc.*, 2002 WL 1804918, at \*3 (E.D. Pa. 2002).

17. *Champ v. Siegel Trading Co., Inc.* 55 F.3d 269, 274 (7th Cir. 1995).

18. See *Green Tree Fin. Corp.*, 539 U.S. at 444; *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1765 (2010); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 338 (2011); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2066 (2013); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2306, 2308 (2013).

19. *Green Tree Fin. Corp.*, 539 U.S. at 444.

20. Compare *Stolt-Nielsen*, 130 S. Ct. at 1765 with *Oxford Health Plans*, 133 S. Ct. at 2070–71.

21. *Concepcion*, 563 U.S. at 340. The Court did not categorically preempt all forms of class arbitration, as seen by its holding in *Oxford*. 133 S. Ct. at 2070–71. Moreover, questions linger as to whether congressional grants to agencies like the Consumer Finance Protection Bureau under legislation like the Dodd-Frank Wall Street Reform Act allow those agencies to render contract provisions requiring individual arbitration unenforceable. See generally Part IV, *infra*.

22. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 464 (2015).

23. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *cert. granted*, No. 16-285, 2017 WL 125664 (U.S. Jan. 13, 2017).

24. First, for those contracts that offer them, claimants would have to recognize that the arbitration provision they sign have an "opt out" clause which the claimants could exercise to forego arbitration altogether. However, because most claimants are not aware their contracts provide for such an opt-

employees—contractually bound themselves to pre-dispute arbitration and simultaneously waived their rights to aggregate their claims in a class action or class arbitration.<sup>25</sup> For people who allege large-value claims and have enough funds to hire an attorney and experts, such an agreement poses no significant threat. The parties submit their dispute to an arbitrator, who expeditiously reaches a decision.<sup>26</sup>

Yet, when these two contract provisions (the class action waiver and arbitration provision) couple together in so-called “negative value” suits, the result pits individual claimants with scarce resources against a wealthier opponent and strips claimants of their pursuit of valid albeit low-value claims against commercial defendants.<sup>27</sup> Often, the costs those claimants must incur in individual arbitration overtake a paltry damages award’s benefits.<sup>28</sup> And while ordinary litigation allows plaintiffs to circumvent such an economic barrier by banding together with others as a class to take advantage of pooled resources or a common fund doctrine, both the agreement to arbitrate and the class waiver prevent claim aggregation.<sup>29</sup> In this way, a commercial entity can cloister itself away from significant financial liability, as well as any correlative damages award meant to deter unsavory behavior.

Academia has largely criticized the policy points<sup>30</sup> purported by *Concepcion*’s majority.<sup>31</sup> Some scholars proclaim an apocalyptic fallout, fearing that commercial parties might use class waivers and arbitration clauses to undo collective actions allowable under legislative pillars like the Environmental Protection Act, National Labor Relations Act, and Sherman

out, many individuals’ options whittle down to either hoping their arbitration provision provides for an *Oxford* scenario, or their potential grievance falls under some statute that shows a clear intent to forego the FAA’s permission of arbitration, like Dodd-Frank. See Part III(c), *infra*.

25. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).

26. See STEPHEN C. YEAZELL, *CIVIL PROCEDURE* 555–58 (8th ed. 2012).

27. MARCUS ET AL., *supra* note 1, at 222.

28. *Id.*

29. P. Christine Deuelle & Corey Berman, *The Future of Class Arbitration: Recent Supreme Court Jurisprudence on Arbitration Clauses Interpretation and Enforceability*, CLASS ACTION MONITOR, at 1 (July 23, 2013),

[http://www.weil.com/~media/files/pdfs/Weil\\_Summer\\_2013\\_Class\\_Action\\_Monitor.pdf](http://www.weil.com/~media/files/pdfs/Weil_Summer_2013_Class_Action_Monitor.pdf)  
[<https://perma.cc/9Y79-VBC4>].

30. *Concepcion* denoted well-established policy reasons for disallowing class arbitration. These include arbitration’s intended efficiency and informality, as well as the risk class arbitration carries for defendants with its lack of appellate review. Another rationale may include parties’ freedom to contract amongst one another. 563 U.S. 333, 348–51.

31. See Brian Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 174 (2015) (noting that “class actions are headed for demise[.]”).

Act.<sup>32</sup> Other organizations rebuff these claims through empirical studies that show individual arbitration benefits claimants more than traditional litigation. Recently, media outlets have caught wind of *Concepcion*'s long-term, disparate effects, and have reported on the practical consequences that may ensue if the Court's holding goes unaltered.<sup>33</sup> To stymie class actions' preemption, agencies like the Consumer Financial Protection Bureau ("CFPB") have attempted to introduce regulations that would give certain plaintiffs an attempt to sue as a class before a business can compel individual arbitration. But these agencies' efforts remain constricted by regulatory boundaries and sinusoidal political winds.<sup>34</sup>

This Note addresses the issues surrounding arbitration provisions, class action waivers, and the problems that crop up when these provisions are used together in a contract. Part II outlines the current jurisprudential climate that courts have created regarding class arbitration's permissiveness and proscription in non-court proceedings. In Part III, the Note analyzes the problems associated with the U.S. Supreme Court's current stance on class arbitration, chiefly the obstacles claimants face when they sue a business and try to aggregate their claims into a class action. The Note's conclusion echoes concerns that arbitration clauses effectively foreclose on class action rights where such rights are not statutorily protected. Part IV posits various ways in which Congress can reform the problematic system. Finally, Part V briefly concludes.

32. See, e.g., *id.* at 199 ("[I]t will mean that businesses will have all but entirely insulated themselves from class action liability") (citing Sarah R. Cole, *On Babies and Bathwater: The Arbitration Fairness Act and the Supreme Court's Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 467 (2011) ("The Supreme Court's recent decision in *AT&T v. Concepcion* . . . sounds the death knell for the class arbitration process."); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3052 (2015) ("While this shift from dispute resolution in courts—the public realm—to dispute resolution in arbitration—the private realm—initially undermined values and mechanisms of adjudication, the shift from public lawsuits to private arbitration now also threatens values and mechanisms of lawmaking."); Jean R. Sternlight, *Tsunami: AT&T Mobility L.L.C. v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 704–07 (2012) ("It is highly ironic but no less distressing that a case with a name meaning 'conception' should come to signify death for the legal claims of many potential plaintiffs.").

33. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348–51 (2011).

34. Not only do agencies only possess power to legislate or adjudicate on matters only within its scope or subject matter, but statues granting a certain agency such power may further narrow the scope that some of that rulemaking or adjudication can take. Take for example the powers of the CFPB to regulate agreements entered into between a consumer and a lender. See 12 U.S.C. § 5518(b) (2012) ("The [CFPB], by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the [CFPB] finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.").

## II. *GREEN*[ER] PASTURES: A STATUTORY AND JURISPRUDENTIAL OVERVIEW OF CLASS ARBITRATION

### A. *The Federal Arbitration Act*

Before it overviews class arbitration's case law, Part II summarizes the pertinent sections of the Federal Arbitration Act and distinguishes substantive and procedural arbitrability. Congress enacted the FAA in 1925 to solidify ADR's growing presence alongside traditional, court-centered dispute resolution.<sup>35</sup> Courts have spilt much ink analyzing two of the FAA's sections—section 2 and section 4—and how those sections apply to class arbitration. Section 2 addresses the validity of arbitration provisions, and provides:

a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>36</sup>

As Chief Justice Rehnquist stated in simpler terms, arbitration is a matter of consent, not coercion.<sup>37</sup> In turn, section 4 highlights a district court's requirement to compel arbitration when one party to the contract tries to litigate an issue covered within the scope of that contract's arbitration clause.<sup>38</sup> The U.S. Supreme Court interprets this pair of sections in tandem to outline where it does and does not possess the power to review arbitral decisions.<sup>39</sup>

Substantive and procedural arbitrability are concepts that address which reviewer—a court or an arbitrator—possesses the power to decide an issue in arbitration. If a consumer alleges she is not bound by a contract's arbitration clause, that consumer raises a question that concerns *substantive arbitrability*, which is within *courts'* purview to adjudicate.<sup>40</sup> Additionally, courts decide whether an arbitration agreement is revocable based on legal

35. Fitzpatrick, *supra* note 31, at 163 (“The FAA was enacted . . . to override judicial hostility to arbitration . . .”).

36. 9 U.S.C. § 2 (2012).

37. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 109 S. Ct. 1248, 1250 (1989).

38. 9 U.S.C. § 4 (2012) (A court that is “satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”).

39. *Concepcion*, 563 U.S. at 344, 351.

40. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452–53 (2003).



or equitable grounds.<sup>41</sup> Conversely, the U.S. Supreme Court presumes that parties intend *arbitrators* to decide disputes about the meaning of a particular *procedure* used in an arbitration, such as waiver, delay, or available defenses to arbitration.<sup>42</sup>

*B. Beginnings: Green Tree and Stolt-Nielsen*

The Supreme Court distinguished substantive arbitrability from procedural arbitrability in *Green Tree Financial Corp. v. Bazzle*.<sup>43</sup> The case featured a plaintiff couple who alleged that Green Tree had failed to provide them with a form explaining their legal rights in a loan transaction.<sup>44</sup> The parties had entered into a contract containing a pre-dispute arbitration provision. When the couple sued and sought to certify a class, a state trial court certified that class, but simultaneously entered an order compelling class arbitration.<sup>45</sup> An arbitrator later entered an award in favor of the arbitral class.<sup>46</sup>

Four justices of the Supreme Court concluded that the question of whether a contract forbade class arbitration qualified as one of procedural arbitrability within an arbitrator's adjudicative scope.<sup>47</sup> The plurality reasoned that the question was not "whether [the parties] agreed to arbitrate the matter," but instead focused on the "kind of arbitration proceeding" the parties had contracted.<sup>48</sup> Nevertheless, the Court declined to opine on whether silence in an arbitration clause permitted or foreclosed class arbitration,<sup>49</sup> an omission that left both plaintiffs and defendants perpetually perplexed.<sup>50</sup> Neither side knew how to interpret a contract silent on the issue of class arbitration.

The *Green Tree* Court did suggest arbitration-precluding language that parties could include in their contractual agreements. For example, if a contract stated that disputes would be resolved by an arbitrator "selected by [Green Tree] to arbitrate this dispute and no other (even identical) dispute

41. *See id.*

42. *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (2010); *BC Group PLC v. Republic of Argentina*, 134 S. Ct. 1198, 1202 (2014).

43. *Green Tree Fin. Corp.*, 539 U.S. at 444.

44. *Id.* at 448–49.

45. *Id.* at 449.

46. *Id.*

47. *Id.* at 451.

48. *Id.*

49. *Id.* at 447.

50. Ultimately, this irresolution precipitated the Court's decisions in both *Stolt Nielsen*, and, more tangentially, *Oxford Health Plans LLC*. *See generally* *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013).



with another [third party],” such language would prohibit class arbitration.<sup>51</sup> Unsurprisingly, commercial entities used this dictum and refined their arbitration clauses to hinder class arbitration. But the holding’s ambiguity also caused many arbitrators to interpret *Green Tree* as generally permitting class arbitration. Indeed, by 2009 the American Arbitration Association (“AAA”) had certified nearly 300 such arbitrations.<sup>52</sup>

*Stolt-Nielsen v. AnimalFeeds International Corp* clarified the Court’s stance on class arbitration in two ways.<sup>53</sup> First, it commanded a Court majority, rather than a mere plurality, thereby giving it greater precedential effect.<sup>54</sup> Second, it squarely addressed contractual silence on class arbitration. The Court concluded that, under the FAA, claimants seeking to arbitrate as a class could not compel a defendant to do so if the contract they entered into was silent on the matter.<sup>55</sup> The Court reiterated its dicta from a previous case<sup>56</sup>—noting that arbitration acts as a welcome and expeditious alternative to traditional courtroom litigation—but further expounded that the “basic precept that arbitration ‘is a matter of consent, not coercion,’” and that an arbitrator could not infer an implied agreement to arbitrate “solely from . . . the parties’ agreement to arbitrate.”<sup>57</sup>

*Green Tree* had framed the inquiry into party intent in the negative (i.e.—“did the parties restrict one another from class arbitration?”). *Stolt-Nielsen* flipped this; now, arbitrators had to ask whether parties affirmatively agreed to allow class arbitration.<sup>58</sup> And while the *Green Tree* plurality provided contract language that would *block* class arbitration, the *Stolt-Nielsen* majority failed to offer similar language that it would use to interpret a contract as *authorizing* class arbitration.

As a matter of policy, the Court rationalized that an inference of consent to class arbitration from mere silence tapered ADR’s efficient and informal spirit. Because class arbitrations would take longer and require more sophisticated procedures than individual dispute resolution, class arbitrations carried greater financial and temporal costs. The Court refused to burden a party that might not have agreed to such costs in a contract silent on class arbitration. “[I]t cannot be presumed,” Justice Alito wrote,

51. *Green Tree Fin. Corp.*, 539 U.S. at 451.

52. Deuelle & Berman, *supra* note 29, at 3.

53. *Stolt-Nielsen*, 130 S. Ct at 1758–76.

54. *Id.* at 1763.

55. *Id.* at 1776.

56. See *Southland Corp. v. Keating*, 465 U.S. 1, 36 (1984) (O’Connor, J., dissenting).

57. *Stolt-Nielsen*, 130 S. Ct. at 1774, 1782 (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 109 S. Ct. 1248, 1250 (1989)).

58. *Id.* at 1775.

“that the parties consented to [class arbitration] by simply agreeing to submit their disputes to an arbitrator.”<sup>59</sup> Ultimately, the Court’s retreat from a presumption of class arbitration imposed a burden on parties to provide specific language allowing for the practice.<sup>60</sup>

### C. *Concepcion*

The following October term, the Court resolved mounting friction between the FAA and state law when it issued its seminal holding in *AT&T Mobility LLC v. Concepcion*.<sup>61</sup> There, a consumer moved to certify a putative class in federal district court after alleging that AT&T had engaged in deceptive advertising by claiming its cell phone plans featured free phones.<sup>62</sup> While the fact pattern imitated *Green Tree* and *Stolt-Nielsen* (i.e. — a plaintiff brings a class action suit, and a lower court compels that plaintiff and the class maintainable to arbitration) *Concepcion* crucially differed from its antecedent cases. First, whereas *Green Tree* and *Stolt-Nielsen* featured arbitration provisions silent on the subject of class arbitration, in *Concepcion*, the plaintiff had signed a pre-dispute contract with language that required him to submit to mandatory *individual* arbitration.<sup>63</sup> Moreover, AT&T’s arbitration provision provided highly favorable terms to claimants; the company would pay all ADR costs (although not necessarily the claimants’ attorney’s or expert’s fees), the arbitration would take place in the county where the consumer was located, the arbitrator was not limited in her possible damages award, and if the plaintiff received a larger award than AT&T’s last settlement offer, AT&T would raise its offer to \$7,500 and would pay double attorney’s fees.<sup>64</sup>

The district court acknowledged the generous terms of AT&T’s provision; nevertheless, it held that precedent established in *Discover Bank v. Superior Court*<sup>65</sup> prohibited unconscionable contracts of adhesion that permit a party to evade liability from “negative value” claims whose cost to litigate individually exceeds the expected damages award.<sup>66</sup> The Ninth Circuit affirmed this holding. The U.S. Supreme Court, however, reversed, concluding *Discover Bank* violated the purpose of Section 2 of the FAA.<sup>67</sup>

59. *Id.*

60. *Id.* at 1776.

61. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011).

62. *Id.* at 336–38.

63. *Id.* at 336.

64. *Id.* at 336–37.

65. *Discover Bank v. Superior Court*, 36 Cal.4th 148, 163 (Ct. App. 1st 2005).

66. *Concepcion*, 563 U.S. at 351–52.

67. *Id.* at 352.

By permitting class arbitration in cases where a court deemed individual arbitration provisions unconscionable, *Discover Bank* allowed plaintiffs to sue a defendant and force that defendant to “bet the company with no effective means of review.”<sup>68</sup>

In so commenting, Justice Scalia referenced that courts review arbitral decisions only under narrow circumstances, such as fraud; thus, meaningful appellate review often was unavailable to scrutinize an adverse judgment against a party in class arbitration. The Court held that because the parties had not explicitly permitted class arbitration in their contract, and that the lower court “manufactured” a class arbitration under *Discover Bank*’s precedent, the Ninth Circuit’s interpretation permitting class arbitration violated the FAA’s Section 2.<sup>69</sup>

The *Concepcion* majority advanced several policy points in support of its holding, including those rooted in arbitration’s informality and lack of appellate review.<sup>70</sup> With respect to the former, the majority argued that class arbitration would shape-shift arbitral proceedings into a cumbersome quagmire like traditional litigation, bogged down in dense procedures, a parade of experts, and tremendous attorney’s fees.<sup>71</sup> Under such a regime, arbitrators could not exercise procedures that resulted in “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”<sup>72</sup>

The Court also intimated that if claimants forced businesses to defend class arbitration proceedings, those businesses would abandon arbitration provisions in their contracts completely.<sup>73</sup> “[W]hen damages allegedly owed to tens of thousands of potential claimants are aggregated and decided at once, the risk of an error will often become unacceptable. Faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims.”<sup>74</sup>

68. *Id.* at 351.

69. *Id.* at 352.

70. *Id.* at 348–50.

71. *Id.* at 348–49.

72. *Id.* (“A cursory comparison of bilateral and class arbitration illustrates the difference. According to the American Arbitration Association (AAA), the average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months, four months if the arbitration was conducted by documents only . . . As of September 2009, the AAA had opened 283 class arbitrations . . . Not a single one, however, had resulted in a final award on the merits.”).

73. *Id.* at 350.

74. *Id.*

#### D. Oxford and Italian Colors

Post-*Concepcion*, the Court positioned the FAA as a preemptive barrier against class arbitration. Two years later, though, the Court issued its unanimous opinion in *Oxford Health Plans LLC v. Sutter*, and threw a wrench into the past decade's tightening precedent.<sup>75</sup> A case that began pre-*Stolt-Nielsen*, *Oxford* featured a plaintiff physician who sought to certify a putative class against an insurance agency for breach of contract. Oxford Health Plans ("Oxford") moved to compel arbitration.<sup>76</sup> The state court granted Oxford's motion, and, once in arbitration, the parties agreed that "the arbitrator should decide whether their contract authorized class arbitration."<sup>77</sup> With that, the arbitrator concluded that the clause reflected the parties' mutual intent to allow the physicians to proceed in class arbitration, reasoning that the parties sought to include in the arbitration proceedings "everything that [was] prohibited from the court process."<sup>78</sup> He then entered an award for the plaintiffs' class.

The Third Circuit rejected Oxford's request to vacate the arbitrator's judgment under the FAA's Section 10(a)(4).<sup>79</sup> On appeal, the U.S. Supreme Court upheld the Third Circuit's decision, noted that Oxford carried a heavy burden of proof when attempting to vacate an arbitral award, and concluded that it had not met this burden.<sup>80</sup> Thus, regardless of the arbitral decision's deficiencies, the court had to uphold it.<sup>81</sup> The unanimous Court also reiterated its distinction between "substantive" and "procedural" arbitrability, opining that, had Oxford argued that the availability of class arbitration was a "question of arbitrability," the company would have framed such an issue as one of substantive arbitrability reviewable by courts *de novo*.<sup>82</sup> However, because Oxford and the plaintiff physician agreed to let the arbitrator decide whether the arbitration agreement permitted a class option, the Court could not tackle the substantive arbitrability question.<sup>83</sup>

Unlike *Stolt-Nielsen*, where both parties admitted that they had not reached an agreement concerning class arbitration, in *Oxford*, the Court found no such admission, and the arbitrator—wielding the power conferred

75. *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071 (2013).

76. *Id.* at 2067.

77. *Id.*

78. *Id.*

79. 9 U.S.C. § 10(a)(4) (2012).

80. *Oxford Health Plans*, 133 S. Ct. at 2068.

81. *Id.* at 2069.

82. *Id.*

83. *Id.* at 2068–69 n.2.

upon him by the parties—validly “construe[d] the contract . . . and did find an agreement to permit class arbitration.”<sup>84</sup> The Court summarized that when the parties agreed to let an arbitrator decide the presence or absence of a class arbitration provision in their contract “an arbitrator’s error—even his grave error—is not enough” for the court to overturn his decision.<sup>85</sup>

Biting at *Oxford*’s heels a week and a half later, the Court handed down its decision in *American Express Co. v. Italian Colors Restaurant*.<sup>86</sup> If *Oxford* threw a rope over for plaintiffs to surmount *Concepcion*’s preemptive wall, *Italian Colors* added spikes to the wall’s top plate. The question presented concerned “[w]hether the Federal Arbitration Act permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.”<sup>87</sup> A plaintiff restaurateur alleged a negative value antitrust claim<sup>88</sup> against American Express (“AmEx”) and, despite a class waiver clause, filed a putative, federal class action against the credit card company that asserted it had violated the Sherman Act. The Second Circuit reversed a grant of AmEx’s request to compel arbitration; the appellate court concluded that expert witness costs impeded the plaintiff’s ability to assert his statutory rights under the Sherman Act individually, and that class arbitration served as the only means by which the plaintiff (and other class members) could pay for such an expert while continuing to pursue his claim.<sup>89</sup> Additionally, AmEx’s arbitration terms were not as generous as AT&T’s, which allowed the plaintiff to claim that the contract he had entered into prevented his pursuit of an allegedly valid claim against AmEx.<sup>90</sup>

84. *Id.* at 2070.

85. *Id.*

86. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013).

87. *Id.* at 2308.

88. “In resisting the motion, respondents submitted a declaration from an economist who estimated that the cost of an expert analysis necessary to prove the antitrust claims would be ‘at least several hundred thousand dollars, and might exceed \$1 million,’ while the maximum recovery for an individual plaintiff would be \$12,850, or \$38,549 when trebled.” *Id.*

89. *Id.*

90. *Compare* AT&T Mobility LLC v. *Concepcion*, 563 U.S. 333, 336–37 (2011) (In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for non-frivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of \$10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages.), *with* Brief for Respondent at 42–44, *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (No. 12-133) (Moreover, the plaintiffs in *Concepcion* . . . would be able to vindicate those claims. Under the distinctive pro-consumer features of AT&T Mobility’s arbitration clause, ‘aggrieved customers who filed claims would be ‘essentially guarantee[d]’ to be made whole,’ making the claims at issue ‘most unlikely to go unresolved.’ . . . If Petitioners’ arbitration clause contained such pro-vindication clauses, Respondents would not be here.”).

The Supreme Court considered whether the FAA's mandate to interpret parties' arbitration agreements by their express terms overrode the plaintiff's allegation that the contract undermined his abilities to seek redress under the Sherman Act. The plaintiff raised an exception in the FAA that invalidates arbitration agreements when they prevent the "effective vindication" of statutorily granted rights; because each class member asserted a "negative value" claim, those members could not effectively bring their claims without the class action mechanism.<sup>91</sup> Indeed, Justice Breyer addressed this point in *Concepcion* when he wrote, "[w]hat rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?"<sup>92</sup>

However, penning the majority opinion, Justice Scalia wrote that "the antitrust laws [neither] guarantee an affordable procedural path to the vindication of every claim," nor "evinced an intention to preclude a waiver" of class procedures. "[T]he fact that it is not worth the expense involved in proving a statutory remedy," Scalia continued, "does not constitute the elimination of the right to pursue that remedy."<sup>93</sup> In the end, the justices divided along a similar, ideological schism as they had in *Concepcion*, with the majority holding the FAA does not permit courts to invalidate clauses that mandate individual arbitration.<sup>94</sup>

### E. Imburgia and Epic Systems

*DIRECTV, Inc. v. Imburgia* grappled with a far less groundbreaking issue than either *Concepcion* or *Italian Colors*. Here, the parties entered into a contract containing an arbitration clause and class waiver before the Court considered *Concepcion*.<sup>95</sup> The clause noted both that the FAA governed the arbitration provision, and "that if the 'law of your state' makes the waiver of class arbitration unenforceable, then the entire arbitration provision is unenforceable."<sup>96</sup> The plaintiff filed a class action lawsuit in California state court alleging that DIRECTV had improperly charged customers early termination fees.<sup>97</sup> Not long after, the Court handed down

91. *Italian Colors*, 133 S. Ct. at 2309–10.

92. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting). See also *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.").

93. *Italian Colors*, 133 S. Ct. at 2309.

94. *Id.* at 2309–12.

95. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 466 (2015).

96. *Id.*

97. *Id.*

*Concepcion*; using Scalia's *Concepcion* rationale, DIRECTV moved to dismiss the class action from the trial court, but both that court and an appellate court denied its motion, stating that the arbitration provision, with its "law of the state" clause, was rendered unconscionable by California law. The class action could proceed.<sup>98</sup>

The U.S. Supreme Court reversed the California appellate courts' decisions, concluding that the contract's "law of the state" clause—despite being drafted before *Concepcion*—could apply only valid state law, absent any other clear directive; because *Concepcion* had previously invalidated *Discover Bank*—which held class arbitration waivers unconscionable—current state law permitted such waivers.<sup>99</sup> Thus, state law did not invalidate the arbitration provision, and DIRECTV could compel the plaintiffs to arbitrate individually.<sup>100</sup>

Before I shut the cover on Part II, one other case, *Lewis v. Epic Systems*, merits a *nota bene*, as the Supreme Court recently heard oral arguments on it and two other consolidated cases.<sup>101</sup> While the Court divided in an ideologically unusual way in *Imburgia*,<sup>102</sup> *Lewis* is poised to factionalize the justices in their familiar interpretive camps. In *Lewis*, the plaintiff class's employer sent it an arbitration agreement mandating individual arbitration for certain "covered claims," such as wage-and-hour disputes.<sup>103</sup> The clause prevented plaintiffs from bringing a claim on behalf of other claimants, as well as arbitrators from combining multiple plaintiffs' cases into one case.<sup>104</sup> When a labor dispute developed between the lead plaintiff and Epic, the plaintiff sued on a class-wide basis.<sup>105</sup> Epic moved to compel arbitration, but Lewis alleged that the arbitration provision violated the National Labor Relations Act ("NLRA") by "interfer[ing] with employees'

98. *Id.* at 466–67.

99. *Id.* at 468–69.

100. *Id.* at 471.

101. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1151 (7th Cir. 2016), *cert. granted*, No. 16-285, 2017 WL 125664 (U.S. Jan. 13, 2017). *See also* *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9th Cir. 2016), *cert. granted*, No. 16-300, 137 S. Ct. 809 (Jan. 13, 2017); *Murphy Oil USA, Inc. v. Nat'l Labor Relations Bd.*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, No. 16-307, 137 S. Ct. 809 (Jan. 13, 2017). I have expounded on Epic System's potential effects in a separate article that assesses class arbitration provision through a more employment-tinted lens. *See generally* Matthew Hamielec, Note, *Lewis's Shifting Conceptions: The Seventh Circuit's Struggle in Applying Class Action Preemption in Employment Contracts*, 12 SEVENTH CIRCUIT REV. 92 (2017).

102. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 463 (2015).

103. *Lewis*, 823 F.3d at 1154.

104. *Id.* at 1154–55.

105. *Id.* at 1151.



right to engage in concerted activities.”<sup>106</sup> The district court denied Epic’s motion to dismiss.<sup>107</sup>

Under the NLRA, employees may “engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection” The NLRA additionally renders unenforceable any contracts that curbs employees’ rights guaranteed by the Act.<sup>108</sup> The National Labor Relations Board (“NLRB”) has consistently prevented employers from imposing individual agreements that curb employees’ access to concerted actions.<sup>109</sup>

On appeal, Epic contended that, because Federal Rule of Civil Procedure 23 did not exist when the NLRA was enacted in the mid-1930s, the NLRA could not have protected an action that did not exist when it was passed.<sup>110</sup> The Seventh Circuit disagreed; writing for a unanimous court, Chief Judge Diane Wood opined that Rule 23’s promulgators did not divine class actions from thin air. And while the Act did not explicitly define “concerted activities,” the Seventh Circuit interpreted “concerted activity” as including modern class actions in its definition.<sup>111</sup> Thus, the NLRA protected the litigation filed by the plaintiff class.<sup>112</sup>

Finding that Rule 23 class actions clearly fit in the definition of “concerted activity,” the three-judge panel further concluded that Epic’s individual arbitration provision ran afoul of the NLRA; the clause prevented employees from suing through an aggregate action, and thus qualified as an “unfair labor practice.”<sup>113</sup> Unlike some of its sister circuits that had enforced individual arbitration provisions, the Seventh Circuit found an individually bargained-for arbitration agreement limiting concerted actions in such a way *per se* invalid.<sup>114</sup>

Finally, on the issue of whether the FAA conflicts with and supersedes the NLRA in its mandate to enforce Epic’s arbitration clause, Judge Wood interpreted that the former did not require the court to enforce the provi-

106. *Id.*

107. *Id.*

108. *Id.* at 1151–52 (quoting *N.L.R.B. v. City Disposal Sys. Inc.*, 465 U.S. 822, 831 (1984)).

109. *Id.* at 1152.

110. *Id.* at 1154.

111. *Id.* at 1153.

112. *Id.*

113. *Id.* at 1155.

114. See Hamielec, *supra* note 101, at 17 n.112 (“In her opinion, Judge Wood points out that the NLRB has followed such a *per se* mantra in its hearings as well, and that the Ninth Circuit failed to cite why it did not engage practice *Chevron* deference to the Board’s decisions. I suspect that the Ninth Circuit might have been trying to be Solomonic in its decision, given that most Supreme Court jurisprudence does not favor employees in such situation. The Seventh Circuit’s decision, then, tilts more toward the idealistic.”).



sion.<sup>115</sup> The Act's savings clause—which requires courts to enforce ADR agreements “save upon such grounds as exist at law or in equity for [their] revocation”—permitted the NLRA class action to continue because the NLRA itself made the arbitration clause illegal.<sup>116</sup>

Wood excoriated a Fifth Circuit decision upholding similar employee arbitration provisions for parroting Scalia's ‘class arbitration is inefficient’ rationale.<sup>117</sup> She posited that courts’ crusades for speedy arbitrations under *Concepcion* and *Italian Color*'s jurisprudence cannot usurp all class-action-permitting statutes to protect ADR from the judiciary's scrutiny.<sup>118</sup> For these reasons, the Seventh Circuit found Epic's arbitration agreement unenforceable.<sup>119</sup>

### III. ARGUMENTS SUPPORTING AND CRITIQUING THE CLASS ARBITRATION MECHANISM

With the case law laid out above, the rift between plaintiffs classes' and commercial defendants' interests seems as dichotomous as that between Montague and Capulet—or, for those keener on a modern reference, Houses Lannister and Stark.<sup>120</sup> “BigLaw” firms advocate strongly for commercial institutions who want to retain the benefits of individual arbitration; they believe the current system offers a less-flawed option to traditional class actions, and actually provides individuals with superior economic outcomes than litigation. On the other side, academics champion the cause of consumers, employees, and shareholders who seek such class litigation; scholars purport reforms of a system that they believe allows businesses to avoid liability and behavior-detering damages. In Part III, this Note traces the various stances taken by legal, governmental, and lay sources on class arbitration; it does so to lay the groundwork for Part IV's reformative discussion, as well as conceptualize the theories behind certain legislative and regulatory proposals.

#### *A. Academic Opinions*

Most legal scholars who have focused on class action arbitration have criticized individual arbitrations as limiting claimants' recovery to an im-

115. *Lewis*, 823 F.3d at 1160.

116. *Id.* at 1156, 1159.

117. *Id.* at 1158.

118. *Id.*

119. *Id.* at 1161.

120. *See generally* GEORGE R. R. MARTIN, A SONG OF ICE AND FIRE: STORM OF SWORDS, (Bantam ed., 2000).

practical mechanism. For example, Brian A. Fitzpatrick concluded that, if Congress or the administrative agencies leave the Court's class arbitration holdings unaltered, businesses will methodically "eliminate virtually all class actions."<sup>121</sup>

Fitzpatrick indicated that Congress enacted the FAA to apply to commercial contracts between businesses ("B2B"), and not to contracts between a business and individuals ("B2C").<sup>122</sup> For businesses, the streamlined procedures, lack of a jury (and the unpredictability that derives from one), and acumen of a professional arbitrator provide efficient dispute resolution.<sup>123</sup>

These features do not necessarily disadvantage non-commercial plaintiffs, but businesses hold at least two advantages when contracting with individuals that they often do not possess when contracting with another business: a superior bargaining position, and the added benefit of a "repeat player effect" when they appear before arbitrators on a habitual basis. While B2B contracting often occurs between parties with congruent bargaining power, B2C contracts feature asymmetrical bargaining power between the individual and the business. Hence, businesses can leverage their dominant position and require consumers, employees, and shareholders to sign contracts that prescribe individual arbitration, curb the use of procedural tools (in, for example, the number of interrogatories claimants can ask of the business or the number of experts claimants can use), and require the claimant to pay the business's attorney's fees and costs of arbitration.<sup>124</sup>

Without these tools, the arbitration provisions preclude individuals from adequately gleaning needed evidence from their opponent and presenting them to an arbitrator. Thus, the individual arbitration mechanism all but forecloses the possibility of "negative value" claimants receiving any relief. Again, Justice Breyer pointed this fact out while dissenting in *Concepcion*.<sup>125</sup>

Fitzpatrick also observed that enterprises that block class actions, especially in the securities fraud context, effectively dull the deterrent effect

121. Fitzpatrick, *supra* note 31, at 163.

122. *Id.* at 164.

123. *Id.* at 165.

124. See, e.g., *In re* Checking Account Overdraft Litig., MDL No. 2036, 685 F.3d 1269, 1282 (11th Cir. 2012) (holding unconscionable a "provision allowing BB&T, and only BB&T, to recover 'any loss, costs, or expenses' arising from 'any dispute' with [its customers], regardless of the outcome of the dispute").

125. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) ("What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a \$30.22 claim?").

of damages levied against them via individual arbitration.<sup>126</sup> However, his assertion extends well beyond securities fraud. Litigation's deterrent effect—one of the fundamental goals of tort law—serves as one check (an efficient and free market acting as another, for example) against businesses from developing poorly designed or unsafe products. It keeps manufacturers and service providers “honest” by offering a legal stick to their market-profiting carrot.

The author joined other scholastics in predicting that businesses will nullify the class action mechanism.<sup>127</sup> Because consumers, shareholders, and employees all have transactional relationships with commercial entities, those entities can require each of these groups to enter into pre-dispute contracts with them.<sup>128</sup> As a result, businesses both wield the means and enjoy a conducive legal environment to preclude the maintenance of over three-quarters of all current federal class action cases filed against them.<sup>129</sup> And though the commercial world has started incorporating arbitration clauses and class action waivers at a more sluggish rate than anticipated, Fitzpatrick nevertheless believed that all large business entities will incorporate both provisions in their form contracts over time.<sup>130</sup> He also cited that people might unwittingly accede to the provisions' incorporation because they do not act rationally when accounting for future risk.<sup>131</sup>

To build on the introduction's example, consumers who buy a cell phone are inundated with a forest's-worth of paperwork, some from the manufacturer, some from the service provider, and some from the retailer. People faced with a flood of fine print simply do not care enough to read it before accepting its terms, regardless of whether a provision is conspicuous, bolded, and precedes all other provisions. They just want the shiny, new phone that unlocks itself by scanning your face! And as *Intelligentsia* baristas and sleep-deprived law students alike try to position their heads at

126. Fitzpatrick, *supra* note 31, at 194–95.

127. *Id.* at 176.

128. *Id.* at 174 (discussing Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373 (2005).

129. *Id.* at 175. Fitzpatrick did not study the types of class actions that plaintiffs bring in state courts, but hypothesizes that the composition of those classes mirror those in federal court. Shareholders, employees, and consumers. *Id.*

130. *Id.* at 174.

131. *Id.* at 190 (citing Daniel B. Klaff, *Debiasing and Bidirectional Bias: Cognitive Failure in Mandatory Employment Arbitration*, 15 HARV. NEGOT. L. REV. 1, 12 (2010)) (“The application of optimism bias to the mandatory arbitration setting is relatively straightforward: employees may underestimate the likelihood that they will experience the kind of negative workplace event that would give rise to a dispute requiring arbitration or litigation.”).

*just* the right angle to bear witness to this technological feat,<sup>132</sup> their apathy allows businesses to satiate their need to reduce legal risk. As these individuals walk away with a sleek new phone, they have no clue that the manufacturer, service provider, and retailer have each (virtually) foreclosed those individuals' ability to litigate. Only once peoples' Note 7 phablets start spontaneously combusting do they think of suing for redress, and by that point they may be relegated to arbitration.<sup>133</sup>

Indeed, commercial entities look to extend this opacity beyond those products that require a lot of contract-signing. Fitzpatrick noted that technological advancements and "legal notions of contract formation" could cause businesses to print class action waivers and arbitration provisions on a product's packaging, with binding effect.<sup>134</sup> This "total incorporation" theory may not rise to the level of ubiquity that the author foresees, but he is not likely to be far off the mark. After all,

whether businesses will take advantage of the opportunity to slip arbitration clauses with class action waivers into all their contracts [. . .] is largely a rhetorical [question]. Why *wouldn't* businesses take advantage of this opportunity? As I noted at the outset, in many cases, these waivers are tantamount to insulating businesses altogether from liability for the small-stakes injuries they cause. Why *wouldn't* every business want such insulation? I think every business would.<sup>135</sup>

132. Nick T., *Here Is How the Iris Scanner on the Galaxy Note 7 Works*, PHONEARENA.COM, (Aug. 8, 2016, 8:45 AM), [http://www.phonearena.com/news/Here-is-how-the-Galaxy-Note-7-iris-scanner-works\\_id82854](http://www.phonearena.com/news/Here-is-how-the-Galaxy-Note-7-iris-scanner-works_id82854) [https://perma.cc/A9HH-CJYD] Though one can only hope that the phone doesn't set fire to users before they get a chance to experience this novelty. See Kyle Wiggers, *Everything We Know About Samsung's Galaxy Note 7 Recall*, DIGITAL TRENDS, <http://www.digitaltrends.com/mobile/samsung-halts-galaxy-note-7-shipments-phones-catching-fire> [https://perma.cc/CGH9-S9CN].

133. In a particularly damning series of events, Samsung tried to enforce its individual arbitration provision when people suffered injuries from the self-combusting Galaxy Note 7 and Gear S Smartwatch devices. See CBS News Politics, *Samsung Exploding Phone Lawsuits May Be Derailed by Fine Print*, CBS NEWS (Feb. 18, 2017, 9:43 AM), <http://www.cbsnews.com/news/samsung-galaxy-note-7-fine-print-class-action-waiver-lawsuits/>; Charles Toutant, *'Hidden' Samsung Arbitration Clause Held Non-Binding*, N.J. L.J., <http://www.njlawjournal.com/id=1202752378136/Hidden-Samsung-Arbitration-Clause-Held-NonBinding?slreturn=20170118160038> [https://perma.cc/5E5N-ELSW]. In the case of the smartwatch, the District of New Jersey found an individual arbitration provision buried in the final pages of the product's warranty materials as inconspicuous and unenforceable, though Samsung is not going down without a fight in the Third Circuit. *Noble v. Samsung Elecs. Am., Inc.*, No. 15-3713, 2016 WL 1029790, at \*1 (D.N.J. Mar. 15, 2016), *aff'd*, No. 16-1903, 2016 WL 1029790 (3d Cir. 2016). Similarly, public outrage has caused companies like Equifax to walk back the scope of its arbitration agreement in the wake of a massive data breach. See David Lazarus, *The Real Outrage Isn't Equifax's Arbitration Clause—It's All the Others*, L.A. TIMES (Sept. 12, 2017), <http://www.latimes.com/business/lazarus/la-fi-lazarus-equifax-arbitration-clauses-20170912-story.html>.

134. Fitzpatrick, *supra* note 31, at 176–77. Courts have upheld the validity of such "package" contractual provisions, despite the fact that the consumer might not have had the opportunity to read the language on the packaging until after she bought it.

135. *Id.* at 190.

To build on this point, if a certain industry like the cellular service providers uniformly include class action waivers and arbitration provisions in their form contracts, those provisions leave consumers without a substitute good that lacks those provisions. Employees who seek a comparable job with a contract featuring no such provision and advocative shareholders who look for substitute investments in a corporation without the waiver printed on its stock certificates could face the same frustration.

Fitzpatrick surmised that after *Concepcion*'s repeal of the *Discover Bank* rule and the Court's holding in *Italian Colors*, existing law cannot proscribe companies from implementing pre-dispute class action waivers in their contracts.<sup>136</sup> He recognized that courts might deem less-generous arbitration clauses than *Concepcion*'s<sup>137</sup> unconscionable, but noted that neither the Court in *Italian Colors* nor lower federal courts<sup>138</sup> have hesitated to uphold uncharitable arbitration agreements.<sup>139</sup> Further, Fitzpatrick doubted that many statutes would rise to the level of *Italian Color*'s "contrary congressional command" requirement sufficient to circumvent the FAA; only one statute, the Dodd Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank"), possesses such a command.<sup>140</sup>

136. *Id.*

137. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336–37 (2011).

138. Fitzpatrick notes that some courts might scrutinize other provisions of the arbitration agreement, such as the payment of both sides' attorneys' fees as unconscionable, but suggests that corporations who face such a conclusion of unconscionability will simply scrap those provisions from their agreements over time in order to preserve their class action waiver. Fitzpatrick, *supra* note 31, at 187.

139. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013). Fitzpatrick, *supra* note 31, at 186 n.117 (quoting *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012) ("[T]he concern is not so much that customers have no effective means to vindicate their rights, but rather that customers have insufficient incentive to do so . . . . But as the Supreme Court stated in *Concepcion*, such unrelated policy concerns, however worthwhile, cannot undermine the FAA." (citations omitted); *Brokers' Servs. Mktg. Grp. v. Celco P'ship*, No. 10-3973 JAP, 2012 WL 1048423, at \*5 (D.N.J. Mar. 28, 2012) ("[T]he Plaintiffs here do not claim that it is impossible to seek their recovery in the manner prescribed by the arbitration agreement, but only that it would be an economically irrational decision to do so. The Supreme Court has held that this rationale for class actions cannot override the FAA.").

140. Dodd-Frank abrogates individual arbitration by granting the CFPB regulatory authority to limit pre-dispute arbitration clauses' prevalence in consumer financial products and services. Indeed, the CFPB has used this charge to propose regulations that this Note discusses in Part IV. At the same time, Dodd-Frank does not expressly allow for consumer class actions concerning financial products or services. Further, the scholar cites to several such statutes that allow plaintiffs to sue as a group, such as the Age Discrimination in Employment Act, the Environmental Protection Act, and the Fair Labor Standards Act. He notes, however, that the group lawsuits purported under these statutes qualify as "opt-in" actions as opposed to "opt out" actions under FRCP 23. Fitzpatrick, *supra* note 31, at 188. By and large, then, current federal statutes do not ameliorate the problems caused by *Concepcion* and its progeny. Nor are states likely to alter their contract law to promote class arbitration, where they can. Fitzpatrick does note that Delaware is well-poised and other states in which it is popular to incorporate a business could enact legislation barring class waivers for corporations looking to incorporate in the state. But he expresses doubt that many other "state courts will engage in a wholesale rewrite of their contract." *Id.* at 178.

The author concluded that congressional inaction, paired with *Concepcion* and *Italian Colors*, creates a regime where businesses will fully incorporate arbitration agreements and class action waivers into their standard form contracts.<sup>141</sup> If left unperturbed, these contracts eventually will lead to the demise of class actions against commercial actors.<sup>142</sup>

Erwin Chemerinsky and Catherine Fisk co-authored an article that analyzed *Concepcion* shortly after it came down.<sup>143</sup> In it, the authors scrutinized the Court majority's policy points in support of federal preemption of state prohibitions on class arbitration waivers.<sup>144</sup> They found the arguments unpersuasive.

The authors first tackled Justice Scalia's belief that class arbitration threatened the informal, economical, and procedurally streamlined environment of ADR; they excoriated the majority for "argu[ing] from [arbitration's] definition," and noted that preserving an arbitration provision's reduced procedures (i.e.—rules limiting the number of experts or interrogatories, more informal rules of evidence) until they rose to affect substantive rights was a capricious standard.<sup>145</sup> They opined, "What if the arbitration agreement provided that arbitrators must resolve a case by flipping a coin? What if the arbitration agreement eliminated pretrial discovery? Simply saying that arbitration is informal tells us nothing about why the FAA preempts state laws prohibiting excessive informality."<sup>146</sup> The pair criticized the majority for failing to demarcate the line between a streamlined procedure and a substantive right.<sup>147</sup>

Chemerinsky and Fisk were even more contemptuous of the majority's other argument—that class arbitration waivers protect defendants from frivolous, low-value suits with little appellate review.<sup>148</sup> The authors lambasted the Court majority for implementing a double standard, under which defendants can force plaintiffs to cede "protections of the federal rules of evidence . . . the right to proceed as a class, or the right to judicial review of arbitrator error," but plaintiffs cannot force defendants to arbitrate against a class.<sup>149</sup> They further castigated the Court for failing to consider that a loss

141. *Id.* at 197.

142. *Id.* at 199.

143. Catherine Fisk & Erwin Chemerinsky, *The Failing Faith in Class Actions: Wal-Mart v. Dukes and AT&T Mobility v. Concepcion*, 7 DUKE J. CONST. L. & PUB. POL'Y. 73, 88 (2011).

144. *Id.* at 89.

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.* at 89–90.

149. *Id.* at 90.



of several thousand dollars to an individual might be proportionally larger than a multi-million dollar loss to AT&T. Chemerinsky and Fisk then accused the majority of partisan obstructionism:

The Court could not have been more explicit that its goal was to protect corporations against consumers who wish to vindicate statutory or common-law claims for fraud or false advertising. Class arbitration is unacceptable because the process “increases risks to defendants,” inasmuch as the aggregated damages might constitute “a devastating loss” that would “pressure[]” them “into settling questionable claims.” This assertion of the need for federal preemption is outrageous as a statement of values and deeply troubling as an indication of the future trend in the law. Parties settle “questionable claims” all the time, sometimes to the defendant’s financial advantage and sometimes to the plaintiff’s.<sup>150</sup>

Scathing allegation aside, the authors failed to address exactly what makes parties settle questionable claims. If a commercial defendant felt that a plaintiff class’ claim had no merit, what would create such an irresistible urge to settle?<sup>151</sup>

Some claim that an ostensible lack of judicial review in arbitration induces commercial defendants to hedge their risk by settling rather than fully arbitrating a questionable, large-value class arbitration to a decision. If an arbitrator would decide a class arbitration in favor of the plaintiffs, a court could only review such a decision under narrow circumstances like fraud, which means that the arbitral decision, and the damages award, would likely remain unaltered. Hence, if the business could negotiate a settlement amount lower than the alleged damages purported by the large-value class, that business could reduce its risk of paying out damages that would not be reviewable by a judge.

In summary, academia’s general vibe connotes disapproval toward the arbitration clause/class action waiver combo.<sup>152</sup> Many scholars have called for reform, hoping that Congress will pass comprehensive legislation that allows claimants to litigate as a class.<sup>153</sup> And Congress has tried to respond, but to no avail.<sup>154</sup> Part III next turns academia’s intellectual foil on the matter: large law firms.

150. *Id.*

151. MARCUS ET AL, *supra* note 1 at 223.

152. *See, e.g.*, Fitzpatrick, *supra* note 31; Fisk & Chemerinsky, *supra* note 143; Glover, *supra* note 32; Sternlight, *supra* note 32.

153. The trend has not been so much to advocate on behalf of class arbitration, but more so to merely allow claimants a chance to get a class certified in court or to outright commercial defendants’ pairing of class action waivers and arbitration clauses. *See* Fitzpatrick, *supra* note 31, at 188.

154. *See* Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017); Arbitration Fairness Act of 2017, S. 537, 115th Cong. (2017); Mandatory Arbitration Transparency Act of 2017, S. 647,



B. “BigLaw” Opinions

BigLaw extolls the virtues of individual arbitration. Its stance juxtaposes well with professors’ by highlighting some compelling arguments for the maintenance of class action waivers and arbitration provisions. That large law firms support individual arbitration should not come as a shock; when a plaintiffs’ class sues a corporation, the corporation often retains a BigLaw firm to represent it, and one should expect the literature these firms distribute to cater to clients’ needs.<sup>155</sup> After all, as the aside-indulgent Francis Underwood crassly confessed, “when the money’s coming your way, you don’t ask any questions.”<sup>156</sup>

Weil, Gotshal & Manges LLP published an article in which two authors praised *Concepcion* and *Italian Colors* while depicting *Oxford* as decided on a specific fact pattern and under a rarely applied form of judicial review.<sup>157</sup> Yet, the Weil attorneys cautioned their readers not to reserve to an arbitrator the question of whether an arbitration clause allows for class arbitration. If the arbitrator had the power to make such a determination, her opinion on the matter will be virtually veiled<sup>158</sup> from judicial review; instead, the authors argue, parties should “seek judicial determination of the issue as one of substantive arbitrability.”<sup>159</sup> If a court declines to interpret the arbitration clause, a business’s counsel should object to the “arbitrary resolution of the question each step of the way so as to preserve the issue for judicial review.”<sup>160</sup> This preservation will allow an appellate court to review the arbitral decision *de novo*, rather than under a narrower standard limited to, for example, fraud.<sup>161</sup>

The article drove home the point that businesses who wish to avoid the threat of class arbitration must unambiguously express its unavailability. The authors then concluded with two other prescriptions. First, they advised a provision stating that, if an arbitrator or a court allows for class

115th Cong. (2017); Mandatory Arbitration Transparency Act of 2017, H.R. 4130, 115th Cong. (2017); Arbitration Transparency Act of 2017, H.R. 832, 115th Cong. (2017); Safety over Arbitration Act of 2017, S. 542, 115th Cong. (2017); Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. (2015); Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015); Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (2013); Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009); Arbitration Fairness Act of 2007, H.R. 3010, 110th Cong. (2007).

155. See, e.g., Deuelle & Berman, *supra* note 29.

156. *House of Cards: Chapter 20*, NETFLIX (Feb. 14, 2014), <http://www.netflix.com>.

157. Deuelle & Berman, *supra* note 29, at 8.

158. See Part III, *infra*.

159. *Id.*

160. Deuelle and Berman, *supra* note 29, at 8.

161. *Id.*

proceedings, then the arbitration agreement will be rendered unenforceable and further proceedings will occur in court.<sup>162</sup> Second, the attorneys suggested that drafters include language that bars “attempted consolidation of individual arbitration claims, which could potentially be the next wave of attempts at aggregated, multilateral arbitration now that class arbitration can be effectively guarded against by careful drafting.”<sup>163</sup>

Weil was not the only firm to buttress its clients’ form contracts with language that would shrink the possibility of a judge or arbitrator interpreting contracts as allowing class arbitration. Across the country, law firms that represented commercial clients issued memos on *Concepcion* and *Italian Colors*’ potential impacts, and offered suggestions on how to trek the new legal landscape.<sup>164</sup>

One of the more measured articles came from WilmerHale in a November 2015 issue of the New York Law Journal.<sup>165</sup> In referencing the Consumer Financial Protection Bureau’s proposed arbitration-curbing rule (discussed in greater detail in Part IV), the authors chided scholars and the federal agency for asserting class arbitration’s demise from pure theory without quantitative metrics. They noted that, not only do arbitrators continue to allow class arbitrations,<sup>166</sup> but also that proposed regulations by the

162. *Id.*

163. *Id.*

164. Many law firms called on companies to ensure that their arbitration provisions contained generous terms for potential claimants so as not to be considered substantively altering of claimants’ rights, and therefore be contra to the FAA. Others stressed that businesses design specific procedures and rules to govern the arbitrations. And yes, a select few firms gaudily touted *Concepcion* and *Italian Colors* as impervious jurisprudential fortresses that required judges to enforce individual arbitration provisions until Congress took further action. See Patrick M. Miller & Patrick J. O’Connor, Jr., *Managing Your Class-Action Risk Through Arbitration Agreements*, FAEGRE BAKER DANIELS LLP (Apr. 13, 2015), <http://www.faegrebd.com/managing-your-class-action-risk-through-arbitration-agreements>; [https://perma.cc/V6FG-YN6M]; Kirkland Alert, *Supreme Court Upholds Class-Action Ban in Arbitration Agreements*, KIRKLAND & ELLIS LLP (May 2011), [http://www.kirkland.com/siteFiles/Publications/Alert\\_050211.pdf](http://www.kirkland.com/siteFiles/Publications/Alert_050211.pdf) [https://perma.cc/4TVM-2BM6]; Memorandum, *Recent Supreme Court Decision on Arbitration of Class Action Claims Presents Significant Opportunities for Employers*, SIMPSON THACHER & BARTLETT LLP (May 3, 2011), <http://www.stblaw.com/docs/default-source/cold-fusion-existing-content/publications/pub1200.pdf?sfvrsn=2> [https://perma.cc/Q9NM-TZ26]; Arbitration Update, *The American Express Decision—A Milestone in Arbitration Law*, SIDLEY AUSTIN LLP (June 25, 2013), [http://www.sidley.com/~media/Files/News/2013/06/The%20American%20Express%20Decision%20%20A%20Milestone%20In%20Ar\\_/Files/View%20Update%20in%20PDF%20Format/FileAttachment/Arbitration%20Update%2062513](http://www.sidley.com/~media/Files/News/2013/06/The%20American%20Express%20Decision%20%20A%20Milestone%20In%20Ar_/Files/View%20Update%20in%20PDF%20Format/FileAttachment/Arbitration%20Update%2062513) [https://perma.cc/Y4SL-6GJW].

165. James H. Carter & John V.H. Pierce, *Have Class Arbitrations Found New Life?*, N.Y.L.J. (Nov. 16, 2015), [http://www.wilmerhale.com/uploadedFiles/Shared\\_Content/Editorial/Publications/Documents/2015-11-16-ny-law-journal-have-class-arbitrations-found-new-life.pdf?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=inter-article-link](http://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2015-11-16-ny-law-journal-have-class-arbitrations-found-new-life.pdf?utm_source=Mondaq&utm_medium=syndication&utm_campaign=inter-article-link).

166. For example, they cite that post-*Concepcion*, the American Arbitration Association still had nearly 150 class arbitrations on their docket. *Id.* Another arbitration service provider, JAMS, noted almost fifty class arbitration cases filed since 2013. *Id.*

CFPB indicate that class arbitration may see a resurgence in the consumer finance setting.<sup>167</sup> The authors did not shy away from pointing out that those class arbitrations that proceeded as negative value suits often resulted in negligible or no damage awards for plaintiffs but high plaintiffs' attorneys' fees.<sup>168</sup> The authors then derided the CFPB's proposal, questioning whether the Bureau reached any meaningful conclusions about class arbitrations and their outcomes relative to individual arbitrations.<sup>169</sup> The authors further criticized the Bureau for relegating claimants bound by arbitration clauses and class action waivers to the imperfect but allegedly plaintiff-preferred world of ordinary class actions.<sup>170</sup>

More recently, and in the wake of the Consumer Financial Protection Bureau's issuance of and Congress's resolution to repeal a rule addressing arbitration provisions in the consumer banking and credit card contexts has led BigLaw firms to dramatically their client advice. Initial BigLaw reaction to the CFPB's rule caused firms to advise affected clients to wholly remove arbitration provisions from their consumer-related contracts. At the very least, firms reemphasized their earlier advice to place savings clauses into consumer contracts so as to cleanly sever the enforceable parts of the agreements from the arbitration provisions whose potential unenforceability could cause the entire contract to be unenforceable. Naturally, when President Trump signed the congressional resolution invalidating the CFPB regulation in late 2017, companies (either on their own, or through their outside counsels) once again flocked to the arbitral forums' benefits.

### *C. Media Perspectives*

Beginning in 2015, several mainstream media articles on arbitration provisions ballooned what was a sparsely covered area in the early 2000s into a politically-laden cottage industry that robustly covers ADR to this day.<sup>171</sup> This segment will focus on two news sources: the New York Times and its editorial doppelganger, the Wall Street Journal.

167. *Id.* This contention seems misguided, though, as the proposed regulation is unclear on whether a class will be allowed to pursue arbitration, or whether it will stay in litigation once certified. Part IV discusses the CFPB's regulation in detail.

168. The article notes that in one case, for example, a plaintiffs' class received no actual damage awards, and only \$2 million dollars in punitive damage awards, which were paid out to two consumer protection organizations. *Id.* The attorneys, on the other hand pocketed \$2.6 million in fees. *Id.*

169. *Id.*

170. *Id.*

171. Admittedly, the articles' authors tend to paint with a broad brush, generalize the overarching theories on both of the arguments' sides, and make victims of claimants and demons of companies, or vice versa.

Through several articles over the past few years, the Wall Street Journal depicted a full-frontal war between plaintiffs' attorneys and businesses.<sup>172</sup> The paper described a proliferation of "specious lawsuits" in which plaintiffs' lawyers accumulated fortunes at the expense of businesses and consumers.<sup>173</sup> Arbitration allegedly curbs this practice through its procedurally efficient, convenient, and cost-effective methods; it creates an alternative to the negative value class action, in which named representatives did not have a sufficient stake to monitor the attorneys<sup>174</sup> handling the case, and lawyers settled claims for minimal amounts per client and then paid themselves exorbitant fees.<sup>175</sup> One author of a 2015 article cited the Searle Civil Justice report from Northwestern Law School as empirical evidence that claimants fared better in arbitration than in traditional litigation.<sup>176</sup> That author viewed the CFPB's proposed regulation (described in Part IV) as a step backward for consumers, and its director, Richard Cordray, as a partisan administrator beholden to lining the pockets of the plaintiffs' bar.<sup>177</sup> When President Trump signed the resolution repealing the rule The Journal hailed the decision as a successful deterrent of dubious class action suits.<sup>178</sup> Unsurprisingly, other newspapers disagreed.

In the autumn of 2015, the New York Times printed a three-part exposé delving into the world of mandatory arbitration clauses and class action waivers.<sup>179</sup> In its first installment, the Times painted businesses as conniv-

172. James R. Copland, *Why the Trial Bar and Its Friends Detest Arbitration*, WALL ST. J. (Dec. 25, 2015), <https://www.wsj.com/articles/why-the-trial-bar-and-its-friends-detest-arbitration-1451065475> [<https://perma.cc/M2HL-V4A7>]; Andrew Ackerman & Yuka Hayashi, *Congress Makes it Harder to Sue the Financial Industry*, WALL ST. J. (Oct. 24, 2017), <https://www.wsj.com/articles/congress-votes-to-overturn-cfpb-arbitration-rule-1508897968>.

173. *Id.*

174. This claim strikes me as dubious, given that named representatives in such negative value claims can be compensated for their time in acting as an effective representative. Frequently, this amount surpasses the damages award that other plaintiffs in the class receive. Thus, if the author's thesis—that paltry damage awards leads to poor monitoring by the named representative—is to be taken at any value, it works under the assumption that named plaintiffs receive no compensation other than their damage award.

175. This claim is susceptible to criticism. Insofar as federal cases are concerned, the Federal Rules of Civil Procedure Rule 23(h) requires that a court review and approve attorney's fees, both in cases that reach judgment and cases that settle. FED. R. CIV. P. 23(h). Attorneys cannot simply divine a number they feel is appropriate for their time spent on a lawsuit. Judges possess the discretion to reduce attorneys' fees that overcharge their clients. Similarly, with coupon settlements, many judges have observed the practice of awarding legal fees as a function of the proportion of coupons that are redeemed, thus reducing the risk of abuse with such settlements or awards. Insofar as state law class actions are concerned, courts' powers to review attorney's fees varies. Thus, there can be a greater chance for fee abuse at the state level.

176. Copland, *supra* note 172.

177. Ackerman & Hayashi, *supra* note 172.

178. *Id.*

179. Silver-Greenberg & Gebeloff, *supra* note 11; Jessica Silver-Greenberg & Robert Gebeloff, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015),

ing entities who hired BigLaw attorneys to provide them with a miraculous instrument that would eradicate their exposure to “frivolous lawsuits.”<sup>180</sup> The Times noted that the Chamber of Commerce flanked class actions from another direction by pushing for legislative reform that manifested itself as the Class Action Fairness Act (“CAFA”)<sup>181</sup> and that reduced the “scourge” of litigation by allowing companies to remove state-filed class actions (which, in some jurisdictions, proved plaintiff-friendly<sup>182</sup>) into federal court.<sup>183</sup> Yet, state courts faced with contracts mandating individual arbitrations continued to strike them down as unconscionable, actions that cause businesses to seek Supreme Court review.<sup>184</sup>

Eventually, these appeals yielded the *Concepcion* and *Italian Colors* holdings, decisions that the New York Times article implies led to a renaissance-like “birth of a thousand clauses” in consumer contracts that people unwittingly signed without knowledge of their repercussions.<sup>185</sup> Additionally, the article’s quantitative findings indicated that an infinitesimal number of people who hold valid claims against businesses proceed to arbitrate once they find out they cannot litigate in court.<sup>186</sup>

<http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [https://perma.cc/95KU-X57U]; Jessica Silver-Greenberg & Robert Gebeloff, *In Religious Arbitration, Scripture Is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), <http://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html> [https://perma.cc/VLC9-DM5F].

180. The article credits Ballard Spahr’s Alan Kaplinsky as the godfather of the modern class action waiver and individual arbitration clause, a legal wizard who “twin[ne]d arbitration clauses with class action bans” and consulted with representatives from large credit card companies, banks, retail giants, and automobile manufacturers on how to incorporate his creation into form contracts. Silver-Greenberg & Gebeloff, *supra* note 11.

181. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

182. *Q&A: Managing and resolving class action disputes*, FINANCIER WORLDWIDE (Oct. 2013), <http://www.financierworldwide.com/qa-managing-and-resolving-class-action-disputes/#.VsoGvflrKM8> [https://perma.cc/FWD5-62VJ].

183. Silver-Greenberg & Gebeloff, *supra* note 11.

184. *Id.*

185. Consumer contracts with Amazon, Netflix, Travelocity, eBay and DirecTV now contain arbitration clauses. Even Ashley Madison, the online site for adulterers, requires that clients agree to them. *Id.* The authors pointed out that some arbitration provisions incorporate opt-out language in their clauses, but that very few consumers take advantage of those opt out procedures. *Id.* However, when faced with sufficient public outcry, such as in the recent Equifax breach, some companies will abandon these arbitration clauses completely. For an additional list of companies that use arbitration provisions, see CBS News Politics, *supra* note 133.

186. This figure, while not quantifiable, has at least some inferential support. Silver-Greenberg & Gebeloff, *supra* note 11. See also Silver-Greenberg & Robert Gebeloff, *In Arbitration, a ‘Privatization of the Justice System’*, *supra* note 179 (“Prevented from joining together as a group in arbitration, most plaintiffs gave up entirely, records show.”).

More than other sources,<sup>187</sup> the Times article focused on employees' interactions with arbitration agreements and class waivers.<sup>188</sup> The piece noted that companies use the clauses in contracts not only with ordinary and low-ranking employees, but also in contracts with corporate officers as well, and evidenced that even individuals who have above-average bargaining power (though still less power than commercial entities) must submit to arbitration's dominion.<sup>189</sup>

In its second article, the Times intensified its critique of arbitration proceedings by examining the procedures employed in arbitration. The author wrote,

Over the last 10 years, thousands of businesses across the country—from big corporations to storefront shops—have used arbitration to create an alternate system of justice. There, rules tend to favor businesses, and judges and juries have been replaced by arbitrators who commonly consider the companies their clients . . . . “This amounts to the wholesale privatization of the justice system.” . . . “Americans are actively being deprived of their rights.”<sup>190</sup>

The article's assertion that the arbitral system is skewed to business' advantage seems embellished. After all, AAA and JAMS rules specify that both parties must agree to an arbitrator before the arbitration proceeds.<sup>191</sup> But, the second installment of the Times series noted that “more than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business.”<sup>192</sup>

This pro-business effect compounds in the class action setting because of the confidential nature of arbitration proceedings, an effective conven-

187. See, e.g., Consumer Reports, *Know What You're Giving Up with Arbitration Clauses*, BOS. GLOBE (Jan. 3, 2016), <https://www.bostonglobe.com/business/2016/01/03/the-consumer-rights-you-giving-away/1yD9doj2vBZdOKNCkxCmFK/>

story.html; *With Mandatory Arbitration, Corporate America Opt's Out of the Legal System*, DAILY BUS. REV. (Jan. 19, 2016), <http://www.dailybusinessreview.com/id=1202747147639/With-Mandatory-Arbitration-Corporate-America-Opt's-Out-of-the-Legal-System?slreturn=20160128215741>

[<https://perma.cc/TTA7-K4K3>]; Mandy Walker, *The Arbitration Clause Hidden in Many Consumer Contracts and the Consumer Rights You're Giving Away as a Result*, CONSUMER REPORTS (Sept. 29, 2015), <http://www.consumerreports.org/cro/shopping/the-arbitration-clause-hidden-in-many-consumer-contracts> (last visited Feb. 18, 2017).

188. Silver-Greenberg and Gebeloff, *supra* note 11.

189. *Id.*

190. Silver-Greenberg & Gebeloff, *In Arbitration, a 'Privatization of the Justice System'*, *supra* note 179. Additionally, Professor Lisa Bingham notes that repeat players (in these cases, commercial entities) hold a distinct advantage in arbitration than “single-shot” claimants. For more on this theory, see Lisa Bingham, *Employment Arbitration: the Repeat Player Effect*, 1 EMP. RTS. EMP. POL'Y J. 189, 192 (1997).

191. Silver-Greenberg & Gebeloff, *In Arbitration, a 'Privatization of the Justice System'*, *supra* note 179.

192. *Id.*

ience for businesses who do not seek to have potential claimants looking to file a class arbitration (assuming a contract that even allows for one.)<sup>193</sup> In another section, the Times authors noted one firm's rules of evidence: "What rules of evidence apply?" one arbitration firm asks in the question and answer section of its website. "The short answer is none."<sup>194</sup> The article also mentions a lack of juries in these proceedings.<sup>195</sup>

The second article shifted to a more stinging tone when it commented on perceived conflicts that arbitrators possess with commercial defendants. Among the usual critiques of pre-dispute arbitration agreements—including inequities in bargaining power and the lack of appellate review—The Times described arbitrators and defense counsels lunching and attending sporting events together.<sup>196</sup> Records revealed that arbitrators habitually handle cases for the same corporate defendants over the course of four years. While this would seem innocuous enough, certain scholars believe that arbitrators who consistently decide cases for the same client develop a bias for a "repeat player" that distinctly benefits them over a "single-shot" claimant.<sup>197</sup>

In direct contrast to the Wall Street Journal's praise of the CFPB rule's repeal, the Times lamented that "[b]y defeating the rule, Republicans are dismantling a major effort of the Consumer Financial Protection Bureau . . . in the aftermath of the mortgage mess."<sup>198</sup> The paper opined that companies like "Wells Fargo and Equifax remain free to break the law without fear of legal blowback from their customers," and that the repeal erased any progress made by the agency and its extensive research.<sup>199</sup> In the end, The Times shared the sentiments of Senator Sherrod Brown of Ohio: "By voting to take rights away from customers . . . the Senate voted tonight to side with Wells Fargo lobbyists over the people we serve."<sup>200</sup>

In short, while some parties are content with maintaining the current regime dominated by individual arbitrations, many others see it as a threat to individuals' ability to seek cogent redress. Per these sources, businesses have the means to contract away damages' deterrent effect, shield them-

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*; see Lisa Bingham, *supra* note 190 at 223–29.

198. Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html>.

199. *Id.*

200. *Id.*

selves from liability, and subject plaintiffs to a forum of reparation that is stacked against them. These parties call for reform. Part IV addresses the changes some institutions have advanced in the hopes of cultivating this reform.

#### IV: LEGISLATING AND REGULATING PAST THE PROBLEMS OF CLASS ARBITRATION PRE-EMPTION

Two governmental institutions—the U.S. Congress and the CFPB—have proposed corrections that would augment claimants’ rights against commercial entities that seek to enforce arbitration provisions and class action waivers.<sup>201</sup> Part IV first addresses proposed legislation put forth by Congress, moves on to examine the CFPB’s attempts to regulate class action waivers/arbitration agreements in the financial contexts, and concludes with this Note’s offer of a solution to the alleged problem.

Looking at congressional action on arbitration agreements, one can see that our august legislature has progressed . . . slowly; meaningful federal legislation has not so much as made it out of committee, though one cannot fault the House for lacking effort. Since 2007, Congressman Henry C. “Hank” Johnson Jr. of Georgia and Senator Patrick Leahy of Vermont have biannually introduced two bills: the Arbitration Fairness Act and the Restoring Statutory Rights and Interests of the States Act (“RSRISA”). This legislation, if enacted, would render pre-dispute arbitration agreements in several contractual contexts (i.e.—disputes arising out of antitrust, civil rights, consumer, or employment) invalid and unenforceable.<sup>202</sup> Moreover, with each re-introduction, the bill has received more supporters (the latest version of the bill garnered over 75 co-sponsors).<sup>203</sup> However, two problems plague the Arbitration Fairness Act’s passing Congress.

First, some of the bills introduced before Congress contains sweeping language that nullifies all pre-dispute arbitration agreements, even those where arbitration might serve as the more advantageous mechanism to

201. Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. (2015); Restoring Statutory Rights and Interests of the States Act of 2017, S. 550, 115th Cong. § 3 (2017); Restoring Statutory Rights and Interests of the States Act of 2015, S. 2506, 114th Cong. § 3 (2016); Restoring Statutory Rights and Interests of the States Act of 2015, H.R. 4899, 114th Cong. § 3 (2016), <https://www.govtrack.us/congress/bills/114/s2506/text> [<https://perma.cc/44WN-AUW5>]; Press Release, CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court (May 5, 2016), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/> [<https://perma.cc/576C-3NLH>].

202. Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017); Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. (2015).

203. Arbitration Fairness Act of 2017, H.R. 1374, 115th Cong. (2017).



resolve disputes.<sup>204</sup> It also has the propensity to hinder arbitration on a business-to-business level. If the legislation made it out of committee, its language would trigger stark lobbying efforts from the commercial sector to defeat it, as it would foreclose not only class arbitration, but virtually all arbitration (unless the parties agree to post-dispute arbitration, an arbitral form that borders on pure fantasy). This poses a problem, as arbitration in the B2B context serves as a pragmatic approach to dispute resolution. By painting in such broad brushstrokes, the arbitration-curbing RSRISA bill in particular sets itself up for failure, or, at the very least, a sure-fire path to a cumbersome congressional conference committee.

Second, the bill attracts no bipartisan support, as its sponsor and co-sponsors are unanimously Democrats.<sup>205</sup> Unless the Democratic Party regains control of both congressional chambers, or the bill draws conservative backing, the two bills, as currently drafted, has about as good a chance of getting out of its congressional holding pen as Ted Kaczynski does from Supermax.<sup>206</sup>

What of the Senate? Well, whereas the lower chamber attempted to sprint for the idealistic, Olympic gold medal of arbitral policy, the upper chamber's legislation is more measured. In early 2016, Senator Patrick Leahy introduced the Restoring Statutory Rights and Interests of the States Act of 2016, a bill that would add an exception to Section 2 of the FAA.<sup>207</sup> The proposed bill re-labels Section 2's original text as Sub-section (a) to make it read like so:

(a) In general.—Except as provided in subsection (b), a written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.<sup>208</sup>

A proposed sub-section, (b), states:

Subsection (a) shall not apply to a written provision that requires arbitration of a claim for damages or injunctive relief brought by an individual or small business concern (as defined in section 3 of the Small Business Act (15 U.S.C. 632)), in either an individual or representative capacity,

204. *Id.*

205. *Id.*

206. See *ADX Florence*, WIKIPEDIA, [https://en.wikipedia.org/wiki/ADX\\_Florence](https://en.wikipedia.org/wiki/ADX_Florence) (last visited March 6, 2016).

207. Restoring Statutory Rights and Interests of the States Act of 2017, S. 550, 115th Cong. § 3 (2017).

208. *Id.*



arising from the alleged violation of a Federal or State statute, the Constitution of the United States, or a constitution of a State, unless the written agreement to arbitrate is entered into by both parties after the claim has arisen and pertains solely to an existing claim.<sup>209</sup>

The Senate bill strikes at the heart of the arbitration clause/class action waiver problem. Like the Arbitration Fairness Act, the Senate bill would render arbitration provisions unenforceable.<sup>210</sup> However, the bill diverges from its House counterpart by broadening the exception's scope to any contractual context (not just disputes deriving from the employment, anti-trust, or consumer realms). Simultaneously, the bill narrows the exception's purview to individuals or small businesses pursuing claims "in either an individual or *representative* capacity" (emphasis added), thereby addressing the problem of class arbitration and focusing the bill's purpose on specific parties (unlike the House bill, which abrogates arbitration clauses generally).

This bill would clearly apply only to individuals and small businesses, not to large commercial entities, and thereby would preserve large businesses' ability to arbitrate disputes arising in the B2B market. Further, the exception emulates the alleged commercial spirit of the FAA. Most importantly, the bill satisfies *Concepcion's* and *Italian Colors's* requirement for a "contrary congressional command" when removing certain claimants from Section 2's grasp. Sadly, just like the Arbitration Fairness Act, Senator Leahy's bill died when the 114th Congress adjourned *sine die*.<sup>211</sup>

Not all hope is lost; those gunning for reform might find it in the fourth "branch" of government: the administrative agencies. Indeed, when a group of state attorneys general sought just such reform, they penned a letter to the CFPB, advising the agency to consider the rulemaking process as a means of stopping the proliferation of contractually induced individual arbitration.<sup>212</sup> CFPB Director Richard Cordray fulfilled this request a year later, and in late 2015 submitted a regulatory proposal addressing the issue of class arbitrations in consumer finance.<sup>213</sup> His agency echoed those con-

209. *Id.*

210. *Id.*

211. Govtrack gives the bill a poor prognosis. Factoring in several variables, the website estimated that the bill has a three percent chance of getting out of committee, and only a 7% chance of the entire Congress passing it. Idealistic indeed. *Id.*

212. Letter from Joseph R. Biden III, Delaware Attorney General, and other Attorneys General, to Richard Cordray, Director, Consumer Financial Protection Bureau (Nov. 19, 2014), [http://www.attorneygeneral.delaware.gov/documents/20141119-AGs\\_Ltr\\_to\\_CFPB\\_re\\_Arb\\_Clauses\\_Final.pdf](http://www.attorneygeneral.delaware.gov/documents/20141119-AGs_Ltr_to_CFPB_re_Arb_Clauses_Final.pdf) [<https://perma.cc/7R5J-WXJJ>].

213. Press Release, Consumer Financial Protection Bureau, *supra* note 201.

cerns already floated by scholars and the New York Times. Asymmetric bargaining power. Procedural inequities mislabeled as “streamlines.” Plaintiffs abandoning claims when they do not amount to a value worthy of pursuit.

The CFPB outlined a regulation that would render contracts containing arbitration clauses and class waivers temporarily unenforceable, until a proposed class had the opportunity to attempt certification in court.<sup>214</sup> If the court denied certification, then the regulation would reinstate the provisions, and claimants could pursue relief via individual arbitration. But, if the court granted certification, then presumably the class action would continue in litigation. Amidst some opposition, the brunt of which came from the Chamber of Commerce,<sup>215</sup> the CFPB proceeded with its various proposals, and came up with a final rule in May 2016.<sup>216</sup>

Experts initially predicted that commercial actors will challenge any regulation on grounds that Dodd-Frank did not indicate a “contrary congressional command” to abrogate arbitration.<sup>217</sup> However, now that President Trump signed a congressional resolution repealing the rule, the regulation died a far less painful albeit equally poignant death.

Without agency-by-agency legislation providing arbitration-reforming congressional mandates, or a Court willing to radically overturn *Italian Colors*’ recent precedent, proponents of the CFPB-like regulation must face an elephant in the room: if claimants are looking for comprehensive, across-the-board reform for arbitration agreements and class action waivers, then the agencies cannot achieve such grandeur. Congress limits agencies regulatory jurisdiction to certain statutory contexts; in the CFPB’s case, these included fields like fair lending, debt collection, mortgage origination and servicing, and foreclosure relief. And while the CFPB still has reformative teeth—and can take a second bite at advancing a rule similar to the one killed off by Congress and the President—many agencies remains feckless to effect change in civil rights, employment, corporate derivative, and antitrust actions. Advocates of unilateral revision can look only to

214. Consumer Financial Protection Bureau, Small Business Advisory Review Panel For Potential Rulemaking on Arbitration Agreements Outline of Proposals under Consideration and Alternatives Considered (Oct. 7, 2015), [http://files.consumerfinance.gov/f/201510\\_cfpb\\_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf](http://files.consumerfinance.gov/f/201510_cfpb_small-business-review-panel-packet-explaining-the-proposal-under-consideration.pdf) [<https://perma.cc/D7G4-KWNH>].

215. Letter from David Hirschmann, President and Chief Executive Officer, U.S. Chamber of Commerce Center for Capital Markets Competitiveness, and Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform, to Monica Jackson, Executive Secretary, Consumer Financial Protection Bureau (Dec. 11, 2013), [http://www.instituteforlegalreform.com/uploads/sites/1/2013\\_12.11\\_CFPB\\_-\\_arbitration\\_cover\\_letter.pdf](http://www.instituteforlegalreform.com/uploads/sites/1/2013_12.11_CFPB_-_arbitration_cover_letter.pdf) [<https://perma.cc/G5XD-L88X>].

216. 12 C.F.R. § 1040 (2016).

217. Carter & Pierce, *supra* note 165.

Congress to correct the Court's blunders. In turn, federal legislators can rectify "the problem" several ways.

Senator Leahy's proposed legislation affords claimants meaningful reform. As noted above, the bill is just broad enough to cover the parties most affected by class action waivers and arbitration clauses, yet narrow enough not to contravene the FAA's commercial purpose. More importantly, the bill would fulfill one of the fundamental goals of tort law—deterrence.<sup>218</sup> Allowing individuals to aggregate their actions into a collective lump sum prevents the "claim chilling" that occurs in individual arbitration,<sup>219</sup> and should signal that a company needs to reexamine the safety and efficacy of a particular product, service, or practice.

As articulated above, the lack of bipartisan support behind Senator Leahy's bill dooms it to the Senate Judiciary Committee's recycle bins. Nevertheless, a quick tweak could cause conservatives to give this bill another look-over: an exception that insulates small businesses from having their arbitration agreements and class action waivers nullified.

The policy perspectives behind this exception are sound. First, unlike the NASDAQ's middle market companies or the New York Stock Exchange's ensconced corporate Colossuses, a small business faced with litigating a class action may confront a "bet the company" suit. While such suits can fulfill their deterrent and compensatory goals, many people find it viscerally upsetting<sup>220</sup> that negative value suits kill off companies that might evolve into the next Tesla or Netflix.

The small business exception would preserve mandatory arbitration provisions and class waivers for those companies that fall under the Small Business Act's scope. Plaintiffs with meritorious and sizeable claims still could arbitrate, and small businesses could receive some breathing room to make mistakes without risking their existence. Obviously, as soon as a small business fails to meet the definition of the Small Business Act, the company would move under the jurisdiction of the Senate bill, and the bill would nullify the company's arbitration clauses and class waivers for certain claimants.

The exception could take a different form, one not focused as much on a distinction between small and large businesses, but more on the quantity

218. An effect that, as noted in Part III, often goes unanalyzed in the context of individual arbitrations. See Part III, *infra*.

219. Carter & Pierce, *supra* note 165.

220. Part of this is likens to the romanticized American Dream where one can start from nothing, open a small business, and then grow it into an empire rivaling that of Rockefeller, Gates, and Morgan. See Copland, *supra* note 172.

of plaintiffs suing and the aggregate amount in controversy. Such an exception would stem from the Class Action Fairness Act (“CAFA”).<sup>221</sup>

To provide an overview, as a means of fostering federal adjudication of class actions, the CAFA changes 28 U.S.C. Section 1332(a)’s diversity jurisdiction requirements. Section 1332(a), as interpreted, mandates complete diversity between plaintiffs and defendants and \$75,000 in controversy exclusive of interest and costs.<sup>222</sup> In turn, the CAFA requires that plaintiffs’ class must comprise of at least 100 claimants, the class must meet minimal diversity standards (meaning that at least one plaintiff’s citizenship must differ from at least one defendant’s citizenship), and the class’s aggregate damages must exceed \$5,000,000.<sup>223</sup>

If a class meets the CAFA’s three requirements, then each respective plaintiff’s arbitration provision would be rendered temporarily unenforceable. Unrestrained by this provision, a plaintiffs’ class would have the freedom to seek certification in federal court. How would a plaintiff know that others like her have similar claims? Well, if a plaintiff’s attorney felt that their client’s claim might be one that could mushroom into a class action, the attorney could petition the arbitrator to stay the proceeding pending further investigation. Here, the burden would fall on law firms to research the breadth of potential claims relegated to arbitration, and advertise to see if one plaintiff’s claim broadens to the level of a class action that meets the CAFA requirements. If a firm’s research and advertising led to a potentially viable class maintainable, then, under this exception, the statute would render these plaintiffs’ arbitration provisions unenforceable and the firm could try to amass a class for certification.

On the other hand, the bill’s drafters could model it to mirror the CFPB’s regulation, allow small businesses and individuals an attempt to get a class certified, and then reinstate the arbitration provision and class waiver once a court has denied certification to the proposed class. Such an amendment would mollify those who fear that the bill would blatantly circumvent parties’ freedom to contract. While businesses still would face the threat of having their contractual provisions nullified, the suggested amendment would not categorically remove arbitration provisions and class waivers as the current House or Senate bills do. It also might satisfy those individuals who believe that claimants fare better in individual arbitration. Once a class was decertified, the consumer would pursue her claim in an environment that supposedly benefits her. Yes, under this method, negative

221. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

222. 28 U.S.C. § 1332(a) (2012).

223. *Id.* § 1332(d).

value claims could get snuffed out, and yes, this amendment would bear a Darwinian patina. To put it crassly, the strong, more meritorious claims might separate from their weaker, negative value counterparts, with the “wheat” proceeding to arbitration and the “chaff” being discarded.

Indeed, each of these suggestions carries its own detractions. The first exception that insulates small businesses from liability clearly discriminates against larger commercial entities. The second exception that revolves around the CAFA requirements could extend the arbitral process (through the proposed stay) to a potentially untenable length that would reduce its efficiency. It also would require law firms to gamble with advertising budgets and other resources in the hopes of aggregating a class action. And both the second *and* the third exceptions—the latter of which applies the CFPB’s proposed regulation on a broader level—have the propensity to snuff out negative value claims if a class does not get certified, and force those plaintiffs to arbitrate individually. Nevertheless, if Congress enacted any of these provisions, at least claimants could not complain that they were foreclosed from litigating, or that the legal landscape was stacked completely against them. And at this point, perhaps some reform, even reform that takes baby steps in changing the Court’s jurisprudence, would be more desirable than nothing.

## V. CONCLUSION

Corporations view the gap in bargaining power between themselves and individuals as an opportunity to engage in an arbitrage of the law. With each edit, law firms strengthen arbitration provisions to survive courts’ skeptical analyses and handcuff claimants to an arbitrator’s largely unreviewable and peripherally biased decision. Academics have called for—and legislators have attempted to enact—reform that smoothens arbitration’s pro-defendant procedures by either rendering class action waivers and arbitration provisions unenforceable, or temporarily unenforceable. However, congressional Democrats have not garnered sufficient support from either their fellow conservative lawmakers or their constituents to go forward with the reforms.

The most disturbing part of individual arbitrations’ effects is how few people recognize that the provisions existentially threaten the civil lawsuit. Perhaps these people simply have no preference whether they can litigate or arbitrate a problem. I doubt that, though, given how few people actually know their contracts contain clauses requiring arbitration and waiving class actions. It is only when aggrieved claimants seek to bring an action on behalf of themselves and a group of others that they realize, in almost Nie-

möller-like fashion<sup>224</sup>, that there is little they can do to challenge the clause—that it is too late. As a stepping-stone, then, advocates for change must better disseminate their calls for reform before concocting solutions devoid of public input.

Perhaps this is why I find the New York Times and Wall Street Journal articles crucial; a continued media debate may act as the optimal medium through which the seeds of change can take root. An informed public could create the groundswell necessary to pass needed legislation, or to have large businesses abandon these clauses altogether. Unlike Fitzpatrick, I remain hopeful that the system will change. With some luck, the next time I am standing in line at Costco trying to buy that new iPhone X, I can watch a chameleon hunt for its lunch without listening to an automated voice blab about arbitration. But like that chameleon, I'll have to wait just a little longer.

224. See United States Holocaust Memorial Museum, *Martin Niemöller: "First They Came for the Socialists . . ."*, HOLOCAUST ENCYCLOPEDIA, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007392> [<https://perma.cc/3AGF-493X>] ("First they came for the Socialists, and I did not speak out—Because I was not a Socialist. Then they came for the Trade Unionists, and I did not speak out—Because I was not a Trade Unionist. Then they came for the Jews, and I did not speak out—Because I was not a Jew. Then they came for me—and there was no one left to speak for me.").

