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DIVIDED AND CONQUERED: THE NEOLIBERAL ROOTS AND EMOTIONAL CONSEQUENCES OF THE ARBITRATION REVOLUTION

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Abstract

The "arbitration revolution" has diminished access to justice for millions of people, allowing American corporations to secure significant insulation from collective challenges in both judicial and arbitral forums. Although currently identified damages are immense, some scholars have recently described proposals to undo the revolution as wishful thinking in the current political climate. This Article acknowledges the political difficulty but seeks to uncover the roots of the problem to re-open a path for a change.

Offering an analysis of the 2019 United States Supreme Court decision in *Lamps Plus, Inc. v. Varela*, this Article demonstrates that the "revolution" has been driven not by the oft-declared policy of "favoring arbitration," but by a premeditated effort to undermine collectivity. This legal hostility towards collective actions, this Article shows, has been part of a broader transformation: the rise to dominance of neoliberalism and the resulting creation of a corporatized political economy. It thus reconceptualizes the arbitration revolution as a process of separating collective actors, one that has been inspired by neoliberal theorists, executed and funded by organized corporate interests, and embraced by the Supreme Court.

This new framing highlights previously unrecognized harm of the arbitration revolution: it leaves prospective claimants feeling isolated from their peers and abandoned by their state, inducing pervasive feelings of powerlessness. Having identified this affective outcome, this Article shows how the emotional consequences of the revolution further operate to suppress resistance and invoke resignation. These behavioral tendencies are not unintended consequences; instead, they are produced by a calculated effort to foster neoliberal hegemony and corporate control by cultivating the passivity of ordinary citizens.

This Article ends with a warning that those who feel powerless and resigned about the protection of their legal rights may feel similarly indisposed to engage in other forms of democratic citizenship. By offering a novel understanding of how the arbitration revolution vitiates

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collectivity and threatens democracy, this Article aims to reignite efforts to undo the revolution and reauthorize citizens to act collectively.

INTRODUCTION

The following is a true story that in April 2019 ended up in an important Supreme Court decision.[1]

Early in 2016, while working as a warehouseman in Redlands, California, Frank Varela discovered that his most personal information, including his social security number, his tax identification number, and his bank account number, was compromised by his employer.[2] A letter from the Internal Revenue Service (IRS) confirmed that the sensitive data was used to file a fraudulent tax return under Frank's name.[3] Frank had to submit to the IRS an identity theft affidavit, and he and his wife,

1. *See* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

2. Class Action Complaint at 4–5, Varela v. Lamps Plus, Inc., No. CV 16-577-DMG (KSx), 2016 WL 9110161 (C.D. Cal. July 7, 2016), *rev'd*, 771 F. App'x 418 (9th Cir. 2019).

3. *Id.*

Darlene, were notified by the IRS that the scam would prevent them from using electronic filing for the foreseeable future.[4] Distressed and afraid of additional abuses, the couple also had to start paying monthly fees for a lifetime monitoring of their accounts.[5]

Frank was not the only one to suffer.[6] His employer of about nine years, Lamps Plus, Inc.—"the nation's largest lighting retailer"—publicly announced that all those who had worked for Lamps Plus during the 2015 calendar year were impacted.[7] The company later explained that a severe data breach occurred when it "fell victim to a sophisticated criminal phishing attack" in which "[t]he hackers impersonated a high-level Lamps Plus employee by sending a fake email to an actual Lamps Plus employee and requested all of Lamps Plus's 2015 W-2 employee tax forms."[8] In response, "[t]he actual Lamps Plus employee . . . sent the W-2s to the hackers."[9] At least 1,300 employees were harmed.[10] As compensation, Lamps Plus offered them one year of free identity monitoring services.[11]

Frustrated by his employer's continuous mishandling of the entire scandal—from the initial neglect that enabled the harm, through the failure to notify its victims, to the refusal to offer fair compensation—Frank sued.[12] On behalf of himself and the other affected employees, he filed a class action complaint in a California federal district court and sought relief.[13] Lamps Plus, however, asked the trial court to compel Frank to arbitrate the dispute and dismiss the lawsuit.[14] The district court found no way around the fact that, as a condition to being hired by Lamps Plus, Frank had had to sign an arbitration agreement in 2007.[15] For that reason, the court decided to compel arbitration and accordingly dismissed the case.[16] However, the court allowed Frank to arbitrate all his claims, including the class-wide claims he had made on behalf of all harmed employees.[17] Then, despite its success in compelling arbitration, Lamps

4. *Id.* at 5.
5. *Id.* at 6.
6. *Id.* at 3.
7. *Id.* at 3–4.
8. Motion to Compel Arbitration on an Individual Basis &, in the Alternative, a Rule 12(b)(6) Motion to Dismiss at 1, *Lamps Plus*, No. CV 16-577-DMG (KSx), 2016 WL 9110161.
9. *Id.*
10. Class Action Complaint, *supra* note 2, at 3.
11. *Id.* at 4.
12. *Id.* at 3.
13. *Id.*
14. *See* Motion to Compel Arbitration on an Individual Basis &, in the Alternative, A Rule 12(b)(6) Motion to Dismiss, *supra* note 8, at 2.
15. Varela v. Lamps Plus, Inc., No. CV 16-577-DMG (KSx), 2016 WL 9110161, at *1, *4 (C.D. Cal. July 7, 2016), *rev'd*, 771 F. App'x 418 (9th Cir. 2019).
16. *Id.* at *7.
17. *Id.*

Plus appealed to the U.S. Court of Appeals for the Ninth Circuit, seeking to prevent him from pursuing class arbitration and compel him to arbitrate all by himself.[18] The Ninth Circuit refused to order so,[19] and Lamps Plus continued its battle against class arbitration at the Supreme Court. In April 2019, in *Lamps Plus, Inc. v. Varela* (*Lamps Plus*),[20] the Supreme Court reversed the Ninth Circuit's decision, denying Frank the ability to band together with his coworkers to hold their employer accountable for the data breach that will continue to haunt them for many years.[21]

Lamps Plus is the Supreme Court's latest opinion in a series of decisions that, in the last few decades, and with particular intensity since 2010, continuously and considerably extended the reach of the Federal Arbitration Act (FAA).[22] While the first cases in this series might have appeared to reflect merely a procedural development, the ongoing expansion of the FAA has later created a growing awareness that the process has had an immense impact on matters of substantive law and issues of socio-economic justice.

In response, scholars, journalists, and policymakers have made a significant effort to document and analyze the increasing expansion of the FAA. They frequently criticize the Court for extending the FAA far beyond what its history and language could justify, and particularly for allowing powerful corporations to include pre-dispute mandatory arbitration clauses in their standard contracts and to use them against considerably weaker parties.[23] By 2015, even before the process reached its current peak, a federal judge described the constant expansion of the FAA as one of the "most profound shifts in our legal history."[24] In a similar tone, some scholars have referred to it as "the arbitration revolution,"[25] a designation that will be used here as well.

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18. *See* Varela v. Lamps Plus, Inc., 701 F. App'x 670 (9th Cir. 2017), *rev'd*, 139 S. Ct. 1407.

19. *Id.* at 673.

20. 139 S. Ct. 1407 (2019).

21. *Id.* at 1419.

22. Pub. L. No. 80-282, 61 Stat. 669 (codified as amended at 9 U.S.C. §§ 1–16 (2012)).

23. *See, e.g.*, David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 67, 75 (2015).

24. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015) (citing Federal Judge William G. Young), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/U848-RDP7].

25. *E.g.*, Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 408–09 (discussing the effects of "the arbitration revolution"); *see* Horton & Chandrasekher, *supra* note 23, at 70–76 (2015) (explaining the development of "the consumer arbitration revolution"); *see also* J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3057 (2015) (describing the Supreme Court's recent arbitration jurisprudence as its "arbitration revolution").

The arbitration revolution is far-reaching. The Supreme Court has ruled that the FAA's relentless protection of arbitration clauses applies in a broad range of settings and therefore covers millions of people in a multitude of situations.[26] As legal scholar Judith Resnik described it in 2015, the FAA applies, for example,

> when individuals claim breaches of federal securities laws; when employees allege discrimination on the basis of age; when employees file sex discrimination suits under state law; when consumers assert rights under state consumer protection laws; when merchants allege violations of the antitrust laws; and when family members claim that negligent management of nursing homes resulted in the wrongful deaths of their relatives.[27]

Assuming you own a smartphone, have a bank account, and use a credit card, the revolution applies to you and anyone you know.

As will be shown below, although the revolution is tied to arbitration clauses inserted into standard contracts, it has less to do with arbitrating disputes and much more to do with thwarting legal challenges altogether. The revolution is an intentional and organized effort to prevent individuals like Frank Varela from coping with corporate wrongdoing by appealing to the powers of solidarity and collective action. What appeared at first as merely an effort to avoid litigation in courts through the imposition of mandatory arbitration has become a leading strategy of corporations, later approved by the Court, to wield arbitration clauses as weapons against *any* collective proceedings. Therefore, these clauses impede collective acts regardless of forum, both in courts (class actions) *and* in arbitration (class arbitrations). As the dissent in *Lamps Plus* recently summed it up: "[T]he Court has hobbled the capacity of employees and consumers to band together in a judicial *or* arbitral forum."[28]

The assault on all forms of collective actions—including when it means denying claimants their "effective access to justice"[29]—is the most disturbing part of the arbitration revolution. Such denial is particularly alarming when, as the dissent in *Lamps Plus* emphasized, the dispute "cries out for collective treatment" because it concerns corporate

26. *See* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2839 (2015).

27. *Id.* (footnotes omitted).

28. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1421 (2019) (Ginsburg, J., dissenting) (emphasis added).

29. *Id.* at 1422 (quoting DirecTV, Inc. v. Inburgia, 136 S. Ct. 463, 471 (2015) (Ginsburg, J., dissenting)).

misconduct that identically and severely harmed numerous people.[30] Without the ability to act together, victims of such misconduct cannot seek redress due to their limited means and the prohibitive cost of legal proceedings. Moreover, if no victim can effectively seek redress, corporations gain immunity and have no incentive to avoid future misconduct. Allowing this anti-collective mechanism to work in the first place, and then gradually removing any remaining ability of lower courts to limit it, is what makes the Court's radical expansion of the FAA truly "revolutionary." This Article thus further studies unexplored dimensions of this assault on collectivity.

Critics of the arbitration revolution have already described many of its negative consequences. Currently identified harms include decreased access to justice, hindered development of substantive laws, under-enforcement of central federal laws that rely on private civil litigation, and, due to the accumulation of all of the previous concerns, a severe threat to equality and the rule of law.[31] Additionally, a new wave of studies has emerged, responding to the arbitration revolution in a different way. These works seem to accept the revolution as a *fait accompli* and thus refrain from seeking to roll it back. Instead, they focus on describing and analyzing post-revolution realities, mostly drawing on empirical tools.[32] Pessimistically, some of these works have recently described proposals to undo the revolution as wishful thinking in "the current political climate."[33] But, even in the face of such a climate, it may be too early to lose all hope for a change. This Article seeks to forge a new path to reform by highlighting that the rich literature to date has paid little to no attention to several key questions related to the anti-collective heart of the arbitration revolution: What political powers facilitated the legal foreclosure of all paths to collective actions?[34] What are the long-

30. *Id.* at 1421.

31. *See infra* Part III.

32. *See* Horton & Chandrasekher, *supra* note 23, at 70–76; *see also* Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Predispute Binding Arbitration Clauses Are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials*, 85 FORDHAM L. REV. 2119, 2121–22 (2017) (describing "[r]ecent empirical legal studies that explore predispute binding arbitration"); Elizabeth C. Tippett & Bridget Schaaff, *How* Concepcion *and* Italian Colors *Affected Terms of Service Contracts in the Gig Economy*, 70 RUTGERS U. L. REV. 459, 464–75 (2018).

33. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 62 n.283 (2019) (stating that "federal intervention is wishful thinking given the . . . current political climate").

34. This question has received "little" attention while the following two received none. More works have discussed relating to the first question. *See, e.g.*, WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION 153 (2015) ("Together, these decisions assault every level of organized popular power and collective consciousness in the United States: citizens, consumers, workers."); *see also* Gilles, *supra* note 25, at 409–14 ("[L]aw cannot grow in the darkness with which arbitration shrouds its activities . . . .").

term emotional and social consequences of such a dramatic shift? Finally, which future reality may develop from these newly recognized consequences?

This Article delves into these questions. The nuanced answers it provides create new grounds for evaluating the arbitration revolution and for resuming efforts to overturn it. Adding a multidisciplinary account of the attack on collectivity to the current literature, this Article reconceptualizes the meaning of the revolution and the magnitude of its consequences while making three different claims.

The first is that the revolution has not been driven by the often-declared "liberal federal policy favoring arbitration,"[35] but by a premeditated anti-collective approach instead. To substantiate this claim, this Article analyzes the latest decision in *Lamps Plus* as offering compelling new evidence that the revolution has been motivated by a deep aversion to collectivity and has substantially contributed to a process aimed at isolating people. Before *Lamps Plus*, many had seen the revolution as anchored in the Court's uncompromising command to enforce class-action waivers.[36] However, the analysis of *Lamps Plus* offered here reveals that such waivers are effectively no longer necessary. For the first time in the history of federal arbitration law, the Court has clarified that even an arbitration clause *without* a waiver would suffice to block collective actions.[37] In other words, *Lamps Plus* has turned mandatory isolation into the new default rule. Therefore, silence itself becomes a waiver of the right to come together. And, since it is unrealistic to think that corporations will draft their standard arbitration clauses in a manner that expresses their *affirmative* consent to collective proceedings, such a default rule essentially turns into a general ban on collective proceedings.

This Article's next claim is that the arbitration revolution is not merely, and perhaps not even primarily, a legal shift. Rather, the anti-collective approach and the isolation it imposes are essential features of a greater transformative change: the rise to dominance of neoliberalism and the resulting creation of a corporatized political economy. To establish this claim, this Article first defines neoliberalism. It then traces the interactions between the people, theories, and institutions that have long been at the frontier of disseminating neoliberal logic, on the one hand, and the revolution's leading Supreme Court Justices and the neoliberal legal discourse that they have advanced, on the other. Recognizing what links, for example, a Nobel Laureate (James Buchanan), an influential billionaire (Charles Koch), and a dominant

35. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

36. *See, e.g.*, Horton & Chandrasekher, *supra* note 23, at 65.

37. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019).

Justice (Antonin Scalia) makes it possible to reconceptualize the arbitration revolution as both a product of neoliberal rationality and a tool for further establishing neoliberal hegemony. As such, the revolution belongs with a growing list of legal shifts that follow the same trajectory, allowing corporations not only to immunize themselves through contracts but also to dominate campaign finance,[38] hold First Amendment rights,[39] break up unions,[40] and so much more.

The third claim is that the arbitration revolution causes severe harm that until now has not been identified: the inducement of long-lasting feelings of powerlessness. This damage surfaces once one recognizes that the arbitration revolution is part of an effective campaign designed to separate people in order to make it harder for them to battle unlimited corporate power. Drawing on a variety of reported qualitative interviews, consumers' websites, and studies of emotions, this Article uncovers how the isolation created by the revolution extends its harsh practical effects to the domain of emotions. It also describes the resulting perilous cluster of emotions under, labels it "affective powerlessness," and explains how it works to leave people resigned and unable to resist. Critically, this Article establishes that the resignation generated by affective powerlessness is not an unintended consequence. Instead, it is part of what anthropologists have called "the politics of resignation"—a calculated effort to protect neoliberal hegemony and corporate control by cultivating submissiveness.

When combined, the above three claims tell an unusual story, laying the foundation for a new understanding of the arbitration revolution and its sweeping results. It is a story of a separation process inspired by neoliberal theorists, executed and funded by organized corporate interests, and embraced by the Supreme Court. This separation process leaves people isolated from their peers and abandoned by the state, resulting in intense feelings of powerlessness. Unsurprisingly, as this Article further explains, this emotional state operates to suppress resistance and invoke resignation, both of which happen to serve the neoliberal goal of full dominance perfectly. The most significant risk that the revolution presents, therefore, does not arise merely from the fact that corporations found a way—legitimized by the Supreme Court—to avoid legal liability. The threat extends to the production of collective numbness and dangerous apathy, which the law allows and perpetuates.

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38. Citizens United v. FEC, 558 U.S. 310, 364 (2010).

39. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 740 (2014) (Ginsburg, J., dissenting) ("[The] RFRA demands accommodation of a for-profit corporation's religious beliefs no matter the impact that accommodation may have on third parties who do not share the corporation owners' religious faith . . . .").

40. *See* Janus v. AFSCME, 138 S. Ct. 2448, 2486 (2018) (invalidating a statute that required all employees, including nonmembers, to pay a membership fee).

This Article tells this meaningful story in three Parts. The first Part reanalyzes the leading cases of the arbitration revolution in light of the latest decision in *Lamps Plus*, demonstrating that the revolution has worked to suppress collective actions and has embraced corporations' efforts to avoid liability by separating masses of claimants. The second Part places the separating effect of the arbitration revolution within a web of neoliberal powers, explaining how the legal shift has both reflected the rise of neoliberalism and actively enhanced its dominance. The third Part builds on the previous two to expose a troubling and unrecognized effect of the separation process: the generation of affective powerlessness. It further illuminates how feelings of powerlessness tend to repress resistance and foster resignation.

This Article concludes with a warning that adds urgency to its call for undoing the separating power of the arbitration revolution. The isolation and resignation intentionally engendered by neoliberals and the corporations they promote are unlikely to remain contained within the boundaries of standard contracts. People who feel resigned regarding their legal rights are prone to feel similarly indisposed to engage in other forms of democratic citizenship. This Article thus offers a better understanding of how the arbitration revolution threatens democracy. Such recognition should reignite efforts to give people back their freedom to act collectively and, with it, the drive to contribute to our democratic society.

I. SUPPRESSING COLLECTIVE ACTIONS

More than resulting from a "liberal federal policy favoring arbitration,"[41] the arbitration revolution has been driven by a premeditated anti-collective approach. This Part provides compelling new evidence that the revolution has been motivated by a deep aversion to collectivity, clearly aiming at isolating people. Until recently, many had seen the revolution as anchored in the Court's uncompromising command to enforce class-action waivers.[42] However, the analysis of latest case of the revolution, *Lamps Plus,* against the background of its predecessors, reveals that such waivers are effectively no longer necessary. For the first time in the history of federal arbitration law, the Court has clarified that even a "silent" arbitration clause, one without a waiver, would suffice to block collective actions.[43] In other words, *Lamps Plus* has turned isolation into the new default rule. Therefore, silence itself becomes a waiver of the right to come together. And, since it is

41. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011) (quoting Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).

42. *See, e.g.*, Horton & Chandrasekher, *supra* note 23, at 65.

43. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019).

unrealistic to think that corporations will draft their standard arbitration clauses in a manner that expressly permits collective proceedings, such a default rule essentially means that *any* arbitration clause forbids class action, even if it does not say so. What comes next explains how we got to this point.

A. *Arbitration Clauses as Hideouts*

The use of contractual arbitration clauses to prevent collective actions of small parties (individuals and small businesses) against their massive counterparts (large-scale corporations) is a relatively new phenomenon. For many years the practice of arbitration and the jurisprudence that surrounded it did not relate to collective actions at all.[44] As many have repeatedly noted, the principal legislation pertaining to arbitration, the FAA, was enacted in 1925 "to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes."[45] In 1925, and for many decades after the enactment of the FAA, predispute arbitration agreements were in limited use, and to the extent they existed, they did not attempt to prevent collective actions.[46]

Put differently, while legal "friendliness" towards the practice of arbitration dates back to the 1925 FAA, judicial hostility towards collective actions—either in courts or in arbitration—is a more recent shift. And it is a dramatic shift that has been facilitated by a combination of technological, economic, political, and legal conditions. Importantly, this shift has very little to do with arbitration as a method of settling disputes outside of courts.[47] Instead, the shift represents an immense effort to *avoid* dispute resolution altogether. For that reason, describing the process as the *arbitration* revolution, or referring to the Court's recent "*arbitration* jurisprudence,"[48] tends to obscure the true nature of the transformation. What is truly at stake is a legally facilitated practice that is calculatedly designed to insulate corporations from legal liability by preventing claimants from coming together—which is by and large their only viable path to redress.

Given the intention to avoid liability by breaking up groups of similarly harmed people, perhaps a more adequate name for the process would have been "the isolation revolution" or "the separation revolution."

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44. *See* Gilles, *supra* note 25, at 390.

45. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1643 (2018).

46. Gilles, *supra* note 25, at 375, 376 (describing how, until the last two decades, use of arbitration clauses to block class actions was unimaginable).

47. *See* Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Actions*, 104 MICH. L. REV. 373, 396 (2005).

48. *See, e.g.*, Glover, *supra* note 25, at 3054 (emphasis added) (repeatedly referring to the Supreme Court's recent arbitration jurisprudence).

Nonetheless, because the analysis that follows generally aims at reconceptualizing the meaning of the arbitration revolution, it continues to use this phrase to address the legal change while demonstrating that, in reality, it establishes an intentional separation process with harsh consequences.

The argument on this point is more than rhetorical. First, and most significantly, including separating terms within arbitration clauses or arbitration agreements artificially places these terms under the coverage of the FAA. Such placement awards separating terms disproportionate protection that initially only meant to promote conducting arbitrations and not preventing them. Second, because arbitration generally enjoys a positive reputation—much thanks to powerful messages from the Supreme Court[49]—the method of folding isolating terms into arbitration agreements operates to conceal the negative impact of these anti-collective terms. Consequently, because the anti-collective terms are hidden within arbitration agreements, noticing and resisting their separating effect turns harder. The following section will describe how the contractual use of arbitration clauses turned into an effort to suppress collective action and how the Supreme Court's constant support of such manipulation has not only propelled its use but also enhanced its effect. As we shall see, achieving isolation through arbitration has been a product of a reciprocal exchange between corporations and an activist pro-corporate judiciary.

B. *Separation via Enforcement of Collective Action Waivers*

Arbitration clauses did not always dictate isolation. The change has started during the 1990s and was driven by a growing desire of corporations to limit or even avoid their exposure to class actions.[50] Many corporations that at earlier times did not seem interested in any form of alternative dispute resolution, or even opposed it,[51] have begun to reconsider their approach. Of particular significance at this time was the technological progress that had increased the use of paper standard-form contracts and would later speed up even more with the ability to use online mass-contracting. This progress allowed corporations to dictate the content of their contracts with greater ease and an immensely enhanced impact. Encouraged by professional publications that recommended a pro-active solution to the "problem" of class actions,

49. *See, e.g.*, Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("[Q]uestions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.").

50. Gilles, *supra* note 47, at 396.

51. *See* SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL RETRENCHMENT 55 (2015) (describing how in the past corporations resisted arbitration, especially in the employment domain).

corporations and their lawyers have launched the attack on collective actions: drafting and including in all their contracts what today seems to be an integral part of almost any standard-form contract: collective action waivers.[52] As their name suggests, these waivers' goal is to make individuals and small businesses give up their ability to respond to corporate wrongdoing by joining forces with similarly harmed others.[53]

Aware of the general favoring of arbitrations, experts suggested to place the new collective action waivers not just anywhere in the contract but deliberately insert them into arbitration clauses.[54] At the time, pre-dispute arbitration clauses offered "safe harbors" for the new waivers since courts had already shown an increased inclination to treat arbitration clauses favorably, even when they were tucked in the boilerplate of standard form contracts.[55] In an article tellingly titled *"The Arbitration Clause as Class Action Shield*," for example, the author wrote that "[while a]n arbitration clause may not be an invincible shield against class action litigation . . . it is surely one of the strongest pieces of armor available . . . ."[56]

The creative proposal to separate potential joint claimants via standard contracts that include arbitration clauses in their boilerplate had an impact. By the late 1990s, a growing number of corporations had adopted collective action waivers as part of their newly implemented or formerly existing arbitration clauses.[57] And yet, about a decade later, in 2005, Professor Myriam Gilles reported that "[t]he penetration of collective action waivers is relatively miniscule today," importantly attributing the slowness of the process to the then-existing uncertainty regarding the legal validity of mass-use of collective action waivers.[58] Indeed, as Professor Gilles predicted,[59] the speedy spread of the new anti-collective strategy was awaiting an endorsement from the legal system.

Some of the hesitations of corporations and their lawyers were generated by the then-unanswered question: What if a court will strike

52. Gilles, *supra* note 47, at 396–98. This Article follows Professor Gilles's choice to use the term "collective action waivers" to capture a variety of possible aggregate proceedings available either in courts or in arbitration. *Id.* at 376 n.15.

53. *See id.* at 396.

54. *See id.* at 396–97.

55. *See id.* at 393–94.

56. Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L. J. 141, 142 (1997).

57. Gilles, *supra* note 47, at 397–98.

58. *Id*. at 425; *see id.* at 426 (suggesting that the lack of appellate opinions regarding collective action waivers might cause "reluctance on the part of general counsel to rush into a perceived violation of applicable law").

59. *Id.* at 426 ("I do expect a tipping point, where it becomes perfectly clear to the broader business community that their interests demand the full-scale imposition of collective action waivers . . . . Most likely, this watershed moment will be precipitated by a major court decision . . . .").

down the collective action waiver while enforcing the remainder of the agreement to arbitrate? Indeed, some courts did just that, managing to simultaneously offer protection of collective rights *and* convey respect to arbitration.[60] They accomplished that by invalidating the collective action waiver while compelling arbitration that allowed collectivity through class arbitration.[61] Revealingly, when corporations realized that they might find themselves exposed to mass battles *outside* of court and without the protections that the public legal system offers to defendants, many of them lost interest in committing to arbitration,[62] demonstrating that this alternative dispute resolution method was not really what they were looking for when they added to their contracts "arbitration" clauses.[63] Such corporate response offers historical support to the current argument that, in many cases, arbitration clauses were merely a tool to achieve an anti-collective goal.

A recent empirical study further bolsters this point. It describes the practice that corporations developed to include a non-severability provision in their arbitration clauses.[64] Such a provision clarifies that in case of invalidation of the desirable component—the collective action waiver—the entire agreement to arbitrate should not be enforced.[65] In other words, in their contractual relationships with those with less bargaining power, corporations have demonstrated much more interest in avoiding the need to deal with collectives than an investment in arbitration.[66] Or, as Professor Gilles phrased it back in 2005: "[B]efore the collective action waiver issue arose, arbitration did not matter all *that* much."[67]

And then came the "tectonic shift"[68]: The one legal decision that more than ever before embraced and actively advanced the project of separating claimants, leaving them too isolated to pursue their rights. In the now-famous 2011 Supreme Court decision of *AT&T Mobility LLC v.*

60. *See, e.g.*, Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 868 (Ct. App. 2002) (finding a class action waiver "violate[d] fundamental notions of fairness").

61. *E.g.*, *id.* at 1101–02.

62. Gilles, *supra* note 47, at 410.

63. *See, e.g.*, Ann C. Hodges, Trilogy *Redux: Using Arbitration to Rebuild the Labor Movement*, 98 MINN. L. REV. 1682, 1691 (2014) ("Arbitration is not a panacea for employers.").

64. *See* Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 40.

65. *See* Tippett & Schaaff, *supra* note 32, at 493–95; *see also* Rutledge & Drahozal, *supra* note 64, at 40 (reporting in the context of credit cards that "[s]lightly under half of the clauses . . . from issuers with slightly more than half the market share . . . contained an 'anti-severability provision'").

66. Tippett & Schaaff, *supra* note 32, at 493 (arguing that the inclusion of a severability provision "suggests that the company is using the arbitration clause primarily or exclusively for the class action waiver").

67. Gilles, *supra* note 47, at 427.

68. Chandrasekher & Horton, *supra* note 33, at 4.

Concepcion (*Concepcion*),[69] the Court removed most of the uncertainty that had previously made corporations hesitate regarding the strategy of adding arbitration clauses to their contracts in order to bury within them collective action waivers. In this 5–4 decision, the Court dramatically expanded the coverage of the FAA and reinterpreted it as powerful enough to prevent lower courts from invalidating collective action waivers.[70] In doing so, the Court took away the judicial power of lower courts to protect collectivity, siding with corporations' interest to avoid liability by using the method of "divide and conquer."

It is invaluable to recognize that *Concepcion* was not purely a legal development by an activist judiciary, but rather a product of an intentional joint effort of some of the leading corporations in America. The goal was to devastate collective actions by devising a new weapon against them. According to the findings of a *New York Times* special investigation, in July 1999, a consortium of legal teams of leading corporations began a series of meetings to strategize about how "to kill class actions."[71] Among the participants in the meetings were representatives of powerful corporations such as American Express,[72] which will later star in one of the revolution's cases. Legal teams from leading banks such as Bank of America, Chase, Citigroup, and powerful corporations such as Sears, Toyota, and General Electric were present at the meeting as well.[73] Interestingly, at the time of the first meeting, American Express had already invented and implemented the practice of avoiding collective actions.[74] Its standard contract stated that the company "may elect to resolve any claim by individual arbitration."[75]

Significant to the inception of the revolution at the Supreme Court, also in attendance were representatives of Discover Bank,[76] the corporation that a few years later would be responsible for the birth and brief life of the "Discover Bank Rule."[77] Although at the time of the first meeting of the consortium Discover Bank did not yet include class action waivers in its standard contracts, it adopted them within several months, possibly influenced by American Express and other consortium members

69. 563 U.S. 333, 339 (2011).

70. *See id.* at 351–52 (holding that the FAA preempts state law).

71. Silver-Greenberg & Gebeloff, *supra* note 24.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* (quoting Am. Express).

76. *Id.*

77. This rule worked for a while to justify invalidation of collective action waiver when their practical meaning was denial of redress, but was later rejected in *Concepcion*. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 340, 352 (2011).

that had previously used the practice.[78] But then, in 2002, when Discover Bank was sued for a wrongful charge of fees and tried to avoid liability by preventing class action based on the above waivers, California's Fourth District Court of Appeal refused to enforce them.[79] It reasoned that the waivers were akin to a "license to push the boundaries of good business practices to their furthest limits."[80] Discover Bank did not give up and petitioned the Supreme Court seeking intervention.[81] Remarkably, at this point the company was represented by then-lawyer John Roberts, who would later become the Chief Justice of the Supreme Court, taking an active part in forever changing the status of collective action waivers.[82] In any case, in 2002, while still a prominent defense attorney, and armed with advice from the organizer of the strategic consortium,[83] he wrote that invalidating collective action waivers "contravenes the central purpose of the Arbitration Act: enforcing arbitration agreements according to their terms."[84]

Although the Court denied the petition, these words—and the idea that state courts *must* enforce collective action waivers—became the law of the land nine years later in *Concepcion*, when the man who had penned them was already at the other side of the bench. Perfectly echoing Chief Justice Roberts older petition, Justice Scalia decided for the first time that state courts can no longer do to corporations what they did in 2002 to Discover Bank, because "[t]he 'principal purpose' of the FAA is to 'ensur[e] that private arbitration agreements are enforced according to their terms.'"[85] The organized effort of the 1999 corporate consortium had finally succeeded.

After *Concepcion*, several other Supreme Court decisions followed, removing any remaining uncertainties regarding the scope of *Concepcion* and the power of class action waivers to separate people. First in the series was *American Express v. Italian Colors Restaurant* ("*Italian Colors*").[86] It removed the argument that even after *Concepcion*, collective action waivers may be invalidated if they patently leave no way for claimants to vindicate their statutory rights.[87] Corporations were now expressly

78. Silver-Greenberg & Gebeloff, *supra* note 24 ("Of the companies participating, only American Express and First USA had adopted an arbitration clause banning class actions; months later, Discover Bank added its own.").

79. Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867–68 (Cal. Ct. App. 2002).

80. *Id.*

81. Silver-Greenberg & Gebeloff, *supra* note 24.

82. *Id.*

83. *Id.*

84. Petition for Writ of Certiorari at 3–4, Discover *Szetela*, 537 U.S. 1226 (No. 02-829).

85. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011) (alteration in original) (quoting Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 478 (1989)).

86. 570 U.S. 228 (2013).

87. *Id.* at 236–37, 239.

allowed to draft their contracts in a way that aims at escaping liability. Symbolically, the direct beneficiary of the decision was American Express—a member of the 1999 consortium that had tried for many years to find a way to avoid liability by using the special protections awarded to arbitration. And yet, for a while, and until 2018, there was still a reason to believe that the judicial approval of collective action waivers against consumers (*Concepcion*) and small businesses (*Italian Colors*) would not be further extended to the employment setting. Although the Supreme Court's "tortured reading" of the FAA already "opened the floodgates for enforcement of arbitration agreements imposed on employees as a condition of employment,"[88] there was nonetheless a lingering doubt regarding employers' ability to force their employees via the use of waivers to give up class arbitration.[89]

In the case of employment, the new reading of the FAA seemed to stand in direct conflict with another veteran federal act: the National Labor Relations Act (NLRA). Given the gap of power between employers and employees, the legislature has explicitly expressed its care for "the individual unorganized worker [who] is commonly helpless"[90] and thus has sought to protect employees' ability to band together. Particularly, § 7 of the NLRA[91] awards employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[92] Indeed, a year after *Concepcion,* the National Labor Relations Board decided that collective action waivers that prevent class claims in both judicial and arbitral forums violate the NLRA because their goal is to avoid a type of concerted activity that the statute protects.[93] To add to the confusion, courts around the country responded in conflicting ways to the Board's position regarding the conflict between the FAA and the NLRA—some rejecting it and others approving it.[94] The question regarding the validity

88. Hodges, *supra* note 63, at 1685 (citing Circuit City Stores, Inc. v. Adams, 532 U.S 105, 118–19 (2001)).

89. Varela v. Lamps Plus, Inc., No. CV 16-577-DMG (KSx), 2016 WL 9110161, at *7 (C.D. Cal. July 7, 2016) (stating that, given the support of collectivity under the NLRA, class action waivers "in the employment context would likely not be enforceable"), *rev'd*, 771 F. App'x 418 (9th Cir. 2019).

90. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1635 (2018) (Ginsburg, J., dissenting) (quoting 29 U.S.C. § 102 (2012)).

91. Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (2012)).

92. 29 U.S.C. § 157.

93. *In re* D.R. Horton, Inc., 357 N.L.R.B. 2277, 2280–81, 2286 (2012), *granted in part*, *rev'd in part sub nom*. 737 F.3d 344 (5th Cir. 2013).

94. Chandrasekher & Horton, *supra* note 33, at 4 (describing, for example, the conflict between the Second and Ninth Circuits).

of collective action waivers in the employment setting was left up in the air.

But then the revolution progressed to remove the doubt. In *Epic Systems Corp. v. Lewis* (*Epic*),[95] another 5–4 decision led by the conservative majority of the Supreme Court, the placement of collective action waivers within arbitration clauses led to prioritizing the FAA over the NLRA, thereby further legitimizing the use of isolation methods under the guise of enforcing arbitration clauses.[96] Because the decision in *Epic* is very recent and directly relates to the value of collective actions, it is worth a closer look.

The litigation that ended in the 2018 *Epic* decision started before *Concepcion's* unconditional judicial embrace of collective action waivers. Back at that time, the validity of such waivers was still questionable. Employees of Ernst & Young, one of the largest accounting firms in the world, sued their powerful employer after "the firm had misclassified its junior accountants as professional employees," thereby depriving them of overtime pay.[97] The employees sought to resist the enforcement of the collective action waiver in their contracts and raised the same difficulty that existed in *Concepcion* and *American Express.*[98] They highlighted the fact that the separated claim of each of them was too small to allow an expensive individual pursuit of rights.[99] Notably, this is an especially acute problem in the employment setting where disputes frequently arise from relatively modest wage-and-hour claims of underpaid employees.[100] In the particular conflict between Ernst & Young and its junior accountants, for example, the value of the employees' separate harms ranged between $2,000 and $29,000, but to prove each one of them alone (despite their identical nature) would have required an investment of about $200,000 per claimant.[101] For that reason, the employees sought to unite efforts via a class action, whereas Ernst & Young tried to block them by enforcing the waivers in their contracts.

At this time, before *Concepcion*, one New York federal district court considering the counterarguments of the parties concluded that "[e]nforcement of the class waiver provision in this case would effectively ban all proceedings by [the employee] against [Ernst &

95. 138 S. Ct. 1612 (2018).

96. *Id.* at 1642 (Ginsburg, J., dissenting).

97. *Id.* at 1620 (majority opinion).

98. *Id.*

99. *Id.* at 1633 (Ginsburg, J., dissenting).

100. Stephanie Greene & Christine Neylon O'Brien, Epic *Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements—#TimesUp on Workers' Rights*, 15 STAN. J. C.R. & C.L. 43, 45 (2019).

101. *Id.* at 66.

Young]."[102] The same court further highlighted the injustice that would have followed by explaining that while the employee "[would] be unable to pursue her claims, even if they are meritorious," Ernst & Young would "enjoy de facto immunity from liability for alleged violations of the labor laws."[103] In a strong demonstration of the influence of *Concepcion* and *American Express*, a district court in California in 2013 facing the same counterarguments in an *identical* dispute between Ernst & Young and its underpaid accountants reached the opposite conclusion.[104] Following *Concepcion*, this court concluded that the inability to pursue rights individually due to the prohibitive cost of separate proceedings could not justify the invalidation of collective action waivers.[105] Both the New York case and the California case were appealed and both were reversed, leaving the Second Circuit and the Ninth Circuit in conflict,[106] thereby opening the gate for another watershed Supreme Court decision.

Following the unprecedented expansion of the FAA in *Concepcion* and *American Express* by the late Justice Scalia, his replacement, Justice Gorsuch, decided in *Epic* that in the clash between two federal laws—the FAA and NLRA—the former governs.[107] The process of failing claimants by separating them with collective action waivers that enjoy the FAA's protection had been completed. As a result, consumers, small businesses, employees, and many others who were somehow subjected to such waivers no longer have effective recourse in all the countless cases in which the cost of separate proceedings is prohibitive. With the active help of the Supreme Court, corporations had found a way to carefully plan a world in which as long as they cause smaller harms to numerous victims, no one will be able to hold them accountable. As the next section will show, the real motivation to "divide and conquer" becomes even more apparent when looking at the parallel process that has developed in cases in which corporations *did not* add collective action waivers to their contracts.

C. *Separation via Interpretation of Silent Arbitration Clauses*

Many jurists and scholars discuss the increased enforcement of class action waivers and the intensified judicial prevention of class arbitration

102. Sutherland v. Ernst & Young, LLP, 768 F. Supp. 2d 547, 554 (S.D.N.Y. 2011), *rev'd*, 726 F.3d 290 (2d Cir. 2013).

103. *Id.*

104. Morris v. Ernst & Young, LLP, No. C-12-04964 RMW, 2013 WL 3460052, at *3, *10 (N.D. Cal. July 9, 2013), *rev'd*, 834 F.3d 975 (9th Cir. 2016), *rev'd sub nom*. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018).

105. *See id.* at *4–7 (discussing whether arbitration is prohibitively expensive).

106. *See* Chandrasekher & Horton, *supra* note 33, at 4.

107. *Epic*, 138 S. Ct. at 1642.

when no such waivers exist without differentiating the two situations.[108] However, for the task taken up in this Article—to better trace the progress of a separation process and its consequences—it is valuable to distinguish the pair. Critical Supreme Court cases that have played an active role in the development of isolation methods under the pretext of "favoring arbitration"[109] were not at all similar to *Concepcion*, *American Express*, or *Epic*, as they did not focus on the enforcement of collective action waivers. Instead, in the last decade, and confusingly during the same period, a distinct line of cases arose. These cases contributed to the separation effect of arbitration clauses by merely interpreting them as blocking claimants from banding together *even though they did not include any express waiver of collective action.* This Article will call this line of cases the "interpretation cases" to distinguish them from the "waiver cases" discussed in the previous section.

Unlike ever before, the last decade has brought about a growing willingness of the Court to read "silent" arbitration clauses—devoid of a waiver of aggregate proceedings—*as if* they explicitly included such a waiver. The bellwether of the interpretation cases is *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.* (*Stolt-Nielsen*)[110]—a Supreme Court case that was decided on April 27, 2010, exactly a year before *Concepcion.*[111] The litigation arose after a group of shipping companies (collectively, Stolt-Nielsen) was found by the Department of Justice to be involved in an illegal price-fixing conspiracy.[112] One harmed customer that had overpaid for ocean transportation services, a company named AnimalFeeds, filed a putative class action in court.[113] However, because the parties included an arbitration clause in their contract, the dispute was eventually sent, with other similar cases, to arbitration.[114]

When AnimalFeeds filed a demand for *class* arbitration, Stolt-Nielsen objected and insisted that AnimalFeeds alone should carry any

108. *See, e.g.*, Chandrasekher & Horton, *supra* note 33, at 5 n.26 (listing thirteen cases that form the new arbitration jurisprudence without differentiating); *see also* Hodges, *supra* note 63, at 1687–88 (lumping together *Concepcion* and *Italian Colors*, which discuss class action waivers, with *Stolt-Nielsen*, discussed below, that had no waiver). *But see* David Horton, *Clause Construction: A Glimpse into Judicial and Arbitral Decision-Making*, 68 DUKE L. J. 1323, 1325 (2019) (differentiating between "two major ways" of expanding the FAA). For an example of a judicial recognition of the difference, see Oregel v. PacPizza, LLC, 187 Cal. Rptr. 3d 436, 448 (Ct. App. 2015), where a California Court of Appeals recognized that "*Concepcion* [i]s irrelevant" if an arbitration clause "d[oes] not contain a class action waiver."

109. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 346 (2011) (quoting Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006)).

110. 559 U.S. 662 (2010).

111. *Id.*

112. Horton, *supra* note 108, at 1349.

113. *Id.*

114. *Id.*

arbitration.[115] At this point, the parties agreed to submit this threshold dispute to a panel of three arbitrators that unanimously decided that the parties' arbitration clause allowed the arbitration to proceed as a class arbitration.[116] The panel reasoned that since the arbitration clause was silent against a background in which class arbitrations are a common practice, the collective method could be used.[117] However, when the case arrived at the Supreme Court, Justice Alito was not convinced. He concluded that the entire decision of the panel rested merely on the public policy of favoring class arbitrations and as such amounted to a forbidden exercise of the panel's power.[118]

Had the Court stopped at awarding a loss to the party seeking a class arbitration, *Stolt-Nielsen* would probably not have gained its high status in the pantheon of the new arbitration jurisprudence. Indeed, for many years after the publication of the decision, many courts took *Stolt-Nielsen* to be limited by its relatively rare facts of sophisticated parties that stipulated that both of them never gave even implied consent to aggregate procedures.[119] But what makes *Stolt-Nielsen* in retrospect so crucial to the separation project discussed here is the fact that the Court did not stop at settling the particular dispute. Instead, in an activist move, Justice Alito insisted on using the case to introduce a new and hostile view of banding together *in arbitrations.*

In *Stolt-Nielsen*, the Court started to develop the argument that "class arbitration" is an oxymoron or an abnormality, suggesting an inherent discrepancy between the idea of arbitration and collectivity. Without citing to any supporting resources, Justice Alito stated that "class-action arbitration changes the nature of arbitration" and added that the differences between individual arbitration and class arbitration are just "too great."[120] The idea that class is not a legitimate type of arbitration of the kind protected by the FAA was not only unprecedented; it also conflicted with the reality at the time of the decision. Ever since the 1980s, certainly during the 2000s, including in 2010, and indeed even in the years after *Stolt-Nielsen*, class arbitrations have been in full use.[121] Further, the leading arbitration providers not only have long offered class arbitrations; they also have created and published elaborate rules designed to institutionalize this way of dispute resolution.[122] In fact, in

115. *See id.*

116. *Id.* at 1349–50.

117. *Id.* at 1350.

118. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 677 (2010).

119. *See* Horton, *supra* note 108, at 1351–53 (describing the confusion).

120. *Stolt-Nielsen*, 559 U.S. at 685–87.

121. *See* Horton, *supra* note 108, at 1349 (presenting data released by the AAA); *see also* Alyssa S. King, *Too Much Power and Not Enough: Arbitrators Face the Class Dilemma*, 21 LEWIS & CLARK L. REV. 1031, 1037 (2017) (describing the history of class arbitration).

122. King, *supra* note 121, at 1039–40; *see also* Horton, *supra* note 108, at 1349.

2003, the Court explicitly confirmed the authority of arbitrators to decide the availability of class arbitration proceedings in situations in which the arbitration clause lacked a collective action waiver.[123] And, all these years, neither arbitrators nor judges have expressed doubt regarding the general fit between arbitrations and aggregate proceedings. The decision in *Stolt-Nielsen* was in that respect "revolutionary."

Exactly a year after *Stolt-Nielsen*, in *Concepcion*, the Court enthusiastically adopted the new ostracizing of class arbitrations, this time in the context of the waiver cases. The late Justice Scalia set the tone, and his bluntness added an edge to Justice Alito's innovation. The unique rhetoric he used and what it reveals will be further explored in the next Part. For now, however, the point is more descriptive: the process of making class arbitrations seem inadequate started at *Stolt-Nielsen* and was significantly amplified in *Concepcion.* Post-2011, many have predicted that the two cases together "would effectively end the use of class arbitration."[124] In reality, however, as the opening story of Frank Varela demonstrates, class arbitrations remained both desirable and available.

Then, in 2013, only ten days before the decision in *Italian Colors*, which further fortified *Concepcion* in the line of the waiver cases, the Court released a ruling in another interpretation case. The new interpretation case—*Oxford Health Plans v. Sutter*[125]—was factually similar to *Stolt-Nielsen,* but it did not feature any stipulation between the parties regarding the silence of their agreement.[126] This time, the Court affirmed an arbitrator's decision to interpret a broadly phrased arbitration clause as reflecting consent to class arbitration.[127] It was a rare 9–0 decision, and none of the Justices mentioned the argument that class arbitration is not truly a form of arbitration.[128] Perhaps encouraged by the deference of the Court in *Oxford Health Plans*, arbitrators continued to permit class arbitrations in cases of broadly phrased arbitration clauses. However, a 2017 empirical study of sixty-four arbitral decisions that were published after *Stolt-Nielsen* and before the end of 2015 shows the immense impact of the Court's new hostility to class arbitration, documenting a sharp decline in arbitrators' willingness to permit class

123. Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444, 447, 452–53 (2003).

124. King, *supra* note 121, at 1042 & n.72 (describing the response and citing articles to that effect).

125. 569 U.S. 564 (2013).

126. *See id.* at 567.

127. *Id.* at 566, 573.

128. The only (quite subtle) hint in this direction was in Justice Alito's concurrence, in which he noted that, because in arbitration class members can enjoy a win but avoid a loss if they do not opt in before a decision is made, the Court may need to reconsider whether "the availability of class arbitration is a question the arbitrator should decide." *Id.* at 575.

arbitration.[129] It took six more years for the crusade on class arbitrations in the context of the interpretation cases to resume.[130]

And then, following the footsteps of the latest waiver case—the 2018 *Epic* decision—came the newest development in the interpretation cases: the 2019 decision in *Lamps Plus*.[131] As we have seen, in this decision, the Court ordered that Frank Varela and some 1,300 employees of the national company Lamps Plus could not band together to seek redress from their employer for severely compromising their personal and financial data.[132] The 5–4 decision in *Lamps Plus* does to the strand of interpretation cases what *Epic* has done to the line of waiver cases: removing any remaining arguments that former cases were somehow limited by their context and left *some* room for legitimate collective action. The novelty of the decision in *Lamps Plus* and its unprecedented demonstration of bias against collectivity call for a closer look.

The story of the dispute discussed in *Lamps Plus* opened this Article. As Justice Ginsburg commented in her dissent, it is a story that "cries out for collective treatment."[133] The harm to Frank Varela and his coworkers originated from one identical incident: a single email that was sent by a senior employee to a hacker and exposed the most private details of each and every employee.[134] The consequences of this event were dire and similar for each employee: long-term exposure to abuse of the data by an unlimited amount of its receivers.[135] And, despite the magnitude of the event, Lamps Plus offered all the victims the same unsuitable solution of one year of free identity monitoring services.[136] It is, therefore, particularly hard to see what is "inefficient" in consolidating about 1,300 identical claims, all resulting from one data breach. On the contrary, it seems illogical and wasteful to require each employee to pay a separate lawyer and independently prove what happened. And yet, to a corporation determined to avoid liability and to a Court resolved to eradicate class arbitrations—none of this seemed to matter.

After two lower courts authorized class arbitration, the Court reversed and insisted that Frank Varela and his numerous coworkers must seek justice separately.[137] This conclusion, Chief Justice Roberts explained,

129. King, *supra* note 121, at 1044 (describing a decline from a high permission rate at the level of 90% (or about 70%) of the cases to a low permission rate of only 45%).

130. Ten days after *Oxford Health Plans*, Justice Scalia's decision in *American Express* was published. It included abundant citations from *Concepcion* and another fierce attack on class arbitrations.

131. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

132. *Id.* at1419.

133. *Id.* at 1421 (Ginsburg, J., dissenting).

134. *Id.* at 1412 (majority opinion).

135. *See id.* at 1413.

136. Class Action Complaint, *supra* note 2, at 4.

137. *Lamps Plus*, 139 S. Ct. at 1413, 1419.

accepts as a starting point that the arbitration clause that Lamps Plus included in its standard contracts was *ambiguous*.[138] Such a starting point should have set the case apart from *Stolt-Nielsen*, in which the parties did *not* argue for two opposing interpretations. However, the glaring difference did not strike Chief Justice Roberts as significant. To him, while regular contractual ambiguity calls for interpretation that attempts to "ascertain[]" one of the two competing meanings of the disputed contractual language,[139] ambiguity in the arbitration context should work differently.[140] In the case of arbitration clauses, explained Chief Justice Roberts for the first time, courts are not free to approach the interpretation task with their usual impartiality.[141] Instead, Chief Justice Roberts maintained that when considering whether an ambiguous arbitration clause reflects an intention to allow or ban collective proceedings, "it is important to recognize the 'fundamental' difference between class arbitration and the individualized form of arbitration envisioned by the FAA."[142]

In other words, courts and arbitrators should start from a *preference* to *not* allow class arbitrations because, since 2010, those had been marked as not deserving the protection of the FAA. For that reason, writes Chief Justice Roberts, "ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration.'"[143] The innovative declaration that ambiguity is not enough to open the way to class arbitration leaves no escape from asking what might be enough. On this point, the Court has reached a new peak in the separation process. For the first time in the history of the FAA, it clarified that once an arbitration clause is included in a contract the only way to allow class arbitration is "an *affirmative* 'contractual basis for concluding that the party agreed to do so.'"[144]

Although Chief Justice Roberts has probably tried to conceal it,[145] the word "affirmative" in the sentence cited above is not part of any previous

138. *Id.* at 1414–15.

139. *See* RESTATEMENT (SECOND) OF CONTRACTS § 200 (AM. LAW INST. 1981) ("Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.").

140. *Lamps Plus*, 139 S. Ct. at 1414–15.

141. *Id.*

142. *Id.* at 1416 (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1622–23 (2018)).

143. *Id.* (alteration in original) (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011)).

144. *Id.* (emphasis added) (emphasis omitted) (quoting Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010)).

145. *See id.* Chief Justice Roberts used the past tense of "we held" in the full sentence, suggesting that the entire sentence is a product of previous holdings. Here is the full sentence including the citation of *Stolt-Nielsen*: "And for that reason, *we held* that courts may not infer consent to participate in class arbitration absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.'" *Id.* (emphasis added) (quoting *Stolt-Nielsen*, 559 U.S. at 684).

decision of the Court. Significantly, this word is the newest layer of the arbitration revolution. The rule coming from *Stolt-Nielsen* required "a contractual basis for concluding that [a] party agreed [to class arbitration]."[146] Chief Justice Roberts repeated it, citing *Stolt-Nielsen* to create an impression of continuation, but added before it—not once but twice[147]—a single adjective that forms a significant shift. This stealth modification of the *Stolt-Nielsen* rule turns a so-called ambiguous arbitration clause—one that is phrased very broadly without banning class arbitration—into a clear one. From now on, we are told, any phrasing that does not "affirmatively" express consent of the drafting party to subject itself to collective challenges should be read as if it were straightforwardly carrying the opposite message: class arbitration is forbidden.[148] By merely adding one word to an older precedent, Chief Justice Roberts set isolation as the new default rule.

Given the zero probability that corporations will ever express an affirmative consent to class arbitration,[149] we have now completed a full circle: we started from corporations adding arbitration clauses to their mass contracts in order to hide within them collective action waivers, and now the mere existence of an arbitration clause—one that does not even include a waiver—leads to the same result. Requiring "affirmative" consent to class arbitration, therefore, transforms naked arbitration clauses and the very idea of arbitration into a direct method of separating claimants, even without saying a word about it. As a result, anyone who, like Frank Varela, signed an arbitration clause because he or she had no other choice is also taken as someone who signed off any right to band together with others. Note the biased treatment of consent that follows. While the Court refuses to take into account corporations' implied consent (only their "affirmative" consent will count), it is more than eager to rely on the implied consent of the other party to the contract. Once people like Frank Varela have signed on the dotted line of an arbitration clause, the Court assumes that they also have given their implied consent to waiving their collective rights. In short, implied consent works only to separate people.

Why did Chief Justice Roberts make such an effort to weave the word "affirmative" into the original text of *Stolt-Nielsen*? It is because Lamps Plus, like other drafters of mass contracts that use arbitration clauses that do *not* contain a collective action waiver, would have lost without this added word. One leading reason is the maxim of *contra proferentem*, an interpretation rule that guides judges to hold contractual ambiguities

146. *Id.* at 1412 (emphasis omitted) (quoting *Stolt-Nielsen*, 559 U.S. at 684).

147. *Id.* at 1416, 1419 (repeating the word "affirmative").

148. *Id.*

149. *See* Horton, *supra* note 108, at 1346 (suggesting that affirmative consent to class arbitration does not exist).

against the drafter of the contract and accordingly to award unclear terms the meaning suggested by the non-drafting party.[150] This rule, known to any first-year student of contract law, is applied under two cumulative conditions: that the drafting party chose the ambiguous language *and* that this party enjoyed superiority of power that did not allow the other party to clarify it. Both conditions can be easily satisfied in the relationship between Lamps Plus, the drafter, and Frank Varela, its warehouse employee. More generally, they can similarly be met anytime that corporations are drafting contracts of adhesion to impose arbitration on their many consumers, workers, suppliers, and others. Accordingly, under *contra proferentem*, corporate drafters who did not include a waiver in their standard arbitration clause should be taken as implicitly agreeing to class arbitration.

Determined to block class arbitrations, Chief Justice Roberts was willing to undo centuries of common law to remove the risk of collectivity that comes from the rule of *contra proferentem.* Adding one more extension to the already-expanded FAA, Chief Justice Roberts therefore opined that the FAA preempts not only state law or federal legislation that threatens the operation of arbitrations, but also the general rule of *contra proferentem.*[151] Chief Justice Roberts further reasoned that applying the traditional common law rule would produce, by way of interpretation, an implied consent to class arbitration; while, according to the Court's latest decision, such consent "is inconsistent with the FAA."[152]

D. *Deliberate Separation*

To be sure, other scholars have concluded before that a leading effect of the so-called arbitration revolution amounts to a demise of the ability of claimants to protect their rights by banding together. Professor David Horton recently summarized the works that recognized such effect, writing: "*Concepcion* and its progeny have sounded 'the death knell for consumer and employment class actions.'"[153] Nevertheless, the current analysis seeks to go beyond identifying the practical effect of the revolution. With the advantage of seeing one more piece of the puzzle—the 2019 *Lamps Plus* decision—it reveals that the "death knell" is a product of a deliberate separation process promoted by organized

150. Another reason arises from the prevalence of collective action waivers throughout the years relevant to the dispute.

151. *Lamps Plus*, 139 S. Ct. at 1418.

152. *Id.* (quoting AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011)).

153. Horton, *supra* note 108, at 1326 (quoting Maureen A. Weston, *The Clash: Squaring Mandatory Arbitration with Administrative Agency and Representative Recourse*, 89 S. CAL. L. REV. 103, 116 (2015)); *see id.* at 1326 n.17 (citing many other articles).

corporate interests and perpetuated by the Court in two parallel lines of cases.

Consider, for example, reading the most recent decisions in *Epic* and *Lamps Plus* together. Combined, they mean that in 2019, almost a decade after the release of *Stolt-Nielsen* and *Concepcion*, the mere inclusion of an arbitration clause is enough to fail claimants' efforts to band together, with (*Epic*) or without (*Lamps Plus*) a waiver. The fact that the duo has emerged at the employment setting—once a natural domain of solidarity and collective rights—further highlights the magnitude of the assault on collectivity. Significantly, in terms of their legal reasoning, these cases are hard to reconcile. On the one hand, *Epic* prevents collective actions through waivers that are served on a take-it-or-leave-it basis and are thus supported by a very weak consent of employees. On the other hand, *Lamps Plus* reaches the same separating result by insisting that when it comes to employers, only a strong ("affirmative") consent will do. How can weak consent justify compelling individual arbitrations but not class arbitrations? The only way to explain the two cases together, and indeed the entire revolution, is thus to recognize that the newest decisions reflect an intentional use of the FAA not to treat arbitration favorably but to *disfavor* collective actions.

Before closing the discussion of the arbitration revolution as a separation process, a note about judicial activism is in place. In deciding the *waiver* cases in accordance with corporations' interests, the Court can be viewed as merely having a participatory role in the separation process. However, in deciding the *interpretation* cases, the Court should be recognized as *leading* the process, helping even corporations that failed to draft their contracts carefully. Because they involve rare interventions in arbitral decisions and work to prevent arbitrations, the interpretation cases substantiate, even more than the waiver cases, the general argument in this Part: that behind the façade of supporting arbitration rests an activist jurisprudence that aims at separating claimants in the service of corporate interests.[154] The next Part links the increasing hostility to collectivity and the resulting separation process to the rising dominance of neoliberalism.

II. JOINING THE NEOLIBERAL PROJECT

While the previous Part described how two lines of cases, seemingly dedicated to arbitration, converge to create a separation effect, this Part's focus is on the role of discourse and ideology. What comes next

154. NANCY MACLEAN, DEMOCRACY IN CHAINS 228–29 (2017) (pointing out the irony in that "after years of criticizing 'judicial activism' by the Supreme Court for greater equity, Koch grantees are now making, as one Cato publication puts it, *the Case for an Activist Judiciary* to secure economic liberty").

establishes that the arbitration revolution is not merely, and perhaps not even primarily, a legal shift. Rather, the anti-collective approach and the isolation it imposes are essential features of a greater transformative change: the rise to dominance of neoliberalism and the creation of a corporatized political economy. The result is an important reconceptualization of the arbitration revolution as both a product of neoliberal rationality and a tool for further constituting neoliberal hegemony.

A. *Law as Discourse*

In its embellished reading of the FAA, the Court's conservative majority has not only dramatically changed the law regarding the availability of collective proceedings; it also has developed a new framework and original uses of terminologies to reason about the shift. As a result, the arbitration revolution presents a risk that reaches beyond its practical outcomes and goes deeper and further to intervene in people's perception of reality. Exposing this layer requires revisiting the leading decisions that mark the arbitration revolution to track nuances of tone and particular linguistic choices. On this discursive front, the late Justice Scalia was a pioneer and a dominant leader. His rhetorical moves, chiefly in writing for the majority in *Concepcion*, have been heavily cited in later decisions and have utterly transformed the conversation.

In broad strokes, the new discourse used to promote separation draws on neoliberal ideas and particularly on neoliberalism's long history of vilifying solidarities. But, even more importantly, this discourse also plays an active role in disseminating neoliberal logic with the power and authority unique to law. This dissemination effect is what makes the anti-collective ideas spread by the Court reach far beyond the claimants that pragmatically lose access to justice. All people contractually involved with large corporations—and that means all of us—have been exposed in the last decades to a powerful message that delegitimizes coming together in response to being wronged. Exposing the roots of such a message, and how the Supreme Court became one of its messengers, is a key to better understanding the full influence of the arbitration revolution.

B. *Neoliberalism and the Revolution's Discourse*

The attack on collective actions through the expansion of the FAA has not happened in a vacuum. Rather, the legal war against collectivity has also targeted class actions that are divorced from arbitration[155] and labor unions.[156] Further, and most importantly, the entire battle has

155. *See, e.g.*, Maureen Carroll, *Class Action Myopia*, 65 DUKE L.J. 843, 868–69 (2016).

156. *See, e.g.*, Catherine L. Fisk & Martin H. Malin, *After* Janus*,* 107 CALIF. L. REV. 1821, 1823 (2019).

coincided—both chronologically and ideologically—with the rising dominance of neoliberal ideas in the United States in the last four decades.[157]

Although we all know that we live in the midst of the neoliberal age, the meaning of the term seems to remain "perplexingly elusive."[158] Hence, the following exploration of how neoliberalism has both incited the arbitration revolution and benefited from it compels an effort to clarify what neoliberalism is and how it reached its status as the most dominant political project of our era.[159] One necessary step in this direction is to remove a common confusion that originates in the word itself.[160] Neoliberalism should not be minimized into a new variation of a liberal economic approach,[161] an observation that has several concrete manifestations that are highly relevant to our discussion. The first is the political nature of the neoliberal project.[162] In the American context,

157. *See* WENDY BROWN, IN THE RUINS OF NEOLIBERALISM 21 (2019) (discussing "the neoliberal transformations taking place around the world in the past four decades"); *see also* Hila Keren, *Valuing Emotions*, 53 WAKE FOREST L. REV. 829, 864 (2018) ("Intellectually, neoliberalism may have been founded in Europe by Friedreich Hayek about seventy-five years ago, but its *practical* rise in the Anglo-American world is associated more with the 1980s, under the leadership and policies of Margaret Thatcher and Ronald Reagan." (footnote omitted)).

158. Jamie Peck, *Preface: Naming Neoliberalism*, *in* THE SAGE HANDBOOK OF NEOLIBERALISM xxii (Damien Cahill, Melinda Cooper, Martijn Konings & David Primrose eds., 2018).

159. *See* Philip Mirowski, *Hell Is Truth Seen Too Late*, BOUNDARY, Feb. 2019, at 46 (describing the criticism against the use of "neoliberalism" but insisting that "[a]wareness of the philosophical core of neoliberalism—namely, the epistemic superiority of the market in all things—is a necessary prerequisite to understanding some of the most crucial developments in contemporary politics"); *see also* BROWN, *supra* note 157, at 17 ("Neoliberalism—the ideas, the institutions, the policies, the political rationality—has, along with its spawn, financialization, likely shaped recent world history as profoundly as any other nameable phenomenon in the same period, even if scholars continue to debate precisely what both are.").

160. Part of the reason for this confusion is explained by MacLean as follows:

> Members of the Mont Pelerin Society initially chose to refer to themselves as "neoliberals," to signal the way they were retooling nineteenth-century pro-market ideas; it's the name applied to them today by critics of the policies they advocated. But the word "neoliberal" confused Americans because Democrats in the Roosevelt mold now had such a hammerlock on the word "liberal."

MACLEAN, *supra* note 154, at 51.

161. S. M. AMADAE, PRISONERS OF REASON: GAME THEORY AND NEOLIBERAL POLITICAL ECONOMY 11–12 (2015) (arguing that "[t]he shift in orientation from liberalism to neoliberalism is sufficiently stark" to call for a discussion of the differences).

162. *See, e.g.*, Philip Mirowski, *The Political Movement That Dared Not Speak Its Own Name: The Neoliberal Thought Collective Under Erasure* 2 (Inst. for New Econ. Thinking, Working Paper No. 23, 2014) (criticizing in a general way those who refuse to recognize neoliberalism as a political project and defining it as "a thought collective and political movement combined"), https://www.ineteconomics.org/uploads/papers/WP23-Mirowski.pdf [https://perma.cc/UJ9E-TPN2].

while both democrats and republicans are liberals in the sense of believing in the necessity of capitalist economy and free markets, neoliberalism better correlates with the interests and beliefs of those on the right-wing of the political map, including libertarians and conservatives.[163] And, as we shall see, this orientation is not fortuitous but rather a product of a comprehensive and coordinated effort.

It is thus not an accident that the conservative majority of the Court has executed the revolution. It is also not an accident that the Justices that authored the revolution's leading cases have been all affiliated with and supported by the neoliberal Federalist Society. The Society, which was established in 1982, just as neoliberalism had started to rise to prominence in the United States, is the legal arm of what historian Philip Mirowski has titled "the Neoliberal Thought Collective"[164]—the infrastructure through which neoliberals have calculatingly—albeit stealthily—built up their movement's "knowledge production and political action capacities."[165]

For example, Justice Scalia, undoubtedly the leader of the revolution, was probably "the most important elite sponsor of the Society" since its early days—at the time during which he was a mentor and advisor to the student founders of the Society as a faculty member at the Chicago School of Law.[166] In 1987, when "the Federalist Society hosted its first-ever national lawyers convention at the Mayflower Hotel" in Washington, D.C., Justice Scalia was the first speaker on a panel dedicated to "Methods of Statutory Construction."[167] He ended his talk predicting that "in the future" courts will interpret statutes based more on "objective analysis" and "less [on] legislative history,"[168] foretelling how in the 2000s he would expand the reading of the FAA while setting aside

163. Peck, *supra* note 158, at xxvi. This is not to say that neoliberalism did not influence the left.

164. *Id.*

165. Philip Mirowsky, *Neoliberalism: The Movement that Dare Not Speak its Name,* AMERICAN AFFAIRS (2018), https://americanaffairsjournal.org/2018/02/neoliberalism-movement-dare-not-speak-name/ [https://perma.cc/D7AM-V49V].

166. *See* STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT 141 (2008) (describing Justice Scalia's many contributions including fundraising, speaking at the first conference, and hosting Society members at his home).

167. *Methods of Statutory Construction [Archive Collection]: 1987 National Lawyers Convention*, FEDERALIST SOC'Y (Jan. 30, 1987, 12:00 PM), https://fedsoc.org/events/methods-of-statutory-construction-archive-collection [https://perma.cc/G275-XUCG].

168. The Federalist Soc'y, *1987 Annual Lawyers Convention: Methods of Statutory Construction [Archive Collection]*, YOUTUBE (May 3, 2008), https://www.youtube.com/watch?time_continue=2465&v=xDcXOAnbSuA&feature=emb_logo [https://perma.cc/XW8W-KWXF] (beginning at 41:04 for quoted material).

the Act's legislative history that clearly limited it to arbitration agreements between commercial parties of similar bargaining power.[169]

The revolution's other spearheads—Chief Justice Roberts, Justice Alito, and Justice Gorsuch—all have strong and continuous ties to the Federalist Society.[170] And, while the Society is not openly and directly involved in politics, it does promote the dissemination of neoliberal logic via powerful and profound processes of education, training, and networking.[171] The Society has therefore been an "organization of extraordinary consequence," openly aiming to counter the liberal (taken as left-leaning) control of the legal profession.[172] To say that the arbitration revolution is the brainchild of the stellar ambassadors of the Federalist Society is thus to recognize that the revolution itself is founded on neoliberal rationality and as such carries salient political weight.

The second meaningful difference between liberalism and neoliberalism regards the role of the state and the relationship between the state and the market. Unlike liberals, neoliberals are not genuinely interested in the separation of the public state from the private market, even as they voice calls for a small government or non-interventionist state. Far from the model of *Laissez-faire* economics, neoliberalism requires the state "to actively promote and construct a free market society."[173] Neoliberalism thus reconfigures the liberal commitment of the state, profoundly transforming it from the duty to care for all its members and the common good[174] to a narrower but active commitment to the most dominant market players: large businesses and financial

169. Circuit City Stores, Inc. v. Adams, 532 U.S 105, 125–28 (2001) (Stevens, J., dissenting) (describing the application of the FAA to workers in accordance with the history of the statute).

170. *See, e.g.*, AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 3 (2017) (describing Justice Alito in tuxedo at the thirtieth anniversary of the Society). Further, according to the Federalist Society's website, Chief Justice Roberts and Justice Scalia were both speakers at the 2007 National Lawyer Convention of the Society. *See Hon. John G. Roberts, Jr.: Chief Justice of the United States*, FEDERALIST SOC'Y, https://fedsoc.org/contributors/john-roberts [https://perma.cc/AM56-WPN3]. Similarly, Justice Scalia was a speaker at the 2008 National Lawyer Convention of the Society. *See 2008 National Lawyers Convention*, FEDERALIST SOC'Y (Nov. 20, 2008, 8:00 AM), https://fedsoc.org/events/2008-national-lawyers-convention [https://perma.cc/G56G-4ZNT]. Similarly, Justice Gorsuch is listed as a contributor on the Society's website, *see* https://fedsoc.org/contributors/neil-gorsuch[https://perma.cc/T9JY-FLET].

171. HOLLIS-BRUSKY, *supra* note 170, at 3.

172. TELES, *supra* note 166, at 135.

173. JULIE A. WILSON, NEOLIBERALISM 37 (2018).

174. *See* Sean Phelan & Simon Dawes, *Liberalism and Neoliberalism*, OXFORD RES. ENCYCLOPEDIA (2018), https://oxfordre.com/communication/view/10.1093/acrefore/9780190228613.001.0001/acrefore-9780190228613-e-176?rskey=pPx3Zm&result=1 [https://perma.cc/5FXC-BJXT] (describing how liberal philosophers like John Stuart Mill and Jeremy Bentham approved state intervention on behalf of the worse-off members of society and how philosopher John Rawls linked freedom with equality and saw the market as part of society as well as an appropriate subject of social control).

elites.[175] Generally speaking, this new orientation of the state explains many legal transformations of the last few decades.[176] It also more concretely clarifies why the arbitration revolution so evidently sacrifices the interests of ordinary citizens to cater to the needs and interests of the largest businesses.

A third theme of what differentiates neoliberal ideology from liberalism is the goal and practice of extending the logic of the market *to all areas of life*. Although liberals debate the extent to which public intervention in private markets is justified, they all seem to agree that some domains lie outside of the market and should be analyzed and organized according to noneconomic metrics. Neoliberalism, however, has deliberately produced a radical restructuring not only of the economy but also of non-market fields such as "politics, society, culture, and the environment."[177] It even has restructured our emotions.[178] One scholar described the theoretical shift as a process in which "[m]arket ideas moved out of economics departments to become the new standard currency of the social sciences" until they "became fixtures of common sense."[179]

The British Prime Minister Margaret Thatcher, one of the symbols of neoliberalism, once made a famous declaration of neoliberalism's ambitious effort to establish itself as general common sense, stating that "[e]conomics are the method; [but] the object is to change the . . . soul."[180] Accordingly, the neoliberal project uses many mediums through which it disseminates its logic until it can penetrate our subjectivities. One path to the soul is discourse—a set of communicative acts through which, in a complex social process, ideas get widely circulated, turn into "truths," and become the "common sense."[181] And, once an idea becomes part of common sense, it is ready to be internalized, or, as Thatcher would have it, to change the soul.

Crucially, as a forceful social institution that exerts authority and is trusted by many, the law can operate precisely in this way, and the

175. *See* WILSON, *supra* note 173, at 27; *see also* DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 33 (2005) ("In the event of a conflict between Main Street and Wall Street, the latter was to be favoured.").

176. *See, e.g.*, STEPHEN M. FELDMAN, THE NEW ROBERTS COURT, DONALD TRUMP, AND OUR FAILING CONSTITUTION 173–86 (2017) (describing some of the pro-business decisions led by the conservative majority of the Roberts Court).

177. Peck, *supra* note 158, at xxx.

178. *See* Keren, *supra* note 157, at 864 (discussing neoliberalism treating emotions as a new type of personal property).

179. DANIEL T. RODGERS, AGE OF FRACTURE 10 (2011).

180. Interview by Ronald Butt with Margaret Thatcher, Prime Minister, U.K., in London, U.K. (May 3, 1981).

181. *See* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE & THE DISCOURSE ON LANGUAGE app. 215 (A. M. Sheridan Smith trans., 1972).

arbitration revolution offers a prime example. It demonstrates the takeover of a noneconomic arena by the metrics used initially only in market settings. Revolution aside, arbitration is one of several methods of alternative dispute resolution, all operating alongside conventional litigation. As such, arbitration is part of a civilized justice system maintained by society to avoid violent settlement of disagreements. Nonetheless, when the revolution commenced, it reconfigured arbitration as purely "a matter of contract,"[182] thereby concealing its essence as an institutionalized form of dispute resolution. To further distance arbitration from justice, the new cases emphasized that arbitrations should be evaluated by their ability to achieve the core market goal of *economic efficiency*. Moreover, as Justice Scalia repeatedly stated in *Concepcion* and *Italian Colors*, such economic efficiency is to be measured by conventional economic metrics such as "costs," "savings," and "speed."[183] Instead of the "costliness and delays of [public] litigation,"[184] he stated, private arbitration is a "speedy resolution"[185] that offers "greater efficiency" by "reducing the cost and increasing the speed of dispute resolution."[186] Indeed, by the time the decisions in *Epic* and *Lamp Plus* were written, all that their authors did was adopt Justice Scalia's economized language as if it were the only way to discuss matters of arbitration.

To be sure, some of the economic jargon cited above was used to discuss arbitrations before. The point is not the use of words with economic flavor but rather their careful "recycling" to attack collective actions. Words that were used to compare arbitration to traditional adjudication are now used differently: to distinguish types of arbitrations and to convey that while individual arbitrations are valuable, class arbitrations are harmful. Consider the use of the word "speed" as one example. Pre-revolution, the Court used the promptness of arbitrations in a noneconomic way, emphasizing it as a reason to prevent courts from acting in a manner that would slow down arbitration. The Court stated, for example, that the FAA reflects a "clear congressional purpose that the arbitration procedure . . . be speedy and *not subject to delay and obstruction in the courts*."[187] Used in this way, "speedy" is not an economic standard but an idea relating to the harmonization of different methods of dispute resolution. Post-revolution, however, speed is used to mark the economic value of individual arbitrations and to portray

182. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011).

183. *Id.* at 345, 350.

184. *Id.* at 345 (quoting Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219 (1985)).

185. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 239 (2013).

186. *Concepcion*, 563 U.S. at 345, 348.

187. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) (emphasis added).

collective arbitrations as lacking such value. For example, the Court cautioned that "with class arbitration 'the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away.'"[188] The new economized discourse thus makes speed a reason to reject some arbitrations while preferring others, completely subjecting the domain of dispute resolutions to economic logic.

Similarly, the constant use of the jargon of "incentives" further transforms the issue of arbitration into a purely economic one. For example, as an essential part of his legal reasoning, Justice Scalia stressed in *Concepcion* that allowing class arbitrations "will have a substantial deterrent effect on incentives to arbitrate."[189] Later, in *Italian Colors*, he similarly translated the justice-based argument that collective action waivers leave claimants without redress into the language of economics. Under such treatment, claimants' insistence on class arbitrations is explained not by the fact that without them they lose access to justice,[190] but merely by the economic problem of having "no economic incentive" to pursue claims individually.[191]

In short, a new discourse has been born, subjecting a noneconomic setting to market rationality. By heavily using an economized rhetoric, applying a cost-and-benefit analysis, and committing to incentive thinking, the new arbitration jurisprudence amounts to the production of what sociologist and philosopher Pierre Bourdieu called a "strong discourse."[192] Similar to other neoliberal economization processes, the one transforming the domain of dispute resolution is implemented by "extending a specific formulation of economic values, practices, and metrics"[193] to a noneconomic issue.

Suppressing any appeal to justice-based arguments completes the takeover of the field of arbitration by an economized rationality. A salient part of the arbitration revolution targets any attempt of arbitrators, state courts, agencies, or the liberal Justices to discuss the issue in noneconomic terms such as fairness and public policy. The revolution's cases offer abundant examples of such negation of any alternative rationality—as if they follow Margret Thatcher's "there is no alternative"

188. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018)).

189. *Concepcion*, 563 U.S. at 351 n.8.

190. *See, e.g.*, Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 782 (2002) (describing arbitration as the "denial of access . . . to the law itself").

191. Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235 (2013).

192. Pierre Bourdieu, *Utopia of Endless Exploitation: The Essence of Neoliberalism*, LE MONDE DIPLOMATIQUE (Dec. 1998), http://mondediplo.com/1998/12/08bourdieu [https://perma.cc/65E6-7VG2] ("Neoliberal discourse is not just one discourse among many. Rather, it is a 'strong discourse.'").

193. BROWN, *supra* note 34, at 30.

slogan, also called the "TINA-Principle."[194] When the dissent in *Concepcion* raised the issue that forbidding class proceedings denies access to justice, the response dismissed such thinking, claiming that states cannot require preserving class arbitrations, "even if it is desirable for *unrelated* reasons."[195] Similarly, in *Italian Colors*, the Court declared that an approach that insisted on the public policy underlying antitrust laws was "simply irrational."[196] And, in *Epic*, the majority repeated the general rejection of justice concerns, stating that in expressing concerns for workers' ability to enforce wage-and-hour laws, "the dissent retreats to policy arguments" that courts are "not free" to make.[197] The messages in all these examples go beyond applying an economic discourse to a noneconomic topic: together, they confront the legitimacy of arguments regarding justice, fairness, and public policy—once at the heart of legal debates regarding alternative dispute resolutions.

The dismissal of any reasoning that deviates from market logic is a signature move of the neoliberal project. Following cultural critic Henry Giroux it is dubbed the "disimagination machine"[198]: the apparatus neoliberalism uses to gain hegemony and stifle resistance by making all alternative worldviews unimaginable.[199] In the context of the arbitration debate, the alleged exclusivity of the economized discourse is directly aimed at the disimagination of the possibility of collectivism. Because according to economized logic class arbitrations do not make sense, and because no other analysis of the issue is considered legitimate, the capacity of individuals to resist corporate wrongdoing by coming together is "disimagined," making class arbitration inconceivable. But there is more. As the following section discusses, neoliberal strategies have been used not only to differentiate class arbitrations from individual arbitrations based on economic logic but also to demonize them.

C. *The Neoliberal Road to Separation*[200]

The decisions that constitute the revolution include strong rhetoric against class arbitrations. The assault starts by portraying these arbitrations as inferior according to market rationality: both "slower" and

194. Christian Neuhäuser, *TINA*, KRISIS, no. 2, 2018, at 15.

195. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351 (2011) (emphasis added).

196. *Italian Colors*, 570 U.S. at 234.

197. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018).

198. HENRY A. GIROUX, THE VIOLENCE OF ORGANIZED FORGETTING: THINKING BEYOND AMERICA'S DISIMAGINATION MACHINE 26–27 (2014).

199. WILSON, *supra* note 173, at 72.

200. The title of this section alludes to Friedrich Hayek's famous book, *The Road to Serfdom*, originally written in German and considered to be the fundamental text of the neoliberal project. *See* FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944).

"more costly" than individual arbitrations.[201] From there, it continues to presenting doubt regarding the authenticity and integrity of class arbitrations, describing them as "manufactured," first in *Concepcion*[202] and most recently in *Lamps Plus*.[203] And it gets harsher. The revolution's cases also portray class arbitrations as dangerous. In *Italian Colors,* the Court cautioned that if courts were obligated to ensure that a singular resolution is a viable option as a condition to enforcing a class arbitration waiver, the result would be a "litigating *hurdle*,"[204] which "would undoubtedly *destroy* the prospect of a speedy resolution."[205] Even more belligerent is the deliberate effort to associate collectivity with the specter of chaos. Allowing class arbitrations, wrote Justice Scalia in *Concepcion* for the first time, is "likely to generate procedural *morass*."[206] Then, proving that he intentionally used this strong rhetoric, he repeated the exact sentence in *Italian Colors*.[207] Next, to further spread the pronounced disdain towards class arbitration, both Justice Gorsuch in *Epic* and Chief Justice Roberts in *Lamps Plus* repeatedly emphasized the same threat of morass.[208] Together, the cases that regularly identify class arbitrations with the specter "morass" follow the neoliberal method of turning anything that contributes to the public good into "a metaphor for public disorder."[209] One can only hypothesize that Justice Scalia designed the legal phrase "[p]rocedural morass" to echo the neoliberal attack on the welfare state, which has been constantly presented as creating a "bureaucratic morass."[210]

Furthermore, revealing much of neoliberalism's relentless loyalty to corporations, the revolution's decisions further demonize class arbitrations by describing them as intentionally harming the corporations that are their typical defendants. Class arbitrations are portrayed, for example, as a tool utilized to bully corporations "into settling questionable claims,"[211] one that "unfairly 'plac[es] pressure on the

201. *E.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011); *see also* Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1416 (2019) (describing class arbitration by quoting *Concepcion*); *Epic*, 138 S. Ct. at 1623 (same); *Italian Colors*, 570 U.S. at 238 (same).

202. *Concepcion*, 563 U.S. at 348.

203. *Lamps Plus*, 139 S. Ct. at 1417–18 (quoting *Concepcion*, 563 U.S. at 348).

204. *Italian Colors*, 570 U.S. at 238–39 (emphasis added).

205. *Id.* (emphasis added).

206. *Concepcion*, 563 U.S. at 348 (emphasis added).

207. *Italian Colors*, 570 U.S. at 238 (quoting *Concepcion*, 563 U.S. at 348).

208. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018) (quoting *Concepcion*, 563 U.S. at 348); *Lamps Plus*, 139 S. Ct. at 1416 (quoting *Concepcion*, 563 U.S. at 348).

209. Henry A. Giroux, *Neoliberalism, Corporate Culture, and the Promise of Higher Education: The University as a Democratic Public Sphere*, 72 HARV. EDUC. REV. 425, 428 (2002).

210. DONNCHA MARRON, CONSUMER CREDIT IN THE UNITED STATES 91 (2009).

211. *Concepcion*, 563 U.S. at 350.

defendant to settle even unmeritorious claims,'"[212] while exposing them to "the risk of 'in terrorem' settlements."[213] However, given corporations' significant power advantage, this description of victimhood rings hollow and can be seen only as part of a robust anti-collective message.

Significantly, this fierce attack on class arbitrations is tightly linked to and serves as a leading illustration of neoliberalism's general assault on anything collective.[214] Awareness of this linkage is critical to developing a deeper understanding of the roots and real purpose of the revolution. To neoliberals, all acts of solidarity that can challenge the existing structure of power are unwelcome. Under neoliberalism, individuals should remain strictly focused on increasing their personal human capital, and thus, "they are not supposed to choose to construct strong collective institutions."[215] Indeed, as Bourdieu theorized, in its essence, neoliberalism is "a programme of the methodological destruction of collectives."[216]

But why do neoliberals so strongly object to individuals' efforts to cooperate? One evident reason is neoliberalism's aspiration to total hegemony. As part of imposing market rationality everywhere, neoliberals are highly committed to preserving and enhancing the current control of the strongest market actors. Accordingly, they are also committed to blocking any resistance by collectives of ordinary citizens, such as consumers or employees. From this perspective, a neoliberal worldview dictates supporting the efforts of corporations to insulate themselves from demanding legal confrontations that carry significant economic and reputational risks.

And yet, to more fully understand the resistance to collectivity, one needs to go deeper and interrogate the intellectual roots of neoliberalism and the way they have shaped influential neoliberal strategies that can shed light on the success of the arbitration. In her thorough study of the archives of one of the leading thinkers of neoliberalism, the late Nobel Laureate James Buchanan, historian Nancy MacLean recently offered an original explanation that goes to the theoretical origins of American neoliberalism. In general, her book, titled *Democracy In Chains*, details the centrality of Buchanan's work to the project of transferring to the United States the original of neoliberal ideas,[217] which emerged in the famous gathering in Mont Pelerin and were articulated in the writings of

212. *Epic*, 138 S. Ct. at 1632 (quoting Shady Grove Orthopedic Assocs., PA v. Allstate Ins., 559 U.S. 393, 445 n.3 (2010)).

213. *Concepcion*, 563 U.S. at 350.

214. *See, e.g.*, BROWN, *supra* note 34, at 153; WILSON, *supra* note 173, at 5.

215. *See* HARVEY, *supra* note 175, at 69.

216. Bourdieu, *supra* note 192 (emphasis omitted).

217. MACLEAN, *supra* note 154, at xviii (arguing that the Buchanan's lifetime work played a major role in saving neoliberal ideas from remaining a "dead-end fantasy").

economist Friedrich Hayek.[218] Aptly, Buchanan even referred to himself as the "American 'Hayek.'"[219]

Of particular relevance to the neoliberal assault on collectivity, MacLean's study exposes that neoliberal intellectuals often used the phrase "the collective order" as a cipher for the enemy of their goals.[220] The phrase referred to the risky ability of individuals, who are powerless when separated, to band together and make demands for legal and policy reforms that government officials would accept due to the strength of numbers.[221] The "collective order" is perilous because to satisfy the needs of the many would necessarily require the fewer wealthy to participate in funding the efforts while sacrificing their interests.

Accordingly, in 1956, when the University of Virginia asked him to chair its economic department and to found and lead the Thomas Jefferson Center for Political Economy and Social Philosophy, Buchanan suggested a mission statement that clarified that the new center would exclude those who seem to support "the coercive powers of the collective order."[222] He also later explained that the new center would aim to break "the powerful grip that collectivist ideology already had on the minds of intellectuals."[223]

MacLean's analysis suggests that what lies at the core of the neoliberal hostility to collective group action is fear of "the American people collectively."[224] In a defensive response, therefore, the neoliberal plan has been for many years to delegitimize and defeat collective acts. Buchanan's famous and highly influential public choice theory, for which he was awarded the Nobel Prize in economic sciences in 1986, offers a leading example of the intellectual effort to minimize the threat of group action. One of the theory's central innovations was a negative exposition of the very attempt of collectives to pursue their interests, a dynamic that the theory marked inadequate, not least by giving it a new name with a flavor of manipulation and greed: "rent seeking."[225] The fact that the public choice theory was presented and accepted as a groundbreaking academic work, as opposed to an ideological argument, helped to make it influential outside of economics departments, with a particular sway on

218. *See* DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS 2–3 (2012).

219. MACLEAN, *supra* note 154, at 137.

220. *Id.* at xxiii.

221. *See id.* at xxii.

222. *Id.* at 45 (quoting the private mission statement submitted by Buchanan).

223. *Id.* at 46 (quoting the private mission statement submitted by Buchanan).

224. *Id.* at 10.

225. *See* AMADAE, *supra* note 161, at 270 (explaining rent-seeking); *see also* Sophie Harnay & Alain Marciano, *Seeking Rents Through Class Actions and Legislative Lobbying: A Comparison*, 32 EUR. J.L. & ECON. 293, 300–02 (2011) (discussing the consequences for rent-seeking strategies).

legal analysis, mainly through the theory's adoption by the increasingly dominant law and economics movement.[226] The rational choice theory and the related game theory have similarly helped to shape anti-collective views in many disciplines. As political scientist S. M. Amadae argues in her book *Prisoners of Reason: Game Theory and Neoliberal Political Economy*, "collective action, public interest, voluntary cooperation, trades unions, social solidarity, and even voting are all irrational according to rational choice theory."[227]

Importantly, resistance to collectivity has not remained academic. Theories such as the public choice theory and the rational choice theory have had an immense impact in the real world, and their message that collective action is "inefficient" and "manipulative" eventually found its way to the Supreme Court and helped to bring about the arbitration revolution. Salient facilitators of the flow of ideas from universities to courts have been generous funding and massive organization-building activity by the financial elite that lead America's largest corporations with the leading example of the billionaire brothers David and Charles Koch. Sharing Buchanan's concerns regarding "the collective order," but understanding the limits of their direct political power under a democratic majority system,[228] the Koch brothers have spent decades "funding conservative economists and law professors, think tanks, and political groups."[229] In doing so, they seem to have followed Buchanan's important strategy that called for paying "attention to the *rules* rather than the *rulers*."[230] In MacLean's words:

> Only James Buchanan had also developed an operational strategy for how to get to that radically new society, one that took as axiomatic what both Buchanan and Koch understood viscerally: that the enduring impediment to the enactment of their political vision was the ability of the American people, through the power of their numbers, to reject the program.[231]

Additionally, and as part of paying attention to the "rules," the Koch brothers have also supported the advancement of Buchanan-like ideas through educating and training future rulemakers—from law students, through lawyers, to judges—and helping them secure influential

226. *See* TELES, *supra* note 166, at 121.

227. AMADAE, *supra* note 161, at 9–10.

228. MACLEAN, *supra* note 154, at 193.

229. Alex Kotch, *US Treasury Cites Koch-Funded Research in Critique of Consumer Protections*, INT'L BUS. TIMES (Oct. 27, 2017, 12:10 PM), https://www.ibtimes.com/political-capital/us-treasury-cites-koch-funded-research-critique-consumer-protections-2607138 [https://perma.cc/7SGQ-2FQL].

230. MACLEAN, *supra* note 154, at 184.

231. *Id.* at 193.

positions.[232] While this space is too limited to describe the many ways in which interested economic elites promote neoliberal ideas through law,[233] one example that particularly relates to the battle against collective actions and the arbitration revolution is worth highlighting. It shows that the hostility to collective actions expressed in the leading cases of the revolution is part of a concerted and well-planned effort to defeat collective actions by a combination of theory, money, and law.

The Justices who wrote the revolution's leading cases—Chief Justice Roberts, Justice Scalia, Justice Alito, and Justice Gorsuch—had significant exposure to the aversion towards collectivity, and their familiarity with the issue was not coincidental but a product of deliberate efforts. We already have seen that the Justices have long been connected with the Federalist Society.[234] What needs to be added here, to illustrate the pathways from theory to legal change further, is the issue of funding. To disseminate Buchanan-like approaches in a manner that can reach the rulemakers, the Koch brothers have offered direct and significant financial support to the Federalist Society, sponsoring the Society's efforts to organize gatherings in which market-based ideas would be exchanged and to promote committed participants to the judiciary.[235] In addition, to stretch their worldview to the bench, the Koch brothers also established their complex network of organizations and centers—sometimes referred to as "Kochtopus"[236] or "Kochland."[237] This network has offered members of the judiciary, including the abovementioned Supreme Court Justices, many opportunities to closely interact with theorists and business moguls in summer training sessions, seminars, fundraising events, and more.[238]

For example, in 2007, Justice Scalia took part in a "'political strategy and fund-raising' seminar" organized by the Koch brothers while the Federalist Society reimbursed all his expenses.[239] The ethical aspects of such participation attracted some criticism,[240] but for the current discussion, what matters more is mapping out how the goal of shielding corporations from collective challenges might have made its way from

232. *See id.* at 195.

233. *See, e.g.*, BROWN, *supra* note 34, at 151–73.

234. *See supra* Part II.

235. MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS 17 tbl.3 (2013) (listing the Koch family, via different foundations, amongst the leading contributors to the society).

236. MACLEAN, *supra* note 154, at 189.

237. CHRISTOPHER LEONARD, KOCHLAND: THE SECRET HISTORY OF KOCH INDUSTRIES AND CORPORATE POWER IN AMERICA (2019).

238. MACLEAN, *supra* note 154, at 195 ("[A] stunning 40 percent of the U.S. federal judiciary had been treated to a Koch-backed curriculum.").

239. BRUCE ALLEN MURPHY, SCALIA: A COURT OF ONE 426 (2014).

240. *See id.* at 426–27.

theory to revolution. On the same point, Buchanan's involvement with George Mason University (GMU) in general, and the history of the birth and rise of GMU's law school in particular, both offer another illuminating example that ties together theory (Buchanan), funding (Koch), and law (Justice Scalia). In the 1980s, after Buchanan joined GMU's economics department and brought with him the Center for the Study of Public Choice,[241] his presence came with "[l]iterally millions of dollars."[242] Subsequent to Buchanan's move to GMU, Charles Koch had the Institute for Humane Studies, which he controlled, follow.[243] Soon after, the head of the institute invited Buchanan to speak at the national conference of the Federalist Society and although it is not clear whether he accepted the invite, his theories were discussed many times during the Society's gatherings, where, as referenced earlier, the Justices leading the revolution, and especially Justice Scalia, were sometimes in attendance.[244]

The Koch family continued to support spreading Buchanan anti-collective ideas. In 1997, for example, it donated ten million dollars to the creation of the new and enlarged James Buchanan Center for Political Economy, explaining to a forum of research fellows that achieving reforms while being "greatly outnumbered" by the majority of citizens requires developing "winning strategies."[245] Similarly, in 2016, the Charles Koch Foundation added another ten million dollars to support renaming GMU's law school, itself an establishment committed to conservative law and economics thinking.[246] With the help of this donation, the law school that Henry Mann established then changed its name to the Antonin Scalia Law School.[247] In its announcement of the name-change the school also reported that the Kochs' contribution was supplemented by another gift of twenty million dollars from a donor who had contacted GMU via the executive vice president of the Federalist Society, Leonard Leo, whom the announcement described as "a personal

241. *Mason Remembers Nobel Laureate James M. Buchanan*, GEO. MASON U. (Jan. 11, 2013), https://www2.gmu.edu/news/1105 [https://perma.cc/BJ4Z-R6XJ].

242. MACLEAN, *supra* note 154, at 172 (quoting then-senior vice president of George Mason University).

243. *See* Matthew Baraka, *George Mason University Becomes a Favorite of Charles Koch*, AP (Apr. 1, 2016), https://apnews.com/613470e79eb64a5f9a4880996e0fd7c5/george-mason-university-becomes-favorite-charles-koch [https://perma.cc/B7WY-H7AP].

244. *See supra* note 170 and accompanying text.

245. MACLEAN, *supra* note 154, at xx, 242 n.13 (quoting Charles G. Koch, Address to a Fellows Research Colloquium: Creating a Science of Liberty (1997)).

246. For the history of the law school, and its importance in disseminating conservative ideology, see TELES, *supra* note 166, at 207–16.

247. *See Mason Receives $30 Million in Gifts, Renames Law School After Justice Antonin Scalia*, GEO. MASON U. (2016), https://www.law.gmu.edu/news/2016/scalia_school_of_law_announcement [https://perma.cc/KBK7-V6HM].

friend of the late Justice Scalia and his family."[248] Leonard Leo, others argued, is also the one who brought to the Supreme Court the other three Justices that have led the revolution, Chief Justice Roberts and Justices Alito and Gorsuch.[249]

While all the ties described above may amount only to a "circumstantial trail [that] leaves many open questions," to use MacLean's candid words,[250] the point here is mainly to illustrate the purposeful investment in diffusing anti-collective theories and a pro-corporate approach into the legal system, enough to empower the emergence of a new jurisprudence that would eliminate the ability of individuals to band together against corporations.

Much more directly, stalwarts of the Koch-supported Federalist Society openly sought to bring the revolution about via a variety of amicus briefs. Prior to the historic decision in *Concepcion*, for example, members of the Society were involved in filing four different amicus briefs calling for an unlimited affirmation of collective action waivers: on behalf of the Class Action Fairness Center, the Wireless Association, The Voice of the Defense Bar, and by a group of "Distinguished Law Professors."[251] Indeed, in an analysis of *Concepcion* published in the Federalist Society's journal, titled *Class Action Watch*, Professor Brian Fitzpatrick—to whom the Society awarded in the same year its lucrative Bator award[252]—opined that "the Supreme Court has just handed the business community its biggest victory in a very long time."[253] Fitzpatrick additionally predicted that "the decision could lead to the end of class actions against businesses across most—*if not all*—of their activities."[254] And, as subsequent cases of the revolution prove, he was right. Years of writing, educating, funding, and organizing eventually succeeded, awarding corporations a weapon against the loathed "collective order."

To summarize this detailed section, it is therefore possible to sketch in broad strokes the path from the development of neoliberal ideas in the United States to the most recent decision of the arbitration revolution. In

248. *Id.*

249. Terry Gross, *How One Man Brought Justices Roberts, Alito, and Gorsuch to the Supreme Court*, NPR (Apr. 12, 2017, 1:33 PM), https://www.npr.org/2017/04/12/523495201/how-one-man-brought-justices-roberts-alito-and-gorsuch-to-the-supreme-court [https://perma.cc/XR24-YJHH] (interviewing Jeffrey Toobin, a staff writer at *The New Yorker*).

250. MACLEAN, *supra* note 154, at 297 n.72.

251. AVERY & MCLAUGHLIN, *supra* note 235, at 93, 94.

252. *Brian Fitzpatrick Receives the Federalist Society's 2011 Bator Award*, VAND. U. (Mar. 7, 2011), https://law.vanderbilt.edu/news/brian-fitzpatrick-receives-the-federalist-societys-2011-bator-award/ [https://perma.cc/U94S-X24G].

253. Brian T. Fitzpatrick, *Did the Supreme Court Just Kill the Class Action?*, CLASS ACTION WATCH, Sept. 2011, at 1, 12.

254. *Id.* at 1.

the beginning, theories were developed and spread to convey that collective actions are irrational, coercive, and dangerous. Then, corporations started to use their market power, as well as market tools (contracts), to eliminate collective actions. Next, after some years of legal battles, the law was dramatically changed, compelling courts to enforce those restrictive contracts, regardless of their impact on access to justice. And most recently, it was decided that even corporations that did not try to prevent collective actions explicitly will be helped by the Court that made sure that from now on, judges and arbitrators will give arbitration clauses in standard contracts an interpretation that disallows group-action. Significantly, the leaders of the largest American corporations have carefully planned and generously funded all of the four stops along the road to separation. Overall, by actively helping corporations to isolate people, the majority of the Supreme Court added legal authority to a pro-corporation and anti-collective neoliberal ideology, further legitimizing its rationality and amplifying its already immense impact.

As if predicting all that, geographer David Harvey wrote in 2005 that "the neoliberal state is necessarily hostile to all forms of social solidarity that put restraints on capital accumulation."[255] He further explained that, if need be, the state will use its *legal* arm against collectives, resorting "to coercive legislation and policing tactics . . . to disperse or repress collective forms of opposition to corporate power."[256] The more profound investigation of the theoretical roots of resisting collective actions combined with the sketching of how those ideas were deliberately diffused into the Supreme Court perfectly matches Harvey's description: the arbitration revolution indeed has operated to "repress collective forms of opposition to corporate power." The coming Part asks: Repression at what price?

III. GENERATING AFFECTIVE POWERLESSNESS

As others have argued before,[257] and I have written elsewhere,[258] the arbitration revolution and the increasing ability of corporations to immunize themselves from liability that it fostered have many negative

255. HARVEY, *supra* note 175, at 75. Note that here again neoliberalism greatly differs from liberalism, especially the Rawlsian type of liberalism, which would have supported collective actions to promote individual interests, particularly when individual autonomy is at risk due to inequalities. *Cf.* Martin H. Redish & Clifford W. Berlow, *The Class Action as Political Theory*, 85 WASH. U. L. REV. 753, 764–79 (2007) (discussing the different theories that are relevant to the class action debate).

256. HARVEY, *supra* note 175, at 77.

257. *See, e.g.*, Glover, *supra* note 25, at 3054, 3057.

258. *See* Hila Keren, *Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity*, 2 CANADIAN J. COMP. & CONTEMP. L. 339, 345 (2016).

consequences. Those include a severe decrease in access to justice,[259] weakening of both the common law[260] and essential federal laws that rely on private civil litigation,[261] and, due to the accumulation of all of the previous concerns, general harm to equality and the rule of law.[262] However, recognizing the role of neoliberalism in shaping the anti-collectivist core of the revolution allows identifying additional damage: a pervasive *emotionally* corrosive effect that carries with it a long-term *social* risk.

To those interested in studying the impact of neoliberalism, these yet-to-be-noticed consequences—which arise outside of the conventional domains of law and economics—will not come as a surprise. After all, as mentioned earlier, Margaret Thatcher famously announced that the goal of disseminating neoliberal ideas has always been "to change the soul."[263] Moreover, critics of neoliberalism have long been cautioning that the neoliberal takeover includes significant and intentional influence on the emotions and that such control hurts our sociality.[264]

As argued in the previous Parts, the arbitration revolution has created a separation process that has been inspired by neoliberal theorists, executed and funded by organized corporate leaders, and embraced by the Supreme Court. This Part cautions that this separation process has a penetrating effect on the soul. It leaves people isolated from their peers and abandoned by their state. All alone, ordinary citizens are being put into a long-term condition of feeling powerless and helpless, too weakened to engage in resistance. The fact that such powerlessness perfectly aligns with the neoliberal goal of reaching hegemony suggests that the emotional consequences are far from accidental.

A. *Individualized Arbitrations and Neoliberal Individualization*

Decades of organized pressure to defeat collective actions, both in judicial and arbitral forums, have left people like Frank Varela with only one path of action: to pursue justice outside of courts and all alone. Intriguingly, while eradicating all other options, the decisions that constitute the revolution reformed even the name of this surviving option. In the middle of the revolution, after *Stolt-Nielsen*, *Concepcion*, and

259. *See, e.g.*, Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703, 704 (2012).

260. *See, e.g.*, Gilles, *supra* note 25, at 377 ("For the entire categories of cases that are ushered into [arbitration] . . . common law doctrinal development will cease.").

261. *See, e.g.*, David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 989 (2017) (explaining "how arbitration affects the implementation of statutes that are enforced through private civil litigation").

262. *See, e.g.*, Keren, *supra* note 258, at 395.

263. Interview by Ronald Butt with Margaret Thatcher, *supra* note 180.

264. *See, e.g.*, Keren, *supra* note 157, at 871–74 (explaining how the impact of neoliberalism in the affective arena threatens to fray our social fabric).

Italian Colors, the Court drifted away from the tradition of calling a non-class arbitration a "bilateral" arbitration.[265] Instead—and for the first time at the Supreme Court level—Justice Gorsuch introduced in *Epic* a new designation, repeatedly referring to a non-class arbitration as an "individualized" arbitration.[266] Shortly after, Chief Justice Roberts adopted this new labeling in the recent *Lamp Plus*, as well as other judges and scholars who wrote about the topic post-*Epic*.[267]

Like Shakespeare's Juliet, one may ask: "[W]hat's in a name?"[268] To which at least two replies are due, both relying on the broad recognition of the expressive power of law.[269] The first relates to the comparison between using "bilateral" and "individualized" to describe the only option left post-revolution. The adjective "bilateral," which literally means two-sided,[270] also denotes, when used in the context of arbitration, a dispute resolution process that is mutual, reciprocal, and consensual.[271] The use of "bilateral" thus encourages associating the path to redress that it describes with fundamental principles of justice. At the same time, "bilateral" also helps to conceal the typical gap of power between the parties to the standard contracts that forbid collective action, a gap that so clearly existed in cases like *Concepcion* and *Italian Colors*. For those reasons, using "bilateral" was a convenient linguistic choice for Justice Scalia, as he introduced for the first time a revolution that closes options

265. *See, e.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 338, 347–48 (2011) (using the word "bilateral" six times to refer to non-class arbitration).

266. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619–23, 1626, 1629, 1632 (2018) (describing this path of arbitration/proceedings/dispute resolution procedure as "individualized" fifteen times).

267. Until *Epic*, no decision of the Supreme Court used the term "individualized arbitration." The term appeared in lower courts for the first time in 1997. *See* Randolph v. Green Tree Fin. Corp., 991 F. Supp. 1410, 1424 (M.D. Ala. 1997), *rev'd*, 178 F.3d 1149 (11th Cir. 1999), *and aff'd*, 244 F.3d 814 (2001). Based on a Lexis-Advanced search, from that time and until 5/21/2018 (the date of the Court's decision in *Epic*), for more than *two decades*, the term was used by lower courts thirty-seven times. Then, in the short time post-*Epic* and until 8/19/2019 the term was used in the Court's decision in *Lamp Plus* as well as in additional forty-two decisions of lower courts. This rapidly increasing frequency offers another demonstration of legal dissemination of neoliberal logic.

268. WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2 (arguing that the fact that Romeo's last name associates him with a rival family should not matter because "[t]hat which we call a rose [b]y any other name would smell as sweet").

269. *See, e.g.*, Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 607–08 (1998); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2022 (1996).

270. *Bilateral*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/bilateral. [https://perma.cc/7VA4-CUX8].

271. All synonyms suggested by the web and Microsoft Word versions of thesauri, respectively. For the online version, see *Bilateral*, THESAURUS.COM, https://www.thesaurus.com/browse/bilateral?s=t [https://perma.cc/5S3C-LHSQ].

formerly open for all. Moreover, and related to the previous Part, such rhetoric illustrates the stealth "winning strategies" that Buchanan recommended and Koch institutionalized.[272] Conversely, substituting "bilateral" with "individualized" has none of the above strategic advantages as the latter word highlights rather than obscures the solitude that is inherent to the non-collective path to redress.

The second reply relates to the difference between describing the single remaining way to seek justice as "individualized" and not merely (as numerous courts have done) as "individual."[273] Interestingly, Justice Gorsuch added the adjective "individualized" to the discussion in *Epic* after the lower court that decided the dispute, the U.S. Court of Appeals for the Seventh Circuit, limited itself to the language of "individual" arbitration.[274] The increasing use of the word "individualized" is a particularly meaningful rhetorical choice in light of the neoliberal background of the revolution. It is similarly crucial if one wishes to better understand how the legal change operates to further disseminate the neoliberal common sense.

Most generally, breaking social life into individualized segments is a core idea in neoliberalism. As political scientist Wendy Brown explained, neoliberalism "solicits the individual as the only relevant and wholly accountable actor."[275] The goal of neoliberal individualization is not only to separate people from each other out of the aversion to collectives mentioned before. It is also to draw a clear dividing line between the self and its environment, disconnecting people and their experiences from any social context. In this way, neoliberalism suppresses individuals' ability to link their fate to the social order or to implore assistance from social institutions or the state. It makes, in short, "[s]elf and society . . . mutually exclusive,"[276] echoing Margaret Thatcher's infamous declaration that there is no justification for government help because "[t]here is no such thing as society."[277]

It is worth recognizing here that neoliberal individualization is markedly different from liberal individualism. Individualism emerges from a celebration of individuality that is associated with agency and autonomy, and it leaves each person to self-determine her needs and goals. By contrast, individualization is an *imposed* process that ignores

272. MACLEAN, *supra* note 154, at xx.

273. While many lower courts have exclusively used "individual" rather than "bilateral" or "individualized," none of the revolution cases have done that. *E.g.*, Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016), *rev'd*, 138 S. Ct. 1612 (2018).

274. *Id.*

275. BROWN, *supra* note 34, at 133.

276. WILSON, *supra* note 173, at 4.

277. Interview by Douglas Keay with Margaret Thatcher, Prime Minister, U.K., in London, U.K. (Sept. 23, 1987), https://www.margaretthatcher.org/document/106689 [https://perma.cc/US6Y-FKCM].

private inclinations and wishes and generally cares very little about the individual herself. An important part of the individualization process is the way neoliberal rationality interrupts autonomy, dictating to all people that their primary goal, as they approach *any* area of their life, should be to maximize their human capital.[278] The purpose of such a self-optimization project is to endlessly attempt to win what neoliberalism frames as an ongoing competition against other individuals over scarce resources.[279] Individualization also denies the universal vulnerabilities that make us inevitably interdependent while rendering irrational the natural yearning for giving and receiving (free) care.[280]

Accordingly, when Justice Gorsuch repeatedly used the word "individualized" he revealed that even when they are included in signed contracts, collective action waivers may not truly be mutual and consensual (as suggested by "bilateral") or the product of individual choice (as indicated by "individual"). Instead, what comes to the fore thanks to Justice Gorsuch's new articulation is the *forced* and *involuntary* nature of the process that pressures claimant to battle wrongdoing all by themselves. Similarly, when Chief Justice Roberts followed Justice Gorsuch's discourse in *Lamps Plus*, he brought to light the fact that even when arbitration clauses do not include waivers, courts nonetheless are going to *compel* claimants to fight alone by reading these clauses *as if* they were limiting collective action. To call the resulting narrow path of access to justice "individualized arbitration" is, therefore, to concede that "individualization is a fate, not a choice."[281]

It is certainly possible that neither Justice Gorsuch nor Chief Justice Roberts was aware of the critical analyses of the neoliberal "relentless process of individualization,"[282] as they each shifted to using the language of "individualized" arbitration. They surely did not adopt this new phrasing with out of a wish to expose the forced nature of the single path they have left open for claimants. However, at the same time, the ease with which the word "individualized" entered the conversation despite its nonconsensual tone can teach us something about how far along the revolution had already been by the time the decisions in *Epic* and *Lamps Plus* were written. It suggests that by 2018, seven years post-*Concepcion*, and after the election of President Donald Trump resulted in a conservative control of the Court, the Justices felt confident enough to forego previous efforts to "market" individual arbitration as something that, from claimants' perspective, might be favorable or at least fair.

278. BROWN, *supra* note 34, at 31–32, 34.

279. SAM BINKLEY, HAPPINESS AS ENTERPRISE: AN ESSAY ON NEOLIBERAL LIFE 23 (2014).

280. WILSON, *supra* note 173, at 5.

281. ZYGMUNT BAUMAN, LIQUID MODERNITY 34 (2000).

282. Mark Davis & Zygmunt Bauman, FREEDOM AND CONSUMERISM: A CRITIQUE OF ZYGMUNT BAUMAN LIQUID MODERNITY 93 (2008).

Moreover, in both *Epic* and *Lamps Plus*, the Justices not only described the claimants as subject to an "individualized" process, but they also adopted another signature move of neoliberalism and "responsibilized" these claimants, holding them solely and entirely responsible to their fate.[283] First in *Epic* and then in *Lamp Plus*, the individualized employees were further framed as the only ones responsible for being left without an effective path of redress simply because they "agreed" to arbitrate. For example, in *Epic*, Justice Gorsuch went as far as blaming the individual employee, Mr. Morris, for daring to sue Ernest and Young "*despite* having agreed to arbitrate claims against the firm."[284] In a similar tone, Chief Justice Roberts stated in his description of the facts in *Lamp Plus* that "[l]ike most Lamps Plus employees, Varela had signed an arbitration agreement when he started work at the company. *But* after the data breach, he sued Lamps Plus . . . ."[285] It appears that because both Justices had already conceded that the employees were limited to an "individualized" arbitration they had no particular need to cope with Justice Ginsburg's dissent that in both cases tried to remind everyone that the employees had not truly agreed to anything but rather had faced a "Hobson's choice" to "accept arbitration on their employer's terms or give up their jobs."[286]

And yet, even if the adoption of the "individualized" modifier was not aimed at illuminating the true nature of non-class arbitration, its appearance can help seeing that by using the power of the legal system, neoliberalism individualizes even the ways humans cope with inevitable crises in their lives, such as the scams that harmed the employees in both *Epic* and *Lamp Plus*. Limited to "individualized" solutions, each person learns that when in trouble, she cannot count on anyone but herself. Ironically, the discussion above shows that as part of the neoliberal project, corporations and the Court have *acted together* in the last few decades to create a world defined by intense separation and isolation. What are the consequences of living in such a world?

B. *The Emotional Consequences of Individualization*

Importantly, neoliberalism is not only a top-down project led by corporations and their avid supporters. Much of its success to reach people of all political persuasions relates to the fact that we have all internalized the neoliberal logic until it feels our own, sometimes without

283. *See, e.g.*, BROWN, *supra* note 34, at 133 (explaining how people are being "responsibilized" because neoliberalism, for its own political goals, "solicits the individual as the only relevant and wholly accountable actor").

284. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1620 (2018) (emphasis added).

285. Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1413 (2019) (emphasis added).

286. *Epic*, 138 S. Ct. at 1636 n.2; *Lamp Plus*, 139 S. Ct. at 1421 (quoting *Epic,* 138 S. Ct. at 1636 n.2).

even having full awareness of its origins. This internalization process is itself a product of a neoliberal strategy. As sociologist Sam Binkley explains it: "Preferring not to act on subjects directly" and seeking to "govern minimally" the neoliberal project "brings about *specific changes in its subjects*. . . ."[287] To use only one simple example, many think and say that they need to "invest" more time in themselves, their health, or their relationship with others, accepting the economic dynamics of calculating investments and returns without noticing the structural limitations on their time (such as due to having to work for long hours).[288] Some even invest actual money in measuring and ranking their performance in these noneconomic spheres, using a rapidly growing marketplace of products designed for such tasks.[289] Through such an internalization process, the neoliberal worldview disseminates itself by working from within.[290]

Eventually, coming at us from many external sources *and* springing internally, the neoliberal message ends up influencing everything in our lives, including not only well-calculated big decisions such as what to study and where, but also, for example, the way we express ourselves. A particularly relevant example is found in longitudinal studies of written texts in the United States and Norway that demonstrate how with the rise of neoliberalism during the last few decades the frequency of words related to collective solidarity (e.g. "obliged" or "common") decreased, while the frequency of words pertaining to individual self-promotion (e.g., "choose" or "entitlement") increased.[291] Importantly, with this penetrating power neoliberalism also influences our emotional life.

Accordingly, this section argues that the inability to seek justice together with others either in courts or in arbitration creates a severe sense of isolation that produces intense feelings of powerlessness and helplessness. Such lasting emotions are individually and socially harmful much beyond the arbitration-controlled contractual arena: they deplete individual and social resilience in all areas of life and stand to produce despair and apathy that would further enhance the general social disconnect produced by neoliberalism.[292]

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287. Sam Binkley, *The Emotional Logic of Neoliberalism: Reflexivity and Instrumentality in Three Theoretical Traditions*, *in* THE SAGE HANDBOOK OF NEOLIBERALISM, *supra* note 158, at 589 (emphasis added).

288. *See* Keren, *supra* note 157, at 866.

289. *See generally id.* at 864–71 (describing how neoliberalism has changed the conceptualization of emotions).

290. *Id.* at 866.

291. Glenn Adams et al., *The Psychology of Neoliberalism and the Neoliberalism of Psychology*, 75 J. SOC. ISSUES 189, 194 (2019).

292. WILSON, *supra* note 173, at 153 ("[L]iving in [neoliberal] competition breeds social alienation and disconnection at both the individual and social level.").

Illuminating the emotional consequences of ousting collective actions and leaving people to fend for themselves is an intricate task. Part of the complexity is that this separation project has culminated, as we have seen, only recently and in an intentional and stealthy way, which makes evidence scant. Another complication comes from the general inclination to ignore the emotions when analyzing legal issues.[293] As a result, despite the richness of scholarly work studying and criticizing the arbitration revolution, no attention was given to the possibility that it has a long-term impact on people's emotions.

And yet, a notable exception recently appeared in the context of employment contracts when an employee explicitly expressed in a published interview the emotional impact of being subject to a class action waiver. The interviewed employee stated: "The employment class action waiver *affected me emotionally* as I felt *powerless* in the organization. I felt *isolated* from others . . . ."[294] This direct statement offers a critical starting point, and it indeed begins to substantiate the considerable emotional toll that the neoliberal attack imposes on collective actions. A 2017 psychological experiment provides further direct support, reporting that exposing people to information regarding the effect of arbitration clauses generated "negative feelings toward binding arbitration."[295] What follows is a detailed study of less direct evidence. The findings strongly support the above employee's account and particularly demonstrate how denying access to collective legal actions can produce the powerlessness that the interviewed employee reported.

1. Reports by Class Action Participants

People who did manage to get involved in class action have reported an array of positive emotions. Their reports strongly suggest that by banning class actions, corporations, and the courts that support them, deprive people of such valuable affective effects. The positive impact of engagement in class actions can be gleaned from a set of interviews conducted by Professor Stephen Meili with active representatives of class actions (often called "named plaintiffs") and their lawyers. Building on previous work by Professor Bryant Garth,[296] Meili's interviews demonstrate a general "sense of empowerment" that comes from the

293. *See* Kathryn Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2034 (2010).

294. Matthew B. Seipel, *The Strong Do as They Can: How Employment Group-Action Waivers Alienate Employees*, 7 AM. U. LABOR & EMP. L.F. 1, 2 (2017) (emphasis omitted) (quoting an unnamed Software Engineer).

295. Quintanilla & Avtgis, *supra* note 32, at 2128.

296. *See* Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26 LAW & SOC'Y REV. 237, 237 (1992).

involvement in class actions.[297] As part of such broad empowerment, interviewees reported feeling capable, worthy, influential, effective, and proud. For example, they felt that class actions gave them, despite being "little people," the rare ability "to take on large corporate interests."[298] Similarly, they described feeling "satisfied" because they had made a difference and had been successful in bringing about change.[299] As one plaintiff said, "[T]he point was made . . . the next time around [debt collectors] will look more in depth at what they're sending out . . . ."[300]

Moreover, some interviewees have highlighted the potential of feeling self-validation by the process. To illustrate, one named plaintiff who expressed deep disappointment when "his" class action was *not* certified explained that certification would have meant that participants "could have been somebody."[301] Significantly, much of the empowerment-related emotions were experienced in the face of a threat to resilience. Interviewees repeatedly contrasted their emerging positive feelings with being previously disempowered and disrespected by the corporations they took action against. They described how being part of a class action activity helped them survive humiliation and restore self-value after having been made to feel "insignificant"[302] or even like "dirt."[303] Such a description illuminates how collective actions not only offer a practical solution to limited resources but also offer an essential emotional coping mechanism.

Similarly, class actions function at the emotional level by offering a healthy mode of coping with anger and other intense negative emotions caused by the wrongdoing. For example, for several named plaintiffs the process allowed them to "air private grievances."[304] Likewise, one attorney reported that the procedure offered a method for plaintiffs "to do something" about feeling angry.[305] In other words, participants found in class actions a way to "channel" anger into a much more productive path.[306] Their experiences accord with other scholarly work of law and emotions theorists that more generally explained the way law could assist in positively channeling emotions, for example, in the context of

297. Stephen Meili, *Collective Justice or Personal Gain? An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 84 (2011).

298. *Id.* at 90.

299. *See id.* at 114–18.

300. *Id.* at 116.

301. *Id.* at 97 (quoting Telephone Interview 30043 (Sept. 30, 2009)).

302. *Id.* at 101 ("And they don't like being told that they're insignificant . . . ." (quoting Telephone Interview 30020 (Feb. 3, 2009))).

303. *Id.* at 93 ("In my opinion, just my opinion, we're real people here and we're not worth dirt." (quoting Telephone Interview 30039 (Nov. 3, 2009))).

304. *Id.* at 91.

305. *See id.* at 107 (quoting Interview 30011 (Oct. 24, 2008)).

306. *Id.* at 93.

international tribunals convened in response to episodes of genocide.[307] As Professor Martha Minow has argued, such tribunals may turn consuming grief and rage toward the more concrete and socially attainable goal of securing justice in relation to specific perpetrators.[308]

Most relevant to the social aspects of life under forced separation, many of the named plaintiffs emphasized that what motivated them to invest their time and energy in the collective process, and what made them eventually feel empowered by it, was not only and not even mainly self-interest.[309] Because success is far from being guaranteed, and even a win of a class action frequently means only a modest tangible reward, participants emphasized first being driven and later feeling rewarded by something else.[310] They described their motivation and satisfaction as related to being engaged in "protecting the public"[311] or representing "the people who had been harmed."[312] Some even expressed particular care for class members "who were [more] vulnerable."[313] Confirming the authenticity of these reported sentiments and explaining their importance, class action lawyers stated that the best class representatives are those who "care for something beyond their self-interest."[314] Given such emphasis on the unselfish drive to collaborate, it is worth noting that many studies have shown that engaging in other-regarding behaviors and experiencing other-oriented positive emotions are associated with greater wellbeing.[315] Thus, understanding class actions as expressions of prosocial motivations explains much of the general sense of empowerment reported by partakers.

Furthermore, contributors to class actions have also associated their activity with a sense of moral adequacy. Blending the value of prosocial behavior and morality, they described, for instance, a feeling that they "were doing the right thing for hopefully a lot of people."[316] Contributors also framed their class action as a battle of right and wrong, attributing their satisfaction to the fact that "'right' won out."[317] Needless to say that

307. Abrams & Keren, *supra* note 293, at 2054 (defining a variety of ways in which law influences emotions and describing in this context how "[t]he law can also work to *channel* or *moderate* emotions that are already being experienced by a particular person or group").

308. *See* MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 52–90 (1998); Abrams & Keren, *supra* note 293.

309. *See* Meili, *supra* note 297, at 88–89.

310. *Id.* at 89–96.

311. *Id.* at 87.

312. *Id.* at 94 (quoting Telephone Interview 1018 (Dec. 12, 2008)).

313. *Id.* at 89.

314. *Id.* at 103 (quoting Telephone Interview 1012 (Nov. 17, 2008)).

315. *See, e.g.*, Stephen G. Post, *Altruism, Happiness, and Health: It's Good to Be Good*, 12 INT'L J. BEHAV. MED. 66, 66 (2005).

316. Meili, *supra* note 297, at 95 (quoting Telephone Interview 30032 (July 28, 2009)).

317. *Id.* at 117.

participants' view of class actions as morally valuable stands in sharp contrast to their demonized portrayal in the cases constituting the arbitration revolution. Even more importantly, the reported satisfaction from doing the right thing reveals that participants in class actions not only care for other claimants who were similarly harmed but also care about maintaining just social order.

For all those reasons combined, people who took part in class actions often stressed that for them, participation meant far more than using a procedural tool. They have defined class actions as "consumers' only recourse"[318] and as "the only way" to cope with corporate wrongdoing.[319] Indeed, even though emotions were not the focus of Meili's study, he found it necessary to emphasize "how many named plaintiffs see the class action as their *last best hope* of holding corporations accountable."[320] Accordingly, these reported sentiments suggest that involvement in class actions was the only thing that saved participants from feeling helplessness and even despair.

All in all, when they are read with special attention to emotions, the statements of Meili's interviewees offer a rare glimpse into the emotional world of those involved in class actions. Recognizing the positive emotions coming from such involvement also sheds light on what it would *feel* like to live in a world without any collective legal recourse. Instead of feeling caring, moral, empowered, and proud, people may remain trapped in their initial anger while feeling disempowered by their inability to do anything about it. In other words, Meili's interviewees reveal emotions that corroborate the feelings of the employee cited earlier, who—due to being subject to a class action waiver—reported feeling powerlessness and isolation.[321] Most importantly, Meili's interviews also help to reconceptualize class action activity as an act of care and as a form of social activism that aligns with morality and justice. Such new understanding provides a way to resist the hostile neoliberal message—often amplified by the Justices responsible for the arbitration revolution—according to which collective actions are driven by selfish greed and a desire to a desire to achieve "'in terrorem' settlements" of "questionable claims."[322]

Finally, focusing on the emotions that drive collective actions and are produced by them helps in understanding how natural and robust the drive to band together is, especially when personal resilience is so evidently insufficient. A new study by Professors Andrea Chandrasekher

318. *Id.* (quoting Telephone Interview 1018 (Dec. 12, 2008)).

319. *Id.* at 118 (quoting Telephone Interview 30034 (Sept. 25, 2009)).

320. *Id.* at 117 (emphasis added).

321. *Cf.* Seipel, *supra* note 294, at 2 (noting how one software engineer felt powerless and isolated as a result of the employment class action waiver).

322. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 350 (2011).

and David Horton further validates this point.[323] It reveals that as the arbitration revolution has progressed and has blocked access to class arbitrations, claimants yearning for justice have found a new way to band together, which the authors call "class action-style cases."[324] According to the study, in this way hundreds of seemingly individual actions that share identical facts and claims are brought against the same wrongdoer and are all managed by the same lawyers.[325] For example, the study reports that in one case, the same law firm filed on the same day "1,354 employment cases against Macy's in the AAA."[326] Although the authors criticize this new development, their empirical findings tell a story that matches the testimonies of Meili's interviewees: that people *feel* a need to band together and will make much effort to act in concert against injustice.

2. Consumers' Complaints Websites

Both the existence and the content of consumer-created complaint websites can illustrate how corporate wrongdoing generates a painful sense of powerlessness that is followed by a rise of need to alleviate the pain by creating solidarities with others who have similarly suffered. The websites offer a dense description of the helplessness that comes from having to face big corporations all alone. First and foremost, such websites demonstrate a constant quest for coping with wrongdoing collectively: by communicating with others, exchanging information and ideas for solutions, and considering and planning engagement in a variety of collective actions. And, with particular relevance to the current discussion, a salient place within this effort to band together is saved in these websites to hopes and attempts to use *legal* measures and bring about collective actions.[327]

Marketing scholars James Ward and Amy Ostrom conducted a study of forty consumer-constructed websites. The study reported that what motivates consumers to create complaint websites or engage in their operation are feelings of isolation and powerlessness as a result of corporate wrongdoing.[328] For example, the study cited one aggrieved consumer who wrote: "If things go seriously wrong you will be totally on

323. *See* Chandrasekher & Horton, *supra* note 33, at 26–50.

324. *Id.* at 55 (using and describing the term).

325. *Id.* at 54.

326. *Id.* at 55.

327. For many comments against SLS on Complaints Board, see *SLS – Class Action Suit*, COMPLAINTSBOARD, https://www.complaintsboard.com/complaints/sls-c313430.html#comments [https://perma.cc/VEU7-8EV8], which includes an example of one consumer writing: "How can we all be a part of this CLASS ACTION LAWSUIT? pLEASE enlighten us."

328. *See* James C. Ward & Amy L. Ostrom, *Complaining to the Masses: The Role of Protest Framing in Customer-Created Complaint Web Sites*, 33 J. CONSUMER RES. 220, 220 (2006).

your own."[329] More generally, Ward and Ostrom noted that "[c]onsumer dissatisfaction has long been regarded as primarily a lonely experience."[330] Importantly, the loneliness that the coauthors described in their study echoes the feeling of isolation expressed by the employee cited earlier, who found himself limited by a class action waiver.[331]

Another interviewee in Ward and Ostrom's study stated: "us 'little people' seem to have no recourse!!!"[332] Note that this last statement is remarkably identical to the sentiments of Meili's interviewees, who also reported resorting to collective action to cope with being made to experience themselves as "little people" and who also felt that they had no other recourse.[333] This matching choice of words suggests how characteristic is the link between powerlessness and isolation and how common it is for people interacting with big corporations to feel disempowered and as a result to feel a pressing emotionally driven need to come together. It also explains why when coming together is forbidden, like in the case of the employee cited earlier, the result is experiencing similar emotions and referring to them explicitly as isolation and powerlessness.

Intriguingly, founders of and participants in consumers' complaints websites frequently express a strong belief that, pursuant to corporate aggression, *collective* action is the exclusive coping mechanism and the only way to fight the paralyzing effect of powerlessness.[334] On this point, Ward and Ostrom's study quoted, for example, a disgruntled customer of Allstate who stated: "If we don't help each other out, we're all potential victims, but there is *strength in numbers*."[335] Similarly, another frustrated customer, this time of United Airlines, reportedly asserted: "We must all work together if we have any chance of making a difference. Let's *get together* and make a stand United!"[336] To tie these quotes to the previous Part, note how they directly clash with Buchanan and Koch's fear of the power of numbers and people's ability to get together.[337] More generally, Ward and Ostrom found that 85% of the site creators encouraged others to join their efforts by adopting a website design that includes the ability

329. *Id.* at 224.

330. *Id.* at 228.

331. Seipel, *supra* note 294, at 2.

332. Ward & Ostrom, *supra* note 328, at 226.

333. *See* Meili, *supra* note 297, at 90.

334. *See* Ward & Ostrom, *supra* note 328, at 221 ("[I]ndividuals may feel impotent to affect the large institutions that are often targets of protest.").

335. *Id.* at 226 (emphasis added).

336. *Id.* (emphasis added).

337. *See supra* note 231 and accompanying text.

to add and share comments and stories.[338] Significantly, 45% of them also expressly called for acting collectively.[339]

Most importantly to the discussion of the arbitration revolution, consumers' complaint websites reveal that when consumers imagine joining forces against the business that harmed them, they often envision using the law and specifically initiating class actions. In one leading site, tellingly titled the Complaint Board,[340] many borrowers have contested and protested long years of exploitation by a specific lender: Specialized Loan Services (SLS). For example, expressing both the powerlessness of confronting SLS all by herself and her desperate desire to unite with others specifically through a class action, one borrower stated: "I am a single mother with 3 children. Please let us all get together and make this into a large if not the largest *class action suit* ever."[341] Likewise, Ward and Ostrom's study described a consumer who was in "tears," having realized she is not alone in her battle and asked: "Can we bring *a joint suit* against this fraudulent company?"[342] Another consumer cited in this study, named Karla, expressed a similar wish, asking: "Can we get together? Go to the media, or *a class action suit*???"[343] Meaningfully, such explicit yearning for class actions coming from consumers' websites mirrors and reinforces the positive emotions that the participants of class actions in Meili's interviews expressed.

All these voices together—the employee who directly expressed feelings of powerlessness due to inability to initiate class actions, Meili's interviewees who took part in class actions, and the consumers who so explicitly make online wishes for class actions—present a clear quest for coming together in response to being harmed. They reflect a reality in which when individuals feel powerless to cope with wrongs all by themselves, they tend to handle the situation by searching for an escape from this paralyzing sense and naturally seek to establish coalitions with similar others. Then, as an essential part of this prosocial coping mechanism, people tend to turn to the law, imagining a class action as one of the most effective ways out of their powerlessness.[344] All of that

338. *See* Ward & Ostrom, *supra* note 328, at 226.

339. *Id.*

340. *See SLS – Class Action Suit*, *supra* note 327; *see also* Alex, *Best Complaint Websites 2018*, MEDIUM (Mar. 7, 2018), https://medium.com/@complaintlinealex/best-complaint-websites-2018-3f1f23b61cdf [https://perma.cc/4BWJ-7MBZ] (listing and reviewing leading complaint websites).

341. MR.Hasla, Comment to *SLS – Class Action Suit*, COMPLAINTSBOARD (Dec. 15, 2012) (emphasis added), https://www.complaintsboard.com/complaints/sls-c313430.html#comments [https://perma.cc/VEU7-8EV8].

342. Ward & Ostrom, *supra* note 328, at 227 (emphasis added).

343. *Id.* (emphasis added).

344. *See* Meili, *supra* note 297, at 131 ("[T]he role of named plaintiff itself provides a sense of importance and empowerment . . . .").

speaks volumes as to the magnitude of the emotional cost of taking away from those who already feel powerless their primary method of coping: the collective action option. As we shall now see, the study of emotions offers additional support to this observation.

3. The Affective Dimensions of Isolation and Powerlessness

While isolation and powerlessness can be treated as cognitive descriptions of factual conditions, it is crucial to acknowledge their emotional, sometimes called "affective," side.[345] Scholars interested in emotions in a variety of disciplines have linked alienation and powerlessness, describing them as "intra-psychic mental states."[346] They have also stressed the need to understand powerlessness "in terms of subjective sentiments."[347] Without diving into nuanced distinctions, common among theorists of emotions, between emotions, affects, feelings, and other parallel terms, what is significant for the current discussion is to notice that a meaningful part of what the interviewees in all the settings described above had voiced relates to the affective (or emotional) dimensions of their experiences. "Hearing" their voices as expressing emotional states is central to improving our understating of the consequences of the arbitration revolution.

Once the affective side of powerlessness is better recognized, it is vital to illuminate some of its leading emotional components further to grasp why feeling powerless can be painful and create the need to overcome the pain by seeking collective action. In his extensive exploration of affective powerlessness (which he calls subjective powerlessness), sociologist Warren TenHouten explains powerlessness as an emotional state that includes several basic emotions that are each unpleasant on its own.[348] For example, his account presents sadness as part of powerlessness and explains that feeling subjected to external dominance, at the expense of being able to control one's reality personally, tends "to increase sadness and clinical-level depression."[349]

Additionally, TenHouten explains that fear is also involved in feeling powerless, emerging as a response to the realization that actions of a powerful agent are, or may become, damaging to the wellbeing of the powerless agent.[350] Social hierarchy—such as the one existing between

345. *See* Warren D. TenHouten, *The Emotions of Powerlessness*, 9 J. POL. POWER 83, 111 (2016) ("[P]owerlessness is a sentiment that has both cognitive and affective aspects.").

346. *Id.* at 84.

347. Melvin Seeman, *Sentiments and Structures: Strategies for Research in Alienation*, *in* 96 ALIENATION, COMMUNITY, AND WORK 17, 21 (Andrew Oldenquist & Menachem Rosner eds., 1991).

348. *See* TenHouten, *supra* note 345, at 86.

349. *Id.* at 86–87.

350. *Id.* at 87.

corporations and their consumers and employees—can generate such fear as soon as the possibility of wrongdoing by the dominant party arises.[351] Pertinent to legal disputes, even the prospect of having to confront the stronger party, especially alone, may induce fear relating to the risks of both defeat and retaliation.[352] For example, in his influential study of social power, political sociologist John Gaventa described how powerless coal miners at the Appalachian Valley were afraid to complain and protest against their working conditions out of fear for their lives, jobs, and homes.[353]

What is worse, the fear in powerlessness is often associated with anxiety due to the lack of perceived ability to cope with the threat.[354] Such anxiety may have additional debilitating consequences.[355] Finally, powerlessness sometimes brings shame about, and even humiliation, both due to the inability, perceived or actual, to fend off the pressures of those with power advantage.[356] As one scholar observed: "There is no more humiliating experience than to have one's relative lack of power in relation to another continuously rubbed in one's face,"[357] concluding that "[p]owerlessness activates shame."[358]

Appreciating how unpleasant is the affective experience of powerlessness, especially given the other negative emotions it entails, it is easier to comprehend how it induces a natural, perhaps even inevitable, response directed at alleviating the pain.[359] And, since the pain is coming from a sense of diminished control, the spontaneous reaction is an attempt to restore some power.[360] Indeed, a leading theory in social psychology, "the theory of psychological reactance," holds in general that "a threat to or a loss of a freedom motivates the individual to restore that freedom."[361]

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351. *See id.* ("Out of prudence, fear, and the desire to curry favor, public performances of the powerless are often shaped to appeal to the expectations of the powerful, while accepting the social order's status quo as natural and inevitable." (citation omitted)).

352. *See id.* ("The prospect of challenging dominant elites can result in fear of defeat and subsequent reprisals.").

353. JOHN GAVENTA, POWER AND POWERLESSNESS 205–06 (1980).

354. *See* TenHouten, *supra* note 345, at 92.

355. *Id.*

356. *See id.*

357. GERSHEN KAUFMAN, SHAME: THE POWER OF CARING 23 (3d ed. 1992).

358. *Id.* at 197.

359. *See* TenHouten, *supra* note 345, at 94–95 (discussing responses elicited from fear or embarrassment and the subsequent attempts to minimize those responses).

360. *See id.* at 87; Derek D. Rucker & Adam D. Galinsky, *Desire to Acquire: Powerlessness and Compensatory Consumption*, 35 J. CONSUMER RES., 257, 258–59 (2008).

361. SHARON S. BREHM & JACK W. BREHM, PSYCHOLOGICAL REACTANCE: A THEORY OF FREEDOM AND CONTROL 4 (2013); *see also* Benjamin D. Rosenberg & Jason T. Siegel, *A 50-Year Review of Psychological Reactance Theory: Do Not Read this Article*, MOTIVATION SCI., Dec. 21, 2017, at 1 (discussing Brehm's theory holding that when a person's freedom of behavior is threatened, she is "motivated to restore it").

In the context of consumption, for example, researchers have argued based on experiments that "feeling powerless is often an aversive state that will lead consumers to attempt to attenuate or alter this state."[362] Accordingly, efforts to band together with others to counter wrongdoing by a stronger entity should be understood as an effort to escape feelings of powerlessness and restoring some control via collective actions.

However, when restoring control is impossible, as it is in the world recently created by the arbitration revolution, an opposite psychological response is likely to emerge. Being trapped in continuous powerlessness and imposed isolation, people may internalize the external legal rule and develop learned helplessness.[363] According to this influential psychological theory, when people are exposed to a prolonged (or permanent) inability to control external events or conditions by taking action, they become "prone to learn a passive or 'helpless' action orientation."[364] The broader implications of the possibility that the arbitration revolution is cultivating learned helplessness will be further discussed in the remaining sections. For now, however, it is valuable to recognize that at the most individual level, learned helplessness is known to be associated with many physical and mental health problems such as chronic stress and depression.[365] This is not to suggest that every uncompensated small-dollars claim can lead, by itself, to these severe outcomes, but to call attention to the aggregate risk society takes when it exposes millions of people to arbitration clauses and thus to a *systemic* lack of redress.

4. Intentionally Produced Resignation

The affective outcomes of depriving people of their legal ability to take part in acts of solidarity are hardly unintended consequences. The neoliberal project, in general, and large corporations, in particular, are highly interested in maintaining their dominance.[366] In the service of this interest, they engage not only in influencing rules such as the FAA. They also deliberately and strategically target emotions, imposing isolation in an effort to deplete people's emotional resources and, in that way,

362. Rucker & Galinsky, *supra* note 360, at 257.

363. For one of the most influential works in psychology and in general and the definitive book on the subject of learned helplessness in particular, see MARTIN E. P. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH (1975).

364. Jarkko Pyysiäinen et al., *Neoliberal Governance and 'Responsibilization' of Agents: Reassessing the Mechanisms of Responsibility-Shift in Neoliberal Discursive Environments*, 18 DISTINKTION 215, 222 (2017).

365. *See, e.g.*, ROBERT M. SAPOLSKY, WHY ZEBRAS DON'T GET ULCERS: THE ACCLAIMED GUIDE TO STRESS, STRESS-RELATED DISEASES, AND COPING 494–95 (3d ed. 2004) (offering a review of learned helplessness literature in the context of stress and depression).

366. *See* WILSON, *supra* note 173, at 22.

undermine their resilience.[367] The resulting feelings of powerlessness help neoliberals and corporations to maintain the status quo because they operate to repress resistance and secure a docile state of mind.[368]

In their article *Capitalism and the Politics of Resignation,* anthropologists Peter Benson and Stuart Kirsch argue that "corporations actively cultivate" and benefit from a "general feeling of disempowerment."[369] Naming this feeling "resignation," the authors explain it, along the lines of affective powerlessness, as a feeling structure that reflects a recognition that "things [have] gone awry[,] but one is practically unable to do anything about it."[370] They further argue that resignation arises from an "acknowledgment that structural limitations impede one's ability to bring about change."[371] In many cases of felt resignation, they assert, all that is left is to use the popular response of "whatever," which conveys the general surrendering to corporations' unlimited power.[372]

To illustrate their argument that corporations deliberately "seek to produce resignation and stifle critique,"[373] Benson and Kirsch analyze strategies that tobacco companies use against consumers' class actions and legislative intentions to prohibit smoking.[374] They also describe similar practices used to achieve what they call "the hijacking of critique"[375] in the mining industry.[376] Further supporting Benson and Kirsch's descriptions of how the politics of resignation works, others have more recently revealed a similar pattern of intentional cultivation of powerlessness and resignation in additional corporate settings, such as in

367. *See* Kathryn Abrams & Hila Keren, *Legal Hopes: Enhancing Resilience Through the External Cultivation of Positive Emotions*, 64 N. IR. LEGAL Q. 111, 113–14 (2013).

368. *See* Rucker & Galinsky, *supra* note 360, at 259. Interestingly, corporations benefit from powerlessness in a way that is even more straightforward than those discussed in this section. The literature regarding consumers' behavior establishes that when consumers feel powerless they tend to spend *more* money on the purchase of goods and services, especially those associated with higher status (and more power) or those expected to increase their sense of belonging. *See id.*; Lukasz Walasek et al., *The Need to Belong and the Value of Belongings: Does Ostracism Change the Subjective Value of Personal Possessions?*, 58 J. BEHAV. & EXPERIMENTAL ECON. 195, 203–04 (2015) (finding that feelings of ostracism do not impact people's feelings towards their belongings except consumers will purchase "an unappealing product only when its public consumption would increase the opportunity for social affiliation"). These findings align with the theory of psychological reactance discussed earlier. *See* Rucker & Galinsky, *supra* note 360, at 259.

369. Peter Benson & Stuart Kirsch, *Capitalism and the Politics of Resignation*, 51 CURRENT ANTHROPOLOGY 459, 460 (2010).

370. *Id.* at 468.

371. *Id.*

372. *Id.*

373. *Id.*

374. *See id.* at 468–71.

375. *Id.* at 475.

376. *See id.* at 471–74.

the rapidly growing industry of data-gathering.[377] Together, such works generally demonstrate that corporations have routinized ways to make people feel that resistance would be futile with the intention of fostering resignation.

But why would neoliberals and corporations target the emotions? In general, because it is an effective way to have people internalize a message that would have been resisted if ordered from above. Indeed, in many non-legal disciplines, the so-called "affective turn" has increased awareness of the role emotions play in guiding human behavior. Such a body of work teaches that one salient way in which emotions are understood to direct behavior is their capacity to create *action tendencies*.[378] Anger, for example, induces an inclination to attack[379] and is considered an emotion that motivates collective action.[380] To a large degree, then, corporations and those who are interested in maintaining their control must counter such anger at the emotional level. Importantly, feelings of powerlessness, especially when combined with fear, sadness, and/or shame, all generate precisely the behaviors that serve best the goal of securing hegemony: inhibiting defiance and fostering acceptance of the status quo.

First, with regard to the inhibition of defiance, the cultivation of affective powerlessness creates action tendencies of avoidance and inaction[381] as well as "passivity and resignation."[382] In the same vein, studies of affective powerlessness suggest that it is associated with

377. *See, e.g.*, Nora A. Draper & John Turow, *The Corporate Cultivation of Digital Resignation*, 21 NEW MEDIA & SOC'Y 1824, 1829 (2019); *see also* Lina Dencik & Jonathan Cable, *The Advent of Surveillance Realism: Public Opinion and Activist Responses to the Snowden Leaks*, 11 INT'L J. COMM. 763, 777 & n.3 (2017) (discussing how unease over surveillance does not result in active resistance against such practices).

378. *See, e.g.*, Barbara L. Fredrickson, *The Role of Positive Emotions in Positive Psychology: The Broaden-and-Build Theory of Positive Emotions*, 56 AM. PSYCHOLOGIST 218, 219 (2001) ("Discrete emotion theorists often link the function of specific emotions to the concept of *specific action tendencies*. Fear, for example, is linked with the urge to escape, anger with the urge to attack, disgust with the urge to expel, and so on." (citations omitted)).

379. *See id.*

380. Martijn van Zomeren et al., *Toward an Integrative Social Identity Model of Collective Action: A Quantitative Research Synthesis of Three Socio-Psychological Perspectives*, 134 PSYCHOL. BULL. 504, 506 (2008).

381. *See generally* RICHARD S. LAZARUS, EMOTION & ADAPTATION (1991) (explaining what action tendencies are and describing avoidance and inaction tendencies as arising from emotions such as sadness and shame, which are part of affective powerfulness). An example of such inaction can be seen in the context of climate change. *See* Christopher Aitken et al., *Climate Change, Powerlessness and the Commons Dilemma: Assessing New Zealanders' Preparedness to Act*, 21 GLOBAL ENVT'L CHANGE 752, 758 (2011) (suggesting, in the context of climate change, that individuals who feel more "powerless" are less likely to take action).

382. AARON BEN-ZE'EV, THE SUBTLETY OF EMOTIONS 466 (2000) (discussing sadness, which is part of affective powerless, as creating passivity and resignation); *see also* LAZARUS, *supra* note 381, at 247 (discussing sadness as inducing resignation).

conforming to authority and submissiveness.[383] Over time, all the tendencies that feeling powerless produce may even turn into the condition of learned helplessness that was discussed earlier. When this occurs, the inhibition of defiance becomes more permanent, in line with the interests of neoliberals and corporations.

Second, with regard to the acceptance of the status quo, it should be noted that while fostering affective powerlessness produces formal consent, it is a distorted type of approval.[384] Far from expressing an agreement agreeing to desired results, this consent is based on reluctant acceptance and has more to do with surrendering to a given reality due to lack of choice or alternatives.[385] Some scholars have called this type of unwilling consent "acquiescence,"[386] and others named it "disaffected consent."[387] This is also precisely the sort of consent that consumers and workers are giving—at the beginning of the process—to class action waivers. Hence, in her dissent in *Epic*, Justice Ginsburg aptly named them "arm-twisted waivers."[388] The arbitration revolution thus can and should be seen as operating at the emotional level to finish off what corporations have started: cultivating affective powerlessness that not only suppresses resistance but is also capable of producing "disaffected consent" to the entire process.

To conclude, an emotional state of powerlessness is not only a severe consequence of the arbitration revolution but also an intentional outcome that has been strategically produced to serve the interests of neoliberals and corporations. Inciting people to feel powerless benefits the hyper-capitalist system that neoliberalism promotes and enriches corporations because, as argued here, it can produce resignation or even learned helplessness. As a result of such manipulation of the emotions, the urge to band together and act collectively—so loudly articulated in the interviews cited earlier—has been dying from within.

CONCLUSION

At the core of this Article are neoliberal processes difficult to notice, trace, and narrate. And yet, the task is vital. The neoliberalization of

383. *See* TenHouten, *supra* note 345, at 93 (noting an association with submissiveness); *id.* at 96 (noting an association with conforming to authority).

384. *See id.* at 93.

385. For different types of consent in general, including "unwanted consent," see Robin West, *Sex, Law, and Consent*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 221, 246–47 (Franklin G. Miller & Alan Wertheimer eds., 2010). For different types of consent in the contractual setting, see Hila Keren, *Consenting Under Stress*, 64 HASTINGS L.J. 679, 721–23 (2013).

386. TenHouten, *supra* note 345, at 88.

387. Jeremy Gilbert, *Disaffected Consent: That Post-Democratic Feeling*, SOUNDINGS, Summer 2015, at 29.

388. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1642 n.9 (2018) (Ginsburg, J., dissenting).

everything, including our laws, extracts a toll too high to overlook. Such toll demands that we delve into the intricacies of nonlegal disciplines and wrestle with their integration so that we can fully account for what is at stake.

By adding to previous discussions an analysis of the latest episode of the arbitration revolution, the Supreme Court decision in *Lamps Plus*, this Article has made it more evident that the legal system has been going through a "tectonic shift."[389] It has exposed that as a result of this decision, corporations do not even need to insist on collective action waivers anymore. Post-*Lamps Plus*, corporations need only include simple arbitration clauses in their standard contracts—the courts will do the rest. That is, corporations now have the ability to separate millions of future claimants even without drafting waivers of collective action into their contracts. The upshot of forging such an easy path to liability evasion has never been more palpable: without the ability to band together, most claims are doomed to disappear. This is precisely the reason corporations sought to include "arbitration" clauses in standard contracts to begin with: to sound the death knell for most claims against them.

In her recent book, *The Code of Capital: How the Law Creates Wealth and Inequality,* Professor Katharina Pistor identifies the wealth-enhancing impact of the law.[390] She describes how lawyers who "seek to ensure that their clients can accomplish their goals *legally*," use their planning and drafting skills to shape transactions that "push the boundaries of existing law," and then await the response of judges and regulators.[391] Pistor explains that such legal strategies do not always succeed (recall the invalidation of class action waivers in the "*Discover Bank* Rule"[392]), but insists that through "constantly contesting the existing boundaries of legal rules . . . lawyers turn any of their clients' assets into capital."[393] As retold here, the story of using arbitration clauses as devices that buy corporations' immunity by the strategy of divide and conquer provides a powerful example. It details how lawyers and the law have meaningfully contributed to the creation of new capital for corporations, allowing them to extract value from their contractual counterparts while minimizing their exposure to liability.

Moreover, this Article has shown that the arbitration revolution is not merely, and perhaps not even primarily, a legal shift. Instead, the

389. Chandrasekher & Horton, *supra* note 33, at 4.

390. *See generally* KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019) (explaining the idea that law creates wealth and inequality through capital).

391. *Id.* at 213 (emphasis in the original).

392. *See supra* note 77 and accompanying text.

393. PISTOR, *supra* note 390, at 213.

revolution and its sweeping consequences can be fully understood only once put in their broader context. Taking into account parallel changes in ideology, politics, and culture, this Article has illuminated the arbitration revolution as an essential part of a more extensive neoliberal program. It has demonstrated that as both a product of neoliberal logic and a tool for further establishment of neoliberal hegemony, the resulting new arbitration jurisprudence should be reconceptualized as a building block in the intentional construction of a corporatized political economy. As such, the revolution belongs with a growing list of legal shifts similarly operating to allow corporations not only to immunize themselves from legal liability through contracts, but also to dominate campaign finance,[394] have First Amendment rights,[395] break unions,[396] and so much more.

Foreclosing all paths to solidarity does much more than extinguish any realistic way to cope with corporate power. With immeasurable authority and immense influence on public opinion, the Supreme Court has engaged in normalizing, legitimizing, and encouraging the ability of corporations to become invincible. As a result, and precisely as Margaret Thatcher wanted it to be, the process has been changing our souls,[397] extending the harsh practical effects of the revolution "into the depths of our subjectivities."[398] As this Article has explained for the first time, the prolonged factual state of "divided and conquered" induces affective powerlessness: a dangerous cluster of emotions that leaves people resigned and unable to resist. Even worse, such affective powerlessness is not an unintended consequence, but rather part and parcel of "the 'politics of resignation'"[399]—a calculated effort by neoliberals and the corporations they promote to protect their dominance. The principal risk, thus, does not arise merely from the fact that corporations found a way—that the Supreme Court approved—to avoid liability. The threat goes far beyond that to the production of collective numbness and the possible creation of learned helplessness in our society. Alarmingly, it does not stop there.

In her recently published book, *In the Ruins of Neoliberalism*, political scientist Wendy Brown cautions against the fatal harm to democracy that the neoliberal takeover of our lives continues to cause. She argues that while at the beginning the neoliberal project focused on replacing political control with market control, it more recently (and in a timeline

394. Citizens United v. FEC, 558 U.S. 310, 319 (2010).
395. Burwell v. Hobby Lobby Stores, Inc., 573 U. S. 682, 690–91 (2014).
396. Janus v. AFSCME, 138 S. Ct. 2448, 2459–60 (2018).
397. Interview by Ronald Butt with Margaret Thatcher, *supra* note 180.
398. WILSON, *supra* note 173, at 46.
399. Benson & Kirsch, *supra* note 369, at 460.

that parallels the arbitration revolution) has gone even further.[400] According to Brown, "the neoliberal utopia" of a social order "in which individuals and families would be politically pacified by markets and morals"[401] has developed into a program of "starving . . . democratic energies."[402] Her chilling analysis describes relentless neoliberal efforts "to dedemocratize the political culture and the subjects within it."[403]

The arbitration revolution, as reconceptualized in this Article, forcefully demonstrates the magnitude of the risk Brown identifies. We cannot assume that the effects of the revolution's widespread cultivation of affective powerlessness will remain contained in the realm of standard contracts. Instead, it is predictable that people who feel resigned because there is nothing left for them to do when their service providers and employers wrong them are unlikely to feel motivated to engage in any other form of democratic citizenship. This specter should motivate anyone who cares about democracy to not abandon the efforts to change the current situation. This Article has offered an original understanding of how the arbitration revolution threatens democracy. Such understanding should reignite efforts to reverse the revolution and give people back their freedom to act collectively. Hopefully, a resumed ability to band together would restore access to justice and, with it, would generate a broader drive to become more involved in our democratic society.

400. *See* BROWN, *supra* note 157, at 58.
401. *Id.* at 17.
402. *Id.* at 57.
403. *Id.* at 58.