

How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act

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I. INTRODUCTION

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

– U.S. Const. amend. VII

Most people assume the Seventh Amendment’s right to trial by jury applies to them. That they have recourse in the civil justice system when an employer breaks the law. That the courthouse doors remain open when companies commit fraud or injure consumers.

Increasingly, just the opposite holds true, as mandatory arbitration clauses deny Americans their day in court. For years, companies have been quietly working to limit the Seventh Amendment’s reach and the ability of consumers and employees, whether individually or as a class, to hold them accountable. These days, nearly every contract—whether to purchase a cell phone plan, place a loved one in the care of a nursing home, or begin work at a new job—contains at least one key provision limiting rights: a pre-dispute “agreement” to waive the Seventh Amendment’s right to trial by jury and instead submit to binding arbitration. Many also include a waiver of the ability to pursue any claims on a classwide basis, whether in arbitration or litigation. Together, these provisions buried in the fine print of standard form, “take it or leave it” contracts of adhesion operate to largely shield companies from liability for both negligent and intentional acts.

As several State Attorneys General recently observed in a letter to Richard Cordray, Director of the Consumer Financial Protection Bureau (“CFPB”), “[m]andatory pre-dispute arbitration . . . jeopardizes one of the fundamental rights of Americans: the right to be heard and seek judicial redress for our claims” and represents “a systemic failure to hold accountable those companies who abuse the trust placed in them by consumers.”¹

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¹ Letter from Attorneys General to Richard Cordray, Director, Consumer Fin. Prot. Bureau (Nov. 19, 2014) at 2–3, <http://perma.cc/P65M-UQNA>.

Asymmetric bargaining power (or the lack of any bargaining power by consumers) along with procedural and substantive infirmities inherent in many pre-dispute arbitration clauses, including bias, class waivers, and lack of understanding by consumers, is contributing to near immunity for some corporate wrongdoers.

The Supreme Court made these clauses even more powerful at the expense of consumers in two recent decisions addressing the Federal Arbitration Act (“FAA”), which makes agreements to arbitrate “valid, irrevocable, and enforceable.”² In a 5-4 decision in *AT&T Mobility LLC v. Concepcion*,³ the Supreme Court held that the FAA exists to enforce arbitration agreements according to their terms and “trumps any interest in ensuring the prosecution of low-value claims,” even when that means no one can bring a claim.⁴ While *Concepcion* applied to state law, in *American Express Co. v. Italian Colors Restaurant* the same bare majority of the Supreme Court held, for all practical purposes, that the FAA likewise trumps other federal laws, again subordinating a consumer’s ability to pursue a statutory right or cause of action to the requirement of “‘rigorously enforc[ing]’ arbitration agreements according to their terms.”⁵ The decision, Justice Kagan presciently wrote in her dissent, threatens to make arbitration “a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.”⁶

Despite the legal landscape tilting radically towards the powerful, some bright spots for consumers remain. Even with the Supreme Court’s *Concepcion* and *Italian Colors* decisions, courts recognize that not all arbitration clauses are enforceable. Growing public awareness about this usurping of rights has forced some corporations to back away from efforts to unilaterally impose arbitration. And if it follows the findings of its recent arbitration study, the CFPB is poised to ban mandatory arbitration clauses and waivers of class actions in agreements for the financial products it oversees. But without a legislative override of the Supreme Court’s decisions by amending the FAA to exempt “take it or leave it” contracts or passing the Arbitration Fairness Act to prohibit the inclusion of mandatory arbitration clauses in consumer or employment contracts, corporations will grow ever more powerful, unpunished for and undeterred in their wrongdoing, and the Seventh Amendment’s promise of access to the courthouse will exist as nothing more than a façade for most Americans.

² 9 U.S.C. § 2 (2006). When enacted in 1925, Congress called it the “United States Arbitration Act.” See Act of Feb. 12, 1925, ch. 213, § 14, 43 Stat. 883, 886. But Congress neglected to include the section setting forth the title when it codified the Act in 1947. See Act of July 30, 1947, ch. 392, 61 Stat. 669. Most commentators and the Supreme Court refer to the Act as the FAA. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

³ 131 S. Ct. 1740 (2011).

⁴ *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 n.5 (2013) (quoting *Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 487 (1989)).

⁵ See *id.*

⁶ *Id.* at 2320 (Kagan, J., dissenting).

II. PRE-DISPUTE ARBITRATION CLAUSES AND BANNING OF CLASS PROCEDURES SEVERELY UNDERMINE CONSUMER PROTECTIONS

A. *Class Actions and Arbitration Evolved as Methods to Resolve Different Kinds of Disputes*

Both the American jury system and arbitration find their origins in medieval Europe. But the twentieth century growth of class actions and arbitration agreements diverged markedly, aimed at addressing different kinds of disputes and differing power dynamics.

1. *Class Actions Exist to Strengthen Those Without the Ability to Otherwise Pursue Their Claims and Help Deter and Redress Wrongdoing*

Under King Henry II's rule between 1154 and 1189, England used *assizes*, panels of twelve men assembled to resolve disputes over property by stating, under oath, whom they knew to be the true owner or heir.⁷ In 1215, the Magna Carta declared that “[n]o free man shall be seized or imprisoned . . . except by the lawful judgment of his equals or by the law of the land.”⁸ Evolving over the years, the idea of a jury trial and the jury's role as the protector of individual liberty were firmly established by the time the colonists landed in America.⁹ Among the Founding Fathers' complaints in the Declaration of Independence was that King George had deprived the colonists “in many cases, of the benefits of Trial by Jury.”¹⁰ In 1789, they enshrined the right to trial by jury in both criminal and civil cases in the Sixth and Seventh Amendments of the Bill of Rights.

Class actions—litigation involving one or more named plaintiffs standing as representatives for a larger group¹¹ and their interests in a single lawsuit—have existed almost as long. The earliest published account of group litigation dates to 1199.¹² Governed in the United States by various of the

⁷ *Dialogue on the American Jury: We the People in Action, Part I: The History of Trial by Jury*, AM. BAR ASS'N, <http://perma.cc/JZ28-MY7H>.

⁸ Magna Carta, 1215, 16 & 17 John, c. 39 (Eng.).

⁹ *Dialogue on the American Jury*, *supra* note 7.

¹⁰ THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).

¹¹ The Federal Rules of Civil Procedure also allow for defendant classes but those are far less common. *See* FED. R. CIV. P. 23(a) (“One or more members of a class may sue or be sued as representative parties”); 1 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 5:1, at 399 (5th ed. 2012) (“There is another species of class action lawsuit, the defendant class action In a defendant class action, a representative defends claims on behalf of absent defendant class members, binding all to the outcome of the representative's litigation.”); *id.* at § 5.2, at 404–05 (“Defendant classes most often appear in securities litigation, patent and copyright infringement cases, and actions against local officials in challenges to state law.” (citations omitted)).

¹² Debra Lyn Bassett, *Constructing Class Action Reality*, 2006 *BYU L. REV.* 1415, 1432 (2007) (citing Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 *ARIZ. L. REV.* 687, 688 (1997)).

Federal Rules of Equity from 1833 until the drafting of the Federal Rules of Civil Procedure in 1938, class actions developed to “decide questions common to all the members of the class in one proceeding without the necessity of all the members appearing in court.”¹³ Rule 23 of the new Federal Rules of Civil Procedure divided class actions into three confusing categories differing in the description of their common rights, ability to aggregate claims, and who might be bound by the judgment.¹⁴ The 1966 amendments to the Federal Rules abolished these categories and instead described class actions in practical terms.¹⁵ Fundamentally, a proposed class must meet four prerequisites of Rule 23(a): (1) enough class members such that joinder of all is impracticable; (2) the existence of common questions of law or fact; (3) the class representative’s claims or defenses are typical of the class’s claims or defenses; and (4) the class representative will fairly and adequately protect the class’s interests.¹⁶ In addition, the class must fit one of the descriptions of Rule 23(b): (1) separate actions would risk opposing standards of conduct for the defendant or adjudications that substantially harm the ability of non-represented parties to protect their interests; (2) the defendant’s alleged conduct makes class injunctive or declaratory relief appropriate; or (3) questions

¹³ Note, *Developments in the Law: Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 877, 934 (1958) (citing *Hansberry v. Lee*, 311 U.S. 32, 41–42 (1940)). See Bassett, *supra* note 12, at 1432–33.

¹⁴ See Bassett, *supra* note 12, at 1434–36.

¹⁵ Rule 23 provides, in relevant part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(a)–(b).

¹⁶ *Id.* 23(a).

of fact or law common to the class predominate over questions affecting only individuals and a class action is the superior method to fairly and efficiently adjudicate the dispute.¹⁷

As Ben Kaplan, the reporter for the 1966 Amendments, noted, the revised Rule 23 exists to help vindicate “the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”¹⁸ Typically, class actions “serve the important policy function of deterring and redressing wrongdoing, particularly where a company defrauds large numbers of consumers out of individually small sums of money.”¹⁹ Without the ability to aggregate these wrongdoings, many individuals cannot afford to bring their own case or find legal representation to do so. Indeed, the price of admission is too high to let anyone attend; for example, the costs of proving damages in *Italian Colors*, discussed below, outstripped any potential recovery by a factor of ten or more.²⁰ No one—no client and no lawyer—would take that case individually.

The prosecution of individual claims concerning small sums also fails to provide any incentive to the company to stop or change the offending practice, even if it loses the individual claims.²¹ Instead, the deterrence power of class actions comes in their ability to create broad change through classwide injunctive or declaratory relief or through substantial classwide damages or penalties. Class actions also often complement or supplement public enforcement, as public agencies cannot detect and deter all unfair or unlawful conduct.²² In their recent letter to the CFPB, several State Attorneys General wrote that class actions have “the capability of providing real and meaningful benefit to harmed consumers and can result in injunctive relief mandating business reforms that are in the public interest. Our offices work together to ensure that such relief and redress are maximized.”²³

2. *Arbitration Grew as a Voluntarily Negotiated Choice to Address Disputes Between Companies of Relatively Equal Power*

Arbitration, by contrast, exists as a process to resolve disputes and began as an alternative to more formal litigation and less formal or less binding mediation between two individual parties. Conventional wisdom holds that arbitration developed through the merchant class in medieval Europe as a

¹⁷ *Id.* 23(b).

¹⁸ Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (specifically discussing classes under Rule 23(b)(3)).

¹⁹ *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 854 (9th Cir. 2009).

²⁰ *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308 (2013).

²¹ *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (“A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone’s (usually an attorney’s) labor.” (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (1997))).

²² 1 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 1:8, 21–26 (5th ed. 2011) (noting the Supreme Court has recognized this fact).

²³ Attorneys General letter, *supra* note 1, at 3–4.

means to resolve disputes between them efficiently and economically.²⁴ Traveling between fairs to conduct business with each other, merchants needed a simple way to resolve disputes arising from those transactions both quickly and in accordance with the customary norms that merchants respected.²⁵

While the details may vary, at bottom, the parties to arbitration typically agree to use an impartial third party to decide the dispute and to be bound by the arbitrator's award. In theory, the parties may negotiate almost every feature of the process, "including the number of arbitrators . . . ; the location of the hearing; the applicable law; the availability, types, and amounts of discovery; the timetable of events; the evidentiary standards; the appropriateness of expert witnesses; whether or not attorneys will represent the parties; and the use of pre- or post-hearing briefs."²⁶

By the late 1800s, the American judiciary exhibited antagonism to arbitration, an offshoot, presumably, of English courts' hostility to the process.²⁷ Both English and American hostility appeared rooted "primarily on the theory that an arbitration agreement was an 'ouster of jurisdiction' of the court and therefore void or voidable as against public policy."²⁸ In 1889, England passed its Arbitration Act, making arbitration agreements irrevocable, arbitration awards final, and "empowering arbitrators to summon witnesses and examine them under oath."²⁹

Attitudes in the United States began to shift soon thereafter. In 1920, New York enacted an arbitration statute similar to the later-enacted FAA, declaring that a contract provision to settle a dispute by arbitration "shall be valid, enforceable, and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."³⁰ The Supreme Court upheld New York's law in *Red Cross Line v. Atlantic Fruit Company* four years later.³¹ By that time, business groups had been lobbying for and Congress had begun holding hearings on proposed federal legislation.³²

²⁴ Sarah Rudolph Cole & Kristen M. Blankley, *Arbitration*, in THE HANDBOOK OF DISPUTE RESOLUTION 318, 320 (Michael L. Moffitt & Robert C. Bordone eds., 2005).

²⁵ *Id.*

²⁶ *Id.* at 318.

²⁷ H.R. REP. NO. 68-96, at 2 (1924). See, e.g., David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 LAW & CONTEMP. PROBS. 5, 16 (2004) (noting that American courts "deemed arbitration agreements to be revocable at the will of either party at any time before an arbitration award was enforced"); see also 65 CONG. REC. 1912, 1931 (1924) (Rep. George Graham of Pennsylvania stating "[o]riginally, agreements to arbitrate, the English courts refused to enforce, jealous of their own power and because it would oust the jurisdiction of the courts."); Preston Douglas Wigner, *The United States Supreme Court's Expansive Approach to the Federal Arbitration Act: A Look at the Past, Present, and Future of Section 2*, 29 U. RICH. L. REV. 1499, 1502 (1995).

²⁸ Schwartz, *supra* note 27, at 17.

²⁹ Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, J. DISP. RESOL. 469, 474 (2006).

³⁰ *Red Cross Line v. Atlantic Fruit Company*, 264 U.S. 109, 130 (1924).

³¹ *Id.* at 125.

³² See *Arbitration of Interstate Commercial Disputes: Joint Hearings on S. 1005 and H.R. 646 Before the Subcomms. of the Comms. on the Judiciary*, 68th Cong. 1 (1924) [hereinafter

The hearings and other legislative history make at least two points clear: (1) “commercial bodies of the country”³³ advocated for the legislation as a means to deal with disputes arising between each other “in commercial contracts and admiralty contracts”³⁴ and (2) arbitration is a “purely voluntary”³⁵ creature of contract. As the House Judiciary Committee Chairman stated, the FAA “simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when voluntarily placed in the document by the parties to it.”³⁶ On the heels of these hearings, Congress passed the FAA in 1925, which makes arbitration agreements “valid, irrevocable, and enforceable,” unless the contract is otherwise legally unenforceable.³⁷

The FAA contemplated knowingly and voluntarily negotiated arbitration agreements between parties of roughly equal bargaining power, such as individual businesses dealing with each other. There, arbitration can make a lot of sense: Parties may be able to resolve their disputes quickly, with an arbitrator mutually selected and under rules and confidentiality provisions all have agreed to. That is not how mandatory arbitration clauses are playing out.

B. Mandatory Arbitration Clauses and Class Action Bans Strip from Consumers Many of the Benefits and Protections of the Jury System and the Ability to Effectively Hold Wrongdoers Accountable

Increasingly over the last two decades, companies have inserted mandatory arbitration clauses in their standard form purchase agreements, relying on the fact that the consumer or employee has little to no ability to negotiate the contract. The rise in mandatory arbitration agreements in these settings, especially when combined with prohibitions on class proceedings, are leading to an effective granting of immunity from liability for those who cheat and steal or violate the law and less deterrence of such wrongdoing.

1924 *Joint Hearing*]; *Sales and Contracts to Sell in Interstate and Foreign Commerce and Federal Commercial Arbitration: Hearing on S. 4213 and S. 4214 Before the Subcomms. of the S. Comm. on the Judiciary, 67th Cong. 1* (1923) [hereinafter 1923 *Hearing*] (statement of Charles L. Bernheimer, Chairman, Arbitration Committee of the New York Chamber of Commerce); Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 NOTRE DAME L. REV. 101, 125 (2002).

³³ 1923 *Hearing*, *supra* note 32, at 8 (statement of Charles L. Bernheimer, Chairman, Arbitration Committee of the New York Chamber of Commerce).

³⁴ 65 CONG. REC. 2, 1931 (1924) (statement of House Judiciary Committee Chairman George S. Graham).

³⁵ 1924 *Joint Hearing*, *supra* note 32, at 26 (statement of Alexander Rose of the Arbitration Society of America). *See, e.g., id.* at 14 (statement of American Bar Association counsel Julius Henry Cohen: “I think everybody today feels very strongly that the right of freedom to contract, which the Constitution guarantees to men, includes the right to dispose of any controversy which may arise out of the contract in their own fashion.”).

³⁶ 65 CONG. REC. 2, 1931 (1924) (statement of House Judiciary Committee Chairman George S. Graham).

³⁷ 9 U.S.C. § 2 (2014).

The lack of any bargaining power by consumers, along with bias of arbitrators, secrecy of arbitration, existence of class waivers, and lack of understanding (or use) of arbitration by consumers is contributing to near immunity for corporate America.

Current arbitration clauses in consumer contracts typically seek to sweep up all potential claims the consumer may bring, including those under federal laws such as the Fair Labor Standards Act and those based on state laws or local ordinances,³⁸ and often prohibit the pursuit of claims on a class-wide basis in either litigation or arbitration. In signing these agreements, consumers are forced to forego fundamental protections provided by the judicial system, including a neutral decision-maker,³⁹ the rules of civil procedure and evidence,⁴⁰ and the sunshine and deterrent effect afforded by open court proceedings.

But consumers often have no choice. Whether for leasing a car, taking out a student loan, or applying for a job, these agreements exhibit one thing in common besides the pre-dispute arbitration clause: they are contracts of adhesion. The company crafts and then presents the agreement as “take it or leave it;” the consumer or employee has no bargaining power or ability to change the terms of the contract. With the rise of online purchasing and contracting, many of these agreements arrive as lengthy sets of terms on a website, requiring consumers to click “I agree” without any ability to modify any provision before moving to complete the purchase. And these clauses are ubiquitous: for example, in 2014, seven of the eight largest mobile wireless providers, covering 99.9% of mobile wireless subscribers, included arbitration clauses in their consumer contracts.⁴¹

1. *Mandatory Arbitration Leads to Fewer Claims by Consumers, Lower Recoveries, and Less Deterrence of Corporate Wrongdoing*

The problems of arbitration are many, including absence of consumer choice, scarcity of filings by consumers, secrecy, arbitral bias, and lack of consumer knowledge, all of which contribute to an effective granting of immunity from liability under state or federal consumer rights laws for the proponent of the arbitration clause.

When it created the CFPB as part of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress instructed the agency to conduct a study concerning the use of pre-dispute arbitration clauses in

³⁸ See *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 294 (2d Cir. 2013).

³⁹ See *infra* notes 60–62, 71–74 and accompanying text (discussing the problem of arbitral bias).

⁴⁰ CFPB ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a), § 4.1, (Mar. 10, 2015), <http://perma.cc/5PLG-LLKY> (noting that “limited discovery rights are the hallmark of arbitration” and arbitration rules “generally envision less discovery than would be available in court” (citation omitted)).

⁴¹ *Id.* § 2.3.

consumer financial products and services.⁴² The agency released preliminary findings in December 2013 and issued its final report on the three-year study in March 2015. This rigorous study, likely the most comprehensive empirical study to date of arbitration generally and certainly of consumer financial arbitration specifically, supports many of the arguments consumer rights advocates raise regarding arbitration, including the rarity of filings by individuals and the greater societal recoveries available through litigation, particularly class actions.⁴³

Examining six financial products or services—credit cards, checking accounts, prepaid cards, storefront payday loans, private student loans, and mobile wireless billing—the CFPB found widespread adoption of bans on classwide arbitration in consumer agreements.⁴⁴ In the study’s sample, approximately 94% of credit card arbitration clauses, 89% of checking account arbitration clauses, 98% of prepaid card arbitration clauses, 89% of storefront payday loan arbitration clauses, 86% of mobile wireless arbitration clauses, and 100% of private student loan arbitration clauses expressly prohibit class arbitration proceedings.⁴⁵

Very few individuals file arbitration cases. Looking at filings with the American Arbitration Association (“AAA”), the primary arbitration company addressing consumer financial products, the CFPB found records of only about 1,850 filings between 2010 and 2012 concerning six financial services or products—and more than 1,400 of those were filed by a company or jointly by a company and a consumer.⁴⁶ By contrast, consumers filed nearly 3,500 lawsuits in federal court during the same time frame, 470 of which were class actions.⁴⁷ And almost all of the arbitration filings involved disputes with more than \$1,000 at stake.⁴⁸ As CFPB Director Cordray noted when presenting the agency’s findings, “consumers seem to be indicating that it rarely makes sense for them to bring an individual claim with only a small amount at stake.”⁴⁹

⁴² 12 U.S.C. § 5518(a) (2015).

⁴³ CFPB ARBITRATION STUDY, *supra* note 40, § 1.2.

⁴⁴ *Id.* § 2.4.

⁴⁵ *Id.* § 2.5.5. Many of these contracts also include bans on the consumer participating in a class action in court even for cases or causes of action not subject to or covered by the arbitration clause. *Id.* § 2.1.

⁴⁶ *Id.* § 1.4.3. Like the class action ban analysis, the CFPB collected data on this issue on credit cards, checking accounts/debit cards, prepaid cards, payday and similar loans, and private student loans but replaced mobile wireless billing with auto purchase loans. *Id.* § 1.3. Consumers only had counsel in approximately sixty percent of these arbitral disputes, while companies were almost always represented by attorneys. *Id.* § 1.4.3.

⁴⁷ *Id.* § 6.2.1. These numbers do not include state court filing. *Id.* The agency looked at five categories of products or services: credit cards, checking accounts/debit cards, prepaid cards, payday loans, and private student loans. For class actions, the CFPB also looked at automobile loans. *Id.* § 6 Introduction.

⁴⁸ *Id.* § 1.4.3 (noting fewer than twenty-five filings per year involved amounts less than \$1,000).

⁴⁹ Richard Cordray, Director, CFPB, Prepared Remarks at Arbitration Field Hearing (Mar. 10, 2015), <http://perma.cc/3DVN-29VB>.

Consumers derive more utility from class litigation than arbitration. Where consumers have the choice to opt out of a class action and arbitrate with the AAA, they almost universally choose to stay in the class and forego the option to file a claim in arbitration. More than thirteen million class members received money or made claims in several class actions settled since July 2009 involving credit cards, deposit accounts, or payday loans; less than 4,000 opted out and barely any filed an arbitration claim.⁵⁰ “One significant takeaway from these various points,” CFPB Director Richard Cordray noted when revealing the preliminary results in December 2013, “is that few consumers use arbitration at all, at least when compared to the number of consumers involved in lawsuits and class actions.”⁵¹

Litigated class actions result in far greater recoveries for consumers. Studying the settlements of approximately 420 consumer financial class actions between 2008 and 2012, the CFPB found gross relief totaling \$2.7 billion going to thirty-four million consumers, including cash relief of \$2 billion and in-kind relief (such as free or discounted access to a service) of nearly \$650 million.⁵² This accounting omits injunctive relief such as changes in company behavior included in some settlements.⁵³ By contrast, in the 341 disputes filed in 2010 or 2011 in which an arbitrator reached a decision on the merits, consumers received a combined total of less than \$175,000 in damages and \$190,000 in debt forbearance but were forced to pay \$2.8 million, mainly on disputed debts.⁵⁴

Arbitration is largely secretive and disjointed, leading to less deterrence of unlawful conduct. Although the CFPB found that few of the arbitration clauses in the consumer financial services and products it examined contain affirmative confidentiality or nondisclosure requirements,⁵⁵ the fact remains that arbitration is a private adjudication, requiring no public filings, no legal record of the proceedings, and no explanation from the arbitrator for his or her ruling.⁵⁶ And arbitral decisions have no bearing or preclusive effect on each other as arbitrators need not abide by the principles of *stare decisis*.⁵⁷ This stunts both growth of the law and the deterrence effect of holding wrongdoers accountable; as Professor Myriam Gilles of Cardozo Law School recently noted, the

⁵⁰ CFPB ARBITRATION STUDY, *supra* note 40, app. A § 4.8.2 (arbitration study preliminary results).

⁵¹ Richard Cordray, Director, CFPB, Prepared Remarks at Arbitration Field Hearing (Dec. 12, 2013), <http://perma.cc/353Q-CQJD>.

⁵² CFPB ARBITRATION STUDY, *supra* note 40, § 8.1. According to the CFPB’s estimates, approximately eighty-four percent of this total cash and in-kind relief went to consumers, with sixteen percent going to attorneys’ fees. *Id.* § 8.3.5.

⁵³ *Id.* § 8.4.

⁵⁴ *Id.* § 5.2.2. See Cordray, *supra* note 49.

⁵⁵ See CFPB ARBITRATION STUDY, *supra* note 40, § 2.5.8.

⁵⁶ See Myriam Gilles, POUND CIVIL JUSTICE INSTITUTE, *The Demise of Deterrence: Mandatory Arbitration and the “Litigation Reform” Movement*, in FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT 17 (2015).

⁵⁷ *Id.* at 32.

deterrence capacity of litigation relies, in large part, upon publicity. In order for standards or norms to have any influence on behavior, they must be made public for all to see, to “become known, feed expectations, and breed a common understanding of the legal culture of the country.” Lawsuits provide for this. . . . Arbitration, on the other hand, does not.⁵⁸

In November 2014, sixteen State Attorneys General wrote to CFPB Director Cordray, encouraging the agency to regulate pre-dispute mandatory arbitration clauses and class action bans in the consumer financial products and services under its purview.⁵⁹ Arbitral bias, prohibitive arbitration fees, and other procedural and substantive infirmities of arbitration clauses in consumer contracts, they argued, serve to “deter injured individuals from pursuing their rights.”⁶⁰

Minnesota’s Attorney General shed light on arbitration’s “repeat player bias,” finding arbitrators face a powerful incentive to find for the party likely to hire them for future cases—the corporation rather than the consumer. In 2009, the Minnesota Attorney General’s Office filed suit against the National Arbitration Forum (“NAF”), then the country’s largest arbitration company handling consumer credit disputes, alleging the company hid from the public its myriad ties to creditors and collection agencies.⁶¹ According to an investigation by Public Citizen referenced in the state’s complaint, NAF ruled for businesses against consumers ninety-four percent of the time.⁶² Less than a week after Minnesota filed the complaint, NAF entered into a Consent Judgment, barring it from arbitrating credit card and other consumer disputes.⁶³

The Attorneys General also pointed out that very few consumers understand pre-dispute arbitration clauses or class action bans, or even are aware of them.⁶⁴ A recent study lends strength to this assertion. Researchers at St. John’s University conducted an online survey of 668 American consumers to examine what they know and understand about arbitration clauses in standard form contracts.⁶⁵ Despite the fact that the researchers’ sample arbitration

⁵⁸ *Id.* at 17 (citing 9 U.S.C. § 4 (2014)).

⁵⁹ Letter from Attorneys General, *supra* note 1, at 1.

⁶⁰ *Id.* at 3.

⁶¹ See Complaint at 1–2, *Swanson v. National Arbitration Forum, Inc.*, No. 27-cv-0918550, 2009 WL 5424036 (Minn. Dist. Ct. July 14, 2009), <http://perma.cc/994M-ZP98>.

⁶² PUBLIC CITIZEN, THE ARBITRATION TRAP: HOW CREDIT CARD COMPANIES ENSNARE CONSUMERS 2 (2007), <http://perma.cc/XN6F-J6TH>. See *infra* notes 71–74 and accompanying text (discussing discrepancies between consumers and companies as to percentages of relief and recovery in arbitration).

⁶³ *Swanson v. National Arbitration Forum, Inc.*, No. 27-cv-0918550, 2009 WL 5424036 (Minn. Dist. Ct. July 17, 2009) (consent judgment).

⁶⁴ Letter from Attorneys General, *supra* note 1, at 2. See CFPB Arbitration Study, *supra* note 40, § 2.4 (finding that credit card arbitration clauses are almost always more complex and written at a higher reading grade or level than other parts of the contract).

⁶⁵ See Jeff Sovern, Elayne Greenberg, Paul Kirgis & Yuxiang Liu, “Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements 2 (St. John’s Legal Studies Research Paper No. 14-0009, 2014).

clause was far less complex and more readable than the average credit card arbitration clause,⁶⁶ the “survey results suggest a profound lack of understanding about the existence and effect of arbitration agreements among consumers.”⁶⁷ Less than nine percent of those surveyed understood that the contract contained an arbitration clause and that that clause would prevent them from pursuing their rights in court.⁶⁸ Although the contract included a class action waiver twice in bold (including one time in all capital letters), only twelve percent recognized that the class waiver prohibited them from participating in a class action.⁶⁹

Perhaps most importantly, despite the existence of the arbitration clause, the surveyed consumers demonstrated great faith in a fundamental right to access the judicial system and disbelief that a judge would enforce a consumer contract that denies that right.⁷⁰ In response to a question asking if the contract allowed them to pursue a claim in court, one consumer stated “You always have a right to pursue legal action when someone has wronged you, it is not up to one party or another to determine whether or not they will take away that right,” while another called the ability to sue in court an “American right.”⁷¹

2. *The Supposed Consumer Benefits of Arbitration Have Not Borne Out*

Proponents of mandatory arbitration argue this form of dispute resolution provides consumers with a fair and more efficient system to address claims and ultimately brings down the costs of goods and services. The evidence suggests otherwise.

Individual consumers rarely use arbitration and when they do, they recover very little. The CFPB found consumers filed arbitration claims half as often as federal lawsuits over a three-year period (including filing only two class arbitration petitions compared to 470 class actions in federal court).⁷² When they do use arbitration, consumers are both far less likely to win their claims and awarded a fraction of what companies receive when they win. Of the 158 disputes in which an arbitrator issued a decision on a consumer’s affirmative claim, the consumer received some relief in 20.3% of cases, winning an average of fifty-seven cents for every dollar claimed across those thirty-two cases and an average of twelve cents for every dollar claimed

⁶⁶ *Id.* at 31–32.

⁶⁷ *Id.* at 2.

⁶⁸ *Id.*

⁶⁹ *Id.* at 54. For example, on page six of the agreement, the following appeared in bold, italics, and all capital letters: “You will not have the right to participate as a representative or member of any class of claimants, or as a private attorney general.” *Id.* at 53.

⁷⁰ *Id.* at 66.

⁷¹ *Id.* at 67.

⁷² CFPB ARBITRATION STUDY, *supra* notes 46–47 and accompanying text. *See also* CFPB ARBITRATION STUDY, *supra* note 40, §§ 1.4.3–1.4.4.

across all 158 cases.⁷³ By contrast, of the 244 disputes involving corporate claims or counterclaims resolved by the arbitrator, the company won in ninety-three percent of cases.⁷⁴ In those 227 cases, the companies received ninety-eight cents for every dollar claimed; factoring in all 244 cases, arbitrators awarded companies ninety-one cents for every dollar globally claimed.⁷⁵

The CFPB's study also undermines one of the strongest arguments put forward by proponents of mandatory arbitration—that in the absence of compulsory arbitration, companies will be forced to externalize the costs of litigation by raising the prices of goods and services. Encouraging the CFPB to study whether mandatory arbitration clauses lower the price of consumer financial services and products, the U.S. Chamber of Commerce wrote “businesses can avoid the higher litigation costs associated with defending claims in court. That enables them to eliminate costs that otherwise would inflate the prices of their products or services” and argued that companies with these clauses “produce savings that they may pass on to consumers through lower prices.”⁷⁶ A recent set of class action settlements over consumer credit cards provided a unique case study for the agency to look at precisely this issue. In *Ross v. Bank of America*, consumers sued multiple credit card companies alleging the issuers colluded to include mandatory arbitration clauses and class action bans in their contracts.⁷⁷ Four defendants agreed to stop using the arbitration clauses for at least three-and-a-half years as part of a settlement of the case while three non-settling defendants continued using the clauses.⁷⁸ The CFPB found no statistically significant evidence that the consumer credit card services prices increased after the *Ross* settlers jettisoned the arbitration clauses or that companies pass to consumers any supposed savings from the use of mandatory arbitration clauses.⁷⁹

At bottom, arbitration as a mandatory, rather than a truly voluntarily negotiated, undertaking has little to commend it where individual consumers are concerned.

III. THE SUPREME COURT CAST ITS LOT, UPHOLDING MANDATORY ARBITRATION AGREEMENTS OVER ENSURING THE EFFECTIVE VINDICATION OF RIGHTS IN *CONCEPCION* AND *ITALIAN COLORS*

Scarcely considered for many years after enactment and despite the detrimental effects of mandatory arbitration on consumers, the FAA grew in

⁷³ CFPB ARBITRATION STUDY, *supra* note 40, § 5.2.2.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* § 10 Introduction, n.1.

⁷⁷ *Id.* § 10.1 (citing *Ross v. Bank of America*, No. 05-cv-7116(WHP), 2009 WL 3444920, at *1 (S.D.N.Y. Oct. 6, 2009)).

⁷⁸ *Id.* § 10.6.

⁷⁹ *Id.* § 10.1.

importance and gained significant power during the second half of the twentieth century and the early years of the twenty-first century. Two recent decisions in particular demonstrate the FAA's new breadth and effect on consumer and employee claims, preempting both state laws and other federal laws.

A. *In AT&T Mobility v. Concepcion, the Supreme Court Begins to Wipe out the Ability to Prosecute Low-Value Claims*

AT&T Mobility LLC v. Concepcion involved the kind of individually-small, globally-substantial wrong that class actions were designed to address: the plaintiffs alleged AT&T engaged in fraud and false advertising by marketing cell phones as free but charging sales tax on them.⁸⁰ For the Concepcions, this amounted to \$30.22.⁸¹ From an economic perspective, pursuing AT&T individually made no sense, with fees and expenses vastly outstripping the \$30 single damages in the case.⁸² As a class, however, consumers might be able to hold the company accountable for the small scale harm writ large. The Supreme Court's 5-4 decision closed the door on this possibility.

The Concepcions brought suit on behalf of all California customers subjected to the allegedly unlawful sales tax, asserting violations of the California Unfair Competition Law and other state consumer protection statutes.⁸³ But their contract with AT&T contained an arbitration agreement—and that agreement prohibited class arbitration.⁸⁴ When AT&T moved (two years after the filing of the complaint) to compel individual arbitration over the \$30 dispute, the Concepcions challenged the class waiver provision under California's *Discover Bank* rule, which held that class action waivers in consumer contracts of adhesion may be unconscionable.⁸⁵ In *Discover Bank*, the California Supreme Court confirmed the important role of class actions in both deterring and righting wrongdoing and that a class waiver permits a company to immunize itself from liability for its unlawful behavior.⁸⁶ Applying a general unconscionability principle, *Discover Bank* stated that when a class action waiver

is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the

⁸⁰ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

⁸¹ *Id.*

⁸² *See, e.g., Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 986 (9th Cir. 2007) (“[W]hen the potential for individual *gain* is small, very few plaintiffs, if any, will pursue individual arbitration or litigation, which greatly reduces the aggregate liability a company faces when it has exacted small sums from millions of customers.”).

⁸³ *Laster v. T-Mobile, USA, Inc.*, No. 05-cv-1167, 2008 WL 5216255, at *1 (S.D. Cal. Aug. 11, 2008). (*Concepcion* was consolidated with *Laster*.)

⁸⁴ *Concepcion*, 131 S. Ct. at 1744.

⁸⁵ *See Discover Bank v. Sup. Ct.*, 113 P.3d 1100, 1108 (Cal. 2005).

⁸⁶ *Id.* at 1108–09.

superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver becomes in practice the exemption of the party “from responsibility for [its] own fraud, or willful injury to the person or property of another.”⁸⁷

The decision regarding class action waivers, the California Supreme Court noted, applies equally to contracts with arbitration agreements and those without such clauses.⁸⁸ But AT&T argued that *Discover Bank* proclaimed a new rule that would apply only to arbitration agreements, which would conflict with and thus be preempted by the FAA.⁸⁹ Affirming the district court’s decision, the Ninth Circuit Court of Appeals sided with the *Concepcions*, finding that (1) the cell phone contract was a contract of adhesion, (2) the dispute “involve[d] predictably small amounts of damages,” and (3) “the party with superior bargaining power ha[d] carried out a scheme deliberately to cheat large numbers of consumers out of individually small sums of money.”⁹⁰ The appellate court also held that because California’s law embodied a generally applicable contract law and defense, it did not single out arbitration clauses for special scrutiny, and the FAA neither expressly nor impliedly preempted it.⁹¹

In April 2011, the Supreme Court reversed, finding that the FAA preempts California’s law.⁹² The 5-4 decision found the FAA exists to promote arbitration⁹³ and that class proceedings undermine the fundamental nature of arbitration and are inconsistent with the Act.⁹⁴ The fact that California’s law addressed “take it or leave it” consumer contracts, not arm’s length negotiated contracts between persons or businesses with relatively equal bargaining power, mattered not; Justice Scalia asserted that nearly all contracts are adhesive and noted that while “states remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action waiver provisions in adhesive agreements to be highlighted,” “[s]uch steps cannot, however, conflict with the [FAA] or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms.”⁹⁵ At bottom, as Justice Scalia would later claim, *Concepcion* established “that the [FAA’s] command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low-value claims.”⁹⁶

Justice Breyer, writing for the dissent, questioned the slim majority’s opinion, noting that California’s law “does just what § 2 [of the FAA] re-

⁸⁷ *Id.* at 1110.

⁸⁸ *Id.* at 1112.

⁸⁹ *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 857 (9th Cir. 2009).

⁹⁰ *Id.* at 854–55.

⁹¹ *Id.* at 856–57.

⁹² *Concepcion*, 131 S. Ct. at 1753 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

⁹³ *Id.* at 1749.

⁹⁴ *Id.* at 1748.

⁹⁵ *Id.* at 1750 n.6.

⁹⁶ *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 n.5 (2013).

quires, namely puts agreements to arbitrate and agreements to litigate ‘upon the same footing,’”⁹⁷ and the Act’s legislative history’s emphasis on roughly equal bargaining power between the contracting parties “suggests, if anything, that California’s statute is consistent with, and indeed may help to further, the objectives that Congress had in mind.”⁹⁸ Despite the dissent’s concerns, the majority elevated arbitration, even when imposed in “take it or leave it” contracts of adhesion, above consumers’ rights to seek redress for low-value claims under state law, effectively shutting the courthouse to consumers. The Court would soon take this a step further in *Italian Colors*, gutting federal claims by imposing arbitration.

*B. The Supreme Court Abandons the Effective Vindication Rule
in Favor of the FAA in Italian Colors*

Two years later, the same bare majority of the Supreme Court decided the FAA similarly supplants or triumphs over other federal laws, upholding arbitration clauses even where they prohibit the effective vindication of rights guaranteed by federal law.

Italian Colors Restaurant, a small eatery in California, sued American Express on behalf of itself and other merchants, alleging that American Express violated federal antitrust laws by using its monopoly power to force businesses to accept select credit cards at rates close to 30% higher than those for similar or competing cards.⁹⁹ But *Italian Colors*, like all or nearly all merchants doing business with American Express, had signed American Express’s standard form contract requiring dispute resolution through arbitration and prohibiting class arbitration.¹⁰⁰ At stake for *Italian Colors* was \$12,850 or \$38,549 trebled under the antitrust laws.¹⁰¹

When American Express sought to compel individual arbitration, *Italian Colors* presented a declaration from an economist stating that the cost of proving the antitrust violations—the expert opinion necessary to define the relevant market, demonstrate American Express’s monopoly power and anticompetitive effects, and measure damages—“would be ‘at least several hundred thousand dollars, and might exceed \$1 million.’”¹⁰² The class waiver had the effect of barring effective vindication of the antitrust laws because no merchant had an economic incentive to individually pursue its claims in arbitration. The Second Circuit Court of Appeals held the class waiver unenforceable on *Italian Colors*’ showing that “they would incur prohibitive costs if compelled to arbitrate” under it.¹⁰³

⁹⁷ *Concepcion*, 131 S. Ct. at 1758 (Breyer, J., dissenting).

⁹⁸ *Id.* at 1759 (Breyer, J., dissenting).

⁹⁹ *Italian Colors*, 133 S. Ct. at 2308.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* (quoting *In re American Express Merchs.’ Litig.*, 554 F.3d 300, 315–16 (2d Cir. 2009)).

In June 2013, the Supreme Court reversed, finding the *Concepcion* decision to rigorously enforce arbitration clauses effectively resolved the case and that such enforcement supersedes a plaintiff's ability to pursue or enforce a statutory right guaranteed by another federal law.¹⁰⁴ Rejecting Italian Colors' argument that requiring individual litigation or arbitration of the merchants' claims would disregard the policies of the antitrust laws, the majority stated that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."¹⁰⁵

The majority similarly dismissed Italian Colors' effective vindication argument, which Justice Scalia described as "a judge-made exception to the FAA" to allow for the assertion of federal statutory rights.¹⁰⁶ In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court implied that arbitration agreements could be invalidated on public policy grounds if they operated "as a prospective waiver of a party's *right to pursue* statutory remedies."¹⁰⁷ The "right to pursue" served as the key for Justice Scalia and the majority—and the fatal flaw for Italian Colors:

[*Mitsubishi*] would certainly cover a provision in an arbitration agreement forbidding the assertion of certain statutory rights. And it would perhaps cover filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable. But the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy. The class-action waiver merely limits arbitration to the two contracting parties. It no more eliminates those parties' right to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938.¹⁰⁸

In a blistering dissent, Justice Kagan gave voice to many critics of mandatory arbitration and accused the majority of ignoring *stare decisis* and the central tenet of the Court's decisions on arbitration.¹⁰⁹ *Mitsubishi Motors*, the dissent noted, included the effective vindication rule as an important limiting factor for arbitration to preserve federal rights "[a]nd in the decades since *Mitsubishi*, we have repeated its admonition time and again, instructing courts not to enforce an arbitration agreement that effectively (even if not explicitly) forecloses a plaintiff from remedying a federal statutory right."¹¹⁰ By rejecting the effective vindication rule and allowing arbitration clauses to thwart federal law, the Court took *Concepcion* a step further and provided *de facto* immunity for corporations under federal law: here, where

¹⁰⁴ *Id.* at 2312.

¹⁰⁵ *Id.* at 2309.

¹⁰⁶ *Id.* at 2310–11.

¹⁰⁷ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 652 n.19 (1985) (emphasis added).

¹⁰⁸ *Italian Colors*, 133 S. Ct. at 2310–11 (citations omitted).

¹⁰⁹ *Id.* at 2313 (Kagan, J., dissenting).

¹¹⁰ *Id.* at 2314 (Kagan, J., dissenting) (quoting *Mitsubishi Motors*, 473 U.S. at 637).

the demonstrated expert fees to prove the antitrust violation grossly exceeded any individual's merchant's possible recovery, no rational merchant would choose to bring the claim.¹¹¹

So if the arbitration clause is enforceable, Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. And here is the nutshell version of today's opinion, admirably flaunted rather than camouflaged: Too darn bad.¹¹²

IV. IN THE WAKE OF *CONCEPCION* AND *ITALIAN COLORS*, CORPORATIONS ARE ESCAPING LIABILITY

Following *Concepcion* and *Italian Colors*, courts are shunting off to arbitration claims for which state and federal laws provide private rights of action to protect both individual rights and broader policy goals; these include claims under the labor laws, state unfair and deceptive practices acts, and whistleblower statutes.

For example, faced with the question of “whether an employee can invalidate a class-action waiver provision in an arbitration agreement when that waiver removes the financial incentive for her to pursue a claim under the Fair Labor Standards Act of 1938,” the Second Circuit Court of Appeals looked to the Supreme Court's *Italian Colors* decision and answered “no” in *Sutherland v. Ernst & Young, LLP*.¹¹³ There, the employee presented uncontested evidence that the costs of individual arbitration would outstrip her potential recovery by a hundred-fold.¹¹⁴ In *Richards v. Ernst & Young, LLP*, the Ninth Circuit Court of Appeals reversed a lower court's denial of a motion to compel arbitration, finding no prejudice to the plaintiff despite the fact that Ernst & Young failed to move for arbitration until years into the litigation.¹¹⁵ Adding insult to injury, the Court described the discovery expenses as self-imposed, because “Ms. Richards was a ‘part[y] to an agreement making arbitration of disputes mandatory,’ and therefore ‘[a]ny extra

¹¹¹ *Id.* at 2315–16 (Kagan, J., dissenting). Justice Breyer raised a similar concern in the *Concepcion* dissent, noting “What rational lawyer would have signed on to represent the *Concepcions* in litigation for the possibility of fees stemming from a \$30.22 claim? . . . In California's perfectly rational view, nonclass arbitration over such sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the \$30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold).” *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1761 (Breyer, J., dissenting).

¹¹² *Italian Colors*, 133 S.Ct. at 2313 (Kagan, J., dissenting).

¹¹³ *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 292 (2d Cir. 2013).

¹¹⁴ *Id.* at 294–95.

¹¹⁵ *Richards v. Ernst & Young, LLP*, 734 F.3d 871, 872–73 (9th Cir. 2013). *But see* *Bower v. Inter-Con Sec. Sys., Inc.*, 181 Cal. Rptr. 3d 729, 732–34 (Cal. Ct. App. 2014) (company waived right to compel arbitration by engaging in discovery for several months in putative wage and hour class action).

expense incurred as a result of [Ms. Richard's] deliberate choice of an improper forum, in contravention of their contract, cannot be charged to' Ernst & Young."¹¹⁶

Even cases seeking injunctive relief designed to stop unfair or deceptive trade practices are being forced into arbitration. In *Ferguson v. Corinthian Colleges, Inc.*, the plaintiffs, current and former students of colleges owned by Corinthian Colleges, Inc., sought classwide money damages and injunctive relief on claims that the company misrepresented the quality of the schools' education, their accreditation, the cost, and graduates' career prospects.¹¹⁷ The district court granted Corinthian's motion to compel arbitration on all money damages claims; however, it exempted the claims for injunctive relief under California's *Broughton-Cruz* rule.¹¹⁸ In *Broughton v. Cigna Healthplans of California*, the California Supreme Court noted that when a plaintiff exercises a right under the California Legal Remedies Act to seek an order enjoining violative practices, she acts as a "private attorney general, enjoining future deceptive practices on behalf of the general public"¹¹⁹; because arbitration and the purposes of the Act conflict, arbitration for such claims seeking injunctive relief cannot be compelled.¹²⁰ Four years later, in *Cruz v. Pacificare Health Systems, Inc.*, the California Supreme Court extended this holding to injunctive relief sought under the state's unfair competition and false advertising laws.¹²¹ The Ninth Circuit Court of Appeals reversed, finding the *Broughton-Cruz* rule prohibits arbitration of a particular kind of claim—those for injunctive relief under the state statutes—and thus is preempted by the FAA.¹²² Of course, whether the arbitrator would have the power to grant the public injunctive relief the students sought or whether they would end up back in court was an entirely different question and one the Court of Appeals side-stepped:

We decline to resolve in advance the question of what, if any, court remedy Plaintiffs might be entitled to should the arbitrator determine that it lacks the authority to issue the requested injunction. . . . If the arbitrator comes to that conclusion, Plaintiffs may return to the district court to seek their public injunctive relief.¹²³

This trend of courts conferring *de facto* corporate immunity extends to whistleblower claims. In *Khazin v. TD Ameritrade Holding Corp.*, the Third

¹¹⁶ *Richards*, 734 F.3d at 873 (citation omitted).

¹¹⁷ *Ferguson v. Corinthian Colleges, Inc.*, 733 F.3d 928, 931 (9th Cir. 2013).

¹¹⁸ *Id.* at 930.

¹¹⁹ *Broughton v. Cigna Healthplans of California*, 988 P.2d 67, 76 (Cal. 1999).

¹²⁰ *Id.* at 76, 78.

¹²¹ *Cruz v. Pacificare Health Systems, Inc.*, 66 P.3d 1157, 1164–65 (Cal. 2003).

¹²² *Ferguson*, 733 F.3d at 930, 937. The California Court of Appeal recently reached the same decision as the Ninth Circuit and other federal courts, finding the FAA preempts the *Broughton-Cruz* rule. See *McGill v. Citibank, N.A.*, 181 Cal. Rptr. 3d 494, 504 (Cal. Ct. App. 2014).

¹²³ *Ferguson*, 733 F.3d at 937.

Circuit Court of Appeals found the plaintiff's whistleblower retaliation claim under 2010's Dodd-Frank Wall Street Reform and Consumer Protection Act subject to arbitration despite the Act's provision stating that "[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section."¹²⁴ Dodd-Frank, the Third Circuit Court of Appeals noted, amends various statutes regulating the financial industry, including the Sarbanes-Oxley Act of 2002.¹²⁵ The court rejected the argument that Congress did not intend to treat whistleblower claims under Sarbanes-Oxley and the Dodd-Frank Act differently—that doing so would “undermine Dodd-Frank’s broader purpose of enhancing protections for whistleblowers.”¹²⁶ Instead, it found the anti-arbitration provision applies only to Sarbanes-Oxley whistleblower retaliation claims, not Dodd-Frank whistleblower claims.¹²⁷

In many areas, the courts are bearing out the granting of corporate immunity for violations of federal and state statutes that critics of pre-dispute arbitration clauses decry. Pushed into private arbitration where there is no guarantee that an arbitrator will apply or uphold the law, consumers and the public suffer.

V. SOME BRIGHT SPOTS REMAIN AS PUBLIC OPINION TURNS AGAINST MANDATORY ARBITRATION AND COURTS ROLL BACK SOME CLAUSES

While the Supreme Court's decisions in *Concepcion* and *Italian Colors* cast ominous clouds over consumers' ability to effectively seek recourse against corporate wrongdoers, the outlook is not completely bleak. Increasing public education, the CFPB's solid empirical study, and court restraints on particularly malodorous mandatory arbitration clauses show some spots for hope.

A. *As the Public Learns More About the Use and Effects of Arbitration, Companies Can Change (or Be Forced to Change) Policies*

In April 2014, General Mills added an arbitration clause to its website, requiring consumers who downloaded coupons, participated in promotions or sweepstakes, engaged with General Mills' “online communities,” or otherwise interacted with the company to agree to binding arbitration for “all disputes related to the purchase or use of any General Mills product or service.”¹²⁸ As word of the company's terms (and the questionable way in

¹²⁴ *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488, 494–95 (3d Cir. 2014) (quoting 18 U.S.C. § 1514A(e)(2)).

¹²⁵ *Id.* at 491.

¹²⁶ *Id.* at 493.

¹²⁷ *Id.*

¹²⁸ Stephanie Strom, *General Mills Reverses Itself on Consumers' Right to Sue*, N.Y. TIMES, Apr. 20, 2014, at A17, <http://perma.cc/J3P8-S7GS>.

which it sought to demonstrate consumer “agreement” to those “take it or leave it” terms simply by accessing the General Mills site) spread, backlash came swiftly. Consumers choked on the idea of giving up their rights simply for “liking” General Mills on Facebook, an action arguably within the bounds of the arbitration clause.¹²⁹ Facing bad press, letters to Congress with the subject “Trix don’t belong in the fine print,” and consumer anger on social media sites, General Mills reversed course within the month, removing the arbitration clause.¹³⁰

The General Mills experience exemplifies how consumers are learning more about the prevalence and pitfalls of arbitration as news outlets begin to carry stories on the issue. For example, a recent article appearing on Florida’s Local 10 News website leads with “Don’t sign anything with the word ‘arbitration’ in it” in its “5 things Floridians need to know not to get ripped off” story.¹³¹ The article notes that most consumer contracts include pre-dispute “mandatory arbitration” provisions, requiring consumers “to have the case heard and decided by an arbitrator, which is a lawyer or retired judge who was picked by the company.”¹³² Although the article identifies many of the problems with mandatory arbitration, including arbitral bias,¹³³ the advice not to sign anything containing the word “arbitration” amounts to the impossible, given the prevalence of such clauses.¹³⁴ Likewise, the *New York Times* recently carried a front-page story on how the financial industry is flouting federal law protections for active duty service members and hiding behind mandatory arbitration clauses.¹³⁵ As of this writing, it remains too early to tell whether the article’s efforts to shine light on a terrible practice affecting a sympathetic group of Americans will shame either the companies or Congress into acting.

The CFPB’s recently released three-year study on mandatory arbitration and class action bans in consumer financial services and products is a precursor to rule-making by the agency.¹³⁶ Given the study’s findings that mandatory arbitration clauses and class action bans undermine protections for consumers, it is widely believed that the agency will move to prohibit

¹²⁹ Stephanie Strom, *When ‘Liking’ a Brand Online Voids the Right to Sue*, N.Y. TIMES, Apr. 16, 2014, at B1, <http://perma.cc/V4TL-ZS96>.

¹³⁰ See Stephanie Strom, *General Mills Amends New Legal Policies*, N.Y. TIMES, Apr. 18, 2014, at B2, <http://perma.cc/F6NH-66L3>.

¹³¹ Jerard Heller, *Five Things Floridians Need to Know to Not Get Ripped off*, LOCAL 10 NEWS (Jan. 7, 2015, 2:46 PM), <http://perma.cc/K9AY-8CRT>.

¹³² *Id.*

¹³³ *Id.* (“The arbitrator knows that if he or she rules against the company and in favor of the consumer, the company will not pick that arbitrator again. The arbitrator does not have to explain his or her decision; it can simply be arbitrary.”).

¹³⁴ See, e.g., *supra* notes 40–41 and accompanying text.

¹³⁵ Jessica Silver-Greenberg & Michael Corkery, *Failed by Law and Courts, Troops Come Home to Repossessions*, N.Y. TIMES, Mar. 16, 2015, at A1, <http://perma.cc/KJ39-QREY> (writing “Congress has given service members a number of protections . . . from repossessions and foreclosures. Efforts to maintain that special status . . . has run into resistance from the financial industry. . . . While using mandatory arbitration, some companies repeatedly violate the federal protections, leaving troops and their families vulnerable.”).

¹³⁶ Cordray, *supra* note 49.

companies from including such clauses in consumer contracts for the goods and services under its purview.

*B. Some Courts Have Found Ways to Moderate
the Effect of Arbitration Clauses*

Many attorneys and courts have found ways to tiptoe through the *Concepcion/Italian Colors* minefield. As Tina Wolfson and Bradley King recently outlined in their well-researched article in *The Federal Lawyer*, “some arbitration agreements are still not enforceable on grounds that are applicable to all contracts and do not single out characteristics inherent to arbitration, such as collective action waivers.”¹³⁷ Courts have rejected (a) attempts to compel arbitration by nonsignatories to an arbitration agreement (e.g., technology service providers or manufacturers seeking to enforce end user agreements signed by consumers but not the provider or manufacturer compelling arbitration);¹³⁸ (b) claims that nonparties consented to arbitration on behalf of a “vulnerable plaintiff,”¹³⁹ such as a dependent minor, incapacitated individual, or decedent, by signing for them;¹⁴⁰ and (c) arbitration of claims related to online purchases where the “click-through” agreement on the website failed to sufficiently alert the consumer to the arbitration clause.¹⁴¹

Where one party retains discretion to modify the terms of the arbitration clause or the contract otherwise displays a lack of mutual consideration, courts often refuse to compel arbitration.¹⁴² For example, in *Carey v. 24 Hour Fitness, USA, Inc.*, the Fifth Circuit Court of Appeals found that the defendant’s unilateral right to modify the employee handbook and arbitration provision, and to make the changes retroactive, effectively “allows 24 Hour Fitness to hold its employees to the promise to arbitrate while reserving its own escape hatch.”¹⁴³ Because the agreement did not prohibit retroactive changes by 24 Hour Fitness, the arbitration provision was illusory and thus unenforceable.¹⁴⁴

And courts may still invalidate arbitration agreements on grounds of procedural or substantive unconscionability or unenforceability.¹⁴⁵ In *Nesbitt v. FCNH, Inc. et al*, the District of Colorado relied in part on *Italian Colors*’ admonition that an arbitration clause cannot act “as a prospective waiver of

¹³⁷ Tina Wolfson & Bradley King, *Even After Concepcion and Italian Colors, Some Arbitration Agreements Are Not Enforceable*, THE FEDERAL LAWYER, Jan./Feb. 2015, at 19.

¹³⁸ See *id.* at 20 n.5 (listing cases). But see *Marengo v. DirecTV LLC*, 183 Cal. Rptr. 3d 587 (Cal. Ct. App. 2015) (granting DirecTV’s motion to compel arbitration pursuant to the employment agreement signed by the plaintiff with 180 Connect, Inc., before DirecTV acquired the latter company).

¹³⁹ Wolfson & King, *supra* note 137, at 20.

¹⁴⁰ See *id.* at 20 n.6 (listing cases).

¹⁴¹ See *id.* at 20 n.11 (listing cases).

¹⁴² See *id.* at 20 n.10 (listing cases).

¹⁴³ *Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202, 206 (5th Cir. 2012).

¹⁴⁴ *Id.* at 204.

¹⁴⁵ Wolfson & King, *supra* note 137, at 20 nn.12–18 (listing cases).

a party's right to pursue statutory remedies" to strike as unenforceable a trade school's arbitration provision.¹⁴⁶ The district court found that the arbitration agreement's requirements that the parties split the costs of arbitration and that each side bear their own attorney costs "effectively deprives the plaintiff of an accessible form to resolve [her] statutory claim and vindicate [her] statutory rights"¹⁴⁷ and "amounts to a prospective waiver of Ms. Nesbitt's right to pursue a statutory remedy [under the Fair Labor Standards Act], specifically attorney's fees."¹⁴⁸ Because the arbitration agreement did not have a savings clause allowing unenforceable provisions to be severed, the court found the entire agreement unenforceable.¹⁴⁹ In *Chavarria v. Ralphs Grocery Company*, the Ninth Circuit Court of Appeals applied California's unconscionability analysis to invalidate an arbitration agreement on both procedural and substantive unconscionability grounds, finding the agreement effectively allowed the company to select the arbitrator and required the arbitrator to apportion costs equally between the parties at the outset of the arbitration, regardless of the merits of the claim and disregarding any potential state law to the contrary.¹⁵⁰ *Concepcion*, the Ninth Circuit noted, "cannot be read to immunize all arbitration agreements from invalidation no matter how unconscionable they may be, so long as they invoke the shield of arbitration."¹⁵¹ By making the costs of pursuing the claim prohibitive, the defendant's arbitration clause "present[ed] exactly" the exception the *Italian Colors* Court identified as perhaps voiding an arbitration clause: "filing and administrative fees attached to arbitration that are so high as to make access to the forum impracticable."¹⁵²

Courts have recently reaffirmed the categorical invalidation of arbitration agreements in select contexts. In the middle of 2014, the California Supreme Court issued a significant decision in *Iskanian v. CLS Transportation of Los Angeles* preserving the right of citizens to bring representative actions under California's Private Attorneys General Act of 2004 ("PAGA") for civil penalties on behalf of the state for Labor Code violations committed by an employer against its employees.¹⁵³ The defendant's employment agreement included an arbitration clause prohibiting class proceedings, including "representative action[s]."¹⁵⁴ Likening PAGA to *qui tam* actions, the court held that "requiring an employee as a condition of employment to

¹⁴⁶ *Nesbitt v. FCNH, Inc.*, No. 14-cv-00990-RBJ, 2014 WL 6477636, at *3 (D. Colo. Nov. 19, 2014).

¹⁴⁷ *See id.* at *5 (quoting *Daughtery v. Encana Oil & Gas (USA), Inc.*, No. 10-cv-02272-WJM-KLM, 2011 WL 2791338, at *10 (D. Colo. July 15, 2011)).

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at *6.

¹⁵⁰ *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 920–26 (9th Cir. 2013).

¹⁵¹ *Id.* at 927.

¹⁵² *Id.* (quoting *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2310–11 (2013)).

¹⁵³ *Iskanian v. CLS Transp. of Los Angeles, LLC*, 327 P.3d 129, 133 (2014) *cert. denied*, 135 S. Ct. 1155 (2015). The court noted that most proceeds of PAGA litigation go to the state. *Id.*

¹⁵⁴ *Id.*

give up the right to bring representative PAGA actions in any forum is contrary to public policy” and the FAA’s “goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state’s behalf.”¹⁵⁵ PAGA claims escape preemption by the FAA because the government, the court found, “is always the real party in interest in [a PAGA] suit,”¹⁵⁶ the FAA “aims to ensure an efficient forum for the resolution of *private* disputes,”¹⁵⁷ and “a PAGA claim . . . is not a dispute between an employer and an employee arising out of their contractual relationship. It is a dispute between an employer and the *state*.”¹⁵⁸

The Supreme Court denied *certiorari* in *Iskanian* in January 2015. But several California federal district courts have rejected the *Iskanian* holding, instead finding that federal law preempts California’s prohibition on agreements that waive an employee’s right or ability to pursue a PAGA claim, presumably setting up a visit to the Supreme Court via the Ninth Circuit Court of Appeals.¹⁵⁹

VI. TRUE REFORM REQUIRES CONGRESSIONAL ACTION TO LIMIT THE SCOPE OF THE FAA, *CONCEPCION*, AND *ITALIAN COLORS*

Increasing public education of and agitation by consumers around the harms of mandatory arbitration agreements and class action bans is key. But although bad press and public pressure resulted in at least one major company rolling back its mandatory arbitration clause, and some lawyers and courts are finding ways to work in the fringes, consumers need Congressional action to fix the broken system. The Supreme Court’s *Concepcion* and *Italian Colors* decisions in favor of large corporations and against consumers have closed many avenues through the judicial system. Even positive steps through the executive branch of government, such as the CFPB’s likely rule-making prohibiting mandatory arbitration clauses and class action bans in consumer financial products, only go so far without Congressional support. Opponents of the agency and its findings threatened to sue the CFPB over the study (even before knowing the outcome) and many in Congress are seeking to gut the agency’s funding and reduce its effectiveness.¹⁶⁰

In the executive branch, in September 2014, the Department of Defense proposed a rule to ban forced arbitration for high-cost loans made to active-duty service members and their families and to close some loopholes in the

¹⁵⁵ *Id.* See *id.* at 148.

¹⁵⁶ *Id.* at 148.

¹⁵⁷ *Id.* at 149.

¹⁵⁸ *Id.* at 151.

¹⁵⁹ See Regina Silva, *Iskanian v. CLS Will Continue to Divide Calif. Courts*, LAW360, Jan. 28, 2015, <http://perma.cc/E77P-JX3W>.

¹⁶⁰ See, e.g., Peter Schroeder, *House Bill Would Cap CFPB Budget*, THE HILL, Feb. 24, 2015, <http://perma.cc/TA46-KXKM>.

Military Lending Act to shut down other forced arbitration clauses.¹⁶¹ The recent *New York Times* article on predatory lending practices and arbitration clauses harming service members noted that the U.S. Chamber of Commerce and the Securities Industry and Financial Markets Association, Wall Street's major trade organization, opposed a bipartisan bill introduced in Congress last year that would have permitted service members to opt out of arbitration and instead seek redress in court.¹⁶² The bill never made its way out of committee.¹⁶³

Some in Congress have begun taking baby steps to clean up the mess left by *Concepcion*, *Italian Colors*, and their aftermath. For example, in December 2014, on the eve of student loan servicer ECMC Group's purchase of fifty-six Corinthian Colleges, Inc., campuses, Senator Richard Durbin of Illinois challenged the company's planned inclusion of mandatory arbitration agreements in student enrollment documents.¹⁶⁴ "I am concerned," he wrote, "that as negotiations continue, ECMC is signaling that it intends to operate its new education subsidiary in a manner alarmingly similar to a for-profit institution, including through the use of that industry's hallmark—mandatory arbitration agreements," which "largely shielded companies like Corinthian from being held responsible for wrongdoing and prevented students whose lives have been ruined by these schools from receiving relief."¹⁶⁵ Noting that not-for-profit educational institutions rarely, if ever, include mandatory arbitration, Senator Durbin urged ECMC to stand by its public announcement that it wants to "help students" and thus "start by not denying students' rights to bring claims of wrongdoing before the courts."¹⁶⁶

Representative Henry Johnson of Georgia and Senator Al Franken of Minnesota introduced companion House and Senate versions of the Arbitration Fairness Act of 2011 and reintroduced them in 2013 and 2015; the bills would effectively limit the reach of the FAA by prohibiting pre-dispute arbitration agreements for employment, consumer, antitrust, or civil rights disputes. Both times, the bills gained several cosponsors but died in Congress.¹⁶⁷

Without Congressional action, ubiquitous pre-dispute arbitration clauses and class action bans lead to the "predictable result" of

¹⁶¹ See News Release, U.S. Dep't of Def., Obama Administration Proposes New Regulations to Expand Important Financial Protections for Military Families (Sept. 26, 2014), <http://perma.cc/VH33-75XV>.

¹⁶² Silver-Greenberg & Corkery, *supra* note 135.

¹⁶³ *Id.*

¹⁶⁴ Letter from Richard Durbin, U.S. Senator, to David Hawn, President and CEO, ECMC Group (Dec. 19, 2014), <http://perma.cc/4RT3-UC92>.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ H.R. RES. 1873, 112TH CONG. (2011); H.R. RES. 1844, 113TH CONG. (2013); H.R. RES. 2087, 114TH CONG. (2015); S. RES. 987, 112TH CONG. (2011); S. RES. 878, 113TH CONG. (2013); S. RES. 1133, 114TH CONG. (2015).

not only unfairness to the harmed consumers but also a systemic failure to hold accountable those companies who abuse the trust placed in them by consumers. The few claims that actually do make it to arbitration are typically only adjudicated as to a single customer, due to inclusion of class action prohibitions. This means that a decision in favor of the consumer will have no precedential value or binding effect against the company with respect to legal proceedings brought by other consumers. . . . As a result, corporations are less likely to be held accountable for wrongdoing.¹⁶⁸

Freedom of contract remains a hallmark of the American experience and few, if any, commentators suggest the banning of arbitration as a means to resolve claims where parties truly voluntarily agree to the terms after a dispute arises. But given the harms to both consumers and the public of secretive, individual arbitration when forced through mandatory arbitration agreements and class action bans, Congress must act to preserve meaningful access to the civil justice system for all by limiting the reach of these clauses and legislatively overruling *Concepcion* and *Italian Colors*.

¹⁶⁸ Letter from Attorneys General, *supra* note 1, at 3.