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# RATIONAL ACTORS, CLASS ACTION WAIVERS, AND THE EMERGENCE OF MASS INDIVIDUAL ARBITRATION DEMANDS

Richard D. Freer\*

## INTRODUCTION

Congress passed the Federal Arbitration Act (“FAA” or “Act”) in 1925 to mandate that courts enforce arbitration agreements.<sup>1</sup> For sixty years, the Act was applied to commercial contracts between businesses.<sup>2</sup> About forty years ago, the Supreme Court started rejecting the traditional understandings that guided FAA jurisprudence regarding arbitrability.<sup>3</sup> The result was an exponential increase in the number and types of cases subject to arbitration. Speaking generally, businesses applauded the transformation because it allowed them to have consumers, employees, patients, clients—a host of people with whom they had a contractual relationship—forego their right of access to courts and submit their claims to private dispute resolution.

Many of the claims commonly funneled into arbitration today (particularly consumer claims) are “negative value”—that is, the maximum recovery for the

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\* Charles Howard Candler, Professor of Law, Emory University. I am delighted to participate in this celebration of the career of Professor Rhonda Wasserman, who has been a friend and colleague in the academy for over three decades. I am indebted to Peter Hay and Stacie Strong for their comments, suggestions, and guidance.

<sup>1</sup> See Federal Arbitration Act, 9 U.S.C. §§ 1–16.

<sup>2</sup> Imre Stephen Szalai, *Exploring the Federal Arbitration Act Through the Lens of History*, 2016 J. DISP. RESOL. 115, 118 (2016) (stating that historical research on the FAA shows “the statute was enacted to cover privately-negotiated arbitration agreements between merchants in order to facilitate the resolution of contractual disputes, through minimal procedures applicable solely in federal court”).

<sup>3</sup> See *id.* (“[T]hrough decades of flawed interpretations, the Supreme Court has expanded the statute to force both state courts and federal courts to acknowledge and compel arbitration in a wide variety of disputes, including complex statutory disputes of a public nature, consumer disputes, and employment disputes.”).

plaintiff would be less than the cost of vindicating the claim.<sup>4</sup> Eventually, plaintiffs sought to arbitrate such cases through class arbitration, using class provisions promulgated by leading arbitration providers, the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS).<sup>5</sup> Businesses responded with “class action waivers,” which require the plaintiff to proceed individually.<sup>6</sup> Because such claims may not be economically viable, however, plaintiffs attempt to void the class waivers on a variety of theories. And that argument has been a focal point for the past two decades in the FAA case law: are class action waivers enforceable? If so, can state or federal laws be invoked to overcome such waivers and permit aggregate arbitration?

Ten years ago, Professor Rhonda Wasserman published an insightful article on the subject, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*.<sup>7</sup> There, she viewed the Supreme Court’s FAA decisions, particularly those addressing class action waivers, through a legal process lens.<sup>8</sup> She examined the dynamic relationships between the Supreme Court on the one hand, and Congress, administrative agencies, and the lower federal and state courts on the

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<sup>4</sup> See, e.g., *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 238 (2013) (“The regime established by the Court of Appeals’ decision would require . . . that a federal court determine (and the parties litigate) the legal requirements for success on the merits claim-by-claim and theory-by-theory, the evidence necessary to meet those requirements, the *cost of developing that evidence*, and the *damages that would be recovered in the event of success*. . . . The FAA does not sanction such a judicially created superstructure.”) (emphasis added).

<sup>5</sup> Class arbitration emerged from decisions upholding a trial judge’s discretion to order parties to arbitration on a class-wide basis. See, e.g., *Keating v. Superior Court*, 645 P.2d 1192, 1209–20 (Cal. 1982), *rev’d on other grounds sub nom. Southland Corp. v. Keating*, 465 U.S. 1 (1984); see also *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 453–54 (2003) (plurality opinion recognizing contractual propriety of class arbitration). In the wake of this judicial acceptance, AAA and JAMS issued their respective rules. SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS (AM. ARB. ASS’N 2003); CLASS ACTION PROCEDURES (JUD. ARB. AND MED. SERVS. 2009). Thus, class arbitration was coming into its own just as the Court expanded the types of claims subject to arbitration. Plaintiffs, newly shifted to the arbitral forum, attempted to pursue class arbitrations, which led to the current fight over class waivers. See S.I. Strong, *Enforcing Class Arbitration in the International Sphere: Due Process and Public Policy Concerns*, 30 U. PA. J. INT’L L. 1, 3–4 (2014).

<sup>6</sup> See generally Szalai, *supra* note 2, at 118.

<sup>7</sup> Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 LOY. U. CHI. L.J. 391 (2012).

<sup>8</sup> *Id.*

other.<sup>9</sup> And she raised important questions about the respective roles of these institutions in setting policy.

Specifically, Professor Wasserman demonstrated that the Court had substituted its policy views for those of Congress.<sup>10</sup> In response to these decisions, some federal agencies, state courts, and lower federal courts pushed back in an effort to avoid the Court's prescriptions.<sup>11</sup> Professor Wasserman wrote in the immediate wake of two Supreme Court decisions, *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*<sup>12</sup> and *AT&T Mobility, LLC v. Concepcion*,<sup>13</sup> and recognized their potential impact on the availability of class arbitration.

First, *Stolt-Nielsen* is understood to have established a default presumption against class arbitrations; aggregate hearings are available only if the parties affirmatively agree.<sup>14</sup> Second, *Concepcion* extended the FAA's force to preempt not simply state laws that *de jure* discriminate against arbitration clauses, but to those that have the *de facto* effect of doing so.<sup>15</sup>

One of the key insights of Professor Wasserman's article was that *Stolt-Nielsen* and *Concepcion* injected a new policy underpinning the FAA: now, a central purpose of the Act was to promote "informal" and "bilateral" arbitration.<sup>16</sup> This policy, unmentioned for over eight decades, was invoked in *Stolt-Nielsen* and *Concepcion* to justify the Court's restrictions on class arbitration.<sup>17</sup> I will refer to this policy as the "simplicity" rationale: arbitration proceedings are presumptively relatively simple affairs, not to be complicated by aggregation of claims.

In the decade since Professor Wasserman wrote *Legal Process in a Box*, the Court has decided eight relevant cases, including two in 2022.<sup>18</sup> My goal in this

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<sup>9</sup> *Id.* at 412–13.

<sup>10</sup> *Id.* at 394–411.

<sup>11</sup> *Id.* at 412–44.

<sup>12</sup> 559 U.S. 662 (2010).

<sup>13</sup> 563 U.S. 333 (2011).

<sup>14</sup> *Stolt-Nielsen*, 559 U.S. at 697.

<sup>15</sup> *Concepcion*, 563 U.S. at 351.

<sup>16</sup> Wasserman, *supra* note 7, at 405–06.

<sup>17</sup> See *Stolt-Nielsen*, 559 U.S. at 684; *Concepcion*, 563 U.S. at 348.

<sup>18</sup> (1) *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906 (2022); (2) *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708 (2022); (3) *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019); (4) *Epic Sys. Corp. v. Lewis*,

Article is to survey those eight decisions to determine what the Court has done with the themes Professor Wasserman identified, particularly from *Stolt-Nielsen* and *Concepcion*.<sup>19</sup> As discussed below, the central message of those two cases now enjoys broad embrace by the Court. Additionally, the Court's most recent effort, *Viking River Cruises*—which, like several other cases, addresses issues Professor Wasserman raised—suggests a new flexibility and nuance missing in earlier efforts.

Even with this nuance, however, it is clear that the FAA jurisprudence of the last forty years has favored business defendants over individual plaintiffs. First, the Court embraced business' efforts to shift a wide range of claims out of court and into arbitration. Second, the Court, while leaving open some arguments, has largely upheld class waivers. By the conventional wisdom, the inability to pursue a class arbitration remedy means that negative-value claims (those not worth pursuing on an individual basis) will simply never be brought; defendants in such cases will be insulated from liability.

But the conventional wisdom is being turned on its head by a development no one seemed to foresee. Increasingly, some law firms are facilitating the mass assertion of individual arbitration claims, which unleashes on the business defendant potentially devastating administrative and processing fees. In essence, plaintiffs are calling businesses' bluff—you wanted individual arbitration, they say, we will force you to incur fees that will dwarf your potential liability on the merits.<sup>20</sup> This story is unfolding but this development has already led some businesses to abandon their victories under the FAA and to remove arbitration provisions from their contracts.

Part I of this Article gives a brief overview of the FAA, including the four understandings that underlay the Court's jurisprudence for six decades, and the radical transformation wrought by the Court's rejection of those understandings in the past four decades. Part II discusses how the transformation of the FAA led

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138 S. Ct. 1612 (2017); (5) *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); (6) *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47 (2015); (7) *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2015); and (8) *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013). The Court also decided *Coinbase, Inc. v. Bielski*, 143 S. Ct. 1915, 1918–23 (2023), which held that a district court must stay arbitration proceedings during the pendency of an interlocutory appeal on the issue of arbitrability. I do not discuss *Coinbase* because it did not address the issues on which this Article focuses.

<sup>19</sup> I do not attempt to apply a legal process lens, nor do I address each of the issues Professor Wasserman discussed. I focus only on Supreme Court decisions and the pushback seen from some state and lower federal courts. Thus, I do not assess (aside from a brief footnote) the interaction between the Court and administrative agencies.

<sup>20</sup> The leading treatment of this trend is J. Maria Glover, *Mass Arbitration*, 74 STAN. L. REV. 1283 (2022).

plaintiff and defense counsel, as rational actors, to adopt positions that ultimately led to the focus on class action waivers. Part III analyzes the Court's decisions from 2013 to the present and draws at least some tentative conclusions about where things stand a decade after Professor Wasserman raised these issues. It concludes by discussing how the emergence of mass individual arbitration claims is causing businesses to rethink their four-decade effort to force individual plaintiffs into arbitration.

## I. THE FAA: THE TRADITIONAL UNDERSTANDINGS AND THE MODERN UNDERSTANDINGS

Well into the twentieth century, American courts generally refused to enforce arbitration clauses.<sup>21</sup> Their theory was that such provisions improperly “ousted” courts of jurisdiction.<sup>22</sup> Ouster was problematic for two reasons. First, prescribing the subject matter jurisdiction of courts is a legislative function not to be usurped by private litigants. Second, such clauses drained courts' authority to adjudicate disputes and enforce rights.<sup>23</sup> In 1925, expressly to overcome judicial hostility to arbitration clauses, Congress passed the FAA, which sets out a comprehensive scheme of judicial enforcement of arbitration provisions and arbitral awards subject to very limited judicial review.<sup>24</sup>

The FAA addresses only contractual arbitration (as opposed, for example, to court-annexed arbitration).<sup>25</sup> The Act applies when parties to a contract agree that disputes arising under the agreement will be decided in an arbitral forum, not in court.<sup>26</sup> Congress was not motivated by a desire to vitiate the ouster doctrine across

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<sup>21</sup> See Daniel Centner & Megan Ford, *A Brief History of Arbitration*, AM. BAR ASS'N (Sept. 19, 2019), [http://www.americanbar.org/groups/tort\\_trial\\_insurance\\_practice/publications/the\\_brief/2018-19/summer/a-brief-history-arbitration](http://www.americanbar.org/groups/tort_trial_insurance_practice/publications/the_brief/2018-19/summer/a-brief-history-arbitration) [<https://perma.cc/9PG7-ZNCZ>] (“[W]hile arbitration may have been recognized during the early history of the United States, it was not preferred. Prior to the enactment of the Federal Arbitration Act . . . arbitrators' statutory authority to resolve a dispute often was limited to specific contexts, such as bankruptcy and admiralty.”).

<sup>22</sup> See generally 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3569 (3d ed. Supp. 2022).

<sup>23</sup> See, e.g., *Cooper v. MRM Inv. Co.*, 367 F.3d 493, 498 (6th Cir. 2004) (discussing ouster doctrine). For the same reasons, courts generally did not enforce forum selection clauses. While Congress intervened in the arbitration context, the ultimate widespread acceptance of forum selection clauses came about through judicial decision-making.

<sup>24</sup> 9 U.S.C. §§ 1–16.

<sup>25</sup> See *id.* § 2.

<sup>26</sup> See *id.*

the board. It reacted to lobbying by merchants, who had for years desired to have their disputes handled in a relatively informal manner, to be decided by an expert in the relevant field rather than a generalist judge.<sup>27</sup> Merchants in these cases likely had ongoing business relationships; arbitration would be quicker and avoid the expense and formality of court litigation, including the possibility of protracted appeals.<sup>28</sup>

Moreover, because the companies seeking arbitration were of equal bargaining power, arbitration provisions were likely the result of negotiation rather than imposition. To the extent there was overreaching, the “saving clause” of Section 2 of the Act allowed a court to reject arbitration “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>29</sup> If an arbitration provision were the result of, say, fraud in the inducement or unconscionability, a court would not enforce it.

Thus, in 1925, Congress passed the FAA and overrode the ouster doctrine to allow arbitration of contract disputes between commercial entities.<sup>30</sup> Consistent with this limited scope, courts applied the FAA in the business-to-business context. Indeed, the courts, led by the Supreme Court, resisted expanding the scope of the FAA by developing and applying what may be called four “traditional understandings” about the scope of arbitrability under the Act.

First, in general, claims of employees against employers were not subject to arbitration. This understanding flowed from Section 1 of the FAA, which expressly exempts “contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”<sup>31</sup> As a general (though not universal) matter, courts concluded that employment contracts were beyond the reach of the Act.<sup>32</sup>

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<sup>27</sup> See, e.g., *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1642–44 (2018) (Ginsburg, J., dissenting) (surveying the legislative history associated with the FAA, and noting that “[t]he legislative hearings and debate leading up to the FAA’s passage evidence Congress’s aim to enable merchants of roughly equal bargaining power to enter into binding agreements to arbitrate *commercial* disputes”).

<sup>28</sup> See WRIGHT ET AL., *supra* note 22.

<sup>29</sup> 9 U.S.C. § 2.

<sup>30</sup> *Centner & Ford*, *supra* note 21.

<sup>31</sup> 9 U.S.C. § 1.

<sup>32</sup> See, e.g., *Craft v. Campbell Soup Co.*, 177 F.3d 1083, 1090 (9th Cir. 1999), *amending* 161 F.3d 1199 (9th Cir. 1998), *abrogated by* *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). Courts reasoned that the exemption in Section 1 of the FAA was to be interpreted with reference to Congress’s understanding in 1925 of its authority under the Commerce Clause. Under that view, Congress likely

Second, statutory claims were not subject to arbitration.<sup>33</sup> In *Wilko v. Swan*, decided in 1953, the Court held that claims arising under federal securities laws could not be arbitrated.<sup>34</sup> Congress created those claims to protect investors from fraudulent behavior in the purchase or sale of securities.<sup>35</sup> Adequate protection of the investors, the Court concluded, required a judicial forum for the vindication of rights.<sup>36</sup> Arbitration, the Court warned, would permit arbitrators without legal training to enter an award “without explanation of their reasons and without a complete record of their proceedings . . . .”<sup>37</sup>

Third, the FAA did not apply to cases filed in state court. This conclusion was based upon statutory language.<sup>38</sup> Section 3 permits “courts of the United States” to stay litigation in favor of arbitration,<sup>39</sup> and Section 4 permits a “United States district court” to compel arbitration.<sup>40</sup> No provision in the FAA expressly refers to state courts.

Fourth, Congress did not intend the Act to apply to adhesion contracts. Though that term entered the American legal lexicon in a law review article in 1919,<sup>41</sup> adhesion contracts were not adopted by a majority of states until after an influential California Supreme Court decision in 1962.<sup>42</sup> Indeed, to the extent they are

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doubted that it had authority to legislate regarding all employees. Those listed in the statute certainly were covered by the Commerce Clause jurisprudence of 1925. Under this view, the provision exempting contracts of employment is interpreted to remove from the Act’s purview all such contracts that affect interstate commerce, with the specific references being exemplars rather than exclusive.

<sup>33</sup> See Szalai, *supra* note 2, at 124 (“[T]he FAA was designed for contractual disputes, not statutory claims.”).

<sup>34</sup> 346 U.S. 427, 435–38 (1953).

<sup>35</sup> *Id.* at 435.

<sup>36</sup> *Id.* at 438.

<sup>37</sup> *Id.* at 436.

<sup>38</sup> 9 U.S.C. §§ 3–4; see also Szalai, *supra* note 2, at 118–22 (surveying the history of the FAA to demonstrate it was intended to apply only in federal courts).

<sup>39</sup> 9 U.S.C. § 3.

<sup>40</sup> *Id.* § 4.

<sup>41</sup> Edwin Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919).

<sup>42</sup> *Steven v. Fidelity & Casualty Co.*, 58 Cal. 2d 862, 882 (Cal. 1962); see Mo Zhang, *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy*, 41 AKRON L. REV. 123, 123 n.1 (2008) (“The concept of the contract of adhesion is not an American product, but rather originated in French civil law



mentioned in the legislative history, legislators argued that they were not subject to the FAA.<sup>43</sup> Moreover, because the typical FAA case involved merchants who negotiated the arbitration clause, no one in Congress seemed to think the Act would apply to boilerplate contracts between businesses and consumers, in which the arbitration provision was not negotiated.<sup>44</sup>

Remarkably, in the past forty years, the Court has overturned all four traditional understandings. It has not ignored them; it has affirmatively jettisoned them and adopted the opposite positions.<sup>45</sup>

- In 2001, the Court held the limitation in Section 1 applies only to employment contracts of “transportation workers.”<sup>46</sup> In other words, all employment contracts except those of workers in the transportation field are subject to the FAA.
- In 1985, the Court concluded that, at least in the international context, federal antitrust claims can be relegated to arbitration.<sup>47</sup> Two years later, it reached the same conclusion as to claims arising under the Securities Exchange Act of 1934.<sup>48</sup> In 1989, it overruled *Wilko v. Swan*, holding that claims arising under the Federal Securities Act of 1933 were subject to arbitration.<sup>49</sup> These holdings rested on the assumption that there is nothing all that special about access to a court for the vindication of rights.

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and was adopted by a majority of American courts after the California Supreme Court endorsed adhesion in 1962.”).

<sup>43</sup> Wasserman, *supra* note 7, at 398–99 (listing statements by legislators from the 1924 Congress who stated their opposition to having the FAA apply to adhesion contracts, concluding “the point of the statute was to enforce arbitration agreements between merchants of roughly equal bargaining power, *not* arbitration clauses in contracts of adhesion” (emphasis in original)).

<sup>44</sup> *Id.*

<sup>45</sup> The Court’s actions are consistent with the move toward alternative dispute resolution in the 1970s and 1980s, which was fueled by the “litigation explosion” and the concomitant overcrowding of courts. *See generally* Richard D. Freer, *Exodus and Transformation of American Litigation*, 65 EMORY L.J. 1491, 1494–1504 (2016).

<sup>46</sup> *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001). Because the plaintiff in that case was an employee in a retail electronics store, and thus was not a transportation worker, the clause requiring him to arbitrate disputes growing out of his employment was enforceable.

<sup>47</sup> *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637–40 (1985).

<sup>48</sup> *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 238 (1987).

<sup>49</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484–85 (1989).

According to the Court, arbitrators, without juries and without the usual incidents of civil dispute resolution, can protect litigants' rights as effectively as courts.<sup>50</sup>

- In 1984, the Court concluded that the Act requires arbitration of cases filed in state courts.<sup>51</sup> Because about 98% of civil cases are filed in state courts,<sup>52</sup> this holding alone increased the number of cases subject to the FAA exponentially. Emphasizing the pro-arbitration policy of the FAA over its language, the Court concluded that “Congress can hardly have meant that an agreement to arbitrate can be enforced against a party who attempts to litigate an arbitrable dispute in federal court, but not against one who sues on the same dispute in state court.”<sup>53</sup>
- The Act now clearly applies to adhesion contracts,<sup>54</sup> notwithstanding that the arbitration clause is not negotiated. This conclusion was obvious from the rejection of the first two historical understandings. The arbitration provision in employment contracts and those applying to antitrust, securities, and any number of other claims are now found in adhesion contracts.

The Court also adopted an expansive view of the issues subject to arbitration. In 1986, the Court concluded that arbitration of claims can be denied only if “it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.”<sup>55</sup> Accordingly, arbitration may be ordered for far more than a claim that the other party to the contract breached that contract.<sup>56</sup> It may, depending on its terms, embrace any claims—common law,

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<sup>50</sup> See *id.* at 483 (finding that arbitration does not innately undercut substantive rights afforded to parties under the Securities Act of 1933). There are core procedural protections in arbitration that mirror those in litigation. See S.I. Strong, *General Principles of Procedural Law and Procedural Jus Cogens*, 122 PENN ST. L. REV. 347 (2018).

<sup>51</sup> *Southland Corp. v. Keating*, 465 U.S. 1, 14–15 (1984).

<sup>52</sup> Colleen F. Shanahan & Anna E. Carpenter, *Simplified Courts Can't Solve Equality*, 148 DAEDALUS 128, 128 (2019) (citation omitted).

<sup>53</sup> *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 26 n.34 (1983).

<sup>54</sup> See *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 683 (1996) (holding that a Montana law—which required notice of an arbitration clause be typed in underlined capital letters on the first page of the contract—was preempted by the FAA).

<sup>55</sup> *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986).

<sup>56</sup> *Id.*

statutory, constitutional, in contract or tort—arising from the contractual relationship, including such singular and potentially high-dollar claims as wrongful termination and wrongful death.

With these developments, the FAA landscape today bears little resemblance to that of forty years ago. Beyond the dramatic rise in the number of disputes subject to the FAA, the Court has changed the character of contractual arbitration in two fundamental ways.

First is the character of the *parties* subject to arbitration. Traditionally, they were businesses of equal bargaining power who negotiated their entire contract, including the agreement to litigate in an arbitral forum.<sup>57</sup> Now, arbitration plaintiffs are often individuals with no bargaining power and who did not engage in the negotiation of terms.<sup>58</sup> Many plaintiffs are of limited means compared to the business against whom they arbitrate. And plaintiffs, unlike businesses, are not repeat players; having to engage in any formal dispute resolution process is likely a rare event in their lives.<sup>59</sup>

Second is the character of the *claims* subject to arbitration. Traditionally, again, merchants arbitrated trade disputes.<sup>60</sup> Now, for instance, an employee may be required to arbitrate not simply a claim that the employer violated the contractual terms of employment (such as failing to provide promised support), but any claims *arising out of that relationship*—for instance, claims that the employer violated federal or state anti-discrimination.<sup>61</sup> And an investor must arbitrate not simply a

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<sup>57</sup> See Szalai, *supra* note 2, at 118.

<sup>58</sup> See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/S37H-J98T>] (explaining that arbitration agreements have become almost ubiquitous in modern consumer contracts).

<sup>59</sup> See, e.g., *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342 (2011) (explaining that businesses are more likely to litigate than individuals).

<sup>60</sup> See Szalai, *supra* note 2, at 118.

<sup>61</sup> *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (“It is now clear that statutory claims may be subject of an arbitration agreement, enforceable pursuant to the FAA. . . . [T]he burden is on the [party seeking to avoid arbitration] to show that Congress intended to preclude a waiver of judicial forum for [statutory] claims.”).

claim that her brokerage firm breached the contract (such as failing to credit a deposit), but any federal or state securities law claim arising from the relationship.<sup>62</sup>

The entire sea change in the application of the FAA was wrought by the Court, not Congress.<sup>63</sup> Nearly three decades ago, Justice O'Connor concluded that "the Court has abandoned all pretense of ascertaining congressional intent with respect to the [FAA], building instead, case by case, an edifice of its own creation."<sup>64</sup> When the law changes, rational actors will react in ways that maximize their position, a point to which we now turn.

## II. RATIONAL ACTORS AND THE IMPORTANCE OF CLASS ARBITRATION

When the law changes, rational actors adapt either to take advantage of it or avoid its application to them. In response to early signals about the transformation of the FAA, by 2000 a parade of businesses—retailers, brokerage firms, banks, employers, transportation companies, cellphone and internet providers, legal professionals, medical service providers, insurance companies, manufacturers, and on and on—inserted boilerplate arbitration clauses into their form contracts with a parade of individuals.<sup>65</sup>

As noted, some of these claims were high-value, such as wrongful termination. But many were negative-value claims.<sup>66</sup> These claims generally are not worth pursuing on an individual basis, simply because the cost of asserting them is greater than the ultimate reward.<sup>67</sup> As Judge Posner reminds us, no one but a lunatic or a fanatic sues to recover \$30,<sup>68</sup> meaning, for example, that many consumer protection

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<sup>62</sup> *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485–86 (1989) (finding that the FAA requires arbitration of violations of federal securities law).

<sup>63</sup> Wasserman, *supra* note 7, at 394–404.

<sup>64</sup> *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

<sup>65</sup> Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration/> [<https://perma.cc/VG53-E3FX>].

<sup>66</sup> Benjamin P. Edwards, *Disaggregated Classes*, 9 VA. L. & BUS. REV. 305, 342 (2015) (explaining negative-value claims and that most individuals in class action suits seek such claims).

<sup>67</sup> *See id.*

<sup>68</sup> "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

claims are not worth asserting individually.<sup>69</sup> Importantly, though, not all negative-value claims are *de minimis*. For example, some antitrust claims for hundreds of thousands of dollars are impracticable on an individual basis because the recovery is dwarfed by the upfront expenses for expert witness opinion evidence.<sup>70</sup>

Realizing that many claims cannot feasibly be pursued alone, it was rational for plaintiffs' counsel to seek aggregate vindication of claims, such as through class arbitration.<sup>71</sup> We are now about twenty years into this struggle between plaintiffs, who generally want class arbitration, and business defendants, who generally oppose class arbitration.

This fray raises the same issues long presented by class actions in court—issues involving the goals of compensation and deterrence. In negative-value cases in any forum, class proceedings create litigation that otherwise would not be pursued.<sup>72</sup> Ordinarily, this is not thought to be a societal good.<sup>73</sup> And there is the principle of *de minimis non curat lex*—sometimes we are simply required to take our lumps for \$50.<sup>74</sup> Moreover, in cases for monetary relief, the negative-value class action generally has done a poor job in compensating claimants.<sup>75</sup>

Weighing in the opposite direction is the policy of deterrence.<sup>76</sup> If plaintiffs *de facto* will not assert their claims, the defendant will be exculpated for behavior that

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<sup>69</sup> *Concepcion* provides an example. The individual consumers had claims of around \$30. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 337 (2011).

<sup>70</sup> This was the case in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013).

<sup>71</sup> For simplicity, I will speak of class arbitrations, but realize that plaintiffs could try in other ways to aggregate the claims of multiple plaintiffs in a single case. Whether they seek to do so through joinder or the class action or some other form of representative suit does not matter.

<sup>72</sup> This is because individual plaintiffs do not have the incentive to assert negative-value claims alone.

<sup>73</sup> See Adam Liptak, *When a Lawsuit Is Too Big*, N.Y. TIMES (Apr. 2, 2011), <http://www.nytimes.com/2011/04/03/weekinreview/03liptak.html> [<https://perma.cc/747Z-LH5L>] (describing the high volume of class action suits).

<sup>74</sup> See Max L. Veech, *De Minimis Non Curat Lex*, 45 MICH. L. REV. 537, 538 (1947) (explaining the principle of *de minimis non curat lex*).

<sup>75</sup> See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 803 (9th ed. 2014) (“[W]hat is most important from an economic standpoint is that the violator be confronted with the costs of his violation—this preserves the deterrent effect of litigation—not that he pay them to his victims.”).

<sup>76</sup> See Alexandra D. Lahav, *The Political Justification for Group Litigation*, 81 FORDHAM L. REV. 3193, 3193 (2013) (“[W]hat legitimates the class action best is the role it plays in the larger polity rather than the internal protections it offers participants.”).

may have violated legal norms. Based largely upon the deterrence rationale, some states bar a contractual waiver of the privilege of seeking class arbitration.<sup>77</sup> In these instances, the state public policy in favor of enforcing its law—consumer protection, employment, etc.—bans (in certain instances) “class waivers.”

If such bans on aggregation are enforced, and class arbitration proceeds, the defendant can face potentially devastating aggregate liability based upon the outcome of a single arbitral proceeding. If the plaintiffs’ claims are weak on the merits, the potential liability may coerce the defendant to settle the case. This form of “blackmail” is a legitimate concern.<sup>78</sup> In court litigation, the judge is required to assess the fairness of a potential class settlement. In doing so, she is required to apply various procedural protections to ensure, among other things, that the defendant is not being railroaded and that class members are not being taken advantage of by class counsel.<sup>79</sup>

In recent cases, we have an interesting new twist: businesses are putting into the form contracts provisions that say, in essence, “we will arbitrate the plaintiff’s individual claim, but if the plaintiff is permitted to represent a class, we want to abandon arbitration and litigate in court.”<sup>80</sup> In my view, this contractual development constitutes an admission by defendants: if their liability exposure is serious, they want the protections accorded by court process. Arbitration, they may be admitting, is not good enough to protect our rights when it really matters; there is something ersatz about arbitration when the stakes are high (to us).

Compare the plight of a plaintiff in a case of great importance to the plaintiff, such as the employee whose job was wrongfully terminated. Those types of claims present high stakes for the plaintiff—often a once-in-a-lifetime dispute with serious consequences. And yet, businesses generally can provide that they will be decided in arbitration—with no judge, no jury, no rules of evidence, little if any discovery, and precious little appellate review.

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<sup>77</sup> See, e.g., *Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 233 (3d Cir. 2012) (listing examples of class waivers under state law and finding that these states’ policies are “egregious” and present an “obstacle to the fulfillment of the FAA’s purposes”).

<sup>78</sup> *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

<sup>79</sup> In federal court, these protections are found in Federal Rule 23(e). See FED. R. CIV. P. 23(e). There are analogous provisions in the state-court provisions for class litigation.

<sup>80</sup> The quotation is mine but accurately reflects the position taken by defendants in *Morgan* and *DIRECTV*. See *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1711 (2022); *DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 49–50 (2015).

As Professor Wasserman noted, *Stolt-Nielsen* and *Concepcion* put two new barriers in the plaintiff's path: (1) a default rule that class arbitration is not available and (2) a presumption that arbitration is to be "informal" and "bilateral."<sup>81</sup> We proceed now to see how the Court has dealt with these presumptions in the decade since Professor Wasserman wrote. It will soon become clear that Professor Wasserman was correct in her conclusion that *Concepcion* was a "fast-moving train."<sup>82</sup>

### III. THE COURT'S RELEVANT FAA DECISIONS FROM 2013 TO THE PRESENT

Since 2013, the Court has decided eight cases relevant to our study. We address them in three categories: (1) those elaborating on the default rule that class proceedings are not available in arbitration; (2) those addressing the expanded notion of the "equal treatment" doctrine; and (3) those in which plaintiffs invoke federal or state law to have class action waivers declared ineffective.

#### A. *The Default Rule that Class Arbitration Is Not Available*

In *Stolt-Neilsen*, the parties stipulated that their agreement "was silent" as to whether aggregate arbitration was permitted.<sup>83</sup> The arbitration panel concluded, however, that because the parties had not *precluded* class arbitration, aggregate arbitration was permitted.<sup>84</sup> The Court reversed and held, under Section 10(a)(4) of the Act, that the panel "exceeded its power."<sup>85</sup> The parties' stipulation that the agreement "was 'silent'" on the issue meant that they had not agreed to arbitrate in the aggregate.<sup>86</sup>

This result puts plaintiffs in arbitration in a different position from those in court. In court, a plaintiff may choose from any of the applicable procedural rules, including Federal Rule 23 or, in state court, any state version of a class or representative suit. Additionally, plaintiffs may use any of the various joinder rules

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<sup>81</sup> See Wasserman, *supra* note 7, at 405.

<sup>82</sup> *Id.* at 441.

<sup>83</sup> *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 668 (2010).

<sup>84</sup> *Id.* at 669.

<sup>85</sup> *Id.* at 677. See also 9 U.S.C. § 10(a)(4) (showing this is one of the relatively few grounds under the FAA on which a court may refuse to enforce an arbitration award).

<sup>86</sup> *Stolt-Nielsen*, 559 U.S. at 687.

provided for their forum. In arbitration, however, the presumption is that the plaintiff does not have access to procedural tools of aggregation. Only if the contract (one the plaintiff had no role in drafting) allows aggregation can she proceed to arbitrate *en masse* or even with a single co-plaintiff.

The Court based the holding on the “simplicity” rationale: that the FAA embraces “informal” and “bilateral” arbitrations. In *Concepcion*, the Court expanded by speaking of arbitration as embracing “efficient and speedy dispute resolution.”<sup>87</sup> Class arbitration defeats this goal by sacrificing “the principal advantage of arbitration—its informality—and mak[ing] the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>88</sup>

The Court further noted that class arbitration, at least if it is to bind class members, would require analysis of due process protections of their interests, which would increase the cost and complexity of the proceeding.<sup>89</sup> This is certainly true, but the concern rings a bit hollow. After all, for decades, the Court has equated arbitration with court litigation.<sup>90</sup> An arbitrator can protect the plaintiff’s rights under federal securities and antitrust laws as well as a judge can. An arbitrator can decide the facts as well as a jury in such cases. Yet the Court seems to lack such confidence in an arbitrator’s ability to provide appropriate safeguards for class members and defendants in class arbitration.<sup>91</sup>

Moreover, the Court expressed worry that aggregate exposure increases risks to defendants by creating pressure to settle even claims that are marginal (or lacking) on the merits.<sup>92</sup> As we discussed in Part II above, the same is true in court litigation. And it is a legitimate concern. In court, we empower (and trust) the judge to oversee

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<sup>87</sup> *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345 (2011) (quoting *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985)).

<sup>88</sup> *Id.* at 348.

<sup>89</sup> *Id.* at 349–50.

<sup>90</sup> Romona L. Lampley, “*Underdog*” Arbitration: A Plan for Transparency, 90 WASH. L. REV. 1727, 1744–45 (2015) (“[T]he Supreme Court [in *Concepcion*] reiterated the district court’s finding that the plaintiffs were ‘better off under their arbitration agreement with AT&T than they would have been as participants in a class action. . . .’”) (citation omitted).

<sup>91</sup> The class arbitration rules provide protective mechanisms similar to those in class action litigation rules. *See, e.g.*, SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS RULE 8 (AM. ARB. ASS’N 2003) (requiring arbitrator to approve settlement of class arbitration, providing for notice to class members and an opportunity to object).

<sup>92</sup> *Concepcion*, 563 U.S. at 350.



the settlement process. Apparently, though, we are more nervous about having an arbitrator discharge a task designed to protect parties, particularly the defendant who fears being blackmailed into settlement. It seems a strange incongruity with the general theme that arbitration is just as good as court litigation when it comes to protecting plaintiff's rights.

Professor Wasserman made a strong case that Congress never intended “to displace state laws seeking to preserve the right of consumers and others to proceed [in arbitration] collectively.”<sup>93</sup> Nonetheless, the rule that class arbitration is permitted only if the parties agree has become mainstream in the ensuing years.

In *Oxford Health Plans, LLC v. Sutter*, Justice Kagan wrote for a unanimous Court to uphold an order that the parties proceed with class arbitration.<sup>94</sup> Though the agreement appeared to be silent on the question of aggregation, the parties agreed to submit the matter to the arbitrator.<sup>95</sup> The arbitrator concluded, based upon his construction of the contract, that the parties had agreed to class arbitration.<sup>96</sup> The Court affirmed under Section 10(a)(4) of the FAA because the arbitrator had not exceeded his powers.<sup>97</sup>

As Justice Kagan explained, in *Stolt-Nielsen*, the arbitration panel imposed its own policy preference for the parties' lack of agreement to arbitrate *en masse*.<sup>98</sup> In doing so, it exceeded its powers, which required judicial reversal under Section 10(a)(4).<sup>99</sup> In *Oxford Health*, however, the parties asked the arbitrator whether the contract permitted aggregate proceedings.<sup>100</sup> The arbitrator's conclusion that it did

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<sup>93</sup> Wasserman, *supra* note 7, at 399.

<sup>94</sup> 569 U.S. 564, 564, 565 (2015).

<sup>95</sup> *Id.* at 572–73.

<sup>96</sup> *Id.* at 566.

<sup>97</sup> *Id.* at 564.

<sup>98</sup> *Id.* at 566–67 (citing *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 (2010)).

<sup>99</sup> *Stolt-Nielsen*, 559 U.S. at 672, 676–77.

<sup>100</sup> *Oxford Health*, 569 U.S. at 564. The Court so far has failed to decide whether class arbitration is a “gateway” issue (like arbitrability), which is presumptively to be decided by a court, not the arbitrator. In *Oxford Health*, it did not matter, because the parties agreed that the arbitrator should decide it. *Id.* at 573. The American Arbitration Association's Rule 3 permits an arbitrator to decide whether the clause “permits the arbitration to proceed on behalf of or against a class.” Wasserman, *supra* note 7, at 402 (quoting SUPPLEMENTARY RULES FOR CLASS ARBITRATIONS RULE 3 (AM. ARB. ASS'N 2003)).

was based upon his interpretation of the contract.<sup>101</sup> When an arbitrator engages in contract interpretation, the question for a reviewing court under Section 10(a)(4) is not whether it agrees with the interpretation.<sup>102</sup> Rather, it is whether “the arbitrator strayed from his delegated task of interpreting a contract, not [whether] he performed that task poorly.”<sup>103</sup> Because the arbitrator undertook that task and found a contractual basis for aggregation, his ruling must stand.<sup>104</sup>

In *Lamps Plus, Inc. v. Varela*, the Court faced a one-off from *Stolt-Nielsen* and *Oxford Health*.<sup>105</sup> In the former, the parties agreed that their contract did not permit aggregate arbitration. In the latter, the parties permitted the arbitrator to determine whether their contract permitted aggregate arbitration.<sup>106</sup> In *Lamps Plus*, the parties agreed that their contract addressed the issue but was “ambiguous.”<sup>107</sup>

The Supreme Court reversed the Ninth Circuit’s decision to uphold the class arbitration.<sup>108</sup> The majority opinion by Chief Justice Roberts deferred to the Ninth Circuit’s conclusion, based upon California law, that the contract was ambiguous on the question of class arbitration.<sup>109</sup> Once the clause was characterized as ambiguous, however, *Stolt-Nielsen* required the court to reject class arbitration.<sup>110</sup> Ambiguity cannot constitute agreement. Because the state law conflicted with a “rule of

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<sup>101</sup> *Oxford Health*, 569 U.S. at 566–67.

<sup>102</sup> *Id.* at 569.

<sup>103</sup> *Id.* at 572.

<sup>104</sup> *Id.* at 566.

<sup>105</sup> *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019). Justice Alito concurred in *Oxford Health*, joined by Justice Thomas. 569 U.S. at 573. He argued that the arbitrator’s finding that the parties to the contract had agreed to class proceedings may not bind the class members whose rights will purportedly be decided. *Id.* at 574. Arbitration is a matter of agreement, and there is no indication that the class members agreed to have their claims asserted by the plaintiff in this case, much less to be bound by the result of the arbitration. *Id.* In his view, there is a serious question whether class members can be bound absent affirmatively opting into the proceeding. *Id.*

<sup>106</sup> *Oxford Health*, 569 U.S. at 566.

<sup>107</sup> *Lamps Plus*, 139 S. Ct. at 1413.

<sup>108</sup> *Id.* at 1419.

<sup>109</sup> *Id.* at 1415. Though the Court split five-to-four in *Lamps Plus*, the major disagreements were about interpretation of two federal statutes, discussed *infra* notes 115–27. On the point under discussion here, there was little, if any, dissent. *Lamps Plus*, 139 S. Ct. at 1419–35.

<sup>110</sup> *Lamps Plus*, 139 S. Ct. at 1415.

fundamental importance”—“that arbitration ‘is a matter of consent, not coercion’”—the FAA preempted it.<sup>111</sup>

*Lamps Plus* further entrenched the notion that the FAA envisions “informal” and “bilateral” proceedings, a goal that is threatened by class proceedings.<sup>112</sup> The Court emphasized the “‘fundamental’ difference between class arbitration and the individualized form of arbitration envisioned by the FAA.”<sup>113</sup> Yes, parties can agree to class proceedings, but courts cannot infer that they have from contracts that are silent or ambiguous on the matter.<sup>114</sup>

Cases such as *Oxford Health* and *Lamps Plus*—in which the contract left doubt about class proceedings—are likely anachronistic. As rational actors, businesses and their lawyers presumably include class action waivers as a matter of course. Plaintiffs and their counsel respond by arguing that federal or state law obviates those waivers. They then run into the Court’s invigorated “equal treatment” principle.

### B. *The “Equal Treatment” Principle and the Saving Clause*

Section 2 of the FAA mandates that courts enforce arbitration agreements, subject to its “saving clause.”<sup>115</sup> That clause provides that arbitration agreements may be challenged “upon such grounds as exist at law or in equity for the revocation of any contract.”<sup>116</sup> Arbitration provisions are to be as enforceable as other contracts. Accordingly, if a general contract defense would defeat another type of agreement, so will it defeat a clause submitting to private dispute resolution. But if a state law contract defense is aimed solely at arbitration, the saving clause does not apply.<sup>117</sup>

The equal treatment principle clearly preempts federal or state law that singles out arbitration for unique treatment *de jure*. For example, in *Doctor’s Associates, Inc. v. Casarotto*, state law forbade arbitration of a particular substantive claim; the

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<sup>111</sup> *Id.* (quoting *Stolt-Nielsen*, 559 U.S. at 681).

<sup>112</sup> *Lamps Plus*, 139 S. Ct. at 1411.

<sup>113</sup> *Id.* at 1416.

<sup>114</sup> The Court likened the question to the gateway questions of arbitrability (though refusing to rule that it is). *Id.* at 1417 n.4 (in concluding that “[n]either silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the central benefits of arbitration itself”). *Id.* at 1417; *see supra* note 86.

<sup>115</sup> 9 U.S.C. § 2.

<sup>116</sup> *Id.*

<sup>117</sup> *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

FAA preempted the state law.<sup>118</sup> In *Concepcion*, the Court adopted a broader principle. Even if a state defense is not aimed *de jure* at banning arbitration, it is preempted if it has that *de facto* effect.<sup>119</sup> In *Concepcion*, the Ninth Circuit refused to enforce a class action waiver in a consumer contract.<sup>120</sup> It relied upon a decision from the Supreme Court of California, *Discover Bank v. Superior Court*, which held that waivers of the right to arbitrate collectively are unconscionable and therefore unenforceable.<sup>121</sup> Such waivers violated the public policy in favor of enforcement of consumer protection laws.<sup>122</sup>

Unconscionability is a general contract defense available to challenge the enforceability of any contract.<sup>123</sup> But, as it was applied in *Discover Bank*, the general defense singled out arbitration provisions for specialized treatment and therefore violated the equal treatment principle. Moreover, the state law violated the “simplicity” rationale: the assumption that arbitration is to be “informal” and “bilateral.” Therefore, the FAA preempted the California case law.<sup>124</sup>

The Court has continued to embrace this analysis to preempt state laws. *Kindred Nursing Centers Ltd. v. Clark*, decided in 2017, dealt with two cases in which the plaintiffs held powers of attorney that allowed them to conduct business on behalf of relatives.<sup>125</sup> Among other things, the plaintiffs, acting under these powers, entered into contracts to have their relatives moved into a care facility, one of a chain of care and rehabilitation centers operated by the defendant.<sup>126</sup> The contracts contained a broad arbitration provision, requiring arbitration of “[a]ny and all claims or controversies arising out of or in any way relating to” the relatives’ stays at the defendant’s facility.<sup>127</sup>

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<sup>118</sup> 517 U.S. 681, 686–87 (1996) (“Courts may not, however, invalidate arbitration agreements under state laws applicable *only* to arbitration provisions.”).

<sup>119</sup> *Concepcion*, 563 U.S. at 351–52.

<sup>120</sup> *Id.* at 338.

<sup>121</sup> 113 P.3d 1100, 1110 (Cal. 2005), *abrogated by Concepcion*, 563 U.S. 333.

<sup>122</sup> *Discover Bank*, 113 P.3d at 1108.

<sup>123</sup> *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. L. INST. 1981).

<sup>124</sup> *Concepcion*, 563 U.S. at 352.

<sup>125</sup> 581 U.S. 246, 250–55 (2017).

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

The plaintiffs' relatives died at the care center.<sup>128</sup> They sued for wrongful death in Kentucky state courts, alleging that the defendant's substandard care resulted in the deaths of their relatives.<sup>129</sup> The defendant moved to compel arbitration of the wrongful death claims.<sup>130</sup> The Supreme Court of Kentucky refused to enforce the arbitration provision because Kentucky law forbade an agent from entering into an arbitration agreement on behalf of a principal unless the principal expressly waived her "fundamental constitutional rights to access the courts [and] to trial by jury."<sup>131</sup> Neither of the powers of attorney contained a clear statement by which the principal waived the right to court litigation and jury trial.<sup>132</sup> Accordingly, the Kentucky court refused to order arbitration.<sup>133</sup>

The Supreme Court reversed, with Justice Kagan writing for seven of the eight Justices who participated in the case.<sup>134</sup> The Court held that the FAA preempted the Kentucky law.<sup>135</sup> Section 2 "establishes an equal-treatment principle: A court may invalidate an arbitration" clause on the basis of "generally applicable contract defenses" and may not do so based upon rules that single out arbitration.<sup>136</sup> Justice Kagan relied upon *Concepcion* to conclude that the Kentucky doctrine singled out arbitration *in practice*: it was a legal rule "hinging on the primary characteristic of an arbitration agreement—namely, a waiver of the right to court and receive a jury trial."<sup>137</sup>

The Kentucky court recognized that its rule appeared to single out arbitration provisions but defended it by saying that it would apply the rule to *any* contract that implicated a fundamental constitutional right, such as contracts waiving the right to

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 248 (quoting *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 327 (Ky. 2015)).

<sup>132</sup> *Kindred*, 581 U.S. at 250.

<sup>133</sup> *Id.* at 248.

<sup>134</sup> Justice Gorsuch did not participate. *Id.* at 257. Justice Thomas was the lone dissenter in *Kindred*. *Id.* Justice Thomas believes that holding was incorrect and consistently dissents in FAA cases originating in state court. *See, e.g., id.* at 256–57 (Thomas, J., dissenting). That ship has sailed, but it is worth noting that Justice Thomas's position would blunt the impact of the FAA dramatically.

<sup>135</sup> *Id.* at 250.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 252.

freedom of worship or freedom from involuntary servitude.<sup>138</sup> The Court rejected this argument as “utterly fanciful,” noting that there was no suggestion that any such contract had been encountered.<sup>139</sup> Thus, it concluded that the purpose of the Kentucky law was to inhibit arbitration agreements, which is forbidden by the FAA.<sup>140</sup>

The equal treatment principle can also defeat federal judge-made doctrines that single out arbitration clauses for disparate treatment. A unanimous Court did so in 2022 in *Morgan v. Sundance, Inc.*<sup>141</sup> The case reminds us that equal treatment is a two-way street: it can defeat rules that favor arbitration as well as those that disfavor it.

In *Morgan*, the plaintiff brought a collective action under the Fair Labor Standards Act (FLSA) on behalf of employees of a restaurant chain who were allegedly improperly denied overtime pay.<sup>142</sup> The employees had signed contracts requiring arbitration of such claims and forbidding aggregation.<sup>143</sup> The plaintiff sued in federal court, but the defendant did not move to enforce the arbitration agreement.<sup>144</sup> Instead, it engaged in the litigation for nearly eight months.<sup>145</sup> Then it changed course, precisely because the Supreme Court’s decision in another case made clear that class waivers could be enforced in the arbitration of FLSA claims.<sup>146</sup>

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<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> The Court also rejected the argument that the state law was the formation of a contract rather than enforcement of a contract. *Id.* at 253–54. The argument was that under Kentucky law no contract was ever formed, so Section 2 of the FAA (which speaks of “enforcement,” not “formation”) was not implicated. *Id.* The scope of the powers of attorney in the case were quite different. One clearly allowed the agent to enter into the arbitration agreement and must, on remand, be enforced. *Id.* at 248. The other, as the state court had noted, might not have granted the authority to enter into an arbitration agreement. *Id.* On remand, the state court would be required to address the issue of the scope of the delegation. *Id.* at 255.

<sup>141</sup> 142 S. Ct. 1708 (2022).

<sup>142</sup> *Id.* at 1711.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* The case is *Lamps Plus*, discussed in this regard *supra* note 105.

Only then did the defendant seek an order compelling the parties to arbitrate.<sup>147</sup> Before getting to the principal point of *Morgan*, we note that this is another example of a defendant wanting to ensure that class litigation proceed in court, not in arbitration. The defendant obviously reasoned that if it was stuck with aggregate litigation (which it thought was the case for all those months), it would prefer to litigate in federal court. But if it could avoid aggregated litigation, it would prefer to arbitrate.

Because the defendant engaged in litigation for several months before invoking the arbitration clause, the plaintiff asserted waiver.<sup>148</sup> The Eighth Circuit held that engaging in litigation without asserting an arbitration clause can constitute waiver of the clause. But, because of the FAA's "policy favoring arbitration," the court imposed upon the plaintiff the burden of showing that the delay had prejudiced her.<sup>149</sup>

Justice Kagan made short work of the Eighth Circuit's rule: it violated the FAA by singling out arbitration clauses for special treatment.<sup>150</sup> True, it was preferential treatment, but that was irrelevant: "[A] court may not devise novel rules to favor arbitration over litigation. . . . The federal policy is about treating arbitration contracts like all others, not about fostering arbitration."<sup>151</sup> Thus, the FAA's basic mandate may preempt state law or federal common law that, in practice, impairs the enforcement of arbitration clauses.

The principle of equal treatment, based not simply on the *de jure* but on the *de facto* impact of state or federal law, enjoys broad support on the Court. We now turn to plaintiff's appeals to federal or state law to preclude the enforcement of class waivers in arbitration.

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<sup>147</sup> *Morgan*, 142 S. Ct. at 1711.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 1712.

<sup>150</sup> *Id.* at 1713–14.

<sup>151</sup> *Id.* at 1713. Section 6 of the FAA, which provides that a motion to compel arbitration will be decided "in the manner provided by law" for other motions, constitutes "a bar on using custom-made rules, to tilt the playing field in favor of (or against) arbitration." *Id.* at 1714.

### C. *The Recent Attacks on Class Action Waivers*

#### 1. The “Effective Vindication” Doctrine

*Concepcion* left open the important question of “effective vindication.” There, the Court concluded, on the facts of the case, that the arbitration provision provided meaningful redress for consumers proceeding individually.<sup>152</sup> For example, the arbitration agreement required that the arbitration take place in the plaintiff’s home county, that the defendant pay all arbitration costs, and, if the award was higher than the provider had offered in settlement, that the plaintiff recover \$7,500 plus double attorney’s fees.<sup>153</sup> The Court concluded that these provisions ensured that individual arbitration could effectively make the plaintiffs whole.<sup>154</sup> Businesses include such “friendly” terms in an effort to convince courts that individual arbitration is indeed feasible.<sup>155</sup>

The *Concepcion* decision implied that less generous arbitration provisions might be challenged if they left the plaintiff without an economically viable path to vindication of her right. Plaintiffs attempted to use this open door to argue against class action waivers. The Court largely closed the door, however, in 2013, with *American Express Co. v. Italian Colors Restaurant*.<sup>156</sup> There, a class of restaurant owners sued a credit card company, alleging that it violated federal antitrust laws by using monopoly power to force them to accept higher interest rates than those charged by competitors.<sup>157</sup> The agreement required arbitration and forbade aggregation.<sup>158</sup> Though the individual claims were for tens of thousands of dollars, they were negative-value claims because retaining expert witnesses on relevant economic issues would likely exceed any recovery.<sup>159</sup>

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<sup>152</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351–52 (2011).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> See generally Myriam Gilles, *Killing Them with Kindness: Examining “Consumer-Friendly” Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825 (2012).

<sup>156</sup> 570 U.S. 228 (2013).

<sup>157</sup> *Id.* at 231.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*



The Second Circuit held that the aggregation waiver could not be enforced.<sup>160</sup> It distinguished *Concepcion* because the plaintiffs in *Italian Colors* demonstrated that individual pursuit of claims was not economically feasible.<sup>161</sup> It concluded, as a principle of federal common law, that a court may compel class arbitration when it finds that such aggregate assertion is the “only economically feasible means” for plaintiffs to pursue their federal claim.<sup>162</sup> In other words, because individual arbitration would not be pursued economically, it could not afford effective vindication of claims.

The Supreme Court reversed.<sup>163</sup> The majority was willing to assume that individual litigation would not be economically feasible.<sup>164</sup> Nonetheless, *Concepcion* governed because nothing in the FAA, the antitrust laws, or Rule 23 of the Federal Rules of Civil Procedure (the federal class action rule) demonstrated an intention to stop parties from foregoing their right to assert class claims.<sup>165</sup> Starkly, “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim”<sup>166</sup> and the fact that it is not economically worth pursuing the claim “does not constitute the elimination of the *right to pursue* that remedy.”<sup>167</sup> After *Italian Colors*, the “effective vindication” doctrine appears to be effectively dead.

## 2. Possible Congressional Override of Class Waivers

Of course, when Congress creates a right of action, it may provide that aggregate assertion of claims is necessary for vindication of that right. Professor Wasserman discussed the issue with regard to the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA).<sup>168</sup> Six years later, the Court addressed

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<sup>160</sup> *Id.* at 232.

<sup>161</sup> *Id.* at 236 n.4.

<sup>162</sup> *In re Am. Express Merchs.’ Litig.*, 667 F.3d 204, 213–14 (2d Cir. 2012), *rev’d*, *Italian Colors*, 570 U.S. 228.

<sup>163</sup> *Italian Colors*, 570 U.S. at 239.

<sup>164</sup> *Id.* at 235–36.

<sup>165</sup> *Id.* at 232–35.

<sup>166</sup> *Id.* at 233.

<sup>167</sup> *Id.* at 236–37 (emphasis in original). To bolster this point, the majority opinion noted that Congress created the antitrust damages claim asserted by the plaintiffs forty-eight years before Rule 23 was promulgated. *Id.* at 234. Thus, Congress did not, in the antitrust law, require facilitation of the aggregate assertion of the claims. *Id.* at 249.

<sup>168</sup> See Wasserman, *supra* note 7, at 414.

those acts in *Epic Systems Corp. v. Lewis*.<sup>169</sup> In *Epic Systems*, the plaintiff sued his erstwhile employer in federal court in California, asserting claims under the FLSA and California law on behalf of a putative class.<sup>170</sup> The FLSA provides for collective actions on an opt in basis.<sup>171</sup> The plaintiff asserted a collective FLSA action on behalf of all junior account executives of the defendant, alleging a violation by failing to compensate them for overtime work.<sup>172</sup> On the state law claims, the plaintiff sought certification of a nationwide class action under Federal Rule 23.<sup>173</sup>

The Ninth Circuit recognized that the parties' agreement required individualized arbitration.<sup>174</sup> It concluded, however, that the saving clause of Section 2 defeated the class waiver.<sup>175</sup> Specifically, that court reasoned, requiring individualized arbitration proceedings of FLSA claims violated the NLRA.<sup>176</sup> According to the Ninth Circuit, the NLRA required recognition of aggregated claims, which made the class waiver illegal.<sup>177</sup> Because illegality is a defense available to any contract—and does not single out arbitration—it concluded that the saving clause applies to override the contractual waiver of group proceedings.<sup>178</sup>

The Supreme Court reversed and further bolstered themes tracing back to *Concepcion*.<sup>179</sup> First, the saving clause did not apply because the state law, in practice, applied only to arbitration provisions and not to contracts generally.<sup>180</sup> Specifically, the plaintiff's assertion of illegality was aimed at the fact that the

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<sup>169</sup> 138 S. Ct. 1612 (2018).

<sup>170</sup> *Id.* at 1620.

<sup>171</sup> See 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff [to a private civil suit arising under the Act] unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.”).

<sup>172</sup> *Epic Sys.*, 138 S. Ct. at 1620.

<sup>173</sup> *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 986 (9th Cir. 2016), *abrogated by Epic Sys.*, 138 S. Ct. 1612.

<sup>178</sup> *Morris*, 834 F.3d at 986. The court took no position on whether arbitration might ultimately be ordered. *Id.* at 990.

<sup>179</sup> *Epic Sys.*, 138 S. Ct. at 1622–23.

<sup>180</sup> *Id.* at 1622.

contract required individualized hearings.<sup>181</sup> “[B]y attacking (only) the individualized nature of the arbitration proceedings, the employees’ argument seeks to interfere with one of arbitration’s fundamental attributes.”<sup>182</sup> Second, those attributes, of course, are that hearings be “informal” and “bilateral.”<sup>183</sup> Class arbitration would run counter to “the traditionally individualized and informal nature of arbitration.”<sup>184</sup> Thus, the contractual language was regnant—unless Congress had mandated aggregate proceedings in the FLSA or NLRA.

Did the FLSA—by granting the right to bring a collective action—reflect a congressional directive of aggregate proceedings? The plaintiff could not legitimately make that argument because it was foreclosed by a 1991 case, *Gilmer v. Interstate/Johnson Lane Corp.*<sup>185</sup> There, the Court held that the identical provision in the Age Discrimination in Employment Act (ADEA) did not prohibit individualized arbitration proceedings.<sup>186</sup> This led the *Epic Systems* plaintiffs to argue that a different statute, the NLRA, operated to displace the FAA’s direction of individualized hearings. On its face, the argument that one act could repeal the effect of the FAA for claims arising under yet another act—what the majority called a “a sort of interpretive triple bank shot”<sup>187</sup>—was a longshot.

The plaintiffs’ NLRA argument was based upon Section 7 of that legislation, which guarantees workers the rights to self-organization, to form, join, or assist labor organizations, to collective bargaining, and “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”<sup>188</sup> They asserted, and the Ninth Circuit held, that the phrase allowing “other concerted activities” overrides the FAA and renders class waivers impermissible.<sup>189</sup>

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<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> *See id.* at 1623.

<sup>184</sup> *Id.*

<sup>185</sup> 500 U.S. 20, 32 (1991).

<sup>186</sup> *Id.*

<sup>187</sup> *Epic Sys.*, 138 S. Ct. at 1626.

<sup>188</sup> 29 U.S.C. § 157.

<sup>189</sup> *Epic Sys.*, 138 S. Ct. at 1620, 1624.

The Supreme Court majority rejected this argument for several reasons. First, nothing in the NLRA stated an intent to override the FAA.<sup>190</sup> Second, repeals by implication are not favored and the Court was unwilling to read into “other concerted activities” an embrace of class arbitration.<sup>191</sup> The NLRA was passed in 1935, three years before promulgation of Rule 23 and seven years before the FLSA provided for collective actions.<sup>192</sup> True, some form of collective action existed in 1935,<sup>193</sup> but, the Court concluded that Congress’s failure to mention this fact supported the conclusion that the Act simply does not address procedures for enforcing rights.<sup>194</sup> In context, the quoted language refers to the focus of the section: the right to unionize and engage in collective bargaining, and not to aggregate litigation.<sup>195</sup>

### 3. Possible State Law Override of Class Waivers

One of many instructive insights from Professor Wasserman’s 2012 article is that when the Court substitutes its policy vision for that of Congress, state courts and lower federal courts may be resistant.<sup>196</sup> When a new approach and policy basis did not bubble up from the lower courts, there may be pushback to the new regime.<sup>197</sup> No state has been more intransigent in this regard than California.

In *DIRECTV, Inc. v. Imburgia*, decided in 2015, consumers filed a class action in a California state court, alleging that the defendant’s fees for early termination of service violated California law.<sup>198</sup> The contract required arbitration and individualized proceedings.<sup>199</sup> It also provided that if the “law of your state” prohibits the class waiver, then the arbitration provision itself will be unenforceable.<sup>200</sup> Again,

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<sup>190</sup> *Id.* at 1626.

<sup>191</sup> *Id.* at 1624.

<sup>192</sup> *Id.* at 1624–25.

<sup>193</sup> *Id.* at 1625.

<sup>194</sup> *Id.* at 1627. One intense point of disagreement between the majority and the dissenters was the level of clarity with which Congress must express its intent that plaintiffs must be permitted to sue in the aggregate. *Id.* at 1631–32.

<sup>195</sup> *Id.* at 1624.

<sup>196</sup> Wasserman, *supra* note 7, at 433–34.

<sup>197</sup> *Id.*

<sup>198</sup> 577 U.S. 47, 49–50 (2015).

<sup>199</sup> *Id.* at 50.

<sup>200</sup> *Id.*

a business is saying, in essence, that if it must litigate against a class, it would prefer to be in court and not in an arbitral forum.

The plaintiffs in *DIRECTV* argued that the class waiver violated California law, which, they claimed, forbade such provisions in consumer cases involving negative-value claims.<sup>201</sup> California, of course, had had such a law—the *Discover Bank* rule—but the Supreme Court held in *Concepcion* that it was preempted by the FAA.<sup>202</sup> Nonetheless, the California Court of Appeal held that the parties intended “law of your state” to include the invalidated *Discover Bank* rule.<sup>203</sup> The Supreme Court was required to accept the state court’s interpretation of state law but nonetheless held that the FAA preempted the state court’s interpretation of that contract.<sup>204</sup>

Justice Breyer wrote for the majority in *DIRECTV*. He pointed out that California courts had not interpreted “law of your state” to include invalidated law in any other contractual context than under the FAA.<sup>205</sup> For example, there was no example of California treating “law of your state” to include state laws held invalid because they conflicted with another federal law, such as federal labor law or antidiscrimination law.<sup>206</sup> Because the state’s interpretation was invoked only to override the FAA, it discriminated against arbitration and was preempted.<sup>207</sup>

Plaintiffs also attempted to rely on the familiar contract doctrine that ambiguities in a contract are to be construed against the drafter.<sup>208</sup> In *DIRECTV*, the Court rejected application of the doctrine because the pivotal phrase was not ambiguous.<sup>209</sup> As we just saw, the clause “law of your state” was not ambiguous: it did not permit the application of state law to any federal law except the FAA, which

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<sup>201</sup> *See id.*

<sup>202</sup> *Id.* at 51.

<sup>203</sup> *Id.* (quoting *Imburgia v. DIRECTV, Inc.*, 170 Cal. Rptr. 3d 190, 194 (Cal. Ct. App. 2014), *rev’d*, *DIRECTV*, 577 U.S. 47).

<sup>204</sup> *DIRECTV*, 577 U.S. at 51.

<sup>205</sup> *Id.* at 55.

<sup>206</sup> *Id.* at 56.

<sup>207</sup> *Id.* at 57.

<sup>208</sup> *Id.* at 52–53.

<sup>209</sup> *Id.* at 55.

is forbidden.<sup>210</sup> With no ambiguity in the clause, there was no room to apply the doctrine.<sup>211</sup>

The most interesting of the cases in this area is also the most recent one: *Viking River Cruises, Inc. v. Moriana*, decided in 2022.<sup>212</sup> Again, Professor Wasserman's article was prescient, as it raised the possibility that the California Private Attorney General Act (PAGA) might command aggregate vindication.<sup>213</sup>

The California Labor and Workforce Development Agency (LWDA) is responsible for enforcement of various aspects of the state's labor code.<sup>214</sup> Recognizing that the LWDA lacked resources to enforce those laws fully, the California Assembly passed PAGA.<sup>215</sup> The Act is complex but can be broken into two components: (1) a claim brought on behalf of the state and (2) an individual claim.

First, PAGA permits an "aggrieved employee" to sue on behalf of the state to enforce code violations allegedly affecting other employees.<sup>216</sup> Such a claim may only be brought by an employee who has suffered from a code violation herself.<sup>217</sup> Interestingly, such an employee does not sue as a representative of other employees: she sues on behalf of the state, which is the real party in interest.<sup>218</sup> She sues to enforce duties owed by the employer to the state, not duties owed by the employer to the individual employees.<sup>219</sup> The representative seeks to recover civil penalties "ranging from \$100 per pay period for the first violation, and \$200 per pay period

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<sup>210</sup> *Id.* at 58.

<sup>211</sup> In *Lamps Plus*, the Court concluded that the rule of construing ambiguous language against the drafter cannot function to determine the parties' intent in drafting a clause. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1418 (2019). The rule "provides a default rule based on public policy considerations" and thus seeks ends unrelated to the intent of the parties. *Id.* at 1417.

<sup>212</sup> 142 S. Ct. 1906 (2022).

<sup>213</sup> Wasserman, *supra* note 7, at 436.

<sup>214</sup> See Private Attorneys General Act of 2004, CAL. LAB. CODE § 2699(a).

<sup>215</sup> See *Viking River Cruises*, 142 S. Ct. at 1913–14 (explaining the California Assembly's motivations for passing PAGA).

<sup>216</sup> CAL. LAB. CODE § 2699(a).

<sup>217</sup> *Id.*

<sup>218</sup> See *Viking River Cruises*, 142 S. Ct. at 1914–15.

<sup>219</sup> *Id.* at 1906, 1915.

per violation, for any subsequent violations.”<sup>220</sup> And the code violations concerning the non-plaintiff employees need not be related legally or factually with the alleged code violation concerning the plaintiff. Seventy-five percent of any recovery goes to the LWDA, with the remainder distributed to the employees affected by the code violations.<sup>221</sup>

Second, PAGA also creates an “individual claim” for an employee suffering from a code violation.<sup>222</sup> Apparently, in a typical case, the plaintiff will file both her individual claim and a representative claim.

In *Viking River Cruises*, employees of the defendant cruise line entered into standard contracts, which included (1) a clause requiring arbitration of an employee’s individual claim and (2) forbidding the employee from maintaining a representative PAGA claim.<sup>223</sup> The contract also contained a severability clause to the effect that the invalidity of the second provision would not invalidate the first.<sup>224</sup> The plaintiff, a sales representative who alleged that Viking had violated a code provision about the timing of severance pay, asserted her individual claim and the representative claim in a California state court.<sup>225</sup> Viking moved to compel arbitration of the individual claim and for dismissal of the representative action.<sup>226</sup> The California courts refused to enforce either the arbitration clause or the waiver clause and ordered that all claims proceed in court litigation.<sup>227</sup>

The California Court of Appeal relied upon *Iskanian v. CLS Transportation Los Angeles, LLC*, the definitive state supreme court case, to deny the defendant’s motion to compel arbitration.<sup>228</sup> *Iskanian* had two major pronouncements. First, PAGA forbids agreements purporting to waive the right to file representative actions; in other words, an aggrieved plaintiff cannot be forced to forego her right to litigate

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<sup>220</sup> CAL. LAB. CODE § 2699(f)(2).

<sup>221</sup> *Id.* at § 2699(i).

<sup>222</sup> See *Viking River Cruises*, 142 S. Ct. at 1916.

<sup>223</sup> *Id.* at 1916.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 1911.

<sup>228</sup> 327 P.3d 129, 148–49 (Cal. 2014), *overruled by Viking River Cruises*, 142 S. Ct. at 1924–25.

(in a court of arbitration) on behalf of the state.<sup>229</sup> Second, PAGA forbids agreements purporting to litigate or arbitrate individual PAGA claims separately from representative PAGA claims.<sup>230</sup>

The Supreme Court, with one dissenter (who did not address the merits of the case), held that the FAA preempted the second *Iskanian* rule, but not the first.<sup>231</sup> By requiring the representative claim to be arbitrated with the personal claim, state law improperly permitted litigation of myriad claims not covered by the arbitration clause.<sup>232</sup> That is, the employer and employee agreed to litigate only the employee's claim, but not claims brought on behalf of the state concerning a potentially limitless number of unrelated statutory violations concerning potentially thousands of people.<sup>233</sup> The parties did not agree to arbitrate those latter claims and state law cannot compel the defendant to do so.<sup>234</sup>

Justice Alito wrote the Court's opinion. Part II of the opinion strengthens the "simplicity" rationale. Indeed, it concludes that it "would not be a right to *arbitrate*"<sup>235</sup> if state law could transform traditional individualized arbitration with procedures "at odds with arbitration's informal nature."<sup>236</sup> This implies that a right to arbitrate is a right to submit a "bilateral" dispute to an arbitrator.

But then Justice Alito moves on to a discursive assessment of whether the "simplicity" rationale requires disputes featuring one plaintiff and one defendant.<sup>237</sup> He rejects Viking's argument that the FAA preempts any state law that would require more than one plaintiff versus one defendant and thus opens the door to a wider array of arbitration.<sup>238</sup> "Bilateral," as the Court uses it, includes non-class representative actions in which an agent sues on behalf of another: "[W]e have never held that the

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<sup>229</sup> *Iskanian*, 327 P.3d at 149.

<sup>230</sup> *Id.*

<sup>231</sup> *Viking River Cruises*, 142 S. Ct. at 1924–25. Justice Thomas dissented based on his conclusion that the FAA should not apply to cases in state courts.

<sup>232</sup> *Id.* at 1911–12.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.*

<sup>235</sup> *Id.* at 1918.

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* at 1917–23.

<sup>238</sup> *Id.* at 1922–24.



FAA imposes a duty on States to render all forms of representative standing waivable by contract.<sup>239</sup> What is forbidden is a state law that mandates the kind of proceeding that a class arbitration brings—and what the PAGA representational claim would bring.<sup>240</sup> By mandating joinder akin to the class action, PAGA so changes the traditional face of arbitration as to violate the “simplicity” rationale.<sup>241</sup> Justices Breyer, Kagan, Sotomayor, and Gorsuch joined the opinion in full.<sup>242</sup>

Justice Barrett, joined by the Chief Justice and Justice Kavanaugh, concurred in the result but pointedly did not join Part II of Justice Alito’s opinion. For them, the PAGA procedure was enough like other aggregation devices addressed in earlier cases to compel preemption.<sup>243</sup> There was no need, in Justice Barrett’s view, to ruminate about what forms of litigation might be permitted in arbitration.<sup>244</sup>

Perhaps *Viking River Cruises* opens the possibility that plaintiffs might gain some measure of aggregation or joinder in future arbitrations. At the least, the case demonstrates nuance. The conclusion that one part of the California law was preempted and another was not shows, at least, that the Court can use a scalpel instead of a hatchet. Still, businesses have been remarkably successful in avoiding class arbitrations (and therefore liability) altogether.<sup>245</sup> Though they won the battle of arbitrability and largely have won the battle against class arbitration, businesses are not taking a victory lap. They face a new and potentially devastating development—created, ironically, by their own success at the Supreme Court over the past forty years.

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<sup>239</sup> *Id.* at 1921.

<sup>240</sup> *Id.* at 1924.

<sup>241</sup> *Id.* at 1923.

<sup>242</sup> Justice Sotomayor wrote separately to emphasize that the California legislature “is free to modify the scope of statutory standing under PAGA within state and federal constitutional limits.” *Id.* at 1925–26 (Sotomayor, J., concurring).

<sup>243</sup> *Id.* at 1926 (Barrett, J., concurring in part and dissenting in part).

<sup>244</sup> *Id.*

<sup>245</sup> Myriam Gilles, *The Politics of Access: Examining Concerted State/Private Enforcement Solutions to Class Action Bans*, 86 *FORDHAM L. REV.* 2223, 2227–29 (2018).

#### 4. Turning the Tables: The Emergence of Mass Individual Arbitrations

With the right resources and coordination, a large number of people subject to arbitration clauses can file individual arbitration demands against the same defendant. Recently, a few law firms, notably Keller Lenker, have begun processing mass individual arbitrations—hundreds or, more often, thousands of individual arbitration demands on behalf of clients.<sup>246</sup> Under the common “friendly” terms of the arbitration provisions, defendants are required to pay various processing fees for each arbitration demanded.<sup>247</sup> Until recently, businesses were not forced to pay these fees on a large scale because plaintiff law firms lacked the wherewithal to advance the initial arbitration filing fees for hundreds or thousands of clients at a time. Starting in 2018, however, some firms have geared up and marshaled the resources to file massive numbers of arbitration demands.<sup>248</sup>

This, in turn, can trigger mountainous administrative and processing fees to be paid, under the common contractual terms, by the defendant. For example, when over 31,000 individual claims were filed against Uber, the American Arbitration Association (AAA) billed the company for \$92 million in fees. The New York Appellate Division rejected Uber’s efforts to block collection of those fees by pointing out that the defendant had made the bed in which it was now forced to lie:

While Uber is trying to avoid paying the arbitration fees associated with 31,000 nearly identical cases, it made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and AAA’s fees are directly attributable to that decision.<sup>249</sup>

Professor Glover has canvassed a host of issues raised by the emergence of mass arbitration demands. For example, firms may rethink the “friendly” terms of their arbitration clauses and attempt to shift fees to plaintiffs. Doing so, however, could invigorate challenges based upon the effective vindication argument and for

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<sup>246</sup> Glover, *supra* note 20.

<sup>247</sup> These are terms companies insert in efforts to convince courts that individual arbitration is feasible. See note 155, *supra*.

<sup>248</sup> Glover, *supra* note 20, at 1365 (“In 2018, a defendant corporation may well have laughed at a new firms’ threat to file 12,500 demands and to advance 12,500 filing fees. Today, less so.”).

<sup>249</sup> Uber Tech., Inc. v. Am. Arbitration Ass’n., 204 A.D.3d 506, 510 (N.Y. App. Div. 2022).

unconscionability.<sup>250</sup> Also, companies are putting pressure on arbitration providers to cut processing fees in the mass arbitration context. Alternative providers, offering lower processing fees for mass arbitrations, are popping up.<sup>251</sup> There have been efforts to “batch” mass arbitrations into a single proceeding, thereby incurring a single processing fee; this practice presents the obvious incongruity of “batching” claims in the context of a contract that bans class arbitration.<sup>252</sup> Professor Glover’s study is comprehensive and compelling; it raises substantial ethical issues and questions going to the core of civil dispute resolution.<sup>253</sup>

For us, however, the key takeaway may be that some companies have decided to abandon arbitration altogether. Amazon did this in June 2021 after being hit with over 75,000 individual arbitration demands charging that its Echo devices recorded people without consent.<sup>254</sup> Widespread retreat from arbitration provisions will present significant challenges to burdened court systems to which such disputes will now return. But the starkest fact is that Amazon and others now find that facing class action litigation in court is less harrowing than being overwhelmed in fees generated by the system they have worked four decades to establish.<sup>255</sup>

While the drama of mass arbitration claims plays out, many companies will retain their arbitration provisions and will fight about whether class arbitration is permitted. The issues Professor Wasserman raised a decade ago will continue to play out, though in the context of in which businesses are rethinking their long-term game plan.

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<sup>250</sup> Glover, *supra* note 20, at 1365.

<sup>251</sup> *Id.* at 1363 (establishing that providers such as AAA and JAMS not presently equipped to handle massive numbers of individual claims).

<sup>252</sup> *Id.* at 1365.

<sup>253</sup> *Id.*

<sup>254</sup> Sara Randazzo, *Amazon Faced 75,000 Arbitration Demands. Now it Says: Fine, Sue Us*, WALL ST. J. (June 1, 2021), <https://www.wsj.com/articles/amazon-faced-75-000-arbitration-demands-now-it-says-fine-sue-us-11622547000>.

<sup>255</sup> As discussed in the text accompanying note 80, *supra*, some businesses already have expressed a preference for court litigation when claims are asserted in a class proceeding.

## CONCLUSION AND POSTSCRIPT

Professor Wasserman presciently viewed *Stolt-Nielsen* and *Concepcion* as potential game-changing cases in the battle over class arbitration.<sup>256</sup> The cases' central developments—the presumption against class arbitration and the extension of the equal treatment doctrine to preempt federal and state laws—now enjoy wide support on the Court. Their “simplicity” principle—that arbitration is intended to be “informal” and “bilateral”—also has taken root. *Viking River Cruises* may offer some hope for aggregation, and therefore a greater measure of enforcement of private rights and public policy.

But that is a weak glimmer. After all, at best, the plaintiff is still in arbitration. The inescapable fact is that the Court's transformation of the FAA in favor of business defendants is nearly watertight. It has allowed businesses to take manifold claims out of court and into arbitration. It has made it difficult for plaintiffs to arbitrate as a class.

With the policy agenda usurped by the Court, as Professor Wasserman showed, the burden is on Congress to respond.<sup>257</sup> Congress has done so once, in 2022, when it banned arbitration agreements and class action waivers in cases asserting sexual harassment and sexual assault claims.<sup>258</sup> A requirement of individualized arbitration often leaves important legislation under-enforced and defendants undeterred. The 2022 legislation is important and ameliorative. It recognizes that sexual harassment and sexual assault claims deserve the protection of court litigation.<sup>259</sup>

So do a good many others.

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<sup>256</sup> Wasserman, *supra* note 7, at 403.

<sup>257</sup> *Id.* at 407.

<sup>258</sup> 9 U.S.C. § 402(a).

<sup>259</sup> *See id.*

