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THE END OF CLASS ACTIONS?

Brian T. Fitzpatrick*

*In this Article, I give a status report on the life expectancy of class action litigation following the Supreme Court's decisions in *Concepcion* and *American Express*. These decisions permitted corporations to opt out of class action liability through the use of arbitration clauses, and many commentators, myself included, predicted that they would eventually lead us down a road where class actions against businesses would be all but eliminated. Enough time has now passed to make an assessment of whether these predictions are coming to fruition. I find that, although there is not yet solid evidence that businesses have flocked to class action waivers—and that one big category of class action plaintiffs (shareholders) remain insulated from *Concepcion* and *American Express* altogether—I still see every reason to believe that businesses will eventually be able to eliminate virtually all class actions that are brought against them, including those brought by shareholders.*

TABLE OF CONTENTS

INTRODUCTION.....	162
I. THE <i>CONCEPCION</i> AND <i>AMERICAN EXPRESS</i> DECISIONS.....	163
II. THE END OF CLASS ACTIONS?	173
A. Do Businesses Have the Opportunity to Ask All of the People Who Currently Sue Them in Class Actions to Agree to Pre-Dispute Contractual Terms?	175
B. Is There Anything Left in the Law that Can Stop Businesses from Including in Their Pre-Dispute Contractual Terms Arbitration Clauses with Class Action Waivers?	179
1. Arbitration Clauses.....	179

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2. Embedded Class Action Waivers	185
a. State Law	185
b. Federal Law	188
C. Will Businesses Take Advantage of the Opportunity?.....	190
III. WHERE DO WE GO FROM HERE?	193
CONCLUSION	199

INTRODUCTION

On the morning of October 9, 2011, the day the Supreme Court heard arguments in *AT&T Mobility L.L.C. v. Concepcion*,¹ I published an opinion piece in the *San Francisco Chronicle* that made the following predictions: (1) the Supreme Court would enforce the class action waiver AT&T placed into its arbitration agreements; and (2) doing so would start us down a path where class actions against businesses would be all but eliminated.² As we know, the Supreme Court enforced AT&T's class action waiver³ (and, indeed, doubled down on the

1. 131 S. Ct. 1740 (2011).

2. See Brian T. Fitzpatrick, Op-Ed., *Supreme Court Case Could End Class-Action Suits*, S.F. CHRON., Nov. 7, 2010, <http://www.sfgate.com/opinion/article/Supreme-Court-case-could-end-class-action-suits-3246898.php>.

3. See, e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (2012) ("The coup de grace administered to consumer class actions [was] by a 5-4 Supreme Court this past term in *AT&T Mobility L.L.C. v. Concepcion*. All of the doctrinal developments of recent years circumscribing the reach of class actions pale in import next to [*Concepcion's*] game-changing edict . . ."); Jean R. Sternlight, *Tsunami: AT&T Mobility L.L.C. v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 707 (2012) ("The reasoning of the majority's opinion in *Concepcion* is vulnerable to attack on various grounds . . . [I]t would in some ways be fun to join the attacks on the majority's analysis . . ."); Maureen A. Weston, *The Death of Class Arbitration after Concepcion?*, 60 U. KAN. L. REV. 767, 791 (2012) ("That the FAA, enacted in 1925, authorizes private parties to eliminate class and representative actions hardly seems plausible. Yet, the Supreme Court's decision in *Concepcion* suggests just that . . . Just as *Concepcion* may be the death knell of arbitral class actions, it may also infect other areas of state legislation and governance."); Arthur H. Bryant, Op., *Class Actions Are Not Yet Dead*, 33 NAT'L L.J., no. 42, June 20, 2011, at 46 ("The U.S. Supreme Court's 5-4 decision in *AT&T v. Concepcion* is a disturbing example of judicial activism that makes it easier for corporations to enforce mandatory arbitration clauses banning class actions, cheat consumers and workers out of millions and keep almost all of the money."); Editorial, *Gutting Class Actions*, N.Y. TIMES, May 13, 2011, at A26 ("The Supreme Court's 5-to-4 vote in *AT&T Mobility v. Concepcion* is a devastating blow to consumer rights."); Erwin Chemerinsky, Op-Ed., *Supreme Court: Class (Action) Dismissed*, L.A. TIMES, May 10, 2011, at A11 ("The effect of the Supreme Court's decision is to make it far less likely that corporations engaged in even massive fraud will be held accountable when many people lose a little."); David Schwartz, *Do-It-Yourself Tort Reform: How the Supreme Court Quietly Killed the Class Action*, SCOTUSBLOG (Sept. 16, 2011, 10:52 AM), <http://www.scotusblog.com/2011/09/do-it-yourself-tort-reform-how-the-supreme-court-quietly-killed-the-class-action/> ("*Concepcion* is the culmination of twenty-

enforcement of class action waivers two years ago in *American Express Co. v. Italian Colors Restaurant*⁴). But did it start us down a path that will lead to the end of class actions against businesses? Many other scholars have shared my fear that it would,⁵ but only now has enough time passed that it is possible to make an assessment of whether our fears are coming to fruition. In this Article, I try to undertake this assessment. I find that, although there is not yet solid evidence that businesses have flocked to class action waivers—and that one big category of class action plaintiffs (shareholders) remain insulated from *Concepcion* altogether—I still see every reason to believe that businesses will eventually be able to eliminate virtually all class actions that are brought against them, including those brought by shareholders.

In Part I of this Article, I briefly recount the Supreme Court’s decisions in *Concepcion* and *American Express*. In Part II, I explain the premises behind my prediction regarding the future of class actions and assess how those premises have fared thus far. In Part III, I assess what, if anything, might be done about all this, and, in the Conclusion, I offer a few parting thoughts.

I. THE *CONCEPCION* AND *AMERICAN EXPRESS* DECISIONS

The *Concepcion* and *American Express* decisions rested on an interpretation of the Federal Arbitration Act (“FAA”), so it is worth starting there. The FAA was enacted in 1925 to override judicial hostility to arbitration agreements that obligated parties to forgo recourse to courts of law for any future claims that might arise between them.⁶ The Act renders “valid, irrevocable, and

five years of Supreme Court arbitration jurisprudence that has turned the FAA into a do-it-yourself tort reform statute.”)

4. 133 S. Ct. 2304 (2013).

5. See, e.g., Gilles & Friedman, *supra* note 3 (“[T]he Supreme Court’s ruling suggests that many—indeed, most—of the companies that touch consumers’ day-to-day lives can and will now place themselves beyond the reach of aggregate litigation. These companies include telephone companies, internet service providers, credit card issuers, payday lenders, mortgage lenders, health clubs, nursing homes, retail banks, investment banks, mutual funds, and the sellers of all manner of goods and services. And that is just consumers. Employees, too, will find themselves unable to band together and seek legal redress.”); Sternlight, *supra* note 3, at 704 (“The U.S. Supreme Court’s five-to-four decision in *AT&T Mobility L.L.C. v. Concepcion* is proving to be a tsunami that is wiping out existing and potential consumer and employment class actions.”); Weston, *supra* note 3, at 767 (“In *AT&T Mobility L.L.C. v. Concepcion*, the Supreme Court potentially allowed for the evisceration of class arbitration, and indeed most class actions, in consumer and employment settings . . .”).

6. See *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219–20 n.6 (1985) (“The House Report accompanying the [Federal Arbitration] Act makes clear that its purpose was to place an arbitration agreement ‘upon the same footing as other contracts, where it belongs’ . . . and to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.” (citing H.R. REP. NO. 68-96, at 1 (1924)). See also Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 283 (1926) (“[I]n our English system of jurisprudence . . . there has been an established rule . . . that parties might not, by their [arbitration] agreement, oust the jurisdiction of the

enforceable” any “written provision . . . to settle [a controversy] by arbitration” subject to one exception: “such grounds as exist at law or in equity for the revocation of any contract.”⁷ Under the FAA, courts cannot overturn decisions rendered by arbitrators, except in the narrowest of circumstances.⁸ Although it appears the Act was intended to operate in only a small corner of the economy, this history has been lost and the Act now roams freely.⁹ As a result, pre-dispute arbitration agreements have become a routine part of the commercial world. Businesses insist on these agreements in their contracts with their customers, in their contracts with employees, and in their contracts with other businesses.¹⁰

courts. This rule was so firmly established that our American courts did not feel themselves free to change the rule, but declared it to be the duty of the legislature to make this change.”).

7. 9 U.S.C. § 2 (2006).

8. See 9 U.S.C. § 10(a) (listing as the bases for vacating an arbitration judgment: “an award . . . procured by corruption, fraud, or undue means,” “evident partiality or corruption in the arbitrators,” “misconduct . . . or other misbehavior [of the arbitrators] by which the rights of any party have been prejudiced,” and “where the arbitrators exceeded their powers”). The last ground is the most commonly invoked by parties seeking to vacate an award. See Andrew M. Campbell, *Construction and Application of § 10(a)(4) of Federal Arbitration Act (9 U.S.C.A. § 10(a)(4)) Providing for Vacating of Arbitration Awards Where Arbitrators Exceed or Imperfectly Execute Powers*, 136 A.L.R. FED. 183 (1997) (“[M]ore awards have been vacated on this ground than under all the other reasons for vacating awards combined.”). But the Supreme Court has held it is available “only when [an] arbitrator strays from interpretation and application of the agreement and effectively ‘dispense[s] his own brand of industrial justice’” *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509 (2001).

9. See Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. REV. 449, 467 (1996) (“The un rebutted legislative history created prior to the FAA’s passage establishes that only disputes arising out of commercial contracts were to be arbitrable; no agreements to arbitrate employment disputes in any industry were to be included. The decision to exclude noncommercial agreements from the scope of the Act makes sense because the FAA’s underlying purpose was to promote arbitration in the commercial setting.”); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created A Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 106 (2006) (“[T]he central concept behind the [Federal Arbitration] Act: to provide for enforceability of arbitration agreements between merchants—parties presumed to be of approximately equal bargaining strength—who needed a way to resolve their disputes expeditiously and inexpensively . . . The hearings make clear that the focus of the Act was merchant-to-merchant arbitrations, never merchant-to-consumer arbitrations. All of the examples given by Bernheimer as to cases he knew about or cases he had personally been involved with through the New York Chamber of Commerce were cases between merchants.” (citing *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H. 646 Before the J. Comm. Of Subcomms. On the Judiciary*, 68th Cong. 5–9 (1924))).

10. See Theodore Eisenburg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 882–83 (2008) (“Over 75% of the consumer agreements we examined included mandatory arbitration clauses Over 90% of the . . . employment agreements included arbitration clauses.”); David Horton, *Arbitration as Delegation*, 86 N.Y.U. L. REV.

Historically, pre-dispute arbitration has been attractive to businesses because they can design arbitration proceedings with different procedural rules than those that exist in courts.¹¹ Businesses fear the unpredictability of juries in courts; thus, arbitration is more attractive because they can specify that any arbitrated cases will be submitted to professional arbitrators rather than laypersons.¹² Businesses fear the time and expense of discovery in courts;¹³ thus, they can specify that any cases in arbitration will enjoy informal and streamlined exchanges of information.¹⁴

437, 439 (2011) (“Arbitration clauses appear in hundreds of millions of consumer and employment contracts.”). There is disagreement over how prevalent mandatory arbitration clauses are in business-to-business contracts. Compare Theodore Eisenburg et al., *supra* (finding arbitration clauses in 6.1% of sampled business-to-business contracts), with Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (Or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433, 467 (2010) (“[T]here are strong reasons to believe that [the Eisenburg et al.] sample is not representative of business-to-business contracts as a whole. Their study is a useful reminder that arbitration clauses are not widely used in material contracts, what one might call ‘extraordinary’ contracts between businesses. But their study simply does not speak to the frequency with which arbitration clauses are used in ordinary contracts between businesses.”).

11. See STEPHEN J. WARE, ALTERNATIVE DISPUTE RESOLUTION § 2.3(c) (2001) (“Not only does the parties’ contract determine *whether* a dispute goes to arbitration, the contract also determines *what occurs* during arbitration . . . [T]he rules of procedure and evidence in arbitration are, with few exceptions, whatever the contract says they are. Arbitration agreements commonly provide for less discovery and motion practice than is typical of litigation and commonly provide for fewer rules of evidence . . . Arbitration privatizes procedural law by allowing parties to create their own customized rules . . .”); see also JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 1.1 (3d ed. 2005) (“Interest in alternative dispute resolution is fueled by a number of motives [including] . . . [c]reating better processes that are more open, flexible and responsive to the unique needs of the participants.”).

12. See Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Reconciliation*, 77 B.U. L. REV. 687, 774–75 (1997) (“[I]mportant procedural rights are waived by an agreement to arbitrate. The first is trial by jury. An arbitration agreement vests the arbitrator with full authority to decide all issues of fact, law, and damages. Employers generally favor this transfer of authority because they perceive juries as being less predictable than judges or arbitrators.”); Christopher A. Drahozal, “*Unfair*” *Arbitration Clauses*, 2001 U. ILL. L. REV. 695, 709 (2001) (“One consequence of the parties’ selection of expert arbitrators is that the case will not be tried by a jury . . . [T]his is cited as an advantage of arbitration from the corporation’s viewpoint . . .”).

13. See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558–61 (2007) (“[T]he threat of discovery expense will push cost-conscious [business] defendants to settle even anemic cases . . .”).

14. See *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (“Although [arbitration discovery] procedures might not be as extensive as in the federal courts, by agreeing to arbitrate, a party ‘trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.’”); see also Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631, 1641 n.51 (2005) (“The typical arbitration clause leaves the extent of discovery in part to the

Businesses also fear class actions.¹⁵ The question in *Concepcion* was whether the class action device is one of the procedures that businesses can change in arbitration.¹⁶ AT&T wrote an arbitration agreement that required its customers to pursue their claims on their own; they could not join a class action.¹⁷ But a class action waiver is a different sort of “procedural” change than, for example, a jury-trial waiver or a full-discovery waiver: without the class action device, many plaintiffs—i.e., those with small claims—will be unable to pursue their claims at all.¹⁸ That is, in many cases, a class action waiver is not only a change in procedure, but also a change in liability: businesses can escape all accountability for causing small harms if they can escape class actions. To be sure, changes in other procedures might also be seen as changes in liability. I suspect moving from juries to professional arbitrators reduces not only the variance of awards against businesses but the mean sum awarded as well.¹⁹ Nonetheless, even if the difference is only a matter of degree rather than kind, the difference in degree is a dramatic one: with class action waivers, businesses can reduce their liability for small-stakes injuries to something very near zero. For this reason, state courts in California had declared class action waivers unconscionable when they involved parties with small claims.²⁰

discretion of the arbitrator, but it is well recognized that less discovery is usually available in arbitration than in litigation.”).

15. See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 811–12 (2010) (“Class actions have been the result of great controversy in the United States. Corporations fear them. Policymakers have tried to corral them. Commentators and scholars have suggested countless ways to reform them.”); see also Letter from U.S. Chamber of Commerce to Consumer Fin. Prot. Bureau 53 (Dec. 11, 2013), available at <http://blogs.reuters.com/alison-frankel/files/2013/12/mayerbrown-chamberletter.pdf>.

16. AT&T Mobility L.L.C. v. *Concepcion*, 131 S. Ct. 1740 (2011).

17. *Id.* at 1744 (“The contract provided for arbitration . . . but required that claims be brought in the parties’ individual capacities, and not as a plaintiff or class member in any purported class or representative proceeding.”).

18. See, e.g., *id.* at 1761 (Breyer, J., dissenting) (“What rational lawyer would have signed on to represent the *Concepcions* in litigation for the possibility of fees stemming from a \$30.22 claim?”); *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (Posner, J.) (“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”).

19. See Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After Gilmer v. Interstate Johnson Lane Corp.*, 21 EMP. REL. L.J., no. 2, 1995, at 21 (“[T]he size of damage awards in arbitrations tends to be smaller than in jury trials.”); David S. Schwarz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60 (1997) (“While the jury is probably still out on this issue, there is a general perception that arbitrators give smaller awards than juries. Arbitrators may be more jaded, and hence make lower awards, particularly in more egregious cases where punitive damages are available.”).

20. See *Discover Bank v. Super. Ct.*, 113 P.3d 1100, 1110 (Cal. 2005) (“[W]hen the [class action] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages,

This was the setting when the Concepcions brought their state law consumer-fraud claim as a class action in federal court. They claimed that AT&T had wrongly charged them the sales tax (\$30.22) on a phone that AT&T had said would be “free.”²¹ AT&T moved to dismiss the suit and compel arbitration because the Concepcions had signed a contract agreeing to arbitrate any disputes and to do so without joining a class action.²² The U.S. District Court for the Southern District of California and the U.S. Court of Appeals for the Ninth Circuit permitted the suit to go forward because they thought the class action waiver in AT&T’s arbitration agreement was unconscionable under California law.²³ Although, as I noted, the FAA renders any arbitration agreement “enforceable,” because unconscionability is a basis for invalidating any contract, these courts found that the case fell within FAA’s exception for “such grounds as exist at law or in equity for the revocation of any contract.”²⁴ The courts noted that this was true of the unconscionability defense not only at a high level of abstraction but also with regard to the specific application of it against class action waivers: under California law, any contract that waived class actions for small-stakes claims would be unconscionable, whether it involved arbitration or not.²⁵

In a 5-4 vote that divided along familiar ideological lines, the Supreme Court reversed.²⁶ The majority opinion, authored by Justice Scalia, held that the FAA preempted California’s unconscionability doctrine.²⁷ Although the Court acknowledged California’s law was facially neutral between arbitration and other contracts,²⁸ the Court thought the doctrine would nonetheless frustrate the

and . . . the party with the superior bargaining power has [allegedly] carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then . . . the waiver . . . [is] unconscionable under California law and should not be enforced.”).

21. *Concepcion*, 131 S. Ct. at 1744.

22. *See id.* at 1744–45.

23. *Laster v. T-Mobile USA, Inc.*, No. 05-cv-1167, 2008 WL 5216255, at *14 (S.D. Cal. Aug. 11, 2008) (“In balancing the relative procedural and substantive unconscionability of the revised arbitration provision, Plaintiffs have met their burden of establishing that the provision is unconscionable as applied to them under California law.”), *aff’d*, 584 F.3d 849, 855 (9th Cir. 2009) (“Because all three prongs of the *Discover Bank* test are met, AT&T’s class action waiver is unconscionable under California law.”).

24. *Laster*, 2008 WL 5216255, at *7 (“Generally applicable contract defenses such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening Section 2 of the FAA.”), *aff’d*, 584 F.3d at 857–59.

25. *See Laster*, 584 F.3d at 857 (“AT&T contends the *Discover Bank* rule . . . [is] applicable only to arbitration agreements. This contention is incorrect . . . ‘[T]he rule announced in *Discover Bank* is simply a refinement of the unconscionability analysis applicable to contracts generally in California.’” (quoting *Shroyer v. New Cingular Wireless Servs., Inc.*, 498 F.3d 976, 987 (9th Cir. 2007))).

26. *See Concepcion*, 131 S. Ct. at 1743.

27. *See id.* at 1753.

28. *See id.* at 1747 (“[T]he inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration.”).

purposes of the FAA by discouraging parties from entering into arbitration agreements.²⁹

Why did the Court think a doctrine that prohibited class action waivers both in arbitration agreements and nonarbitration agreements would discourage parties from entering into arbitration agreements? The Court gave a three-part answer. First, the Court said that striking class action waivers in arbitration agreements would force businesses to defend class actions in arbitration proceedings.³⁰ Second, the Court said that businesses would not want to defend

29. See *id.* at 1751–53.

30. See *id.* at 1750 (stating that the *Discover Bank* rule would lead to “inevitable class arbitration”). I do not understand why Justice Scalia thought that striking the class waiver meant that AT&T would have to defend the class action in arbitration rather than in court. After all, the Concepcions filed their class action in federal court, and it was AT&T that sought to compel arbitration. See *id.* at 1744–45. The lower federal courts denied AT&T’s motion to do so, which kept the class action suit in federal court; had the Supreme Court affirmed rather than reversed, the suit would have continued to stay there (and AT&T could have received the robust judicial review of the court system rather than the meager judicial review of arbitration, contra point two in Justice Scalia’s analysis above). I suppose it might have been possible for the Concepcions to dismiss their case in court and refile it in arbitration had they prevailed before the Court. Perhaps this is what the Court was worried about when it said California law “allows any party to a consumer contract to demand [classwide arbitration] *ex post*.” *Id.* at 1750. Perhaps California law said that, once a class action waiver was struck in an arbitration agreement, then the plaintiff could choose whether to bring his or her class action in court or in arbitration. But if California law said this, and the Court cited nothing to suggest it did, it would have *clearly* been preempted by the FAA. This is the case because just one year earlier, the same five Justices in the majority in *Concepcion* decided in *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010), that, unless an arbitration agreement *explicitly* says class actions are permitted in arbitration, then the agreement does not permit class actions in arbitration. See *id.* at 684 (“[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so.”). AT&T’s arbitration agreement, which, if the Concepcions would have won, would have contained only a stricken clause forbidding class actions, would not satisfy that standard.

But even if *Stolt-Nielsen* is put to the side and we assume things were as the Court assumed they were (i.e., once the class waiver was struck, the Concepcions could opt for a class action in court or in arbitration), there is still no reason to believe that this would force any business (apart from AT&T in this case and this case only) into a class-wide arbitration if it would rather face class actions in court. The reason for this is that businesses are free to write bifurcated arbitration agreements. They can say that, although you must bring individual claims in arbitration, you can only bring class claims in court. See, e.g., Drahozal, *supra* note 12, at 779 (quoting a provision from Taco John’s International, Inc. Restaurant Franchise Agreement: “if a claim which is subject to arbitration under this Agreement is properly the subject of a class action, then the party making that claim may, in its discretion, elect either to assert it as a single-party claim (as opposed to a claim on behalf of a class) in the arbitration, or to file it as a class action in a court of competent jurisdiction, pursuant to the laws and rules applicable to that court”). Thus, it is hard to see how respecting California’s unconscionability law would have discouraged a single business to forgo arbitration altogether for fear of having to defend class actions in arbitration proceedings.

class actions in arbitration proceedings.³¹ This was true, the Court thought, both because class-wide arbitration is less attractive to businesses than individual arbitration (because it is more formal and slower),³² and because class-wide arbitration is less attractive to businesses than class-wide actions in court: although the stakes of a class-wide arbitration are as great as they are in court, the judicial review available, as I noted above, is not.³³ Third, for these reasons, the Court said that, if forced to endure class-wide arbitration, businesses would forgo arbitration altogether.³⁴ As the Court put it, it is “not reasonably deniable that requiring

In any event, the Court’s decision has not been limited to situations where invalidating the class waiver would lead to class actions in arbitration. Lower courts have been unconcerned about whether invalidating a class waiver would lead to a class action in court or arbitration; they have followed *Concepcion* regardless. *See, e.g., Cruz v. Cingular Wireless, L.L.C.*, 648 F.3d 1205, 1213 (11th Cir. 2011) (“[Plaintiffs] claim that *Concepcion* was only concerned with state laws that impose nonconsensual class *arbitration* on parties. Because [the class action waiver’s nonseverability clause] assures that [Defendants] will not be forced into class *arbitration*—but only class *litigation*—they claim that *Concepcion* is not implicated here Th[is] argument is disposed of easily.”); *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1160 (9th Cir. 2012) (rejecting attempt to distinguish *Concepcion* because “Washington law would . . . invalidate the entire arbitration agreement, whereas *Concepcion* dealt with a state-law rule that would have forced parties into non-consensual class-wide arbitration”).

31. *See Concepcion*, 131 S. Ct. at 1752 (explaining that the “small chance of a devastating loss” in class arbitration will “pressure [businesses] into settling questionable claims” because “defendants would [not] bet the company [in class arbitration] with no effective means of review.”).

32. *See id.* at 1751 (“[T]he switch from bilateral to class arbitration sacrifices the principle advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”).

33. *See id.* at 1752 (relying on the point that, “[i]n contrast [to appeals in litigation], [the FAA] allows a court to vacate an arbitral award *only*” in limited, specific circumstances).

34. *See id.* at n.8 (“[I]n class-action arbitration huge awards (with limited judicial review) will be entirely predictable, thus rendering arbitration unattractive.”). In the reply to the opposition to their petition for writ of certiorari, AT&T argued that, even if businesses would not have to defend class actions in arbitration rather than court, there was another reason they would abandon arbitration if class waivers were struck: “[b]usinesses would have little incentive to subsidize [individual] arbitration . . . if, at the end of the day, they still must litigate in court every claim pleaded as a class action.” Reply Brief for Petitioner at 24, *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740 (2011) (No. 09-893), 2010 WL 4312794, “[I]nstead, companies will give up on arbitration entirely” *Id.* The U.S. Chamber of Commerce recently reiterated this same argument. Letter from U.S. Chamber of Commerce to Consumer Fin. Prot. Bureau, *supra* note 15, at 54–55 (“[A] company that sets up an arbitration program incurs significant administrative costs If faced with the prospect of . . . simultaneously dealing with the huge costs of litigating class actions in court, all rational companies . . . would abandon arbitration entirely”). But this argument is hard to square with the substantial majority of businesses that, before *Concepcion*, used arbitration agreements without class action waivers. *See Drahozal & Ware, supra* note 10, at 472–73 (“Indeed, the substantial majority of cases (190 of 299, or

consumer disputes to be arbitrated on a [class-wide] basis will have a substantial deterrent effect on incentives to arbitrate.”³⁵ In his dissent, Justice Breyer pointed out that class action waivers were not just waivers of procedure but, as I noted, for small-stakes claimants, waivers of substantive liability as well.³⁶ But the Court was unmoved: “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons.”³⁷

Concepcion was a preemption decision; in a showdown between state law and the FAA, the FAA won. But what would happen if the showdown were between the FAA and another federal law? A federal statute that preserved a right to proceed in a class action might well trump the FAA. The FAA is an old statute, and when two federal statutes conflict, the more recent or more specific one can trump the older or more general one.³⁸ But, as I explain below, there is no federal statute that preserves the right to proceed in a class action. The only thing that preserves that right is Rule 23 of the Federal Rules of Civil Procedure.

But what if the mere effectiveness of another federal statute were to be hampered by a class action waiver? Might the other statute trump the FAA then, too? Until the *American Express* decision, this had been the view of the U.S. Court of Appeals for the Second Circuit,³⁹ the National Labor Relations Board (“NLRB”),⁴⁰ as well as many scholars.⁴¹ This view was known as the “vindication

64.5%) in the sample [from American Arbitration Association consumer arbitration] did not arise out of an arbitration clause with a class arbitration waiver.”)

35. See *Concepcion*, 131 S. Ct. at n.8.

36. See *id.* at 1761 (Breyer, J., dissenting) (“In California’s perfectly rational view, non-class arbitration over such [small] sums will also sometimes have the effect of depriving claimants of their claims . . .”).

37. *Id.* at 1753 (majority opinion).

38. See, e.g., *RadLAX Gateway Hotel, L.L.C. v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (“The general/specific canon is perhaps most frequently applied to statutes in which a general permission or prohibition is contradicted by a specific prohibition or permission. To eliminate the contradiction, the specific provision is construed as an exception to the general one.”); *Credit Suisse v. Billing*, 551 U.S. 264, 285 (2007) (holding that newer, securities-related statutes had impliedly repealed inconsistent provisions in older, antitrust-related statutes); *Brown v. Gen. Servs. Admin.*, 425 U.S. 820, 821 (1976) (“A precisely drawn, detailed statute pre-empts more general remedies.”); *Morton v. Mancari*, 417 U.S. 535, 550 (1974) (“In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”); *Wood v. United States*, 41 U.S. 342, 363 (1842) (“[T]here must be a positive repugnancy between the provisions of the new law, and those of the old; and even then, the old law is repealed by implication, only *pro tanto*, to the extent of the repugnancy.”).

39. *In re Am. Express Merchants Litig.*, 667 F.3d 204, 218 (2d Cir. 2012) (“Thus, as the class action waiver in this case precludes plaintiffs from enforcing their statutory rights, we find the arbitration provision unenforceable.”), *rev’d*, 133 S. Ct. 2304 (2013).

40. *In re Horton*, 357 N.L.R.B., No. 184, Jan. 3, 2012, at *1 (“[W]e find that such an agreement unlawfully restricts employees’ Section 7 right to engage in concerted action for mutual aid or protection, notwithstanding the [FAA], which generally makes

of rights” theory to evade the FAA,⁴² and it was based on dicta in Supreme Court decisions which found that various federal statutory causes of action were not exempt from arbitration because there was nothing in the “text,” “legislative history,” or “underlying purposes” of the statutes that “irreconcilably conflict[ed]” with the FAA.⁴³ The vindication-of-rights theory seized upon the last of these grounds for conflict—the “underlying purposes”—to contend that, because small-stakes federal statutory claimants cannot bring their claims without class actions, those federal statutes would be effectively gutted for such claimants if the FAA were not overridden.⁴⁴

If the FAA said explicitly that “written provisions to settle controversies by arbitration with class-action waivers” shall be enforceable, then I would have thought that the vindication-of-rights theory would have been doomed from the beginning, because it would be hard to see how the mere efficacy of another

employment-related arbitration agreements judicially enforceable.”), *rev'd*, No. 12-60031, 2013 WL 6231617 (5th Cir. Dec. 3, 2013).

41. See, e.g., Gilles & Friedman, *supra* note 3, at 640 (“In the most recent installment of what is now the Amex trilogy, the Second Circuit made clear that its conception of the vindication-of-rights doctrine is unaffected by *Concepcion*. In our view, the court is correct . . .”).

42. See *id.* at 640–47.

43. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26–27 (1991) (“*Gilmer* concedes that nothing in the text of the ADEA or its legislative history explicitly precludes arbitration. He argues, however, that [it] would be inconsistent with the statutory framework and purposes of the ADEA . . . [W]e disagree.”); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 221 (1987) (“Nothing in RICO’s text or legislative history even arguably evinces congressional intent to exclude civil RICO claims for treble damages under 18 U.S.C. § 1964(c) from the Arbitration Act’s dictates. Nor is there any irreconcilable conflict between arbitration and RICO’s underlying purposes.”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985) (“We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.”).

44. See Gilles & Friedman, *supra* note 3, at 640–47; see also Roger J. Perlstadt, *Timing of Institutional Bias Challenges to Arbitration*, 69 U. CHI. L. REV. 1983, 1995 (2002) (“The treatment of statutory rights is different because of the public interest in the resolution of disputes over statutory rights—an interest that is separate from private parties’ interest in resolving a dispute between themselves. In order for these rights to be submitted to arbitration, the arbitration must allow effective vindication of them. Any arbitration of a statutory claim that did not allow for effective vindication of rights would ‘conflict() with the statute’s purpose of both providing individual relief and generally deterring unlawful conduct through the enforcement of its provisions.’”); J. Maria Glover, Note, *Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements*, 59 VAND. L. REV. 1735, 1765 (2006) (“[T]he crux of the problem with class action waivers in the context of negative-value claims is that proceeding with an individual arbitration is ‘prohibitively expensive’ in light of the small value of the claim. Only through aggregate procedures can a plaintiff ‘effectively vindicate’ her individual rights.”).

statute could trump the explicit terms of the FAA.⁴⁵ But the FAA does not explicitly say “with class action waivers”; it says only “written provisions to settle controversies by arbitration” shall be enforceable. The FAA is silent on class action waivers. Thus, the question posed by the vindication-of-rights theory was not how to interpret two statutes whose *texts* conflict with one another, but how to interpret two statutes whose *purposes* conflict with one another. How does one answer that question?

One answer would be to fall back again on the canons that give the edge to the more recently enacted or more specific statute. Although it is unclear whether the FAA or a federal statutory cause of action for, say, antitrust or labor violations is more “specific” than the other, many of the federal statutes on which class actions are based were enacted more recently than the FAA—including, Title VII of the Civil Rights Act,⁴⁶ the Americans with Disability Act,⁴⁷ the Employee Retirement Income Security Act,⁴⁸ the Age Discrimination in Employment Act (“ADEA”),⁴⁹ the Equal Pay Act (“EPA”),⁵⁰ the Fair Labor Standards Act,⁵¹ and the Securities Acts⁵²—but some of the most important ones were not, including the Sherman Antitrust Act.⁵³

This is not, however, how the Supreme Court answered this question two years ago in *American Express*—a case brought under the Sherman Act against American Express on behalf of merchants that accepted its credit cards.⁵⁴ The merchants’ agreement with American Express obligated them to bring any cause of action against American Express in arbitration, and forbade them from joining a class action.⁵⁵ The merchants argued that this would foreclose them from bringing

45. In fairness, however, I must acknowledge that Supreme Court dicta on the vindication-of-rights theory had come close to suggesting just that, because, in those cases, the question was whether the federal statutory cause of action could be arbitrated at all, and that does seem to be a question which the FAA’s text answers explicitly.

46. 42 U.S.C. § 2000(e) (2012) (enacted in 1964).

47. 42 U.S.C. §§ 12101–12213 (enacted in 1990).

48. 29 U.S.C. §§ 1001–1461 (2012) (enacted in 1974).

49. 29 U.S.C. §§ 621–634 (enacted in 1967).

50. 29 U.S.C. § 206(d) (enacted in 1963).

51. 29 U.S.C. §§ 201–219 (enacted in 1938).

52. 15 U.S.C. § 77(a)–(aa) (2012) (enacted in 1933).

53. 15 U.S.C. §§ 1–7 (enacted in 1890).

54. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013) (“Respondents brought a class action against petitioners for violations of the federal antitrust laws. According to respondents, American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards. This tying arrangement, respondents said, violated § 1 of the Sherman Act.”).

55. *See id.* (“Respondents are merchants who accept American Express cards. Their agreement with petitioners—American Express and a wholly owned subsidiary—contains a clause that requires all disputes between the parties to be resolved by arbitration. The agreement also provides that “[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.” (internal citations omitted)).

a cause of action at all: without the ability to spread the costs of antitrust experts over a large group of plaintiffs, the merchants' antitrust suit—and perhaps most every antitrust suit—would not be viable.⁵⁶ As a result, the merchants argued that enforcing class action waivers would all but gut the Sherman Act.⁵⁷

The Court might have done what I suggested above and concluded that because the FAA postdated the Sherman Act, the efficacy of the FAA trumped the efficacy of the Sherman Act when the two were drawn into conflict. But the Court did not do that. Dividing along the same ideological line as in *Concepcion* (this time 5-3, with Justice Sotomayor recused), and again with Justice Scalia at the helm, the Court adopted a broader theory: the mere efficacy of another federal statute is no match for the efficacy of the FAA. The Court said that only a “contrary congressional command”—what I take to mean a contrary statutory text—could override the efficacy of the FAA.⁵⁸ In my opinion, all of this seems to suggest that the FAA is no ordinary statute; rather, it is some sort of super-statute that is treated differently than its counterparts in the U.S. Code.

II. THE END OF CLASS ACTIONS?

The *Concepcion* decision stunned many commentators.⁵⁹ By the time *American Express* was decided, commentators were less surprised.⁶⁰ As I said, I

56. See *id.* at 2310 (“Enforcing the waiver of class arbitration bars effective vindication, respondents contend, because they have no economic incentive to pursue their antitrust claims individually in arbitration.”).

57. See *id.* at 2316–20 (Kagan, J., dissenting) (“Italian Colors cannot prevail in arbitration without an economic analysis defining the relevant markets, establishing Amex’s monopoly power, showing anticompetitive effects, and measuring damages. And that expert report would cost between several hundred thousand and one million dollars. So the expense involved in proving the claim in arbitration is ten times what Italian Colors could hope to gain, even in a best-case scenario. . . . Amex has put Italian Colors to this choice: Spend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights [A]rbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.”).

58. See *id.* at 2309 (upholding class action waiver because “[n]o contrary congressional command require[d]” otherwise).

59. See, e.g., Sarah Rudolph Cole, *On Babies and Bathwater: The Arbitration Fairness Act and The Supreme Court’s Recent Arbitration Jurisprudence*, 48 HOUS. L. REV. 457, 467 (2011) (“The Supreme Court’s recent decision in *AT&T v. Concepcion* . . . sounds the death knell for the class arbitration process [T]he Court appears to have placed an insurmountable obstacle in the path of consumer efforts to vindicate low-value claims.”); Sternlight, *supra* note 3, at 704 (“It is highly ironic but no less distressing that a case with a name meaning “conception” should come to signify death for the legal claims of many potential plaintiffs. The U.S. Supreme Court’s five-to-four decision in *AT&T Mobility L.L.C. v. Concepcion* is proving to be a tsunami that is wiping out existing and potential consumer and employment class actions.”); Weston, *supra* note 3, at 794 (“*Concepcion*, based on a dated notion of arbitration, improperly guts the FAA savings clause and violates the reserved role under the FAA for states to hold arbitration contracts to the standards required for all contracts. Certainly, the FAA was not intended to shield wrongdoers from liability.”); Bryant, *supra* note 3 (“The U.S. Supreme Court’s 5-4 decision in *AT&T v.*

thought the Supreme Court would decide *Concepcion* the way it did, and that doing so would take us down a road that could lead to the end of class actions against businesses. In this Part, I assess the latter prediction: are class actions headed for demise? I continue to fear that they very well might be.

My prediction rested on three premises: (1) businesses have the opportunity to ask all of the people who currently sue them in class actions to agree to pre-dispute contractual terms; (2) after *Concepcion* (and certainly after *American Express*) there is no longer anything in the law that can stop businesses from including in those terms arbitration clauses with class action waivers; and (3) businesses will take advantage of the opportunity and ask all of the people who sue them to agree to arbitration clauses with class action waivers. Below, I discuss each of these premises and assess how they have fared in the years since *Concepcion*.

Before I do so, however, I should note that, several years before *Concepcion* was decided, a very prescient article written by Professor Myriam Gilles presaged some of my analysis.⁶¹ Her article worried about a clash between arbitration and class action litigation.⁶² In a more recent article written after *Concepcion*, Professor Gilles and Gary Friedman reiterated many of her prior fears, but they ultimately sounded something of a more optimistic note than I do here.⁶³ I explain below why I think even Professor Gilles and Mr. Friedman may underappreciate the full potential of *Concepcion*.

Concepcion is a disturbing example of judicial activism"); Chemerinsky, *supra* note 3 (“This is nothing other than a conservative majority favoring the interests of businesses over consumers, employees and others suffering injuries.”); *Gutting Class Actions*, *supra* note 3 (“With Justice Antonin Scalia writing for the majority, the Supreme Court reversed that decision and, in a dramatic example of judicial activism, ruled that class-based arbitrations also would not be permitted.”). I was not stunned by the decision. Shortly before the case was argued, I published an opinion piece predicting the outcome. Fitzpatrick, *supra* note 2.

60. See, e.g., Jeffrey M. Hirsch, *The Supreme Court's 2012-2013 Labor and Employment Law Decisions: The Song Remains the Same*, 17 EMP. RTS. & EMP. POL'Y J. 157, 158 (2013) (“[I]t was unsurprising that the Court enforced the provision in [*American Express*].”).

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

62. *Id.* at 377 (“Assuming the collective action waiver emerges more or less unscathed from the current round of judicial challenges, it is only a matter of time before these waivers metastasize throughout the body of corporate America and bar the majority of class actions as we know them.”).

63. See Gilles & Friedman, *supra* note 3, at 639–40 (“[I]t is clear there are many cases that class action waivers simply cannot reach. In some . . . there is no contractual relationship between the parties In other cases, Congress has evinced a clear intent that the class action remedy be available. And then there are outlier cases”).

A. Do Businesses Have the Opportunity to Ask All of the People Who Currently Sue Them in Class Actions to Agree to Pre-Dispute Contractual Terms?

In 2010, I published an empirical study that examined all federal court class action settlements in 2006 and 2007.⁶⁴ The study showed that there are basically only three groups of plaintiffs who sue businesses in class actions: consumers of the products of those businesses, employees of those businesses, and shareholders of those businesses. In particular, over both years in my study, I found that 17% of all federal class action settlements were suits brought against businesses by consumers (including fraud and antitrust suits), 23% were suits brought against businesses by their employees (including labor, employment, and benefits suits), and 37% were brought against businesses by their shareholders.⁶⁵ These three categories of suits made up over three-quarters of all federal court class actions. The remaining quarter of class actions consisted largely of suits against government actors.⁶⁶ In fact, the only appreciable numbers of suits against businesses not brought by consumers, employees, or shareholders were class actions brought under the Fair Debt Collection Practices Act,⁶⁷ but these are relatively insignificant suits for trivial sums of money.⁶⁸

My study examined only federal court class actions. It is possible that the class actions filed against businesses in state court look different than those in federal court.⁶⁹ It is true, for example, that there are no securities-fraud class actions in state court.⁷⁰ But even if the distribution of class actions against

64. See Fitzpatrick, *supra* note 15.

65. See *id.* at 818 tbl. 1.

66. See *id.* It is possible that *Concepcion* will affect class actions against government actors as well, but many of these class actions are brought by persons who are not in voluntary transactional relationships with the government, such as prisoners. Moreover, for the same reason governments have voluntarily waived their sovereign immunity from suit, they may be less inclined to seek class waivers from those who are in voluntary transactional relationships with them.

67. See *id.* (showing that these settlements comprised 6% of all class action settlements in federal court).

68. See *id.* at 825 tbl. 4 (showing that all of these settlements summed to well under \$10 million per year, a fraction of 1% of the value of all class action settlements in federal court).

69. Empirical scholars have only begun to study state court class actions and only in certain subject areas and in certain states. See, e.g., JUDICIAL COUNCIL OF CAL., ADMIN. OFFICE OF THE COURTS, FINDINGS OF THE STUDY OF CALIFORNIA CLASS ACTION LITIGATION, 2000–2006: FIRST INTERIM REPORT (2009), available at <http://www.courts.ca.gov/documents/class-action-lit-study.pdf>; Robert B. Thompson & Randall S. Thomas, *The New Look of Shareholder Litigation: Acquisition-Oriented Class Actions*, 57 VAND. L. REV. 133 (2004); Robert B. Thompson & Randall S. Thomas, *The Public and Private Faces of Derivative Suits*, 57 VAND. L. REV. 1747 (2004).

70. See Securities Litigation Uniform Standards Act of 1998 § 16, 15 U.S.C. § 78bb(f)(1) (2012) (“No covered class action based upon the . . . law of any State . . . may be maintained in any State or Federal court by any private party alleging . . . a misrepresentation or omission of a material fact in connection with the purchase or sale of a

businesses is different in state court than in federal court, I have seen nothing to suggest that the universe of plaintiffs is any different. In short, I strongly suspect that, whether in state or federal court, almost all of the people who sue businesses in class actions today fall into the consumer, employee, and shareholder categories.

This is important because one thing that consumers, employees, and shareholders all have in common is that they are in transactional relationships with the businesses that they sue. This means, at least in theory, that the businesses they sue can ask all of these plaintiffs to consent to pre-dispute contractual terms—including arbitration clauses with class action waivers. This is easiest to see with regard to employees. At the time of hiring—or, indeed, at any time thereafter—businesses can (and often do) ask their employees to sign contractual agreements, including clauses to arbitrate any dispute that might arise.⁷¹

But these sorts of agreements can bind consumers and shareholders, too. With respect to consumers, in light of advances both in technology and in legal notions of contract formation, producers of almost any product can now bind purchasers to contractual language. Even if the purchase is unlike the cell phone purchase in *Concepcion* that required consumers to sign a document,⁷² businesses can bind consumers to contractual language by placing the language on the product's packaging.⁷³ Indeed, even if the consumer could not read the language

covered security; or . . . that the defendant used or employed any manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security.”)

71. See Gilles, *supra* note 61, at 419–20 (“While arbitration of employment disputes is nothing new . . . the potential for collective action waivers to curtail most, if not all, employment class actions seeking broad-scale changes in the U.S. workplace is a more recent phenomenon And the newfound ability of employers to notify employees of arbitration clauses via mass emails will make it far easier to impose these waivers.”); see also Sternlight, *supra* note 14, at 1641 (“[C]ompanies now commonly impose arbitration after the relationship has already commenced.”). For examples of courts holding that an adequate post-hire arbitration notice is binding if an at-will employee continues work, see *Seawright v. Am. Gen. Fin. Servs., Inc.*, 507 F.3d 967, 972 (6th Cir. 2007); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 743 (7th Cir. 2002); *In re Halliburton Co.*, 80 S.W.3d 566, 568–71 (Tex. 2002).

72. Even when the purchase is online and the contractual language appears only on a computer screen, the language can be binding. See Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 487 (2002) (“Courts have had little difficulty enforcing standard terms offered in electronic format.”); 15B AM. JUR. 2D *Computers and the Internet* § 106 (2014) (“Shrinkwrap or clickwrap agreements are generally enforceable, unless their terms are objectionable on grounds applicable to contracts in general, such as illegality or unconscionability.”).

73. See Gilles, *supra* note 61, at 416–17 (“There is nothing, as a matter of current law, to prevent companies from unilaterally imposing a fully enforceable waiver of the right to collective action in all manner of consumer transactions Consumers buy goods; goods have packaging; packaging may contain waivers of exposure to collective actions; therefore, the seller of goods need never be exposed to collective action by consumers.”); *James v. McDonald’s Corp.*, 417 F.3d 672, 675, 679 (7th Cir. 2005) (binding customer to arbitration clause included in “Monopoly” game’s official terms when the fry carton containing game pieces, among other places, directed customer to read those terms).

until after he or she purchased the product, many courts have found the language to be binding.⁷⁴ This means that even consumers who buy through intermediaries can be asked to consent to pre-dispute contractual provisions.⁷⁵ For this reason, I am not so sure that, as Professor Gilles and Mr. Friedman put it, “consumer cases stemming from retail purchases” are “cases that class action waivers simply cannot reach.”⁷⁶

With respect to shareholders, they buy their shares subject to the terms and provisions found in the corporation’s charter and bylaws.⁷⁷ That is, like employees and customers, shareholders are in something of a contractual

74. See *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1449–50, 1455 (7th Cir. 1996) (finding software licensing agreement binding despite only being available after opening the package); *Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1148–50 (7th Cir. 1997) (applying *ProCD* reasoning to standardized consumer contract enclosed in computer box); Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 459–60 (2006) (“A majority of courts in the last ten years have enforced shrinkwrap licenses . . .”). *But see* *Klocek v. Gateway, Inc.*, 104 F. Supp. 2d 1332, 1337–42. (D. Kan. 2000); *Novell, Inc. v. Network Trade Ctr., Inc.*, 25 F. Supp. 2d 1218, 1230–31 (D. Utah 1997), *vacated in part on other grounds*, 187 F.R.D. 547 (D. Utah 1999); John E. Murray, Jr., *The Dubious Status of the Rolling Contract Formation Theory*, 50 DUQ. L. REV. 35, 36 (2012) (“The majority of jurisdictions have not had the opportunity to decide the fate of the rolling [contract formation] theory [as explained in *ProCD*].”).

75. See, e.g., *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 568 (9th Cir. 2014) (refusing to enforce arbitration agreement sent by third party to consumer one month after purchase, but noting that this “could be easily remedied by Toyota” by informing consumers that it “has a relationship with Sirius XM to provide Toyota customers with a trial service”); *Hill*, 105 F.3d at 1148–50 (upholding arbitration clause included with warranty shipped with personal computer); *Wilson v. Mike Steven Motors, Inc.*, 111 P.3d 1076 (Table), No. 92468, 2005 WL 1277948, at *9 (Kan. Ct. App. May 27, 2005) (upholding arbitration clause car dealer included when consumer purchased an automobile); Sternlight, *supra* note 14, at 1638–39 (“Arbitration has even been mandated in connection with games sponsored by McDonald’s hamburger chain and with respect to a mail-in on a Cheerios cereal box.”). Even if many businesses have yet to include arbitration clauses with simple, everyday retail products (e.g., on the tag of a pair of blue jeans), those clauses appear to be binding under the “shrinkwrap” rationale from cases such as *ProCD*. By analogy, for example, adhesive warranty disclaimers are perfectly legal if conspicuously placed upon ordinary consumer goods. See U.C.C. § 2-316 (2012).

76. Gilles & Friedman, *supra* note 3, at 639.

77. See 1 TREATISE ON THE LAW OF CORPORATIONS § 3:11 (3d ed. 2011) (“The ‘charter’ . . . constitutes a contract between the corporation and the individuals who become shareholders or members of the corporation The future parties to the contract are the corporation and the persons who become, from time to time, shareholders or members of the corporation.”); Paul Weitzel, *The End of Shareholder Litigation: Using Bylaw or Charter Amendments to Require Binding Arbitration of Shareholder Disputes*, 2013 BYU L. REV. 65, 97 (“Every state to address the issue has held that bylaws and charters are contracts binding upon shareholders The major treatises are also unanimous.”).

relationship with corporations.⁷⁸ Although there is currently a debate over whether corporations can unilaterally insert arbitration provisions into their bylaws under Delaware law,⁷⁹ there is no barrier under Delaware law to inserting arbitration provisions into corporate charters with shareholder consent.⁸⁰ Thus, corporations have much the same opportunity to bind shareholders to the equivalent of contractual terms that they do consumers and employees.⁸¹ In my view, Professor Gilles and Mr. Friedman underestimate this potential development.⁸²

With all of this said, it may be possible for creative lawyers to salvage some subset of the current system by alleging conspiracies between the businesses

78. See *ATP Tour, Inc. v. Deutscher Tennis Bund*, 91 A.3d 554, 558 (Del. 2014) (“[C]orporate bylaws are ‘contracts among a corporation’s shareholders’” (quoting *Airgas, Inc. v. Air Prods. & Chems., Inc.*, 8 A.3d 1182, 1188 (Del. 2010))); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 939 (Del. Ch. 2013) (“The bylaws of a Delaware corporation constitute part of a binding broader contract among the directors, officers, and stockholders formed within the statutory framework of the DGCL.”); Hal S. Scott & Leslie N. Silverman, *Stockholder Adoption of Mandatory Individual Arbitration for Stockholder Disputes*, 36 HARV. J.L. & PUB. POL’Y 1187, 1213 (2012) (“[B]y-laws are viewed as contracts between a corporation and its stockholders.”); Randall S. Thomas, *What Should We Do About Multijurisdictional Litigation in M&A Deals?*, 66 VAND. L. REV. 1925, 1952 (2013) (“Charters are claimed to be contracts . . .”).

79. Compare Scott & Silverman, *supra* note 78, at 1223 (“Corporations could and should describe the arbitration provision in their by-laws and their effect on present and future stockholders in their Exchange Act filings.”), with Thomas, *supra* note 78, at 1953 (“There are substantive reasons to think that these clauses are unenforceable. The first of these is the issue of shareholder consent, especially as to management-imposed bylaws. Director-adopted bylaws do not have express shareholder consent.”), and Randall S. Thomas & Robert B. Thompson, *A Theory of Representative Shareholder Suits and Its Application to Multijurisdictional Litigation*, 106 NW. U. L. REV. 1753, 1814 (2012) (“Should shareholders be bound when directors use their broad powers in corporate law to insert such a provision into the bylaws without a direct shareholder vote? At present, there appears to be little support for allowing these bylaws.”).

80. See, e.g., Thomas, *supra* note 78 (paraphrasing Delaware’s logic as: “Charters are claimed to be contracts, and forum-selection provisions, in general, are permissible as a matter of contract law, so these particular types of claims must also be enforceable.”).

81. See Weitzel, *supra* note 77, at 105 (concluding that shareholders can limit the “tremendous costs” of shareholder litigation “through an amendment to the charter or bylaws, which will likely be considered a contract that binds shareholders” and that “[t]he Federal Arbitration Act will enforce such a provision, and it is unlikely that any defense will apply”); cf. A.C. Pritchard, *Stoneridge Investment Partners v. Scientific-Atlanta: The Political Economy of Securities Class Action Reform*, 2008 CATO SUP. CT. REV. 217, 248 (2008) (suggesting that “shareholders change the damages measure in Rule 10b-5 securities fraud class actions” by waiving the fraud-on-the-market presumption of reliance in the corporation’s articles of incorporation).

82. See Gilles & Friedman, *supra* note 3, at 639 n.16 (arguing that under the current state of affairs, “class action waivers simply cannot reach” “securities fraud cases based on secondary market purchases” but also noting that “future efforts to embed class action waivers in IPO registration materials may become more commonplace and less controversial”).

they wish to sue and some third party to which the plaintiffs have no relationship; I have seen, for example, consumer-fraud class actions in recent years recast for this reason as class actions under the Racketeer Influenced and Corrupt Organizations Act.⁸³ It is too early to tell, however, if this workaround will be successful.

B. Is There Anything Left in the Law that Can Stop Businesses from Including in Their Pre-Dispute Contractual Terms Arbitration Clauses with Class Action Waivers?

I asserted above that businesses almost always have the opportunity to ask consumers, employees, and even shareholders, to agree to pre-dispute contracts terms. Is there anything in the law that would foreclose businesses from including in these contracts arbitration clauses with class action waivers? In this Section, I explain why I believe it is unlikely that anything can be found to stop them. First, it is now clear that pre-dispute arbitration agreements can be enforced for virtually every cause of action that is brought against businesses in class actions today except for securities fraud, and it is hard to see how securities fraud will escape for much longer. Second, after *Concepcion* and *American Express*, it is hard to see how anything in the law can stop class action waivers imbedded in an otherwise enforceable arbitration clause.

I. Arbitration Clauses

For the first several decades after the enactment of the FAA, the Supreme Court remained quite skeptical of arbitration provisions in pre-dispute contracts, and held that any number of claims could not be arbitrated pursuant to such agreements, especially statutory causes of action.⁸⁴ Over the last couple of

83. See, e.g., *Manjunath A. Gokare, P.C. v. Fed. Express Corp.*, No. 2:11-CV-02131-SHM, 2012 WL 3136668 (W.D. Tenn. Aug. 1, 2012); *Rajagopalan v. NoteWorld, L.L.C.*, 718 F.3d 844 (9th Cir. 2013).

84. See, e.g., *McDonald v. City of W. Branch*, 466 U.S. 284, 292 (1984) (“It is apparent, therefore, that in a § 1983 action, an arbitration proceeding cannot provide an adequate substitute for a judicial trial We therefore hold that in a § 1983 action, a federal court should not afford res judicata or collateral-estoppel to effect an award in an arbitration proceeding brought pursuant to the terms of a collective-bargaining agreement.”); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728, 745 (1981) (“Because Congress intended to give individual employees the right to bring their minimum-wage claims under the [Fair Labor Standards Act] in court, and because these congressionally granted FLSA rights are best protected in a judicial rather than in an arbitral forum, we hold that petitioners’ claim is not barred by the prior submission of their grievances to the contractual dispute-resolution procedures.”); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 40–41, 51 (1974) (holding that even when an employment contract contains an arbitration agreement, “there can be no prospective waiver of an employee’s rights under Title VII [of the Civil Rights Act]”); *Wilko v. Swan*, 346 U.S. 427, 438 (1953) (invalidating arbitration agreement for claims arising under the Securities Act of 1933); see also David Horton, *Arbitration and Inalienability: A Critique of the Vindication of Rights Doctrine*, 60 U. KAN. L. REV. 723, 731–32 (2012) (“[Lower courts during this period] invalidated pre-dispute contracts to arbitrate claims under the Patent Act, the

decades, however, the Court has completely reversed course.⁸⁵ The Court is now very receptive to arbitration,⁸⁶ and, indeed, many of its own precedents barring pre-dispute arbitration agreements have been implicitly or even explicitly overturned.⁸⁷

The consequence of this reversal is that, with one very significant exception, courts have held that pre-dispute arbitration agreements are enforceable for virtually every claim brought against businesses in modern class actions. What kinds of claims are these? According to my empirical study, with respect to consumers, they are largely claims under state law for consumer fraud and under federal and state law for antitrust violations⁸⁸—all of these have been held subject to pre-dispute arbitration.⁸⁹ With respect to employees, they are largely claims under state and federal law for discrimination, wage violations, and hour violations, as well as under federal law for benefits violations⁹⁰—all of these, too,

Commodity Exchange Act, the Railway Labor Act (RLA), the Securities Exchange Act of 1934, the Racketeer Influenced and Corrupt Practices Act (RICO), and the Employment Retirement Income Security Act.” (internal citations omitted)).

85. See *Horton*, *supra* note 84, at 724 (“[T]he Court has nearly concluded its slow march toward universal arbitrability.”); see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626–27 (1985) (“[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution.”); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 965 F. Supp. 190, 194–95 (D. Mass. 1997) (“Ten years after *Gardner–Denver*, the Supreme Court did an about face with respect to the competence of an arbitral forum to adjudicate controversies based on statutory rights, at least with respect to certain statutes.”).

86. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 131–32 (2001) (Stevens, J., dissenting) (“Judges in the 19th century disfavored private arbitration. The [Federal Arbitration] Act was intended to overcome that attitude, but a number of this Court’s cases decided in the last several decades have pushed the pendulum far beyond a neutral attitude and endorsed a policy that strongly favors private arbitration.”).

87. See, e.g., *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 485 (1989) (overruling *Wilko*, 346 U.S. at 427); *LaChance v. Ne. Pub., Inc.*, 965 F. Supp. 177, 179–80 (D. Mass. 1997) (“[*Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)], at least on the surface, appeared to reverse more than a decade’s worth of law which had held that an employee could never be obliged, as a condition of employment, to waive the right to resort to the federal courts to redress violations of various civil rights statutes.”); *Rosenberg*, 965 F. Supp. at 195 (“*Mitsubishi* reversed *Gardner–Denver*’s presumptions The FAA, the [*Mitsubishi*] Court held, created a presumption in favor of arbitrability; but because a private contract requiring arbitration cannot trump a statute, courts must still look to the language and legislative intent of the statute at issue to see if the presumption was rebutted. *Mitsubishi* placed the onus on plaintiffs to demonstrate a negative—that Congress intended that the statute preclude arbitration.”).

88. See Fitzpatrick, *supra* note 15, at 818 tbl. 1.

89. See *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1741, 1744, 1756 (2011) (state law consumer fraud claims are arbitrable); *Mitsubishi*, 473 U.S. at 628–40 (federal law antitrust claims are arbitrable); *Kristian v. Comcast Corp.*, 446 F.3d 25, 64–65 (1st Cir. 2006) (state law antitrust claims are arbitrable).

90. See Fitzpatrick, *supra* note 15, at 818 tbl. 1.

have been held to be arbitrable.⁹¹ It is true that there are a handful of consumer and employee claims that are still exempt from arbitration per the explicit command of federal statutes,⁹² but my empirical study found that none of these gives rise to many class actions.⁹³

The one very significant exception is claims brought by shareholders under federal securities laws. No court has ever held these claims to be arbitrable (though, no court has ever held them unarbitrable), and no company of which I am aware has taken them to arbitration. This is significant because, as I noted above, securities-fraud claims brought by shareholders comprise the largest share of class action suits against businesses today.⁹⁴ This is true not only in terms of the number of suits, but, perhaps more importantly, in terms of the amount of money at stake: according to my empirical study, the money that changes hands in securities-fraud suits makes up roughly 75% of all of money that changes hands in federal class action settlements—including even settlements against nonbusiness defendants.⁹⁵

Why have courts never opined on whether securities-fraud claims can be arbitrated? One reason appears to be that the Securities & Exchange Commission (“SEC”) does not like shareholder arbitration, and it has done its best to prevent companies from inserting arbitration terms into their corporate documents.⁹⁶ The

91. See, e.g., *14 Penn Plaza L.L.C. v. Pyett*, 556 U.S. 247, 274 (2009) (“We hold that a collective-bargaining agreement that clearly and unmistakably requires union members to arbitrate [Age Discrimination in Employment Act] claims is enforceable as a matter of federal law.”); *Perry v. Thomas*, 482 U.S. 483, 492 (1987) (holding that the FAA preempts state laws permitting wage recovery actions to be litigated in court in the face of arbitration agreements); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 219 (1985) (noting that “[c]laims involving vacation or overtime pay, work assignment, unfair discharge” are, “in short, the whole range of disputes traditionally resolved through arbitration”); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000) (“To date, four circuits have held that Congress did not intend to prohibit arbitration of statutory [Employment Retirement Income Security Act] claims Having carefully examined the opinions, we agree with those circuits”).

92. Many of these are collected in Gilles & Friedman, *supra* note 3, at 639 n.77 (referencing 15 U.S.C. § 1639c(e)(1)) (residential mortgage loans); 18 U.S.C. § 1514A(e) (whistleblower claims under the Sarbanes-Oxley Act); 10 U.S.C. § 987(e)(3), (f)(4) (payday loans and consumer credit contracts, other than residential mortgages and car loans, entered into by members of the military or their families); 15 U.S.C. § 1226(a)(2) (automobile dealer franchise agreements)). See also National Consumer Law Center, *20 Litigation Areas Where Consumer Class Actions Remain Viable Despite Concepcion*, 29 NCLC REPORTS, March/April 2011, at 22 n.14, 23 n.27, 24 n.36 (citing 25 U.S.C. § 1012(b) (state insurance claims under the McCarran–Ferguson Act); 15 U.S.C. § 1691e(a) (claims to utilize federal substantive rights under the Equal Credit Opportunity Act); 7 U.S.C. § 26(h) & 12 U.S.C. § 5567 (whistleblower claims)).

93. See Fitzpatrick, *supra* note 15, at 818, tbl. 1.

94. See *id.*

95. See *id.* at 826, tbl. 4.

96. See Ralph C. Ferrara & Stacy A. Puente, *Holding IPOs Hostage to Class Actions: Mandatory Arbitration Clauses in IPOs*, 9 SEC. LITIG. REP., no. 4, Apr. 2012, at 1, 4 (“The mandatory arbitration clause is by no means a novel invention. The [SEC]’s

SEC has done this in two ways. First, it has refused to exercise its discretion to grant waivers of unrelated requirements for companies trying to issue initial public offerings if they have arbitration clauses in their corporate documents.⁹⁷ Second, it has permitted publicly traded companies, when sending proxy matters to shareholders, to leave out any amendments to corporate documents that call for arbitration.⁹⁸ For this reason, there are virtually no publicly traded companies that require their shareholders to arbitrate claims against them.⁹⁹

The trouble with the SEC's steadfastness, however, is that it is difficult to find something in federal securities law that says shareholder claims cannot be arbitrated. Indeed, the Supreme Court has held that claims brought under *the very same provisions of the securities laws* can be arbitrated when brought against brokers.¹⁰⁰ This is why a number of commentators believe that it is only a matter

established position has been that such clauses were void—particularly where the clause would limit a shareholder's ability to enforce his or her rights under Section 10(b) of the Exchange Act, which would violate the prohibition against waiver of rights under Section 29(a) of the Exchange Act." (internal citations omitted)); Christos Ravanides, *Arbitration Clauses in Public Company Charters: An Expansion of the ADR Elysian Fields or A Descent into Hades?*, 18 AM. REV. INT'L ARB. 371, 407 (2007) ("The SEC . . . has been shortsightedly insisting on a near ban on experimentation with ADR methods for domestic companies . . .").

97. See Drahozal & Ware, *supra* note 10, at 462 ("[T]he SEC has opposed the use of arbitration to resolve disputes between public corporations and shareholders, using its acceleration power to force the abandonment of a proposed arbitration clause between the issuer and buyer of securities."); Barbara Black, *Arbitration of Investors' Claims Against Issuers: An Idea Whose Time Has Come?*, 75 LAW & CONTEMP. PROBS. 107, 116 (2012) ("In 1990, when a corporation that was planning its initial public offering (IPO) sought to include an arbitration provision in its governance documents, the SEC staff objected to its inclusion. In its view, it would be contrary to the public interest to require investors who want to participate in the nation's equity markets to waive access to a judicial forum for vindication of federal or state law rights, where such a waiver is made through a corporate charter rather than through an individual investor's decision.").

98. See Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LITIG. 1, 8–9 (2012) (noting that the SEC allowed Pfizer and Gannett to refuse to transmit to their shareholders proposals to amend their bylaws "to require arbitration of all shareholders' claims, including federal securities claims").

99. Despite the SEC's resistance, a few companies have managed to list on the exchanges with shareholder arbitration requirements in their charters. See Ravanides, *supra* note 96, at 389 ("A meticulous survey of reports and statements filed with the SEC by U.S.-listed companies over the last twelve years documents timid signs of a novel trend: corporations with equity listings on American stock exchanges no longer hesitate to incorporate in their bylaws or articles of incorporation provisions that mandate resolution by arbitration of intra-corporate controversies. Despite having opted for arbitration, these, mostly foreign, companies have been enjoying full access to U.S. equity markets, whereas the SEC, with few exceptions, has been anything but fiercely defensive of its putative anti-arbitration policy.").

100. See Barbara Black, *Eliminating Securities Fraud Class Actions Under the Radar*, 2009 COLUM. BUS. L. REV. 802, 825 (citing *Shearson/Am. Express, Inc. v.*

of time before the Supreme Court holds that shareholder claims can be arbitrated as well.¹⁰¹

I suspect these commentators are correct, based not only on the modern pro-arbitration bent of the Court¹⁰² and my reading of federal securities laws, but also based on the hostility the Court has exhibited over the past couple of decades to securities-fraud class actions.¹⁰³ There has been a concerted effort by conservative scholars to cast doubt on the efficacy of securities-fraud class actions in recent years,¹⁰⁴ and I suspect it is beginning to pay off.¹⁰⁵ Although securities-

McMahon, 482 U.S. 220 (1987); *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989)).

101. See, e.g., John C. Coffee, Jr., *The Death of Shareholder Litigation?*, 34 NAT'L L.J., no. 24, Feb. 13, 2012, at 14 ("Opponents of such provisions must face the sad fact that the battle has already been lost . . ."); Hal Scott & Leslie N. Silverman, *The Alternative to Shareholder Class Actions*, WALL ST. J., Apr. 2, 2012, at A13; see also Scott & Silverman, *supra* note 78, at 1221 ("The Supreme Court's decisions in *McMahon* and *CompuCredit*, which held that arbitration agreements do not violate general statutory anti-waiver provisions, make the legality of arbitration under the federal securities laws abundantly clear . . ."). *But see* Black, *supra* note 100 at 828–32 (attempting to distinguish the shareholder-broker cases from the shareholder-corporation cases).

102. See Frank Blechschmidt, *All Alone in Arbitration: AT&T Mobility v. Concepcion and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541, 561 (citing the "Court's liberal policy favoring arbitration"); Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C. L. REV. 123, 128–29 (2005) (citing the "pro-arbitration philosophy now embraced by the Court"); Barbara Black, *The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?*, 72 U. CIN. L. REV. 415, 417 (2003) (citing "the Court's pro-arbitration . . . slant").

103. Jennifer O'Hare, *Retail Investor Remedies Under Rule 10B-5*, 76 U. CIN. L. REV. 521, 549 n.144 (2008) ("The Supreme Court's decision in *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975) is commonly thought to mark the beginning of a period of judicial hostility towards securities fraud class actions."); Daniel J. Morrissey, *After the Ball Is Over: Investor Remedies in the Wake of the Dot-Com Crash and Recent Corporate Scandals*, 83 NEB. L. REV. 732, 739–41 (2005) (detailing the Supreme Court's growing hostility toward securities-fraud class actions between the mid-1970s and the mid-1990s).

104. See Pritchard, *supra* note 81, at 225–26 (discussing the perverse incentives for plaintiff-shareholders to sue whenever stock prices drop, even absent any evidence of fraud, and the enormous costs—including risk of bankruptcy—these suits impose on defendant-companies); John C. Coffee, Jr., *Reforming the Securities Class-Action: An Essay on Deterrence and its Implementation*, 106 COLUM. L. REV. 1534, 1534 (2006) ("Securities class actions impose enormous penalties, but they achieve little compensation and only limited deterrence. This is because of a basic circularity underlying the securities class action: When damages are imposed on the corporation, they essentially fall on diversified shareholders, thereby producing mainly pocket-shifting wealth transfers among shareholders."); Bradley J. Bondi, *Facilitating Economic Recovery and Sustainable Growth Through Reform of the Securities Class Action System: Exploring Arbitration as an Alternative to Litigation*, 33 HARV. J. L. & PUB. POL'Y 607, 610 (2010) ("The current system of securities class-action litigation is an inefficient means to redress the harm to investors . . . Securities class-action lawsuits are essentially wealth transfers among shareholders and often are circular in nature. Existing shareholders bear the burden of

fraud plaintiffs have not lost all of their cases at the Court in recent years, they certainly have lost the lion's share of them,¹⁰⁶ and they may very well lose this one as well when it comes to pass. Indeed, only last year, in *Halliburton Co. v. Erica P. John Fund*,¹⁰⁷ the Court entertained an entirely separate threat to securities-fraud class actions: whether to jettison the fraud-on-the-market theory set forth in *Basic Inc. v. Levinson*.¹⁰⁸ Without the fraud-on-the-market theory, it is difficult to see how the common issues in a securities-fraud class action can predominate over the individual issues, a requirement for class certification.¹⁰⁹ Although the Court did not go so far as to overrule *Basic*, it nonetheless made it more difficult for plaintiffs to invoke the theory.¹¹⁰ I suspect the Court will not have as much difficulty merely extending its arbitration precedents to encompass securities-fraud claims.

compensating aggrieved shareholders, some of whom also may be existing shareholders.”); Howell E. Jackson, *Summary of Research Findings on Extra-Territorial Application of Federal Securities Law*, 1743 PLI/CORP. 1243, 1253–54 (2009) (“Many interviewees cite U.S. anti-fraud laws . . . as a ‘top concern’ because they are the ‘most intrusive’ and have the ‘biggest’ impact on extraterritorial transactions. What drives foreign firms away from the U.S. capital markets is not U.S. regulatory compliance but rather the ‘fear that listing on a U.S. exchange exposes the foreign issuer to potentially bankrupting securities liabilities if its stock price were to decline sharply.’ The ‘real burden’ for foreign private issuers is ‘cost of litigation that we have built into our system with class action suits, shareholder suits’ as well as the ‘risk of huge enforcement actions,’ both of which are ‘deeply frightening’ for foreign management As a result, ‘the only way foreign companies can protect themselves from being exposed to costly class action litigation, is to move out of the United States altogether—and that is what a lot of companies are doing.’” (quoting interviews with various U.S. and U.K. firms)).

105. See generally Donald C. Langevoort, *Lies Without Liars? Janus Capital and Conservative Securities Jurisprudence*, 90 WASH. U. L. REV. 933 (2013).

106. Of the 30 securities-fraud actions, both individual and class, that were decided by the Supreme Court between 1986 and 2011, the defendant won 18 while the plaintiff or class won only 12.

107. 134 S. Ct. 2398 (2014).

108. See *id.* at 2405 (“The questions presented are whether we should overrule or modify *Basic*’s presumption of reliance and, if not, whether defendants should nonetheless be afforded an opportunity in securities class action cases to rebut the presumption at the class certification stage, by showing a lack of price impact.”).

109. See *id.* at 2416 (“[W]ithout the presumption of reliance, a Rule 10b–5 suit cannot proceed as a class action: Each plaintiff would have to prove reliance individually, so common issues would not ‘predominate’ over individual ones, as required by Rule 23(b)(3).” (internal citations omitted)).

110. See *id.* at 2417 (“[D]efendants must be afforded an opportunity before class certification to defeat the presumption through evidence that an alleged misrepresentation did not actually affect the market price of the stock.”); Sam Hananel, *Supreme Court Raises Bar For Securities Class Action Cases*, HUFFINGTON POST (June 23, 2014, 4:59 PM), http://www.huffingtonpost.com/2014/06/23/supreme-court-halliburton_n_5521929.html (“The Supreme Court . . . made it tougher for investors to join together to sue corporations for securities fraud, a decision that could curb the number of multimillion-dollar legal settlements companies pay out each year.”).

2. *Embedded Class Action Waivers*

If there is nothing in the law to stop pre-dispute arbitration clauses for all of the causes of action that plaintiffs raise against businesses in class actions, is there anything in the law to stop class action waivers embedded in those clauses? After *Concepcion* and *American Express*, it is difficult to find anything in either state or federal law that can do so.¹¹¹

a. State Law

Concepcion seemed to terminate any chance that something in state law can slow class action waivers. If California's unconscionability doctrine was preempted by the FAA, why wouldn't any state law that invalidated class waivers be preempted?¹¹² Some commentators have argued that perhaps a state law that is more selective of which class waivers it invalidates could circumvent the FAA,¹¹³

111. It should be noted that Justice Thomas does not believe that the FAA applies in state courts, and, unlike Justice Scalia (who also believes this but will follow Supreme Court precedent otherwise until it is overturned, see *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting)), Justice Thomas is willing to vote against an arbitration agreement in any FAA case that comes from a state court. See *Allied-Bruce*, 513 U.S. at 285–97 (Thomas, J., dissenting); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006) (same); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 460 (2003) (same); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 689 (1996) (same). Because Justice Thomas cast the deciding vote in *Concepcion* and *American Express*, this means that any class action waiver case that reaches the Supreme Court from a state court could presumably come out the other way. The problem is that this is only possible in the Supreme Court. Lower courts have understandably felt compelled to follow the Supreme Court's precedent that says the FAA applies in state court as well as in federal court, Justice Thomas's views notwithstanding. See, e.g., *Cottonwood Fin., LTD., v. Estes*, 810 N.W.2d 852, 856 (Wis. 2012) ("In light of *Concepcion*, the classwide arbitration waiver in [defendant's] arbitration agreement is enforceable and is not substantively unconscionable."); *Robinson v. Title Lenders, Inc.*, 364 S.W.3d 505, 517 (Mo. 2012) (en banc) ("Pursuant to *Concepcion*, the trial court clearly erred in finding that [defendant's] arbitration agreement was unenforceable based on its class waiver."); *Wallace v. Ganley Auto Group*, No. 95081, 2011 WL 2434093, at *3 (Ohio Ct. App. 2011) ("In light of the Supreme Court's holding in *Concepcion*, appellants' argument that [appellee's] arbitration clause is unenforceable because it bans class actions is without merit.").

112. The California Supreme Court has held unenforceable arbitration agreements that waive the rights of plaintiffs to bring an action under the Private Attorney Generals Act (something of a quasi-public class action) to redress consumer and employment violations, see *Iskarian v. CLS Trans. L.A., L.L.C.*, 327 P.3d 129 (Cal. 2014), but federal courts have disagreed, see, e.g., *Lucero v. Sears Holdings Mgmt. Corp.*, No. 3:14-cv-01620, 2014 WL 6984220 (S.D. Cal. Dec. 2, 2014).

113. See, e.g., Jerett Yan, *A Lunatic's Guide to Suing for \$30: Class Action Arbitration, the Federal Arbitration Act and Unconscionability After AT&T v. Concepcion*, 32 BERKELEY J. EMP. & LAB. L. 551, 558 (2011) ("The *Discover Bank* rule was a unique formulation of unconscionability doctrine that is readily distinguishable from the rules used in most other states. The very feature of the *Discover Bank* rule that drew the ire of the *Concepcion* majority, its breadth, was the rule's most distinguishing feature.").

but lower courts have not hesitated in extending *Concepcion* to override the unconscionability laws of other states.¹¹⁴ It is hard to argue with these courts. Under Justice Scalia's reasoning in *Concepcion*, any state law that invalidated class waivers would discourage businesses from using arbitration, and, thereby, frustrate the purposes of the FAA.

The arbitration clause at issue in *Concepcion* was very generous to small-stakes claimants.¹¹⁵ Other commentators have argued that perhaps state laws might still invalidate arbitration agreements that are less generous.¹¹⁶ But, again, lower courts have not hesitated in extending *Concepcion* to uphold less-generous arbitration agreements.¹¹⁷ Again, it is hard to argue with these courts. None of the Court's analysis in *Concepcion* rested on the generous terms of AT&T's agreement. Indeed, other than in the fact section of his opinion, Justice Scalia did not cite these terms until the very end of his decision. Only after explaining that *it was irrelevant* under the FAA whether small-stakes claimants have recourse against businesses outside class actions, the Court noted that things were not quite

114. See, e.g., *Wallace*, 2011 WL 2434093 (overriding Ohio law); *Cottonwood*, 810 N.W.2d at 855 (overriding Wisconsin law).

115. See *AT&T Mobility L.L.C. v. Concepcion*, 131 S. Ct. 1740, 1744 (2011) ("In the event the parties proceed[ed] to arbitration, the agreement specif[ed] that AT&T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of \$10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, deni[ed] AT&T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receive[d] an arbitration award greater than AT&T's last written settlement offer, require[d] AT&T to pay a \$7,500 minimum recovery and twice the amount of the claimant's attorney's fees.")

116. See, e.g., *Cole*, *supra* note 59, at 490 n.150 ("[T]he arbitration agreement in the AT&T contract with the *Concepcions* is unusually generous If the Court limits its holding to the facts of the case, holding that California's application of the unconscionability doctrine in this kind of arbitration setting is preempted, the question will remain open whether other, less generous agreements, would also be preempted.")

117. See *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1159 (9th Cir. 2012) ("[T]he concern is not so much that customers have no effective *means* to vindicate their rights, but rather that customers have insufficient *incentive* to do so But as the Supreme Court stated in *Concepcion*, such unrelated policy concerns, however worthwhile, cannot undermine the FAA." (internal citations omitted)); *Brokers' Servs. Mktg. Grp. v. Cellco P'ship*, CIV.A. 10-3973 JAP, 2012 WL 1048423, at *5 (D.N.J. Mar. 28, 2012) ("[T]he Plaintiffs here do not claim that it is impossible to seek their recovery in the manner prescribed by the arbitration agreement, but only that it would be an economically irrational decision to do so. The Supreme Court has held that this rationale for class actions cannot override the FAA."); *Knutson v. Sirius XM Radio Inc.*, Civil No. 12CV418 AJB (NLS), 2012 WL 1965337, at *5 (S.D. Cal. May 31, 2012) (rejecting the argument that insufficient incentive to arbitrate undermines substantive rights).

so bad in this particular case because AT&T's agreement was so generous to individual claimants.¹¹⁸

It is possible that the inability to strike class action waivers in arbitration agreements will encourage courts to scrutinize *other* provisions in arbitration agreements more closely for unconscionability under state law. Indeed, some courts have recently struck down arbitration agreements because they were too favorable to businesses in light of provisions that called for paying defendant's attorneys' fees regardless of whether the defendant prevailed in the arbitration.¹¹⁹ But it will be easy enough for businesses to scrub these sorts of provisions from their arbitration agreements over time in order to ensure that their access to class action waivers remains unfettered.

I suppose it is also possible that state courts could dial back their "shrink-wrap" contract law and make it more difficult for businesses to bind consumers to contractual terms like arbitration clauses. But state courts would have to do this for all contractual terms; they could not do this only for arbitration clauses because that sort of discrimination against arbitration would be clearly forbidden by the FAA.¹²⁰ I think that it is unlikely that state courts will engage in a wholesale rewrite of their contract law to save class actions.

Finally, it is possible that Delaware could erect special state law barriers to class action waivers in shareholder suits. For example, if Delaware decided that corporations could not place arbitration clauses or class action waivers in corporate bylaws or charters, there is an argument that the FAA could not preempt that decision. This is because corporate law is traditionally the domain of the states and there are doctrines that force courts to presume that Congress did not intend to preempt state laws in traditional state domains.¹²¹ On the other hand, contract law, too, is traditionally the domain of the states, but that did not give the Supreme Court pause in *Concepcion*. Thus, in the end, I remain pessimistic that state law can slow class action waivers.

118. See *Concepcion*, 131 S. Ct. at 1753.

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

120. See *Concepcion*, 131 S. Ct. at 1747 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA.").

121. See, e.g., *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) ("In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U. S. 218, 230 (1947))).

b. Federal Law

As I noted above, there is no federal statute that says plaintiffs have a right to join class actions. As a result, it is going to be hard to find something in federal law that rises to the sort of “contrary congressional command” that *American Express* said would be necessary to override the FAA.¹²² Nonetheless, I explore the best possibilities below.

First, some of the statutes that give rise to class actions against businesses explicitly permit plaintiffs to sue as a group: the ADEA, the EPA, and the Fair Labor Standards Act.¹²³ But the group actions provided by these statutes are so-called opt-in “collective actions,”¹²⁴ rather than Rule 23-style opt-out class actions—which are the group actions that businesses worry most about.¹²⁵ Thus, although I could see one arguing that these provisions create statutory rights to join opt-in collective actions, it is harder to see them as creating statutory rights to join Rule 23-style opt-out class actions. (Of course, Rule 23 grants access to Rule 23-style opt-out class actions, but federal rules like Rule 23 cannot trump federal statutes like the FAA.)¹²⁶

Second, the NLRB believes that one provision of the National Labor Relations Act (“NLRA”) actually does grant employees the right to join Rule 23-

122. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

123. The Fair Labor Standards Act explicitly provides for group actions. *See* 29 U.S.C. § 216(b) (2012) (“An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer . . . by any one or more employees for and in behalf of himself or themselves and other employees similarly situated.”). The Age Discrimination in Employment Act incorporates the Fair Labor Standards Act of 1938 (“FSLA”) collective action provision into its own statute. *See* 29 U.S.C. § 626(b) (“The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section[] . . . 216 (except for subsection (a) thereof) . . .”). Similarly, the EPA as a whole has been incorporated into the FLSA. *See* 29 U.S.C. § 206(d).

124. *See* 29 U.S.C. § 216(b) (“No employee shall be a party plaintiff to any such action 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.”).

125. *See* Deborah R. Hensler, *The Globalization of Class Actions: An Overview*, 622 ANNALS AM. ACAD. POL. & SOC. SCI. 7, 25 (2009) (“[B]usiness interests fear class actions, especially trans-substantive opt-out class actions for money damages . . .”); Edward F. Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 DEPAUL L. REV. 401, 410–11 (2002) (“Insurance and business interests have signaled a major campaign to change the ‘opt-out’ provisions in the class action rules to require an affirmative act to ‘opt in.’”).

126. *See Am. Express Co.*, 133 S. Ct. at 2306–07 (“Nor does congressional approval of Federal Rule of Civil Procedure 23 establish an entitlement to class proceedings for the vindication of statutory rights. The Rule imposes stringent requirements for certification that exclude most claims, and this Court has rejected the assertion that the class-notice requirement must be dispensed with because the ‘prohibitively high cost’ of compliance would ‘frustrate [plaintiff’s] attempt to vindicate the policies underlying the antitrust laws.’ (internal citations omitted)).

style class actions.¹²⁷ This provision prohibits employers from interfering with the ability of employees “to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection”¹²⁸ When the NLRB’s interpretation was appealed to the Fifth Circuit, however, the court did not think Congress intended the vague phrase “concerted activities” to encompass class actions.¹²⁹ It is hard to disagree with the Fifth Circuit, if for no other reason than the enactment of the NLRA in 1935 predated the advent of the Federal Rules of Civil Procedure (including Rule 23) by three years. It is true that there was a precursor to Rule 23 in existence in 1935—Rule 38 of the Federal Rule of Equity¹³⁰—but neither Rule 38 nor even the 1938-version of Rule 23 operated anything like today’s class actions; the modern opt-out class action did not arise until the Federal Rules of Civil Procedure were revised in 1966.¹³¹

Finally, the federal statute that is most likely to give rise to a “contrary congressional command” is the Dodd–Frank Wall Street Reform and Consumer Protection Act of 2010.¹³² Although the legislation does not specifically invoke class actions, it does specifically invoke limitations on arbitration agreements: one section empowers the Consumer Financial Protection Bureau (“CFPB”) to impose conditions on the use of pre-dispute arbitration in consumer financial products.¹³³ Under the canons whereby a more specific or more recent statute trumps a more general or more aged one, this invocation of limitations on arbitration is surely explicit enough to trump the FAA. Many people expect the CFPB to soon consider regulations prohibiting class action waivers in arbitration agreements.¹³⁴ If it does

127. See *In re D.R. Horton, Inc.*, 357 N.L.R.B., no. 184, Jan. 3, 2012, at 12 (“Rule 23 may be a procedural rule, but the Section 7 right to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures is not.”), *rev’d*, No. 12-60031, 2013 WL 6231617 (5th Cir. Dec. 3, 2013).

128. 29 U.S.C. § 158(a)(1).

129. See *In re D.R. Horton, Inc.*, No. 12-60031, 2013 WL 6231617, at *15 (5th Cir. Dec. 3, 2013).

130. See Fed. R. Eq. 38 (1912).

131. See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664, 670 (1979) (“The only textual change that can be said to have had any ‘substantive’ effect on class action practice is the shift from the pre-1966 requirement that nonparty class members opt in to what was then called a ‘spurious’ class action to the current principle that members of a Rule 23(b)(3) class are presumed participants and will be bound unless they exercise their privilege to opt out of the suit.”).

132. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203 (2010).

133. See 12 U.S.C. § 5518(b) (2012) (“The CFPB, by regulation, may prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties, if the CFPB finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.”).

134. See, e.g., *Back to the Future: The CFPB’s Arbitration Report Could Signal a Return to the Days Before Concepcion*, LOEB & LOEB LLP CLIENT ALERTS/REPORTS (Jan. 2014), <http://www.loeb.com/articles-clientalertsreports-20140108-cfpbsarbitrationreport>

so and adopts them, then it might preserve some—but only some (those brought by credit card and mortgage consumers, for example)—of the class actions against businesses.¹³⁵

As I see it, then, there is little in either state or federal law that will stop businesses from taking advantage of the opportunity to bind consumers, employees, and even shareholders to class action waivers in arbitration clauses. But the law is still not settled for shareholders, and it will take several years before it is. In addition, there is some chance that the CFPB will protect at least credit card and mortgage consumers from class action waivers, and a remote chance that the NLRB's interpretation of the NLRA will protect employees.

C. Will Businesses Take Advantage of the Opportunity?

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

It is true that businesses might not adopt these waivers if consumers, employees, and shareholders demanded otherwise (and were willing to vote with their feet if businesses did not comply with their demands). But I am skeptical that this will be the case. For a host of reasons now chronicled by behavioral economists, people do not rationally account for unlikely future events—such as a dispute with a merchant or their employer—when making purchases or employment decisions.¹³⁶

(“The logical conclusion to be drawn from these findings is that the CFPB is laying the foundations for rulemaking that will prohibit or severely limit the availability of pre-dispute arbitration clauses in consumer agreements.”).

135. See Gilles & Friedman, *supra* note 3, at 656 (“If, after careful study, the agency were to issue regulations prohibiting the use of class action waivers in consumer financial products, the Supreme Court’s ruling in *Concepcion* would be upended, at least for those contracts over which the CFPB has direct authority.”).

136. See Christine Jolls, *Behavioral Law and Economics* 14 (Yale Law Sch., Pub. Law & Legal Theory, Working Paper No. 130, 2006), available at <http://ssrn.com/abstract=959177> (“One such judgment error is optimism bias, in which individuals believe that their own probability of facing a bad outcome is lower than it actually is.”); Daniel B. Klaff, *Debiasing and Bidirectional Bias: Cognitive Failure in Mandatory Employment Arbitration*, 15 HARV. NEGOT. L. REV. 1, 12 (2010) (“The application of optimism bias to the mandatory arbitration setting is relatively straightforward: employees may underestimate the likelihood that they will experience the kind of negative workplace event that would give rise to a dispute requiring arbitration or litigation.”). I suppose there is the possibility that a union could force an employer to stop using class waivers, but I have never heard of a union worrying about such a term of employment.

It is more realistic to think that shareholders will insist that companies forgo class waivers for securities claims. In particular, the large institutional investors that own thousands or millions of shares may have more power and perhaps less cognitive bias than individual investors, and recourse to class actions may be more important to them. On the other hand, the largest institutional investors do not need class actions to pursue securities-fraud claims against companies—today, they often opt-out of class actions because they have enough at stake to go it alone.¹³⁷ This actually may make institutional investors not only indifferent to class actions but better off without them: if they sue, but smaller shareholders do not, then smaller shareholders end up subsidizing larger ones.¹³⁸

I must admit, however, that the empirical evidence does not yet bear my prediction out. As I said, corporations have yet to use arbitration clauses—let alone those with class action waivers—against their shareholders; in the few instances arbitration has been put before shareholders in proxy votes, it failed.¹³⁹ But surely this is most attributable to the legal uncertainty that still exists over arbitration in the shareholder context. When this uncertainty is resolved, I expect corporations to seek arbitration more aggressively. Indeed, there is still uncertainty about whether corporations even need to put these clauses to a vote by shareholders. Rather, many believe that, under Delaware law, corporations can adopt arbitration clauses unilaterally by changing their bylaws.¹⁴⁰ If that question is resolved in favor of unilateral action, then I believe corporations will seek these clauses more aggressively still.

It is more surprising that the empirical evidence does not yet bear out a flight to class action waivers in the consumer and employment context. I am not aware of any empirical studies in the employment context, but, in the consumer

137. Elizabeth Chamblee Burch, *Optimal Lead Plaintiffs*, 64 VAND. L. REV. 1109, 1132 (2011) (“Given the potential intraclass conflicts, it’s no surprise that plaintiffs opt out of securities class actions. But the opt outs generally do not include those most prejudiced by an inadequate representative—the individual investors. Instead, institutions opt out. One 2008 survey of pension funds reported that sixty percent of its respondents pursued individual lawsuits instead of remaining in the class. Those who opted out cited various reasons for doing so, such as maximizing their recovery, pursuing additional claims, controlling litigation strategy and settlement, suing in a preferred (often state-court) forum, leveraging their position to demand corporate-governance changes, and receiving settlement funds quickly.” (internal citations omitted)).

138. See David Webber, *Shareholder Litigation Without Class Actions*, 57 ARIZ. L. REV. 201, 217 (2015) (“Loss of the class action device enshrines this semi-circularity problem into our law, creating a two-tier legal system for investors—one in which, from the same fraud (or mispriced deal), large institutions recover damages while individuals and small institutions do not, and one in which small investors must reach farther into their pockets to compensate large institutional losses for that fraud (or mispriced deal).”).

139. See Black & Gross, *supra* note 98, at 9 (discussing failure of votes at Google and Frontier Communications).

140. See Weitzel, *supra* note 77, at 99–100 (“An arbitration provision could also be included in the corporation’s bylaws . . .”).

context, the studies to date—despite the anecdotes to the contrary¹⁴¹—do not show these clauses have become anything near ubiquitous. For example, in 2012 the CFPB studied the incidence of arbitration clauses and class action waivers in consumer credit card and checking account contracts, and found that roughly only 50% of credit card users and 40% of checking account users were bound by arbitration clauses with class action waivers.¹⁴² The lack of ubiquity in credit card contracts can be explained in large part by an antitrust settlement that barred many of the largest banks from using arbitration clauses for several years.¹⁴³ The checking account number is more puzzling.

What explains the puzzle? Scholars have theories. Professors Bo Rutledge and Chris Drahozal, in their study of arbitration clauses in franchisor–franchisee contracts after *Concepcion* (where penetration is also far less than 100%, and with little change before and after that decision),¹⁴⁴ suggest two explanations in particular: (1) there is a great deal of inertia (or “stickiness”) that must be overcome before even sophisticated businesses change their standard-form contractual language; and (2) although businesses can benefit from class action waivers if they use arbitration, there are corresponding costs to arbitration that may

141. See, e.g., Greg Blankinship, *Ebay Wants You to Give Up Your Class Action Rights*, FINKELSTEIN, BLANKINSHIP, FREI-PEARSON & GARBER, LLP BLOG (August 31, 2012), <http://www.4classaction.com/blog/2012/08/31/ebay-wants-you-give-your-class-action-rights> (“In August, Ebay altered the terms and conditions every user ‘agrees’ to when they use the site; those terms now include an arbitration clause with a class action waiver. As written, and assuming any court upholds it, this arbitration clause appears to preclude any future class action suits.”); Mark Hachman, *Microsoft’s New Terms of Service to Block Class Action Suits*, PC MAGAZINE (May 25, 2012), <http://www.pcmag.com/article2/0,2817,2404937,00.asp> (“[Microsoft] has begun changing its user agreements to prevent consumers from filing class-action lawsuits . . . tak[ing] advantage of a 2011 Supreme Court case, *AT&T Mobility vs. Concepcion*, that allows companies to settle a complaint either privately or via small claims court, but can prevent the plaintiff from forming a class for a class action lawsuit.”); Erin Fuchs, *Here’s How You Can Preserve Your Right To Sue The Pants Off PayPal*, BUS. INSIDER (October 18, 2012), <http://www.businessinsider.com/paypal-arbitration-agreement-2012-10> (“But thanks to an April 2011 Supreme Court decision, companies like PayPal can require users to resolve their claims outside of court in ‘arbitrations,’ effectively banning class action lawsuits. As of Nov. 1, PayPal is jumping on the bandwagon to require consumers to agree to arbitration.”).

142. See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY PRELIMINARY RESULTS, at 24 fig. 2, 28 fig. 3, 37 (Dec. 12, 2013), available at http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.

143. See *id.* at 22–23 n.51. These banks were Bank of America, Capital One, Chase, and HSBC; the settlement prohibited them from using arbitration clauses in credit card contracts between 2010 and 2014. See *id.*

144. See Peter B. Rutledge & Christopher R. Drahozal, “Sticky” Arbitration Clauses? *The Use of Arbitration Clauses after Concepcion and Amex*, 67 VAND. L. REV. 955, 961 (2014) (“The use of arbitration clauses in franchise agreements has increased since *Concepcion*, but not dramatically, and most franchisors have not switched to arbitration . . .”).

outweigh this benefit.¹⁴⁵ The first theory is perfectly plausible but it also does not undermine my prediction that businesses will eventually flock to arbitration clauses with class action waivers. Rather, it suggests only that it may take more time for businesses to do so. The second theory would undermine my prediction, but I find it much less plausible. Professors Rutledge and Drahozal speculate that businesses might not want to use arbitration because they have only limited appellate rights in arbitration. For some businesses, the inability to appeal adverse decisions in litigation against individuals might outweigh the benefit of insulating themselves from class actions.¹⁴⁶ I can understand businesses that do not often face class actions coming to this conclusion (which may include the franchisors Professors Rutledge and Drahozal examined), but I cannot understand businesses that do often face class actions coming to this conclusion. Surely, businesses are much more afraid of class actions lawsuits than they are individual awards rendered by arbitrators.

Clearly, further empirical study is needed in this area. For now, it is still difficult to say how far businesses have gone in adopting arbitration clauses with class action waivers outside the shareholder context (where they have not yet gone anywhere at all). I still believe, however, that the incentives associated with class waivers in arbitration clauses overwhelmingly point in favor of adopting them, and I still think it is only a matter of time until businesses do so.

III. WHERE DO WE GO FROM HERE?

The preceding analysis raises an obvious question: what, if anything, should be done about all of this? I will canvass the possible answers.

One answer is to do nothing at all and let class actions meet their demise. There are, after all, those who think class actions are socially detrimental, and these commentators presumably would be opposed to resuscitating them. For example, conservative commentators have for some time thought that securities-fraud class actions serve no salutary purpose,¹⁴⁷ and more recently, they came to

145. See *id.* at 959 (“Contracts . . . may be ‘sticky’ and resistant to change.”); *id.* at 975 (“[T]here are costs to using an arbitral class waiver, and these costs provide a reason for some businesses not to use an arbitral class waiver even after *Concepcion* and *Amex*.”).

146. See *id.* at 973–74 (“The principal disadvantage of arbitration is the absence of the availability of multi-layered appeal which can normally be filed to rectify erroneous court decision, but not arbitration award’ . . . this cost gives franchisors a very good reason not to use an arbitration clause, which at least reduces, if not offsets entirely, any benefit from avoiding class actions.” (quoting Martin Fern, *Franchise Law Update: Protecting a Franchisor Against the Risk of System-Wide Class Actions*, <http://perma.cc/4QRF-WW3R> (foxrothschild.com, archived Mar. 10, 2014))).

147. See, e.g., Statement of Joseph A. Grundfest, Professor of Law and Bus., Stanford Law Sch., *Meeting of the Advisory Committee on the Auditing Profession* 4 (Feb. 4, 2008), available at <http://www.treasury.gov/about/organizational-structure/offices/Documents/Grundfest%2002-04-08%20Testimony.pdf> (“The conclusion is clear. The class action securities fraud litigation system is broken. It fails efficiently to deter fraud and fails rationally to compensate those harmed by fraud. Its greatest proponents seem

the same conclusion about consumer class actions.¹⁴⁸ The debate over securities-fraud class actions has gone on for some time, and I will not recount it here—at least the participants in that debate are engaging the relevant questions.¹⁴⁹ I cannot say the same for the recent criticism leveled against consumer class actions. The criticism comes from the U.S. Chamber of Commerce.¹⁵⁰ The Chamber hired the Washington D.C. law firm Mayer Brown to conduct an empirical study of consumer class actions.¹⁵¹ Law firms, of course, are accustomed to zealously representing their clients, and Mayer Brown’s study is no exception. The study concludes that consumers do not benefit at all from consumer class actions, and the reasoning is two-fold: (1) only a minority of class actions result in a recovery in favor of the class because the rest are dismissed or settled before certification; and (2) even when class actions result in a recovery, almost none of it goes to class members because class members file claims at very low rates.¹⁵² I do not understand what the first point has to do with anything—class actions are risky endeavors and not every case will succeed. In addition, businesses can hardly cry foul for picking off representative plaintiffs by settling with them before certification. The second point, however, is more serious. Although the evidence is scant, it may be true that claims rates in consumer cases are very low. If it is true, I think things will change in the future as it becomes easier to distribute money to people automatically,¹⁵³ but let us assume this point is valid at least for the time

to be the class action counsel and others who profit as a consequence of the irrationally large damage exposures generated by the current regime.”).

148. See Letter from U.S. Chamber of Commerce to Consumer Fin. Prot. Bureau, *supra* note 15.

149. Compare, e.g., A.C. Pritchard, *Markets As Monitors: A Proposal to Replace Class Actions with Exchanges As Securities Fraud Enforcers*, 85 VA. L. REV. 925, 928–47 (1999) (“Fraud on the market class actions are brought to compensate investors who have bought their shares for too much, or sold them for too little, as a result of fraudulent misstatements by the corporation . . . , however, compensation does little to reduce the social costs of securities fraud—deterrence is much more important in controlling those costs . . . Because they shortchange deterrence, securities class actions are an expensive way to reduce the social costs of fraud on the market.”), with e.g., Michael J. Kaufman & John M. Wunderlich, *The Unjustified Judicial Creation of Class Certification Merits Trials in Securities Fraud Actions*, 43 U. MICH. J.L. REFORM 323, 323 (2010) (“The class action device is vital to deterring securities fraud and remedying its victims, who almost never suffer losses sufficient to justify an individual suit.”).

150. See Letter from U.S. Chamber of Commerce to Consumer Fin. Prot. Bureau, *supra* note 15.

151. See Mayer Brown LLP, *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, REUTERS 1 (2013), <http://blogs.reuters.com/alison-frankel/files/2013/12/mayerbrownclassactionstudy.pdf>.

152. See *id.* at 5 (“Over one-third of the class actions that have been resolved were dismissed voluntarily by the named plaintiff and produced no relief for the class.”); *id.* at 8–9 (“Many class settlements—and virtually all settlements of consumer class actions—produce negligible benefits for class members . . . because . . . relatively few class members actually make claims . . .”).

153. See Brian T. Fitzpatrick & Robert C. Gilbert, *An Empirical Look at Compensation in Consumer Class Actions*, 11 N.Y.U. J.L. & BUS. (forthcoming 2015).

being. Nonetheless, Mayer Brown's conclusion that class actions therefore do not benefit consumers does not follow. This is because the conclusion assumes that consumers can benefit from class actions only when they receive compensation. This is false. Consumer class actions have never been about compensation; they have always been about deterrence.¹⁵⁴ So long as businesses pay *someone* for the harm they cause, then they have proper incentives to avoid causing that harm.¹⁵⁵ Consumers can benefit from deterrence just as much as they can from compensation: when businesses are adequately deterred from wrongdoing, consumers are not cheated by businesses in the first instance. Thus, because whatever money not going to the class in class action settlements almost always goes to someone else—class counsel and often a charity¹⁵⁶—consumers have much to gain from class actions thanks to the deterrence class actions generate.

In fairness, the Chamber's criticism goes beyond the Mayer Brown study. The Chamber has also argued that consumer class actions do not deter wrongdoing.¹⁵⁷ The reasoning here is that class actions are resolved without regard to the underlying merits of the class's claim: if businesses pay out whether or not they commit wrongdoing, the Chamber says, class actions cannot deter wrongdoing.¹⁵⁸ This time the logic is sound but the underlying empirical point is not: there is no reason to believe that class actions are resolved without regard to the merits. The Chamber thought otherwise because no consumer class actions ever go to trial; all of them in the Mayer Brown study that were not dismissed were

154. See Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043, 2047–69 (2010) (“But small-stakes class actions serve no insurance function. Rather, the only function they serve is deterrence.”); see also Gilles & Friedman, *supra* note 3, at 132–36 (“[The] primary goal in small-claims class actions is deterrence, and that the only question we should ask with respect to any rule or reform proposal in this area is whether it promotes or optimizes deterrence.”); David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 918 (1998) (“[T]he various joinder devices, including the class action, [can be seen] as essentially techniques for allowing individuals to achieve the benefits of pooling resources against a common adversary.”).

155. See Fitzpatrick, *supra* note 154, at 2058–79 (“The utilitarian account of the deterrence function of litigation is a familiar one: it is desirable to force those who cause harms to pay an amount of damages that will optimally deter them from causing the harms to begin with.”).

156. See *id.* at 2048 (noting that “[m]any district courts” currently distribute “class action proceeds that, for various reasons, cannot be distributed to class members” to “charities under the so-called ‘cy pres’ doctrine”).

157. Letter from U.S. Chamber of Commerce to Consumer Fin. Prot. Bureau, *supra* note 15 (“Once the class is certified, settlement virtually always follows, driven by the transaction costs (including e-discovery) that such actions impose—which again have little or no correlation to the underlying merits of the case. The class action thus does not impose burdens only on businesses that engage in wrongful conduct. Instead, the burdens of class actions are chiefly a function of who plaintiffs’ lawyers choose to sue . . .”).

158. *Id.*

settled.¹⁵⁹ But it is well-known that parties settle in the shadow of what they believe would happen at trial, and, as such, cases settle somewhere around the expected trial outcome.¹⁶⁰ The Chamber also notes that class actions often settle to avoid litigation costs.¹⁶¹ But this is true of all litigation, and it means only that class actions, like all lawsuits, are resolved with regard to things other than the merits—it does not mean that they are resolved without regard to the merits.¹⁶²

I remain convinced that class actions serve a very important regulatory function in the United States and, without them, a great deal of wrongdoing would go undeterred.¹⁶³ This is not to say that there are not aspects of class action litigation that should be reformed. It may very well be that certain categories of class actions are not socially useful. I have questioned before, for example, whether statutory damages should be recoverable in class actions because such class actions may systematically over-deter wrongdoing.¹⁶⁴ Moreover, I think steps can be taken to correct settlement influences that distort settlements from expected trial outcomes (the merits, if you will). For example, I have said before that perhaps plaintiffs in class actions should shoulder defendants' discovery costs if

159. *See id.* at 45 (“In the entire data set, not one of the class actions ended in a final judgment on the merits for the plaintiffs. And none of the class actions went to trial, either before a judge or a jury.”).

160. *See* Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979) (“Individuals in a wide variety of contexts bargain in the shadow of the law . . .”).

161. Letter from U.S. Chamber of Commerce to Consumer Fin. Prot. Bureau, *supra* note 15 (“Settlement virtually always follows, driven by the transaction costs (including e-discovery) that such actions impose—which again have little or no correlation to the underlying merits of the case. The class action thus does not impose burdens only on businesses that engage in wrongful conduct.”).

162. *See* STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 401–03 (2004) (showing that rational settlement decisions are based on litigation costs and expected trial outcomes).

163. *See* Fitzpatrick, *supra* note 154, at 2059 (“When claims are too small to pursue individually, aggregating them into a class action that becomes worthwhile to pursue permits suits to go forward that would not have done so without the device. This, of course, forces defendants to internalize more of the costs of their activities, thereby pushing deterrence closer to the optimal level. But even when claims are worth enough that plaintiffs would have brought them in the absence of the class action device, aggregating the claims furthers the deterrence purpose of civil litigation by permitting plaintiffs to reap the same economies of scale as defendants. These economies not only decrease the administrative costs of deterring through civil litigation, but they permit the plaintiff side to match the investments in class action litigation made by the defendant side; it is thought that this leveling of the playing field increases the likelihood that the judgments in such cases will reflect the actual legal harms defendants cause.”).

164. *See id.* at 2071 (“[S]ome commentators believe that statutory-damages claims, which do often form the basis of small-stakes class actions, were designed to overassess damages because it was assumed that these actions would be brought only a small fraction of the times defendants caused harm (and the possibility of class action litigation, aggregating as it does all the parties who have been harmed by the defendant into one action, seriously undermines this assumption).”).

the suit is lost on summary judgment in order to reduce the litigation-expense distortion.¹⁶⁵ I have also said that perhaps we should try class actions by sampling several juries rather than putting everyone before one jury in order to reduce the distortion from risk aversion.¹⁶⁶ But the fact that some aspects of class action litigation should be changed, does not mean that we should jettison class actions altogether. In my estimation, the case for standing by while class actions meet their demise is not very compelling.

So if something should be done to save class actions, what should it be? One possibility is to amend the FAA, and abrogate *Concepcion* and *American Express*. This would restore the status quo *ex ante*. Many commentators favor this answer,¹⁶⁷ and, indeed, a bill that would do this is currently pending.¹⁶⁸ Given the business community's power in Washington, however, no one thinks this bill has much of a chance in the foreseeable future.

Another possibility is to increase government deterrence of wrongdoing. For example, Professor Gilles and Mr. Friedman have suggested that governmental officials bring class actions on behalf of consumers, employees, and shareholders under their *parens patriae* powers.¹⁶⁹ But, as even they acknowledge, the private sector's enforcement resources dwarf those of the public sector. Government officials are, therefore, likely to bring only a fraction of the suits that the private

165. See *id.* at 2073 (“If the problem is that plaintiffs can run up discovery tabs on defendants, then, as other commentators have noted, the better solution may be to ask plaintiffs to pay for the discovery they request or at least to do so if the discovery they request does not turn up anything.” (internal citations omitted)); Brian T. Fitzpatrick, *Twombly and Iqbal Reconsidered*, 87 NOTRE DAME L. REV. 1621, 1645 (2012) (“[P]laintiffs might be asked to pay only the defendants’ discovery-related fees and expenses if they lose their cases, or they might be asked to pay the defendants’ fees and expenses only if they lose their cases on summary judgment.”).

166. See Fitzpatrick, *supra* note 154, at 2072–73 (“[S]ome commentators have argued that defendants overpay to settle class actions because of the risk of an outcome at trial that could bankrupt them If the problem is that the prospect of a single class action trial is too great for defendants to bear, then the better solution may be to do as many commentators have proposed and sample several trials and average the results.”).

167. See Gilles & Friedman, *supra* note 3, at 652 (“Congress could provide that class action waivers shall be unenforceable—at least in standard-form consumer and employment contracts. That is the gist of the proposed Arbitration Fairness Act of 2011, which, after dying in committee both in 2007 and 2009, was reintroduced immediately after *Concepcion*. But observers appear uniform in their assessment that this bill stands little chance of passage in the current political environment.”).

168. S. 878, 113th Cong. § 402 (2013); H.R. 1844, 113th Cong. § 402 (2013) (“Notwithstanding any other provision of this title, no predispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment dispute, consumer dispute, antitrust dispute, or civil rights dispute.”).

169. See Gilles & Friedman, *supra* note 3, at 623 (“Insulated from the threats posed by class action waivers and restrictive class action standing doctrine, attorneys general are now uniquely positioned to represent the interests of their citizens in the very consumer, antitrust, wage-and-hour, and other cases that have long provided the staple of private class action practice.”).

bar brings today—and thereby generate only a fraction of the deterrence.¹⁷⁰ Professor Gilles and Mr. Friedman have a clever way around this resource limitation, however: public officials can hire the class action bar to prosecute these suits on contingency.¹⁷¹ Although these partnerships introduce a whole host of new controversies,¹⁷² I believe this is the most promising idea I have come across. Even still, I am uncertain these partnerships could ever match the litigation activity level of the private bar on its own. At the very least, in jurisdictions with business-friendly attorneys general, it is unlikely that *parens patriae* suits would be much of a replacement at all. After all, one of the virtues of using private attorneys general to regulate businesses is that they cannot be captured by those businesses in the same way public attorneys general sometimes can be.

At the end of the day, then, I remain pessimistic—pessimistic that either the law or the market can save class actions against businesses from a premature demise.

170. See *id.* at 668–69 (“At the outset, we take it as a given that state AGs generally lack the resources to take the laboring oar on many of the large-scale cases that have traditionally been the province of the class action plaintiffs’ bar. Chronically underfunded, state AGs have typically been consigned to a supporting role in complex class litigations. And these budgetary constraints are only getting worse in the current economic climate. So it is unrealistic to expect state AGs to step into the breach with their own resources.” (internal citations omitted)).

171. See *id.* at 669 (“There is little to stop state AGs from engaging private law firms on a contingent fee basis to pursue claims in *parens patriae* on behalf of injured state residents.”).

172. For example:

First, these arrangements risk converting the public offices of state attorneys general into less-than-objective profit centers, further blurring the distinction between public and private litigation and even running afoul of state and federal law. Second, these arrangements may bypass the proper budgetary processes by permitting risk-free investments by governments—investments whose costs are borne only after a settlement. Third, they risk bypassing the legislative process by seeking industry-shaping behavior that legislatures have specifically contemplated and rejected. Fourth, they risk creating the appearance of impropriety as public officials dole out choice assignments, particularly in ‘coattail’ cases following some other state’s investigation, to political patrons. That problem may be magnified by the possibility that these arrangements will facilitate the existence of ‘revolving doors’ between lucrative plaintiff practices and stints at attorney general offices.

John H. Beisner, Matthew Shors & Jessica Davidson Miller, *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1462 (2005). See also David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingency Fee*, 51 DEPAUL L. REV. 315, 324–25 (2001) (noting the problems of “loyalties divided between their private tort clients and their public clients” and inability to “forego[] monetary claims, or some fraction of them, in return for nonmonetary concessions”); Gilles & Friedman, *supra* note 3, at 631, 669–70 (“[I]f improperly implemented, this model courts ‘pay-to-play’ type abuses, where state officials extract benefits for bestowing lucrative engagements upon favored members of the private bar.”).

CONCLUSION

In this Article, I have tried to undertake an honest assessment of the future of class actions against businesses in light of the Supreme Court's decisions permitting them to use class action waivers so long as they are embedded in arbitration clauses. My assessment is a pessimistic one. Although there is not yet solid evidence that businesses have flocked in droves to class action waivers—and there is one big category of class action plaintiffs (shareholders) who remain insulated from class action waivers altogether for the time being—I think there is every reason to believe that businesses will eventually employ these waivers en masse against consumers and employees, and that they will topple the remaining barriers to doing so against shareholders as well. If this comes to pass, it will mean that businesses will have all but entirely insulated themselves from class action liability.

It is hard for me to conclude that a world without class actions will be anything other than a world with greater corporate wrongdoing. But I am also pessimistic that anything can be done to undo the path that has been blazed for businesses by the Supreme Court. There is little chance of Congress undoing the Court's decisions and the class action alternatives proposed by commentators are, at best, half measures.

It is not often that a scholar writes an article that says things that he hopes will be proved wrong. I'm afraid this is one of those articles.

