# ETHICS OF LEGAL ASTUTENESS: BARRING CLASS ACTIONS THROUGH ARBITRATION CLAUSES

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## ABSTRACT

*Recent Supreme Court cases empower firms to effectively bar class action lawsuits through mandatory arbitration clauses included in consumer adhesion and employment contracts. This article reviews these legal changes and argues for economic self-restraint among both corporate executives and corporate lawyers who advise them. Arbitration has many virtues as it promises to reduce transaction costs and to streamline economic exchange. Yet, the ethics of implementing a legal strategy often requires self-restraint when one is in a position of power, and always requires respect for due process when issues of human health, safety, and dignity are in play.*

## I. INTRODUCTION

One hallmark of a professional is a willingness to sacrifice self-interest for the good of another.[1] Corporate executives, as stewards of other people's money, have a professional obligation to subordinate their own interests to the desires of shareholders and to the welfare of the firm.[2] Shareholders, of course, have no legal authority to empower executives to engage in illegal

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[1] The term "professional" suggests a constellation of attributes, typically including but not limited to: expertise, a high level of training, a public-service orientation, and a sense of fiduciary obligation. *See generally* MICHAEL D. BAYLES, PROFESSIONAL ETHICS (2d ed. 1989) (discussing the characteristics of a profession); WILLIAM E. MOORE, THE PROFESSIONS: ROLES AND RULES (1970) (discussing the characteristics of a profession). As an example of professional self-sacrifice, physicians are expected to help the infirmed even when such help may endanger the physician's own health. AM. MED. ASS'N, CODE OF MED. ETHICS §9.067 (2010) (recognizing a duty to provide emergency medical care "even in the face of greater than usual risks to [the physician's] own safety, health, or life"). Similarly, lawyers are expected to serve unpopular clients and to provide pro-bono services to the poor. *See* MODEL RULES OF PROF'L CONDUCT Preamble (Am. Bar Ass'n 2007) (expressing professional commitment "to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel").

[2] *See* CONSTANCE E. BAGLEY, MANAGERS AND THE LEGAL ENVIRONMENT: STRATEGIES FOR THE 21ST CENTURY 657–69 (7th ed. 2013) (discussing the corporate executive's duties of good faith, care, loyalty, and candor, each of which is owed to both the firm and to the firm's shareholders).

activities, nor do they have moral authority to authorize unethical conduct.[3] Yet, within these constraints, fidelity to shareholder desires provides the *sine qua non* of professionalism among corporate executives.[4]

Legal astuteness, a term coined by Professor Constance Bagley, provides one means for corporate executives to fulfill their ethical obligation to enhance shareholder wealth.[5] Legally astute executives work with corporate counsel to scan the legal environment, seeking opportunities to use the law both to advance the interests of the firm and to parry legal threats.[6] For example, effective use of trademark law can create a competitive advantage both by protecting one's brand and by forestalling competition.[7] Effective lobbying can ensure that the corporate interest is heard and can shape regulatory change so as to generate a competitive advantage.[8] Effective contracting can forestall nuisance claims, assure that claims are resolved in friendly forums, and allocate contractual risks to the most efficient risk-bearer.[9] In each of these scenarios, and countless others, legal astuteness provides the firm with a competitive advantage.

Legal astuteness includes monitoring changes in the law, both legislatively and judicially, and adapting corporate strategies in accord. For example, a shift in the Supreme Court's interpretation of the Federal Arbitration Act ("FAA") illustrates how an astute legal strategy can help parry threats posed by class action lawsuits.[10] In a well-known case, Vincent and Liza Concepcion entered into a contract for phone service with AT&T

[3] *See* Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 BUS. ETHICS Q. 53, 68 (1991) (emphasizing that shareholders have no moral authority to empower executives to ignore ethical duties; hence, executives may only seek shareholder and firm objectives through ethical means); Joseph S. Spoerl, *The Social Responsibility of Business*, 42 AM. J. JURIS. 277, 278–79 (1997).

[4] The notion that business management constitutes a profession traces to Justice Louis Brandeis. *See* LOUIS D. BRANDEIS, BUSINESS—A PROFESSION 1 (1914), https://louisville.edu/law/library/special-collections/the-louis-d.-brandeis-collection/business-a-profession-chapter-1 (address delivered at Brown University Commencement Day, 1912, originally published in *System*, Oct. 1912 and reprinted as chapter 1 of Brandeis's second book). Brandeis defined a profession as an occupation: (1) "for which the necessary preliminary training is intellectual," (2) "pursued largely for others and not merely for one's self", and (3) "in which the amount of financial return is not the accepted measure of success." *Id*. Brandeis concluded that a corporate executive should aspire to professional attributes. *Id*. For a more recent articulation of the professional duties of corporate executives, see generally Rakesh Khurana & Nitin Nohria, *It's Time to Make Management a True Profession*, 2008 HARV. BUS. REV. 70.

[5] Constance E. Bagley, *Winning Legally: The Value of Legal Astuteness*, 33 ACAD. MGMT. REV. 378, 378 (2008).

[6] *See generally* GEORGE J. SIEDEL, USING THE LAW FOR COMPETITIVE ADVANTAGE (2002) (exploring the interplay between legal strategy and effective management); George J. Siedel & Helena Haapio, *Using Proactive Law for Competitive Advantage*, 47 AM. BUS. L.J. 641 (2010) (connecting legal strategy and business strategy); Evan A. Peterson, *Promoting Future-Oriented Legal Thinking in Long-Term Strategic Planning*, 29 S.L.J. 69 (2019) (providing useful citations to the current law and management literature).

[7] *See* Ross D. Petty, *The Strategic Use of Legal Margins: How to Introduce an Extension of Someone Else's Brand*, *in* LEGAL STRATEGIES: HOW CORPORATIONS USE LAW TO IMPROVE PERFORMANCE 317, 332–33 (Antoine Masson & Mary J. Shariff eds., 2010) (distinguishing between fair use and wrongful use and discussing how a legally astute company can free ride on the trademark of another firm while limiting the risk of a lawsuit); David Orozco, *Legal Knowledge as an Intellectual Property Management Resource*, 47 AM. BUS. L. J. 687, 714–15 (2010) (exploring intellectual property law as a source of competitive advantage).

[8] *See* G. RICHARD SHELL, MAKE THE RULES OR YOUR RIVALS WILL 32–84 (2004) (discussing strategic lobbying in both the legislative and the regulatory arenas).

[9] *See* Larry A. DiMatteo, *Strategic Contracting: Contract Law as a Source of Competitive Advantage*, 47 AM. BUS. L.J. 727, 767–69 (2010).

[10] *See generally* John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Action*, 95 COLUM. L. REV. 1343 (1995); John C. Coffee, Jr., *The Globalization of Entrepreneurial Litigation: Law, Culture, and Incentives*, 165 U. PA. L. REV. 1895 (2017) (discussing the threat posed by abuses of class action tort litigation).

Mobility LLC ("AT&T").[11] An arbitration clause, which was common to all customers, required that all claims be brought in the parties' individual capacity and not as a member of a representative class. Although their phones were nominally free, AT&T promotional materials did not mention a modest sales tax. The Concepcions sued under a California false advertising statute, and their complaint was consolidated as a class action. AT&T sought to compel arbitration. Both the U.S. District Court and the Ninth Circuit Court of Appeals declared the waiver of class action rights to be unconscionable. The U.S. Supreme Court reversed, holding that California's unconscionability law was preempted by the FAA.[12] The Court's interpretation of the FAA reinforced AT&T's economic incentive to bar class actions with arbitration clauses. Today such clauses are commonplace.[13]

This article examines the ethics of legal astuteness with reference to the strategic use of arbitration to bar class actions. The discussion proceeds in two parts followed by a conclusion. Part I examines Supreme Court arbitration cases. It begins with detailed discussions of *Southland Corp. v. Keating*,[14] decided in 1984, and *AT&T Mobility LLC v. Concepcion*,[15] penned in 2011. It then examines Supreme Court interpretations post-*Concepcion*, culminating with the 2019 case of *Lamps Plus v. Varela*.[16] Many of these opinions include discussions of class actions under the Federal Rules of Civil Procedure, histories of the FAA, and references to unconscionability precedents. Not surprisingly, the logic of arbitration is a bit convoluted. Recent judicial trends, however, unambiguously enhance corporate prerogatives, tilting economic power to the lawyers who draft—and to the executives who approve—arbitration clauses that bar class actions.

Part II examines the ethical dimensions of barring class actions through arbitration clauses. It begins with the economic efficiency advantages to be gained from class action bars and suggests appropriate ways of achieving these gains. It then emphasizes potential abuses through over-reaching. This ethical reflection gives voice to concerns over "boilerplate" terms in employment and consumer settings.[17] It also gives voice to the dissents in recent cases. In short, Part II recognizes the legitimate gains achievable through class action bars, but also suggests voluntary constraints on abuses and references potential legal changes that would reinforce those constraints without sacrificing the efficiency gains.

This article contributes to the scholarly literature in three ways. First, it seeks to clarify and advance discussion of a recent trend in the U.S. Supreme

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[11] AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336 (2011).

[12] *Id*. at 333 (holding that the FAA preempts California's *Discover Bank* unconscionability precedent).

[13] *See* Katherine V.W. Stone, *Procedure, Substance, and Power: Collective Litigation and Arbitration of Employment Rights*, 61 UCLA L. REV. DISCOURSE 164, 166–71 (2013); Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers and Consumers of Their Rights*, ECON. POL'Y INST., Briefing Paper #414, at 3 (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/.

[14] Southland Corp. v. Keating, 465 U.S. 1 (1984)

[15] AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[16] Lamps Plus Inc., et al. v. Varela, 139 S. Ct. 1407 (2019).

[17] *See generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013) (providing a provocative critique of potential abuses of "form contacts" and "click-on" agreements).

Court to enhance the use of arbitration clauses. Second, it seeks to contribute to a growing body of literature on what might be called "law and management,"[18] "corporate legal strategy,"[19] or alternatively, "proactive law."[20] Third, and perhaps most important, it strives to enhance the law and management literature with an extended discussion of ethics. Recent Supreme Court interpretations of the FAA have given the defense bar a potent tool with which to limit collective actions. Yet, just because an executive can use a legal change to enhance corporate interests, does not mean that he or she *should*. Legal astuteness, properly conceived, *always* requires ethical justification and *often* requires moral self-restraint.

In an introduction to a symposium issue on corporate legal strategy recently published in the *American Business Law Journal*, Professor Robert Bird writes: "A discipline of legal strategy without an accompanying assessment of its ethics and values can too easily lend itself to encouraging a rudderless or winner-take-all managerial attitude toward the law."[21] Similarly, in an introduction to a collection of scholarly works on corporate legal strategy, Professor D. Trevor Anderson writes: "Much more remains to be done at the theoretical and practical levels before we can adequately understand this subject and all its implications. One can readily imagine another book responding to the ethical questions raised." [22] The following examination of the ethical dimensions of class actions, arbitration, and unconscionability seeks to address this concern.

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[18] The law and management literature enjoys a twenty-year history. *See* Constance E. Bagley, *What's Law Got to Do with It?: Integrating Law and Strategy*, 47 AM. BUS. L.J. 587, 588 (2010) (discussing the genesis of the law and management movement). An essay by Constance Bagley published in the Financial Times (London), provided an early spark. *See* Constance E. Bagley, *Legal Problems Showing a Way to Do Business*, FIN. TIMES (Nov. 27, 2000) at 2. Two years later, George Siedel argued that effective management requires a "view from the balcony" where executives, working with legal counsel, survey an ever-changing legal landscape to find ways to secure competitive advantages. SIEDEL, *supra* note 6, at 24–25. In 2004, Richard Shell linked the notion of legal strategy to Michael Porter's five forces of competition, showing how each force had legal dimensions. *See* SHELL, *supra* note 8, at 124–26. *See generally* MICHAEL E. PORTER, COMPETITIVE STRATEGY: TECHNIQUES FOR ANALYZING INDUSTRIES AND COMPETITORS (1980) (providing a seminal discussion of strategic management). The legal strategy literature was introduced to the management literature with the publication of Bagley's highly influential article on legal astuteness. *See generally* Bagley, *supra* note 5.

[19] *See* Robert C. Bird & David Orozco, *Finding the Right Corporate Legal Strategy*, 56 MIT SLOAN MGMT. REV. 81, 82–86 (2014) (discussing five pathways of legal strategy: avoidance, compliance, prevention, value, and transformation); Antoine Masson & Mary J. Shariff, *Preface to* LEGAL STRATEGIES: HOW CORPORATIONS USE LAW TO IMPROVE PERFORMANCE, ix–x (Antoine Masson & Mary J. Shariff eds., 2010).

[20] Gerlinde Berger-Walliser et al., *Using Proactive Legal Strategies for Corporate Environmental Sustainability*, 6 MICH. J. ENVTL. & ADMIN. L. 1, 3 (2016); Gerlinde Berger-Walliser & Paul Shrivastava, *Beyond Compliance: Sustainable Development, Business, and Proactive Law*, 46 GEO. J. INT'L. L. 418, 434 (2015); Siedel & Haapio, *supra* note 6, at 641. The Proactive Law movement championed by Helena Haapio and others is centered in Sweden and Finland and emphasizes the importance of contracts for strategic advantage. *See* Robert C. Bird, *The Many Futures of Legal Strategy*, 47 AM. BUS. L.J. 575, 578–79 (2010) (discussing the Nordic version of corporate legal strategy).

[21] Bird, *supra* note 20, at 585 (introducing the symposium issue).

[22] D. Trevor Anderson, *Introduction* to LEGAL STRATEGIES: HOW CORPORATIONS USE LAW TO IMPROVE PERFORMANCE 1, 5 (Antoine Masson & Mary J. Shariff eds., 2010).

## II. CLASS ACTIONS, ARBITRATION, AND UNCONSCIONABILITY[23]

### A. THE ROAD TO *AT&T MOBILITY LLC V. CONCEPCION*

The path of the U.S. Supreme Court's arbitration jurisprudence culminating in the widespread use of arbitration agreements in consumer adhesion and employment contracts, and also enabling the legally astute to parry threats posed by class action lawsuits, began in earnest with *Southland Corp. v. Keating*.[24] At the heart of this case was a California state statute, the California Franchise Investment Law ("Investment Law"), designed by the state legislature to balance the economic power between franchisors and franchisees. The provision of the Investment Law at issue stated: "Any condition, stipulation or provision purporting to bind any person acquiring any franchise to waive compliance with any provision of this law or any rule or order hereunder is void."[25] Although this provision did not expressly prohibit arbitration of claims brought under the Investment Law, the California Supreme Court interpreted it to "require *judicial* consideration of claims brought under the state statute."[26] As Justice Stevens wrote in his dissent,[27] "the California Legislature has declared all conditions purporting to waive compliance with the protections of the Franchise Investment Law, including but not limited to arbitrations provisions, void as a matter of public policy."[28] He argued that state statutory law reflecting a "state policy of providing special protection for franchisees"[29] fell within the savings clause of Section 2 of the FAA. Section 2 of the FAA states:

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[23] In this article, our purpose is not to expand legal scholarship in the arbitration field. For this reason, we do not include an extensive literature review of this area. Instead, our article discusses shifts in the Court's arbitration jurisprudence as a vehicle for illustrating how legally astute business counsel can harness changes in the law proactively and offensively to create competitive advantage for their clients. For readers interested in additional arbitration-focused scholarship related to our article, we note the following possibilities: Brian Farkas, *The Continuing Voice of Dissent: Justice Thomas and the Federal Arbitration Act*, 22 HARV. NEGOT. L. REV. 33 (2016); Stephanie Greene & Christine Neylon O'Brien, *New Battles and Battlegrounds for Mandatory Arbitration After Epic, New Prime, and Lamps Plus*, 56 AM. BUS. L.J. 815 (2019); Nancy A. Welsh, *Class Action-Barring Mandatory Pre-dispute Consumer Arbitration Clauses: An Example of (and Opportunity for) Dispute System Design?*, 13 U. ST. THOMAS L.J. 381 (2017).

[24] 465 U.S. 1 (1984). The *Southland* Court's opinion was authored by Chief Justice Burger and joined by Justices Brennan, White, Marshall, Blackmun, and Powell. In a separate opinion, Justice Stevens concurred in part and dissented in part. Justice O'Connor filed a dissenting opinion, which Justice Rehnquist joined. The Court opinion noted two questions relevant in this case. It dismissed the second question: "whether arbitration under the federal Act is impaired when a class-action structure is imposed on the process by the state courts" because, according to the Court, "it does not affirmatively appear that the validity of the state statute was 'drawn in question' *on federal grounds* by Southland, this Court is without jurisdiction to resolve this question as a matter of federal law. . . ." *Id.* at 9 (emphasis added). In this case, eight hundred franchisees sought to join the class action alleging fraud. *Id.* at 8.

[25] *Id.* at 10.

[26] *Id.* (emphasis added).

[27] Justice Stevens concurred in part and dissented in part.

[28] *Southland*, 465 U.S. at 20 (Stevens, J., dissenting).

[29] *Id.* at 21. Justice Stevens thought that Justice O'Connor's dissent discussing the legislative history of the FAA clearly showed that the enacting Congress viewed the statute as generally procedural, but he was "persuaded that the intervening developments in the law compel the conclusion that the Court has reached." *Id.* at 17.

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.[30]

What states could not do, according to Justice Stevens, was to pass laws directly or indirectly making *all* arbitration agreements unenforceable. He argued that "the judiciary must fashion the limitations as a matter of federal common law," and that such limitations would "not necessarily require the inexorable application of a uniform federal rule of decision notwithstanding the differing conditions which may exist in the several States and regardless of the decisions of the States to exert police powers as they deem best for the welfare of their citizens."[31] In other words, such state crafted public-policy laws were acceptable "so long as the state rule does not conflict with the policy of § 2."[32]

The Court, however, rejected Justice Stevens' argument. The majority stated that "[i]f we accepted this analysis, *states could wholly eviscerate congressional intent* to place arbitration agreements 'upon the same footing as other contracts.'"[33] However, the majority also noted that "general contract defenses such as fraud" could be raised "to avoid enforcement of an arbitration agreement."[34] Hence, general contract defenses like fraud, unconscionability, and duress—but not a state statute reflecting a public policy choice—could be used to prevent the enforcement of an arbitration agreement. The Court also rejected Justice O'Connor's contention that the FAA was "a procedural statute, applicable only in federal courts."[35] Her dissent noted that Section 2 of the FAA did not explicitly reference the judicial forums to which it applied. However, when it was read in conjunction with Sections 3 and 4 of the FAA,[36] it became clear that the statute applied to federal courts. Justice O'Connor argued that the history of the FAA's enactment also supported this position. In making the FAA applicable to state courts, Justice O'Connor stated that "the Court discovers a federal right in FAA § 2 that the state courts must enforce."[37]

Instead, the Court held that "[i]n enacting § 2 of the Federal Act [FAA], Congress declared a national policy favoring arbitration and *withdrew the power of the states* to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration."[38] According to the Court, Section 2 of the FAA was a substantive provision applicable in both federal and state courts. The only limits imposed by the FAA on the

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[30] Federal Arbitration Act, 9 U.S.C. § 2 (2006).

[31] *Southland*, 465 U.S. at 19 (Stevens, J., dissenting).

[32] *Id.* at 20.

[33] *Id.* at 17 n.11 (internal quotations to H.R. REP. No. 96, at 1 (1924)) (emphasis added). The Court largely dismissed his concerns in footnote 11 of its opinion.

[34] *Id.*

[35] *Id.* at 25 (O'Connor, J., dissenting).

[36] The language of Sections 3 and 4 of the FAA respectively state that "the courts of the United States" and "any United States district court" are to specifically enforce arbitration agreements. Federal Arbitration Act, 9 U.S.C. §§ 3–4 (2006).

[37] *Southland*, 465 U.S. at 35 (O'Connor, J., dissenting).

[38] *Id.* at 10 (emphasis added).

enforcement of arbitration agreements were (1) that such agreements be within a maritime contract or a "transaction involving commerce," and (2) that such agreements could be revoked by "grounds as exist at law or in equity for the revocation of any contract."[39] The Investment Law did not fall within the latter category (the savings clause of Section 2). The Court further stated that "[w]e see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law."[40] Because the FAA created "a substantive rule applicable in state as well as federal courts, Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements."[41] Hence, the Investment Law was preempted by the FAA.

The *Southland* Court suggested that its understanding of the FAA as a substantive rule had been provided in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co*.[42] In *Prima Paint*, the claimant alleged that the other party used fraud to secure consent to the contract, which also contained an arbitration agreement.[43] The claimant did not specifically allege that consent to the arbitration agreement itself had been procured by fraud.[44] Nevertheless, "[t]he Court held that, notwithstanding a contrary state rule, consideration of a claim of fraud in the inducement of a contract is for the arbitrators and not for the courts."[45] If an agreement to arbitrate contained within a contract allegedly entered into as the result of fraud did not fall within the savings clause of Section 2, the breadth of Section 2 seemed to be exceedingly narrow; even though the Court assured "that a party may assert general contract defenses such as fraud to avoid enforcement of an arbitration agreement."[46] According to the Court, however, the Investment Law was not such a defense.

In sum, absent such general contract defenses, the long-term, practical impact of *Southland*[47] would seem to be the requirement that both state and

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[39] *Id*. at 10–11 (quoting Federal Arbitration Act, 9 U.S.C. § 2 (2006)).
[40] *Id*. at 11.
[41] *Id*. at 16.
[42] *Id*. at 11 (quoting Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967)).
[43] *Id*.
[44] *Id*.
[45] *Id*. (internal quotations omitted).
[46] *Id*. at 17 n.11.
[47] In Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995), the Court faced a request to overturn *Southland*, but based upon considerations such as *stare decisis*, reliance interests, and Congress' lack of legislative response to its decision in *Southland*, it declined in a seven-to-two decision. Justice Breyer authored the Court's opinion, and was joined by Chief Justice Rehnquist, and Justices Stevens, O'Connor, Kennedy, Souter, and Ginsburg. Justice O'Connor also filed a concurring opinion. Justice Thomas filed a dissenting opinion, joined by Justice Scalia, who also authored a separate dissent. The Court stated that:

> §2 gives States a method for protecting consumers against unfair pressure to agree to a contract with an unwanted arbitration provision. States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. §2 (2006) (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause.

*Id*. at 281. Justice O'Connor's concurrence predicted that the Court's holding would "displace many state statutes carefully calibrated to protect consumers . . . and state procedural requirements aimed at ensuring knowing and voluntary consent." *Id*. (O'Connor, J., dissenting). Justice Thomas' dissent argued, as had Justice O'Connor in *Southland*, that the FAA was not applicable to state courts. *Id*. at 285–97. In his dissent, Justice Scalia argued that *Southland* was wrongly decided, that it should be overruled, and federal courts specifically enforce arbitration agreements. In time, this proved to be true. It also increasingly created opportunities for the astute use of legal strategy to promote the interests of powerful economic actors, particularly to parry the threat of class action lawsuits.

### B. *AT&T MOBILITY LLC V. CONCEPCION*

In *AT&T Mobility LLC v. Concepcion*, the Court held in a five-to-four decision that Section 2 of the FAA preempted the ability of state courts to create rules, such as California's *Discover Bank* rule, making the enforceability of arbitration agreements contingent upon a party's ability to pursue classwide procedures.[48] The Concepcions entered an agreement with AT&T Mobility LLC ("AT&T") for cell phone services and, purportedly, "free" cell phones.[49] AT&T's adhesion contract contained an arbitration clause covering all disputes between the parties, and requiring that any claims pursuant to the agreement be brought in an individual capacity.[50] AT&T charged the Concepcions $30.22 in sales tax for the "free" phones.[51] In response, the Concepcions filed a class action suit in the United States District Court for the Southern District of California.[52] They alleged that by charging sales tax on phones advertised as "free," AT&T was liable for fraud, false advertising, and other claims.[53]

AT&T unsuccessfully sought to compel individual arbitration of the Concepcions' claims. Although the District Court had a favorable view of the arbitration provision itself,[54] it held the provision to be unconscionable under the California Supreme Court's holding in *Discover Bank v. Superior Court*.[55] In *Discover Bank*, California's Supreme Court held that when consumer adhesion contracts contained class action waivers, the disputes arising therefrom involved small amounts, and allegations of widespread deliberate deception/cheating by the more powerful party existed, it would be unconscionable to allow class action waivers to protect such parties from the consequences of their misbehavior.[56]

The Ninth Circuit Court of Appeals affirmed, and also held that the FAA did not preempt the *Discover Bank* rule because it was "a refinement of the unconscionability analysis applicable to contracts generally in California."[57]

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that it "entail[ed] a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes. *Id*. at 284–85 (Scalia, J., dissenting). Nevertheless, he would not "in the future dissent from judgments that rest on *Southland*." *Id* at 285. Ironically, Justice Scalia's concern about state courts' loss of power would certainly prove true in *Concepcion*, an opinion of the Court he later authored. *See generally* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

[48] *Concepcion*, 563 U.S. 333, 352 (2011). Justice Scalia wrote the Court's opinion, which Justices Roberts, Kennedy, Thomas, and Alito joined. Justice Breyer authored a dissenting opinion, which Justices Ginsburg, Sotomayor, and Kagan joined.

[49] *Id*. 337.

[50] *Id*. at 336.

[51] *Id*. at 337.

[52] *Id*.

[53] *Id*.

[54] The Court stated: "The District Court found this scheme [the arbitration provision at issue] sufficient to provide incentive for the individual prosecution of meritorious claims that are not immediately settled, and the Ninth Circuit admitted that aggrieved customers who filed claims would be 'essentially guarantee[d]' to be made whole." *Id*. at 352.

[55] *See generally* Discover Bank v. Superior Court, 36 Cal. 4th 148, (2005).

[56] *See Concepcion*, 563 U.S. at 340 (quoting *Discover Bank*'s holding).

[57] *Id*. at 338 (quoting Laster v. AT&T Mobility LLC, 584 F.3d 849, 857 (2009)).

In other words, *Discover Bank* treated class action waivers in arbitration agreements just as it did class action waivers in any other contracts, regardless of the presence of an arbitration agreement. Given this neutrality, the Ninth Circuit explained that the *Discover Bank* rule fell within the savings clause of Section 2 of the FAA.[58]

The majority, however, disagreed. The Concepcions had argued that regardless of whether the Court interpreted *Discover Bank's* holding as "an application of unconscionability" or as a "prohibition on collective-action waivers," both interpretations constituted "grounds as exist at law or in equity for the revocation of any contract" under Section 2's savings clause.[59] Nonetheless, the Court explained that Section 2's savings clause "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability,' but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue."[60] The Court agreed with AT&T's position that *Discover Bank* applied the doctrine of unconscionability, a generally applicable doctrine, in a way that disfavored arbitration. Therefore, the FAA preempted California's *Discover Bank* rule. Noting the "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract," the Court repeated language it used long ago in *Southland* that "courts must place arbitration agreements on an equal footing with other contracts."[61]

Indeed, in *Perry v. Thomas*,[62] the Court had flagged the possibility "that the FAA's pre-emptive effect might extend even to grounds traditionally thought to exist 'at law or in equity for the revocation of any contract'"[63] because state courts could not "rely on the uniqueness of an agreement to arbitrate as the basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot."[64] Hence, neither a state legislature nor a state court could formulate generally applicable rules of law, such as California's Franchise Investment Law or *Discover Bank,* which as a practical matter would prevent the specific enforcement of an arbitration agreement. In sum, "[w]hen state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."[65]

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[58] *Id*.

[59] *Id*. at 341.

[60] *Id*. at 339 (quoting Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996)). In his concurring opinion, Justice Thomas argued that

> [i]t would be absurd to suggest that §2 requires only that a defense apply to "any contract" [and, therefore, constitutes a ground "at law or in equity for the revocation" of a contract]. If §2 means anything, it is that courts cannot refuse to enforce arbitration agreements because of a state public policy against arbitration, even if the policy nominally applies to "any contract."

*Id*. at 352–53 (Thomas, J., concurring). Hence, "[t]here must be some additional limit on the contract defenses permitted by §2." *Id*. at 353. Thomas argued that that limitation constituted "defects in the making of an agreement." *Id*. Therefore, Section 2's savings clause is intended to make unenforceable arbitration agreements in which a party "successfully challenges the formation of the arbitration agreement, such as by proving fraud or duress." *Id*.

[61] *Id*. at 339.

[62] 482 U.S. 483 (1987).

[63] *Concepcion*, 563 U.S. at 341.

[64] *Id*. (quoting *Perry*, 482 U.S. at 492 n.9).

[65] *Id*.

Otherwise, the Court reasoned—similar to its rationale in *Southland*—states could in theory make an unlimited number of such rules (whether via legislature or court). The practical effect, the Court suggested, would be to diminish the enforceability of arbitration agreements.[66] As relevant in *Concepcion*, if a state rule permitted a party to an arbitration agreement to demand classwide procedures *ex post* regardless of the party's *ex ante* agreement, it would likely decrease the use of arbitration.[67] Classwide procedures impact the informality, speed, cost, procedural requirements, and risks to parties, particularly that of defendants, in an arbitration proceeding.[68]

Disagreeing with the majority, the dissent argued that the *Discover Bank* rule did not single out arbitration agreements. Rather, it applied neutrally to class action waivers *in any contract in certain circumstances* whether or not an arbitration provision was present. Hence, arbitration agreements were placed "upon the same footing as other contracts"[69] and fell within the savings clause of Section 2. The FAA's primary concern was equal treatment of arbitration contracts, not ensuring the procedural and cost-efficiency of arbitration.[70] Therefore, the dissent argued, "California is free to define unconscionability as it sees fit, and its common law is of no federal concern as long as the State does not adopt a special rule that disfavors arbitration."[71] Furthermore, according to the dissent, class arbitration is not fundamentally different from individual arbitration. Contrary to the majority's view, individual arbitration is a not a "fundamental attribut[e]" of arbitration.[72]

An implicit concern of the Court's opinion in *Concepcion*, as in *Southland*, was that astute legal strategy by state legislatures or courts could thwart the purposes of the FAA. Largely absent from these opinions, however, was a recognition that astute legal strategies could also be used by powerful economic actors to insulate themselves from misbehavior via arbitration agreements. In *Concepcion*, even the California state courts had a favorable view of the arbitration agreement at issue. However, as *Concepcion's* dissent explained: "*Discover Bank* sets forth circumstances in which the California courts believe that the terms of consumer contracts can be manipulated to insulate an agreement's author from liability for its own frauds by 'deliberately cheat[ing] large numbers of consumers out of individually small sums of money.'"[73] In other words, powerful economic actors through astute legal strategy could strategically design consumer adhesion contracts in such a way that consumers would have no ability in practice to seek redress for injury. Indeed, as discussed in Part II, a repeat of *Concepcion's* general circumstances could easily occur in the future whether or not the related arbitration agreement was consumer friendly as in the case of AT&T's provision. Arguably, this concern was to prove true.

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[66] *See id*. at 341–43 (discussing examples of rules that might facially appear to be generally applicable to all contracts, but would in practice disfavor arbitration).
[67] *See id*. at 346.
[68] *Id*. at 348.
[69] *Id*. at 360 (Breyer, J., dissenting) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 511 (1974)).
[70] *Id*.
[71] *Id*. at 364.
[72] *Id*. at 362.
[73] *Id*. at 365–66 (quoting Discover Bank v. Superior Court, 36 Cal. 4th 148 (2005)).

### C. FAA POST-*CONCEPCION*

As of this writing, the Court has decided thirteen arbitration cases post-*Concepcion*. Three of these cases—*American Express Co. v. Italian Colors Restaurant*,[74] *Epic Systems Corp. v. Lewis*,[75] and *Lamps Plus, Inc. v. Varela*[76]—are particularly relevant to this article and are briefly discussed in this subpart.

In *American Express*, the Court held a class action waiver in an arbitration provision enforceable under the FAA.[77] The Court, in considering an antitrust claim likely to require an expert economic report costing hundreds of thousands of dollars, held this despite the fact that the expense to an individual claimant of arbitrating such a claim would far surpass any likely recovery amount.[78] In justifying its holding, the Court distinguished between the expense involved in pursuing a claim and the elimination of the right to pursue the claim itself.[79] Both the opinion of the Court and of the dissent referenced *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*.[80] The Court stated that "as dictum in *Mitsubishi Motors* . . . we expressed a willingness to invalidate, on 'public policy' grounds, arbitration agreements that 'operat[e] . . . as a prospective waiver of a party's right to pursue statutory remedies'" and that "'so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.'"[81] In other words, as long as the claimant could bring its statutory cause of action to arbitration, regardless of how economically feasible this was in practice, the Court did not view the arbitration agreement as preventing the claimant from vindicating its federal statutory right. Furthermore, the Court noted in *Gilmer v. Interstate/Johnson Lane Corp*.[82] that it upheld a class action waiver in an arbitration agreement even when the federal employment-related statute at issue explicitly allowed class procedures.[83]

The problem with the Court's perspective, according to the dissent, was that "the rule against prospective waivers of federal rights can work only if it applies not just to a contract clause explicitly barring a claim, but to others

[74] 570 U.S. 228 (2013). Justice Scalia authored the Court's opinion, which was joined by Chief Justice Roberts, and Justices Kennedy, Thomas, and Alito. Justice Thomas filed a concurring opinion. Justice Kagan filed a dissenting opinion, which Justices Ginsburg and Breyer joined. Justice Sotomayor was not involved in the consideration or decision of the case.

[75] 138 S. Ct. 1612 (2018). Justice Gorsuch authored the Court's opinion, which Chief Justice Roberts and Justices Kennedy, Thomas, and Alito joined. Justice Thomas filed a concurring opinion. Justice Ginsburg authored a dissenting opinion, which Justices Breyer, Sotomayor, and Kagan joined.

[76] 139 S. Ct. 1407 (2019). Chief Justice Roberts authored the Court's opinion, which Justices Thomas, Alito, Gorsuch, and Kavanaugh joined. Justice Thomas filed a concurring opinion. Justice Ginsburg filed a dissenting opinion, which Justices Breyer and Sotomayor joined. Justice Sotomayor filed a dissenting opinion as did Justice Breyer. Justice Kagan also filed a dissenting opinion, which Justices Ginsburg, Breyer, and, in part, Sotomayor joined.

[77] *Am. Express*, 570 U.S. at 238–39 (stating that the Court's decision in *Concepcion* "all but resolves this case," and reversing the Court of Appeals's third reversal of the District Court's grant of American Express's motion to compel arbitration on an individual basis and dismissal of the lawsuit).

[78] *Id*. at 231.

[79] *See id*. at 235–36.

[80] 473 U.S. 614 (1985).

[81] *Am. Express*, 570 U.S. at 235 (quoting Mitsubishi Motors Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985)).

[82] 500 U.S. 20 (1991).

[83] *Am. Express*, 570 U.S. at 237.

that operate to do so."[84] Otherwise, the dissent reasoned, "companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights, making arbitration unavailable or pointless."[85] In other words, the Court's holding would provide companies with an incentive to engage in astute legal strategies to shield themselves from the class action lawsuits that might be necessary in certain circumstances to deter potential misbehavior. In general, the dissent argued that when the totality of the contract in this case was considered—its arbitration provision, waiver of class procedures, disallowance of joinder or claim consolidation, confidentiality requirements (effectively preventing merchant cost sharing of expert economic reports etc.), and prevention of any cost shifting (even for meritorious claims)—in addition to the fact that American Express "refused to enter into any stipulations that would obviate or mitigate the need for the [costly] economic analysis," claimants could not in practice vindicate their federal statutory claims.[86] Therefore, claimants' theoretical right to bring such claims to an individual arbitration forum had little value because the expense in doing so would be much greater than the potential recovery.[87] Accordingly, it chided the Court's myopic focus in this case on the class action waiver, and its failure to discuss the contract and surrounding circumstances as a whole.[88]

In 2018, the Court decided *Epic Systems*.[89] It encompassed three substantively similar cases, and considered whether employment agreements could mandate individual arbitration, and foreclose the possibility of class action lawsuits.[90] The Court argued that regardless of one's policy perspective, the FAA clearly answered yes to this question.[91]

In one of the cases, an ex-Ernst &Young ("E&Y") employee had signed an arbitration agreement foreclosing collective action suits, and mandating individual arbitration.[92] The ex-employee later brought a class action suit against E&Y, alleging violations of California law, and the Fair Labor Standards Act due to E&Y's classification of such employees, and related failure to pay them overtime.[93] Plaintiffs argued that the National Labor Relations Act (NLRA)'s protection of employee's collective or "concerted" activities, included protection of the collective ability to bring class action suits. E&Y moved to compel arbitration, and the federal district court granted the request.[94] However, the Ninth Circuit reversed, holding that because it foreclosed collective action suits, the arbitration agreement violated the

[84] *Id*. at 242 (Kagan, J., dissenting).
[85] *Id*. at 244.
[86] *Id*. at 246.
[87] *See id*. at 244–45.
[88] *See id*. at 240–41 (the dissent asserts that "[a]nd it [the majority] concocts a special exemption for class-arbitration waivers—ignoring that this case concerns much more than that").
[89] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612 (2018).
[90] *Id*. at 1619–20. The three cases at issue were: Murphy Oil USA, Inc. v. NLRB, 808 F.3d 1013 (5th Cir. 2015), Morris v. Ernst & Young, LLP, 834 F.3d 975 (9th Cir. 2016), and Lewis v. Epic Sys. Corp., 823 F.3d 1147 (7th Cir. 2016).
[91] 138 S. Ct. at 1619.
[92] *Id*. at 1619–20.
[93] *Id*. at 1620.
[94] *Id*.

NLRA, and that agreements in violation of federal law fell within the savings clause of Section 2 of the FAA.[95] The Court then reversed the Ninth Circuit.[96]

The Court termed Plaintiff's argument a "putative NLRA defense," based upon purported illegality rather than unconscionability, as in *Concepcion*. It stated:

> Concepcion's essential insight remains: courts may not allow a contract defense to reshape traditional arbitration by mandating classwide arbitration without the parties' consent . . . . Illegality, like unconscionability, may be a traditional, generally applicable contract defense in many cases, including arbitration cases. But an argument that a contract is unenforceable just because it requires bilateral arbitration is a different creature. A defense of that kind, Concepcion tells us, is one that impermissibly disfavors arbitration whether it sounds in illegality or unconscionability.[97]

The Court also explained that the FAA and NLRA were not in conflict with each other, and it provided a litany of cases in which it "has heard and rejected efforts to conjure conflicts between the Arbitration Act and other federal statutes."[98] Additionally, it noted that the plaintiff's base claims actually arose out of the Fair Labor Standards Act ("FLSA") rather than the NLRA, and stated that the Court had long ago in *Gilmer* held that the FLSA "does not displace the Arbitration Act or prohibit individualized arbitration proceedings."[99] Furthermore, the Court added citing *Gilmer*, even if a statute expressly provides for class actions procedures, this does not foreclose the possibility of individual arbitration, and that "today's decision merely declines to read into the NLRA a novel right to class action procedures that the Board's own general counsel disclaimed as recently as 2010."[100]

The dissent in *Epic Systems*, authored by Justice Ginsburg, addressed the history of the FAA and of the NLRA, in addition to public policy considerations.[101] For example, the FAA was originally designed to enforce arbitration agreements among *merchants*. Additionally, for more than seventy-five years, the National Labor Relations Board ("NLRB") had "held that the NLRA safeguards employees from employer interference when they pursue joint, collective, and class suits related to the terms and conditions of their employment."[102] In fact, the NLRA was enacted precisely because individual employees generally have little negotiation leverage in comparison to their employers, and this motivating purpose, the dissent thought, should inform the Court's holding in this case. Furthermore, in 2012, the NLRB specifically prohibited employee contracts barring class action procedures regardless of forum (arbitral or court). The dissent viewed

[95] *Id*.
[96] *Id*. at 1632 (reversing the appeals court decisions' in *Epic Systems* and *Ernst & Young* but affirming the appeals court's decision in *Murphy Oil*).
[97] Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018).
[98] *Id*. at 1627.
[99] *Id*. at 1626.
[100] *Id*. at 1630.
[101] *See generally id*. (Ginsburg, J. dissenting).
[102] *Id*. at 1637 (Ginsburg, J., dissenting).

"[s]uits to enforce workplace rights [as] collectively fit[ting] comfortably under the umbrella 'concerted activities for the purpose of . . . mutual aid or protection'"[103] in the NLRA. Accordingly, Justice Ginsburg stated, "I would hold that employees' §7 rights [under the NLRA] include the right to pursue collective litigation regarding their wages and hours, [and] I would further hold that employer-dictated collective-litigation stoppers, i.e. "waivers," are unlawful."[104] The dissent urged Congress to correct "the Court's elevation of the FAA over workers' rights to act in concert."[105]

Finally, in April 2019, the Court decided *Lamps Plus*.[106] The plaintiff, Frank Varela, was one of 1300 Lamps Plus employees who had personal tax information stolen as a result of a corporate data breach.[107] These employees had signed an arbitration agreement upon beginning their employment with the company.[108] After Varela's information was used to file a false tax return, he filed a class action suit against Lamps Plus in a Federal District Court in California.[109] Lamps Plus moved to compel bilateral arbitration and to dismiss the suit.[110] The District Court dismissed Varela's claims, ordered arbitration, and authorized the arbitration to proceed on a classwide basis.[111] Lamps Plus appealed. The Ninth Circuit affirmed[112] and explained that no language in the arbitration agreement explicitly addressed classwide procedures.[113] Nevertheless, the Ninth Circuit viewed the agreement as ambiguous because it believed that various phrases in the agreement could support both parties' perspectives.[114] However, California, like most states, construes ambiguous contractual language against the drafter (here, Lamps Plus), especially in the case of adhesion contracts.[115] Therefore, the Ninth Circuit held that Varela's interpretation prevailed, which permitted the arbitration to proceed on a classwide basis.[116]

In a five-to-four decision, the Supreme Court reversed.[117] It considered "whether the FAA . . . bars an order requiring class arbitration when an agreement is not silent, but rather 'ambiguous' about the availability of such arbitration."[118] The Court deferred to and accepted the Ninth Circuit's determination that the agreement was ambiguous.[119] Nevertheless, it held that a court cannot compel classwide arbitration when an arbitration agreement is silent about the issue, it also may not do so when an arbitration

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[103] *Id.*
[104] *Id.* at 1641.
[105] *Id.* at 1633.
[106] A large part of this summary of Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019), is from Colleen Baker, *A Comment or Two on Lamps Plus v Varela*, LAW PROFESSOR BLOGS NETWORK: BUS. LAW PROF BLOG (Apr. 28, 2019), https://lawprofessors.typepad.com/business_law/2019/04/a-comment-or-two-on-lamps-plus-v-varela.html.
[107] *Lamps Plus*, 139 S. Ct. at 1412–13.
[108] *Id.* at 1413.
[109] *Id.* at 1412–13.
[110] *Id.* at 1413.
[111] *Id.*
[112] With one judge dissenting.
[113] *Lamps Plus*, 139 S. Ct. at 1413.
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *See generally id.*
[118] *Id.* at 1412.
[119] *Id.* at 1415.

agreement is ambiguous about the issue.[120] This echoed the Court's prior holding in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp*.[121] The Court reiterated that classwide arbitration is importantly distinct from traditional, individual arbitration and "undermines the most important benefits of that familiar form of arbitration" such as informality, speed, economy.[122] The Court also noted that classwide arbitration "introduce[s] new risks and costs for both sides," particularly for the defendant, and creates significant due process issues.[123] Therefore, "[t]he . . . [FAA] requires more than ambiguity to ensure that the parties actually agreed to arbitrate on a classwide basis."[124] Hence, if a state law contract interpretation rule—such as construing ambiguous contract language against the drafter—thwarts implementation of the purposes and objectives of the FAA, it is preempted. The FAA is responsible for resolving ambiguity in arbitration provisions, not state law. As the Court had stated in *Concepcion*, even a purportedly neutral, general rule of interpretation could be preempted if it directly or indirectly targeted arbitration.

Citing *Stolt-Nielsen*, the Court heavily emphasized that the FAA made arbitration "a matter of consent, not coercion,"[125] and that arbitrators only have the authority that the parties have agreed to give them. The Court stated further that a default rule of interpretation applied to ambiguous language in the contract "is by definition triggered only after a court determines that it cannot discern the intent of the parties."[126] Hence, in cases such as this one, a claim that parties consented to classwide arbitration would be "manufactured" by a state law, policy-based default rule. It would not result from the parties' consent, which was foundational to the enforceability of the arbitration agreement.

In her dissent, Justice Ginsburg forcefully stated: "I write separately to emphasize once again how treacherously the Court has strayed from the principle that 'arbitration is a matter of consent, not coercion.'"[127] She continued: "Today's decision underscores the irony of invoking 'the first principle' that 'arbitration is strictly a matter of consent' . . . to justify imposing individual arbitration on employees who surely would not choose to proceed solo."[128] Justice Ginsburg argued that the FAA initially had a narrow purpose: to overcome judicial prejudice towards arbitration between commercial entities (merchants).[129] It was not intended for use in contracts between employers and employees or businesses and consumers in which there was a vast difference in the parties' bargaining power. Arbitration clauses in employment and consumer adhesion contracts have greatly expanded because of the Court's jurisprudence and, at the same time, the Court has stymied a collective approach by enforcing class action waivers,

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[120] *Id*. at 1417.
[121] 559 U.S. 662 (2010).
[122] *Lamps Plus*, 139 S. Ct. at 1415.
[123] *Id*. at 1416 (quoting Epic Sys. Corp v. Lewis, 138 S. Ct. 1612, 1623 (2018).
[124] *Id*. at 1415.
[125] *Id*. (quoting Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662 (2010)).
[126] *Id*. at 1417.
[127] *Id*. at 1420 (Ginsburg, J., dissenting) (quoting Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662, 681 (2010)).
[128] *Id*. at 1421.
[129] *Id*. at 1420 (Ginsburg, J., dissenting)

making it very difficult to vindicate rights in practice. Justice Ginsburg called upon Congress to quickly correct the Court's path, particularly in regard to claimants' ability to take collective action.[130]

Justice Sotomayor also authored a dissent, arguing that the Court "went wrong years ago" in deciding that class action arbitration was fundamentally different from individual arbitration.[131] She stated that a class action was "simply 'a procedural device.'"[132] Justice Sotomayor further argued that employees signing an arbitration agreement should not be expected to understand that they are forfeiting a right to bring a classwide procedure.[133] Indeed, from this article's perspective, many such employees likely do not even understand the basics of arbitration or of arbitration agreements. Justice Sotomayor found the arbitration agreement at issue to be ambiguous.[134] She noted the majority did not actually take a position about whether the clause was ambiguous and stated that its opinion "invades California contract law without pausing to address whether its incursion is necessary."[135]

Finally, in her dissent, Justice Kagan wrote that the resolution to *Lamps Plus* should have been straightforward.[136] She argued that Court precedent holds that the interpretation of arbitration agreements is governed by state law as long as such law has a neutral application (and did not expressly or covertly/subtly discriminate against arbitration).[137] She viewed the agreement at issue as "best understood to authorize arbitration on a classwide basis,"[138] and argued that even if the agreement were to be ambiguous, it would still authorize class arbitration. According to a neutral principle of contract interpretation, it would be construed against the drafter, Lamps Plus.[139] As Justice Kagan stated: "All the anti-drafter rule asks about is who wrote the contract."[140] She disagreed that *Stolt-Nielsen* controlled this case, arguing that case was about a unique situation in which the parties had stipulated there was no agreement on whether a class action could be brought.[141] Therefore, she asserted:

> The majority can reach the opposite conclusion only by insisting that the FAA trumps that neutral state rule whenever its application would result in class arbitration. That holding has no basis in the Act – or in any of our decisions relating to it (including the heavily relied-on Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp. . . . . Today's opinion is rooted instead in the majority's belief that class arbitration 'undermine[s] the central benefits of arbitration itself.' . . . But that policy view-of a piece with the majority's ideas about class litigation

[130] *Id*. at 1422.
[131] 139 S. Ct. at 1427 (Sotomayor, J., dissenting).
[132] *Id*. (quoting W. RUBENSTEIN, NEWBERG ON CLASS ACTIONS §1:1 (5th ed. 2011)).
[133] *Id*.
[134] *Id*.
[135] *Id*. at 1428.
[136] *Id*. (Kagan, J. dissenting).
[137] *See id*.
[138] *Id*. (Kagan, J., dissenting).
[139] *Id*.
[140] *Id*. at 1432.
[141] *Id*. at 1428.

– cannot justify displacing generally applicable state law about how to interpret ambiguous contracts.[142]

### D. SUMMARY

In *Epic Systems,* the Court's opinion asserted that the dissent relied more upon history and public policy arguments rather than upon its precedent. This article does not take a position on whether *Southland*, *Concepcion*, and the post-*Concepcion* line of cases, have been correctly decided as a matter of Court precedent. Rather, in providing an overview of seminal cases in the Court's recent arbitration jurisprudence, it seeks to illustrate how powerful economic actors in a specific area of the law astutely use the law to benefit their economic interests; they can then craft arbitration agreements in certain types of contracts—such as consumer adhesion contracts and employment agreements—that while technically legal nevertheless raise important ethical and public policy concerns.

In the area of arbitration, the Court has in essence taken the position that arbitration agreements will be specifically enforced unless a general contract defense such as fraud, duress, unconscionability etc. is applicable to the entire contract in which the arbitration provision is contained. Absent such circumstances, the arbitration agreement will be specifically enforced. This position can be potentially highly problematic if the drafter does not exercise ethical restraint when drafting such provisions in contexts in which differentials in bargaining power, such as in consumer adhesion contracts and many employment agreements, render the idea of mutual consent largely meaningless. Finally, Part III will discuss further ethical considerations related to corporate legal strategy in the area of arbitration.

## III. THE ETHICS OF CORPORATE LEGAL STRATEGY

Courts jealously guard their prerogative to ensure justice between disputing parties. Arbitration clauses threaten that prerogative; hence, it is not surprising that courts have been reluctant to give these clauses *carte blanche* enforcement.[143] Two primary concerns come to the fore. Clauses drafted prior to the dispute introduce the possibility that the non-drafting party did not fully appreciate the waiver of rights incumbent in the arbitration language. Hence, courts have been less likely to enforce *ex ante* arbitration than *ex post* arbitration where the parties would be more alert to the issues, and the agreement would have been entered on more equal ground.[144] Second, courts are concerned with unequal bargaining power. Arbitration clauses negotiated between a strong labor union and corporate management are given more deference than clauses drafted by an organization's lawyer

[142] *Id*.
[143] Prior to the passage of the Federal Arbitration Act of 1925, state courts routinely declined to order specific performance of arbitration agreements. *See* Julius H. Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 270 (1926). Backlogs in the courts prompted the business community to seek legislation enabling merchants to enter into binding arbitration agreements. *See id*. at 269.
[144] *Id*. at 270 (noting that Congress did not intend the FAA to address adhesion contracts).

and then signed by consumers, employees, patients, or others who have little choice or understanding of the clause.[145]

By passing the Federal Arbitration Act of 1925, Congress sought to assuage judicial suspicions regarding abusive arbitration.[146] Section 2's savings clause strikes a key balance. It states that arbitration agreements are "valid, irrevocable, and enforceable, save on such grounds as exist in law or equity for the revocation of any contract."[147] For sixty years, judicial interpretation of this provision assured that most, if not all, *ex post* arbitration agreements and agreements negotiated between equals would receive *carte blanche* enforcement, while *ex ante* agreements derived from unequal bargaining power would be judged under an unconscionability standard.[148] Enforcing consensual arbitration agreements was particularly important in the 1920s when these agreements were typically found in supply chain or other business to business settings.[149] After the FAA, arbitration contracts between merchants would receive the same deference as any other contract. If the court found overreaching by the drafting party, however, the arbitration clause would be struck as unconscionable and the right to judicial review preserved.[150]

As Part I discussed, the U.S. Supreme Court began to revisit the compromise struck by Section 2, particularly the application of the FAA to state courts beginning in the 1980s. Between 1983 and 2010, there were more than a dozen Supreme Court decisions in arbitration cases that expanded the scope of the FAA and restricted the ability of state courts to use the unconscionability doctrine to address overreaching.[151] Many of these cases

[145] *See, e.g.*, Hooters of America, Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999) (affirming a district court's refusal to compel arbitration of a Title VII sexual harassment claim where the arbitration agreed to between employer and employee was so one-sided that the employer lacked good faith in extracting the agreement to arbitrate).

[146] *See* Katherine V.W. Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 969–94 (1999) (discussing the reluctance of courts to enforce arbitration agreements and the enactment of the FAA).

[147] Federal Arbitration Act, 9 U.S.C. § 2 (2006).

[148] *See generally* RADIN, *supra* note 17, at 124–35 (discussing the history or unconscionability adjudication, both prior to and after *Southland*, as applied to arbitration agreements found in contracts of adhesion); Daniel T. Ostas, *Predicting Unconscionability Decisions: An Economic Model and an Empirical Test*, 29 AM. BUS. L.J. 535 (1992) (examining the factual nuances found in a set of 330 unconscionability cases decided between 1962 and 1992).

[149] *See* Cohen & Dayton, *supra* note 143, at 265–66, 280–81 (discussing the enactment of the FAA in 1925 with sole reference to business to business settings); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286, 323 (2013) (noting that the FAA was enacted with the "seemingly limited purpose of overcoming the then existing 'judicial hostility' to the arbitration of contracts between businesses"); Stone, *supra* note 146, at 969–76 (noting that the use of arbitration began in merchant-to-merchant settings).

[150] *See* Miller, *supra* note 149, at 323 (noting that the FAA was not designed to address contracts where one party had relatively little bargaining power).

[151] *See* Rent-A-Center, West v. Jackson, 561 U.S. 63, 70–71 (2010) (interpreting the "severability doctrine" in a way that eliminated many unconscionability challenges to arbitration clauses); Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681, 687 (1996) (holding that a Montana law requiring arbitration clauses to be conspicuous was preempted by FAA); Mitsubishi Motors v. Soler Chrysler-Plymouth, 473 U.S. 614, 624–28 (1985) (finding that the FAA also applied to statutory disputes and not just contractual disputes); Southland Corp. v. Keating, 465 U.S. 1, 10–11 (1984) (holding that despite language in FAA Section 2 seeming to preserve the role of state law to regulate arbitration, the FAA preempted any state laws with which it conflicted); Moses H. Cone Mem'l Hospital v. Mercury Constr. Corp., 460 U.S. 1, 24–25 (1983) (noting that when in doubt, the FAA controls); Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 405 (1967) (stating that parties must arbitrate whether a contract was procured by fraud (the separability doctrine)).

set the stage for *Concepcion*.[152] The cases also set the groundwork for the employment cases, *Epic Systems* and *Lamps Plus*. The FAA contains a clause that seems to exclude employment disputes from the statute's coverage; Section 1 provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[153] Nonetheless, in 1991, in *Gilmer v. Interstate/Johnson Lane Corp.,* the Supreme Court applied the FAA to an employment case, ruling that an employee was required to bring his age discrimination complaint to arbitration rather than to a court.[154] In 2001, in *Circuit City Stores, Inc. v. Adams*,[155] the Supreme Court interpreted the exemption for "contracts of employment" exceedingly narrowly. It ruled that the statute applied to all contracts of employment except those involving workers who, like seamen and railroad workers, were engaged in transportation that crossed state lines.[156] Since then, courts have applied the FAA to numerous employment cases, including the 2018 case of *Epic Systems*[157] and the 2019 case of *Lamps Plus*.[158]

### A. PARRYING ENTREPRENEURIAL LITIGATION

The impact of the Supreme Court's recent arbitration decisions has been to make arbitration the only forum available in practice for resolving disputes in many cases. Courts will not permit state legislatures to constrict arbitration and they will enforce arbitration agreements in all but the rarest circumstances, regardless of how much they advantage the stronger parties. In light of these Supreme Court rulings, it is not surprising that the use of arbitration by private-sector businesses and employers has grown enormously.[159]

The shift in arbitration law is having dramatic effect on class action litigation. Such litigation has always been somewhat controversial. Collective actions avoid the waste of judicial time and resources necessary when essentially similar cases are tried separately. Yet, collective actions can cause perverse incentives. At times, the interests of the plaintiffs' class action attorneys do not conform to the interests of the plaintiffs themselves. In the extreme, the plaintiff lawyer plays the role of the principal, not the agent, as only the attorney stands to gain significantly from the action.

Consider, for example, the facts in *Concepcion*. AT&T advertised a free phone to customers willing to sign a two-year service agreement. The promotional materials did not mention that the customer would be expected to pay California sales tax on the phone. The complaint alleged fraud. Yet, fraud requires proof of: (1) scienter, (2) a false statement, (3) reasonable reliance, and (4) materiality. In this light, the complaining customers did not

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[152] *See supra* Part I(A) discussing Supreme Court opinions leading to AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
[153] Federal Arbitration Act, 9 U.S.C. § 1 (2006).
[154] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).
[155] 532 U.S. 105 (2001).
[156] *Id*. at 109.
[157] *See* Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1619–20 (2018).
[158] *See* Lamps Plus, Inc. v Varela, 139 S. Ct. 1407, 1412–13 (2019).
[159] Stone, *supra* note 13, at 166–71.

strike a very sympathetic posture. It is doubtful that this was fraudulent. Was there an intent to deceive? Was there a false statement? Was it reasonable for the customers to think the transaction was tax free? And, most importantly, is a fifteen-dollar tax on a three-hundred-dollar phone material?

Upon reflection, it appears that the only parties truly interested in bringing the fraud action were the class action plaintiff attorneys. Each customer paid fifteen dollars in tax for the phone, but there may have been millions of customers in the state of California. By certifying the class, the potential award becomes significant and the plaintiff attorneys gain significant leverage in settlement negotiations with defense counsel.[160] Professor John Coffee coined this situation "entrepreneurial litigation."[161] It involves situations where litigation is instigated and typically funded by plaintiff attorneys, rather than by the injured parties, and the parties themselves have relatively little or no interest in the outcome.

The threat posed by entrepreneurial litigation is not confined to consumer fraud cases. By the 1930s, the term "strike suit" was already understood to refer to an action whose nuisance value gave it a settlement value greater than its merits.[162] During the 1950s and 1960s plaintiff attorneys perfected the antitrust class action.[163] Critics were heard to describe this trend as leading to "legalized blackmail."[164] In the 1970s, the acknowledgement of implied causes of action, principally under Rule l0b-5, resulted in a sharp increase in securities class actions.[165] The 1980s witnessed an eruption of activity in the "mass tort" field, principally in toxic products class actions that raise multifaceted issues of causation and scientific proof including well documented litigation over Agent Orange, the Dalkon Shield, and asbestos.[166] This litigation is typically funded by the attorneys themselves. For example, in the Agent Orange case, five plaintiff's attorneys each contributed a minimum of 250 thousand dollars to a common expense fund, and the plaintiff's management committee spent almost two million dollars in expenses over a nine-month period in preparation for trial.[167]

Some commentators have analyzed the incentive for extortion in nuisance suits and concluded that rational, well-informed plaintiffs might bring an action that has no chance of success at trial in order to extort a

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[160] The U.S. Supreme Court has noted that nuisance actions can give plaintiff's attorneys extortionate leverage over defendants. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 739–40 (1975); *see* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 571 (2d Cir. 1968) ("[T]he only persons to gain from a class suit are not potential plaintiffs, but the attorneys who will represent them.").

[161] *See* John C. Coffee, *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 627 (1987) (developing the notion of "entrepreneurial litigation"). *See generally* JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE (2015) (collecting and restating ideas developed over two decades of scholarship).

[162] *See* Note, *Extortionate Corporate Litigation: The Strike Suit*, 34 COLUM. L. REV. 1308, 1308 (1934).

[163] *See* Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 5–12 (1971).

[164] *Id.* at 9.

[165] *See* John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 669 (1986).

[166] *See* Diane Wagner, *The New Elite Plaintiffs' Bar*, A.B.A. J. 44, 44 (Feb. 1, 1986).

[167] *Id.* at 44.

recovery from the defendants.[168] Perhaps recognizing this potential, AT&T's lawyers in *Concepcion* defended their corporate client with a consumer-friendly arbitration clause. If the Concepcions had prevailed in arbitration, they would have been compensated with attorney fees and awarded damages in excess of the actual losses sustained.[169] Both the District Court and the Ninth Circuit held that the clause itself was fair and balanced.[170] The lower courts found for the plaintiffs by applying a California unconscionability precedent that sought to remove the potential for overreaching by the drafting party. Yet, there was no evidence of overreaching in the case. Writing for the majority, Justice Scalia overruled the Ninth Circuit and used the FAA to preempt state unconscionability protections as applied to arbitration clauses.

### B. BOILERPLATE AND OVERREACHING

The majority in *Concepcion* chose a set of sympathetic facts with which to advance its views of the application of Court's precedents regarding the use of arbitration in consumer cases. The plaintiffs had what appears to be a weak substantive complaint, and the defendant's lawyers had drafted a relatively consumer-friendly clause. Critics complain that the precedent sets a perverse incentive for legally astute corporate executives to use adhesion contracts to deny consumers, patients, borrowers, employees, and other individuals meaningful access to judicial remedies. Adhesion contacts are not individually negotiated, are typically not negotiable, and are seldom read. They also introduce the potential for overreaching.

Professor Mary Jane Radin draws a distinction between contracts that are fully negotiated between equals and contracts that contain unread and non-negotiable "boilerplate."[171] Radin describes two distinct "worlds" of contracting: World A ("Agreement") and World B ("Boilerplate").[172] The world of agreement is informed by consent. One envisions two farmers in an 1820 field dickering over the sale of livestock, or alternatively, a battery of union lawyers negotiating detailed working rules with a team of lawyers from corporate management in the 1950s. In World A, no party has an information advantage and no party will sign until a mutually advantageous, and hopefully efficient, agreement is met. In World A, the court properly plays the role of a neutral referee. It provides standard terms that facilitate the transaction, guards again fraud, duress, and illegality, and provides a remedy in the event of a breach.[173] But otherwise, the court is quite passive.

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[168] *See, e.g.*, Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 59 (1975); David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 3 (1985).

[169] The clause provided that AT&T would pay customers a minimum of $7,500 and twice their attorney's fees if they obtained an arbitration award greater than AT&T's last settlement offer.

[170] The District Court found that the arbitration scheme provided an adequate incentive for the prosecution of meritorious claims, and the Ninth Circuit noted that aggrieved customers who filed claims would be "essentially guarantee[d]" to be made whole. *See* Laster v. AT&T Mobility LLC, 584 F. 3d 849, 856 n.9 (9th Cir. 2010).

[171] *See generally* RADIN, *supra* note 17.

[172] *Id.* at xiii–xvii.

[173] *See generally* ANTHONY T. KRONMAN & RICHARD A. POSNER, THE ECONOMICS OF CONTRACT LAW (1979) (explaining three economic functions of contract law: providing standard terms, discouraging fraud, and providing a clear sanction for breach so as to encourage efficient performance).

By leaving the terms of the contract to the parties, transaction costs are reduced, and a decentralized market emerges.

World B offers a very different picture. Here one finds the world of the adhesion contract. One party drafts the agreement and presents it on a take-it-or-leave it basis. The terms, sometimes called "boilerplate" due to their rigid and non-negotiable nature, are seldom read by either the sales agent, who typically has no authority to alter the contact, nor by the individual being presented the writing. Boilerplate terms usually employ legalistic language. The salesperson presenting the contact may be unable to explain its meaning. Often the seller delivers the boilerplate when the product itself is delivered, and sometimes the terms are on a paper inside a shrink-wrapped package. At other times, there is no paper at all; the customer, patient, borrower, employee, tenant, or other individual simply "clicks online" and the boilerplate arguably controls a variety of details associated with the transaction including the choice of forum, warranty disclaimers, end-use license agreements, and most notably for present purposes, arbitration provisions.

Adhesion contracts provide an incentive for overreaching. Consider, for example, the facts presented in *Carnival Cruise Lines, Inc. v. Shute*.[174] An adhesion contract, delivered to a customer after her non-refundable ticket had been purchased, required her to bring any personal injury claim in a Florida court even though she lived in Washington.[175] Although Mrs. Shute never signed the agreement, the U.S. Supreme Court assumed she had agreed to its terms and upheld the choice of forum provision.[176] The 1991 precedent has been consistently followed.[177] Today, adhesion contracts are being used routinely to extend intellectual property rights beyond the limits posed by fair use,[178] to limit consequential damages in tort claims,[179] and to waive a host of statutory claims.[180] Adhesion contracts are also being used to require binding, bilateral arbitration that denies consumers, employees and other individuals a day in court and frustrates attempts at collective actions.

The question arises as to why consumers, tenants, patients, employees, or other individuals would sign or click the acceptance button, with regard to contract terms which they have never read.[181] The most innocent explanation is that many of these terms enable the stronger party to save money, and part of these savings can be passed along to the non-drafting party.[182] Presumably it is less expensive for Carnival Cruise to always litigate

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[174] 499 U.S. 585 (1991).

[175] *Id.* at 587–88.

[176] *Id.*

[177] *See* RADIN, *supra* note 17, at 6 (discussing the influence of the *Carnival Cruise* precedent).

[178] *Id.* at 211–12.

[179] *Id.* at 6–7 (discussing adhesion contracts that contain exculpatory clauses).

[180] *See, e.g.*, Am. Express v. Italian Colors Restaurant, 570 U.S. 228 (2013) (denying collective action in a Sherman Act setting); *see also* Epic Sy. v. Lewis, 38 S. Ct. 1612, 1623–30 (2018) (using bilateral arbitration to prohibit collective enforcement of federal overtime pay regulations); Circuit City Stores., Inc. v. Adams, 532 U.S. 105, 122–24 (2011) (allowing boilerplate to waive a state-law employment discrimination action).

[181] *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008) (exploring the limits of the economic assumption of hyper-rationality).

[182] *See* Stephen Ware, *The Case for Enforcing Adhesive Arbitration Agreements—With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 277–78 (2006) (noting that reducing consumer choices reduces costs and enables lowers price).

in Florida and these cost savings can be shared. One suspects, however, that most people do not read their contracts because they believe: (1) that the terms are customary; (2) that they are very unlikely to ever need to use the rights addressed; and (3) that no other terms are available in the marketplace.[183] Of course, there is no guarantee that any cost savings will be shared, rather than just pocketed by the drafting party, and one may wonder legitimately whether savings for the consumer is even a partial motivation for the use of such contracts.

From the point of view of the drafting party, one finds strong economic reasons to prefer arbitration to litigation and to bar collective actions. The most innocent reason, as mentioned above, and as emphasized by the pro-arbitration majorities, derives from the cost savings achieved through informality. But one can imagine more sinister reasons as well. The dissenting justices in *Concepcion* expressed concern that mandatory bilateral arbitration could lead to intentional frauds, where individually suffered damages would not warrant the expense of arbitration, but the collective sum retained by the drafting party was significant. In addition, a choice of law clause within an arbitration agreement could be used to select a forum with corporate-friendly rules. Arbitration also carries no precedential value, is generally confidential, and it does not require arbitrators to be attorneys. Perhaps most importantly, there is some concern that arbiters tend to be pro-business. In one extreme case, the National Arbitration Forum found in favor of a consumer or an employee in only thirty cases from a caseload of over eighteen thousand.[184] Since corporations are repeat players in arbitration, there is an inherent conflict of interest where arbiters seek clients in competition with other private arbitration companies. One suspects the need to curry favor with one's repeat trading partner.

Using arbitration clauses to prohibit class actions in some situations seems very inefficient. In the *Southland* case there were eight hundred franchisees who had very similar claims against the franchisor.[185] Because arbitration decisions do not evoke the power of *res judicata,* these claims could potentially be arbitrated eight hundred times, generating remarkable waste. In *American Express*, the denial of a class action procedure rendered the antitrust claims effectively unenforceable because no single claimant could justify the expert witness fees necessary to prove the alleged violation.[186] Precedents like *Southland* and *American Express* create an incentive for over-reaching and significantly increase transaction costs.

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[183] *See* RADIN, *supra* note 17, at 24–29 (discussing cognitive psychology, heuristic bias, and bounded rationality). For an introduction to the legal insights offered by cognitive psychology, see generally BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein, ed., 2000) and DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011).

[184] *See* RADIN, *supra* note 17, at 288–90 (discussing the potential for arbiter bias).

[185] Southland Corp. v. Keating, 465 U.S. 1, 8 (1984) (noting that there were eight hundred franchisees seeking to join the class action alleging fraud).

[186] *See* Am. Express v. Italian Colors Rest., 570 U.S. 228, 235–36 (2013) (stating, somewhat cryptically, that a claimant could vindicate a federal claim through arbitration even if it were economically infeasible to prove that claim in an arbitral forum).

### C. MINIMUM MORAL FRAMEWORK FOR THE ARBITRATION PROCESS

Both corporate executives and corporate lawyers owe fiduciary obligations to shareholders and to the firm itself. The court cases discussed above enable executives and counsel to insert bilateral arbitration clauses into adhesion contracts with their firm's customers and employees. In *Epic Systems* the majority frames the question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration?"[187] But, were the agreements voluntary? If so, then no one could object. Yet, managers at Epic Systems e-mailed employees a contract requiring resolution of wage and hours claims by individual arbitration. That corporate communication stated that if the employees continued "to work at Epic," they would "be deemed to have accepted the agreement."[188] E&Y similarly e-mailed its employees an arbitration agreement which stated that the employees' continued employment would indicate their assent to its terms.[189] Employees at Epic Systems and at E&Y did not face much of a choice: accept arbitration on their employer's terms or give up their jobs.

One could argue that the dispute resolution clauses in *Epic System* reduce the costs of the firms. Yet, implementation of these dispute resolution techniques also necessitates professional self-restraint. As noted by Professor Milton Friedman, professionalism in corporate settings requires increasing shareholder wealth *subject to* law and ethical custom.[190] Once it becomes apparent to the firm's lawyers and to the firm's executives that legally required overtime pay is going unpaid at Epic Systems, or that employees are being misclassified at E&Y, then corrective actions becomes required. Simply hiding behind the bilateral arbitration agreement and choosing a corporate friendly arbiter while stonewalling employees, would be contrary to both the law and to widely shared ethical custom. Ethical custom requires treating employees with due respect, avoiding unfair consequences, and acting with integrity.[191] In short, widely shared ethical custom would include taking the firm's legal obligations seriously.

The important point is that *there is nothing wrong with resolving consumer and employee concerns with individual arbitration*. Yet, the ethics of corporate legal strategy, or alternatively, the ethics of legal astuteness, requires that this cost-saving technique be used properly. The European Union is attempting to set ethical guidelines on arbitration through legislation.[192] State law in the United States tends to rely on the courts to

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[187] *See* Epic Sys. v. Lewis, 138 S. Ct. 1612, 1612 (2018).

[188] *Id*. at 1636, n.2 (Ginsburg, J., dissenting).

[189] *Id*.

[190] In an oft-cited essay, Milton Friedman wrote that the social responsibility of the corporate executive "generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom." Milton Friedman, *The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970, § SM (Magazine), at 23.

[191] *See generally* ARLEN LANGVARDT ET AL., BUSINESS LAW: THE ETHICAL, GLOBAL, AND E-COMMERCE ENVIRONMENT 117–24 (2018) (noting the three traditional approaches to ethics: deontology, teleology, and virtue).

[192] The European Commission Directive of 1993 on Unfair Contracts provides: "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer." RADIN, *supra* note 17, at 234–35 (quoting Unfair Contract

protect against unconscionable business practices that introduce the potential for oppression and unfair surprise.[193] This has traditionally included judicial review of one-sided adhesion contracts. With the recent shift in the U.S. Supreme Court's interpretation of the FAA, much of these state unconscionability protections have been preempted,[194] and areas of federal law have been muted.[195] Hence, the responsibility for ethical restraint has moved to corporate executive suites and to the corporate lawyers who advise on legal matters.

Writing in dissent in *Lamps Plus*, Justice Ginsburg laments that the newfound interpretation of the FAA is being applied to contracts of adhesion. She argues that arbitration is best suited for a fully negotiated context where both parties seek to streamline the dispute resolution process. Adhesion settings seem problematic. However, Ginsburg's *Lamps Plus* dissent also sounds a note of hope. She writes: "Developments outside the judicial arena ameliorate some of the harm this Court's decisions have occasioned."[196] She observes that some companies no longer require employees to arbitrate sexual harassment claims and other companies have extended their no-forced-arbitration policy to other claims as well.[197] Perhaps this trend reflects concern with employee morale, seeks to build goodwill among the firm's stakeholders, or attempts to forestall regulatory intervention.[198] Less cynically, this self-restraint may simply reflect a professional desire to act responsibly with regard to one's social responsibilities within the law.

In the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Congress required the Consumer Financial Protection Bureau ("CFPB"), its newly established independent government bureau, to conduct a study of arbitration agreements in the consumer finance area. Following the study, the CFPB implemented a rule in July 2017 that banned mandatory arbitration agreements in certain types of consumer financial contracts. Congress, however, quickly passed a bill, signed by the President, to overturn the rule.[199] Dodd-Frank also provided the Securities Exchange Commission ("SEC") with the authority to restrict the use of mandatory

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Terms Directive 1993/13, 1993 O.J. (L 95) (EEC).). Seventeen such terms are included in the Annex, including "excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring consumers to take disputes exclusively to arbitration." *Id.* at 235–36.

[193] The literature on unconscionability is quite extensive. For a useful introduction, see Ostas, *supra* note 148, at 535–41. Unconscionability precedents typically require some combination of procedural and substantive unfairness. *See generally* Arthur Allan Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967) (introducing this terminology). Though unconscionability traces to early equity courts, the doctrine has also been included in the U.C.C. § 2-302 (1962) (using the language of "unfair surprise" and "oppression" to explain the policies underlying unconscionability concerns).

[194] *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

[195] *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013) (allowing an arbitration clause to bar concerted actions that could help redress for a Sherman Act violations); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (enforcing a class action waiver even though the federal Age Discrimination in Employment Act expressly permitted collective actions).

[196] Lamps Plus Inc., et al. v. Varela, 139 S. Ct. 1407, 1422 (Ginsburg, J., dissenting).

[197] *Id.*

[198] *See* RADIN, *supra* note 17, at 243–48 (speculating on factors that may persuade corporations to restrain economic prerogatives generated by recent interpretations of the FAA).

[199] *See* Yuka Hayashi, *Trump Signs Bill Scrapping Rule that Made It Easier to Sue Banks*, WALL ST. J. (Nov. 1, 2017).

arbitration agreements in certain areas of the securities industry.[200] Thus far, the SEC has not made any such restrictions. However, the Financial Industry Regulatory Authority ("FINRA"), a self-regulatory organization that regulates broker-dealers and is overseen by the SEC, prohibits arbitration of class action claims.[201] Of course, FINRA's rules only apply to its members, but they nonetheless demonstrate the potential for professional self-restraint.

In recent article, Professor Robert Bird and David Orozco distinguish five "pathways" of legal strategy: (a) avoidance; (b) compliance; (c) prevention; (d) value; and (e) transformation.[202] Whereas the first three pathways center on legal risk management, the final two emphasize the generation of future-oriented business opportunities.[203] Professor Constance Bagley emphasizes the need for ethical reflection and self-restraint when implementing a legal strategy:

> Contracts can fill regulatory gaps and lawyers can serve as "creative legal engineers" and "transaction cost engineers" who facilitate legitimate global business transactions. But "creative compliance" and taking advantage of unintended legal loopholes can thwart the rule of law. Legally astute managers . . . understand that business decisions consist of continuous, interrelated economic and moral components and that the moral aspects of choice are the final component of strategy.[204]

What then are moral minimums with regard to using arbitration clauses to bar collective actions? Two safe harbors seem appropriate. First, there would appear to be very little ethical concern with *ex post* arbitration clauses. Once a dispute arises, all parties will take note, and any resulting dispute resolution procedure is likely to be reasonable. Second, there also would seem to be very little ethical concern with *ex ante* arbitration clauses negotiated between two sophisticated parties with reasonably similar bargaining power who are both represented by counsel. Again, the potential for overreaching seems minimal when bargaining power seems equal.

Ethical concerns arise with contracts of adhesion. Justice Breyer, writing the dissent in *Concepcion,* expressed the potential for intentional petty frauds that would go unpunished if collective actions were barred with bilateral arbitration clauses.[205] Responding to this concern, one could introduce legislation,[206] empower a regulatory agency,[207] or potentially reinvigorate the

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200 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, H.R. 4173, 111th Cong. § 921 (2010).

201 FIN. INDUS. REGULATORY AUTH., RULE 13204 (2012); FIN. INDUS. REGULATORY AUTH., RULE 2204 (2008).

202 *See* Bird & Orozco, *supra* note 19, at 82–86.

203 *Id*. at 86.

204 Constance E. Bagley, *Foreword* to LEGAL STRATEGIES: HOW CORPORATIONS USE LAW TO IMPROVE PERFORMANCE v, viii (Antoine Masson & Mary J. Shariff eds., 2010) (quotation marks in original; citations to quoted phrases omitted).

205 *See supra* notes 69–73 and accompanying text.

206 *See* RADIN, *supra* note 17, at 222 (noting that several bills have been introduced in Congress to amend the FAA and to overrule the Supreme Court's interpretations of it, but so far, each has died in committee).

207 The Frank Dodd Wall Street Reform and Consumer Protection Act of 2010 prohibits mandatory arbitration in mortgage and home equity loans. *See generally* H.R. 4173, 111th Cong. (2010).

unconscionability precedents that were in place prior to *Southland* and *Concepcion*. Alternatively, one could hope for market corrections triggered by reputation costs coupled with an appeal to voluntary social responsibility.[208] After all, intentional fraud constitutes *malum in se*, and just because fraud pays does not imply that one should engage in fraud.[209] In addition, one would hope that the marketplace would punish fraud through significant reputation costs.

The ethical concerns with collective-action bars also vary with reference to the substantive right affected. The need for rights vindication was raised most directly in the *American Express* dissent penned by Justice Kagan.[210] In that case, American Express allegedly used its monopoly power to insert a clause in an adhesion contact that made it economically infeasible for individual customers to fund a Sherman Act claim.[211] Economic logic can effectively bar vindication of overtime pay, as in *Epic Systems*,[212] or civil rights claims in matters involving discrimination.[213]

When a right to human health, safety, or dignity is involved, then at a moral minimum, legal astuteness with regard to arbitration requires an effective means of resolving the dispute. At a minimum, this would include a balanced right to due process, including a: (1) fair method of choosing an arbiter; (2) balanced access to discovery; (3) right to cross-examine witnesses; and (4) reasonable right to appeal in egregious settings. Under current law, in adhesion settings, these issues are currently regulated by imperfect market incentives coupled with an appeal to professional responsibility as embraced by corporate executives and the corporate lawyers who advise them. Whether these factors prove adequate to satisfy social demands remains to be seen.

## IV. CONCLUSION

This article examines the fundamental inseparability of legal and ethical inquiry with reference to recent changes in contract law implemented by the U.S. Supreme Court. Typically writing with a five to four majority, the Court has empowered firms to effectively bar class action lawsuits through mandatory arbitration clauses included in consumer and employment contracts. The results are predictable—firms adjust their adhesion contracts in an effort to increase their profits.

This article reviews recent legal changes, and it argues for economic self-restraint among both corporate executives and corporate lawyers who advise them. Arbitration has many virtues as it promises to reduce transaction costs and to streamline economic exchange. Yet, the ethics of legal astuteness

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208 *See generally* Douglas S. Baird, *The Boilerplate Puzzle*, 104 MICH. L. REV. 933 (2006) (arguing that concern over lack of consent to boilerplate is puzzling because market forces will tend to promote efficient terms).

209 *See generally* Daniel T. Ostas, *When Fraud Pays: Executive Self-Dealing and the Failure of Self-Restraint*, 44 AM. BUS. L.J. 571 (2007) (discussing the need for ethical self-restraint in situations where fraud is cost-effective).

210 *See supra* notes 84–85 and accompanying text.

211 *Id*.

212 *See supra* notes 97–105 and accompanying text.

213 *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

require self-restraint whenever fraud seems to pay and require respect for due process when issues of human health, safety, and dignity are in play. Restraint can be incentivized, and values can be protected by legislation, by market forces, by administrative rules, or by judicial decision. This article argues that necessary restraints and respect for central values are also advanced by an appeal to professional ethics as expressed in the concepts of legal astuteness, corporate legal strategy, and law and management generally.