LEWIS’S SHIFTING CONCEPCIONS: THE SEVENTH CIRCUIT’S STRUGGLE IN APPLYING CLASS ACTION PREEMPTION IN EMPLOYMENT CONTRACTS

MATTHEW HAMIELEC


INTRODUCTION

In 1973, Shyamala Rajender, a postdoctoral fellow at the University of Minnesota, filed a class action against the state college for sexual discrimination.1 Her efforts culminated in a settlement that enjoined the University from discriminating against women on the basis of sex.2 Three decades later, nine members of Abercrombie & Fitch’s salesforce sued the company, alleging employment discrimination on the basis of minority status and gender; the parties settled for a sum around $40 million.3 And in 2013, a class spearheaded by George McReynolds settled with Bank of America

* J.D. candidate, May 2017, Chicago-Kent College of Law, Illinois Institute of Technology; B.A./B.S./M.S., University of Illinois at Urbana–Champaign. The author would like to thank his friends and family for constantly supporting his academic and professional endeavors, as well as his SEVENTH CIRCUIT REVIEW Honors Seminar professor, teaching assistants, and peers for their editorial input.
2 Id.
after accusing the financial colossus of denying black employees equal pay and promotional opportunities in favor of white peers.  

Each of the above-noted plaintiffs used the class action procedure to leverage their resources against opponents with plentiful litigation war chests. After all, plaintiffs’ capacity to pool resources— and prosecute a claim with the prospect of a fee shift under the common fund doctrine—acts as one justification for upholding the class mechanism’s effect on litigation. Class actions reduce the frequency of imbalanced, David-versus-Goliath lawsuits, where an individual sues a corporation and risks the litigation divesting her of time and money at the hands of a wealthier, immortal opponent.  

Historically, the United States provided an accommodative environment for class filings. Yet, since the mid-2000s, the country’s jurisprudence warped from this supportive position, and has permitted individual arbitration provisions to whittle away at claimants’ access to group litigation. This gradual erosion of plaintiff classes’ rights culminated in the 2013 U.S. Supreme Court decision American Express Co. v. Italian Color Restaurant; there, a divided Court held that a federal statute’s mandate requiring enforcement of arbitration

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5 The McReynolds case, for example, featured over 1,000 plaintiffs in the purported class. Karen Weise, Judge Approves Merrill Lynch’s $160 Million Racial Bias Settlement, BLOOMBERG BUSINESSWEEK (Dec. 6, 2013), http://www.bloomberg.com/news/articles/2013-12-06/judge-approves-merrill-lynchs-160-million-racial-bias-settlement. The lawsuit brought by Ms. Rajender featured a class of all women at the University of Minnesota system that were subject to disparate promotional and hiring practices. Rajender, 563 F. Supp. at 402.


7 West v. Randall, 29 F. Cas. 718, 721 (1820).

8 Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013) (Kagan, J., dissenting) (“The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse. And here is the nutshell version of today’s opinion, admirably flaunted rather than camouflaged: Too darn bad.”).
provisions had not been overridden by federal antitrust laws that had permitted class proceedings.\textsuperscript{9} The result functionally foreclosed a group of plaintiffs from pursuing valid but financially negligible claims on an individual basis.

\textit{Italian Colors} and its precursors have been interpreted as curbing employees’, shareholders’, and consumers’ abilities to pursue certain statutorily granted rights as a group.\textsuperscript{10} In virtually every case, the Supreme Court considered these arbitration provisions’ validity, affirmed their enforceability despite their preclusive effects on class actions, and left the lower federal courts to administer its holdings in other statutory contexts.\textsuperscript{11}

This Note traces the Seventh Circuit’s application of Supreme Court jurisprudence on a contract requiring individual arbitration in \textit{Lewis v. Epic Systems Corp.}; the case addresses Epic Systems Corporation’s (“Epic”) arbitration clauses in its employment agreements—clauses which contractually blunted a plaintiffs’ class from aggregating a cause of action under the National Labor Relations Act (“NLRA”).\textsuperscript{12} The Note first overviews the caselaw surrounding class actions and arbitration provisions. In Part II, I assess the \textit{Lewis} decision for its impacts on class actions. I conclude that federal appellate courts normatively grapple between extending \textit{Italian Colors}’ holding to statutes like the NLRA,\textsuperscript{13} and protecting plaintiffs’ access to a litigation mechanism that can provide them cogent redress.\textsuperscript{14} These difficult choices lead to a veritable tapestry of decisions concerning class arbitration that both uphold the practice in some cases, and fully prevent it in lieu of individual arbitration in others. Finally, this article calls on the Supreme Court to resolve the circuit split caused by \textit{Lewis} by upholding the Seventh Circuit’s

\textsuperscript{9} \textit{Italian Colors Rest.}, 133 S.Ct. at 2306.
\textsuperscript{11} \textit{Italian Colors Rest.}, 133 S.Ct. at 2312; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).
\textsuperscript{12} \textit{Lewis v. Epic Sys. Corp.}, 823 F.3d 1147 (7th Cir. 2016).
\textsuperscript{14} 9 U.S.C.A. § 2 (Westlaw through Pub. L. No. 114-244).
decision to abrogate the arbitration provision in the plaintiffs’ contract. Such a holding would memorialize the class action’s nadir at the hands of the Federal Arbitration Act, and perpetuate a spirit that preserves collective actions’ use in asserting statutory rights.

I. OVERVIEWING CLASS ACTIONS THROUGH THE FEDERAL ARBITRATION ACT AND CASE LAW

A. The Federal Arbitration Act

The point of greatest contention in class arbitration jurisprudence, the Federal Arbitration Act (“FAA”), does not directly address class actions in its verbiage, largely because such a proceeding did not formally exist until the recent adoption of Federal Rule of Civil Procedure 23.15 Yet, the Supreme Court and its subordinate brethren have used the FAA as a justifiable fulcrum for upholding individual arbitrations.16 Thus, an overview of the FAA might help some conceptualize the issues surrounding class actions and arbitration.

Congress enacted the FAA in the Roaring Twenties both to solidify alternative dispute resolution’s (“ADR”) growing presence alongside traditional litigation, and to ward off hostile judges trying to keep their dockets from shrinking.17 Courts have honed in on two of the statute’s sections—§ 2 and § 4—as a means of scrutinizing class arbitrations’ permissiveness in the ADR context.18 Section 2 states that contractual provisions between parties that bind those parties to arbitration for disputes arising from that contract “shall be valid,

\[\text{footnotes include:} \]


16 See Italian Colors Rest., 133 S.Ct. at 2312; Concepcion, 563 U.S. at 351 (2011).

17 Fitzpatrick, supra note 10 at 163 n.6 (citing Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 219–20 n.6 (1985)) (“The House Report accompanying the [Federal Arbitration] Act makes clear that its purpose was to place an arbitration agreement ‘upon the same footing as other contracts, where it belongs’ . . . and to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate.”).

irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”

By the same token, parties who have not contractually agreed to class arbitration cannot be bound to it; one case simplified the idea to a catchy phrase: “arbitration is a matter of consent, not coercion.” In turn, § 4 compels a district court to relegate parties to arbitration when one party to the contract tries to litigate an issue covered within the scope of that contract’s arbitration clause. The Supreme Court interprets these sections together to outline where it does and does not possess the power to review arbitral decisions.

B. Summarizing a History of Alternative Dispute Resolution

Like most American law, the class action mechanism sailed its way into Yankee courts on English winds. Ironically, just as the English Court of Chancery witnessed steeply declining filings of group actions in London, the Supreme Court of the United States upheld their domestic validity in West v. Randall. Despite class actions’ availability, many lawyers relegated this tool to an unused cupboard until the Federal Rules of Civil Procedure codified the modern class action in Rule 23. Since then, lawyers have used the class mechanism in a panoply of contexts, from settling aggregate tort liability in asbestos and Agent Orange cases, to compensating shareholders in securities suits against corporations, to aggregating

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19 Id. § 2 (2012).
21 9 U.S.C § 4 (A court that is “satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue . . . shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement.”)
22 West v. Randall, 29 F. Cas. 718, 721 (1820).
23 FED. CIV. P. 23.
26 Ludlow v. BP, P.L.C., 800 F3d. 674, 685 (5th Cir. 2015).
employee discrimination claims against businesses.\textsuperscript{27} Class actions’ popularity, in tandem with litigation’s soaring use and cost, continued to rise with each passing decade.\textsuperscript{28} In the 1980’s, though, traditional litigation found itself competing with a newer, private form of dispute resolution.

Alternative dispute resolution—both through its less formal iteration, mediation, and more formalized procedure, arbitration—began its prominent rise during the Reagan administration.\textsuperscript{29} Part of this growth stemmed from the Supreme Court’s shifting outlook on ADR; in that decade, the Court swayed from its once-held belief that private dispute resolution did not adjudicate parties’ legal rights, and instead called for greater use of arbitration.\textsuperscript{30} Whether that policy shift stemmed from judges realizing that the U.S. court system suffered from incurable backlog, or whether the Burger Court sought to reaffirm a then-necrotizing right to contract, is less relevant when compared to the meteoric rise in ADR’s popularity.\textsuperscript{31}

Individuals appreciated that ADR offered efficiency and economy.\textsuperscript{32} Litigants did not spend months bogged down in procedural minutia, and arbitration served as a temporal foil to the litigiously clogged courts, whose rulings on trivial pre-trial motions could fill a span of months; in contrast, an entire arbitration could go from opening arguments to a final award in a matter of days.\textsuperscript{33} If parties wished, they could contractually curb rules of civil procedure, and

\textsuperscript{27} Tyson Foods, Inc. v. Bouaphakeo, 136 S. Ct. 1036, 1041 (2016).
\textsuperscript{29} Id.
\textsuperscript{31} Stipanowich, supra note 28at 872.
\textsuperscript{32} AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 348 (2011) (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”).
\textsuperscript{33} See id.
limit the number of experts each side could call to testify.\textsuperscript{34} Mediation is even less formal; unless stated otherwise in a contract, if the parties in mediation do not resolve their disputes, a mediator’s recommendation binds neither party.\textsuperscript{35}

Many bought into this efficacious mantra. From the mid-1990’s to the early 2000s, demand for ADR services grew four-fold.\textsuperscript{36} Like sharks drawn to blood, the commercial world soon caught whiff of ADR’s benefits, added arbitration provisions into many of their contracts with suppliers, and, in time, expanded their use of these clauses by incorporating them into employee contracts, product packaging, and stock certificates.\textsuperscript{37}

Many businesses viewed pre-dispute arbitration clauses as a golden goose. For them, employees, consumers, and shareholders provided financial sustenance; if a businesses’ relationship with one of these groups dulled, both sides contractually bound themselves to arbitration.\textsuperscript{38} Naturally, commercial entities thought that such


\textsuperscript{35} Some forms of arbitration also do not feature binding decisions, though many arbitration clauses in commercial and non-commercial settings do feature finality in judgments. \textit{Arbitration}, AMERICAN ARBITRATION ASSOCIATION, https://www.adr.org/aaa/faces/services/disputeresolutionservices/arbitration?_afrLoo p=3038444056361043&_afrWindowMode=0&_afrWindowId=658kn0n0b_1#%40 %3F_afrWindowId%3D658kn0n0b_1%26_afrLoop%3D3038444056361043%26_af rWindowMode%3D0%26_adf.ctrl-state%3D658kn0n0b_55 (last visited Dec. 1, 2016). Mediation infrequently requires the mediator to issue a decision, much less a binding one. \textit{Mediation vs. Arbitration vs. Litigation: What's the Difference?}, FINDLAW, http://adr.findlaw.com/mediation/mediation-vs-arbitration-vs-litigation-whats-the-difference.html (last visited Dec. 2, 2016).

\textsuperscript{36} Stipanowich, \textit{ supra} note 28, at 872.


agreements called for individual arbitration, meaning that the business only had to arbitrate against one employee, consumer, or shareholder at a time.\footnote{See generally \textit{Italian Colors Rest.}, 133 S.Ct. 2304 (2013); \textit{Concepcion}, 563 U.S. 333; \textit{Green Tree Fin. Corp.}, 539 U.S. 444 (2003).} However, aggrieved plaintiffs sought to bring the benefits of suing as a class into arbitration proceedings. They unconventionally combined the Rule 23 with the Federal Arbitration Act, and created a new type of proceeding: class arbitration, a class action conducted within an arbitration proceeding’s confines.\footnote{\textit{Id.}} Suddenly, the golden goose looked less like a judicially divined gift and more like a costly ugly duckling.

\textbf{C. Preconceived Notions: The Supreme Court’s Jurisprudence on Class Arbitration Before Concepcion}

After plaintiffs’ lawyers invented the class arbitration, the commercial sector quickly litigated against its validity; the first suit to make its way up to the Supreme Court was \textit{Green Tree Financial Corp. v. Bazzle}.\footnote{\textit{Id.}} The case featured a class who sued a lender for a failure to disclose certain information about its mortgages.\footnote{\textit{Id.} at 448–49.} A state trial court both certified a class action and entered an order compelling arbitration.\footnote{\textit{Id.} at 449.} The justices faced a question of first impression: whether an arbitrator could interpret an arbitration clause silent on the matter of class arbitration as forbidding the practice, or whether such interpretations were relegated to courts.\footnote{\textit{Id.} at 447.}

A plurality of justices concluded that this question constituted a matter of “procedural arbitrability”—whose resolution rested with an arbitrator—as opposed to one of “substantive arbitrability”—whose resolution rested with a court.\footnote{\textit{Id.} at 452–53.} Thus, the arbitrator did not encroach on the state court’s power when he decided the class arbitration could
go forward.\footnote{id}{Id. at 455.} \textit{Green Tree}, however, dodged the confounding issue of whether an arbitration clause’s silence on class proceedings permit the such actions, or whether silence forecloses on class arbitrations altogether.

The Court let this question fester for seven years until resolving it in \textit{Stolt-Nielsen v. AnimalFeeds International Corp}.\footnote{stolt-nielsen}{Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 666 (2010).} Writing for a majority, Justice Alito concluded that the FAA precluded a plaintiff’s class from dragooning a defendant into a class arbitration when the contract entered into by the parties was silent on the type of arbitral proceeding.\footnote{alito}{Id. at 687.} Alito reiterated a prior case’s central theme: arbitration “is a matter of consent, not coercion.”\footnote{volt}{Id. at 681 (quoting Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479 (1989)).}

The majority’s opinion shifted the \textit{Green Tree} inquiry in a slight but profound way. Whereas \textit{Green Tree} asked whether the arbitrator had erred in holding the parties intended to \textit{foreclose} the class mechanism in arbitration, \textit{Stoel-Nielsen} required arbitrators to inquire whether parties had \textit{agreed} to arbitration. Thus, the Court moved the negotiating burden onto plaintiffs, who would now have to bargain for class arbitration rights in a pre-dispute contract with commercial entities.\footnote{negotiating}{This suggestion expects plaintiffs to, above all, understand that they have the class arbitration mechanism even available to them before they sign a contract, a fact which very few consumers know about. Moreover, because many of these contracts are contracts of adhesion, there is no possibility of negotiating favorable terms by individuals. \textit{See} Press Release, Consumer Financial Protection Bureau, CFPB Study Finds that Arbitration Agreements Limit Relief for Consumers (Mar. 10, 2015), http://www.consumerfinance.gov/about-us/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/ (last visited Dec. 1, 2016).}
D. AT&T Mobility LLC v. Concepcion

One of the two most prominent class arbitration cases, AT&T Mobility v. Concepcion, assessed a direct confrontation between the FAA and state law addressing alternative dispute resolution. The case’s plaintiffs sought to certify a class in a federal district court alleging that AT&T had engaged in deceptive advertising for free cell phones. In response, the communications giant filed a motion to compel arbitration. Unlike Green Tree or Stolt-Nielsen—which featured arbitration clauses silent on the issue of class arbitration—the agreement signed by the case’s plaintiff’s featured a pre-dispute clause requiring individual arbitration. The contract also contained claimant-friendly terms.

A California district court held that AT&T’s arbitration provision violated the state’s unconscionability doctrine as interpreted by its Supreme Court in Discover Bank v. Superior Court. Under the “Discover Bank rule,” standard-form contracts that allowed a party to evade liability from “negative value” claims—claims whose cost to litigate individually exceed a claimant’s expected damages awards—were unconscionable.

The Supreme Court reversed in a splintered five-to-four vote. The majority concluded that the FAA’s § 2 preempted Discover Bank, and that, because the plaintiffs had not explicitly contracted for class arbitration in the proceeding-at-hand, they used state law to manufacture a mechanism that differed from the one agreed to by the parties. Justice Scalia bolstered his majority opinion with two policy points: arbitration’s informality, and its lack of appellate review.

52 Id. at 336–8.
53 Id. at 338.
54 Id. at 333.
55 Id. at 337.
56 Id. at 351–2.
57 Id. at 352.
58 Id.
59 Id. at 349.
First, he argued that class arbitration would morph ADR into procedurally laden proceedings, populated with an endless stream of experts and hefty attorneys’ fees.\(^{60}\) Both would hamper arbitration’s “lower costs, greater efficiency . . . [and] speed.”\(^{61}\) Second, Scalia opined that courts’ allowance of class arbitrations would cause businesses to forego arbitration provisions in their contracts altogether.\(^{62}\) The apparatus’s increased costs (stemming from accommodating a class arbitration) and narrow standards of appellate review—which, for example, come about only in cases of fraud or a lack of jurisdiction in matters of “substantive arbitrability”—would result in “defendants . . . be[ing] pressured into settling questionable claims.”\(^{63}\) For these reasons, the majority concluded that the plaintiffs had to pursue their claims in individual arbitration.\(^{64}\)

E. American Express Co. v. Italian Colors Restaurant

While Concepcion did not address a negative value suit brought under a federal statute, the Court considered such an issue in American Express Co. v. Italian Colors Restaurant.\(^{65}\) The case presented a fairly simple question: did the FAA permit “courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim”?\(^{66}\) A restauranteur alleged a negative value claim against American Express (“AmEx”); despite a class waiver and an arbitration clause in his contract, he filed an antitrust class action against the credit card colossus.\(^{67}\)

Round one went to AmEx when a federal district court granted the company’s motion to compel arbitration,\(^{68}\) but the Second Circuit reversed on the ground that individual arbitration’s trial costs for the

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\(^{60}\) See id. at 348.

\(^{61}\) Id.

\(^{62}\) See id. at 350.

\(^{63}\) Id.

\(^{64}\) Id. at 352.

\(^{65}\) 133 S.Ct. 2304, 2308 (2013).

\(^{66}\) Id.

\(^{67}\) Id.

\(^{68}\) Id. at 2306.
plaintiffs blocked them from asserting Sherman Act claims individually.\(^{69}\) To the appellate court, class arbitration was a logical compromise that both preserved AmEx’s desire for private dispute resolution and permitted the plaintiff’s to pursue their cause of action without it costing them more than each claim was worth.\(^{70}\) Further, AmEx’s arbitration provision was less generous when compared to Concepcion’s; these unfavorable terms made it easier for the plaintiff to assert that the contract he had entered into prevented him from litigating an allegedly valid claim against AmEx.\(^{71}\)

The Court analyzed whether the plaintiff’s argument that the contract weakened his ability to sue under the Sherman Act overrode the FAA’s § 2 mandate to interpret parties’ arbitration agreements by their terms.\(^{72}\) The plaintiff raised an exception in the FAA that invalidates arbitration clauses when they prevent the “effective vindication” of statutory rights; because each class member asserted a “negative value” claim, those members could not effectively bring their claims without the class action mechanism.\(^{73}\)

Justice Scalia disagreed. Delivering a knockout blow to the plaintiffs, the conservative jurist concluded that the Sherman Act does

\(^{69}\) *Id.*

\(^{70}\) *Id.* at 2309.

\(^{71}\) AmEx’s arbitration terms were far less generous than AT&T’s in *Concepcion*. Compare AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 336–7 (2011) (“In the event the parties proceed to arbitration, the agreement specifies that AT&T must pay all costs for non-frivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages.”) *with* Brief for Respondent at 17, Am. Express Co. v. Italian Colors Rest., 133 S.Ct. 2304, (No. 12-133) (Moreover, the plaintiffs in *Concepcion* . . . would be able to vindicate those claims. Under the distinctive pro-consumer features of AT&T Mobility’s arbitration clause, ‘aggrieved customers who filed claims would be ‘essentially guarantee[d]’ to be made whole,’ making the claims at issue ‘most unlikely to go unresolved.’”).

\(^{72}\) 9 U.S.C.A. § 2 (Westlaw through Pub. L. No. 114-244); *Italian Colors Rest.*, 133 S.Ct. at 2309.

\(^{73}\) *Italian Colors Rest.*, 133 S.Ct. at 2309.
not “guarantee an affordable procedural path to the vindication of every claim,” nor does it have any intent that waives class procedures; “the fact that it is not worth the expense involved in proving a statutory remedy . . . does not constitute the elimination of the right to pursue that remedy.”74 Dissenting, Justice Kagan noted that enforcing the individual arbitration provisions would throw up insurmountable barriers to litigation, including expert witness costs that would outspend expected individual damages awards by double-digit multiples.75 She opined that “[n]o rational actor would bring a claim worth tens of thousands of dollars if doing so meant incurring costs in the hundreds of thousands.”76 Ultimately, the Justices factionalized along similar ideologies as they had in Concepcion, with the majority holding the FAA does not permit courts to invalidate individual arbitration clauses.77


The same year the Supreme Court announced its decision in Italian Colors, the Fifth Circuit decided D.R. Horton, Inc. v. NLRB.78 In D.R. Horton, a class of superintendents sought to initiate class arbitration proceedings alleging that their employer had “misclassified them as exempt from statutory overtime protections in violation of the Fair Labor Standards Act.”79 Horton advised the claimants that they signed a “Mutual Arbitration Agreement” that required individual arbitration between each claimant and itself.80 In response, the claimants filed an NLRA infraction with the National Labor Relations Board (“NLRB” or “Board”).81 A Board administrative judge

74 Id.
75 Id. at 2316.
76 Id.
77 Id. at 2309–12.
78 737 F.3d 344 (5th Cir. 2013).
79 Id. at 349.
80 Id.
81 Id.
determined that Horton had indeed violated the NLRA by restraining the employees from engaging in a collective action guaranteed under § 7 of the Act.\textsuperscript{82} Horton appealed to the Fifth Circuit.\textsuperscript{83} The appellate court reversed the NLRB’s decision in a two-to-one split.\textsuperscript{84} Writing for the majority, Judge Southwick reminded the Board that, while courts ordinarily give the agency’s adjudicatory arm judicial deference, such deference would be withheld where the Board has interpreted the NLRA to the ignorance of other “Congressional objectives.”\textsuperscript{85} No previous case had held class action waivers in arbitration agreements as violative of § 7.\textsuperscript{86} Judge Southwick understood that concerted actions brought by workers against employers served as a means of parlaying improved employment terms; however, he observed that preservation of the FAA’s modern interpretation merited a more compelling interest.\textsuperscript{87} The majority opined that class action procedures are not a substantive right guaranteed to litigants.\textsuperscript{88} While the class action may help claimants receive some form of remedy through its procedures, the mechanism itself does not serve as that remedy.\textsuperscript{89} The Board claimed that the Mutual Arbitration Agreement violated § 7 of the Act, and thus triggered the FAA’s savings clause that did not require its enforcement. Yet, in mirroring the Supreme Court’s rationale in Concepcion and arguing that the FAA required the enforcement of arbitration agreements, the Fifth Circuit majority concluded that the savings clause was not triggered.\textsuperscript{91} In rationalizing this conclusion, Judge Southwick reiterated Justice Scalia’s points on class arbitration proceedings: they are inefficient, they prevent multilayered review,
and they would serve as a disincentive to businesses for including arbitration agreements in their contracts in the first place.92

Similarly, the majority failed to find a contrary congressional command, either express or implied, in the NLRA that showed a congressional will to circumvent the FAA and disallow arbitration clauses.93 It then concluded that the Board’s ruling was improper, and that Horton’s arbitration agreement with its employees must be enforced.94

In dissent, Judge Graves agreed with the Board and that Horton’s contract violated the plaintiffs’ abilities to pursue a statutorily-granted and substantive right to collective action.95 Further, the jurist argued, while the FAA was intended to prevent an ongoing judicial crusade against private dispute resolution in the nineteenth and early twentieth centuries, “[t]o find that an [individual] arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law.”96

Graves’s opinion took some time to reverberate across the appellate courts, but eventually it struck a chord with Judge Wood when the Seventh Circuit considered Lewis.97 There, the plaintiff class’s employer, Epic Systems Corp. (“Epic”), emailed its employees an arbitration agreement that mandated individual arbitration for certain “covered claims,” such wage-and-hour disputes.98 The clause further proscribed parties from

[br]ing[ing] a claim on behalf of other individuals, and any arbitrator [from]: (i) combin[ing] more than one individual’s claim or claims into a single case; (ii) participat[ing] in or facilitat[ing] notification of others of

92 Id. at 539.
93 Id. at 360–61.
94 Id. at 364.
95 Id.
96 Id. at 365 (quoting D.R. Horton, Inc., 2012 WL 36274, at *11 (2012)).
97 See generally Lewis v. Epic Systems Corp., 823 F.3d 1147 (7th Cir. 2016).
98 Id. at 1151
potential claims; or (iii) arbitrat[ing] any form of a class, collective or representative proceeding.  

The email stated that if the employees continued to work at Epic, they accepted this provision; it also required an acknowledgment from each employee at the end of the email. The lead plaintiff acknowledged these emails. However, once a labor dispute developed between him and Epic, he sued in the United States District Court for the Western District of Wisconsin. The corporation moved to compel arbitration, and Lewis countered, alleging that the arbitration clause violated the National Labor Relations Act by “interfer[ing] with employees’ right to engage in concerted activities.” The district court denied Epic’s motion to dismiss, and the business appealed to the Seventh Circuit.

The NLRA provides that employees may “engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection,” and furthers the protection of this right by rendering unenforceable any contracts that renounces employees’ rights guaranteed by Act. The NLRB has consistently rebuked employers from imposing individual agreements that curbed employees’ access to concerted actions. And while the Act did not explicitly define “concerted activities”, both the district court and the Seventh Circuit concluded that class actions “fit well within the [term’s] ordinary understanding.” Epic contended that, because FRCP Rule 23 did not exist in 1935, the NLRA could not have protected an action that did not exist when it was passed. However, an unpersuaded Judge Wood noted, Rule 23 was not divined from tabula rasa. Indeed, West v. Randall and its progeny proved that collective actions had existed.

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99 Id. at 1154–55.
100 Id. at 1151.
101 Id.
102 Id.
103 Id.
104 Id. at 1151.
105 Id.
106 Id. at 1152.
107 Id. at 1153.
108 Id. at 1154.
well before Judicial Conference of the United States first drafted the FRCP. Thus, the NLRA protected the class action purported by Lewis.\footnote{Id.}

The Seventh Circuit upheld the district court on the case’s next issue: whether Epic’s arbitration clause violated the NLRA.\footnote{Id. at 1156.} Answering in the affirmative, the unanimous panel held that the individual arbitration provision ran afoul of the NLRA; the clause prevented employees from suing through a “concerted activity”, and thus qualified as an “unfair labor practice.”\footnote{Id. at 1155.} The court distinguished itself from the Ninth Circuit—which concluded that, where an employer allowed an employee to “opt-out” of an individual arbitration without penalty, that employer’s arbitral policy did not violate the NLRA.\footnote{Id.} While its sister court permitted such arbitration clauses to stand, the Seventh Circuit found that an individually bargained-for arbitration agreement limiting concerted actions in such a way is \textit{per se} invalid.\footnote{Id.}

Finally, on the issue of whether the FAA conflicts with and supersedes the NLRA in its mandate to enforce Epic’s arbitration clause, Judge Wood interpreted that the former did not bind the court to enforce the provision.\footnote{Id. at 1160.} The FAA’s savings clause—which requires courts to enforce ADR agreements “save upon such grounds as exist at law or in equity for [their] revocation”—permitted the NLRA class action to continue because the NLRA itself made the arbitration clause illegal.\footnote{Id.}

\footnote{In her opinion, Judge Wood points out that the NLRB has followed such a \textit{per se} mantra in its hearings as well, and that the Ninth Circuit failed to cite why it did not engage practice \textit{Chevron} deference to the Board’s decisions. I suspect that the Ninth Circuit might have been trying to be Solomonic in its decision, given that most Supreme Court jurisprudence does not favor employees in such situation. The Seventh Circuit’s decision, then, tilts more toward the idealistic. \textit{Id.}}
Wood excoriated the *D.R. Horton* majority for parroting Scalia’s “class arbitration is inefficient” rationale. To her, the Fifth Circuit had not even attempted to reconcile the two statutes, and instead “pick[ed] . . . among congressional enactments.” She also took *Italian Color*’s reasoning and spun it on its head. Whereas the Supreme Court reasoned that antitrust laws cannot pursue their general purpose at all costs (such as in vindicating the rights of negative value claimants through class arbitration), Judge Wood posited that the FAA cannot usurp all class-action-permitting statutes to protect ADR from the judiciary’s scrutiny. For these reasons, the Seventh Circuit found Epic’s arbitration agreement unenforceable, and affirmed the Wisconsin district court.

II. FAMILIAR BACKINGS: ARGUMENTS SUPPORTING AND OPPOSING INDIVIDUAL ARBITRATION PROVISIONS AND CLASS ARBITRATION

The positions taken by *D.R. Horton* and *Lewis* clearly disharmonize the circuit courts. The Seventh Circuit went out on a limb with *Epic Systems*, swimming against the jurisprudential current followed by other courts of appeal. What used to be an uneven split disfavoring the Seventh Circuit, though, has recently become more even-keeled. On the one hand, the Eighth and Second Circuits agree with the Fifth. Through August, the Seventh Circuit stood alone against its three appellate brethren. However, toward the end of that month, the Ninth Circuit agreed with Judge Wood, and created a more even, three-to-two fissure.

The policy points that each side argues attract certain special interests as well. On the one hand, academics and regulatory agencies champion the cause of the lowly plaintiffs’ classes; this pair aims to

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116 Id. at 1158.
117 Id.
118 Id.
119 Id. at 1161.
120 See Owen v. Bristol Care, Inc., 702 F.3d 1050, 1052 (8th Cir. 2013); Richards v. Ernst & Young, LLP, 744 F.3d 1072, 1075 (9th Cir. 2013).
121 See supra note 120.
122 Morris v. Ernst & Young, LLP, 834 F.3d 975, 983, 990 (9th Cir. 2016).
level the current legal landscape surrounding class arbitration so that individuals have a fighting chance.\textsuperscript{123} On the other side, large law firms and special interest groups like the U.S. Chamber of Commerce advocate for individual arbitration provisions, claiming they reduce wasteful litigation and promote the freedom to contract with fewer regulatory encumbrances.\textsuperscript{124} This Note will next shift to assess some of these positions; it first summarizes arguments against individual arbitration mainly levied by academics and media sources, and then dives into the private sector’s ripostes. Finally, it argues why \textit{Lewis} properly sided with academia and regulatory agencies.

\section*{A. Opinions Disfavoring Individual Arbitration}

Legal academia coalesces its scholasticism on arbitration provisions and class waivers around two similar but distinct cores. Some argue for the idealistic, calling for a ban on individual arbitration provisions between commercial entities and employees, shareholders, and consumers.\textsuperscript{125} Others fight for a more pragmatic (albeit flawed, in my opinion) position that allows for class arbitrations.\textsuperscript{126} Many scholars overarchingly view the commercial

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{123} See Fitzgerald, \textit{supra} note 10 at 199; Christopher R. Leslie, \textit{The Arbitration Bootstrap}, 94 \textit{Tex. L. Rev.} 265, 266 (2015).
\item \textsuperscript{126} See Maureen A. Weston, \textit{The Death of Class Arbitration After Concepcion?}, 60 Kansas L. Rev. 101, 128 (2012).
\end{enumerate}
\end{footnotesize}
sector as weaponizing arbitration provisions against individuals in a way that exceeds their intended purpose under the FAA. Some authors analyze the problems they cause in certain sectors like employment or business law, while another group spells a far greater threat to the general sphere of litigation; one author has gone so far to say that arbitration provisions have the propensity to “eliminate virtually all class actions.”

Perhaps the strongest points scholastics make is the inapplicability of arbitration clauses in parties with disparate bargaining power. The FAA’s legislative history strongly indicates that Congress enacted the statute to foster arbitration between businesses, not between a business and individuals. Why would Congress want to limit the FAA only between such parties? After all, ADR provides feuding parties an efficient forum for resolving their qualms, as the streamlined process avoids the public court system’s sluggishness. Rather than a judge deciding an issue through a generalist application of the law, ADR supplies an adjudicator with specific acuity in a legal niche to precisely apply (at times) arcane legal doctrines, and to resolve a conflict between parties. If the parties would like to circumscribe certain rules of evidence or procedure to quicken the arbitration’s pace, then they could contractually agree to forego such formalities. Parties can still reap benefits from such proceedings when they are between an individual and a commercial entity.

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127 Fitzpatrick, supra note 10 at 164 n. 9.
128 Id. at 161.
129 Id. at 164 n.9.
130 Id.
Yet, arbitrations that feature an individual going against a business usually do not involve careful negotiation over an arbitration clause’s terms. Rather, scholastics argue, the commercial actor presents a person with a standard-form contract at some “trigger deal” such as purchasing a product or share of stock, or obtaining employment. The individual cannot tailor her contract with the commercial actor both because she does not possess sufficient bargaining power to convince the business to make contractual concessions, and because the business could not feasibly keep track of the various bargains it strikes with each individual employee or shareholder. Thus, the individual has two options: walk away from the “deal” and find another (presumably one that does not feature an arbitration provision), or take the “deal” despite its unfavorable terms. Many opt for the latter either because they do not care that the “deal” cedes their (and the business’s) access to a court, they feel that they will not get into a conflict with the business that would result in litigation, or they are unwittingly unaware that the contract even has an arbitration clause.

Narrowing to a labor context, even if a potential employee walks away from a contract that limits the parties to individual arbitration and seeks a contract without such constrictions, that employee might not find an employer that offers such terms. In this example, I assume that the employee is searching for jobs in a particularized sector, such as a computer manufacturer or cell phone service provider. If that sector’s participating companies each possess employment contracts with individual arbitration provisions, then that employee would either be forced to work in a different market, or—if the employee cannot

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133 See Fitzpatrick, supra note 10 at 176.
134 Id. Courts have upheld the validity of such “package” contractual provisions, despite the fact that the consumer might not have had the opportunity to read the language on the packaging until after she bought it.
135 Silver-Greenberg & Gebeloff, supra note 132 (“Prevented from joining together as a group in arbitration, most plaintiffs gave up entirely, records show. . . . Many companies give people a window—typically between 30 and 45 days—to opt out of arbitration. Few people actually do, either because they do not realize they have signed a clause, or do not understand its consequences, according to plaintiffs and lawyers.”).
readily transfer from one industry to another because his work experience or education is particularized to one industry—acquiesce to a contract requiring arbitration. In this way, certain sectors can implicitly act as cartels in their standard-form contracts.

The choice between an individual accepting such a contract and seeking access to a court with a less restrictive contract raises an inherent question: how are individuals disadvantaged in arbitration through standard-form contracts? For plaintiffs like those in Concepcion, whose arbitration terms were rather generous, the problem of chronically imbalanced dispute resolution does not seem as apparent. Under AT&T’s arbitration clause, plaintiffs enjoy a convenient location to arbitrate (the plaintiff’s county), AT&T pays for the costs of arbitration, and the arbitrator is not capped at a damages award.

Despite the AT&T contract’s facially favorable terms, the benefits reaped by the cellular service provider outnumber those enjoyed by individual plaintiffs. By requiring individual arbitration, AT&T can minimize its exposure to large litigation expenses and contain a dispute’s costs to small, individualized arbitral awards as


137 Id. at 336–37. ("In the event the parties proceed to arbitration, the agreement specifies that AT & T must pay all costs for nonfrivolous claims; that arbitration must take place in the county in which the customer is billed; that, for claims of $10,000 or less, the customer may choose whether the arbitration proceeds in person, by telephone, or based only on submissions; that either party may bring a claim in small claims court in lieu of arbitration; and that the arbitrator may award any form of individual relief, including injunctions and presumably punitive damages. The agreement, moreover, denies AT & T any ability to seek reimbursement of its attorney's fees, and, in the event that a customer receives an arbitration award greater than AT & T's last written settlement offer, requires AT & T to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.")

138 Id. at 365 (Breyer, J. dissenting) ("But class proceedings have countervailing advantages. In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate. I suspect that it is true even here, for as the Court of Appeals recognized, AT & T can avoid the $7,500 payout . . . simply by paying the claim's face value, such that "the maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22." ")
opposed to a larger class award. Rather than claimants receiving a potential benefit from litigation passively—as they would if they were in a class and not acting as a class representative—individual arbitration requires active litigation on behalf of all plaintiffs if those plaintiffs want to collect any damages. The burden to litigate shifts from a select individual or small group to many more (depending on the scope of the harmful activity, of course). Given this, individual arbitration clauses promote an active, “opt-in” form of dispute resolution rather than a passive, “opt-out” model (as Rule 23(b)(3) class actions normally are structured). Such a model prevents plaintiffs from filing an action that asks for a lump-sum damages award for all putative class members—including passive plaintiffs, which give class action damages their “meat.”

Ultimately, an “opt-in” action dulls class actions’ capabilities of fulfilling tort law’s behavior-deterrent purpose. One would expect that fewer individuals would pursue a claim that requires active participation rather than passive participation. Active participation requires a claimant to expend time and money, costs that some people might not find worthwhile paying relative to the expected damages they might receive (or, if they lose, the possibility of facing no reward and a hefty bill for attorneys’ fees). With less participation, a corporation could be expected to pay out fewer damages awards to a smaller pool of plaintiffs. In this sense, individual arbitration provisions not only threaten the existence of the class action procedure, but also weaken the bedrock of certain principles of tort law.

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141 *See id.*
Implicitly, *Lewis* preserves the class mechanism as a means of dispute resolution. Judge Wood frequently mentioned how the NLRA protected covered employees’ abilities to engage in “concerted activity.” The Act’s legislative history reflects that collective actions are intended to provide workers with access to proper redress; part of this redress involves levying both ordinary and exemplary damages on a defendant so as to chill the behavior that harmed individuals in the first place. Wood noted that other circuit courts took issue with arbitration provisions that proscribed damages awards. Individual actions would not provide as great a deterrent effect on corporations; in addition to business’s reduced exposure to actual damages, punitive damages stemming from individual suits would be limited to smaller amounts (assuming uniform, single-digit multiplier caps) than such damages deriving from a class award.

Aside from chipping away at tort law’s deterrent effect, mandatory individual arbitrations’ proscriptive procedures also prevent plaintiffs from presenting a case against a defendant. Clauses that limit parties in or prohibit them from introducing experts might make an employment discrimination suit depend solely on party testimony. Plaintiffs facing such limitations might fail in providing sufficient evidence to make out their cause of action. The same effect occurs in procedures that limit the amount of interrogatories parties may send to one another, or in procedures that limit the amount of evidence parties may present to the arbitrator.

Scholastics argue that even if an arbitration proceeds under traditional rules of evidence and procedure, other pecuniary issues malign plaintiffs when they individually arbitrate. For example, class actions may serve as the only means by which a plaintiff (or a group) could afford experts to prove their claim. While *Lewis* did not specifically address this financial quandary, other courts have raised it

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142 Lewis v. Epic Systems Corp., 823 F.3d 1147, 1154 (7th Cir. 2016).
143 Id. at 1152.
144 Id. at 1153.
145 Id. at 1160.
146 See Fitzpatrick, supra note 10 at 172–73.
in a context that could readily be ascribed to employment actions. To illustrate, if an arbitration provision does not detail whether attorneys’ or experts’ fees shift to a party, then the plaintiff will have to dole out the costs of those people, all in the hopes that she can recover an award that covers the fees she accrued during arbitration. In alleged “negative value” suits—claims whose individual cost to litigate exceed the expected damages award—plaintiffs cannot feasibly litigate without harming themselves financially. On the other hand, the commercial defendant, by virtue of being a business entity, usually has an ample fisc to cover litigation expenses, and thus can afford expert testimony and hefty attorneys’ fees more readily.

The class action levels the playing field from a dollars perspective, as it provides plaintiffs the benefit of cost-sharing amongst themselves. While cost-sharing’s virtues are apparent in “positive value” claims, its utility is felt most when used in the “negative value” suits. Expert witness fees are simply subtracted from an aggregate damages award, and then the parties split that cost up amongst themselves. In turn, one plaintiff will not be saddled with the cost of the expert, and a class’s negative value claims become feasible to pursue.

Additionally, both academics and the Lewis majority scoff at the idea that class arbitration—one of individual arbitration’s alternatives—is irreconcilable with arbitration’s intended informality. One academic paper challenged this claim after Justice Scalia raised it in Concepcion’s majority. Scalia argued that class arbitration threatened ADR’s informality and economy by bogging down a speedier alternative to litigation with cumbersome Rule 23 procedures.

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like certification; he felt that until an individual arbitration clause affected a parties’ substantive rights, courts would be forced to uphold such provisions.  

In response, Erwin Chemerinsky and Catherine Fisk noted that Scalia’s failure to provide a bright-line rule as to what constituted a substantive violation provides the judiciary with capricious latitude in enforcing such arbitration provisions. While the authors did not express a problem with such latitude, they criticized Scalia for invalidating California’s attempts at trying to draw a more definitive line with its *Discover Bank* rule.  

*Lewis*’s majority took this argument a step further; it criticized the Fifth Circuit as mimicking Scalia’s uncompromising protection of arbitration’s informality. The Seventh Circuit argued *D.R. Horton* was “looking for trouble” when it suggested that “any law that even incidentally burdens arbitration . . . necessarily conflicts with the FAA.” Judge Wood observed that, in its quest to maintain arbitration’s relaxed nature, the Fifth Circuit caused the FAA to trump a federally granted substantive right—in that case, the right for employees to act in concerted activity given to them under the NLRA. Rather than one statute superseding the other, the two statutes should be reconciled. In this case, the plaintiffs’ arbitration agreement triggered the FAA’s savings clause that enforces arbitration agreements “save upon such grounds as exist at law or in equity . . . .” Because the NLRA affirmatively grants the right to concerted actions, it would follow that Epic’s individual arbitration provision was illegal under the Act, and therefore unenforceable under the FAA’s savings clause. Judge Wood rebuked Scalia’s standard, noting that the FAA “does not ‘pursue its purposes at all costs’”; even

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150 Chemerinsky & Fisk, *supra* note 148 at 89.
151 *Id.*
152 Lewis v. Epic Systems Corp., 823 F.3d 1147, 1157–58 (7th Cir. 2016).
153 *Id.* at 1158.
154 *Id.* at 1157–58.
155 *Id.* at 1158.
156 *Id.* at 1159–60.
157 *Id.* at 1160.
if Epic’s arbitration clause allowed for class proceedings, such a concerted action would be allowed by the NLRA.\footnote{Id. at 1159. While Judge Wood’s point comports with her theory that the NLRA requires concerted actions, I question whether a class arbitration would be held valid under the NLRA, and then invalidated under the FAA and relegated to ordinary class action litigation rather than class arbitration.}


In a lengthy series on arbitration, the New York Times determined that not only do few individuals know most standard-form contracts contain arbitration provisions, but, once they find out, even fewer bother to pursue their claim at all.\footnote{Silver-Greenberg & Gebeloff, supra note 135.} Moreover, the relative lack of bargaining power employees and consumers have in negotiating their arbitration provisions extends well beyond them; corporations wield sufficient leverage to make even their corporate-level executives sign arbitration provisions addressing labor disputes.\footnote{Silver-Greenberg & Gebeloff, supra note 37 (“the use of class-action bans is spreading far beyond low-wage industries to Silicon Valley and Wall Street, where banks like Goldman Sachs require some executives to sign contracts containing the clauses.”).}

The media also calls arbitrators’ objectivity into question. Ostensibly, arbitrators supplied through the two major ADR service providers, JAMS and AAA, decide cases in an impartial manner.\footnote{Silver-Greenberg & Gebeloff, supra note 37 (“The American Arbitration Association and JAMS [serve as] the country’s two largest arbitration firms . . . .”).} However, several arbitrators have noted that they felt “beholden to
companies” because they often paid for the administration of arbitration. In a common scenario where the individual serves as a “one-time player” in the arbitration, and the business acts as a “repeat player” that both hires and habitually comes before an arbitrator, that arbitrator has a pecuniary interest to arbitrate in favor of the party that controls the amount of business provided to her. Beyond this financial bias, studies have shown that arbitrators form psychological biases that favors arbitral “repeat players.”

B. Positions Supporting Individual Arbitration

While academics excoriate arbitration provisions’ maladies, large law firms and pro-business lobbies advocate for their enforcement. Purported “BigLaw” firms’ stance supporting class waivers and individual arbitration clauses juxtaposes well with professors’. That large law firms support individual arbitration should not come as a shock; when a plaintiffs’ class sues a corporation, the corporation often retains a BigLaw firm to represent it, and one should expect the literature these firms distribute to cater to clients’ needs.

163 Id.
164 See id. See also Lisa Bingham, Employment Arbitration: the Repeat Player Effect, 1 EMP. RTS. & EMP. POL’Y J. 222 (1997).
165 Bingham, supra note 164 at 223.
Weil, Gotshal & Manges published an article that extolled the holdings in *Concepcion*, *Italian Colors*, and their progeny. The article warned clients not to reserve the question of whether an arbitration clause allows for class arbitration to the arbitrator; rather, clients should try to have a court decide the issue of whether a clause allows for class arbitration. These actions would preserve the question of arbitrability for robust appellate review under a de novo standard. Additionally, businesses that wish to avoid the threat of class arbitration must expressly denote its unavailability directly in the contractual provision.

Law firms that represent commercial clients issued memos on *Concepcion* and *Italian Colors*’ potential impacts, and offered suggestions on how to trek the new legal landscape. A group of lawyers from one firm went on to write an op-ed excoriating scholars for lamenting class arbitration’s death without any supportive empirics. They noted that arbitrators continue to allow class arbitrations, and did not skirt the point that “negative valueclass arbitrations often resulted in negligible or no damage awards for plaintiffs, but did yield high plaintiffs’ attorneys’ fees.”

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168 Id.

169 Id.

170 See Deuelle & Berman, supra note 167.


172 Id. The article notes that in one case, for example, a plaintiffs’ class received no actual damage awards, and only $2 million dollars in punitive damage awards,
Turning to pro-business lobbying organizations, the United States Chamber of Commerce ("the Chamber") lobbies Congress to insulate businesses from the threat of frivolous class actions.\textsuperscript{173} The Chamber has also acts as an ardent \textit{amicus} throughout the Supreme Court’s consideration of these arbitration clauses, including cases like \textit{Concepcion}, \textit{Italian Colors}, and other landmark cases.\textsuperscript{174}

The Chamber observed that individual arbitration serves as a balanced process amongst participants, and that its critics mischaracterize its effects on individual claimants.\textsuperscript{175} “[A]rbitration before a fair, neutral decision maker leads to outcomes for consumers and individuals that are comparable or superior to the alternative—litigation in court—and that are achieved faster and at lower expense,”\textsuperscript{176} The organization keenly mentioned that arbitration, with its convenient forum selection and plaintiff-friendly fee-shifting clauses, makes arbitration more utilitarian.\textsuperscript{177} For the Chamber, class

which were paid out to two consumer protection organizations. The attorneys, on the other hand pocketed $2.6 million in fees. \textit{Id.}


\textsuperscript{174} See Brief of the Chamber of Commerce, \textit{supra} note 124; Brief of the Chamber of Commerce of the United States of America, Business Roundtable, American Bankers Association, and National Association of Manufacturers as Amici Curiae or Petitioners at 1, \textit{Am. Express Co. v. Italian Colors Rest.}, 133 S.Ct. 2304, (No. 12-133) ("[M]any of amici’s members use arbitration agreements in millions of their contractual relationships. By eliminating the huge litigation costs associated with resolving disputes in court, those agreements create cost savings that result in lower prices for consumers, higher wages for employees, and benefits for the entire national economy.").

\textsuperscript{175} Letter from David Hirschmann, President and Chief Executive Officer, Center for Capital Markets Competitiveness, and Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform, to Ms. Monica Jackson, Executive Secretary, Consumer Financial Protection Bureau at 44 (Dec. 11, 2013) [hereinafter \textit{Chamber Letter}], http://www.instituteforlegalreform.com/uploads/sites/1/2013_12.11_CFPB_-_arbitration_cover_letter.pdf (last visited Dec. 2, 2016) ("Moreover, claimants can effectively vindicate in individual arbitration any claims that might be asserted through class actions.").

\textsuperscript{176} \textit{Id.} at 3.

\textsuperscript{177} \textit{Id.} at 14.
actions with small-value claims do not need to be preserved because they yield a small benefit to individuals, and merely act as a source of enrichment for lawyers with their hefty fee awards.\(^\text{178}\)

The Chamber highlighted that arbitration acts as a superior alternative to the resource-depleted judiciary.\(^\text{179}\) In a world where courts are shuttering their doors and cannot operate under a crushing backlog of case dockets, arbitration acts as the only rapid-response solution to citizens’ need for redress.\(^\text{180}\) In a world where class actions lead to meager damages awards for plaintiffs, pro-consumer arbitration provisions can provide superior recovery amounts per plaintiff over litigation.\(^\text{181}\) In a world where the chance of a plaintiff winning in litigation can be reduced to a fifty-fifty coin toss, arbitration has not only been disproven as an inferior venue for consumers and employees, but has been shown by certain studies to serve as an equally effective and occasionally superior venue for the same groups.\(^\text{182}\)

For employment-related arbitrations, the Chamber found that ADR served as a blessing rather than a curse. The letter cited to a 2004 study revealing employees were “almost 20% more likely to win in arbitration than in litigated employment cases.”\(^\text{183}\) Further, the study touted,

\[L\]ow-income employees brought 43.5% of arbitration claims, most of which were low-value enough that the employees would not have been able to find an attorney willing to bring litigation on their behalf. These employees were often able to pursue their arbitrations without an attorney, and they won

\(^{178}\) *Id.* at 47 (“In short, class actions do not provide class members with anything close to the benefits claimed by their proponents, although they can . . . enrich attorneys—both on the plaintiffs’ and defense side.”).

\(^{179}\) *Id.* at 3.

\(^{180}\) See *id.* at 4.

\(^{181}\) See *id.* at 18.

\(^{182}\) *Id.* at 17–22.

\(^{183}\) *Id.* at 22.
their arbitrations at the same rate as individuals with representation.\textsuperscript{184} Finally, the Chamber deduced that arbitrations between employers and high-income employees proved as winnable for the employee as litigation.\textsuperscript{185} The Chamber opposed federal regulations addressing individual arbitration provisions promulgated by the Consumer Financial Protection Bureau.\textsuperscript{186} In eschewing a uniform federal standard that rendered such clauses invalid in contracts between individuals and financial institutions, the organization argued that states were free to declare certain types of arbitration clauses as violating state unconscionability standards; indeed, courts have interpreted state unconscionability laws as holding such arbitration agreements invalid when the plaintiff was capped.\textsuperscript{187} However, federal schemes regulating arbitration agreements overstepped the boundaries of federal authority, and created friction between the CFPB’s power and the FAA.\textsuperscript{188} And while the CFPB’s regulation has yet to suffer any litigation challenging its validity, it might not live long enough to see that day under President Trump.

I take issue with the Chamber’s assertions; to begin, the notion that the commercial sector is resolving disputes in a fashion that greatly benefits individuals over traditional litigation is disingenuous. While certain plaintiffs may fair better under arbitration than they would under a class action, not every plaintiff chooses to pursue arbitration in the first place, nor does every plaintiff perform as well as the sample of plaintiffs the Chamber chose to measure.\textsuperscript{189} If each

\textsuperscript{184} Id. at 21.
\textsuperscript{185} Id.
\textsuperscript{186} See generally id.
\textsuperscript{187} See, e.g., Oestreicher v. Alienware Corp., 322 Fed. App’x. 489, 492 (9th Cir. 2009); Omstead v. Dell, Inc., 594 F.3d 1081, 1086 (9th Cir. 2010).
\textsuperscript{188} Arbitration Agreements, 81 Fed. Reg. 32829 (proposed May 3, 2016).
\textsuperscript{189} See Silver-Greenberg & Gebeloff, supra note 132; AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting) (“What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?”).
claimant in a purported class received more in arbitration than they
would in litigation, and if arbitration is as accessible a procedure as a
class action, then surely it would be against the business’s best interest
to facilitate such proceedings, and the business would forego
arbitration in favor of traditional litigation. For a business to do
otherwise would be for it to inflict economic harm on itself.

To provide a more concrete example, assume every person in a
one-thousand-member putative class proceeded to arbitrate against a
commercial entity rather than litigate as a class; assume also that each
person held a valid claim that, when litigated or arbitrated, would
result in damages for them. If the business was forced to arbitrate, it
would have to allot a larger allowance for litigation contingencies in
its retained earnings. First, because each of those claims resulted in an
award for the plaintiff, the business is paying out the same damages in
arbitration than it is in litigation. Beyond that, one-thousand
arbitrations would, from an administrative standpoint, cost more
money and eat up more time (assuming a favorable clause that shifts
ADR costs on the business) than a class action, and business would
suffer more magnified losses than if it had opted for litigation.

Realistically, arbitration benefits the corporation just as much as it
does plaintiffs who collect more under it. As mentioned above,
because arbitration requires a plaintiff’s active participation in the
proceeding, and because class proceedings—which inherently feature
a large mass of passive plaintiffs—are often prevented in arbitration
provisions, the business expects fewer plaintiffs to devote their
resources toward pursuing a claim. The passive class member does
not exist in arbitration, which allows business to enjoy reduced total
costs of dispute resolution because fewer people pursue their claim.

Further, as I briefly noted previously, arbitration also reduces the
threat of another liability for businesses: large punitive damages
awards. Historically, class awards that culminate in significant sums of
ordinary damages also featured large punitive damages. Courts award
these exemplary damages as a means of deterring an actor’s unwanted
behavior from habitual repetition. Because the Supreme Court has

190 See supra note 139 and accompanying text.
191 See id.
jurisprudentially limited their magnitude to single digit multipliers of ordinary damages, they achieve their deterrent purposes optimally when attached to large ordinary damages awards. But because many commercial entities have foreclosed the class proceeding as a viable means, punitive damages will have to be levied in individual arbitrations. In advancing the arbitral regime of dispute resolution, commercial entities have almost completely shielded themselves from any significant financial exposure to exemplary damages.

Why is this bad? For one, it allows a business to supply products, services, and employment with certain societal deficiencies. An example might help illustrate this point. Let us consider a shareholder who decides to invest in a company that just became listed on a public exchange. The Securities Act of 1933 mandates that before a corporation goes public—absent any exemption—it must file a registration statement that includes a prospectus warning investors of risks associated with an investment in that company. If a shareholder acquires stock that requires individual arbitration under its stock legend, and somebody later discovers the representations made in the prospectus were deficient, that shareholder and all other shareholders purchasing that stock in an the company’s initial public offering would have a cause of action against the corporation. But because the stock legend expressly called for individual arbitration of claims, the shareholders would have to proceed alone in their dispute with the company.

192 Brief of Civil Procedure and Complex Litigation Professors as Amici Curiae in Support of Respondents, supra note 140.
193 The Chamber does acknowledge that this occurs. See Chamber Letter, supra note 175 at 18. (“Claimants are able to win not only compensatory damages but also ‘other types of damages, including attorneys’ fees, punitive damages, and interest.’ In particular, 63.1% of prevailing claimants who sought attorneys’ fees were awarded them.”).
194 Fitzpatrick, supra note 10 at 190 (“As I noted at the outset, in many cases, these waivers are tantamount to insulating businesses altogether from liability for the small-stakes injuries they cause. Why wouldn’t every business want such insulation?”).
Let us further assume the shareholder wins his suit, or settles with the corporation. Not only do many arbitration provisions mandate, pre-dispute, that shareholder to sign a confidentiality agreement with any potential outcome, but the doctrine of collateral estoppel may not apply to the commercial entity in arbitration. This could paralyze potential claimants from discussing the results of the arbitration with one another or the public, which can harm current investors in the company who unwittingly remain invested despite undisclosed risks, and which makes markets less efficient. The absence of preclusion also would allow the corporation to avoid pre-established liability from any previous arbitration, which gives the opportunity for the corporation to both win and lose claims stemming from similar or identical fact patterns. This hypothesis strengthens when considering the Note’s previous discussions about arbitrator’s biases that favor “repeat players.” That is to say, if an arbitrator rules against the corporation, nothing prevents the business from simply using another arbitrator—perhaps a more favorably-ruled one—in the future.

I do not mean to completely discredit the arguments advanced by proponents of individual arbitrations. Some of them are compelling, so much so that the Supreme Court has agreed with their propositions. The decision between affirming individual arbitration clauses and striking them is difficult, and it seems that the considerations, while veiled in policy, tend to boil down into normative results. With a class action, putative claimants who survive class certification will likely recover something, though that amount could be paltry in comparison

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198 See Silver-Greenberg & Gebeloff, supra note 132 (“But in interviews with The Times, more than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business.”). This implies that arbitrator would be more inclined to decide a case in favor of a “repeat player” that could provide consistent business. See Bingham, supra note 164 at 223
to the harm done by the actor\textsuperscript{199}; with individual arbitration, many claimants will either not pursue the claim, or, when faced with an onerous arbitration provision, not recover at all.\textsuperscript{200} The decision likens to a “pick your poison” scenario. For these reasons, courts have spilt a great deal of ink and have split on whether individual arbitration provisions should be upheld or stricken.\textsuperscript{201} The decision confounds judges both state and federal, from the trial-level and appellate rungs to our nation’s highest court. It is not easy.

And as things stand now, supporters of arbitration provisions have proven highly competent in advancing their arguments in cases involving contractual arbitration provisions and class waivers.\textsuperscript{202} The Chamber, for example, has already filed a brief with the Supreme Court that supports Epic’s petition.\textsuperscript{203} Given Epic’s appeal and prayer for reversal, and for the reasons noted in Part III, infra, I join the Chamber’s zealfulness in having this nation’s highest court review Lewis. However, where the Chamber seeks reversal, I seek affirmation.

III. JUDICIAL AND REGULATORY SOLUTIONS: THE SUPREME COURT SHOULD UPHOLD THE SEVENTH CIRCUIT’S EPIC DECISION

Predictably, when the Seventh Circuit handed down Lewis—and especially after the Ninth Circuit joined its position by invalidating employment contracts’ arbitration clauses in Morris v. Ernst & Young, 199 Chamber Letter, supra note 124 at 21. See also AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 365 (2011) (Breyer, J., dissenting).

\textsuperscript{200} Silver-Greenberg & Gebeloff, supra note 37 (“Corporations said that class actions were not needed because arbitration enabled individuals to resolve their grievances easily. But court and arbitration records show the opposite has happened: once blocked from going to court as a group, most people dropped their claims entirely.”).

\textsuperscript{201} See supra Parts II.B–II.F.

\textsuperscript{202} The success these lobbying groups have had in the Supreme Court demonstrates this the best. See supra Parts II.B–II.F

LLP—the Supreme Court swiveled its attention back to class actions and arbitration provisions after leaving the topic dormant for more than three years, and granted certiorari in mid-January. For them, Lewis checks all the boxes that makes a case ripe for the Court’s consideration: it features a disagreement between federal appellate courts on how the law should be settled when individual arbitration clauses fly in the face of the NLRA. Additionally, the case concerns a legal topic whose subject matter causes the Court itself to split five-to-four. Finally, the Lewis holding would impact wide swaths of the populace in an important and intimate part of their lives: employment. The case for granting certiorari was strong. And while the Court has yet to hear Lewis’s oral arguments, it has strong motivations to hold off on this task until the Senate confirms Judge Gorsuch and he warms a freshly hewn Court seat.

The current justices recognize their previous cases have put them at loggerheads with one another, and an evenly-split, eight-justice Court would simply affirm the Seventh Circuit’s holding with non-binding effect on the other federal circuits. Thus, their current abstention from hearing oral arguments until the October 2017 term is unsurprising. Nevertheless, once the Court returns to its nine-justice normality, it should affirm the Seventh Circuit’s holding that invalidates Epic’s arbitration clause.

Why affirm Lewis? First, the Supreme Court’s decision in such a case—irrespective of whether the Court affirms or reverses the Seventh Circuit—would answer an otherwise ignored question: does the FAA supersede statutes that permit collective actions, do such statutes trump the FAA, or must courts reconcile the two statutory schemes? The Court’s definitive holding (unless it only garners a plurality opinion) would provide lower federal courts a means of analogizing to Lewis when assessing other statutes similar to the NLRA. Thus, if a securities statute permits collective action against a corporation, lower federal courts would be able to graft the Court’s interpretation in Lewis to such a statute and conclude whether a case’s plaintiffs are entitled to a class action, or whether each claimant must

proceed on an individual basis. Presumably, the same would occur in statutes addressing consumers’ rights. In taking up Lewis for argument, the Supreme Court would color in another section of the fragmented jurisprudence surrounding class actions and the FAA.

More importantly, the Court should uphold the Seventh Circuit because to not do so would result in seismic shifts in the legal landscape of employment law. A reversal of Lewis’s holding would effectively relegate any employment dispute—whether for something as purely financial as unpaid wages to something as personal as race and gender discrimination suits—to individual arbitration. Nothing would stop employers from enforcing individual arbitration clauses into all its employees’ contracts.

Ostensibly, one could argue that not all businesses would necessarily blunt their employees’ rights to collective action through such contractual provisions. Yet, assuming the Court does reverse Judge Wood’s opinion, what would cause businesses to not incorporate individual arbitration clauses in all their employment contracts? The agreements curb damages awards (both compensatory and punitive) businesses pay out to claimants through individual arbitration, and reduce potential allowance accounts in a company’s retained earnings statement (or balance sheet). They save the corporation money relative to traditional court filings. They prevent communication amongst claimants in arbitration through non-disclosure provisions. What does a business have to lose?

Even if one takes the Chamber of Commerce’s point in Part II, infra, at face value—that is, that individuals recover more from an employer in individual arbitration than in class litigation—virtually nothing deters a commercial entity from engaging in the unwanted behavior for which it was sued in the first place. As noted above, while a business’s employees may have their individual harms redressed, the workforce as a whole might not, and the business is free to continue its socially harmful behavior without any retributive threat.

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205 See Fitzpatrick, supra note 10 at 190 (“In my view, this question—whether businesses will take advantage of the opportunity to slip arbitration clauses with class action waivers into all their contracts—is largely a rhetorical one. Why wouldn’t businesses take advantage of this opportunity?”).
from its workforce. That means that unpaid wages could continue to go unpaid for those unaware that they were deprived of their earnings, and women and minority workers would experience no improvement in promotional opportunities. At its worst, arbitration clauses could allow businesses to operate with a non-diverse workforce without any internal pressures to change.\textsuperscript{206}

In the end, the issue remains whether Judge Gorsuch would vote alongside Judge Wood and reconcile the FAA with the NLRA, or whether this justice would determine that the former supersedes the latter and preserves individual arbitrations.\textsuperscript{207} While the choice for a conservative justice seems clear-cut from a political ideology, the issue blurs when one assesses the issue from a statutorily interpretive lexicon. Few would argue that the Seventh Circuit’s decision to invalidate Epic’s arbitration provision in its contracts qualifies as a politically liberal decision; the result strips away a pro-business safeguard and exposes Epic to increased risk.

However, Judge Wood had to assess Lewis within the Supreme Court’s established analyses in Concepcion and Italian Colors.\textsuperscript{208} In doing so, she argued that conservative doctrines of statutory interpretation require that “when two statutes are capable of co-existence . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective” and that “when two statutes complement each other”—that is, ‘each has its own scope and purpose’ and imposes ‘different requirements and protections’—finding that one precludes the other would flout the congressional design.”\textsuperscript{209} Wood posited that because the NLRA invalidates Epic’s contractual provision (by preventing enforcement of contract provisions that abrogate collective actions), such an invalidation qualifies as the clause being illegal “upon grounds in law

\textsuperscript{206} This is true unless the employees resort to a walk-out or the market reacts negatively to such provisions, an unlikely event because many people don’t know the contracts they sign contain arbitration provisions.


\textsuperscript{208} Lewis, 812 F.3d at 1158–59.

\textsuperscript{209} Id. at 1157, 1159.
or in equity” under the FAA.\textsuperscript{210} Concluding, Wood observed that the two statutes can symbiotically work with one another, and one did not oust the other.\textsuperscript{211}

Judge Gorsuch will face an interpretive fork: he could either assume the Seventh Circuit’s reconciliation of the FAA and the NLRA—which, assuming the nominee carries a textualist pedigree, would likely comport with her jurisprudential philosophy on constitutional and statutory interpretation—or he could perpetuate Justice Scalia’s trailblazing interpretation of the FAA that preserves arbitration in the vast majority of contexts. A fiscally neoliberalist platform adopted by many Republicans in Congress would call for a nominee who would carry \textit{Italian Colors’} holding into the employment setting.\textsuperscript{212} But that policy point seems to go against conservative forms of statutory interpretation.\textsuperscript{213} Thus, the Court’s ruling on \textit{Lewis} remains enshrouded in uncertainty. The Court would splinter, likely five-to-four or six-to-three, but which way the majority falls can only be answered with time.

If the Court reverses \textit{Lewis}, such a sudden upheaval in the way employment actions are brought could trigger remedial legislation from Congress that would undo the Court’s holding. Despite Republicans’ traditional, pro-business platform, the 2016 election

\textsuperscript{210} \textit{Id.}
\textsuperscript{211} See \textit{id.} at 1159–60.
injected the GOP with a strong populist ire that allowed Donald Trump to . . . well . . . trump his Republican colleagues in the primaries and Hilary Clinton in the general election.\textsuperscript{214} Republican lawmakers, along with blue-collar Democrat legislators, might propose legislation that preserves the class action explicitly under the NLRA and statutes like it in the securities and consumer settings. Though, admittedly, similar legislation has been previously proposed under Republican-controlled Congresses, and has not received so much as a discussion in committee.\textsuperscript{215} Yet, one other avenue exists for remedial reform: administrative regulation.

Alluded to previously, the CFPB has drafted a regulation that proscribes financial institutions from including arbitration provisions in their consumer contracts that foreclose parties from filing a class action against the financial institution.\textsuperscript{216} While such a regulation is on President Trump’s chopping block along with the rest of the Dodd-Frank Wall Street Reform and Consumer Protection Act, its regulation of consumers’ financial contracts demonstrates a structure that other agencies can use to regulate arbitration provisions in their own spheres. Thus, the NLRB, for example, could draw up a regulation to the tune of the CFPB’s, one which prevents employers from drafting arbitration agreements that preclude any class action filings for employment discrimination cases. The same can be said of the


\textsuperscript{216} Arbitration Agreements, 81 Fed. Reg. 32829 (proposed May 3, 2016).
Securities and Exchange Commission, which could enact a similar regulatory regime in the context of stock certificates or other security-related contracts.

Just as with the CFPB’s proposed rule, one must question the likelihood of such regulations taking place over the next four years.\(^{217}\) And just like other regulations, those that abrogate arbitration provisions would likely be the subject of litigation, and judges would be reluctant to stray away from deferring to agencies’ expertise in accordance with the *Chevron* doctrine\(^{218}\) (even with Judge Gorsuch’s questionable jurisprudence on this deference).\(^{219}\) Challenges aside, the administrative arm of the federal government remains an open avenue to reform arbitration clauses.

CONCLUSION

Few recognize how much the Supreme Court’s interpretation of the Federal Arbitration Act affects the populace’s access to courts.\(^{220}\) As contractual provisions erode the class action mechanism’s prevalence, there arises a need for judges, legislators, and regulators to step in and support individuals’ abilities to collectively litigate. Just as it has in other hot-button issues, Justice Scalia’s death—alongside the Senate’s effective obstruction of Judge

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\(^{220}\) Silver-Greenberg & Gebeloff, *supra* note 132.
Garland and President Trump’s nomination of Neil Gorsuch—has caused scholars to question whether the Court’s newest member will take up the conservative mantle of his predecessor, or instead adjudicate with a more moderate jurisprudence. To that end, Lewis offers the Court an opportunity to either shift its scorched-earth stance on arbitration toward a balanced relationship between private dispute resolution and class litigation, or maintain the status quo and let class actions slip off into procedural extinction. Ultimately, the judiciary, and indeed the public must ask itself: do we ever want to see a case like Ms. Rajender’s again? As is frequently the answer to such a question, only time will tell. Nevertheless, while the Court may struggle with this case, this student has made up his mind: Lewis merits affirmation, if not for the mere fact that a reversal would bring the country one step closer to the death knell of the class action.