

## A Means to an End: How the Expansion of The Federal Arbitration Act of 1925 by the Supreme Court Created a Loophole for Corporations to Avoid Claims by Consumers and Workers Alike

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# A Means to an End: How the Expansion of The Federal Arbitration Act of 1925 by the Supreme Court Created a Loophole for Corporations to Avoid Claims by Consumers and Workers Alike

Brittany L. Pushkin

*Arbitration is rarely thought of outside the legal and business world by the everyday lay person. Whether we know it or not—all of us, in some capacity, have agreed to a mandatory arbitration clause. A contract for cellular service, an employer-employee arrangement, or an agreement to open a bank account are just a few common examples that lock not only clients, but also employees, in contracts that contain mandatory arbitration clauses. In 1925, the Federal Arbitration Act was imagined to propel the efficiency of justice. However, the Supreme Court has greatly expanded the scope of the Act; which, in turn, has twisted the original intent of the Federal Arbitration Act and created a loophole for corporations to avoid class action litigation all together without even looking toward the merits of each case. Allowing this kind of abuse only deprives consumers and employees of their Seventh Amendment right to trial as mandatory arbitration clauses only seem to become more commonplace. Originally, the Federal Arbitration Act was enacted to create another avenue to dispute resolution in order to speed up cases where both parties agreed to avoid trial. Now, arbitration is a wonderland for large companies where the world of justice is flipped on its head and rules of evidence are thrown out without any regard for the law. Even though arbitration is a private dispute resolution, this should not undermine basic due process measures. Simply because large corporations want to avoid the expenses of the trial courts and damages, this does not mean justice should be put on the wayside. Individuals may be left in a*

*worse position after arbitration— even if they come out on the winning side.*

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“Act in such a way that you treat humanity, whether in your own person or in the person of any other, never merely as a means to an end, but always at the same time as an end.”<sup>1</sup>

## I. INTRODUCTION

The Seventh Amendment of the Bill of Rights guarantees, “[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . .”<sup>2</sup> Despite this express right to trial, many individuals’ claims are now being pigeon-holed into private dispute resolution.<sup>3</sup> Mandatory arbitration clauses have become an integral part of American life, for better or for worse. However, although originally thought to streamline the judicial process and save the individual’s hard-earned money on rising litigation costs, arbitration has become a death sentence for legal claims.<sup>4</sup> Although the word arbitration is freely floated around, very few individuals understand what this process entails.<sup>5</sup> Even more troubling, a vast majority of these individuals are likely subject to a mandatory arbitration clause.<sup>6</sup> These clauses are commonly snuck into long employment or client contracts with companies. Although supporters of these arbitration clauses may argue that it is the fault of the signee for not reading the fine print—the blame must be shifted onto these large companies.<sup>7</sup>

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<sup>1</sup> IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS*, 87 (Mary Gregor et al. eds., 2nd ed. 2012).

<sup>2</sup> U.S. Const. amend. VII.

<sup>3</sup> See Jessica Silver-Greenberg and Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, *THE NEW YORK TIMES* (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (“Over the last few years, it has become increasingly difficult to apply for a credit card, use a cellphone, get cable or Internet service, or shop online without agreeing to private arbitration. The same applies to getting a job, renting a car or placing a relative in a nursing home.”).

<sup>4</sup> See *Congress Must Undo Damage of U.S. Supreme Court’s Latest Anti-Consumer Decision*, *PUBLIC CITIZEN* (May 17, 2011), <https://www.citizen.org/news/congress-must-undo-damage-of-u-s-supreme-courts-latest-anti-consumer-decision/> (explaining that the Federal Arbitration Act was originally “a law whose goal was to help facilitate voluntary arbitration between businesses”).

<sup>5</sup> Jessica Silver-Greenberg and Michael Corkery, *In Arbitration, A ‘Privatization of the Justice System’*, *THE NEW YORK TIMES* (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?module=inline>.

<sup>6</sup> Silver-Greenberg and Gebeloff, *supra* note 3.

<sup>7</sup> See *Hearing on H.R. 4960 A Bill to Amend The Securities Exchange of 1934: Hearings Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce House of Representatives*, 100th Cong. 424 (1988) (statement of William J. Fitzpatrick, Senior Vice President, General Counsel, and SIA).

While the arbitration procedure can be more efficient than the traditional rules of litigation, this in turn has a disparate effect on consumers, small business owners, and employees against the corporate goliath. These corporations understand that arbitration not only is far less expensive than traditional litigation, but it is tilted in favor of the big guy.<sup>8</sup> Large businesses even have the resources and connections to sway arbitrators' opinions in their favor.<sup>9</sup> This is despite the fact that arbitration was originally designed to settle claims as discretionary and duly agreed upon by all involved parties.<sup>10</sup> Thus, arbitration has become a pseudo-courtroom that leaves information normally available to the public—in the shadows.<sup>11</sup> These individuals have valid claims that require the attention and experience that a courtroom can provide in order to equitably decide the course of action. Further, it is the publicity of trials that can bring notoriety to claims and warnings of abuse. Yet, now “[t]housands of cases brought by single plaintiffs over fraud, wrongful death and rape are now being decided behind closed doors.”<sup>12</sup>

According to the Economic Policy Institute, “by 2024, more than 80 percent of private sector nonunion workers will be blocked from court by forced arbitration clauses with class- and collective-action waivers.”<sup>13</sup> For many individuals, it is now or never. Yet, it is clear that in the past ten years, the Supreme Court has greatly perverted the original intent of the Federal Arbitration Act<sup>14</sup> only to now read it based on a strict, textualist theory.<sup>15</sup> The Federal Arbitration Act was never intended to be a malleable tool for large corporations to wield against the rest of the 99%.<sup>16</sup> Here, it

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<sup>8</sup> Silver-Greenberg and Gebeloff, *supra* note 3.

<sup>9</sup> *Id.* (“[T]he rules of arbitration largely favor companies, which can even steer cases to friendly arbitrators, interviews and records show.”).

<sup>10</sup> See *Congress Must Undo Damage*, *supra* note 4.

<sup>11</sup> See generally Cynthia Estlund, *The Black Hole of Mandatory Arbitration* 96 N.C. L. Rev. 679, 679-81 (2018) (explaining the secrecy that lies within arbitration as compared with the openness that accompanies public trials).

<sup>12</sup> Silver-Greenberg and Gebeloff, *supra* note 3.

<sup>13</sup> HAMAJI ET. AL., UNCHECKED CORPORATE POWER 1 (May 2019), <https://www.epi.org/files/uploads/Unchecked-Corporate-Power-web.pdf>.

<sup>14</sup> See generally Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 Fla. St. U. L. Rev. 99, 99-100 (2006) (explaining the new scope and reach of the Federal Arbitration Act of 1925).

<sup>15</sup> *Id.* at 157 (“Over the last twenty-five years, the Justices have shown an ability to misuse both legislative history and textualism to reach their desired result, rather than to interpret the statute that was enacted.”).

<sup>16</sup> See Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 OHIO ST. J. ON DISP. RESOL. 669, 729-30 (2001).

was the legislature who created this act, but the Court that destroyed it.<sup>17</sup> Now, it is time for the Legislature to act and salvage what is left of the Act.

## II. THE FEDERAL ARBITRATION ACT OF 1925

Nearly 100 years ago, arbitration was devised as a mechanism tailored to businessmen of similar resources that were in fairly simple dispute.<sup>18</sup> Currently, arbitration is defined as “a private process where disputing parties agree that one or several individuals can make a decision about the dispute after receiving evidence and hearing arguments . . . After the hearing, the arbitrator issues an award.”<sup>19</sup> This definition may seem straightforward; however, this was the original intent that the legislature had in mind when crafting the Federal Arbitration Act of 1925.<sup>20</sup>

### A. *The Original Intent of The Federal Arbitration Act*

In the 1920’s, the Congress was cognizant of how troubling litigation was for the average business—it bred animosity and emptied pockets.<sup>21</sup> Thus, the Federal Arbitration Act sought to alleviate the burdens of the judicial process by allowing individuals who had contracted together to solve any issue in a less formal and expedited manner.<sup>22</sup> Moreover, the

<sup>17</sup> See *Congress Must Undo Damage*, *supra* note 4 (“It is now clear that a five-justice majority on the court is committed to turning the Federal Arbitration Act of 1925 . . . into a shield against corporate accountability.”).

<sup>18</sup> Garrett Epps, *An Epic Supreme Court Decision on Employment*, THE ATLANTIC, (May 22, 2018),

<https://www.theatlantic.com/ideas/archive/2018/05/an-epic-supreme-court-decision-on-employment/560963/> (stating that the Federal Arbitration Act was envisioned to “efficiently settle disputes among merchants—business interests with comparable bargaining power”).

<sup>19</sup> *Arbitration*, AMERICAN BAR ASSOCIATION, (date last accessed: January 5, 2020), [https://www.americanbar.org/groups/dispute\\_resolution/resources/DisputeResolutionProcesses/arbitration/](https://www.americanbar.org/groups/dispute_resolution/resources/DisputeResolutionProcesses/arbitration/).

<sup>20</sup> Moses, *supra* note 14, at 110-11 (explaining that the Federal Arbitration Act was intended as a procedural law which allowed a new form of private dispute resolution that was geared towards simple disputes).

<sup>21</sup> See *generally id.* at 103 (“[T]he [original New York State] statute [that served as a basis for the Federal Arbitration Act] was directed at three evils: (1) long delays caused by congested courts and excessive motion practice, (2) the expense of litigation, and (3) failure through litigation to reach a decision as just.”).

<sup>22</sup> *Id.* at 102 (“Arbitration saves time, saves trouble, saves money . . . It preserves business friendships . . . It raises business standards. It maintains business honor, prevents unnecessary litigation, and eliminates the law’s delay by relieving our courts.” (citing *Arbitration of Interstate Commercial Disputes: Hearing of S. 1005 and H.R. 646 Before the J. Comm. Of Subcomms. on the Judiciary*, 68th Cong. 16 (1924) (statement of Julius Cohen))).

drafters believed arbitration allowed for equity, but also promoted unity in the business community even after a dispute.<sup>23</sup>

As a guide, the legislative history of the Federal Arbitration Act of 1925 provides clear and vivid accounts of the original intent of Congress.<sup>24</sup> As one representative proclaimed, “[t]his bill simply provides for one thing, and that is to give an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when *voluntarily* placed in the document by the parties to it.”<sup>25</sup> This new law was designed to address disputes between arms-length, equally-able bargaining parties that had both mutually agreed to be in a transaction governed by an arbitration clause.<sup>26</sup> The Federal Arbitration Act was originally *not designed to be* applicable to most employer-employee contracts.<sup>27</sup> Further, the framers envisioned this bill would provide a cheaper, more efficient way to deal with *non-complex* legal disputes.<sup>28</sup> The Legislature recognized that more complicated claims were better off with the experience and procedural safeguards of the court system.<sup>29</sup>

Lastly, one of the main goals of the Federal Arbitration Act of 1925 was to allow businessmen to amicably reconcile even after dealing with any sort of legal dispute.<sup>30</sup> Litigation can be a hostile process—as costs grow, so can contempt. Therefore, the legislature acknowledged a less formal arena would help to diminish any conflict between the parties during the lawsuit and after it. Nevertheless, this sort of camaraderie that was emphasized in the Federal Arbitration Act of 1925 no longer remains.

### *B. Supreme Discretion: How The Supreme Court Created A New Federal Arbitration Act*

Despite the basic framework and extensive legislative history of the Federal Arbitration Act, the Supreme Court, over the past thirty years, transformed this Act into an unrecognizable tool for the wealthy and

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<sup>23</sup> *Id.*

<sup>24</sup> *See generally id.*

<sup>25</sup> *Id.* at 108 (citing 65 Cong. Rec. 1931 (1924) (emphasis added)).

<sup>26</sup> Epps, *supra* note 18.

<sup>27</sup> Moses, *supra* note 14, at 105-06.

<sup>28</sup> *Id.* at 111.

<sup>29</sup> *See id.* (“Arbitration was ‘not the proper method for deciding points of law of major importance of involving constitutional questions or policy in the application of statutes.’ These kinds of questions were not within the particular experience of the arbitrators and thus were ‘better left to the determination of skilled judges with a background of legal experience and established system of law.’” (citing Julius Henry Cohen & Kenneth Dayton, *The New Federal Arbitration Law*, 12 VA. L. REV. 265, 281 (1926))).

<sup>30</sup> *Id.* at 102-03.

powerful.<sup>31</sup> Originally, arbitration was reserved solely for businessmen in a transaction.<sup>32</sup> Yet, today, arbitration is now enforceable in consumer and employee contracts.<sup>33</sup> Further, this procedural, federal law has been transformed into a substantive law that is able to preempt state law all the while dealing with certain, consequential rights such as antitrust and antidiscrimination statutes.<sup>34</sup>

The current paradigm began when the Supreme Court greatly increased the scope of this Act.<sup>35</sup> Yet, as the Federal Arbitration Act's breadth ballooned, the Court would then in turn read the Act's plain language on its face. Strangely enough, the Supreme Court Justices have expanded this law liberally all the while interpreting it textually. Although those two words could not seem further apart, this is what is incredibly peculiar about this conundrum. Yet, if one takes a step back to look at the fuller picture, it is clear that this was by design.<sup>36</sup>

Unbeknownst to the general public, legal masterminds slowly started to expand the reach of the Federal Arbitration Act in the previous decades.<sup>37</sup> This sort of paradox was driven by large corporations seeking out one thing: a loophole. Now, consumers and employees alike have little to no recourse if bound by arbitration clauses.

### III. RISE OF MANDATORY ARBITRATION CLAUSES

The 1980's may have marked a new era for the Federal Arbitration Act, yet it is the past ten years that has truly solidified the reach of the Act.<sup>38</sup> In 2011, with *AT&T Mobility LLC. v. Concepcion*, the Supreme Court took a very liberal approach when defining the parameters of the

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<sup>31</sup> See *id.* at 157 (“All of the Justices at various points in time lost sight of the purpose and scope of the legislation or deferred to faulty precedent, creating a far different statute from the one enacted by Congress.”); Epps, *supra* note 18 (“[T]he Court’s conservatives have reinterpreted the [Federal Arbitration] Act to include what they call a ‘liberal federal policy favoring arbitration agreements.’”).

<sup>32</sup> See Epps, *supra* note 18.

<sup>33</sup> *Id.*; Moses, *supra* note 14, at 112.

<sup>34</sup> See Moses, *supra* note 14, at 112-13.

<sup>35</sup> See Epps, *supra* note 18 (“This is a judge-made policy invention, reflecting conservative justice’s empathy for corporations and large employers facing lawsuits by consumers and employees.”).

<sup>36</sup> See Moses, *supra* note 14, at 132 (citing *Circuit City Shores Inc. v. Adams*, 532 U.S. 105, 132 (2001)).

<sup>37</sup> See *id.*

<sup>38</sup> See Moses, *supra* note 14, at 156 (“Despite concerns expressed by members of the 1925 Congress that arbitration not be imposed in a ‘take-it-or-leave-it’ context, the Supreme Court since the 1980s has created a statute which permits businesses to do exactly that.”).



Federal Arbitration Act.<sup>39</sup> Yet, it is the ruling in this case that got the ball rolling. In *AT&T Mobility*, the Court found it was permissible for contracts to contain class action waivers within mandatory arbitration clauses. In the seven years after *AT&T Mobility*, the Court allowed the Federal Arbitration Act to preempt state law, limit the Effective Vindication Doctrine, and take precedence over the National Labor Relations Act of 1935.<sup>40</sup> This precedent severely restricts the rights of consumers and employees alike, all the while, shielding major corporations from any sort of lawsuit by making the possibility of legal action neither pragmatic nor possible.<sup>41</sup>

#### A. *AT&T Mobility LLC. v. Concepcion*

In 2002, a married couple, Vincent and Liza Concepcion, signed an agreement with AT&T Mobility, LLC for the corporation to provide cellphones and a network service in exchange for monthly payments.<sup>42</sup> Under the contract, AT&T agreed to supply *at no cost* the cellphones for the service provided to its customers.<sup>43</sup> However, after the Concepcions were charged over \$30 in sales tax on each phone, they filed a complaint alleging fraud and false advertising which was later combined in a class action suit as other customers faced the same situation.<sup>44</sup> Because the sales tax was too low of an amount for many people to individually sue for, class action was appropriate. This sort of collective action allows for the risk to be worth the reward for all those wronged.<sup>45</sup>

However, the original agreement signed between the Concepcions, as well as many others, and AT&T required mandatory arbitration for any claims against the company.<sup>46</sup> Further, the contract speculated that any claim must also be brought *individually*.<sup>47</sup> In other words, this agreement contained a class action waiver clause.

Based on the original service agreement, AT&T filed a motion to compel arbitration.<sup>48</sup> The Concepcions responded that the service contract

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<sup>39</sup> *AT&T Mobility LLC. v. Concepcion*, 560 U.S. 1740, 1745 (2011).

<sup>40</sup> *See generally* *Moses*, *supra* note 14, at 112-13.

<sup>41</sup> *See* *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2313 (2013) (Kagan, J. dissenting) (describing the arbitration clause in American Express' contract as "impos[ing] a variety of procedural bars that would make pursuit of an anti-trust claim a fool's errand").

<sup>42</sup> *Concepcion*, 560 U.S. at 1744.

<sup>43</sup> *Id.*

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

<sup>45</sup> *See* *Silver-Greenberg and Gebeloff*, *supra* note 3 ("[C]lass-action lawsuits, realistically [are] the only tool citizens have to fight illegal or deceitful business practices.").

<sup>46</sup> *Concepcion*, 560 U.S. at 1744.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

was unconscionable “and unlawfully exculpatory under California law because it disallowed class-wide procedures.”<sup>49</sup> In response, the District Court denied AT&T’s motion, holding that the arbitration clause in the contract purposely disfavored class action litigants, thus the contract was unconscionable.<sup>50</sup> The Ninth Circuit affirmed the lower court’s ruling consistent with California law under *Discover Bank v. Superior Court*.<sup>51</sup> The appellate court found that the Federal Arbitration Act did not supersede California law because the unconscionability measure was in line with basic contract principle.<sup>52</sup> However, upon appeal to the Supreme Court, Justice Scalia, writing for the majority, reversed the Ninth Circuit Court and found that the Federal Arbitration Act preempted California’s state law.<sup>53</sup> Justice Scalia noted that the Federal Arbitration Act of 1925 has a liberal interpretation and the *Discover* Rule and comparable “state-law rules . . . stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>54</sup> Basing his rationale on the “text”<sup>55</sup> of the Federal Arbitration Act, Justice Scalia stated that the “‘primary purpose’ of the FAA is to ‘ensur[e] that private arbitration agreements are enforced according to their terms.’”<sup>56</sup> Here, Scalia’s reasoning set the framework for arbitration cases to follow. Without any regard for the terms of the arbitration agreement, Scalia drove forward the reasoning that the Federal Arbitration Act was meant to enforce *any* and *all* arbitration agreements. In his counterargument to the dissent, Justice Scalia merely mustered up that although there may be unrelated, but noteworthy reasons to not allow the Federal Arbitration Act to preempt state law, this cannot happen as it is simply “inconsistent with the FAA.”<sup>57</sup> This sort of posturing of the Federal Arbitration Act poses the question: How far will this go?

After the widely criticized *Concepcion* decision, many scholars recognized the immediate damaging effect not only on the legal field, but on consumers.<sup>58</sup> The Supreme Court opened the gates for little to no

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<sup>49</sup> *Id.* at 1745.

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

<sup>51</sup> *Id.*; see generally *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005) (“[T]he law in California is that class action waivers in consumer contracts of adhesion are unenforceable, whether the consumer is being asked to waive the right to class action litigation or the right to classwide arbitration.”).

<sup>52</sup> *Concepcion*, 560 U.S. at 1745 (citing *Laster v. AT&T Mobility LLC.*, 584 F.3d 849, 857 (2009)).

<sup>53</sup> *Id.* at 1753.

<sup>54</sup> *Id.* at 1748.

<sup>55</sup> *Id.* (referring to Section 2, 3, and 4 of the Federal Arbitration Act).

<sup>56</sup> *Id.* (citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

<sup>57</sup> *Id.* at 1753.

<sup>58</sup> See generally Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging “Anti-Reform” Provisions in Arbitration Clauses*, 69 U. MIAMI L. REV. 469,

accountability for large corporations.<sup>59</sup> Class action suits promote a large community of similarly situated consumers to have their day in court when their claims are too small to be brought individually. Without a class action option, there is far too much financial risk in going to court or arbitration individually.<sup>60</sup> With this decision, companies are now able to “simply opt out of potential liability by incorporating class action waiver language in their standard form contracts with consumers . . . .”<sup>61</sup>

### *B. American Express Co. v. Italian Colors Restaurant*

Only two years after the historic decision in *AT&T Mobility LLC v. Concepcion*, the Supreme Court was faced with another class-action waiver suit: *American Express Co. v. Italian Colors Restaurant*. Writing once again for the majority, Justice Scalia reinforced the broad approach to interpreting the Federal Arbitration Act and rendered another consequential decision serving as another huge win for large corporations and monopolies.

After being exposed to exorbitant fees, business owners filed an antitrust suit under the Sherman Act of 1890 against the infamous credit card company, American Express.<sup>62</sup> Because these merchants accept various credit cards, including American Express, at their respective places of business, these owners are charged certain fees by those credit card companies.<sup>63</sup> However, the businessmen alleged that “American Express used its monopoly power in the market for charge cards to force merchants to accept credit cards at rates approximately 30% higher than the fees for competing credit cards.”<sup>64</sup> Yet, similar to *Concepcion*, a class action waiver in the arbitration clause of the merchant’s contract with American Express stood in the way of the plaintiffs’ claim.<sup>65</sup>

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470 (2015) (predicting the direct effects that class action waivers will have on consumers such as “small-value individual claims are unlikely to be arbitrated . . . [while] ‘procedurally difficult’ claims . . . cannot realistically be brought by individuals in arbitration”).

<sup>59</sup> See *id.* (“[B]y merely adding an arbitration clause (containing a class action ban and an anti-reform provision) to their contracts, corporate entities have seemingly won the right to cheaply and easily insulate themselves against many forms of privately-enforced legal liability, and with this, the right to continue engaging in practices that cause widespread harm, unless and until detected by a public enforcer.”).

<sup>60</sup> See Silver-Greenberg and Gebeloff, *supra* note 3 (“[I]t is nearly impossible for one individual to take on a corporation with vast resources.”).

<sup>61</sup> Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. Chi. L. Rev. 623, 627 (2012).

<sup>62</sup> *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308 (2013).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

After American Express filed a motion to compel arbitration, the District Court ruled in its favor under the Federal Arbitration Act.<sup>66</sup> The District Court found no weight to the merchants' response which relied on a report concluding that in order to successfully "prove the antitrust claims"<sup>67</sup> it would cost "'at least several hundred thousand dollars, and might exceed \$1 million,' while the maximum recovery for an *individual* plaintiff would be \$12,850, or \$38,549, when trebled."<sup>68</sup> On appeal, the Second Circuit reversed and found in favor of the merchants.<sup>69</sup> The Appellate Court "held that because respondents [merchants] had established that 'they would incur *prohibitive costs* if compelled to arbitrate under the class action waiver,' the waiver was unenforceable, and the arbitration could not proceed."<sup>70</sup>

Eventually, the Supreme Court granted certiorari and later vacated and remanded the case in accordance with the *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.* decision.<sup>71</sup> On remand, the Second Circuit found in favor of the merchants on two separate occasions.<sup>72</sup> For a second time, the Court granted certiorari. Upon review by the Supreme Court, Justice Scalia, found that "the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim."<sup>73</sup> Despite the findings that show the huge expense and little reward of individually going to arbitration, the majority failed to acknowledge the consequences of this decision. Justice Scalia even went as far as saying, "the fact that it [the claim] is not worth the expense involving in *proving* a statutory remedy does not constitute the elimination of the *right to pursue that remedy*."<sup>74</sup> Even though no rational individual would choose to arbitrate when the costs would greatly exceed the reward, the Court did not find that fact to be a legitimate reason to invalidate these arbitration clauses. Thus, the design has once again succeeded as procedurally the claimants may have an avenue to which to proceed upon; however, it is simply not feasible nor practical. These

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* (citing *In re American Express Merchants' Litigation*, 554 F.3d 300, 315-316 (C.A.2 2009)).

<sup>71</sup> *Id.*; see generally *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S. Ct. 1758, 1775 (holding "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so").

<sup>72</sup> *Am. Express Co.*, 133 S. Ct. at 2308 (describing how the Second Circuit actually found in favor for the merchants on remand and once more during a third rehearing in light of the *AT&T Mobility LLC. v. Concepcion* decision).

<sup>73</sup> *Id.* at 2309.

<sup>74</sup> *Id.* at 2311.

decisions no longer represent a tendency to favor arbitration; this is about silencing claims.

Underlying this momentous decision in *Italian Colors*, are the remnants of the Effective-Vindication Doctrine. The Effective Vindication Doctrine was “[c]onceived as a means of ensuring that arbitration is an effective mechanism for vindicating federal statutory rights, the doctrine has played an important role in promoting access to justice.”<sup>75</sup> However, *Italian Colors* reflects a suppression of this doctrine as the majority “limited effective-vindication challenges to situations where an arbitration agreement precludes the assertion of certain statutory rights and cases where filing and administrative fees in arbitration ‘are so high as to make access to the forum impracticable.’”<sup>76</sup> As Justice Kagan explains in the dissent, “Amex has insulated itself from antitrust liability—even if it has in fact violated the law. The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.”<sup>77</sup>

### C. *Epic Systems Corp. v. Lewis*

Justice Gorsuch begins the *Epic Systems Corp. v. Lewis* majority opinion by posing two questions: “[s]hould employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?”<sup>78</sup> Justice Gorsuch goes on to proclaim, “[a]s a matter of policy these questions are surely debatable. But as a matter of law the answer is clear.”<sup>79</sup>

In 2018, the case law was clear. However, the precedent was built upon a series of flawed interpretations of the Federal Arbitration Act of 1925.<sup>80</sup> Similar to *Concepcion* and *Italian Colors*, the plaintiffs in *Epic*

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<sup>75</sup> Okezie Chukwumerije, *The Evolution and Decline of the Effective-Vindication Doctrine in U.S. Arbitration Law*, 14 PEPP. DISP. RESOL. L.J. 375, 375 (2014); see also *Am. Express Co.*, 133 S. Ct. at 2313 (Kagan, J. dissenting) (“[T]he effective-vindication rule—[was created] to prevent arbitration clauses from choking off a plaintiff’s ability to enforce congressionally created rights. That doctrine bars applying such a clause when (but only when) it operates to confer immunity from potentially meritorious federal claims.”).

<sup>76</sup> Chukwumerije, *supra* note 75, at 377-78 (quoting *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310-11 (2013)).

<sup>77</sup> *Am. Express Co.*, 133 S. Ct. at 2313.

<sup>78</sup> *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1619 (2018).

<sup>79</sup> *Id.*

<sup>80</sup> See generally David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 251 (2012) (“The story of FAA jurisprudence since 1983 has been one of justices unwittingly backing themselves into an untenable position and then failing to perceive even a need to find a way out.”); Maureen Weston, *The Death of Class Action After Concepcion?*, 60 KAN. L. REV. 767, 773 (2012) (characterizing the Supreme Court’s

*Systems Corp. v. Lewis* had agreed to arbitrate individually any claims against the company.<sup>81</sup> However, the plaintiffs in the current case were not customers of this corporation. They were employees.<sup>82</sup>

In 1935, the National Labor Relations Act was enacted in order to protect the interests of workers and their right to gather against abusive or harmful practices by employers.<sup>83</sup> Despite Justice Gorsuch's original framing of the question, the central issue at the core of this case was whether corporations can override the employee's right to collective bargaining enumerated in the National Labor Relations Act simply by contracting out of it. Unfortunately, according to *Epic Systems*, companies now can.<sup>84</sup>

### 1. A Fractured History Is The Leading Precedent

A great deal of the majority opinion in *Epic Systems* resembles the arguments of *Concepcion* and *Italian Colors*.<sup>85</sup> In *Epic Systems*, Justice Gorsuch begins the majority opinion by describing a distorted history of the Federal Arbitration Act.<sup>86</sup> Similar to Justice Scalia's background of the Federal Arbitration Act in *Concepcion*, the majority opinion focused narrowly on the utmost importance of enforcing arbitration agreements all the while describing the vast plane in which the Act covers.<sup>87</sup> Here, the majority disingenuously emphasized that the framers and drafters of the Act intended for *all* arbitration agreements to be "valid, irrevocable, and enforceable."<sup>88</sup>

Disguised as an effort to enforce the Federal Arbitration Act, the Court turned a blind eye to the National Labor Relations Act. Justice Gorsuch rationalized that indeed when one looks closer at Section 7 of the National Labor Relations Act, there is no conflict of laws between this act and the

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decisions as "an infatuation with arbitration" (citing Jeffrey Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795 (2012))).

<sup>81</sup> *Epic Systems*, 138 S. Ct. at 1621.

<sup>82</sup> *Id.* at 1619-20.

<sup>83</sup> *National Labor Relations Act*, NATIONAL LABOR RELATIONS BOARD, (last accessed January 5, 2020), <https://www.nlr.gov/how-we-work/national-labor-relations-act>.

<sup>84</sup> *Epic Systems*, 138 S. Ct. at 1632 (reversing the lower court's decision and holding that the arbitration agreements are in fact enforceable in this case).

<sup>85</sup> Compare with *id.* at 1621 with *AT&T Mobility LLC. v. Concepcion*, 560 U.S. 333 1740, 1745 (2011) and *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013).

<sup>86</sup> *Epic Systems*, 138 S. Ct. at 1621.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* (quoting 9 U.S.C. § 2); *but see infra* Section II.A. (illustrating the original intent of the framers and drafters of the Federal Arbitration Act and the focus on voluntariness, similar situated business interests, and non-complex issues such as those that dealt with protected rights).

Federal Arbitration Act.<sup>89</sup> Here, the Court reasoned, Section 7 merely permits collective bargaining and does not explicitly discuss “class or collection action procedures.”<sup>90</sup> However, the National Labor Relations Act was passed into law twenty-one years *before* Rule 23 of Federal Rules of Civil Procedure. Rule 23 of the Federal Rules of Civil Procedure governs modern class action suits.<sup>91</sup> Thus, the Court would be mistaken to immediately write off the intent of the framers of the National Labor Relations Act by not including something that simply was not an issue at the time. Here, it is obvious that the collective bargaining would in fact include class or collection action procedures as this the main goal of the framers of the National Labor Relations Act: promote unity against a tyrannical system.<sup>92</sup>

## 2. A Means To An End

*Epics Systems* represents a culmination of a seven-year project: a means to an end. The combined result of *AT&T Mobility*, *Italian Colors*, and *Epic Systems* is the empowerment of large corporations over consumers, small business owners, and now employees. Because of these decisions, simply inserting a mandatory arbitration clause with a class action waiver will make the costs of litigation and the chance of an individual filing a claim nearly disappear.<sup>93</sup> By overriding the National Labor Standards Act, there is little to no recourse for an employee when an employer violates basic rights.<sup>94</sup> Celine McNicholas, the Director of Governmental Affairs at the Economic Policy Institute, acknowledges that *Epic Systems* represents a shift in society ““which makes it nearly impossible for millions of workers to get justice when their employers

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<sup>89</sup> *Epic Systems*, 138 S. Ct. at 1619.

<sup>90</sup> *Id.* at 1624.

<sup>91</sup> *See* FED. R. CIV. P. 23.

<sup>92</sup> *Epic Systems*, 138 S. Ct. at 1633-34 (Ginsburg, J. dissenting) (“Congress’ aim in . . . the NLRA to place employers and employees on a more equal footing . . . [T]he NLRA operate[s] on a different premise, that employees must have the capacity to act collectively in order to match their employers’ clout in setting terms and conditions of employment.”); Epps, *supra* note 18 (“[A] judge could read the NLRA to bar employer-imposed contracts requiring individual arbitration . . . Under the NLRA, these clauses could be considered as unfairly restricting ‘other concerted activities for the purpose of . . . mutual aid or protection.’ That doesn’t do violence to the FAA; its text explicitly allows an exception when contracts violate ‘grounds as in exist in law.’”).

<sup>93</sup> Gilles, *supra* note 58, at 470.

<sup>94</sup> *See* Epps, *supra* note 18 (noting that “these clauses make it easier for employers to maintain unfair or even unlawful employment structures and salary systems”); *see also* *One Year Since Epic Systems v. Lewis*, *Arbitration is on the Rise*, ECONOMIC POLICY INSTITUTE (May 21, 2019), <https://www.epi.org/press/one-year-since-epic-systems-v-lewis-arbitration-is-on-the-rise/>.

violate fundamental workplace protections”<sup>95</sup> put into place by Congress. Even if arbitration is still a viable option, it is behind closed doors and there is no public accountability.<sup>96</sup> Furthermore, because the cost usually greatly outweighs the incentive to arbitrate, arbitration is a losing battle for each individual.<sup>97</sup>

As Justice Ginsburg reflects upon in her dissent in *Epic Systems*, “[f]orced to face their employers without company, employees ordinarily are no match for the enterprise that hires them.”<sup>98</sup> As a foreseeable consequence of *Epic Systems Corp. v. Lewis*, corporations have begun to “dramatically increase their use of forced arbitration clauses. Soon, only a small minority of American workers will be able to sue [in court] their employers.”<sup>99</sup> In essence, *Epic Systems* represents the final nail in the coffin for claims by employees and consumers alike.

#### IV. THE FUTURE HARM OF MANDATORY ARBITRATION CLAUSES

##### A. *The Supreme Court Decisions Continue To Sabotage Arbitration*

Arbitration clauses may be on the rise, but the integrity of arbitration is in jeopardy.<sup>100</sup> Although this may seem counterintuitive as an onslaught of arbitration clauses and class action waivers are being injected in nearly every consumer and employee contract, arbitration is only hurt by these decisions.<sup>101</sup> The Court has focused on the fact that although arbitration may not be the preferred route of many plaintiffs, it is still an option that does not intrude upon the Effective Vindication of their claims.<sup>102</sup> But in actuality, mandatory arbitration clauses have transformed arbitration into a “claim-suppressing arbitration . . . designed and intended to suppress

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<sup>95</sup> *One Year Since Epic Systems*, *supra* note 94.

<sup>96</sup> *See Estlund*, *supra* note 11, at 102 (“While it is important not to overstate the contrast between arbitration and litigation, there is no doubt that much more of the arbitral process is shielded from public view.”).

<sup>97</sup> *See Silver-Greenberg and Gebeloff*, *supra* note 3.

<sup>98</sup> *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1640 (2018).

<sup>99</sup> *One Year Since Epic Systems*, *supra* note 94.

<sup>100</sup> Adam Raviv, *Too Darn Bad: How the Supreme Court’s Class Arbitration Jurisprudence Has Undermined Arbitration*, 6 Y.B. ARB. & MEDIATION 220, 221 (2014) (“[A]lthough the Court’s recent class arbitration decisions have nominally ‘favored’ arbitration by upholding particular arbitration provisions, in fact the rulings may ultimately undermine the use of arbitration as an efficient, flexible means of resolving disputes both in the U.S. and internationally.”).

<sup>101</sup> *Id.*

<sup>102</sup> *See Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (describing that although the arbitration remedy is expensive, it still exists for the plaintiff).



claims, both in size and number.”<sup>103</sup> By design, arbitration clauses have been carefully woven in between the lines of lengthy contracts. On the surface, it may seem that large corporations incorporate these clauses because arbitration has the tendency to favor the company over the individual in the proceedings—yet, it is the fact that these individuals would rather forego their claim entirely that makes arbitration such an enticing option for these companies.<sup>104</sup> With each and every landmark decision by the Supreme Court, the rights of consumers and employees have been chipped away at. Yet, it truly was the class-wide waivers that had the most pernicious effect.

### *B. Decline of Class Actions*

More than a decade in the making, the move to block class actions was engineered by a Wall Street-led coalition of credit card companies and retailers, according to interviews with coalition members and court records. Strategizing from law offices on Park Avenue and in Washington, members of the group came up with a plan to insulate themselves from the costly lawsuits. Their work culminated in two Supreme Court rulings, in 2011 and 2013, that enshrined the use of class-action bans in contracts. The decisions drew little attention outside legal circles, even though they upended decades of jurisprudence put in place to protect consumers and employees.<sup>105</sup>

The downfall of class action suits began long ago. However, it was *Concepcion* that began the paradigm shift that would soon follow in 2013 and 2018. As David Schwartz recognized, “[a]bsent salvation from the political branches, the class action for consumer and employment claims is dead.”<sup>106</sup>

Despite Justice’s Scalia’s reasoning in *Italian Colors* that there is still a remedy, albeit an expensive one, to these plaintiffs’ claims<sup>107</sup>, no reasonable individual would lose thousands upon thousands of dollars to go up against the corporation.<sup>108</sup> This financial risk is “simply not feasible

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<sup>103</sup> Schwartz, *supra* note 80, at 240.

<sup>104</sup> See Silver-Greenberg and Gebeloff, *supra* note 3.

<sup>105</sup> *Id.*

<sup>106</sup> Schwartz, *supra* note 80, at 266.

<sup>107</sup> See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013).

<sup>108</sup> See Janet Cooper Alexander, *An Introduction to Class Action Procedure in the United States*, DUKE UNIV. SCH. L., I, 1 <https://law.duke.edu/grouplit/papers/classactionalexander.pdf> (“Use of the courts to assert

if brought individually.”<sup>109</sup> Class actions suits are important in the context of holding the corporation publicly accountable for its violations. Further, “[i]ndividual claims are typically small – perhaps only a few dollars, or even less. But in the aggregate, these small individual harms may yield large illegal profits.”<sup>110</sup> Thus, although it may seem pedantic to sue over such seemingly trivial amounts, these companies are the ones gaining so much from this exploitation. Similar to the tax charged on the telephones in *Concepcion* or credit card transaction fees in *Italian Colors*, the individual amount may not seem significant enough to litigate over. Yet, it is the initial abuse in the first place that is bothersome. By slowly gathering these seemingly minor profits, these companies are opening the door to more blatant abuse.

As *Concepcion*, *Italian Colors*, and *Epic Systems* demonstrates, the Supreme Court has let the corporations define who can sue them, or if they can be sued at all. This loophole was created by design under the theory that by “increasing plaintiffs’ transaction costs, [these] defendants can induce them to accept lower settlements or even drop their claims altogether.”<sup>111</sup> It is this type of practice that allows claims to be suppressed, rather than arbitrated. For example, an employee may see it more worthwhile to keep her job while enduring violations of certain protections rather than being further exploited in a closed-door hearing that would eat up her entire life savings. By keeping all claims in the hands of the individual rather than in a class-wide dispute, the corporations are cognizant of the implications of less employees seeing the cause of action through. The American truism, “together we stand, divided we fall,” has never been more ominous as it is in these precarious times.

## V. SOLUTION

The Supreme Court’s propensity to alleviate the class action burden on large corporations has seemingly sealed the fate for anyone legally obliged to a contract with a mandatory arbitration clause and a class action waiver. For many, it may seem like all hope is lost. Nevertheless, there have been strides in the Federal Arbitration Act reform in light of these

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rights is practicable only if the potential benefits exceed the cost . . . Claims that are too small . . . will not be pursued. No matter what rights may be written in the substantive law, if there is no means by which those rights can be enforced the law might as well not exist, for it can be violated with impunity.”)

<sup>109</sup> Jean R. Sternlight and Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROB. 75, 85 (2004).

<sup>110</sup> Cooper Alexander, *supra* note 108, at 1.

<sup>111</sup> *Id.* at 86.

three catastrophic Supreme Court decisions.<sup>112</sup> The Court has gone too far in its interpretation of the Federal Arbitration Act to even attempt to backtrack now. Hence, the duty has been passed onto both Congress and the companies imposing these mandatory arbitration clauses. It is time for to change, whether it be a new bill signed into law or the end of contracts written with such clauses—no matter how lucrative it may be for the corporation to keep such stipulations in place.

### *A. The Forced Arbitration Injustice Repeal Act: A Step In The Right Direction*

Throughout the years, there has been numerous attempts to amend, update, or repeal the Federal Arbitration Act.<sup>113</sup> The most recent endeavor to legislate arbitration clauses came in the form of House Resolution 1423, or better known as the Forced Arbitration Injustice Repeal Act (FAIR Act).<sup>114</sup> “On September 20, 2019, the United States House of Representatives passed the Forced Arbitration Injustice Repeal Act (the “FAIR Act”), H.R. 1423, a bill seeking to eliminate mandatory arbitration agreements and class action waivers in future employment, consumer, antitrust, or civil rights disputes.”<sup>115</sup> The bill states:

The purposes of this Act are to—

(1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and

(2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute.<sup>116</sup>

In response to the FAIR Act, the White House released a statement of administrative policy rebuking this latest action by the House.<sup>117</sup> The White House claimed, “[t]hese blanket prohibitions will increase litigation, costs, and inefficiency, including by exposing the vast majority

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<sup>112</sup> See Jean R. Sternlight, *Introduction: Dreaming About Arbitration Reform*, 8 NEV. L.J. 1, 3-4 (2007), <http://scholars.law.unlv.edu/facpub/282> (discussing various attempts to reform the Federal Arbitration Act of 1925 in response to the Supreme Court’s decisions).

<sup>113</sup> See *id.*

<sup>114</sup> Murray B. Silverstein, *Proposed Legislation to Invalidate Arbitration Agreements and Class Action Waivers Passes House—Now in Senate*, GREENSPOON MARDER CONSUMER FINANCE BLOG, (Oct. 22, 2019), <https://www.lexology.com/library/detail.aspx?g=e0539852-c73c-482a-8543-df489e509295>.

<sup>115</sup> *Id.*

<sup>116</sup> H.R. 1423, 116th Cong. (2019), <https://www.congress.gov/116/bills/hr1423/BILLS-116hr1423rfs.pdf>.

<sup>117</sup> EXEC. OFF. OF THE PRESIDENT, ST. OF ADMIN. POL’Y, (2019), [https://www.whitehouse.gov/wp-content/uploads/2019/09/SAP\\_HR-1423.pdf](https://www.whitehouse.gov/wp-content/uploads/2019/09/SAP_HR-1423.pdf).

of businesses to even more unnecessary litigation. As written, the FAIR Act disregards the benefits of resolving disputes through arbitration, including lower costs, faster resolution, and reduced burden on the judiciary.”<sup>118</sup> Ironically enough, the White House concluded its statement proclaiming, “[b]y limiting contractual options, this bill would hurt businesses and the very consumers and employees its seeks to protect.”<sup>119</sup>

Despite the White House’s argument that the FAIR Act will only result in a slew of litigation<sup>120</sup>, it failed to recognize all the suits *already* in the courts fighting against arbitration clauses themselves. Therein lies the hypocrisy in this entire façade that mandatory arbitration actually speeds up the judicial process.<sup>121</sup> Furthermore, even if there is an arbitration case that may be a quicker resolution to a litigation proceeding this does not mean it is an equitable resolution.<sup>122</sup> It is obvious that supporters of the current paradigm value time saved rather than justice prevailed. The White House’s position is the common argument in support of mandatory arbitration.<sup>123</sup> However, it is this efficiency fallacy that continues to persist despite numerous examples of arbitration as an unjust system.<sup>124</sup>

Moreover, the White House’s claim that a reform to the current system will only increase unnecessary litigation fails to give proper weight to the merits of each case that is strong-armed into arbitration. It is obvious that many individuals with a valid claim forgo arbitration due to the costs associated and the lack of reward.<sup>125</sup> If anything, the White House is

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

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

<sup>121</sup> See David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1312 (2009) (“However, if one compares all case dispositions in the two forums—including settlements, pretrial dismissals, and the like—the average time to disposition may well be shorter in litigation than arbitration.”).

<sup>122</sup> See *id.* at 1339-40 (explaining that although the court system may very well have full dockets, the arbitration system has shown time and time again to be “pro-[corporate] defendant”).

<sup>123</sup> See *Using Arbitration to Resolve Legal Disputes*, FINDLAW, <https://adr.findlaw.com/arbitration/using-arbitration-to-resolve-legal-disputes.html> (last visited Nov. 8, 2019) (“Arbitration is generally considered a more efficient process than litigation because it is quicker, less expensive, and provides greater flexibility of process and procedure.”).

<sup>124</sup> Schwartz, *supra* note 121, at 1340-41 (explaining that there is “no evidence that it [mandatory arbitration] is fair”).

<sup>125</sup> See Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POLICY INST. (Apr. 6, 2018), <https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/> (“Research has found that employees are less likely to win arbitration cases and they recover lower damages in mandatory employment arbitration than in the courts.”).

protecting large companies, not the workers or consumers.<sup>126</sup> By insulating these large companies from future lawsuits, the Court, the White House, and other mandatory arbitration supporters are only saving these corporations significant damages that they would otherwise be likely ordered to pay.<sup>127</sup> It is not that these consumers or employees are wasting the corporations' time with nuisance suits—it is the entire system that has silenced valid claims.<sup>128</sup>

### *B. The Digital Influence*

Though large corporations seem to be the true winner out of this system, many companies are now removing pre-dispute arbitration clauses from its consumer and employee contracts. One of the largest supporters of the FAIR Act was Google.<sup>129</sup> Google threw its support behind this bill in the House after “[m]ore than 20,000 Google employees and contractors in Google offices located in 50 cities worldwide walked out for real change at 11:10am local time protesting sexual harassment, misconduct, lack of transparency, and a workplace culture that doesn't work for everyone.”<sup>130</sup> One of the demands was “[a]n end to Forced Arbitration in cases of harassment and discrimination for all current and future employees, along with a right for every Google worker to bring a co-worker, representative, or supporter of their choosing when meeting with HR, especially when filing a harassment claim.”<sup>131</sup> Here it is obvious that Google recognized that mandatory arbitration clauses not only hurt its workers, but these clauses were hurting its own internal operations.<sup>132</sup>

On the other hand, companies that have neglected to take accountability into its own hands have faced challenges in this increasingly digital world. After news broke that a prominent law firm

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<sup>126</sup> *See id.*

<sup>127</sup> *See id.*

<sup>128</sup> *See* Silver-Greenberg and Corkery, *supra* note 5; *see also* Silver-Greenberg and Gebeloff, *supra* note 3 (describing how “[s]ome state judges have called the class-action bans a ‘get out of jail free’ card, because it is nearly impossible for one individual to take on a corporation with vast resources”).

<sup>129</sup> Colin Lecher, *Google Organizers Join Lawmakers in Arbitration Fight*, THE VERGE, (Feb. 28, 2019, 12:40 PM), <https://www.theverge.com/2019/2/28/18244752/google-organizers-fair-act-bill-forced-arbitration>.

<sup>130</sup> *Google Employees and Contractors Participate In Global “Walkout For Real Change,”* MEDIUM, (Nov. 2, 2018), <https://medium.com/@GoogleWalkout/google-employees-and-contractors-participate-in-global-walkout-for-real-change-389c65517843>.

<sup>131</sup> *Id.*

<sup>132</sup> *See* Lecher, *supra* note 129; *see also* Colin Lecher, *Google Will End Forced Arbitration For Employees In All Disputes*, (Feb. 21, 2019), <https://www.theverge.com/2019/2/21/18235205/google-forced-arbitration-employee-disputes>.

included a clause in its contract for summer associates which required arbitration for any claim including Title VII sexual harassment claims, there was immediate backlash.<sup>133</sup> Shortly after an uproar on social media, the firm tweeted it would no longer include a pre-dispute arbitration clause in its contracts for summer associates nor any other employee.<sup>134</sup>

Over a year later, another prestigious law firm was in the news over the controversial arbitration issue.<sup>135</sup> Yet, this time, this firm was proactively removing mandatory arbitration clauses from its employer-employee contracts.<sup>136</sup> Taking cues from Google, the firm released the news in a statement that focused on the needs of the employees.<sup>137</sup> In an era of increased public accountability, these businesses are quickly realizing that although money can be saved through arbitration and silencing claims, this, in turn, will only have a negative effect. Employees are the foundation of any good business. By taking advantage of employees in the form of arbitration clauses, these companies are quickly facing repercussions both within its own organization and through the web. Critics of mandatory arbitration clauses are taking to social media to publish which organizations still require its employees to sign this sort of clauses as a warning to applicants.<sup>138</sup> Due to the media's ever extending reach, large companies either must respond or face the press. Thus, the onus is on these companies as well as Congress to start making active changes not only to employment contracts, but also to company-client agreements.

## VII. CONCLUSION

Almost 100 years after the creation of the Federal Arbitration Act, the Supreme Court has completely transformed the Act from its humble beginnings. The Federal Arbitration Act merely sought to allow arbitration agreements to be enforceable as any other contract. This bill was intended to ease the judicial process for merchants of similar means to resolve any

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<sup>133</sup> Staci Zaretsky, *Biglaw Firm Tries To Force Summer Associates To Arbitrate Sexual Harassment Claims*, ABOVE THE LAW, (Mar. 26, 2018), <https://abovethelaw.com/2018/03/biglaw-firm-tries-to-force-summer-associates-to-arbitrate-sexual-harassment-claims/>.

<sup>134</sup> *Id.*

<sup>135</sup> Kathryn Rubino, *Another Elite Law Firm Kicks Mandatory Arbitration To The Curb*, Above the Law, (Sept. 20, 2019), <https://abovethelaw.com/2019/09/another-elite-law-firm-kicks-mandatory-arbitration-to-the-curb/?rf=1>.

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

<sup>137</sup> *See id.*

<sup>138</sup> *See generally Fighting For All To Be Free From Coercive Contracts*, PEOPLE'S PARITY PROJECT, <https://www.peoplesparity.org/coercivecontracts/> (demonstrating the amount of law firms that still require mandatory arbitration clauses in employee-employer contracts).

dispute quickly and effectively. Instead of waiting around for the clogged courts to intervene, these businessmen wanted a simpler dispute resolution. However, the Federal Arbitration Act has been manipulated in order to essentially phase out class action lawsuits and silence claims.<sup>139</sup> Although the Court seems to prefer arbitration, it is actually making arbitration in these suits meaningless.

In order to combat the Supreme Court's abusive misinterpretation of the Federal Arbitration Act, both Congress and corporations alike need to act. First, Congress should pass either the FAIR Act or a similar bill that either amends or replaces the Federal Arbitration Act. This piece of legislation should clearly outline in its text the original intentions of the drafters and framers of the Federal Arbitration Act of 1925. For example, the new legislation should include a requirement for mutual consent and voluntariness. Further, corporations must have more accountability. As employees, consumers, and critics take a stand against these companies there will far more pressure on these institutions to act in the best interests of its signee. However, as each day passes by, another claim is silenced. By forcing arbitration, the consumer or employee may opt to not follow through with the claim. Thus, the claim disappears. Another win for the corporate leviathan.

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<sup>139</sup> See *Congress Must Undo Damage*, *supra* note 4 (“It is now clear that a five-justice majority on the [C]ourt is committed to turning the Federal Arbitration Act of 1925 – a law whose goal was to help facilitate voluntary arbitration between businesses – into a shield against corporate accountability.”).