

**DIVIDED AND CONQUERED:
THE NEOLIBERAL ROOTS AND EMOTIONAL CONSEQUENCES
OF THE ARBITRATION REVOLUTION**

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The “arbitration revolution” has diminished access to justice for millions of people, allowing American corporations to secure significant insulation from collective challenges in both judicial and arbitral forums. Although currently-identified damages are immense, some scholars have recently described proposals to undo the revolution as wishful thinking in the current political climate. This Article acknowledges the political difficulty but seeks to uncover the roots of the problem to re-open a path for a change.

*Offering an analysis of the 2019 Supreme Court decision in *Lamps Plus Inc. v. Varela*, the Article demonstrates that the “revolution” has been driven not by the oft-declared policy of “favoring arbitration,” but by a premeditated effort to undermine collectivity. This legal hostility towards collective actions, the Article shows, has been part of a broader transformation: the rise to dominance of neoliberalism and the resulting creation of a corporatized political economy. It thus re-conceptualizes the arbitration revolution as a process of separating collective actors, one that has been inspired by neoliberal theorists, executed and funded by organized corporate interests, and embraced by the Supreme Court.*

This new framing highlights previously unrecognized harm of the arbitration revolution: it leaves prospective claimants feeling isolated from their peers and abandoned by their state, inducing pervasive feelings of powerlessness. Having identified this affective outcome, the Article shows how it operates to suppress resistance and invoke resignation. These behavioral tendencies are not unintended consequences; instead, they are produced by a calculated effort to protect neoliberal hegemony and corporate control by cultivating the passivity of ordinary citizens.

The Article ends with a warning that those who feel powerless and resigned about the protection of their legal rights may feel similarly indisposed to engage in other forms of democratic citizenship. By offering a novel understanding of how the arbitration revolution vitiates collectivity and threatens democracy, the Article aims to reignite efforts to undo the revolution and re-authorize citizens to act collectively.

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INTRODUCTION

The following is a true story that in April 2019 ended up in an important Supreme Court decision.¹

Early in 2016, while working as a warehouseman in Redlands, California, Frank Varela discovered that his most personal information, including his social security number, his tax identification number, and his bank account number, was compromised by his employer. A letter from the IRS confirmed that the sensitive data was used to file a fraudulent tax return under Frank's name. Frank had to submit to the IRS an identity theft affidavit, and he and his wife, Darlene, were notified by the IRS that the scam would prevent them from using electronic filing for the foreseeable future.² Distressed and afraid of additional abuses, the couple also had to start paying monthly fees for a lifetime monitoring of their accounts.³

Frank was not the only one to suffer. His employer of about nine years, Lamps Plus Inc. — “the nation’s largest lighting retailer”⁴ — publicly announced that all those who worked for Lamps Plus during the 2015 calendar year were impacted. The company later explained that a severe data breach occurred when it “fell victim to a sophisticated

¹ Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407 (2019).

² Varela v. Lamps Plus, Inc., Class Action Complaint, 5, March 29, 2016, 2016 WL 11248424.

³ *Id.* at 6.

⁴ *Id.* at 3.

criminal phishing attack,” in which “the hackers impersonated a high-level Lamps Plus employee by sending a fake email to an actual Lamps Plus employee and requested all of Lamps Plus’ 2015 W-2 employee tax forms.”⁵ In response, “the actual Lamps Plus employee...sent the W-2s to the hackers.”⁶ At least 1,300 employees were harmed. As compensation, Lamps Plus offered them one year of free identity monitoring services.⁷

Frustrated by his employer’s continuous mishandling of the entire scandal—from the initial neglect that enabled the harm, through the failure to notify its victims, to the refusal to offer fair compensation—Frank sued. On behalf of himself and the other affected employees, he filed a class action complaint in a California federal district court and sought relief. Lamps Plus, however, asked the trial court to compel Frank to arbitrate the dispute and dismiss the lawsuit. The district court found no way around the fact that—as a condition to being hired by Lamps Plus—Frank had to sign an arbitration agreement in 2007. For that reason, the court decided to compel arbitration and accordingly dismissed the case.⁸ However, the court allowed Frank to arbitrate all his claims, including the classwide claims he made on behalf of all harmed employees. Then, despite its success in compelling arbitration, Lamps Plus appealed to the Ninth Circuit, seeking to prevent him from pursuing class arbitration and compel him to arbitrate all by himself. The Ninth Circuit refused to order so,⁹ and Lamps Plus continued its battle against class arbitration at the Supreme Court. In April 2019, in *Lamps Plus Inc. v. Varela* (*Lamps Plus*),¹⁰ the Supreme Court reversed the Ninth Circuit’s decision, denying Frank the ability to band together with his coworkers to hold their employer accountable for the data breach that will continue to haunt them for many years.

Lamps Plus is the Supreme Court’s latest opinion in a series of decisions that, in the last few decades, and with particular intensity since 2010, continuously and considerably extended the reach of the Federal Arbitration Act (FAA). While the first cases in this series might have appeared to reflect merely a procedural development, the ongoing expansion of the FAA has later created a growing awareness that the process has had an immense impact on matters of substantive law and issues of socio-economic justice.

In response, scholars, journalists, and policymakers have made a significant effort to document and analyze the increasing expansion of the FAA. They frequently criticized the Court for extending the FAA far beyond what its history and language could justify, and particularly for allowing powerful corporations to include pre-dispute mandatory arbitration clauses in their standard contracts, and to use them against considerably weaker parties. By 2015, even before the process reached its current peak, a federal judge described the constant expansion of the FAA as one of the “most profound shifts in our

⁵ *Varela v. Lamps Plus*, Motion to Compel Arbitration, 1, May 31, 2016, 2016 WL 11248769.

⁶ *Id.*

⁷ Class Action Complaint, *supra* note 4, at 4.

⁸ *Varela v. Lamps Plus, Inc.*, 2016 U.S. Dist. LEXIS 189521 (2016).

⁹ *Varela v. Lamps Plus, Inc.*, 701 Fed. Appx. 670 (2017).

¹⁰ 139 S. Ct. 1407 (2019).

legal history.”¹¹ In a similar tone, some scholars have referred to it as “the arbitration revolution,”¹² a designation that will be used here as well.

The arbitration revolution is far-reaching. The Supreme Court has ruled that the FAA’s relentless protection of arbitration clauses applies in a broad range of settings and therefore covers millions of people in a multitude of situations. As legal scholar Judith Resnik described it in 2015, the FAA applies, for example, “when individuals claim breaches of federal securities laws; when employees allege discrimination on the basis of age; when employees file sex discrimination suits under state law; when consumers assert rights under state consumer protection laws; when merchants allege violations of the antitrust laws; and when family members claim that negligent management of nursing homes resulted in the wrongful deaths of their relatives.”¹³ Assuming you own a smartphone, have a bank account, and use a credit card, the revolution applies to you and anyone you know.

As will be shown below, although the revolution is tied to arbitration clauses inserted into standard contracts, it has less to do with arbitrating disputes and much more to do with an intentional and organized effort to prevent individuals like Frank Varela from coping with corporate wrongdoing by appealing to the powers of solidarity and collective action. What appeared at first to be an effort to avoid litigation in courts through the imposition of mandatory arbitration has become a leading strategy of corporations, later approved by the Court, to wield arbitration clauses as weapons against *any* collective proceedings, regardless of forum. Therefore, these clauses impede collective acts both in courts (class actions) *and* in arbitration (class arbitrations). As the dissent in *Lamps Plus* recently summed it up: “the Court has hobbled the capacity of employees and consumers to band together in a judicial *or* arbitral forum.”¹⁴

The assault on all forms of collective actions—including when it means denying claimants their “effective access to justice”¹⁵—is the most disturbing part of the arbitration revolution. Such denial is particularly alarming when, as the dissent in *Lamps Plus* emphasized, the dispute “cries out for collective treatment,”¹⁶ because it concerns corporate misconduct that identically and severely harmed numerous people. Without the ability to act together, victims of such misconduct cannot seek redress due to their limited means and the prohibitive cost of legal proceedings. Moreover, if no victim can effectively seek redress, corporations gain immunity and have no incentive to avoid

¹¹ Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0. (citing Federal Judge Williams Young).

¹² See, e.g., David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 111 (2015); See also J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. JOURNAL 3052 (2015) (using the term), Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371, 408, 424 (2016) (same).

¹³ Judith Resnik, *Arbitration, Transparency, and Privatization: Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2839 (2015).

¹⁴ *Lamps Plus*, 139 S. Ct., at 1422 (Justice Ginsburg dissenting, emphasis added).

¹⁵ *Id.* at 1421 (Justice Ginsburg dissenting).

¹⁶ *Id.* (Justice Ginsburg dissenting).

future misconduct. Allowing this anti-collective mechanism to work in the first place, and then gradually removing any remaining ability of lower courts to limit it, is what makes the Court's radical expansion of the FAA truly "revolutionary." This Article thus further studies unexplored dimensions of this assault on collectivity.

Critics of the arbitration revolution have already described many of its negative consequences. Currently identified harms include decreased access to justice, hindered development of substantive laws, under-enforcement of central federal laws that rely on private civil litigation, and, due to the accumulation of all of the previous concerns, a severe threat to equality and the rule of law.¹⁷ Additionally, a new wave of studies has emerged, responding to the arbitration revolution in a different way. These works seem to accept the revolution as a *fait accompli* and thus refrain from seeking to roll it back. Instead, they focus on describing and analyzing post-revolution realities, mostly drawing on empirical tools.¹⁸ Pessimistically, some of these works have recently described proposals to undo the revolution as wishful thinking in "the current political climate."¹⁹ But, even in the face of such a climate, it may be too early to lose all hope for a change. This Article seeks to forge a new path to reform by highlighting that the rich literature to date has paid little to no attention to several key questions related to the anti-collective heart of the arbitration revolution: What political powers facilitated the legal foreclosure of all paths to collective actions?²⁰ What are the long-term emotional and social consequences of such a dramatic shift? Finally, which future reality may develop from these newly recognized consequences?

This Article delves into these questions. The nuanced answers it provides creates new grounds for evaluating the arbitration revolution and for resuming efforts to overturn it. Adding a multidisciplinary account of the attack on collectivity to the current literature, the Article re-conceptualizes the meaning of the revolution and the magnitude of its consequences while making three different claims.

The first is that the revolution has not been driven by the often-declared "liberal federal policy favoring arbitration,"²¹ but by a premeditated anti-collective approach instead. To substantiate this claim, the Article analyzes the latest decision in *Lamps Plus* as offering compelling new evidence that the revolution has been motivated by a deep

¹⁷ See *infra*, Part III.

¹⁸ See, e.g., Horton & Chandrasekher, *supra* note 12. See also Elizabeth C. Tippet & Bridget Schaaff, *How Concepcion and Italian Colors Affected Terms of Service Contracts in the Gig Economy*, 70 RUTGERS U. L. REV. 459 (2018); Victor D. Quintanilla & Alexander B. Avtgis, *The Public Believes Predispute Binding Arbitration Clauses Are Unjust: Ethical Implications for Dispute-System Design in the Time of Vanishing Trials*, 85 FORDHAM L. REV., 2119 (2017).

¹⁹ See David Horton & Andrea Cann Chandrasekher, *Arbitration Nation: Data from Four Providers*, 107 CAL. L. REV. 62 fn. 283 (2019) (stating that "federal intervention is wishful thinking given... the current political climate.").

²⁰ This question has received "little" attention while the following to received none. For works relating to the first question see, e.g., WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION, 153 (2015). See also Gilles, *supra* note 12.

²¹ See, e.g., *AT&T Mobility v. Concepcion*, 563 U.S. 333, at 339 (2011) (citing *Moses H. Cone Mem. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)).

aversion to collectivity and has substantially contributed to a process aimed at isolating people. Before *Lamps Plus*, many have seen the revolution as anchored in the Court's uncompromising command to enforce class action waivers. However, the analysis of *Lamps Plus* reveals that such waivers are effectively no longer necessary. For the first time in the history of federal arbitration law, the Court has clarified that even an arbitration clause *without* a waiver would suffice to block collective actions. In other words, *Lamps Plus* has turned mandatory isolation into the new default rule. However, since it is unrealistic to think that corporations will draft their standard arbitration clauses in a manner that expresses their *affirmative* consent to collective proceedings, such a default rule effectively forbids such proceedings.

The Article's next claim is that the arbitration revolution is not merely, and perhaps not even primarily, a legal shift. Rather, the anti-collective approach and the isolation it imposes are essential features of a greater transformative change: the rise to dominance of neoliberalism and the resulting creation of a corporatized political economy. To establish this claim, the Article first defines neoliberalism. It then traces the interactions between the people, theories, and institutions that have long been at the frontier of disseminating neoliberal logic, on the one hand, and the revolution's leading Supreme Court justices and the neoliberal legal discourse that they have advanced, on the other. Recognizing what links, for example, a Nobel Laureate (James Buchanan), an influential billionaire (Charles Koch), and a dominant Justice (Antonin Scalia) makes it possible to re-conceptualize the arbitration revolution as both a product of neoliberal rationality and a tool for further establishing neoliberal hegemony. As such, the revolution belongs with a growing list of legal shifts that follow the same trajectory, allowing corporations not only to immunize themselves through contracts but also to dominate campaign finance,²² hold First Amendment rights,²³ break up unions,²⁴ and so much more.

The third claim is that the arbitration revolution causes severe harm that until now has not been identified: the inducement of long-lasting feelings of powerlessness. This damage surfaces once one recognizes that the arbitration revolution is part of an effective campaign designed to separate people in order to make it harder for them to battle unlimited corporate power. Drawing on a variety of reported qualitative interviews, consumers' websites, and studies of the emotions, the Article uncovers how the isolation created by the revolution extends its harsh practical effects to the domain of the emotions. It also describes the resulting perilous cluster of emotions under, labels it "affective powerlessness," and explains how it works to leave people resigned and unable to resist. Critically, this Article establishes that the resignation generated by affective powerlessness is not an unintended consequence. Instead, it is part of what anthropologists have called "the politics of resignation" – a calculated effort to protect neoliberal hegemony and corporate control by cultivating submissiveness.

²² *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010).

²³ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

²⁴ *Janus v. American Federation of State, County, & Municipal Employees, Council 31*, 138 S. Ct. 2448 (2018).

When combined, the above three claims tell an unusual story, laying the foundation for a new understanding of the arbitration revolution and its sweeping results. It is a story of a separation process inspired by neoliberal theorists, executed and funded by organized corporate interests, and embraced by the Supreme Court. This separation process leaves people isolated from their peers and abandoned by the state, resulting in intense feelings of powerlessness. Unsurprisingly, as the Article further explains, this emotional state operates to suppress resistance and invoke resignation, both of which happen to serve the neoliberal goal of full dominance perfectly. The most significant risk that the revolution presents, thus, does not arise merely from the fact that corporations found a way—legitimized by the Supreme Court—to avoid legal liability. The threat extends to the production of collective numbness and dangerous apathy, which the law allows and perpetuates.

The Article tells this meaningful story in three Parts. The first Part re-analyzes the leading cases of the arbitration revolution in light of the latest decision in *Lamps Plus*, demonstrating that the revolution has worked to suppress collective actions, and has embraced corporations' efforts to avoid liability by separating masses of claimants. The second Part places the separating effect of the arbitration revolution within a web of neoliberal powers, explaining how the legal shift has both reflected the rise of neoliberalism and actively enhanced its dominance. The third Part builds on the previous two to expose a troubling and unrecognized effect of the separation process: the generation of affective powerlessness. It further illuminates how feelings of powerlessness tend to repress resistance and foster resignation.

This Article concludes with a warning that adds urgency to its call for undoing the separating power of the arbitration revolution. The isolation and resignation intentionally engendered by neoliberals and the corporations they promote are unlikely to remain contained within the boundaries of standard contracts. People who feel resigned regarding their legal rights are prone to feel similarly indisposed to engage in other forms of democratic citizenship. The Article thus offers a better understanding of how the arbitration revolution threatens democracy. Such recognition should reignite efforts to give people back their freedom to act collectively and, with it, the drive to contribute to our democratic society.

I. SUPPRESSING COLLECTIVE ACTIONS

A. Arbitration Clauses as Hideouts

The use of contractual arbitration clauses to prevent collective actions of small parties (individuals and small businesses) against their massive counterparts (large-scale corporations) is a relatively new phenomenon. For many years the practice of arbitration and the jurisprudence that surrounded it did not relate to collective actions at all. As many have repeatedly noted, the principal legislation pertaining to arbitration, the FAA, was enacted in 1925 “to enable merchants of roughly equal bargaining power to enter

into binding agreements to arbitrate commercial disputes.”²⁵ In 1925, and for many decades after the enactment of the FAA, pre-dispute arbitration agreements were in limited use,²⁶ and to the extent they existed, they did not attempt to prevent collective actions.

Put differently, while legal “friendliness” towards the practice of arbitration dates back to the 1925 FAA, judicial hostility towards collective actions—either in courts or arbitration—is a more recent shift. And it is a dramatic shift that has been facilitated by a combination of technological, economic, political and legal conditions. Importantly, this shift has very little to do with arbitration as a method of settling disputes outside of courts. Instead, the shift represents an immense effort to *avoid* dispute resolution altogether. For that reason, describing the process as the *arbitration* revolution, or referring to the Court’s recent “*arbitration* jurisprudence,”²⁷ tends to obscure the true nature of the transformation. What is truly at stake is a legally facilitated practice that is calculatedly designed to insulate corporations from legal liability by preventing claimants from coming together—which is by and large their only viable path to redress.

Given the intention to avoid liability by breaking up groups of similarly harmed people, perhaps a more adequate name for the process would have been “the isolation revolution,” “or “the separation revolution.” Nonetheless, because the analysis that follows generally aims at re-conceptualizing the meaning of the arbitration revolution, it continues to use this phrase to address the legal change while demonstrating that, in reality, it establishes an intentional separation process with harsh consequences.

The argument on this point is more than rhetorical. First, and most significantly, including separating terms within arbitration clauses or arbitration agreements artificially places these terms under the coverage of the FAA. Such placement awards separating terms disproportionate protection that initially only meant to promote conducting arbitrations and not preventing them. Second, because arbitration generally enjoys a positive reputation—much thanks to powerful messages from the Supreme Court—the method of folding isolating terms into arbitration agreements operates to conceal the negative impact of these anti-collective terms. Consequentially, because the anti-collective terms are hidden within arbitration agreements, noticing and resisting their separating effect turns harder. The following section will describe how the contractual use of arbitration clauses turned into an effort to suppress collective action and how the Supreme Court’s constant support of such manipulation has not only propelled its use but also enhanced its effect. As we shall see, achieving isolation through arbitration has been a product of a reciprocal exchange between corporations and an activist pro-corporate judiciary.

B. Separation via Enforcement of Collective Action Waivers

²⁵ *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1643 (2018).

²⁶ Gilles, *supra* note 12, at 375 (describing how until the last two decades using arbitration clauses to block class actions was unimaginable).

²⁷ See, e.g., Glover, *supra* note * (repeatedly referring to the Supreme Court’s recent arbitration jurisprudence).

Arbitration clauses did not always dictate isolation. The change has started during the 1990s and was driven by a growing desire of corporations to limit or even avoid their exposure to class actions. Many corporations that at earlier times did not seem interested in any form of alternative dispute resolution, or even opposed to it,²⁸ have begun to reconsider their approach. Of particular significance at this time was the technological progress that had increased the use of paper standard-form contracts and would later speed up even more with the ability to use online mass-contracting. This progress allowed corporations to dictate the content of their contracts with greater ease and an immensely enhanced impact. Encouraged by professional publications that recommended a pro-active solution to the “problem” of class actions, corporations and their lawyers have launched the attack on collective actions: drafting and including in all their contracts what today seems to be an integral part of almost any standard-form contract: collective action waivers.²⁹ As their name suggests, these waivers’ goal is to make individuals and small businesses give up their ability to respond to corporate wrongdoing by joining forces with similarly harmed others.

Aware of the general favoring of arbitrations, experts suggested to place the new collective action waivers not just anywhere in the contract but deliberately insert them into arbitration clauses. At the time, pre-dispute arbitration clauses offered “safe harbors” for the new waivers since courts had already shown an increased inclination to treat arbitration clauses favorably, even when they were tucked in the boilerplate of standard-form contracts. In an article tellingly titled “*The Arbitration Clause as Class Action Shield*,” for example, the author wrote that: “[while] an arbitration clause may not be an invincible shield against class action litigation, it is surely one of the strongest pieces of armor available...”³⁰

The creative proposal to separate potential joint-claimants via standard contracts that include arbitration clauses in their boilerplate had an impact. By the late 1990s, a growing number of corporations adopted collective action waivers as part of their newly implemented or formerly existing arbitration clauses.³¹ And yet, about a decade later, in 2005, professor Myriam Gilles reported that “[t]he penetration of collective action waivers is relatively miniscule today,” importantly attributing the slowness of the process to the then-existing uncertainty regarding the legal validity of

²⁸ SARAH STASZAK, NO DAY IN COURT: ACCESS TO JUSTICE AND THE POLITICS OF JUDICIAL ENTRENCHMENT, 55, 59 (2015) (describing how in the past corporations resisted arbitration, especially in the employment domain).

²⁹ Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Actions*, 104 MICH. L. REV., 373, 396-398 (2005). This Article follows professor Gilles choice to use the term “collective action waivers” to capture a variety of possible aggregate proceedings, available either in courts or in arbitration, *id.* at 376, fn. 15.

³⁰ Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L. J. 141, 142 (1997).

³¹ Gilles, *supra* note 29, at 397-398.

mass-use of collective actions waivers.³² Indeed, as predicted by professor Gilles,³³ the speedy spread of the new anti-collective strategy was awaiting an endorsement from the legal system.

Some of the hesitations of corporations and their lawyers were generated by the then-unanswered question: what if a court will strike down the collective action waiver while enforcing the remainder of the agreement to arbitrate? Indeed, some courts did just that, managing to simultaneously offer protection of collective rights *and* convey respect to arbitration. They did that by invalidating the collective action waiver while compelling arbitration that allowed collectivity through class arbitration.³⁴ Revealingly, when corporations realized that they might find themselves exposed to mass battles *outside* of court and without the protections that the public legal system offers to defendants, many of them lost interest in committing to arbitration,³⁵ demonstrating that this alternative dispute resolution method was not really what they were looking for when they added to their contracts “arbitration” clauses.³⁶ Such corporate response offers historical support to the current argument that, in many cases, arbitration clauses have been merely a tool to achieve an anti-collective goal.

A recent empirical study further bolsters this point. It describes the practice that had been developed by corporations to include a non-severability provision in their arbitration clauses. Such provision clarifies that in case of invalidation of the desirable component—the collective action waiver—the entire agreement to arbitrate should not be enforced.³⁷ In other words, in their contractual relationships with those with less bargaining power, corporations have demonstrated much more interest in avoiding the need to deal with collectives than an investment in arbitration.³⁸ Or, as professor Gilles phrased it back in 2005: “before the collective action waiver issue arose, arbitration did not matter all *that* much.”³⁹

And then, came the “tectonic shift.”⁴⁰ The one legal decision that more than ever before embraced and actively advanced the project of separating claimants, leaving them too isolated to pursue their rights. In the now-famous 2011 Supreme Court decision of

³² *Id.* at 425.

³³ *Id.* at 427 (“I do expect a tipping point where it becomes perfectly clear to the broader business community that their interests demand the full-scale imposition of collective action waivers... Most likely, this watershed moment will be precipitated by a major court decision.”).

³⁴ See, e.g., *Szetela v. Discover Bank*, 118 Cal. Rptr. 2d 862 (Ct. App. 2002).

³⁵ Gilles, *supra* note 29, at 410.

³⁶ See, e.g., Ann C. Hodges, *Trilogy Redux: Using Arbitration to Rebuild the Labor Movement*, 98 MINN. L. REV. 1682, 1691 (214)(explaining why “Arbitration is not a panacea for employers.”).

³⁷ See Tippet & Schaaff, *supra* note 18, 493-495. See also Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U L. Rev. 1, 40 (reporting in the context of credit cards that “[s]lightly under half of the clauses... from issuers with slightly more than half the market share... contained an “anti-severability provision.”).

³⁸ Tippet & Schaaff, *id.*, at 493 (arguing that the inclusion of severability provision suggests “that the company is using the arbitration clause primarily or exclusively for the class action waiver.”).

³⁹ Gilles, *supra* note 19, at 427 (emphasis in the original).

⁴⁰ Horton & Chandrasekher, *supra* note 19, at 4.

AT&T Mobility v. Concepcion (*Concepcion*),⁴¹ the Court removed most of the uncertainty that previously made corporations hesitate regarding the strategy of adding arbitration clauses to their contract in order to bury within them collective action waivers. In this 5-4 decision, the Court dramatically expanded the coverage of the FAA and reinterpret it as powerful enough to prevent lower courts from invalidating collective action waivers. By that, the Court took away the judicial power of lower courts to protect collectivity, siding with corporations' interest to avoid liability by using the method of "divide and conquer."

It is invaluable to recognize that *Concepcion* was not purely a legal development by an activist judiciary, but rather a product of an intentional joint-effort of some of the leading corporations in America. The goal was to devastate collective actions by devising a new weapon against them. According to the findings of a special investigation by the New York Times,⁴² on July 1999, a consortium of legal teams of leading corporations begun a series of meetings to strategize about how "to kill class actions."⁴³ Among the participants in the meetings were representatives of powerful corporations such as American Express, which will later star in one of the revolution's cases. Legal teams from leading banks such as Bank of America, Chase, Citigroup, and powerful corporations such as Sears, Toyota, and General Motors were present at the meeting as well.⁴⁴ Interestingly, at the time of the first meeting, American Express had already invented and implemented the practice of avoiding collective actions. Its standard contract stated that the company "may elect to resolve any claim by individual arbitration."⁴⁵

Significantly to the inception of the revolution at the Supreme Court, also in attendance were representatives of Discover Bank, the corporation that a few years later would be responsible for the birth and brief life of the "Discover Bank Rule."⁴⁶ Although at the time of the first meeting of the consortium Discover Bank did not yet include class action waivers in its standard contracts, it adopted them within several months, possibly influenced by American Express and other consortium members that previously utilized the practice.⁴⁷ But then, in 2002, when Discover Bank was sued for a wrongful charge of fees and tried to avoid liability by preventing class action based on the above waivers, California's Court of Appeals refused to enforce them.⁴⁸ It reasoned that the waivers were akin to a "license to push the boundaries of good business practices to their furthest limits."⁴⁹ Discover Bank did not give up and petitioned the Supreme Court seeking

⁴¹ 563 U.S. 333 (2011).

⁴² Silver-Greenberg & Gebeloff, *supra* note 11.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ This rule worked for a while to justify invalidation of collective action waiver when their practical meaning was denial of redress, but was later rejected in *Concepcion*.

⁴⁷ Silver-Greenberg & Gebeloff, *supra* note 11 ("Of the companies participating, only American Express and First USA had adopted an arbitration clause banning class actions; months later, Discover Bank added its own.")

⁴⁸ Szetela, 118 Cal. Rptr. 2d 862.

⁴⁹ *Id.*, at 1101.

intervention. Remarkably, at this point the company was represented by then-lawyer John Roberts, who would later become the Chief Justice of the Supreme Court, taking an active part in forever changing the status of collective action waivers. In any case, in 2002, while still a prominent defense attorney, he wrote—armed with advice from the organizer of the strategic consortium⁵⁰—that invalidating collective action waivers “contravenes the central purpose of the Arbitration Act: enforcing arbitration agreements according to their terms.”⁵¹

Although the Court denied the petition, these words—and the idea that state courts *must* enforce collective action waivers—became the law of the land nine years later in *Concepcion*, when the man who penned them was already at the other side of the bench. Perfectly echoing Roberts’ older petition, Justice Scalia decided for the first time that state courts can no longer do to corporations what they did in 2002 to Discover Bank, because “[t]he principal purpose of the FAA is to ensur[e] that private arbitration agreements are enforced according to their terms.”⁵² The organized effort of the 1999 corporate consortium had finally succeeded.

After *Concepcion*, several other Supreme Court decisions followed, removing any remaining uncertainties regarding the scope of *Concepcion* and the power of class action waivers to separate people. First in the series was *American Express v. Italian Colors Restaurant* (“*Italian Colors*”).⁵³ It removed the argument that even after *Concepcion* collective action waivers may be invalidated if they patently leave no way for claimants to vindicate their statutory rights. Corporations were now expressly allowed to draft their contracts in a way that aims at escaping liability. Symbolically, the direct beneficiary of the decision was American Express—a member of the 1999 consortium that had tried for many years to find a way to avoid liability by utilizing the special protections awarded to arbitration. And yet, for a while, and until 2018, there was still a reason to believe that the judicial approval of collective action waivers against consumers (*Concepcion*) and small-businesses (*Italian Colors*) would not be further extended to the employment setting. Although the Supreme Court’s “tortured reading” of the FAA already “opened floodgates for enforcement of arbitration agreements imposed on employees as a condition of employment,”⁵⁴ there was nonetheless a lingering doubt regarding employers’ ability to enforce their employees via the use of waivers to give up class arbitration.⁵⁵

In the case of employment, the new reading of the FAA seemed to stand in direct conflict with another veteran federal act: the National Labor Relations Act (NLRA). Given the gap of power between employers and employees, the legislator has explicitly

⁵⁰ Silver-Greenberg & Gebeloff, *supra* note 11.

⁵¹ Petition for a Writ of Certiorari *Discover Bank v. John Szetela*, Supreme Court of the United States, November 27th 2002 (copy on file with author).

⁵² *Concepcion*, 563 U.S. 333, at 344.

⁵³ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228 (2013).

⁵⁴ *Hodges*, *supra* note 36, at 1685 (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118-119 (2001)).

⁵⁵ *Varela*, 2016 U.S. Dist., at 19 (stating that given the support of collectivity under the NLRA class action waivers “in the employment context would likely not be enforceable.”).

expressed its care for “the individual unorganized worker [who] is commonly helpless”⁵⁶ and thus has sought to protect employees’ ability to band together. Particularly, §7 of the NLRA awards employees “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively . . . , and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”⁵⁷ Indeed, a year after *Concepcion*, the National Labor Relations Board decided that collective action waivers that prevent class claims in both judicial and arbitral forums violate the NLRA because their goal is to avoid a type of concerted activity that is protected by the statute.⁵⁸ To add to the confusion, courts around the country responded in conflicting ways to the Board’s position regarding the conflict between the FAA and the NLRA – some rejecting it and others approving it.⁵⁹ The question regarding the validity of collective action waivers in the employment setting was left up in the air.

But then the revolution progressed to remove the doubt. In *Epic Systems Corp. v. Lewis (Epic)*,⁶⁰ another 5-4 decision led by the conservative majority of the Supreme Court, the placement of collective action waivers within arbitration clauses led to prioritizing the FAA over the NLRA, thereby further legitimizing the use of isolation methods under the guise of enforcing arbitration clauses. Because the decision in *Epic* is very recent and directly relates to the value of collective actions, it is worth a closer look.

The litigation that ended in the 2018 *Epic* decision started before *Concepcion*’s unconditional judicial embrace of collective action waivers. Back at that time, the validity of such waivers was still questionable. Employees of Ernst & Young, one of the largest accounting firms in the world, sued their powerful employer after “the firm had misclassified its junior accountants as professional employees,”⁶¹ thereby depriving them of overtime pay. The employees sought to resist the enforcement of the collective action waiver in their contracts and raised the same difficulty that existed in *Concepcion* and *American Express*. They highlighted the fact that the separated claim of each of them was too small to allow an expensive individual pursuit of rights. Notably, this is an especially acute problem in the employment setting where disputes frequently arise from relatively modest wage-and-hour claims of underpaid employees.⁶² In the particular conflict between Ernst & Young and its junior accountants, for example, the value of the employees’ separate harms ranged between \$2,000 and \$29,000, but to prove each one of them alone (despite their identical nature) would have required an investment of about \$200,000 per claimant. For that reason, the employees sought to unite efforts via a class action, whereas Ernst & Young tried to block them by enforcing the waivers in their contracts.

⁵⁶ *Epic Systems Corp. v. Lewis* 138 S. Ct. 1612, 1635 (2018) (Justice Ginsburg dissenting).

⁵⁷ 29 U. S. C. §157.

⁵⁸ *D. R. Horton, Inc.*, 357 N.L.R.B. No. 184, 6, 13 (Jan. 3, 2012).

⁵⁹ *Horton & Chandrasekher*, *supra* note 19, at 4 (describing, for example, the conflict between the Second and Ninth Circuits).

⁶⁰ *Epic*, 138 S. Ct. 1612.

⁶¹ *Epic*, 138 S. Ct. 1612, at 1620.

⁶² Stephanie Greene & Christine Neylon O’Brien, *Epic Backslide: The Supreme Court Endorses Mandatory Individual Arbitration Agreements - #TimeUp on Workers’ Rights*, 15 STAN. J.C.R. & C.L. 44, 45 (2019).

At this time, before *Concepcion*, one New York district court facing the counterarguments of the parties concluded that “[e]nforcement of the class waiver provision in this case would effectively ban all proceedings by [the employee] against [Ernst & Young].”⁶³ The same court further highlighted the injustice that follows by explaining that while the employee “will be unable to pursue her claims, even if they are meritorious,” Ernst & Young will “enjoy de facto immunity from liability for alleged violations of the labor laws.”⁶⁴ In a strong demonstration of the influence of *Concepcion* and *American Express*, a district court in California facing in 2013 the same counterarguments in an *identical* dispute between Ernst & Young and its underpaid accountants reached the opposite conclusion. Following *Concepcion*, this court concluded that the inability to pursue rights individually due to the prohibitive cost of separate proceedings could not justify the invalidation of collective action waivers.⁶⁵ Both the New York case and the California case were appealed, both were reversed, leaving the Second Circuit and the Ninth Circuit in conflict,⁶⁶ thereby opening the gate for another watershed Supreme Court decision.

Following the unprecedented expansion of the FAA in *Concepcion* and *American Express* by the late Justice Scalia, his replacement, Justice Gorsuch, decided in *Epic* that in the clash between two federal laws—the FAA and NLRA—the former governs. The process of failing claimants by separating them with collective action waivers that enjoy the FAA’s protection had been completed. As a result, consumers, small businesses, employees, and many others who were somehow subjected to such waivers no longer have effective recourse in all the countless cases in which the cost of separate proceedings is prohibitive. With the active help of the Supreme Court, corporations had found a way to carefully plan a world in which as long as they cause smaller harms to numerous victims, no one will be able to hold them accountable. As the next section will show, the real motivation to “divide and conquer” becomes even more apparent when looking at the parallel process that had developed in cases in which corporations *did not* add collective action waivers to their contracts.

C. Separation via Interpretation of Arbitration Clauses

Many jurists and scholars discuss the increased enforcement of class action waivers and the intensified judicial prevention of class arbitration when no such waivers exist without differentiating the two situations.⁶⁷ However, for the task taken up in this

⁶³ *Sutherland v. Ernst & Young LLP*, 768 F. Supp. 2d 547, 554 (S.D.N.Y. 2011).

⁶⁴ *Id.*

⁶⁵ See *Morris v. Ernst & Young LLP*, No. C-12-04964 RMW (N.D. Cal. July 9, 2013), 2013 WL 3460052.

⁶⁶ See *Horton & Chandrasekher*, *supra* note 19, at 4.

⁶⁷ For a recent example see *Horton & Chandrasekher*, *supra* note 19, 5-6, fn. 26 (listing 13 cases that form the new arbitration jurisprudence without differentiating). See also *Hodges*, *supra* note 36 (lumping together *Concepcion* and *Italian Colors*, which discuss class action waivers, with *Stolt-Nielsen*, discussed below, that had no waiver). But see David Horton, *Clause Construction*, 68 DUKE L. J., 1324, 1325 (2019) (differentiating between “two major ways” of expanding the FAA). For an example of a judicial recognition the difference see, e.g., *Oregel v. PacPizza, LLC*, 187 Cal. Rptr. 3d 436, 448 (Ct. App. 2015)

Article—to better trace the progress of a separation process and its consequences—it is valuable to distinguish the pair. Critical Supreme Court cases that have played an active role in the development of isolation methods under the pretext of “favoring arbitration,”⁶⁸ were not at all similar to *Concepcion*, *American Express*, or *Epic*, as they did not focus on the enforcement of collective actions waivers. Instead, in the last decade, and confusingly during the same period, a distinct line of cases arose. These cases contributed to the separation effect of arbitration clauses by merely interpreting them as blocking claimants from banding together *even though they did not include any express waiver of collective action*. I will call this line of cases the “interpretation cases,” to distinguish them from the “waiver cases” discussed in the previous section.

Unlike ever before, the last decade has brought about a growing willingness of the Court to read arbitration clauses devoid of a waiver of aggregate proceedings *as if* they explicitly included such a waiver. The bellwether of the interpretation cases is *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp. (Stolt-Nielsen)*⁶⁹—a Supreme Court case that was decided on April 27th, 2010, exactly a year before *Concepcion*. The litigation arose after a group of shipping companies (collectively, Stolt-Nielsen) was found by the Department of Justice to be involved in an illegal price-fixing conspiracy. One harmed customer that overpaid for ocean transportation services, a company named AnimalFeeds, filed a putative class action in court. However, because the parties included in their contract an arbitration clause, the dispute was eventually sent, with other similar cases, to arbitration.

When AnimalFeeds filed a demand for *class* arbitration, Stolt-Nielsen objected and insisted that any arbitration should be carried by AnimalFeeds alone. At this point, the parties agreed to submit this threshold dispute to a panel of three arbitrators that unanimously decided that the parties’ arbitration clause allows the arbitration to proceed as a class arbitration. The panel reasoned that since the arbitration clause was silent against a background in which class arbitrations are a common practice, the collective method can be used.⁷⁰ However, when the case arrived at the Supreme Court, Justice Alito was not convinced. He concluded that the entire decision of the panel rested merely on the public policy of favoring class arbitrations and as such, amounted to a forbidden exercise of the panels’ power.⁷¹

Had the Court stopped there, at awarding a loss to the party seeking a class arbitration, *Stolt-Nielsen* would probably not have gained its high status in the pantheon of the new arbitration jurisprudence. Indeed, for many years after the publication of the decision, many courts took *Stolt-Nielsen* to be limited by its relatively rare facts of sophisticated parties that stipulated that both of them never gave even implied consent to aggregate procedures.⁷² But, what makes *Stolt-Nielsen* in retrospect so crucial to the

(recognizing that “*Concepcion* [i]s irrelevant” if an arbitration clause “d[oes] not contain a class action waiver”).

⁶⁸ *Concepcion*, 563 U.S. 333, at 346.

⁶⁹ 559 U.S. 662 (2010).

⁷⁰ Horton, *supra* note 67, at 1350.

⁷¹ *Stolt-Nielsen*, 559 U.S. 662, at 677.

⁷² Horton, *supra* note 67, at 1351-1358 (describing the confusion).

separation project discussed here is the fact that the Court did not stop at settling the particular dispute. Instead, in an activist move, Justice Alito insisted on using the case to introduce a new and hostile view of banding together *in arbitrations*.

In *Stolt-Nielsen*, the Court started to develop the argument that “class arbitration” is an oxymoron or an abnormality, suggesting an inherent discrepancy between the idea of arbitration and collectivity. Without citing to any supporting resources, Justice Alito stated that “class-action arbitration changes the nature of arbitration,” and added that the differences between individual arbitration and class arbitration are just “too great.”⁷³ The idea that class *arbitration* is not a legitimate type of arbitration of the kind protected by the FAA was not only unprecedented; it also conflicted with the reality at the time of the decision. Ever since the 1980s, certainly during the 2000s, including in 2010, and indeed even in the years after *Stolt-Nielsen*, class arbitrations have been in full use.⁷⁴ Further, the leading arbitration providers not only have long offered class arbitrations; they also have created and published elaborated rules designed to institutionalize this way of dispute resolution.⁷⁵ In fact, in 2003, the Court explicitly confirmed the authority of arbitrators to decide the availability of class arbitration proceedings in situations in which the arbitration clause lacked a collective action waiver.⁷⁶ And, all these years, neither arbitrators nor judges have expressed doubt regarding the general fit between arbitrations and aggregate proceedings. The decision in *Stolt-Nielsen* was in that respect “revolutionary.”

Exactly a year after *Stolt-Nielsen*, in *Concepcion*, the Court enthusiastically adopted the new ostracizing of class arbitrations, this time in the context of the waiver cases. The late Justice Scalia set the tone, and his bluntness added an edge to Justice Alito’s innovation. The unique rhetoric he used and what it reveals will be further explored in the next Part. For now, however, the point is more descriptive: the process of making class arbitrations seem inadequate has started at *Stolt-Nielsen* and was significantly amplified in *Concepcion*. Post-2011, many have predicted that the two cases together “would effectively end the use of class arbitration.”⁷⁷ In reality, however, as the opening story of Frank Varela demonstrates, class arbitrations remained both desirable and available.

Then, in 2013, only ten days before the decision in *Italian Colors*, which further fortified *Concepcion* in the line of the waiver cases, the Court released a ruling in another interpretation case. The new interpretation case—*Oxford Health Plans v. Sutter*,⁷⁸—was factually similar to *Stolt-Nielsen*, but it did not feature any stipulation between the parties regarding the silence of their agreement. This time, the Court affirmed an arbitrator’s decision to interpret a broadly phrased arbitration clause as reflecting consent to class

⁷³ *Stolt-Nielsen*, 559 U.S. 662, at 685-687.

⁷⁴ See Horton, *supra* note 67, at 1349 (presenting data released by the AAA). See also Alyssa S. King, *Too Much Power and Not Enough: Arbitrators Face the Class Dilemma*, 21 LEWIS & CLARK L. REV. 1031 (2017).

⁷⁵ King, *Id.* at 1038-1040, also from Horton in Duke.

⁷⁶ *Green Tree Fin. Corp. V. Bazzle*, 539 U.S. 444, 447 (2003).

⁷⁷ King, *supra* note 74, at 1041 & fn. 72 (describing the response and citing articles to that effect).

⁷⁸ *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 (2013).

arbitration. It was a rare 9-0 decision, and neither one of the Justices mentioned the argument that class arbitration is not truly a form of arbitration.⁷⁹ Perhaps encouraged by the deference of the Court in *Oxford Health Plans*, arbitrators continued to permit class arbitrations in cases of broadly-phrased arbitration clauses. However, a 2017 empirical study of 64 arbitral decisions that were published after *Stolt-Nielsen* and before the end of 2015 shows the immense impact of the Court's new hostility to class arbitration, documenting a sharp decline in arbitrators' willingness to permit class arbitration.⁸⁰ It took six more years for the crusade on class arbitrations in the context of the interpretation cases to resume.⁸¹

And then, following the footsteps of the latest waiver case—the 2018 *Epic* decision—came the newest development in the interpretation cases: the 2019 decision in *Lamps Plus*.⁸² As we have seen, in this decision, the Court ordered that Frank Varela and some 1300 employees of the national company Lamps Plus cannot band together to seek redress from their employer for severely compromising their personal and financial data. The 5-4 decision in *Lamps Plus* does to the strand of interpretation cases what *Epic* has done to the line of waiver cases: removing any remaining arguments that former cases were somehow limited by their context and left *some* room for legitimate collective action. The novelty of the decision in *Lamps Plus* and its unprecedented demonstration of bias against collectivity call for a closer look.

The story of the dispute discussed in *Lamps Plus* opened the Article. As Justice Ginsburg commented in her dissent, it is a story that “cries out for collective treatment.”⁸³ The harm to Frank Varela and his coworkers originated from one identical incident: a single email that was sent by a senior employee to a hacker and exposed the most private details of each and every employee. The consequences of this event were dire and similar for each employee: long-term exposure to abuse of the data by an unlimited amount of its receivers. And, despite the magnitude of the event, Lamps Plus offered all the victims the same unsuitable solution of one year of free identity monitoring services. It is, therefore, particularly hard to see what is “inefficient” in consolidating about 1300 identical claims, all resulting from one data breach. On the contrary: it seems illogical and wasteful to require each employee to pay a separate lawyer and independently prove what happened. And yet, to a corporation determined to avoid liability and to a Court resolved to eradicate class arbitrations—none of this seemed to matter.

After two lower courts authorized class arbitration, the Court reversed and insisted that Frank Varela and his numerous coworkers must seek justice separately. This

⁷⁹ The only (quite subtle) hint in this direction was in Justice Alito's concurrence, in which he noted that because in arbitration class members can enjoy a win but avoid a loss if they do not opt-in before a decision is made, the Court may need to reconsider “the availability of class arbitration is a question the arbitrator should decide.” *Oxford Health Plans*, *id.*, at 575.

⁸⁰ King, *supra* note 74, at 1043 (describing a decline from a high permission rate at the level of 90% (or about 70%) of the cases to a low permission rate of only 45%).

⁸¹ 10 days after *Oxford Health Plans* Justice Scalia's decision in *American Express* was published. It included abundant citations from *Concepcion* and another fierce attack on class arbitrations.

⁸² *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

⁸³ *Id.*, at 1421.

conclusion, Justice Roberts explained, accepts as a starting point that the arbitration clause that Lamps Plus included in its standard contracts was *ambiguous*. Such a starting point should have set the case apart from *Stolt-Nielsen*, in which the parties did *not* argue for two opposing interpretations. However, the glaring difference did not strike Justice Roberts as significant. To him, while regular contractual ambiguity calls for interpretation that attempts to “ascertain” one of the two competing meanings of the disputed contractual language,⁸⁴ ambiguity in the arbitration context should work differently. In the case of arbitration clauses, explained Justice Roberts for the first time, courts are not free to approach the interpretation task with their usual impartiality. Instead, Justice Roberts maintained that when considering whether an ambiguous arbitration clause reflects an intention to allow or ban collective proceedings, “it is important to recognize the ‘fundamental’ difference between class arbitration and the individualized form of arbitration envisioned by the FAA.”⁸⁵

In other words, courts and arbitrators should start from a *preference* to *not* allow class arbitrations because, since 2010, those had been marked as not deserving the protection of the FAA. For that reason, writes Justice Roberts, “ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to ‘sacrifice[] the principal advantage of arbitration.’”⁸⁶ The innovative declaration that ambiguity is not enough to open the way to class arbitration leaves no escape from asking what might be enough. On this point, the Court has reached a new peak in the separation process. For the first time in the history of the FAA, it clarified that once an arbitration clause was included in a contract the only way to allow class arbitration is “an *affirmative* ‘contractual basis for concluding that the party agreed to do so.’”⁸⁷

Although Justice Roberts has probably tried to conceal it,⁸⁸ the word “affirmative” in the sentence cited above is not part of any previous decision of the Court. Significantly, this word is the newest layer of the arbitration revolution. The rule coming from *Stolt-Nielsen* required “a contractual basis for concluding that a party agreed [to class arbitration].” Justice Roberts repeated it, citing *Stolt-Nielsen* to create an impression of continuation, but added before it—not once but twice⁸⁹—a single adjective that forms a significant shift. This stealth modification of the *Stolt-Nielsen* rule turns a so-called ambiguous arbitration clause—one that is phrased very broadly without banning class arbitration—into a clear one. From now on, we are told, any phrasing that does not “affirmatively” express consent of the drafting party to subject itself to collective

⁸⁴ RESTATEMENT (SECOND) OF CONTRACTS § 200 (1981) (“Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning.”).

⁸⁵ *Lamps Plus*, 139 S. Ct. 1407, at 1416.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ Justice Roberts used the past tense of “we held” in the full sentence, suggesting that the entire sentence is a product of previous holdings. Here is the full sentence including the citation of *Stolt-Nielsen*: “And for that reason, *we held* that courts may not infer consent to participate in class arbitration absent an affirmative ‘contractual basis for concluding that the party *agreed* to do so.’ *Id.*, at 684, 130 S. Ct. 1758, 176 L. Ed. 2d 605.” *Lamps Plus*, *id.*, at 1416.

⁸⁹ *Id.*, at 1416 and again at 1419.

challenges, should be read as if it was straightforwardly carrying the opposite message: class arbitration is forbidden. By merely adding one word to an older precedent Justice Roberts has set isolation as the new default rule.

Given the zero probability that corporations will ever express an affirmative consent to class arbitration,⁹⁰ we have now completed a full circle: we started from corporations adding arbitration clauses to their mass contracts in order to hide within them collective actions waivers, and now the mere existence of an arbitration clause—one that does not even include a waiver—leads to the same result. Requiring “affirmative” consent to class arbitration, therefore, transforms naked arbitration clauses and the very idea of arbitration into a direct method of separating claimants, even without saying a word about it. As a result, anyone who, like Frank Varela, signed an arbitration clause because he or she had no other choice, is also taken as someone who signed-off any right to band together with others. Note the biased treatment of consent that follows. While the Court refuses to take into account corporations’ implied consent (only their “affirmative” consent will count), it is more than eager to rely on the implied consent of the other party to the contract. Once people like Frank Varela signed on the dotted line of an arbitration clause, the Court assumes that they also gave their implied consent to waiving their collective rights. In short, implied consent only works to separate people.

Why did Justice Roberts make such an effort to weave the word “affirmative” into the original text of *Stolt-Nielsen*? It is because *Lamps Plus*, like other drafters of mass contracts that use arbitration clauses that do *not* contain a collective action waiver, would have lost without this added word. One leading reason is the maxim of *contra proferentem*, an interpretation rule that guides judges to hold contractual ambiguities against the drafter of the contract and accordingly to award unclear terms the meaning suggested by the non-drafting party.⁹¹ This rule, known to any first-year student of contract law, is applied under two cumulative conditions: that the drafting party chose the ambiguous language *and* that this party enjoyed superiority of power that did not allow the other party to clarify it. Both conditions can be easily satisfied in the relationship between *Lamps Plus*, the drafter, and Frank Varela, its warehouse employee. More generally, they can similarly be met anytime that corporations are drafting contracts of adhesion to impose arbitration on their many consumers, workers, suppliers, and others. Accordingly, under *contra proferentem*, corporate drafters who did not include a waiver in their standard arbitration clause should be taken as implicitly agreeing to class arbitration.

Determined to block class arbitrations, Justice Roberts was willing to undo centuries of Common Law to remove the risk of collectivity that comes from the rule of *contra proferentem*. Adding one more extension to the already expanded FAA, he, therefore, opined that the FAA preempts not only state law or federal legislation that threatens the operation of arbitrations, but also the general rule of *contra proferentem*.

⁹⁰ Horton, *supra* note 67, at 1346 (suggesting that affirmative consent to class arbitration does not exist).

⁹¹ Another reason arises from the prevalence of collective action waivers throughout the years relevant to the dispute.

Justice Roberts further reasoned that applying the traditional common law rule would produce, by way of interpretation, an implied consent to class arbitration, while, according to the Court's latest decision, such consent "is inconsistent with the FAA."⁹²

D. Deliberate Separation

To be sure, other scholars have concluded before that a leading effect of the so-called arbitration revolution amounts to a demise of the ability of claimants to protect their rights by banding together. David Horton recently summarized the works that recognized such effect, writing: "*Concepcion* and its progeny have sounded 'the death knell for consumer and employment class actions.'"⁹³ Nevertheless, the current analysis seeks to go beyond identifying the practical effect of the revolution. With the advantage of seeing one more piece of the puzzle—the 2019 *Lamps Plus* decision—it reveals that the "death knell" is a product of a deliberate separation process promoted by organized corporate interests and perpetuated by the Court in two parallel lines of cases.

Consider, for example, reading the most recent decisions in *Epic* and *Lamps Plus* together. Combined, they mean that in 2019, almost a decade after the release of *Stolt-Nielsen* and *Concepcion*, the mere inclusion of an arbitration clause is enough to fail claimants' efforts to band together, with (*Epic*) or without (*Lamps Plus*) a waiver. The fact that the duo has emerged at the employment setting—once a natural domain of solidarity and collective rights—further highlights the magnitude of the assault on collectivity. Significantly, in terms of their legal reasoning, these cases are hard to reconcile. On the one hand, *Epic* prevents collective actions through waivers that are served on a take-it-or-leave-it basis and are thus supported by a very weak consent of employees. On the other hand, *Lamps Plus* reaches the same separating result by insisting that when it comes to employers, only a strong ("affirmative") consent will do. How can weak consent justify compelling individual arbitrations but not class arbitrations? The only way to explain the two cases together, and indeed the entire revolution, is thus to recognize that the newest decisions reflect an intentional use of the FAA, not to treat arbitration favorably but to *disfavor* collective actions.

Before closing the discussion of the arbitration revolution as a separation process, a note about judicial activism is in place. In deciding the *waiver* cases in accordance with corporations' interests, the Court can be viewed as merely having a participatory role in the separation process. However, in deciding the *interpretation* cases, the Court should be recognized as *leading* the process, helping even corporations that failed to draft their contracts carefully. Because they involve rare interventions in arbitral decisions and work to prevent arbitrations, the interpretation cases substantiate, even more than the waiver cases, the general argument in this Part: that behind the façade of supporting arbitration rests an activist jurisprudence that aims at separating claimants in the service of corporate

⁹² *Lamps Plus*, 139 S. Ct. 1407, at 1418.

⁹³ Horton, *supra* note 67, at 1326 fn. 16 (citing many other articles).

interests.⁹⁴ The next Part links the increasing hostility to collectivity and the resulting separation process to the rising dominance of neoliberalism.

II. JOINING THE NEOLIBERAL PROJECT

A. *Law as Discourse*

While the previous Part described how two lines of cases, seemingly dedicated to arbitration, converge to create a separation effect, this Part's focus is on discourse. In its embellished reading of the FAA, the Court's conservative majority has not only dramatically changed the law regarding the availability of collective proceedings; it also has developed a new framework and original uses of terminologies to reason about the shift. As a result, the revolution presents a risk that reaches beyond its practical outcomes and goes deeper and further to intervene in people's perception of reality. Exposing this layer requires revisiting the leading decisions that mark the arbitration revolution to track nuances of tone and particular linguistic choices. On this discursive front, the late Justice Scalia was a pioneer and a dominant leader. His rhetorical moves, chiefly in writing for the majority in *Concepcion*, had been heavily cited in later decisions and had utterly transformed the conversation.

In broad strokes, the new discourse used to promote separation draws on neoliberal ideas and particularly on neoliberalism's long history of vilifying solidarities. But, even more importantly, this discourse also plays an active role in disseminating neoliberal logic with the power and authority unique to law. This dissemination effect is what makes the anti-collective ideas spread by the Court reach far beyond the claimants that pragmatically lose access to justice. All people contractually involved with large corporations—and that means all of us—have been exposed in the last decades to a powerful message that delegitimizes coming together in response to being wronged. Exposing the roots of such a message, and how the Supreme Court became one of its messengers, is a key to better understanding the full influence of the arbitration revolution.

B. *Neoliberalism and the Revolution's Discourse*

The attack on collective actions through the expansion of the FFA has not happened in a vacuum. Rather, the legal war against collectivity has also targeted class actions that are divorced from arbitration⁹⁵ and labor unions.⁹⁶ Further, and most

⁹⁴ NANCY MACLEAN, DEMOCRACY IN CHAINS: THE DEEP HISTORY OF THE RADICAL RIGHT'S STEALTH PLAN FOR AMERICA, 228-229 (2017) (pointing out the irony in that "after years of criticizing "judicial activism" by the Supreme Court for greater equity, Koch grantees are now making, as one Cato publication puts it, the Case for an Activist Judiciary to secure economic liberty.").

⁹⁵ See, e.g., Maureen Carroll, *Class Action Myopia*, 65 DUKE L. J. 843 (2016).

⁹⁶ See, e.g., Catherine L. Fisk & Martin H. Malin, *After Janus*, 107 CAL. L. REV. (forthcoming 2019) available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3245522&download=yes.

importantly, the entire battle has coincided – both chronologically and ideologically – with the rising dominance of neoliberal ideas in the US in the last four decades.⁹⁷

Although we all know that we live in the midst of the neoliberal age, the meaning of the term seems to remain “perplexingly elusive.”⁹⁸ Hence, the following exploration of how neoliberalism has both incited the arbitration revolution and benefited from compels an effort to clarify what neoliberalism is and how it reached its status as the most dominant political project of our era.⁹⁹ One necessary step in this direction is to remove a common confusion that originates in the word itself.¹⁰⁰ Neoliberalism should not be minimized into a new variation of a liberal economic approach,¹⁰¹ an observation that has several concrete manifestations that are highly relevant to our discussion. The first is the political nature of the neoliberal project.¹⁰² In the American context, while both democrats and republicans are liberals in the sense of believing in the necessity of capitalist economy and free markets, neoliberalism better correlates with the interests and beliefs of those on the right-wing of the political map, including libertarians and conservatives.¹⁰³ And, as we shall see, this orientation is not fortuitous but rather a product of a comprehensive and coordinated effort.

⁹⁷ See WENDY BROWN, *IN THE RUINS OF NEOLIBERALISM*, 21 (2019) (discussing “the neoliberal transformations taking place around the world in the past four decades.”). See also Hila Keren, *Valuing Emotions*, 53 WAKE FOREST L. REV. 829, 864 (2018) (explaining that “[i]ntellectually, neoliberalism may have been founded in Europe by Friedrich Hayek about seventy-five years ago, but its practical rise in the Anglo-American world is associated more with the 1980s, under the leadership and policies of Margaret Thatcher and Ronald Reagan.”).

⁹⁸ Jamie Peck, *Preface: Naming Neoliberalism*, xxii, in *THE SAGE HANDBOOK OF NEOLIBERALISM* (Damien Cahill, Melinda Cooper, Martijn Konings & David Primrose eds., 2018).

⁹⁹ For a similar argument made more generally see Philip Mirowski, *Hell Is Truth Seen Too Late*, 46 BOUNDARY 2, 46 (2019) (describing the criticism against the use of “neoliberalism” but insisting that “[a]wareness of the philosophical core of neoliberalism – namely, the epistemic superiority of the market in all things – is a necessary prerequisite to understanding some of the most crucial developments in contemporary politics....”). See also Brown, *supra* note 97, at 17 (“Neoliberalism – the ideas, the institutions, the policies, the political rationality – has, along with its spawn, financialization, likely shaped recent world history as profoundly as any other nameable phenomenon in the same period, even if scholars continue to debate precisely what both are.”).

¹⁰⁰ Part of the reason for this confusion is explained by MacLean as follows: “Members of the Mont Pelerin Society initially chose to refer to themselves as “neoliberals,” to signal the way they were retooling nineteenth-century pro-market ideas; it’s the name applied to them today by critics of the policies they advocated. But the word “neoliberal” confused Americans because Democrats in the Roosevelt mold now had such a hammerlock on the word “liberal.”, MACLEAN, *supra* note 94, at 51.

¹⁰¹ S. M. AMADAE, *PRISONERS OF REASON: GAME THEORY AND NEOLIBERAL POLITICAL ECONOMY*, 11 (2016) (arguing that the shift in orientation from liberalism to neoliberalism is sufficiently stark to call for a discussion of the differences).

¹⁰² See, e.g., Philip Mirowski, *The Political Movement that Dared not Speak its own Name: The Neoliberal Thought Collective Under Erasure*, INSTITUTE FOR NEW ECONOMIC THINKING, 2 (2014) (generally criticizing those who refuse to recognize neoliberalism as a political project and defining it as “a thought collective and political movement combined”) available at <https://www.ineteconomics.org/uploads/papers/WP23-Mirowski.pdf>.

¹⁰³ Peck, *supra* note 98, at xxvi. This is not to say that neoliberalism did not influence the left.

It is thus not an accident that the conservative majority of the Court has executed the revolution. It is also not an accident that the Justices that authored the revolution's leading cases have been all affiliated with and supported by the neoliberal Federalist Society. The Society, which was established in 1982, just as neoliberalism has started to rise to prominence in the US, is the legal arm of what historian Phillip Mirowski has titled "the Neoliberal Thought Collective" – the infrastructure through which neoliberals have calculatingly – albeit stealthily – built up their movement's "knowledge production and political action capacities."¹⁰⁴

For example, Justice Scalia, undoubtedly the leader of the revolution, was probably "the most important elite sponsor of the Society" since its early days—at the time in which he was a mentor and advisor to the student founders of the Society as a faculty at the Chicago School of Law.¹⁰⁵ In 1987, when the Federalist Society hosted its "first-ever national lawyers' convention" at the Mayflower Hotel in Washington DC, Justice Scalia was the first speaker on a panel dedicated to "Methods of Statutory Construction."¹⁰⁶ He ended his talk predicting that "in the future" courts will interpret statutes based more on "objective analysis" and less on "legislative history,"¹⁰⁷ foretelling how in the 2000s he would expand the reading of the FAA while setting aside the Act's legislative history that clearly limited it to arbitration agreements between commercial parties of similar bargaining power.¹⁰⁸

The revolution's other spearheads – Justices Alito, Roberts, and Gorsuch – all have strong and continuous ties to the Society.¹⁰⁹ And, while the Federalist Society is not openly and directly involved in politics, it does promote the dissemination of neoliberal logics via powerful and profound processes of education, training, and networking.¹¹⁰ The Society has therefore been an "organization of extraordinary consequence," openly aiming to counter the liberal (taken as left-leaning) control of the legal profession.¹¹¹ To say that the arbitration revolution is the brainchild of the stellar ambassadors of the

¹⁰⁴ *Id.*, at 16.

¹⁰⁵ See Steven M. Teles, *The Rise of the Conservative Legal Movement*, 141 (2008) (describing Scalia's many contributions including fund raising, speaking at the first conference, and hosting Society members at his home).

¹⁰⁶ Archives of the Federalist Society available at <https://fedsoc.org/events/methods-of-statutory-construction-archive-collection><https://fedsoc.org/events/methods-of-statutory-construction-archive-collection>

¹⁰⁷ Antonin Scalia, *Methods of Statutory Construction*, (1987) Video, Archives of the Federalist Society available at <https://fedsoc.org/events/methods-of-statutory-construction-archive-collection>

¹⁰⁸ *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 125-128 (2001) (Justice Stevens' dissent regarding the application of the FAA to workers in accordance with the history of the statute).

¹⁰⁹ See, e.g., AMANDA HOLLIS-BRUSKY, *IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION*, 3 (2017) (describing Justice Alito in tuxedo at the 30th anniversary of the Society). According to the Federalist Society's website Justices Roberts and Scalia were both speakers at the 2007 National Lawyer Convention of the Society, see <https://fedsoc.org/contributors/john-roberts>. Similarly, Justices Alito and Scalia were both speakers at the 2008 National Lawyer Convention of the Federalist Society, see <https://fedsoc.org/past-events?speaker=douglas-ginsburg&page=2>.

¹¹⁰ HOLLIS-BRUSKY, *id.*, at 3.

¹¹¹ TELES, *supra* note 105, at 135.

Federalist Society is thus to recognize that the revolution itself is founded on neoliberal rationality and as such carries salient political weight.

The second meaningful difference between liberalism and neoliberalism regards the role of the state and the relationship between the state and the market. Unlike liberals, neoliberals are not genuinely interested in the separation of the public state from the private market, even as they voice calls for a small government or none-interventionist state. Far from the model of *Laissez-faire* economics, neoliberalism requires the state “to actively promote and construct a free market society.”¹¹² Neoliberalism, thus, reconfigures the liberal commitment of the state, profoundly transforming it from the duty to care for all its members and the common good,¹¹³ to a narrower but active commitment to the most dominant market players: large businesses and financial elites.¹¹⁴ Generally speaking, this new orientation of the state explains many legal transformations of the last few decades.¹¹⁵ It also more concretely clarifies why the arbitration revolution so evidently sacrifices the interests of ordinary citizens to cater to the needs and interests of the largest businesses.

A third theme of what differentiates neoliberal ideology from liberalism is the goal and practice of extending the logic of the market *to all areas of life*. Although liberals debate the extent to which public intervention in private markets is justified, they all seem to agree that some domains lie outside of the market and should be analyzed and organized according to non-economic metrics. Neoliberalism, however, has deliberately produced a radical restructuring not only of the economy but also of non-market fields such as “politics, society, culture, and the environment.”¹¹⁶ It even has restructured our emotions.¹¹⁷ One scholar described the theoretical shift as a process in which “[m]arket ideas moved out of economics departments to become the new standard currency of the social sciences,” until they “became fixtures of common sense.”¹¹⁸

One famous declaration of neoliberalism’s ambitious effort to establish itself as a general common sense was made by the British Prime Minister Margaret Thatcher, herself one of the symbols of neoliberalism, who stated that “[e]conomics are the method . . . but the object is to change the soul.”¹¹⁹ Accordingly, the neoliberal project utilizes many mediums through which it disseminates its logic until it can penetrate our

¹¹² JULIE A. WILSON, NEOLIBERALISM, 37 (2018).

¹¹³ Sean Phelan & Simon Dawes, *Liberalism and Neoliberalism*, in OXFORD RESEARCH ENCYCLOPEDIA OF COMMUNICATION (Describing how liberals like Mill and Bentham approved state intervention on behalf of the worse-off members of society and how John Rawls linked freedom with equality and saw the market as part of society as well as an appropriate subject of social control.)

¹¹⁴ See WILSON, *supra* note 112, at 27. See also DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM, 33 (2005) (“In the event of a conflict between Main Street and Wall Street, the latter was to be favoured.”).

¹¹⁵ See, e.g., STEPHEN M. FELDMAN, THE ROBERTS COURT, DONALD TRUMP, AND OUR FAILING CONSTITUTION, 173-186 (2017) (describing some of the pro-business decisions lead by the conservative majority of the Roberts Court).

¹¹⁶ Peck, *supra* note 98 at xxx.

¹¹⁷ Keren, *supra* note 97, 53 WAKE FOREST L. REV. 829 (2018).

¹¹⁸ DANIEL T. RODGERS, AGE OF FRACTURE, 10 (2011).

¹¹⁹ Ronald Butt, *Mrs. Thatcher: The First Two Years*, Interview for the *Sunday Times*, May 3, 1981. Available at <https://www.margaretthatcher.org/document/104475>.

subjectivities. One path to the soul is discourse—a set of communicative acts through which, in a complex social process, ideas get widely circulated, turn into “truths,” and become the “common sense.”¹²⁰ And, once an idea becomes part of common sense, it is ready to be internalized, or, as Thatcher would have it: change the soul.

Crucially, as a forceful social institution that exerts authority and is trusted by many, the law can operate precisely in this way, and the arbitration revolution offers a prime example. It demonstrates the takeover of a non-economic arena by the metrics used initially only in market settings. Revolution aside, arbitration is one of several methods of alternative dispute resolution, all operating alongside conventional litigation. As such, arbitration is part of a civilized justice system maintained by society to avoid violent settlement of disagreements. Nonetheless, when the revolution commenced, it reconfigured arbitration as purely “a matter of contract,”¹²¹ thereby concealing its essence as an institutionalized form of dispute resolution. To further distance arbitration from justice, the new cases emphasized that arbitrations should be evaluated by their ability to achieve the core market goal of *economic efficiency*. Moreover, as Justice Scalia repeatedly stated in *Concepcion* and *Italian Colors*, such economic efficiency is to be measured by conventional economic metrics such as “costs,” “savings,” and “speed.”¹²² Instead of the “costliness and delays of [public] litigation,” he stated, private arbitration is a “speedy resolution”¹²³ that offers “greater efficiency” by “reducing the cost and increasing the speed of dispute resolution.”¹²⁴ Indeed, by the time the decisions in *Epic* and *Lamp Plus* were written, all that their authors did was to adopt Scalia’s economized language as if it was the only way to discuss matters of arbitration.

To be sure, some of the economic jargon cited above had been used to discuss arbitrations before. The point is not the use of words with economic flavor but rather their careful “recycling,” to attack collective actions. Words that were used to compare arbitration to traditional adjudication are now utilized differently: to distinguish types of arbitrations and to convey that while individual arbitrations are valuable, class arbitrations are harmful. Consider the use of the word “speed” as one example. Pre-revolution, the Court had used the promptness of arbitrations in a non-economic way, emphasizing it as a reason to prevent courts from acting in a manner that would slow-down arbitration. The Court stated, for example, that the FAA reflects a “clear congressional purpose that the arbitration procedure...be speedy and *not subject to delay and obstruction in the courts.*”¹²⁵ Used in this way, “speedy” is not an economic standard but an idea relating to the harmonization of different methods of dispute resolution. Post-revolution, however, speed is used to mark the economic value of individual arbitrations and to portray collective arbitrations as lacking such value. For example, the Court

¹²⁰ Michel Foucault, *The Discourse on Language (L'ordre du Discourse)*, in *THE ARCHAEOLOGY OF KNOWLEDGE & THE DISCOURSE ON LANGUAGE*, 215 (1972).

¹²¹ See, e.g., *Concepcion*, 563 U.S. 333, at 351.

¹²² *Id.*, at 345 and 350.

¹²³ *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, at 239.

¹²⁴ *Concepcion*, 563 U.S. 333, at 351.

¹²⁵ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967).

cautioned that “with class arbitration the virtues Congress originally saw in arbitration, its speed and simplicity and inexpensiveness, would be shorn away.”¹²⁶ The new economized discourse thus makes speed a reason to reject some arbitrations while preferring others, completely subjecting the domain of dispute resolutions to economic logic.

Similarly, the constant use of the jargon of “incentives” further transforms the issue of arbitration into a purely economic one. For example, as an essential part of his legal reasoning, Justice Scalia stressed in *Concepcion* that allowing class arbitrations “will have a substantial deterrent effect on incentives to arbitrate.”¹²⁷ Later, in *Italian Colors*, he similarly translated the justice-based argument that collective action waivers leave claimants without redress into the language of economics. Under such treatment, claimants’ insistence on class arbitrations is explained not by the fact that without them they lose access to justice,¹²⁸ but merely by the economic problem of having “no economic incentive” to pursue claims individually.¹²⁹

In short, a new discourse has been born, subjecting a non-economic setting to market rationality. By heavily using an economized rhetoric, applying a cost and benefit analysis, and committing to incentive thinking, the new arbitration jurisprudence amounts to the production of what Pierre Bourdieu called a “strong discourse.”¹³⁰ Similar to other neoliberal economization processes, the one transforming the domain of dispute resolution is implemented by “extending a specific formulation of economic values, practices, and metrics”¹³¹ to a non-economic issue.

The takeover of the field of arbitration by an economized rationality is completed by suppressing any appeal to justice-based arguments. A salient part of the arbitration revolution targets any attempt of arbitrators, state courts, agencies, or the liberal Justices to discuss the issue in non-economic terms such as fairness and public policy. The revolution’s cases offer abundant examples of such negation of any alternative rationality—as if they follow Margaret Thatcher’s “there is no alternative” slogan, also called the “TINA-Principle.”¹³² When the dissent in *Concepcion* raised the issue that forbidding class proceedings denies access to justice, the response dismissed such thinking, claiming that states cannot require preserving class arbitrations, “even if it is desirable for *unrelated* reasons.”¹³³ Similarly, in *Italian Colors*, the Court declared that an approach that insisted on the public policy underlying antitrust laws was “simply

¹²⁶ *Lamp Plus*, 139 S. Ct. 1407, at 1416.

¹²⁷ *Id.*

¹²⁸ See, e.g., Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 782 (2002) (describing arbitration as the “denial of access ... to the law itself”).

¹²⁹ *Italian Colors*, 570 U.S. 228, at 235.

¹³⁰ Pierre Bourdieu, *Utopia of Endless Exploitation: the Essence of Neo-liberalism*, at <http://mondediplo.com/1998/12/08bourdieu> (1998) (“neoliberal discourse is not just one discourse among many. Rather, it is a “strong discourse.”).

¹³¹ BROWN, *supra* note **Error! Bookmark not defined.**, at 30.

¹³² Christian Neuhäuser, *TINA*, 2018 KRISIS: JOURNAL OF CONTEMPORARY PHILOSOPHY, 15 (2018).

¹³³ *Concepcion*, 563 U.S. 333, at 351.

irrational.”¹³⁴ And, in *Epic*, the majority repeated the general rejection of justice concerns, stating that in expressing concerns for workers’ ability to enforce wage-and-hour laws, “the dissent retreats to policy arguments” that courts are “not free” to make.¹³⁵ The messages in all these examples go beyond applying an economic discourse to a non-economic topic: together, they confront the legitimacy of arguments regarding justice, fairness, and public policy—once at the heart of legal debates regarding alternative dispute resolutions.

The dismissal of any reasoning that deviates from market logic is a signature move of the neoliberal project. Following cultural critic Henry Giroux it is dubbed the “disimagination machine:”¹³⁶ the apparatus neoliberalism uses to gain hegemony and stifle resistance by making all alternative worldviews unimaginable.¹³⁷ In the context of the arbitration debate, the alleged exclusivity of the economized discourse is directly aimed at the disimagination of the possibility of collectivism. Because according to economized logic class arbitrations do not make sense, and because no other analysis of the issue is considered legitimate, the capacity of individuals to resist corporate wrongdoing by coming together is “disimagined,” making class arbitration inconceivable. But there is more. As the following section discusses, neoliberal strategies have been used not only to differentiate class arbitrations from individual arbitrations based on economic logic but also to demonize them.

C. The Neoliberal Road to Separation¹³⁸

The decisions that constitute the revolution include strong rhetoric against class arbitrations. The assault starts by portraying these arbitrations as inferior according to market rationality: both “slower” and “more costly” than individual arbitrations.¹³⁹ From there, it continues to presenting doubt regarding the authenticity and integrity of class arbitrations, describing them as “manufactured,” first in *Concepcion*¹⁴⁰ and most recently in *Lamps Plus*.¹⁴¹ And it gets harsher. The revolution’s cases also portray class arbitrations as dangerous. In *Concepcion*, the Court cautioned that if courts were obligated to ensure that a singular resolution is a viable option as a condition to enforcing a class arbitration waiver, the result would be a “litigating hurdle,”¹⁴² which “would undoubtedly destroy

¹³⁴ *Italian Colors*, 570 U.S. 228, at 234.

¹³⁵ *Epic*, 138 S. Ct. 1612, 1632.

¹³⁶ HENRY A. GIROUX, *THE VIOLENCE OF ORGANIZED FORGETTING: THINKING BEYOND AMERICA’S DISIMAGINATION MACHINE*, (2014).

¹³⁷ Wilson, *supra* note 112, at 72.

¹³⁸ The title of this section alludes to Friedrich Hayek’s famous book, *THE ROAD TO SERFDOM*, originally written in German and considered to be the fundamental text of the neoliberal project.

¹³⁹ See, *Concepcion*, 563 U.S. 333, at 348, *Italian Colors*, 570 U.S. 228, at 238, *Epic*, 138 S. Ct. 1612, 1623, *Lamp Plus*, 139 S. Ct. 1407, at 1416.

¹⁴⁰ *Concepcion*, *id.*, at 348.

¹⁴¹ *Lamp Plus*, 139 S. Ct. 1407, at 1417.

¹⁴² *Italian Colors*, 570 U.S. 228, at 239 (Emphasis added).

the prospect of a speedy resolution.”¹⁴³ Even more belligerent is the deliberate effort to associate collectivity with the specter of chaos. Allowing class arbitrations, wrote Justice Scalia in *Concepcion* for the first time, “is likely to generate procedural morass.”¹⁴⁴ Then, proving that he intentionally used this strong rhetoric, he repeated the exact sentence in *Italian Colors*.¹⁴⁵ Next, to further spread the pronounced disdain towards class arbitration, both Justice Gorsuch in *Epic* and Chief Justice Roberts repeatedly emphasized the same threat of morass.¹⁴⁶ Together, the cases that regularly identify class arbitrations with the specter “morass” follow the neoliberal method of turning anything that contributes to the public good into “a metaphor for public disorder.”¹⁴⁷ One can only hypothesize that the phrase “[p]rocedural morass” has been designed to echo the neoliberal attack on the welfare state, which had been constantly presented as creating a “bureaucratic morass.”¹⁴⁸

Furthermore, revealing much of neoliberalism’s relentless loyalty to corporations, the revolution’s decision further demonize class arbitrations by describing them as intentionally harming the corporations that are their typical defendants. Class arbitrations are portrayed, for example, as a tool utilized to bully corporations “into settling questionable claims,”¹⁴⁹ one that “unfairly ‘plac[es] pressure on the defendant to settle even unmeritorious claims,’”¹⁵⁰ while exposing them to “the risk of ‘in terrorem’ settlements.”¹⁵¹ However, given corporations’ significant power advantage, this description of victimhood rings hollow and can only be seen as part of a robust anti-collective message.

Significantly, this fierce attack on class arbitrations is tightly linked to and serves as a leading illustration of neoliberalism’s general assault on anything collective.¹⁵² Awareness of this linkage is critical to developing a deeper understanding of the roots and real purpose of the revolution. To neoliberals, all acts of solidarity that can challenge the existing structure of power are unwelcomed. Under neoliberalism, individuals should remain strictly focused on increasing their personal human-capital, and thus, “they are not supposed to choose to construct strong collective institutions.”¹⁵³ Indeed, as theorized by Bourdieu, in its essence, neoliberalism is “a programme of the methodological destruction of collectives.”¹⁵⁴

¹⁴³ *Id.* (Emphasis added).

¹⁴⁴ *Concepcion*, 563 U.S. 333, at 348.

¹⁴⁵ *Italian Colors*, 570 U.S. 228, at 238.

¹⁴⁶ *Epic*, 138 S. Ct. 1612, 1623, *Lamp Plus*, 139 S. Ct. 1407, at 1416.

¹⁴⁷ Henry A. Giroux, *Neoliberalism, Corporate Culture, and the Promise of Higher Education: The University as a Democratic Public Sphere*, 72 HARVARD EDUCATIONAL REVIEW, 425, 428 (2002).

¹⁴⁸ DONNCHA MARRON, CONSUMER CREDIT IN THE UNITED STATES: A SOCIOLOGICAL PERSPECTIVE FROM THE 19TH CENTURY TO THE PRESENT, 91 (2009).

¹⁴⁹ *Concepcion*, 563 U.S. 333, at 350.

¹⁵⁰ *Epic*, 138 S. Ct. 1612, at 1632.

¹⁵¹ *Concepcion*, 563 U.S. 333, at 350.

¹⁵² See, e.g., BROWN, *supra* note 20, at 153; WILSON, *supra* note 112, at 5.

¹⁵³ See HARVEY, *supra* note 114, at 69.

¹⁵⁴ Pierre Bourdieu, *Utopia of Endless Exploitation: The Essence of Neoliberalism*, LE MONDE DIPLOMATIC (1998) <https://mondediplo.com/1998/12/08bourdieu>

But why do neoliberals so strongly object individuals' efforts to cooperate? One evident reason is neoliberalism's aspiration to total hegemony. As part of imposing market rationality everywhere, neoliberals are highly committed to preserving and enhancing the current control of the strongest market actors. Accordingly, they are also committed to blocking any resistance by collectives of ordinary citizens, such as consumers or employees. From this perspective, a neoliberal worldview dictates supporting the efforts of corporations to insulate themselves from demanding legal confrontations that carry significant economic and reputational risks.

And yet, to more fully understand the resistance to collectivity, one needs to go deeper and interrogate the intellectual roots of neoliberalism and the way they have shaped influential neoliberal strategies that can shed light on the success of the arbitration. In her thorough study of the archives of one of the leading thinkers of neoliberalism, the late Nobel laureate James Buchanan, historian Nancy MacLean recently offered an original explanation that goes to the theoretical origins of American neoliberalism. In general, her book, titled *Democracy In Chains*, details the centrality of Buchanan's work to the project of transferring to the United States the original of neoliberal ideas,¹⁵⁵ which emerged in the famous gathering in Mont Pelerin and were articulated in the writings of Friedrich Hayek.¹⁵⁶ Aptly, Buchanan even referred to himself as the "American Hayek."¹⁵⁷

Of particular relevance to the neoliberal assault on collectivity, MacLean's study exposes that the phrase "the collective order" was often used by neoliberal intellectuals as a cipher for the enemy of their goals.¹⁵⁸ The phrase referred to the risky ability of individuals, who are powerless when separated, to band together and make demands for legal and policy reforms that due to the strength of numbers would be accepted by government officials. The "collective order" is perilous because to satisfy the needs of the many would necessarily require the fewer wealthy to participate in funding the efforts while sacrificing their interests.

Accordingly, in 1956, when the University of Virginia offered him to chair its economic department and found and lead the Thomas Jefferson Center for Political Economy and Social Philosophy, Buchanan suggested a mission statement that clarified that the new center would exclude those who seem to support "the coercive powers of the collective order."¹⁵⁹ He also later explained that the new center would aim to break "the powerful grip that collectivist ideology already had on the minds of intellectuals."¹⁶⁰

MacLean's analysis suggests that what lies at the core of the neoliberal hostility to collective group-action is fear of "the American people collectively."¹⁶¹ In a defensive

¹⁵⁵ MACLEAN, *supra* note 94, at xviii (arguing that the Buchanan's lifetime work played a major role in saving neoliberal ideas from remaining a "dead-end fantasy").

¹⁵⁶ See DANIEL STEDMAN JONES, MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS, 2-3 (2012).

¹⁵⁷ MACLEAN, *supra* note 94, at 136.

¹⁵⁸ *Id.*, at xxiii.

¹⁵⁹ *Id.*, at 45.

¹⁶⁰ *Id.*, at 46.

¹⁶¹ *Id.*, at 10.

response, therefore, the neoliberal plan has been for many years to delegitimize and defeat collective acts. Buchanan's famous and highly influential public choice theory, for which he was awarded in 1986 the Nobel Prize in economic sciences, offers a leading example of the intellectual effort to minimize the threat of group action. One of the theory's central innovations was a negative exposition of the very attempt of collectives to pursue their interests, a dynamic which the theory marked inadequate, not the least by giving it a new name with a flavor of manipulation and greed: "rent-seeking."¹⁶² The fact that the public choice theory was presented and accepted as a groundbreaking academic work, as opposed to an ideological argument, helped to make it influential outside of economics departments, with a particular sway on legal analysis, mainly through the theory's adoption by the increasingly dominant law and economics movement.¹⁶³ The rational choice theory and the related game theory have similarly helped to shape anti-collective views in many disciplines. As political scientist S. M. Amadae argues in her book *Prisoners of Reason: Game Theory and Neoliberal Political Economy*: "collective action, public interest, voluntary cooperation, trade unions, social solidarity, and even voting are all irrational according to rational choice theory."¹⁶⁴

Importantly, resistance to collectivity has not remained academic. Theories such as the public choice theory and the rational choice theory have had an immense impact in the real world and their message that collective action is "inefficient" and "manipulative" eventually found its way to the Supreme Court and helped to bring about the arbitration revolution. One salient facilitator of the flow of ideas from universities to courts has been generous funding and massive organization-building activity by the financial elite that leads America's largest corporations with the leading example of the billionaire brothers, David and Charles Koch. Sharing Buchanan's concerns regarding "the collective order," but understanding the limits of their direct political power under a democratic majority system,¹⁶⁵ the Koch brothers have spent decades "funding conservative economists and law professors, think tanks and political groups."¹⁶⁶ In doing so, they seem to have followed Buchanan's important strategy that called for paying "attention to *the rules* rather than the rulers."¹⁶⁷ In MacLean's words: "Only James Buchanan had also developed an operational strategy for how to get to that radically new society, one that took as axiomatic what both Buchanan and Koch understood viscerally: that the enduring impediment to the enactment of their political vision was the ability of the American people, through the power of their numbers, to reject the program."¹⁶⁸

¹⁶² See AMADAE, *supra* note 101, 270 (explaining rent-seeking). See also Sophie Harnay & Alain Marciano, Seeking rents through class actions and legislative lobbying: A comparison, 32 European J. L. Econ. (2011).

¹⁶³ See TELES, *supra* note 105, at 121.

¹⁶⁴ AMADAE, *supra* note 101, at 9-10.

¹⁶⁵ MACLEAN, *supra* note 94, at 193.

¹⁶⁶ Alex Kotch, US Treasury Cites Koch-Funded Research In Critique Of Consumer Protections, International Business Times (Oct. 27 2017), available at <https://www.ibtimes.com/political-capital/us-treasury-cites-koch-funded-research-critique-consumer-protections-2607138>.

¹⁶⁷ MACLEAN, *supra* note 94, at 184.

¹⁶⁸ MACLEAN at 193.

Additionally, and as part of paying attention to the “rules,” the Koch brothers have also supported the advancement of Buchanan-like ideas through educating and training future rule-makers – from law students, through lawyers, to judges – and helping them secure influential positions. While the space is too limited to describe the many ways in which neoliberal ideas have been promoted through law by interested economic elites,¹⁶⁹ one example that particularly relates to the battle against collective actions and the arbitration revolution is worth highlighting. It shows that the hostility to collective actions expressed in the leading cases of the revolution is part of a concerted and well-planned effort to defeat collective actions by a combination of theory, money, and law.

The Justices who wrote the revolution’s leading cases – Alito, Scalia, Gorsuch, and Roberts – had significant exposure to the aversion towards collectivity, and their familiarity with the issue was not coincidental but a product of deliberate efforts. We already have seen that the Justices have long been connected with the Federalist Society.¹⁷⁰ What needs to be added here, to illustrate the pathways from theory to legal change further, is the issue of funding. To disseminate Buchanan-like approaches in a manner that can reach the rule-makers, the Koch brothers have offered direct and significant financial support to the Federalist Society, sponsoring the Society’s efforts to organize gatherings in which market-based ideas would be exchanged and promote committed participants to the judiciary.¹⁷¹ In addition, to stretch their worldview to the bench, the Koch brothers also established their complex network of organizations and centers – sometimes referred to as “Kochtopus,”¹⁷² or “Kochland.”¹⁷³ This network has offered members of the judiciary, including the abovementioned Supreme Court Justices, many opportunities to closely interact with theorists and business moguls in summer training sessions, seminars, fundraising events, and more.¹⁷⁴

For example, in 2007, Justice Scalia took part in a “political strategy and fund-raising seminar” organized by the Koch brothers while the Federalist Society reimbursed all his expenses.¹⁷⁵ The ethical aspects of such participation attracted some criticism,¹⁷⁶ but for the current discussion, what matters more is mapping out how the goal of shielding corporations from collective challenges might have made its way from theory to revolution. On the same point, Buchanan’s involvement with the George Mason University (GMU) in general, and the history of the birth and rise of GMU’s law school

¹⁶⁹ See, e.g., BROWN, *supra* note 20, Chapter V (titled “Law and Legal Reason” and included in the Part of the book dedicated to “Disseminating Neoliberal Reason.”).

¹⁷⁰ See *supra*, Part I.

¹⁷¹ MICHAEL AVERY & DANIELLE MCLAUGHLIN, *THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS*, 17 (2013) (listing the Koch family, via different foundations, amongst the leading contributors to the society).

¹⁷² MACLEAN, *supra* note 94, at 188.

¹⁷³ CHRISTOPHER LEONARD, *KOCHLAND: THE SECRET HISTORY OF KOCH INDUSTRIES AND CORPORATE POWER IN AMERICA* (2019).

¹⁷⁴ MACLEAN, *supra* note 94, at 195 (“A stunning 40 percent of the U.S. federal judiciary had been treated to a Koch-backed curriculum”).

¹⁷⁵ BRUCE ALLEN MURPHEY, *SCALIA: A COURT OF ONE* 426-427 (2014).

¹⁷⁶ *Id.*

in particular, both offer another illuminating example that ties together theory (Buchanan), funding (Koch), and law (Scalia). In the 1980s, after Buchanan joined GMU's economics department and brought with him the Center for the Study of Public Choice,¹⁷⁷ his presence came with "[l]iterally millions of dollars."¹⁷⁸ Subsequent to Buchanan's move to GMU, Charles Koch had the Institute for Humane Studies, which he controlled, follow. Soon after, the head of the institute invited Buchanan to speak at the national conference of the Federalist Society and although it is not clear if he accepted the invite, his theories were discussed many times during the Society's gatherings, where, as referenced earlier, the Justices leading the revolution, and especially Justice Scalia, were sometimes in attendance.¹⁷⁹

The Koch family continued to support spreading Buchanan anti-collective ideas. In 1997, for example, it had donated ten million dollars to the creation of the new and enlarged James Buchanan Center for Political Economy, explaining to a forum of research fellows that achieving reforms while being "greatly outnumbered" by the majority of citizens requires developing "winning strategies."¹⁸⁰ Similarly, in 2016, the Charles Koch Foundation added another ten million dollars to support renaming GMU's law school, itself an establishment committed to conservative law and economics thinking.¹⁸¹ With the help of this donation, the law school that was established by Henry Mann then changed its name to the Antonin Scalia Law School. In its announcement of the name-change the school also reported that the Koch's contribution was supplemented by another gift of twenty million dollars from a donor who contacted GMU via the executive vice president of the Federalist Society, Leonard Leo, whom the announcement described as "a personal friend of the late Justice Scalia and his family."¹⁸² Leonard Leo, others argued, is also the one who brought to the Supreme Court the other three Justices that have led the revolution, "Justices Roberts, Alito and Gorsuch."¹⁸³

While all the ties described above may only amount to "circumstantial trail [that] leaves many open questions," to use MacLean's candid words,¹⁸⁴ the point here is mainly to illustrate the purposeful investment in diffusing anti-collective theories and pro-corporate approach into the legal system, enough to empower the emergence of a new

¹⁷⁷ George Mason University, *Mason Remembers Nobel Laureate James M. Buchanan* (January 11th 2013), <https://www2.gmu.edu/news/1105>.

¹⁷⁸ MACLEAN, *supra* note 94, at 172.

¹⁷⁹ See *infra*, note 109.

¹⁸⁰ MACLEAN, *supra* note 94, at page XX and fn. 13 (citing Charles Koch's speech to the Fellows Research Colloquium).

¹⁸¹ For the history of the law school, and its importance in disseminating conservative ideology, see TELES, *supra* note 105.

¹⁸² Announcement by GMU's law school (2016) available at https://www.law.gmu.edu/news/2016/scalia_school_of_law_announcement

¹⁸³ Terry Gross, *How One Man Brought Justices Roberts, Alito, and Gorsuch to the Supreme Court*, NPR (April 12th 2017) (interviewing *New Yorker* staff writer Jeffrey Toobin) available at <https://www.npr.org/2017/04/12/523495201/how-one-man-brought-justices-roberts-alito-and-gorsuch-to-the-supreme-court>

¹⁸⁴ MACLEAN, *supra* note 94, at 297-298, fn. 72.

jurisprudence that would eliminate the ability of individuals to band together against corporations.

Much more directly, stalwarts of the Koch-supported Federalist Society openly sought to bring the revolution about via a variety of amicus briefs. Prior to the historic decision in *Concepcion*, for example, members of the Society were involved in filing four different amicus briefs calling for an unlimited affirmation of collective actions waivers: on behalf of the Class Action Fairness Center, the Wireless Association, The Voice of the Defense Bar, and by a group of “Distinguished Law Professors.”¹⁸⁵ Indeed, in an analysis of *Concepcion* published in the Federalist Society’s journal, titled *Class Action Watch*, Professor Brian Fitzpatrick—to whom the Society awarded at the same year its lucrative Bator award¹⁸⁶—opined that “the Supreme Court has just handed the business community its biggest victory in a very long time.”¹⁸⁷ Fitzpatrick additionally predicted that “the decision could lead to the end of class actions against businesses across most—if not all—of their activities.”¹⁸⁸ And, as proved by the subsequent cases of the revolution, he was right. Years of writing, educating, funding, and organizing had eventually succeeded, awarding corporations a weapon against the loathed “collective order.”

To summarize this detailed section, it is, therefore, possible to sketch in broad strokes the path from the development of neoliberal ideas in the United States to the most recent decision of the arbitration revolution. In the beginning, theories were developed and spread to convey that collective actions are irrational, coercive, and dangerous. Then, corporations have started to use their market power, as well as market tools (contracts), to eliminate collective actions. Next, after some years of legal battles, the law was dramatically changed, compelling courts to enforce those restrictive contracts, regardless of their impact on access to justice. And most recently, it was decided that even corporations that did not try to prevent collective actions explicitly will be helped by the Court that made sure that from now on, judges and arbitrators will give arbitration clauses in standard contracts an interpretation that disallows group-action. Significantly, all the four stops along the road to separation have been carefully planned and generously funded by the leaders of the largest American corporations. Overall, by actively helping corporations to isolate people, the majority of the Supreme Court has added legal authority to a pro-corporation and anti-collective neoliberal ideology, further legitimizing its rationality and amplifying its already immense impact.

As if predicting all that, David Harvey wrote in 2005 that “the neoliberal state is necessarily hostile to all forms of social solidarity that put restraints on capital accumulation.”¹⁸⁹ He further explained that, if need be, the state will use its *legal* arm

¹⁸⁵ AVERY & MCLAUGHLIN, *supra* note 171, at 93-94.

¹⁸⁶ Vanderbilt University, *Brian Fitzpatrick receives the Federalist Society’s 2011 Bator Award*, (Mar 7, 2011), available at <https://law.vanderbilt.edu/news/brian-fitzpatrick-receives-the-federalist-societys-2011-bator-award/>

¹⁸⁷ Brian T. Fitzpatrick, *Did the Supreme Court Just Kill the Class Action?*, CLASS ACTION WATCH, Sept. 2011, at 12.

¹⁸⁸ *Id.*, at 1 (emphasis in original).

¹⁸⁹ HARVEY, *supra* note 114, at 75 (2005). Note that here again neoliberalism greatly differs from liberalism, especially Rawlsian type of liberalism, which would have supported collective actions to

against collectives, resorting “to coercive legislation and policing tactics ... to disperse or repress collective forms of opposition to corporate power.”¹⁹⁰ The more profound investigation of the theoretical roots of resisting collective actions combined with the sketching of how those ideas were deliberately diffused into the Supreme Court perfectly match Harvey’s description: the arbitration revolution indeed has operated to “repress collective forms of opposition to corporate power.” The coming Part asks: repression at what price?

III. GENERATING AFFECTIVE POWERLESSNESS

As others have argued before,¹⁹¹ and I have written elsewhere,¹⁹² the arbitration revolution and the increasing ability of corporations to immune themselves from liability that it fostered have many negative consequences. Those include a severe decrease in access to justice,¹⁹³ weakening of both the common law¹⁹⁴ and essential federal laws that rely on private civil litigation,¹⁹⁵ and, due to the accumulation of all of the previous concerns, general harm to equality and the rule of law.¹⁹⁶ However, having just recognized the role of neoliberalism in shaping the anti-collectivist core of the revolution allows identifying additional damage: a pervasive *emotionally* corrosive effect that carries with it a long-term *social* risk.

To those interested in studying the impact of neoliberalism, these yet-to-be-noticed consequences—that arise outside of the conventional domains of law and economics—will not come as a surprise. After all, as mentioned earlier, Margaret Thatcher famously announced that the goal of disseminating neoliberal ideas has always been “to change the soul.”¹⁹⁷ Moreover, critics of neoliberalism have long been cautioning that the neoliberal takeover includes significant and intentional influence on the emotions and that such control hurts our sociality.¹⁹⁸

promote individual interests and particularly when individual autonomy is at risk due to inequalities. See Martin H. Redish and Clifford W. Berlow, *The Class Action As Political Theory*, 85 WASH. U. L. REV. 753 (2007).

¹⁹⁰ HARVEY, *id.*, at 77.

¹⁹¹ See, e.g., Glover, *supra* note 12.

¹⁹² Hila Keren, *Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity*, 2 CANADIAN J. COMP. & CONTEMP. L. 339 (2016).

¹⁹³ See, e.g., Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703 (2012).

¹⁹⁴ See, e.g., Gilles, *supra* note 12, at 376 (“[f]or the entire categories of cases that are ushered into [arbitration]... common law doctrinal development will cease.”).

¹⁹⁵ See, e.g., David L. Noll, *Regulating Arbitration*, 105 CAL. L. REV. 985 (2017) (explaining how arbitration affects the implementation of statutes that are enforced through private civil litigation).

¹⁹⁶ See, e.g., Keren, *supra* note 192.

¹⁹⁷ Butt, *supra* note 119.

¹⁹⁸ See, e.g., Keren, *supra* note 97, at 871-874 (explaining how the impact of neoliberalism in the affective arena threatens to fray our social fabric).

As argued in the previous Parts, the arbitration revolution has created a separation process that has been inspired by neoliberal theorists, executed and funded by organized corporate leaders, and embraced by the Supreme Court. This Part cautions that this separation process has a penetrating effect on the soul. It leaves people isolated from their peers and abandoned by their state. All alone, ordinary citizens are being put into a long-term condition of feeling powerless and helpless, too weakened to engage in resistance. The fact that such powerlessness perfectly aligns with the neoliberal goal of reaching hegemony suggests that the emotional consequences are far from accidental.

A. Individualized Arbitrations and Neoliberal Individualization

Decades of organized pressure to defeat collective actions, both in judicial and arbitral forums, have left people like Frank Varela with only one path of action: to pursue justice outside of courts and all alone. Intriguingly, while eradicating all other options, the decisions that constitute the revolution reformed even the name of this surviving option. In the middle of the revolution, after *Stolt-Nielsen*, *Concepcion*, and *Italian Colors*, the Court drifted away from the tradition of calling a non-class arbitration a “bilateral” arbitration.¹⁹⁹ Instead – and for the first time at the Supreme Court level – Justice Gorsuch introduced in *Epic* a new designation, repeatedly referring to a non-class arbitration as an “individualized” arbitration.²⁰⁰ This new labeling was adopted shortly after by Justice Roberts in the recent *Lamp Plus*, as well as by other judges and scholars who wrote about the topic post-*Epic*.²⁰¹

Like Shakespeare's Juliet, one may ask: what's in a name?²⁰² To which at least two replies are due, both relying on the broad recognition of the expressive power of law.²⁰³ The first relates to the comparison between using “bilateral” and “individualized” to describe the only option left post-revolution. The adjective “bilateral,” which literally means two-sided,²⁰⁴ also denotes, when used in the context of arbitration, a dispute

¹⁹⁹ See, e.g., *Concepcion*, 563 U.S. 333 (Justice Scalia using the word “bilateral” 6 times).

²⁰⁰ In *Epic*, Justice Gorsuch described this path of arbitration/proceedings/dispute resolution procedure as “individualized” 15 times.

²⁰¹ Until *Epic*, No decision of the Supreme Court used the term “individualized arbitration.” The term appeared in lower courts for the first time in 1997, see *Randolph v. Green Tree Fin. Corp.*, 991 F. Supp. 1410, 1424 (1997). Based on Lexis-Advanced search, from that time and until 5/21/2018 (the date of the Court's decision in *Epic*), for more than *two decades*, the term was used by lower courts 37 times. Then, in the short time post-*Epic* and until 8/19/2019 the term was used in the Court's decision in *Lamp Plus* as well as in additional 39 decisions of lower courts. This rapidly increasing frequency offers another demonstration of legal dissemination of neoliberal logic.

²⁰² WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, Act II, Scene II (Juliet arguing that the fact that Romeo's last name associates him with a rival family should not matter, because “that which we call a rose by any other name would smell as sweet.”).

²⁰³ See, e.g., Robert Cooter, *Expressive Law and Economics*, 27 J. LEGAL STUD. 585, 607–08 (1998); Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1650–51 (2000); Cass R. Sunstein, *On the*

Expressive Function of Law, 144 U. PA. L. REV. 2021, 2022 (1996).

²⁰⁴ Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/bilateral>.

resolution process that is mutual, reciprocal, and consensual.²⁰⁵ The use of “bilateral” thus encourages associating the path to redress that it describes with fundamental principles of justice. At the same time, “bilateral” also helps to conceal the typical gap of power between the parties to the standard contracts that forbid collective action; a gap that so clearly existed in cases like *Concepcion* and *Italian Colors*. For those reasons, using “bilateral” was a convenient linguistic choice for Justice Scalia, as he introduced for the first time a revolution that closes options formerly open for all. Moreover, and related to the previous Part, such rhetoric illustrates the stealth “winning strategies” that Buchanan recommended and Koch institutionalized.²⁰⁶ Conversely, substituting “bilateral” with “individualized” has none of the above strategic advantages as the latter word highlights rather than obscures the solitude that is inherent to the non-collective path to redress.

The second reply relates to the difference between describing the single remaining way to seek justice as “individualized,” and not merely (as numerous courts have done) as “individual.”²⁰⁷ Interestingly, Justice Gorsuch added the adjective “individualized” to the discussion in *Epic* after the lower court that decided the dispute, the Seventh Circuit, limited itself to the language of “individual” arbitration.²⁰⁸ The increasing use of the word “individualized” is a particularly meaningful rhetorical choice in light of the neoliberal background of the revolution. It is similarly crucial if one wishes to understand better how the legal change operates to further disseminate the neoliberal common sense.

Most generally, breaking social life into individualized segments is a core idea in neoliberalism. As political scientist Wendy Brown explained, neoliberalism “solicits the individual as the only relevant and wholly accountable actor.”²⁰⁹ The goal of neoliberal individualization is not only to separate people from each other out of the aversion to collectives mentioned before. It is also to draw a clear dividing line between the self and its environment, disconnecting people and their experiences from any social context. In this way, neoliberalism suppresses individuals’ ability to link their fate to the social order or to implore assistance from social institutions or the state. It makes, in short, “[s]elf and society mutually exclusive,”²¹⁰ echoing Margaret Thatcher’s infamous declaration that there is no justification for government help because “there is no such thing as society.”²¹¹

It is worth recognizing here that neoliberal individualization is markedly different from liberal individualism. Individualism emerges from a celebration of individuality that is associated with agency and autonomy, and it leaves each person to self-determine her needs and goals. By contrast, individualization is an *imposed* process that ignores

²⁰⁵ All synonyms suggested by the Web and Word versions of Thesaurus, respectively. For the online version see <https://www.thesaurus.com/browse/bilateral?s=t>.

²⁰⁶ MACLEAN, *supra* note 94, at XX.

²⁰⁷ While many lower courts have exclusively used “individual” rather than “bilateral” or “individualized,” none of the revolution cases have done that. See, e.g., *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (2016).

²⁰⁸ *Id.*

²⁰⁹ BROWN, *supra* note 20, at 133.

²¹⁰ WILSON, *supra* note 112, at 4.

²¹¹ Douglas Keay, Interview with Margaret Thatcher for Woman’s Own, MARGARET THATCHER FOUND., available at <https://www.margaretthatcher.org/document/106689>

private inclinations and wishes and generally cares very little about the individual herself. An important part of the individualization process is the way neoliberal rationality interrupts autonomy, dictating to all people that their primary goal, as they approach *any* area of their life, should be to maximize their human capital.²¹² The purpose of such a self-optimization project is to endlessly attempt to win what neoliberalism frames as an ongoing competition against other individuals over scarce resources.²¹³ Individualization also denies the universal vulnerabilities that make us inevitably interdependent while rendering irrational the natural yearning for giving and receiving (free) care.²¹⁴

Accordingly, when Justice Gorsuch repeatedly used the word “individualized” he revealed that even when they are included in signed contracts, collective action waivers may not truly be mutual and consensual (as suggested by “bilateral”) or the product of individual choice (as indicated by “individual”). Instead, what comes to the fore thanks to Justice Gorsuch’s new articulation is the *forced* and *involuntary* nature of the process that pressures claimant to battle wrongdoing all by themselves. Similarly, when Chief Justice Roberts follows Gorsuch’s discourse in *Lamps Plus*, he brings to light the fact that even when arbitration clauses do not include waivers, courts nonetheless are going to *compel* claimants to fight alone by reading these clauses *as if* they were limiting collective action. To call the resulting narrow path of access to justice “individualized arbitration” is, therefore, to concede that “individualization is a fate, not a choice.”²¹⁵

It is certainly possible that neither Justice Gorsuch nor Chief Justice Roberts was aware of the critical analyses of the neoliberal “relentless process of individualization,”²¹⁶ as they each shifted to using the language of “individualized” arbitration. They surely did not adopt this new phrasing with out of a wish to expose the forced nature of the single path they have left open for claimants. However, at the same time, the ease with which the word “individualized” had entered the conversation despite its non-consensual tone can teach us something about how far along the revolution had already been by the time the decisions in *Epic* and *Lamps Plus* were written. It suggests that by 2018, seven years post-*Concepcion*, and after the election of President Donald Trump resulted in a conservative control of the Court, the Justices felt confident enough to forego previous efforts to “market” individual arbitration as something that, from claimants’ perspective, might be favorable or at least fair.

Moreover, in both *Epic* and *Lamps Plus*, the Justices not only described the claimants as subject to an “individualized” process, but they also adopted another signature move of neoliberalism and “responsibilized” these claimants, holding them

²¹² BROWN, *supra* note 20, 31-32, 34.

²¹³ SAM BINKLEY, HAPPINESS AS ENTERPRISE: AN ESSAY ON NEOLIBERAL LIFE, 23 (2014).

²¹⁴ WILSON, *supra* note 112, at 4-5.

²¹⁵ ZYGMUNT BAUMAN, LIQUID MODERNITY, 34 (2000).

²¹⁶ *Id.* at 62.

solely and entirely responsible to their fate.²¹⁷ First in *Epic* and then in *Lamp Plus*, the individualized employees were further framed as the only ones responsible for being left without an effective path of redress simply because they “agreed” to arbitrate. For example, in *Epic*, Justice Gorsuch went as far as blaming the individual employee, Mr. Morris, for daring to sue Ernest and Young “*despite* having agreed to arbitrate against the firm.”²¹⁸ In a similar tone, Chief Justice Roberts stated in his description of the facts in *Lamp Plus* that “[l]ike most Lamps Plus employees, Varela had signed an arbitration agreement when he started work at the company. *But* after the data breach, he sued Lamps Plus...”²¹⁹ It appears that because both Justices already conceded that the employees are limited to an “individualized” arbitration they had no particular need to cope with Justice Ginsburg’s dissent that in both cases tried to remind everyone that the employees did not truly agree to anything but rather faced a “Hobson’s choice” to “accept arbitration on their employer’s terms or give up their jobs.”²²⁰

And yet, even if the adoption of the “individualized” modifier was not aimed at illuminating the true nature of non-class arbitration, its appearance can help seeing that by utilizing the power of the legal system, neoliberalism individualizes even the ways humans cope with inevitable crises in their lives, such as the scams that harmed the employees in both *Epic* and *Lamp Plus*. Limited to “individualized” solutions, each person learns that when in trouble, she cannot count on anyone but herself. Ironically, the discussion above shows that as part of the neoliberal project, corporations and the Court have *acted together* in the last few decades to create a world defined by intense separation and isolation. What are the consequences of living in such a world?

B. *The Emotional Consequences of Individualization*

Importantly, neoliberalism is not only a top-down project led by corporations and their avid supporters. Much of its success to reach people of all political persuasions relates to the fact that we have all internalized the neoliberal logic until it feels our own, sometimes without even having full awareness of its origins. This internalization process is itself a product of a neoliberal strategy. As sociologist Sam Binkley explains it: “Preferring not to act on subjects directly,” and seeking to “govern minimally,” the neoliberal project “brings about *specific changes in its subjects*...”²²¹ To use only one simple example, many think and say that they need to “invest” more time in themselves, their health, or their relationship with others, accepting the economic dynamics of calculating

²¹⁷ See, e.g., BROWN, *supra* note 20, at 133 (explaining how people are being “responsibilized” because neoliberalism, for its own political goals, “solicits the individual as the only relevant and wholly accountable actor”).

²¹⁸ *Epic*, 138 S. Ct. 1612, at 1620 (emphasis added).

²¹⁹ *Lamps Plus*, 139 S. Ct. 1407, at 1413 (emphasis added).

²²⁰ *Epic*, 138 S. Ct. 1612, 1636 and *Lamp Plus*, 139 S. Ct. 1407, at 1421.

²²¹ Sam Binkley, *The Emotional Logic of Neoliberalism: Reflexivity and Instrumentality in Three Theoretical Traditions*, in THE SAGE HANDBOOK OF NEOLIBERALISM, *supra* note 98, 589.

investments and returns without noticing the structural limitations on their time (such as due to having to work for long hours). Some even invest actual money in measuring and ranking their performance in these non-economic spheres, utilizing a rapidly growing marketplace of products designed for such tasks.²²² Through such an internalization process, the neoliberal worldview disseminates itself by working from within.

Eventually, coming at us from many external sources *and* springing internally, the neoliberal message ends up influencing everything in our lives, including not only well-calculated big decisions such as what to study and where, but also, for example, the way we express ourselves. A particularly relevant example can be found in longitudinal studies of written texts in the United States and Norway that demonstrate how with the rise of neoliberalism during the last few decades the frequency of words related to collective solidarity (e.g. “obliged” or “common”) decreased, while the frequency of words pertaining to individual self-promotion (e.g., “choose” or “entitlement”) increased.²²³ Importantly, with this penetrating power neoliberalism also influences our emotional life.

Accordingly, this section argues that the inability to seek justice together with others neither in courts nor in arbitration creates a severe sense of isolation that produces intense feelings of powerlessness and helplessness. Such lasting emotions are individually and socially harmful much beyond the arbitration-controlled contractual arena: they deplete individual and social resilience in all areas of life and stand to produce despair and apathy that would further enhance the general social disconnect produced by neoliberalism.²²⁴

Illuminating the emotional consequences of ousting collective actions and leaving people to fend for themselves is an intricate task. Part of the complexity is that this separation project has culminated, as we have seen, only recently and in an intentional and stealth way, which makes evidence scant. Another complication comes from the general inclination to ignore the emotions when analyzing legal issues.²²⁵ As a result, despite the richness of scholarly work studying and criticizing the arbitration revolution, no attention was given to the possibility that it has a long-term impact on people’s emotions.

And yet, a notable exception recently appeared in the context of employment contracts when an employee explicitly expressed in a published interview the emotional impact of being subject to a class action waiver. The interviewed employee stated: “The employment class action waiver *affected me emotionally* as I felt *powerless* in the organization. I felt *isolated* from others...”²²⁶ This direct statement offers a critical starting

²²² See generally, Keren, *supra* note 97.

²²³ Glann Adams, Sara Estrada-Villalta, Daniel Sullivan, & Hazel Rose Markus, *The Psychology of Neoliberalism and the Neoliberalism of Psychology*, 75 JOURNAL OF SOCIAL ISSUES, 189, at 194 (2019).

²²⁴ WILSON, *supra* note 112, at 153 (“lining in [neoliberal] competition breeds social alienation and disconnections at both individual and social level”).

²²⁵ See generally Kathryn Abrams & Hila Keren, *Who’s Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997 (2010).

²²⁶ Matthew B. Seipel, *The Strong Do as They Can: How Employment Group-Action Waivers Alienate Employees*, 7 AM. U. LABOR & EMP. L.F. 1 (2017).

point, and it indeed begins to substantiate the considerable emotional toll imposed by the neoliberal attack on collective actions. A 2017 psychological experiment provides further direct support, reporting that exposing people to information regarding the effect of arbitration clauses generated “negative feelings toward binding arbitration.”²²⁷ What follows is a detailed study of less direct evidence. The findings strongly support the above employee’s account and particularly demonstrate how denying access to collective legal actions can produce the powerlessness that the interviewed employee reported.

1. Reports by Class Action Participants

People who did manage to get involved in class action had reported an array of positive emotions. Their reports strongly suggest that by banning class actions, corporations, and the courts that support them, deprive people of such valuable affective effects. The positive impact of engagement in class actions can be gleaned from a set of interviews conducted by Professor Stephen Meili with active representatives of class actions (often called “named plaintiffs”) and their lawyers. Building on previous work by Professor Bryant Garth,²²⁸ Meili’s interviews demonstrate a general “sense of empowerment” that comes from the involvement in class actions.²²⁹ As part of such broad empowerment, interviewees reported feeling capable, worthy, influential, effective, and proud. For example, they felt that class actions gave them, despite being “little people,” the rare ability “to take on large corporate interests.”²³⁰ Similarly, they described feeling “satisfied” because they made a difference and were successful in bringing about change. As one plaintiff said: “the point was made...the next time around [debt collectors] will look more in depth at what they’re sending out...”²³¹

Moreover, some interviewees have highlighted the potential of feeling self-validation by the process. To illustrate, one named plaintiff who expressed deep disappointment when “his” class action was *not* certified explained that certification would have meant that participants “could have been somebody.”²³² Significantly, much of the empowerment-related emotions were experienced in the face of a threat to resilience. Interviewees repeatedly contrasted their emerging positive feelings with being previously disempowered and disrespected by the corporations they took action against. They described how being part of a class action activity helped them survive humiliation and restore self-value after having been made to feel “insignificant,”²³³ or even like “dirt.”²³⁴ Such a description illuminates how collective actions not only offer a

²²⁷ Quintanilla & Avtgis, *supra* note 18, at 2128.

²²⁸ Bryant G. Garth, *Power and Legal Artifice: The Federal Class Action*, 26 LAW & SOC. REV. 237 (1992).

²²⁹ Stephen Meili, *Collective Justice or Personal Gain – An Empirical Analysis of Consumer Class Action Lawyers and Named Plaintiffs*, 44 AKRON L. REV. 67, 84 (2011).

²³⁰ *Id.* at 90.

²³¹ *Id.* at 116.

²³² *Id.* at 97.

²³³ *Id.* at 101.

²³⁴ *Id.* at 93

practical solution to limited resources but also offer an essential emotional coping mechanism.

Similarly, class actions functioned at the emotional level by offering a healthy mode of coping with anger and other intense negative emotions caused by the wrongdoing. For example, one interviewee described how the process allowed them to “air private grievances.”²³⁵ Likewise, another interviewee reported that the procedure offered a method “to do something” about feeling angry.²³⁶ In other words, participants found in class actions a way to “channel” anger into a much more productive path.²³⁷ Their experiences accord with other scholarly work of law and emotions theorists that more generally explained the way law could assist in positively channeling emotions,²³⁸ for example, in the context of international tribunals convened in response to episodes of genocide. As Professor Martha Minow has argued, such tribunals may turn consuming grief and rage toward the more concrete and socially attainable goal of securing justice in relation to specific perpetrators.²³⁹

Most relevant to the social aspects of life under forced-separation, many of the named plaintiffs emphasized that what motivated them to invest their time and energy in the collective process, and what made them eventually feel empowered by it, was not only and not even mainly self-interest. Because success is far from being guaranteed, and even a win of a class action frequently means only a modest tangible reward, participants emphasized first being driven and later feeling rewarded by something else. They have described their motivation and satisfaction as related to being engaged in “protecting the public,”²⁴⁰ or by representing “the people who had been harmed.”²⁴¹ Some even expressed particular care for class members “who were more vulnerable.”²⁴² Confirming the authenticity of these reported sentiments and explaining their importance, class action lawyers stated that the best class representatives are those who “care for something beyond their self-interest.”²⁴³ Given such emphasis on the unselfish drive to collaborate, it is worth noting that many studies have shown that engaging in other-regarding behaviors and experiencing other-oriented positive emotions are associated with greater wellbeing.²⁴⁴ Thus, understanding class actions as expressions of prosocial motivations explain much of the general sense of empowerment reported by partakers.

²³⁵ *Id.* at 91.

²³⁶ *Id.* at 107.

²³⁷ *Id.* at 93.

²³⁸ Abrams & Keren, *supra* note 225, at 2054 (defining a variety of ways in which law influences emotions and describing in this context how “[t]he law can also work to *channel* or *moderate* emotions that are already being experienced by a particular person or group.”).

²³⁹ MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE, 52-90 (1998).

²⁴⁰ Meili, *supra* note 229, at 87.

²⁴¹ *Id.* at 94.

²⁴² *Id.* at 89.

²⁴³ *Id.* at 103.

²⁴⁴ See, e.g., Stephen G. Post, *Altruism, Happiness, and Health: It's Good to Be Good*, 12 INTERNATIONAL JOURNAL OF BEHAVIORAL MEDICINE, 66 (2005).

Furthermore, contributors to class actions have also associated their activity with a sense of moral adequacy. Blending the value of prosocial behavior and morality, they described, for instance, a feeling that they “were doing the right thing for hopefully a lot of people.”²⁴⁵ They also framed their class action as a battle of right and wrong, attributing their satisfaction to the fact that “right won out.”²⁴⁶ Needless to say that participants’ view of class actions as morally valuable stands in sharp contrast to their demonized portrayal in the cases constituting the arbitration revolution. Even more importantly, the reported satisfaction from doing the right thing reveals that participants in class actions not only care for other claimants who were similarly harmed but also care about maintaining just social order.

For all those reasons combined, people who took part in class actions often stressed that for them, participation meant far more than utilizing a procedural tool. They have defined class actions as “consumers’ only recourse”²⁴⁷ and as “the only way”²⁴⁸ to cope with corporate wrongdoing. Indeed, even though emotions were not the focus of Meili’s study, he found it necessary to emphasize “how many named plaintiffs see the class action as their *last best hope* of holding corporations accountable.”²⁴⁹ Accordingly, these reported sentiments suggest that involvement in class actions was the only thing that saved participants from feeling helplessness and even despair.

All in all, when they are read with special attention to emotions, the statements of Meili’s interviewees offer a rare glimpse into the emotional world of those involved in class actions. Recognizing the positive emotions coming from such involvement also sheds light on what it would *feel* like to live in a world without any collective legal recourse. Instead of feeling caring, moral, empowered, and proud, people may remain trapped in their initial anger while feeling disempowered by their inability to do anything about it. In other words, Meili’s interviewees reveal emotions that corroborate the feelings of the employee cited earlier, who—due to being subject to a class action waiver—reported feeling powerlessness and isolation. Most importantly, the Meili’s interviews also help to re-conceptualize class action activity as an act of care and as a form of social activism that aligns with morality and justice. Such new understanding provides a way to resist the hostile neoliberal message—often amplified by the Justices responsible for the arbitration revolution—according to which collective actions are driven by selfish greed and a desire to achieve “in *terrorem*’ settlements,” of “questionable claims.”²⁵⁰

Finally, focusing on the emotions that drive collective actions and are produced by them helps understanding how natural and robust the drive to band together is, especially when personal resilience is so evidently insufficient. A new study by Andrea

²⁴⁵ Meili, *supra* note 229, 91.

²⁴⁶ *Id.* at 117.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 118.

²⁴⁹ *Id.* at 117 (emphasis added).

²⁵⁰ *Concepcion*, 563 U.S. 333, at 350.

Chandrasekher and David Horton further validates this point.²⁵¹ It reveals that as the arbitration revolution has progressed and has blocked access to class arbitrations, claimants yearning justice have found a new way to band together, which the authors call “class action-style cases.”²⁵² According to the study, in this way, hundreds of seemingly individual actions that share identical facts and claims are brought against the same wrongdoer and are all managed by the same lawyers. For example, the study reports that in one case, the same law firm filed on the same day “1,354 employment cases against Macy’s in the AAA.”²⁵³ Although the authors criticize this new development, his empirical findings tell a story that matches the testimonies of Meili’s interviewees: that people *feel* a need to band together and will make much effort to act in concert against injustice.

2. Consumers’ Complaints Websites

Both the existence and the content of consumer-created complaint websites can illustrate how corporate wrongdoing generates a painful sense of powerlessness that is followed by a rise of need to alleviate the pain by creating solidarities with others who similarly suffered. The websites offer a dense description of the helplessness that comes from having to face big corporations all alone. First and foremost, such websites demonstrate a constant quest for coping with wrongdoing collectively: by communicating with others, exchanging information and ideas for solutions, and considering and planning engagement in a variety of collective actions. And, with particular relevance to the current discussion, a salient place within this effort to band together is saved in these websites to hopes and attempts to use *legal* measures and bring about collective actions.²⁵⁴

A study of 40 consumer-constructed websites reported that what motivates consumers to create complaint websites or engage in their operation are feelings of isolation and powerlessness as a result of corporate wrongdoing.²⁵⁵ The study, conducted by marketing scholars James Ward and Amy Ostrom, cited, for example, one aggrieved consumer who wrote: “If things go seriously wrong you will be totally on your own.”²⁵⁶ More generally, Ward and Ostrom noted that “[c]onsumer dissatisfaction has

²⁵¹ Chandrasekher & Horton, *supra* note 19.

²⁵² *Id.* at 55 (using and describing the term).

²⁵³ *Id.*

²⁵⁴ See, e.g., the many comments against SLS here <https://www.complaintsboard.com/complaints/sls-c313430.html#comments> (e.g., one consumer writing: “How can we all be a part of this CLASS ACTION LAWSUIT? pLEASE enlighten us.”). Compare to a case in which such class action turned impossible due to strict enforcement of an arbitration clause: *State ex rel. Ocwen Loan Servicing, LLC v. Webster*, 232 W. Va. 341 (2013).

²⁵⁵ James C. Ward & Amy L. Ostrom, *Complaining to the Masses: The Role of Protest Framing in Customer-Created Complaint Web Sites*, 33 JOURNAL OF CONSUMER RESEARCH, 220 (2006).

²⁵⁶ *Id.* at 224.

long been regarded as primarily a lonely experience.”²⁵⁷ Importantly, the loneliness that the coauthors describe in their study echoes the feeling of isolation expressed by the employee cited earlier, who found himself limited by a class action waiver.²⁵⁸

Another interviewee in Ward and Ostrom’s study stated: “us ‘little people’ seem to have no recourse!!!”²⁵⁹ Note that this last statement is remarkably identical to the sentiments of Meili’s interviewees, who also reported resorting to collective action to cope with being made to experience themselves as “little people” and who also felt that they had no other recourse.²⁶⁰ This matching choice of words suggests how characteristic is the link between powerlessness and isolation and how common it is for people interacting with big corporations to feel disempowered and as a result to feel a pressing emotionally-driven need to come together. It also explains why when coming together is forbidden, like in the case of the employee cited earlier, the result is experiencing similar emotions and referring to them explicitly as isolation and powerlessness.

Intriguingly, founders of and participants in consumers’ complaints websites frequently express a strong belief that, pursuant to corporate aggression, *collective* action is the exclusive coping mechanism and the only way to fight the paralyzing effect of powerlessness. On this point, Ward and Ostrom’s study quoted, for example, a disgruntled customer of Allstate who stated: “If we don’t help each other out, we’re all potential victims, but there is *strength in numbers*.”²⁶¹ Similarly, another frustrated customer, this time of United Airlines, reportedly asserted: “We must all work together if we have any chance of making a difference. Let’s *get together* and make a stand United!”²⁶² To tie these quotes to the previous Part, note how they directly clash with Buchanan and Koch’s fear of the power of numbers and people’s ability to get together. More generally, Ward and Ostrom found that 85% of the site creators encouraged others to join their efforts by adopting a website design that includes the ability to add and share comments and stories. Significantly, 45% of them also expressly called for acting collectively.²⁶³

Most importantly to the discussion of the arbitration revolution, consumers’ complaint websites reveal that when consumers imagine joining forces against the business that harmed them, they often envision utilizing the law and specifically initiating class actions. In one leading site, tellingly titled the Complaint Board,²⁶⁴ many borrowers have contested and protested long years of exploitation by a specific lender: Specialized Loan Services (SLS). For example, expressing both the powerlessness of confronting SLS all by herself and her desperate desire to unite with others specifically through a class action, one borrower stated: “I am a single mother with 3 children. Please

²⁵⁷ *Id.* at 228.

²⁵⁸ Seipel, *supra* note 226.

²⁵⁹ Ward & Ostrom, *supra* note 255, at 226.

²⁶⁰ *See supra* note 230.

²⁶¹ Ward & Ostrom, *supra* note 255, at 226 (emphasis added).

²⁶² *Id.* (emphasis added)

²⁶³ *Id.*

²⁶⁴ *See* <https://medium.com/@complaintlinealex/best-complaint-websites-2018-3f1f23b61cdf> (listing and reviewing leading complaint websites).

let us all get together and make this into a large if not the largest *class action suit* ever.”²⁶⁵ Likewise, Ward and Ostrom’s study described a consumer who was in “tears,” having realized she is not alone in her battle and asked: “Can we bring a *joint suit* against this fraudulent company?”²⁶⁶ Another consumer cited in this study, named Karla, expressed a similar wish, asking: “Can we get together? Go to the media, or a *class action suit*???”²⁶⁷ Meaningfully, such explicit yearning for class actions coming from consumers’ websites mirrors and reinforces the positive emotions that were expressed by the participants of class actions in Mieli’s interviews.

All these voices together—the employee who directly expressed feelings of powerlessness due inability to initiate class actions, Mieli’s interviewees who took part in class actions, and the consumers who so explicitly make online wishes for class actions—present a clear quest for coming together in response to being harmed. They reflect a reality in which when individuals feel powerless to cope with wrongs all by themselves, they tend to handle the situation by searching an escape of this paralyzing sense and naturally seek to establish coalitions with similar others. Then, as an essential part of this prosocial coping mechanism, people tend to turn to the law, imagining a class action as one of the most effective ways out of their powerlessness. All that speaks volumes as to the magnitude of the emotional cost of taking away from those who already feel powerless their primary method of coping: the collective action option. As we shall now see, the study of emotions offers additional support to this observation.

3. *The Affective Dimensions of Isolation and Powerlessness*

While isolation and powerlessness can be treated as cognitive descriptions of factual conditions, it is crucial to acknowledge their emotional, sometimes called “affective,” side. Scholars interested in emotions in a variety of disciplines have linked alienation and powerlessness, describing them as “intra-psychic mental states.”²⁶⁸ They have also stressed the need to understand powerlessness “in terms of subjective sentiments.”²⁶⁹ Without diving into nuanced distinctions, common among theorists of emotions, between emotions, affects, feelings, and other parallel terms, what is significant for the current discussion is to notice that a meaningful part of what the interviewees in all the settings described above had voiced relates to the affective (or emotional) dimensions of their experiences. “Hearing” their voices as expressing emotional states is central to improving our understating of the consequences of the arbitration revolution.

Once the affective side of powerlessness is better recognized, it is vital to illuminate some of its leading emotional components further, to grasp why feeling powerless can be painful and create the need to overcome the pain by seeking collective

²⁶⁵ See <https://www.complaintsboard.com/complaints/sls-c313430.html>.

²⁶⁶ Ward & Ostrom, *supra* note 255256, at 227.

²⁶⁷ *Id.*

²⁶⁸ Warren D. TenHouten, *The Emotions of Powerlessness*, 9 JOURNAL OF POLITICAL POWER, 84 (2016).

²⁶⁹ Melvin Seeman, *Sentiments and Structures: Strategies for Research in Alienation*, in ALIENATION, COMMUNITY, AND WORK, 21 (Oldenquist & Posner Eds., 1991).

action. In his extensive exploration of affective powerlessness (which he calls subjective powerlessness), sociologist Warren TenHouten explains powerlessness as an emotional state that includes several basic emotions that are each unpleasant on its own. For example, his account presents sadness as part of powerlessness and explains that feeling subjected to external dominance, at the expense of being able to control one's reality personally, tends "to increase sadness and clinical-level depression."²⁷⁰

Additionally, TenHouten explains that fear is also involved in feeling powerless, emerging as a response to the realization that actions of a powerful agent are, or may become, damaging to the wellbeing of the powerless agent. Social hierarchy – such as the one existing between corporations and their consumers and employees – can generate such fear as soon as the possibility of wrongdoing by the dominant party arises. Pertinent to legal disputes, even the prospect of having to confront the stronger party, especially alone, may induce fear relating to the risks of both defeat and retaliation. For example, in his influential study of social power, political sociologist John Gaventa described how powerless coal miners at the Appalachian Valley were afraid to complain and protest against their working conditions out of fear for their lives, jobs, and homes.²⁷¹

What's worse, the fear in powerlessness is often associated with anxiety due to the lack of perceived ability to cope with the threat. Such anxiety may have additional debilitating consequences.²⁷² Finally, powerlessness sometimes brings shame about, and even humiliation, both due to the inability, perceived or actual, to fend off the pressures of those with power advantage. As one scholar observed: "There is no more humiliating experience than to have one's relative lack of power in relation to another continuously rubbed in one's face. There is no doubt that powerlessness activates shame."²⁷³

Appreciating how unpleasant is the affective experience of powerlessness, especially given the other negative emotions it entails, it is easier to comprehend how it induces a natural, perhaps even inevitable, response directed at alleviating the pain. And, since the pain is coming from a sense of diminished control, the spontaneous reaction is an attempt to restore some power.²⁷⁴ Indeed, a leading theory in social psychology, "the theory of psychological reactance," holds in general that "a threat to or a loss of a freedom motivates the individual to restore that freedom."²⁷⁵ In the context of consumption, for example, researchers have argued based on experiments that "feeling powerless is often

²⁷⁰ TenHouten, *supra* note 268, at 86-87.

²⁷¹ JOHN GAVENTA, POWER AND POWERLESSNESS: QUIESCENCE AND REBELLION IN AN APPALACHIAN VALLEY (1982).

²⁷² TenHouten, *supra* note 268, at 92.

²⁷³ GERSHEN KAUFMAN, SHAME: THE POWER OF CARING, 23, 197 (1992).

²⁷⁴ TenHouten, *supra* note 268, at 87; Derek D. Rucker & Adam D. Galinsky, *Desire to Acquire: Powerlessness and Compensatory Consumption*, 35 JOURNAL OF CONSUMER RESEARCH, 257, 258-9 (2008).

²⁷⁵ Sharon S. Brehm & Jack W. Brehm, *Psychological Reactance: A Theory of Freedom and Control*, 4 (2013). See also Benjamin D. Rosenberg & Jason T. Siegel, *A 50-Year Review of Psychological Reactance Theory: Do Not Read This Article*, MOTIVATION SCIENCE (2017), available at

https://www.researchgate.net/profile/Benjamin_Rosenberg2/publication/321988882_A_50-Year_Review_of_Psychological_Reactance_Theory_Do_Not_Read_This_Article/links/5a441dbea6fdcce19718ba05/A-50-Year-Review-of-Psychological-Reactance-Theory-Do-Not-Read-This-Article.pdf.

an aversive state that will lead consumers to attempt to attenuate or alter this state.”²⁷⁶ Accordingly, efforts to band together with others to counter wrongdoing by a stronger entity should be understood as an effort to escape feelings of powerlessness and restoring some control via collective actions.

However, when restoring control is impossible, as it is in the world recently created by the arbitration revolution, an opposite psychological response is likely to emerge. Being trapped in continuous powerlessness and imposed isolation, people may internalize the external legal rule and develop learned helplessness.²⁷⁷ According to this influential psychological theory, when people are exposed to a prolonged (or permanent) inability to control external events or conditions by taking action, they become “prone to learn a passive or ‘helpless’ action orientation.”²⁷⁸ The broader implications of the possibility that the arbitration revolution is cultivating learned helplessness will be further discussed in the remaining sections. For now, however, it is valuable to recognize that at the most individual level, learned helplessness is known to be associated with many physical and mental health problems such as chronic stress and depression.²⁷⁹ This is not to suggest that every uncompensated small-dollars claim can lead, by itself, to these severe outcomes, but to call attention to the aggregate risk society takes when it exposes millions of people to arbitration clauses and thus to a *systemic* lack of redress.

4. *Intentionally Produced Resignation*

The affective outcomes of depriving people of their legal ability to take part in acts of solidarity are hardly unintended consequences. The neoliberal project, in general, and large corporations, in particular, are highly interested in maintaining their dominance.²⁸⁰ In the service of this interest, they engage not only in influencing rules such as the FAA. They also deliberately and strategically target the emotions, imposing isolation in an effort to deplete people’s emotional resources and, in that way, undermine their resilience.²⁸¹ The resulting feelings of powerlessness help neoliberals and corporations to

²⁷⁶ Rucker & Galinsky, *supra* note 274, at 258-9 (2008).

²⁷⁷ See generally MARTIN E. P. SELIGMAN, *HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH* (1975) (one of the most influential works in psychology in general and the definitive book on the subject of learned helplessness in particular).

²⁷⁸ Jarkko Pyysiäinen, Darren Halpin & Andrew Guilfoyle, *Neoliberal Governance and ‘Responsibilization’ of Agents: Reassessing the Mechanisms of Responsibility-shift in Neoliberal Discursive Environments*, 18 JOURNAL OF SOCIAL THEORY, 215, 222 (2017).

²⁷⁹ See, e.g., ROBERT M. SAPOLSKY, *WHY ZEBRAS DON’T GET ULCER: THE ACCLAIMED GUIDE TO STRESS, STRESS-RELATED DISEASES, AND COPING*, 494-95 (3d ed. 2004) (offering a review of learned helplessness literature in the context of stress and depression).

²⁸⁰ WILSON, *supra* note 112, at 22.

²⁸¹ Kathy Abrams & Hila Keren, *Legal Hopes: Enhancing Resilience Through the External Cultivation of Positive Emotions*, 64 N. IRELAND L. Q., 111 (2013).

maintain the status quo because they operate to repress resistance and secure a docile state of mind.²⁸²

In their article, *Capitalism and the Politics of Resignation*, anthropologists Peter Benson and Richard Kirsch argue that “[c]orporations actively cultivate” and benefit from a “general feeling of disempowerment.”²⁸³ Naming this feeling “resignation,” the authors explain it, along the lines of affective powerlessness, as a feeling structure that reflects a recognition that “things gone awry,” but “one is practically unable to do anything about it.”²⁸⁴ They further argue that resignation arises from an “acknowledgment that structural limitations impede one’s ability to bring about change.”²⁸⁵ In many cases of felt resignation, they assert, all that is left is to use the popular response of “whatever,”²⁸⁶ which conveys the general surrendering to corporations’ unlimited power.

To illustrate their argument that corporations deliberately “seek to produce resignation and stifle critique,”²⁸⁷ Benson and Kirsch analyze the strategies used by tobacco companies against consumers’ class actions and legislative intentions to prohibit smoking. They also describe similar practices used to achieve what they call “the hijacking of critique”²⁸⁸ in the mining industry.²⁸⁹ Further supporting to Benson and Kirsch’s descriptions of how the politics of resignation works, others have more recently revealed a similar pattern of intentional cultivation of powerlessness and resignation in additional corporate settings, such as in the rapidly growing industry of data-gathering.²⁹⁰ Together, such works generally demonstrate that corporations have routinized ways to make people feel that resistance would be futile with the intention of fostering resignation.

But why would neoliberals and corporations target the emotions? In general, because it is an effective way to have people internalize a message that would have been

²⁸² Interestingly, corporations benefit from powerlessness in a way that is even more straightforward than those discussed in this section. The literature regarding consumers’ behavior establishes that when consumers feel powerless they tend to spend *more* money on the purchase of goods and services, especially those associated with higher status (and more power) or those expected to increase their sense of belonging. These findings align with the theory of psychological reactance discussed earlier. See Rucker & Galinsky, *supra* note 274; L. Walasek, W. J. Matthews, & T. Rakow, *The Need to Belong and the Value of Belongings: Does Ostracism Change the Subjective Value of Personal Possessions?* JOURNAL OF BEHAVIOURAL & EXPERIMENTAL ECONOMICS, 195-204 (2015).

²⁸³ Peter Benson & Stuart Kirsch, *Capitalism and the Politics of Resignation*, 51 CURRENT ANTHROPOLOGY 459, at 460 (2010).

²⁸⁴ *Id.* at 468.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.* at 475

²⁸⁹ *Id.* at 471-474.

²⁹⁰ See, e.g., Nora A Draper & John Turow, *The Corporate Cultivation of Digital Resignation*, 21 NEW MEDIA & SOCIETY, 1824 (2019). See also Lina Dencik & Jonathan Cable, *The Advent of Surveillance Realism: Public Opinion and Activist Responses to the Snowden Leaks*, 11 INTERNATIONAL JOURNAL OF COMMUNICATION 763 (2017).

resisted if ordered from above. Indeed, in many non-legal disciplines, the so-called “affective turn” has increased awareness of the role emotions play in guiding human behavior. Such a body of work teaches that one salient way in which emotions are understood to direct behavior is their capacity to create *action tendencies*.²⁹¹ Anger, for example, induces an inclination to attack and is considered an emotion that motivates collective action.²⁹² To a large degree, then, corporations and those who are interested in maintaining their control must counter such anger at the emotional level. Importantly, feelings of powerlessness, especially when combined with fear, sadness, and/or shame, all generate precisely the behaviors that serve best the goal of securing hegemony: inhibiting defiance and fostering acceptance of the status quo.

First, with regard to the inhibition of defiance, the cultivation of affective powerlessness creates action tendencies of avoidance and inaction,²⁹³ as well as “passivity and resignation.”²⁹⁴ In the same vein, studies of affective powerlessness suggest that it is associated with conforming to authority and submissiveness.²⁹⁵ Over time, all the tendencies produced by feeling powerless may even turn into the condition of learned helplessness that was discussed earlier. When this occurs, the inhibition of defiance becomes more permanent, in line with the interests of neoliberals and corporations.

Second, with regard to the acceptance of the status quo, it should be noted that while fostering affective powerlessness produces formal consent, it is a distorted type of approval. Far from expressing agreeing to desired results, this consent is based on reluctant acceptance and has more to do with surrendering to a given reality due to lack of choice or alternatives.²⁹⁶ Some scholars have called this type of unwilling consent “acquiescence,”²⁹⁷ and others named it “disaffected consent.”²⁹⁸ This is also precisely the

²⁹¹ See, e.g., Barbara L. Fredrickson, *The role of positive emotions in positive psychology: The broaden-and-build theory of positive emotions*, 53 AMERICAN PSYCHOLOGIST, 218, (2001) (“Discrete emotion theorists often link the function of specific emotions to the concept of *specific action tendencies*... Fear, for example, is linked with the urge to escape, anger with the urge to attack, disgust with the urge to expel, and so on.”).

²⁹² Martijn van Zomeren, Tom Postmes, & Russell Spears, *Toward an Integrative Social Identity Model of Collective Action: A Quantitative Research Synthesis of Three Socio-Psychological Perspectives*, 134 PSYCHOLOGICAL BULLETIN, 504 (2008).

²⁹³ See generally, RICHARD S. LAZARUS, EMOTION AND ADAPTATION (1998) (explaining what are action tendencies and describing of avoidance and inaction tendencies as arising from emotions such as sadness and shame, which are part of affective powerlessness). See also Christopher Aitken, Ralph Chapman, & John McClure, *Climate Change, Powerlessness and the Commons Dilemma: Assessing New Zealanders’ Preparedness to Act*, 21 GLOBAL ENVIRONMENTAL CHANGE 752 (2011) (Suggesting, in the context of climate change, that individuals who feel more ‘powerless’ are less likely to take action).

²⁹⁴ AARON BEN ZE’EV, THE SUBTLETY OF EMOTIONS, 466 (2000) (discussing sadness, which is part of affective powerlessness, as creating passivity and resignation). See also LAZARUS, *id.*, at 247 (discussing sadness as inducing resignation).

²⁹⁵ TenHouten, *supra* note 268, at 96 (conforming to authority) and 93 (submissiveness).

²⁹⁶ For different types of consent in general, including “unwanted consent” see Robin West, *Sex, Law, and Consent*, in *The Ethics of Consent*, 221, 246-47 (Franklin G. Miller & Alan Wertheimer eds., 2010). For different types of consent in the contractual setting see Hila Keren, *Consenting under Stress*, 64 HASTINGS L. J., 679 (2013).

²⁹⁷ TenHouten *supra* note 268, at 88.

²⁹⁸ Jeremy Gilbert, *Disaffected Consent: That Post-Democratic Feeling*, 60 SOUNDINGS, 29 (2015).

sort of consent that consumers and workers are giving — at the beginning of the process — to class action waivers. Hence, in her dissent in *Epic*, Justice Ginsburg aptly named them “arm-twisted waivers.”²⁹⁹ The arbitration revolution thus can and should be seen as operating at the emotional level to finish off what corporations have started: cultivating affective powerlessness that not only suppresses resistance but is also capable of producing “disaffected consent” to the entire process.

To conclude, an emotional state of powerlessness is not only a severe consequence of the arbitration revolution but also an intentional outcome that has been strategically produced to serve the interests of neoliberals and corporations. Inciting people to feel powerless benefits the hyper-capitalist system promoted by neoliberalism and enriches corporations because, as argued here, it can produce resignation, or even learned helplessness. As a result of such manipulation of the emotions, the urge to band together and act collectively — so loudly articulated in the interviews cited earlier — has been dying from within.

CONCLUSION

At the core of this Article are neoliberal processes difficult to notice, trace, and narrate. And yet, the task is vital. The neoliberalization of everything, including our laws, extracts a toll too high to overlook. Such toll demands that we delve into the intricacies of non-legal disciplines and wrestle with their integration so that we can clarify the actual stakes involved.

By adding to previous discussions an analysis of its latest episode of the arbitration revolution, the Supreme Court decision in *Lamps Plus*, this Article has made it more evident that the legal system has been going through a “tectonic shift.”³⁰⁰ It has exposed that as a result of this decision, corporations do not even need to insist on collective action waivers anymore. Post *Lamps Plus*, corporations need only include simple arbitration clauses in their standard contracts — the courts will do the rest. That is, even without drafting waivers of collective action into their contracts corporations gain the ability to separate millions of future claimants. The upshot of forging such an easy path to liability evasion has never been more evident: without the ability to band together, most claims are doomed to disappear. This is precisely the reason corporations sought to include “arbitration” clauses in standard contracts to begin with: to sound the death knell for most claims against them.

Moreover, the Article has shown that the arbitration revolution is not merely, and perhaps not even primarily, a legal shift. Instead, the revolution and its sweeping consequences can only be fully understood once put in their broader context. Taking into account parallel changes in ideology, politics, and culture, the Article has illuminated the arbitration revolution as an essential part of a more extensive neoliberal program. It has demonstrated that as both a product of neoliberal logic and a tool for further

²⁹⁹ *Epic*, 138 S. Ct. 1612, at 1649.

³⁰⁰ Horton & Chandrasekher, *supra* note 19, at 4.

establishment of neoliberal hegemony, the resulting new arbitration jurisprudence should be re-conceptualized as a building block in the intentional construction of a corporatized political economy. As such, the revolution belongs with a growing list of legal shifts, similarly operating to allow corporations to not only immunize themselves from legal liability through contracts, but also to dominate campaign finance,³⁰¹ have First Amendment rights,³⁰² break unions,³⁰³ and so much more.

Foreclosing all paths to solidarity does much more than extinguish any realistic way to cope with corporate power. With immeasurable authority and immense influence on public opinion, the Supreme Court has engaged in normalizing, legitimizing, and encouraging the ability of corporations to become invincible. As a result, and precisely as Margaret Thatcher wanted it to be, the process has been changing our souls,³⁰⁴ extending the harsh practical effects of the revolution “to the depth of our subjectivities.”³⁰⁵ As this Article has explained for the first time, the prolonged factual state of “divided and conquered” induce affective powerlessness: a dangerous cluster of emotions that leave people resigned and unable to resist. Even worse, such affective powerlessness is not an unintended consequence, but rather part and parcel of “the politics of resignation” – a calculated effort of neoliberals and the corporations they promote to protect their dominance. The principal risk, thus, does not arise merely from the fact that corporations found a way – that the Supreme Court approved – to avoid liability. The threat goes far beyond that to the production of collective numbness and the possible creation of learned helplessness in our society. Alarming, it does not stop there.

In her recently published book, *In the Ruins of Neoliberalism*, political scientist Wendy Brown cautions against the fatal harm to democracy that is continuing to be caused by the neoliberal takeover of our lives. She argues that while at the beginning the neoliberal project focused on replacing political control with market control, it more recently (and in a timeline that parallels the arbitration revolution) went even further.³⁰⁶ According to Brown, “the neoliberal utopia” of a social order in which “individuals and families would be politically pacified by markets and morals”³⁰⁷ has developed into a program of starving “democratic energies.”³⁰⁸ Her chilling analysis describes relentless neoliberal efforts “to dedemocratize the political culture and the subjects within it.”³⁰⁹

The arbitration revolution, as re-conceptualized in this Article, forcefully demonstrates the magnitude of the risk Brown identifies. We cannot assume that the effects of the revolution’s widespread cultivation of affective powerlessness will remain contained in the realm of standard contracts. Instead, it is predictable that people who feel resigned because there is nothing left for them to do when their service providers

³⁰¹ Citizens United

³⁰² Hobby Lobby

³⁰³ [the last supreme court anti-union decision]

³⁰⁴ Butt, *supra* note 119.

³⁰⁵ WILSON, *supra* note 112, at 46.

³⁰⁶ BROWN, *supra* note 97, 58 (2019).

³⁰⁷ *Id.* at 17.

³⁰⁸ *Id.* at 57.

³⁰⁹ *Id.* at 58.

and employers wrong them are unlikely to feel motivated to engage in any other form of democratic citizenship. This specter should motivate anyone who cares about democracy to not abandon the efforts to change the current situation. The Article has offered an original understanding of how the arbitration revolution threatens democracy. Such understanding should reignite efforts to reverse the revolution and give people back their freedom to act collectively. Hopefully, a resumed ability to band together would restore access to justice and, with it, would generate a broader drive to become more involved in our democratic society.