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The Post-Concepcion Contract Landscape: The Role Socially Conscious Business Can Play

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**THE POST-*CONCEPCION* CONTRACT LANDSCAPE: THE
ROLE SOCIALLY CONSCIOUS BUSINESS
CAN PLAY**

Amaan A. Shaikh *

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I. INTRODUCTION

While equal and unobstructed access to the civil court system has been a hallmark of American jurisprudence, the increasing influence of big business in redefining justice has led to the slow erosion of this important Western tradition. Nowhere has this trend been more prevalent than in the rapid explosion of arbitration clauses in employment and consumer contracts. Crucial U.S. Supreme Court decisions have lent a hand in shielding these clauses from attack, and according to Justice Ruth Bader Ginsburg, “predictably resulted in the deprivation of consumers’ rights to seek redress for losses . . . [while insulating] powerful economic interests from liability for violations of consumer-protection laws.”¹

To be sure, arbitration is a legal procedure with a great deal of beneficial, practical use. When used justly by informed parties with equal bargaining power, it is a mechanism of great use. For instance, proponents of arbitration often point to the frequent delays and extremely lengthy procedure that are characteristic of already-burdened civil litigation and cite arbitration’s expedited claim resolution process as proof of its worth.² In certain cases, arbitration *can* also be cheaper than conventional litigation, allowing “companies to pass on to their customers, in whole or in part, the lower dispute resolution costs they incur as a result of arbitration.”³ Moreover, those advocating arbitration also cite “simpler procedural and evidentiary rules,” and its capacity to “[minimize] hostility and [be] less disruptive of ongoing . . .

1. *DIRECTV, Inc. v. Imburgia*, 193 L. Ed. 2d 365, 381 (2015) (Ginsburg, J., dissenting).

2. *Contracts Against Public Policy: Hearing on A.B. 465 Before the S. Comm. on Labor and Indus. Rel. (2015)* (“[D]ata from the U.S. District Court Judicial Caseload Profiler . . . shows that there were 29,312 civil cases filed in California in 2014. As of June 2014, approximately 2,132 cases had been pending in federal court in California for over three years and the median time from filing of a civil complaint to trial in Northern California was 31 months. Comparatively . . . a 2003 article in the New York University School of Law legal journal regarding employment arbitration found that arbitration was resolved within a year while litigation usually lasted over two years.”).

3. Brief of American Bankers Association, American Financial Services Association, Consumer Bankers Association, Financial Services Roundtable and California Bankers Association in Support of Petitioner as Amici Curiae at 14 citing Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. Disp. Resol. 89, 91–93, *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333 (2011).

dealings among the parties.”⁴

Its advantages notwithstanding, the flavor of justice that the modern arbitration system has created remains increasingly dangerous. Binding arbitration decisions, though legally enforceable, usually do not provide for a judicial appeals process,⁵ and existing law permits arbitrators to disregard the law and/or the evidence in rendering their decisions⁶ “without allowing for discovery, complying with the rules of evidence, or explaining their decisions in written opinions.”⁷ The arbitration framework is also largely unregulated, costly, and “unreceptive to consumers”; employers often select the private arbitration company who, in turn, chooses the arbitrators that are made available for the parties to select from.⁸ This has created a “repeat player advantage,” disadvantaging individual plaintiffs who are one-time participants in the arbitration system.⁹ The federal government, to some extent, has recently acknowledged some of these ill-effects of compelled arbitration by moving to ban such clauses in nursing home contracts—contracts affecting a particularly vulnerable population.¹⁰

With these traits, it is hardly surprising that businesses are able to exploit the process in their favor, leading to dispute resolution in friendly confines and, ultimately, a perceived “privatization of the justice system.”¹¹ Encouraged by the Supreme Court’s decision in

4. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995) (quoting H.R. Rep. No. 97-542, at 13 (1982)).

5. Hearing on A.B. 465, *supra* note 2 (citing *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334 (2008)).

6. *Id.* (citing *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1 (1992)).

7. *Id.* (citing Cal. Civ. Proc. §§ 1283.1, 1282.2, 1283.4.); *see also* Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, N.Y. Times (Nov. 1, 2015),

<http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> (“Winners and losers are decided by a single arbitrator who is largely at liberty to determine how much evidence a plaintiff can present and how much the defense can withhold. To deliver favorable outcomes to companies, some arbitrators have twisted or outright disregarded the law, interviews and records show.”).

8. Hearing on A.B. 465, *supra* note 2.

9. *Id.*

10. Rebecca Hersher, *New Rule Preserves Patients’ Rights To Sue Nursing Homes In Court*, NPR (Sept. 29, 2016, 2:25 PM), <http://www.npr.org/sections/thetwo-way/2016/09/29/495918132/new-rule-preserves-patients-rights-to-sue-nursing-homes-in-court>.

11. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System’*, N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> (“Arbitration records obtained by The Times showed that 41 arbitrators each handled 10 or more cases for one company between 2010 and 2014”) (“[M]ore than three dozen arbitrators described how they felt beholden to companies. Beneath every decision, the arbitrators said, was the threat of losing business.”) (“Unfettered by strict judicial rules against conflicts of interest, companies can steer cases to friendly arbitrators.”)

AT&T Mobility v. Concepcion,¹² the problem of this reallocation of adjudicatory authority to the private sphere has been compounded by dramatic increases in the use of arbitration clauses to preclude plaintiffs from resorting to class action litigation, with workers and consumers bearing the brunt of this trend.¹³ A recent *New York Times* exposé has elaborated on the true scope of this relatively recent development. Federal class actions in which defendants filed a motion to compel arbitration have increased from just below 100 in 2005 to well over 250 in 2014, with a grand total of over 1,700 such actions filed during that time period.¹⁴ Out of those, the number of cases in which judges actually ordered plaintiffs to arbitration correspondingly increased as well, from around 50 in 2005, to nearly 140 in 2014.¹⁵ The *Wall Street Journal* also recently reported that “companies using arbitration clauses to preclude class-action claims soared to 43% [in 2014] from 16% in 2012.”¹⁶

The problem seems to be most acute within the labor sector, as employment cases dominate the arbitration scene—there were 149 cases involving labor disputes from 2005 to 2009, and 470 from 2010 to 2014, an increase of 215%.¹⁷ Consumer contract and banking cases followed labor disputes in arbitration relevance, with nearly 320 and 230 cases filed between 2005 and 2014, respectively.¹⁸ With regards to workers, the fact remains that low-wage employees have very few remedies to resort to when their rights are violated, and language barriers that are particularly profound in such jobs prevent informed agreements.¹⁹ Workers and consumers both are left with a system for administering justice which allows financial behemoths like Wells

In turn, interviews and records show, some arbitrators cultivate close ties with companies to get business.”)

12. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

13. See Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> (“By inserting individual arbitration clauses into a soaring number of consumer and employment contracts, companies like American Express devised a way to circumvent the courts and bar people from joining together in class-action lawsuits, realistically the only tool citizens have to fight illegal or deceitful business practices.”).

14. Robert Gebeloff & Karl Russell, *Removing the Ability to Sue*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/interactive/2015/10/30/business/dealbook/arbitration-trends.html>.

15. *Id.*

16. Lauren Weber, *More Companies Block Employees From Filing Suits*, WALL ST. J. (Mar. 31, 2015, 1:51PM), <http://www.wsj.com/articles/more-companies-block-staff-from-suing-1427824287>.

17. Gebeloff & Russell, *supra* note 14.

18. *Id.*

19. Hearing on A.B. 465, *supra* note 2.

Fargo, recently fined \$185 million by the Consumer Financial Protection Bureau (CFPB) for defrauding consumers, to defend themselves by widespread manipulation of class-action waiver clauses.²⁰

This Comment will explore some of the solutions and avenues for relief that the state of California is poised to offer its workers and consumers—a state that has in recent years vigorously fought to test the limits of federal pro-arbitration policy. It will begin by laying out the foundation of this policy in Part II, discussing the Supreme Court’s expansion of the Federal Arbitration Act through decisions like *Concepcion*. Part II will also explore California’s response to this trend by way of PAGA qui tam actions, along with other legislative and executive attempts to address the proliferation of arbitration. Part III will showcase how existing attempts to resolve this issue leave much to be desired. Finally, in Part IV, this Comment investigates how one sector of businesses, benefit corporations and B Corps, can take leadership and build the momentum necessary for returning meaningful court access to plaintiffs litigating against corporations in the face of forced arbitration.

II. BACKGROUND AND ARBITRATION FOUNDATIONS

A. *The Federal Arbitration Act*

The Supreme Court’s interaction with the Federal Arbitration Act (FAA) since the Act’s inception in 1925 has led to the precarious situation consumers and employees find themselves in today. Thus, to understand the omnipresent nature of arbitration arrangements within the modern legal framework, along with California’s solutions to their proliferation, it is important to begin with the FAA.

The circumstances and political climate surrounding the Act’s adoption in 1925 were of a far different nature than that which is present today. The legislation was originally enacted largely in response to judicial enmity towards agreements that included arbitration, a hostility that had roots in the colonial era.²¹ The

20. Emily Peck, *The Infuriating Reason Wells Fargo Got Away With Its Massive Scam For So Long*, HUFFINGTON POST (Sept. 22, 2016, 4:55PM), http://www.huffingtonpost.com/entry/wells-fargo-fraud-republicans_us_57e4192be4b0e80b1ba0d583.

21. AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 339 (2011); see also Jodi Wilson, *How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act*, 63 CASE W. RES. L. REV. 91, 98 (2012) (“The FAA was conceived as a remedy for judicial hostility toward arbitration agreements. This judicial hostility dated back to colonial times. It was prevalent in both state and federal courts—reaching even the United States Supreme Court[.]”).

“revocability doctrine” was the norm before the FAA, where any party to an arbitration agreement could object to arbitration and revoke its agreement to arbitrate.²² Soon, the business community began to grow frustrated with courts honoring the revocability of agreed-upon arbitration and lobbied for change.²³ The “revocability doctrine” was eventually overruled, first with the New York Arbitration Act of 1920, and then the FAA.²⁴

The most important provision of the FAA, considering the substantial attention it has garnered in Supreme Court opinions interpreting it, is Section 2, referred to as the “primary substantive provision”.²⁵

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.²⁶

In other words, any agreement to arbitrate involving commerce is held “valid, irrevocable, and enforceable,” yet such agreements may be invalidated for any reason that is applicable to contracts in general.²⁷ This provision of the FAA, particularly the final clause discussing grounds in which agreements to arbitrate may not be enforceable, has been subject to close judicial parsing.

Notably, Congress may have never intended the FAA to apply to employment contracts whatsoever. As one legal professor has stated “[t]he statute was passed to address the problem of discrimination against bargained-for arbitration agreements between merchants having roughly equal bargaining power.”²⁸ Employment contracts of adhesion seem to lie, according to this description and taking into account

22. Wilson, *supra* note 21, at 98–99.

23. *Id.* at 99.

24. *Id.* at 99–100.

25. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (describing the section as a “congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”).

26. 9 U.S.C. § 2 (LexisNexis 2015); *see also* Wilson, *supra* note 21, at 100 (“With this provision, Congress intended to ensure that arbitration agreements occupied ‘the same footing as other contracts.’”).

27. 9 U.S.C. § 2.

28. *See* Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion*, 46 U. MICH. J.L. REFORM 1203, 1205 (2013).

Congressional testimony of the time, entirely outside the original scope of the FAA.²⁹ The underlying issue this exposes is that the FAA's language "is arguably broader than the intent behind the statute as expressed during the Congressional hearings" and this discrepancy has led to Court expansion of FAA scope.³⁰

Initial applications notwithstanding, while the unique and lowly legal status of arbitration agreements in the early 20th century was the primary catalyst for the FAA's adoption, judicial interpretation of the law has not only reinstated the enforceability of arbitration, but has gone a step further to pave the way for a broader federal policy favoring arbitration.³¹ This is demonstrated below.

B. The Supreme Court's Expansion of the FAA: A Federal Policy of Arbitration Favoritism

It was not until several decades after the FAA's inception that this policy began to substantively form. The first step was the Court holding that arbitration clauses in contracts were indeed separable and could be assessed independently from the contract at-large.³² This indicated a shift elevating arbitration agreements' legal status since they were no longer on the "same footing as other contracts."³³ The Court then resolved any doubts regarding the newly elevated status of arbitration when it later declared that Section 2 of the FAA represented "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary."³⁴

29. See *Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary*, 67th Cong. 10 (1923) (statement of W.H.H. Piatt) ("It is the primary end of this contract that it is a contract between merchants one with another, buying and selling goods"). A careful reading of section 1 of the FAA might lead one to conclude that the law does not even apply to employment contract. *But see* *Circuit City Stores v. Adams*, 532 U.S. 105, 109 (2001) (holding that the exemption clause in Section 1 of the FAA only exempted employment contracts of transportation workers, and not all workers).

30. Imre S. Szalai, *Aggregate Dispute Resolution: Class and Labor Arbitration*, 13 HARV. NEGOT. L. REV. 399, 439-40 (2008).

31. Wilson, *supra* note 21, at 101-02, (discussing how judicial wariness towards arbitration did not immediately give way in the aftermath of the FAA's adoption).

32. See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 411 (1967).

33. *Id.* at 403-04 (allowing courts to enforce clauses compelling arbitration regardless of the validity of the rest of the contract it was embedded in); see also *id.* at 423 (Black, J., dissenting) ("[T]he separability rule which the Court applies to an arbitration clause does not result in equality between it and other clauses in the contract.") (also stating that the question surrounding the making of an arbitration agreement should be determined with reference to state and not federal law "formulated by judges for the purpose of promoting arbitration").

34. Moses, *supra* note 25, at 24-25 (justifying this new pronouncement by looking to the fact that lower courts had been reaching this conclusion since *Prima Paint*, and stating that "any doubts concerning the scope of arbitrable issues should be resolved in favor of

Very soon after *Moses*, the Court pivoted to the application of FAA doctrine to conflicts with state law in *Southland Corp. v. Keating*,³⁵ a decision that typified the perennial conflict between California courts and the Supreme Court on matters of arbitration. There, the Court's majority stated that the FAA was not only applicable to state courts, but it also preempted conflicting state substantive law.³⁶ Whether or not this new view of arbitration meshed well with precedent was something Justice Sandra Day O'Connor was rather alarmed with, believing that the majority was engaging in "judicial revisionism."³⁷ Revisionism or not, *Southland* merely represents one in a line of Supreme Court decisions addressing conflicts between California law encouraging civil court proceedings and the FAA.

Class arbitration is another aspect of the FAA's application that has had increasing relevance in employment contracts. In *Green Tree Financial Corp. v. Bazzle*, a plurality of the Supreme Court vacated a state court decision that ordered class arbitration when the arbitration contract at issue was arguably silent on the issue.³⁸ This, in turn, led to lower courts, the American Arbitration Association, and arbitrators treating *Bazzle* as setting forth an unquestioned holding that "arbitrators, not courts, must determine whether an arbitration agreement provides for class arbitration"³⁹ and that "class actions may be arbitrated when the agreement between the parties is silent on the question."⁴⁰ Thus, the non-binding plurality opinion of *Bazzle* was given too much subsequent weight, resulting in authorities interpreting the decision to stand for principles it may have never been intended to represent.⁴¹

arbitration").

35. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

36. *See id.* at 15–16 (preempting California's Franchise Investment Law, which was interpreted by the California Supreme Court as calling for "judicial consideration of claims" brought under its authority); *see also id.* at 10 (stating that, in enacting Section 2 of the FAA, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum").

37. *Id.* at 36 (O'Connor, J., dissenting).

38. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (plurality opinion) (Justice John Paul Stevens issued a separate opinion explaining that the FAA did not preclude a state court from determining that the agreements are silent regarding class arbitration and that class arbitration is permissible. However, recognizing that adherence to his preferred disposition would result in no controlling judgment, Justice Stevens concurred in the result reached by the plurality.).

39. Szalai, *supra* note 30, at 403-04.

40. *Id.* 404. (citing *Kinkel v. Cingular Wireless LLC*, 857 N.E.2d 250, 262 (Ill. 2006)).

41. *See id.* at 406.

C. The Concepcion Decision

The above cases, each buttressing a strong federal preference towards arbitration, eventually led to one of the strongest pronouncements of FAA authority in *AT&T Mobility LLC v. Concepcion*.⁴² Prior to the Supreme Court's *Concepcion* decision, the Ninth Circuit affirmed a district court ruling that under substantive California contract law and the rule announced in the California Supreme Court decision in *Discover Bank v. Superior Court*,⁴³ the compelled arbitration clause of the contract was unconscionable and not preempted by the FAA.⁴⁴

The California Civil Code permits courts to refuse enforcement of, or to limit the application of, any contract found “unconscionable at the time it was made.”⁴⁵ According to *Discover Bank*, class action waivers in consumer contracts of adhesion are unconscionable when the “party with the superior bargaining power” is said to have “carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money.”⁴⁶ In the Ninth Circuit's review of *Discover Bank*'s application, it found the rule was not preempted by the FAA partly because the federal law was silent on traditional class actions and class action arbitration,⁴⁷ and also because the rule represented a “principle of California law that does not specifically apply to arbitration agreements, but to contracts generally.”⁴⁸

In *Concepcion*, however, Supreme Court held that the *Discover Bank* rule was in fact preempted by the FAA.⁴⁹ This decision changed

42. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 336-37 (2011) (citing App. To Pet. For Cert. 61a) (involving a California cellular service contract of adhesion between the vendor and a customer, which provided for arbitration and explicitly required any claims arising out of that contract to be brought in an “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding”).

43. *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (2005).

44. *Concepcion*, 563 U.S. at 338; see also *Armendariz v. Found. Health Psychcare Servs.*, 24 Cal. 4th 83 (2000) (holding pre-dispute employment arbitration agreements, on which employment is conditioned and that encompass unwaivable statutory rights, are valid and enforceable as long as the following contractual protections are included: (1) provide for a neutral arbitrator; (2) no limitation of remedies; (3) adequate opportunity to conduct discovery; (4) written arbitration award and judicial review of the award; and (5) no requirement for the employee to pay unreasonable costs that he would not incur in litigation or arbitration).

45. Cal. Civ. Code § 1670.5(a) (West 2015).

46. *Discover Bank*, 36 Cal. 4th at 162-63.

47. *Id.* at 163-65.

48. *Id.* at 165 (noting that the rule did not run afoul of the FAA's savings clause).

49. *Concepcion*, 563 U.S. at 343 (“[N]othing in [Section 2's saving clause] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives.”); see also *id.* at 348 (stating that requiring the availability of class arbitration would profoundly frustrate the purpose of arbitration by sacrificing its useful informality, making the process slower, more costly, and more likely to “generate

how businesses could avoid class proceedings, since states were now helpless when trying to “protect the other party through substantive rules of contract law.”⁵⁰ Class actions have historically been an advantageous avenue for employees and consumers to expose widespread corporate mismanagement, while aggregating small claims to punish large businesses where it hurts them most: their pockets.⁵¹ Now, while certain class waivers might be considered legally unconscionable in agreements without arbitration clauses, businesses can evade plaintiffs’ class litigation by simply including arbitration clauses in their agreements.⁵² How this resulting expansion of the FAA meshes with the law’s original intent—to eliminate judicial hostility by ensuring that arbitration agreements are enforced on equal footing with other contracts—is seriously questionable.⁵³

The cases that followed *Concepcion* also illustrate the immensely influential nature of that decision. In *American Express v. Italian Colors*, the Supreme Court held that class action waivers contained in mandatory arbitration clauses were valid even if plaintiffs could prove that it would not be financially feasible to maintain these actions individually.⁵⁴ Most recently, the Supreme Court heard another case involving a contract construed by California courts to be unconscionable due to a clause waiving class-wide arbitration.⁵⁵ There, the Court predictably reversed the California decision, holding that such a conclusion did not “place arbitration contracts ‘on equal footing

procedural morass” while greatly increasing the risks to defendants in the process).

50. Alexander, *supra* note 28, at 1204.

51. See *id.* at 1207 (“Classwide procedures have provided significant public policy benefits in resolving disputes across a broad range of subject areas by making it economically feasible to enforce legal rules in small-dollar transactions, thereby providing deterrence, compensation, and a supplement to governmental enforcement efforts.”).

52. See Wilson, *supra* note 21, at 123; see also Myriam Gilles, *AT&T Mobility vs. Concepcion: From Unconscionability to Vindication of Rights*, SCOTUSBLOG (Sept. 15, 2011, 4:25 PM), <http://www.scotusblog.com/2011/09/att-mobility-vs-concepcion-from-unconscionability-to-vindication-of-rights> (“[The *Concepcion*] ruling is the real game-changer for class action litigation, as it permits most of the companies that touch consumers’ day-to-day lives to place themselves beyond the reach of aggregate litigation by simply incorporating class waiver language into their standard-form contracts.”).

53. See Wilson, *supra* note 21, at 100–01 (describing the original intent of the FAA).

54. See *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); see also Salvatore U. Bonaccorso, *State Court Resistance to Federal Arbitration Law*, 67 STAN L. REV. 1145, 1155 (2015) (stating that the ruling in *Italian Colors* stands for the proposition that a “congressional preference for arbitration could frustrate the vindication of a competing federal right [the effective vindication rule]”); see also *Italian Colors*, 133 S. Ct. at 2320 (Kagan, J., dissenting) (“[T]he FAA was never meant to produce this outcome . . . In the hands of today’s majority, arbitration threatens to become . . . a mechanism easily made to block the vindication of meritorious federal claims and insulate wrongdoers from liability.”).

55. See *DIRECTV, Inc. v. Imburgia*, 193 L. Ed. 2d 365, 370 (2015).

with all other contracts”⁵⁶ and thus did not give “due regard . . . to the federal policy favoring arbitration.”⁵⁷ It was now dreadfully clear that if California wanted to alter the post-*Concepcion* arbitration and class-action landscape to return some semblance of power and leverage to those embroiled in litigation against large businesses, it would have to resort to other means.

D. California Strikes Back: The Private Attorney General Act

Fortunately for workers shackled by employment contracts, California courts’ repeated unsuccessful attempts to side with employees in the arbitration battle did not result in judges bowing to the FAA once and for all.⁵⁸ For example, in *Chavarria v. Ralphs Grocery Co.*, the Ninth Circuit found an arbitration clause in an employment contract procedurally and substantively unconscionable and thus unenforceable.⁵⁹ Invalidating the clause in question on conscionability grounds was not preempted by the FAA because “California law regarding unconscionable contracts, as applied in this case, is not unfavorable towards arbitration, but instead reflects a generally applicable policy against abuses of bargaining power.”⁶⁰ Navigating between the Court’s decisions in *Concepcion* and *Italian Colors* to reach this decision was especially tricky for the Ninth Circuit.⁶¹

56. *Id.* at 375 (citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

57. *Imburgia*, 193 L. Ed. 2d at 375 (citing *Volt Info. Scis. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 476 (1989)); *see also id.* at 374 (The fact that *Imburgia* seemed to directly fly in the face of the Court’s holding just a few years prior in *Concepcion* was not ignored by the Justices at oral argument or in writing the majority opinion.) (“[T]he view that state law retains independent force even after it has been authoritatively invalidated by this Court is one courts are unlikely to accept.”); *see also* Ronald Mann, *Opinion analysis: Justices rebuke California courts (again) for refusal to enforce arbitration agreement*, SCOTUSBLOG (Dec. 14, 2015, 2:08 PM), <http://www.scotusblog.com/2015/12/opinion-analysis-justices-rebuke-california-courts-again-for-refusal-to-enforce-arbitration-agreement/> (“Breyer mused at argument that, despite his dissent from *Concepcion*, this case seemed to follow so closely upon it that a contrary ruling amounted to little more than evasion of the earlier case.”) (“[R]eader can sense the Justices’ bristling sensitivity to the lower court’s casual rejection of the *Concepcion* opinion”).

58. In some scenarios after *Concepcion*, California courts had little choice but to accede to FAA preemption; *see Sanchez v. Valencia Holding Co., LLC* 61 Cal. 4th 899, 923–24 (2015) (finding class action waivers enforceable in a consumer automobile sales contracts and that the anti-waiver provision of the California Legal Remedies Act is preempted as it pertains to an arbitration agreement covered by the FAA.).

59. *See Chavarria v. Ralphs Grocery Co.* 733 F.3d 916, 926 (9th Cir. 2013).

60. *Id.* at 927 (also stating that “[f]ederal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power”).

61. *Id.* at 926–27.

1. *The PAGA as a Concepcion Work-Around*

Regardless of *Chavarria*, it remained incredibly difficult for employees to litigate as a class against large businesses when contracts called for mandated arbitration. Eventually, however, one provision of California law, the Private Attorney General Act (PAGA),⁶² emerged as a promising means for workers to make use of certain elements of class action, while evading federal arbitration preemption. The PAGA, an iteration of the traditional *qui tam* action, authorizes an employee to “bring an action for civil penalties on behalf of the state against his or her employer for Labor Code violations committed against the employee and fellow employees, with most of the proceeds of that litigation going to the state.”⁶³

The PAGA was enacted in response to a number of issues, one of which was labor compliance.⁶⁴ To encourage this, the PAGA empowered “aggrieved employees, acting as private attorneys general, to recover civil penalties for Labor Code violations, with the understanding that labor law enforcement agencies were to retain primacy over private enforcement efforts.”⁶⁵ In other words, the PAGA permits employees to bring civil actions personally and “on behalf of” other employees for Labor Code violations.⁶⁶ For our purposes, the most significant aspects of the PAGA are its potential to parallel the traditional use of aggregative litigation, while operating in a gray area of FAA preemption of state laws that favor class action. PAGA claims are similar to class actions in that they also permit private individuals “to sue for violations affecting a group of similarly situated persons and to recover an amount based on the aggregate harm to the group,” but its nuanced differences from traditional class actions have allowed PAGA claims to evade FAA preemption thus far.⁶⁷

Concepcion did not apply to PAGA actions because they were *representative* actions, often brought in counts wholly separate from class claims, and as such did not preclude individual actions in addition

62. Cal. Lab. Code § 2698 et seq. (West 2015).

63. *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 360 (2014), *cert. denied*, 135 S. Ct. 1155 (2015); *see also* Cal. Lab. Code § 2699(i) (West 2015) (stating that 75% of recovered civil penalties go to the Labor and Workforce Development Agency, and the remaining 25% go towards the aggrieved employees).

64. *Iskanian*, *supra* note 63, at 379 (stating that in the scenario where civil penalties were available there remained “a shortage of government resources to pursue enforcement”).

65. *Arias v. Superior Court*, 46 Cal. 4th 969, 980 (2009).

66. Cal. Lab. Code, § 2699(a) (West 2015); *see also Arias*, 46 Cal. 4th at 986 (describing plaintiffs acting essentially as proxies of “state labor law enforcement agencies”).

67. *Alexander*, *supra* note 28, at 1226.

to PAGA claims.⁶⁸ Thus, and partly due to this fact, PAGA actions do not amount to an “aggregation of individual claims” and do not involve private compensation at all—distinct characteristics of the traditional class action.⁶⁹ The plaintiff does not “vindicate a private right” but rather litigates a claim for the public benefit as a proxy of the state with penalties payable to and collectable by the state.⁷⁰ It is through this deputization of citizens as private attorneys enforcing the labor code that the PAGA avoids falling within the ambit of the FAA.⁷¹

Due to the PAGA’s potential to inflict broader liability on businesses, it was only natural that they soon incorporated PAGA claim waivers in their contracts. Such waivers raised serious states’ rights concerns by “[a]llowing private employers to nullify the legislature’s chosen means of enforcing the labor code.”⁷² Soon enough, these PAGA waivers were challenged by aggrieved employees in court, and once again, federal preemption loomed large.

2. *The Iskanian and Luxottica Decisions*

The California Supreme Court decision in *Iskanian v. CLS Transportation*⁷³ represents key case law on the enforceability of contractual PAGA claim waivers. There, an employee for CLS Transportation brought claims in a representative capacity under PAGA for Labor Code violations, despite signing an arbitration agreement pledging not to assert “class action or representative action claims” that may “represent the interests of any other person.”⁷⁴ The California Supreme Court invalidated, on FAA preemption grounds, the state rule striking down class action waivers in certain circumstances,⁷⁵ a partial victory for business. However, it also

68. *See id.*

69. *Id.* at 1226–28 (also stating that “[a] private plaintiff cannot bring a PAGA suit based solely on violations with respect to herself, but must sue to recover penalties for violations against the whole group”) (noting that PAGA actions “do not present the issues of notice, due process, and commonality that the Supreme Court considered beyond the ken of arbitrators [in *Concepcion*]”).

70. *Id.* at 1228.

71. *See Brown v. Ralphs Grocery Co.*, 197 Cal. App. 4th 489, 501-02 (2011), *cert. denied*, 132 S. Ct. 1910 (2012).

72. Alexander, *supra* note 28, at 1233.

73. *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348, 360 (2014), *cert. denied*, 135 S. Ct. 1155 (2015).

74. *Id.* at 360–61.

75. *Id.* at 364–66 (invalidating the rule announced in *Gentry* that a trial court must invalidate a class action waiver when “a class arbitration is likely to be a significantly more effective practical means of vindicating the rights of the affected employees than individual litigation or arbitration, and [whether] the disallowance of the class action will likely lead to a less comprehensive enforcement of [labor or employment] laws for the employees alleged to be affected by the employer’s violations”). *Id.* at 364 (quoting *Gentry v. Superior Court*,

concluded that waiver of representative claims under the PAGA is “contrary to public policy and unenforceable as a matter of state law.”⁷⁶

More importantly though, these waivers were not deemed preempted by the Court’s decision in *Concepcion* and/or the FAA.⁷⁷ The Court believed that the FAA’s focus on private disputes and not those between an employer and a state agency allowed the PAGA to escape falling within the realm of the FAA.⁷⁸ Also echoing Professor Alexander’s federalism concerns, the Court expressed the belief that, in its view, the FAA was not intended “to curtail the ability of states to supplement their enforcement capability by authorizing willing employees to seek civil penalties for Labor Code violations traditionally prosecuted by the state.”⁷⁹ It was clear that *Iskanian* represented movement in the right direction for defining the outer limits of FAA reach.

It did not take very long for the rule announced in *Iskanian* to be challenged up to the Ninth Circuit in *Sakkab v. Luxottica*,⁸⁰ the most recent and clearest indication of the unenforceability of representative PAGA claim waivers. Like the California Supreme Court before it, here too the Ninth Circuit was confronted with questions of FAA preemption and it ultimately reached the same conclusion the court reached in *Iskanian*: pre-dispute agreements to waive PAGA claims are invalid, and preventing their enforcement is not preempted by the FAA’s preference for arbitration.⁸¹

To reach this decision upholding the *Iskanian* rule, the Ninth Circuit looked primarily to two elements of the FAA: the saving clause in Section 2 of the FAA,⁸² and the rule’s compatibility with the FAA’s purposes.⁸³ The Act’s saving clause states that the *Iskanian* rule must be a “[ground] . . . for the revocation of any contract” if it is to preclude the default irrevocable nature of arbitration clauses.⁸⁴ The Ninth Circuit held that the rule *was* generally applicable to all contracts because it barred waiver of PAGA claims without regard to their presence in an arbitration or non-arbitration contract.⁸⁵

42 Cal. 4th 443, 463 (2007)).

76. *Id.* at 383-84.

77. *Id.* at 387-89.

78. *Id.* at 384-85; *see also Iskanian*, 59 Cal. 4th at 387 (“The fact that any judgment in a PAGA action is binding on the government confirms that the state is the real party in interest.”).

79. *Id.* at 388.

80. *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 427 (9th Cir. 2015).

81. *See id.* at 427.

82. *Id.* at 432; *see also* 9 U.S.C. § 2.

83. *Luxottica*, 803 F.3d at 433.

84. 9 U.S.C. § 2.

85. *Luxottica*, 803 F.3d at 432.

Yet, following the logic in *Concepcion*, a generally applicable contract defense like the *Iskanian* rule might still be preempted if it conflicts with the purposes of the FAA.⁸⁶ One such purpose, as described above, is to overcome judicial hostility to arbitration.⁸⁷ The *Luxottica* court believed that the *Iskanian* rule did not frustrate this purpose because the rule does not express a preference for whether PAGA claims are litigated or arbitrated.⁸⁸ Another purpose of the FAA, to ensure the enforcement of arbitration agreements according to their terms,⁸⁹ was also not contravened since the rule did not “diminish parties’ freedom to select informal arbitration procedures.”⁹⁰ Because PAGA actions do not vindicate absent employees’ claims, do not require special procedures, and are merely actions for penalties brought by employees as proxies of the state, parties are still free “to select the arbitration procedures that best suit their needs.”⁹¹

PAGA claims seemed to have weathered the FAA preemption storm for now,⁹² and this could serve to embolden their use in California, as well as legitimize qui tam actions as a *Concepcion* work-around in other states. We have already seen the impact of the *Iskanian* and *Luxottica* decisions in other, highly publicized, pending litigation. Shortly after the *Luxottica* decision was handed down, attorneys for both parties in *O’Connor v. Uber Technologies*,⁹³ involving the certification of a colossal class of nearly 160,000 current and former Uber drivers, were asked to weigh in on the relevance of the *Luxottica* decision to the class certification in their own case.⁹⁴ After their briefing, the District Court Judge issued an order stating that, given precedent in *Iskanian* and *Luxottica*, Uber’s blanket PAGA waiver in its contract was not only unenforceable, but also unseverable.⁹⁵ As such, the whole arbitration agreement was also

86. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

87. *Luxottica*, 803 F.3d at 434.

88. *Id.*

89. *Concepcion*, 563 U.S. at 344 (2011) (citing *Volt Info. Scis. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478 (1989)).

90. *Luxottica*, 803 F.3d at 435-36.

91. *Id.* at 436-37; see also *id.* at 439-40 (stating that while qui tam actions might be difficult to arbitrate, that does “not mean that the FAA requires courts to enforce private agreements opting out of the state’s chosen method of enforcing its labor laws”).

92. Daniel Wiessner, *Business groups urge 9th Circuit to rethink ruling on PAGA waivers*, REUTERS (Nov. 25, 2015, 6:10 PM), <http://www.reuters.com/article/employment-waivers-idUSL1N13K2IG20151125>.

93. *O’Connor v. Uber Techs., Inc.*, 311 F.R.D. 547 (N.D. Cal. 2015).

94. Daniel Wiessner, *Judge urged to reconsider Uber driver class after 9th Circuit ruling*, REUTERS, (Nov. 12, 2015, 6:41 AM) <http://www.reuters.com/article/employment-uber-idUSL1N1370Q220151112>.

95. *O’Connor*, 311 F.R.D. at 550-551, 555-556 (order granting in part and denying in part plaintiffs’ supplemental motion for class certification).

unenforceable.⁹⁶ The effect of this conclusion was the certification of an entire subclass, a move sure to impact the litigation going forward.⁹⁷

E. PAGA Shortcomings: A Formidable Counter to Concepcion That Does Not Go Far Enough

Luxottica is undoubtedly an important and guiding decision for legislators and other states trying to fill the deterrence gap created by *Concepcion*. With elements of traditional class action, employees are now better equipped to make use of some semblance of aggregate litigation in order to hold businesses accountable. However, even if qui tam procedures like those authorized by the PAGA continue to be used in California and take root nationally, there remains a substantial chunk of legal remedies that are still foreclosed to employees and consumers in the wake of *Concepcion*.

For one, make no mistake that PAGA claims, while similar, are *not* traditional class actions, and thus lack many valuable aspects of conventional Federal Rules of Civil Procedure Rule 23⁹⁸ suits, such as their rigorous procedural safeguards and applicability to a wider range of legal liability that falls outside of the PAGA's strict labor code jurisdiction.⁹⁹ Additionally, because PAGA actions do not aggregate individual claims, the amount of potential damages are arguably not as substantial as that found with regular class actions,¹⁰⁰ and parties could still be subject to arbitration on claims not authorized by the PAGA.¹⁰¹

The fact of the matter is that the underlying legal problem remains: businesses employing pre-dispute contracts with arbitration clauses to prevent meaningful access to courts by plaintiffs, whether by precluding class litigation or forcing arbitration procedures, are essentially free to continue doing so. Absent any meaningful leadership or market forces driving out the use of these contract clauses, corporations are not compelled to change the status quo. At best, the PAGA only nibbles at FAA and *Concepcion* preemption framework, and only in the realm of class action. It still does not touch private, individualized grievances that an employee-plaintiff wants to litigate in court but cannot.

96. *Id.* at 555-556.

97. *Id.*

98. Fed. R. Civ. P. 23. (West 2015).

99. See *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 435-436 (9th Cir. 2015) (discussing the procedural differences between FRCP Rule 23 and the PAGA).

100. *Id.* at 437.

101. Cal. Lab. Code § 2699(a) (West 2015) (describing PAGA's applicability to Labor Code violations).

III. ALTERNATIVE ATTEMPTS TO REIN IN *CONCEPCION*: LEGISLATIVE AND EXECUTIVE ATTEMPTS

This is not to say there have not been alternative, more comprehensive attempts to restore court access to plaintiffs while skirting Supreme Court precedent. In California itself, the legislature has tried to pass several bills trying to rein in the proliferation of unfair arbitration clauses. In 2011, Senator Noreen Evans introduced Senate Bill 491, which aimed at rendering void terms of adhesion contracts that waived the “right to join or consolidate claims or to bring a claim as a representative . . . in a private attorney general capacity.”¹⁰² This bill was soundly defeated in committee.¹⁰³

More recently, in February 2015, Assemblyman Roger Hernandez introduced Assembly Bill 465, a far more comprehensive proposal than S.B. 491. This new bill set out the principle that any waivers of legal rights should be “knowing and voluntary and in writing, and expressly not made as a condition of employment.”¹⁰⁴ Among other things, the bill also placed the burden of proving “knowing and voluntary” waivers on the employer,¹⁰⁵ made requiring arbitration agreements as a condition to employment per se invalid,¹⁰⁶ and afforded employees who were successful in invalidating agreements the right to recover attorneys’ fees.¹⁰⁷ The bill managed to pass both houses and was enrolled before eventually being vetoed by Governor Brown in October 2015.¹⁰⁸ In justifying his veto, Governor Brown cited the far-reaching nature of the bill, along with the preemptive potential of pending litigation in the U.S. Supreme Court.¹⁰⁹

On a national scale there is a history of federal bills trying to limit *Concepcion* that have reached a similar fate to the legislative attempts in California. In fact, Senator Al Franken announced intentions to reintroduce the Arbitration Fairness Act (AFA) on the very day *Concepcion* was handed down.¹¹⁰ This legislation would have

102. S. 491 (2011), http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0451-0500/sb_491_bill_20120430_amended_asm_v97.html.

103. Cheryl Miller, *Legislation to Blunt “Concepcion” Is Killed in State Assembly*, THE RECORDER (July 3, 2012), <http://www.therecorder.com/id=1202561826154?keywords=Cheryl+Miller&publication=The+Recorder&elementType=Article>.

104. *Contracts Against Public Policy*: A.B. 465 § 2(c) (2015).

105. *Id.* at § 2(e).

106. *Id.* at §§ 2(a), 2(d).

107. *Id.* at § 2(g).

108. Margot Roosevelt, *Gov. Brown vetoes bill that would have protected workers’ right to sue employers*, OC REGISTER (Oct. 12, 2015, 11:56 PM), <http://www.ocregister.com/articles/brown-687230-arbitration-workers.html>.

109. *Id.*

110. Alexander, *supra* note 28, at 1209.

amended the FAA to invalidate all pre-dispute arbitration agreements in consumer, employment, and civil rights actions, essentially rendering the FAA inapplicable to such agreements.¹¹¹ In other words, the AFA sought to recalibrate the FAA's scope to fall in line with the Act's original purpose and intention.¹¹² Unfortunately though, the AFA failed to gain bi-partisan support and died in committee.¹¹³

Stepping away from the legislature, federal agencies, most notably the Consumer Financial Protection Bureau (CFPB), have also committed themselves to finding solutions to the problems *Concepcion* introduced. As authorized by the Dodd-Frank Act, the CFPB is permitted to "study the use of pre-dispute arbitration in consumer contracts for financial products or services and to submit a report to Congress."¹¹⁴ In March 2015, the Bureau released a three-year, 700 page study demonstrating the surprising pervasiveness of arbitration clauses, how such clauses can act as a barrier to class actions, and the exorbitant costs arbitration has imposed on employees and consumers.¹¹⁵ Soon after that report's release, in May 2016, the CFPB formally published a proposed rule prohibiting "companies from putting mandatory arbitration clauses in new contracts that prevent class action lawsuits."¹¹⁶ The proposal also requires "companies with arbitration clauses to submit to the CFPB claims, awards, and certain related materials that are filed in arbitration cases," in order to facilitate

111. *Id.* at 1209-10.

112. *Id.* at 1210-211.

113. *Id.* at 1211; *see also H.R. 2087: Arbitration Fairness Act of 2015, GOV TRACK* (Apr. 29, 2015), <https://www.govtrack.us/congress/bills/114/hr2087> (noting a version of the AFA that was again reintroduced in April 2015 and at the time this comment was written, is in committee); *see also Alexander, supra* note 28, at 1211-212 (discussing the Fair Arbitration Act of 2011, which "would have amended the FAA to require that any arbitration clause have a heading printed in bold capital letters, state whether arbitration is mandatory or elective, provide a contact for a consumer to inquire about costs, fees, and forms required for participation, and state that a consumer or employee may proceed in small claims court rather than arbitration").

114. Alexander, *supra* note 28, at 1215-216 (citing 12 U.S.C.S. § 5518(b)) (stating that CFPB has "broad authority to promulgate regulations to 'prohibit or impose conditions or limitations' on pre-dispute arbitration clauses in contracts for consumer financial products or services 'if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers'").

115. *CFPB Study Finds That Arbitration Agreements Limit Relief for Consumers*, Consumer Financial Protection Bureau (Mar. 10, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/>.

116. *CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court*, Consumer Financial Protection Bureau (May 5, 2016), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-deny-groups-consumers-their-day-court/>.

greater transparency in this area.¹¹⁷ This proposal has been highly divisive and had garnered nearly 13,000 public comments as of August 2016.¹¹⁸

Regrettably, despite the promising and optimistic outlook of CFPB proposals, there remains a good chance the Bureau's proposals will be toothless and in vain. Firstly, the Bureau's authority is confined to contracts for consumer financial products and do not cover employment contracts, a substantial area of law desperately needing protection from forced arbitration.¹¹⁹ Moreover, there is still "no private right of action to enforce violations of CFPB rules," and any Bureau proposal still has a good probability of being struck down by the Supreme Court as attempting to reverse *Concepcion*.¹²⁰

All of this goes to show that any real hope of empowering consumers and employees in the aftermath of *Concepcion* will likely not be dependent on federal or state legislation, mainly due to the inability to gain consistent bi-partisan support. Combine those prospects with the use of PAGA and qui tam actions that only go so far to chip away at FAA preemption, and we are left desperately needing another route to empower those litigating against the boundless resources of corporations.

Such a route should begin and end with these businesses themselves, institutions that have thus far been mostly absent and unengaged with regards to working out solutions to the problem of unfettered arbitration. Undoubtedly, businesses themselves have played a front-and-center role in the development of federal policy favoring arbitration, as they have always been unabashedly mobilized in favor of private claims resolution.¹²¹ However, given that the potential legislative, executive, and judicial solutions addressed above are either doomed to failure or severely deficient, if the problem of arbitration is to truly improve, businesses must play a role in their demise and take responsibility for the status quo. Once this is done, more workable and viable solutions to this legal dilemma will follow. Interestingly, there *is* one very promising sector of the business community that holds a key to ameliorating the crisis of unequal access to justice vis-à-vis arbitration.

117. *Id.*

118. Yuka Hayashi, *CFPB's Arbitration Proposal Draws 13,000 Comments*, WALL ST. J. (Aug. 23, 2016), <http://www.wsj.com/articles/cfpbs-arbitration-proposal-draws-13-000-comments-1471983139>.

119. Alexander, *supra* note 28, at 1216.

120. *Id.* at 1216-17 (also discussing the impact of Republican opposition to the CFPB as hindering its effectiveness).

121. *See supra* Part II(A).

IV. THE OPPORTUNITY FOR BUSINESSES TO RETURN LITIGANTS' ACCESS TO COURTS

Businesses, particularly socially conscious “benefit corporations” and related entities, have altogether been much too silent on the increasingly relevant issue of forced arbitration. This has been in spite of their alleged commitment to the general public welfare in addition to bottom lines. Sure, businesses have already begun very publicly championing commitment to other worthwhile social causes ranging from environmental sustainability to fair pay and humane working conditions, but the list should not end there. This Part will explore the potential for benefit corporations to provide desperately needed business-centered leadership and accountability for consumers’ and workers’ deplorable access to courts.

A. *Benefit Corporations and B Corps: Socially Conscious Institutions*

Professor of business administration R. Edward Freeman created waves in 1984 when he released his book *Strategic Management: A Stakeholder Approach*, outlining the now well-known stakeholder approach to business management.¹²² Following in the footsteps of Harvard Law Professor E. Merrick Dodd’s seminal article *For Whom Are Corporate Managers Trustees*, this methodology focuses on managing the multitude of “stakeholders” of a business venture and infuses business with a sense of morality and social value.¹²³ According to the stakeholder theory, businesses should not solely focus on its *shareholders* and profit maximization, but should also look to incorporate the opinions of, and cater to, the multitude of a venture’s *stakeholders*, which often include the surrounding community.¹²⁴ This eye towards managing stakeholders versus shareholders eventually contributed to the emergence of the socially conscious “benefit corporation,” and it is here where issues of social justice and access to courts can take root.

Considered by some the “most ascendant social enterprise innovation today,”¹²⁵ benefit corporations owe their advent largely to the efforts of the founders of B Lab, a non-profit organization created

122. R. Edward Freeman, *Strategic Management: A Stakeholder Approach*, CAMBRIDGE UNIVERSITY PRESS, 1984.

123. E. Merrick Dodd, Jr., *For Whom Corporate Managers are Trustees*, 45 HARV. L. REV. 1365 (1931).

124. R. Edward Freeman, Andrew C. Wicks & Bidhan Parmar, *Stakeholder Theory and “The Corporate Objective Revisited,”* 15 ORGANIZATION SCIENCE, 364 (2004).

125. Steven Munch, *Improving the Benefit Corporation: How Traditional Governance Mechanisms Can Enhance the Innovative New Business Form*, 7 NW. J.L. & SOC. POL’Y 170, 171 (2012).

in 2006 that sought to “[use] the power of business to solve social or environmental problems.”¹²⁶ This new organization was trying to address “[t]he existence of shareholder primacy which makes it difficult for corporations to take employee, community, and environmental interests into consideration when making decisions.”¹²⁷ A year after its founding, B Lab started certifying companies as “Certified B Corporations” if they scored appropriately in their “B Impact Assessment” (BIA), which evaluates a company’s impact in a range of areas like governance, employees, and community.¹²⁸ As B Lab began its certification of socially conscious companies, its founders also began lobbying a number of states to pass benefit corporation legislation incorporating benefit corporation legal structure to existing corporate codes, with Maryland being the first state to do so in 2010.¹²⁹ California’s own benefit corporation statute was passed in 2012, and, an astounding thirty-one states have passed benefit corporation legislation to date, with laws in seven other states currently pending.¹³⁰

Benefit corporations are attractive to companies for a host of reasons. For one, their structure allows directors and others in positions of power more flexibility to take into consideration the impact of their decisions on a venture’s multiple stakeholders—not merely its shareholders.¹³¹ This, in turn, might reduce director liability in certain circumstances.¹³² The corporation’s fiduciary duties to its shareholders¹³³ have the potential to, at times, run counter to the views of certain important stakeholders. Achieving benefit corporation status might also be an advantage for cutting-edge companies trying to attract talent, especially considering the fact that 77% of millennials, who will grow to 75% of the workforce by 2025, say their “company’s purpose was part of the reason they chose to work there.”¹³⁴ Investors are also

126. Kyle Westaway & Dirk Sampsele, *The Benefit Corporation: An Economic Analysis with Recommendations to Courts, Boards, and Legislatures*, 62 EMORY L.J. 999, 1011 (2013).

127. *Id.* (citing *Introducing the B Corporation*, B Revolution Consulting 4 (May 15, 2012), <http://www.brevolutionconsulting.com/assets/BCorp-Intro-pack.pdf>).

128. J. Haskell Murray, *Defending Patagonia: Mergers and Acquisitions with Benefit Corporations*, 9 HASTINGS BUS. L.J. 485, 488–89 (2013); *see infra* note 138, 139.

129. *Id.* at 489.

130. *State by State Status of Legislation*. BENEFIT CORPORATION – POWERED BY B LAB. <http://benefitcorp.net/policymakers/state-by-state-status>.

131. *See generally* Why is Benefit Corp Right For Me? BENEFIT CORPORATION – POWERED BY B LAB <http://benefitcorp.net/businesses/why-become-benefit-corp>.

132. *Id.*

133. Cal. Corp. Code §309(a); *see supra* note 123.

134. *Id.* (citing *The Deloitte Millennial Survey: January 2014 Executive Summary*, DELOITTE, <http://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-dttl-2014-millennial-survey-report.pdf>).

attracted to these corporations given their “increased legal protection, accountability and [mission] transparency. . .”¹³⁵ Mandated annual benefit reports, described below, can also streamline investor due diligence.¹³⁶

It is important to note here the distinction between B Corporations on one hand, and benefit corporations on the other. B Corporations are existing institutions privately certified by B Lab, while benefit corporations are new corporate entities authorized under specific state corporate law.¹³⁷ More nuanced differences between these two forms of socially responsible entities are highlighted below.

1. *B Corps and B Lab Certification*

In order to become a B Lab certified “B Corporation” or “B Corp” companies must: “take a “B Impact Assessment,” pass an assessment review, submit required documentation, adopt B Lab’s amendments to their articles of incorporation, and pay B Lab a certification fee.”¹³⁸ The BIA itself forms the foundation of B Lab’s certification process and consists of a number of questions covering sectors that include business governance, community impact, environment, and workers.¹³⁹ Once a B Corp is certified as such, it is subject to randomly selected on-site reviews vis-à-vis B Lab’s private regulatory scheme and must also go through the process above every two years to maintain certification status.¹⁴⁰ Additionally, there is no special tax treatment for B Corps, and certification does not grant stakeholders any private right

135. *Id.*

136. *Id.*

137. Robert Esposito, *The Social Enterprise Revolution in Corporate Law: A Primer on Emerging Corporate Entities in Europe and the United States and the Case for the Benefit Corporation*, 4 WM. & MARY BUS. L. REV. 639, 695 (2013).

138. *Id.* at 696; see also *How to Become a B Corp*, CERTIFIED B CORPORATIONS, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp>.

139. See generally *B Lab Demo Account Assessment* (Nov. 19, 2015) <http://b-lab.force.com/bcorp/PrintImpactAssessment?id=a03C000000ISIoHIAH>; see also Dana Brakman Reiser, *The Sustainable Corporation: Article: Benefit Corporations – A Sustainable Form of Organization?* 46 WAKE FOREST L. REV. 591, 601–02 (2011) (“[B Lab’s] survey and audit processes are fully documented online and thus appear to fit the transparency requirements, and B Lab will be independent of any unrelated potential incorporators. B Lab evaluates potential B corporations using the BIA, which looks at issues of corporate accountability, employee policy, products’ benefit to consumers, the company’s relationship with its community, and its impact on the environment. The assessment contains a total of two-hundred points, and companies must score eighty points to be certified and granted access to the B Corp mark. B Lab also audits twenty percent of those companies who qualify for B Corp certification every two years.”).

140. Esposito, *supra* note 136, at 696; see also *Performance Requirements*, CERTIFIED B CORPORATIONS, <http://www.bcorporation.net/become-a-b-corp/how-to-become-a-b-corp>; see also Reiser, *supra* note 139 at 601-02.

of action against the company for enforcement purposes.¹⁴¹

Given the lack of any truly *tangible* benefits of B Corp certification and absence of enforceability, the certification “offers only moral, rather than legal, assurances to non-shareholder constituencies and social interests.”¹⁴² As such, the most beneficial aspect of B Lab certification lies in its branding value and marketing potential.¹⁴³ Those closely following the development of B Corps believe that this branding potential can have real a positive impact for companies by attracting directors “committed to a blended mission and investors willing to enforce it,” along with providing a “private regulatory system to help enforce a blended enterprise’s dual mission.”¹⁴⁴

2. The California Benefit Corporation Framework

Benefit corporations, unlike their B Corp counterparts, find their legal framework in a given state’s corporations code. California added a section covering benefit corporations in its code in 2012 and it states that, to become a benefit corporation, the entity must amend its articles to contain a statement that the corporation is a benefit corporation.¹⁴⁵ Moreover, the corporation must “have the purpose of creating a general public benefit”¹⁴⁶ and may also identify any number of “specific public benefits.”¹⁴⁷ The Code defines a “general public benefit” as “a material positive impact on society and the environment, taken as a whole, as assessed against a third-party standard.”¹⁴⁸ What this “third-party standard” entails will be elaborated below.¹⁴⁹ While the Code fails to define what a “specific public benefit” consists of, it does offer a list of examples¹⁵⁰ and states generally that it is “[t]he accomplishment of any . . . particular benefit for society or the environment.”¹⁵¹

The California Corporations Code also details a number of interests a corporation’s directors and committees must consider in discharging their duties, which, for our purposes, include “[t]he

141. Esposito, *supra* note 137 at 696.

142. Reiser, *supra* note 139 at 641-42.

143. *Id.* at 643.

144. *Id.*

145. Cal. Corp. Code §§ 14603(a), 14610(b) (West 2015).

146. Cal. Corp. Code §14610(a).

147. Cal. Corp. Code §14610(b).

148. Cal. Corp. Code §14601(c).

149. *See infra* note 151.

150. Cal. Corp. Code §14601(e)(1-7) (*e.g.*, “Promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business,” “[p]roviding low-income or underserved individuals or communities with beneficial products or services,” and “[i]ncreasing the flow of capital to entities with a public benefit purpose”).

151. Cal. Corp. Code §14601(e)(7).

employees and workforce of the benefit corporation,” “[t]he interests of customers of the benefit corporation as beneficiaries of the general or specific public benefit purposes,” and “community and societal considerations,” among others.¹⁵² Furthermore, like B Lab, California also requires benefit corporations to provide shareholders with an annual benefit report.¹⁵³ This report includes details about the progress the company made regarding its general and specific benefits and also an “assessment of the overall social and environmental performance of the benefit corporation, prepared in accordance with a [consistently applied] third-party standard.”¹⁵⁴

Throughout the relevant statute, references are made to a “third party standard” against which benefit assessment and reporting are gauged.¹⁵⁵ The “third party” charged to develop this standard cannot have a “material financial relationship with the benefit corporation or any of its subsidiaries,” and must have the requisite knowledge “to assess overall corporate social and environmental performance” using a “multistakeholder approach.”¹⁵⁶ The Code highlights the need for transparency in the third party’s evaluations, ensuring that information regarding the standard is publicly available.¹⁵⁷

In practice, the third party standard is very similar to the standard set by B Lab for B Corp certification. B Lab is, in fact, the most prevalent third party standard setter for benefit corporations seeking third parties to fulfill state statutory requirements like those in the California Corporations Code.¹⁵⁸ Meeting a given statute’s “limited transparency and independence requirements” is not considered a difficult barrier to clear, and other standard setters and entity certification programs besides B Lab may also qualify.¹⁵⁹

152. Cal. Corp. Code §14620(b)(1–7).

153. Cal. Corp. Code §14630(a).

154. Cal. Corp. Code §14630 (a)(2).

155. Cal. Corp. Code §14601(g) (defining the third party standard as “a standard for defining, reporting, and assessing overall corporate social and environmental performance”).

156. Cal. Corp. Code § 14601(g)(2–3).

157. Cal. Corp. Code § 14601(g)(4).

158. Mitch Nass, *The Viability of Benefit Corporations: An Argument for Greater Transparency and Accountability*, 39 IOWA J. CORP. L. 875, 884 (2014); see also Reiser, *supra* note 139, at 602 (describing the “third party standard-setter role” as “tailor-made for B Lab”); but see *Benefit Corporations: Hearing on AB 361 Before Assembly Judiciary Committee* (May 3, 2011) (raising the concern that “B Lab is ‘uniquely positioned’ to take advantage of the [statute] . . . and will become the principal certification agency of benefit corporations qualified to form under the statute” to which B Lab responded saying that “there are many third party standards organizations that meet the statutory criteria for a third party standard. Some examples are: the Global Reporting Initiative (GRI), GreenSeal, Underwriters Laboratories (UL), ISO2600, and Green America . . .”).

159. Reiser, *supra* note 139, at 602–603 (discussing the potential for certifiers of high environmental performance to set third party standards, along with corporate governance

3. *The Benefit Enforcement Proceeding*

The most impactful difference between B Corps and benefit corporations lies in their enforcement mechanisms. As stated above, aside from revoking B Corp status for failing to adhere to B Lab benchmarks, there is little B Lab is empowered to do to enforce an entity's commitment to meet rigorous standards of social and environmental performance, accountability, and transparency. This is not entirely the case for statutorily authorized benefit corporations. California's code contains a provision allowing for a "benefit enforcement proceeding," a right of action which may be used in the case a benefit corporation fails to "pursue the general public benefit purpose of the benefit corporation or any specific public benefit purpose set forth in its articles."¹⁶⁰ It may also be initiated if the entity violates a "duty or standard of conduct imposed on a director," or fails to "deliver or post an annual benefit report."¹⁶¹ The relevant statute also states that these proceedings may only be brought either directly by the benefit corporation itself, or derivatively, by a shareholder, director, persons owning five percent or more of equity interest in the corporation's parent company, or those specified in the articles or by laws of the corporation.¹⁶² Third-party beneficiaries of the benefit corporation's general or specific benefit purposes do not have standing to sue.¹⁶³ These proceedings primarily provide for injunctive relief¹⁶⁴ and officers of the corporation are not liable for monetary damages for the failure to discharge any obligations required of them by the California benefit corporation statute¹⁶⁵—a court may only award costs incurred in connection with the benefit enforcement proceeding, including attorneys' fees.¹⁶⁶

B. The Opportunity Within Existing B Corp and Benefit Corporation Framework To Combat Forced Arbitration

Recent studies estimate that the number of benefit corporations nationally is nearing 2,000, with almost 120 in California alone.¹⁶⁷

advisory firms, and product-focused standard-setters like Cradle to Cradle).

160. Cal. Corp. Code § 14601(b)(1), 14623.

161. Cal. Corp. Code § 14601(b)(2–3).

162. Cal. Corp. Code § 14623(b).

163. Cal. Corp. Code §§ 14622(d), 14623(a).

164. *Benefit Corporations and Flexible Purpose Corporations in California: New State Legislation Permits Socially Responsible Corporate Formations*, JUSTICE & DIVERSITY CENTER OF THE BAR ASSOCIATION OF SAN FRANCISCO, <https://www.sfbar.org/forms/jdc/benefit-corp-memo%20.pdf>.

165. Cal. Corp. Code § 14622(c).

166. Cal. Corp. Code § 14623(d).

167. *Earth Day 2015: Does the Earth Benefit From Benefit Corporations?* REUTERS,

With regards to B Lab certified B Corps, there are more than 1,200 nationally.¹⁶⁸ These counts seem to suggest that these entities are slowly but surely beginning to make their mark on the corporate landscape. These companies are also usually bellwethers on social issues and business trends—the “demonstration effect” explains that “[b]enefit corp[oration]s show investors and entrepreneurs from every industry what the future Fortune 500 looks and acts like.”¹⁶⁹ Yet, in a move that arguably runs counter to their public benefit commitment, many benefit corporations also employ compelled arbitration clauses in their contracts, even waiving the right for prospective plaintiffs to resort to class procedures. For instance, a quick glance at the very highly regarded benefit corporation Patagonia, reveals their own use of these clauses and class action waivers.¹⁷⁰ In the same way benefit corporations and B Corps have used their growing power and influence to affect positive change in topics from governance transparency to sustainability and civic engagement, they should also begin to take a leadership role in stemming the rapid explosion of forced arbitration and class action waivers.

1. *Within B Corp Certification*

There are several ways in which socially conscious entities like B Corps and statutorily rooted benefit corporations can pivot towards addressing employees’ and consumers’ diminished access to courts—all without the added trouble of trying to amend existing law. This can most easily be done with regards to B Lab’s B Corp certification process—specifically, by way of the mandated B Impact Assessment reports.¹⁷¹ These reports should be updated to assess a given company’s use of contract terms like those compelling one-sided

(Apr, 14, 2015, 9:00 AM), <http://www.reuters.com/article/idUSnMKWmB98da+1d0+MKW20150414>; Ellen Berrey, *How Many Benefit Corporations Are There?* UNIVERSITY AT BUFFALO, SUNY (May 5, 2015), <http://ssrn.com/abstract=2602781> (numbers do not include several states that have very recently passed benefit corporation legislation, and many states that have previously done so do not track benefit corporation creation).

168. *Our 2016 Year in Review—and #2000BCorps!* B LAB (January 5, 2017), <https://medium.com/@bthechange/our-2016-year-in-review-and-2000bcorps-3f2acc03d1ff#.xr76nkrxa>.

169. *Why is Benefit Corp Right for Me?* BENEFIT CORPORATION, <http://benefitcorp.net/businesses/why-become-benefit-corp>.

170. *Terms of Use* (July 8, 2014), PATAGONIA, <http://www.patagonia.com/us/patagonia.go?assetid=104582> (“Any dispute relating in any way to your visit to Patagonia or to products you purchase through Patagonia shall be submitted to confidential arbitration.”) (“[N]o arbitration under this Agreement shall be joined to an arbitration involving any other party subject to this Agreement, whether through class arbitration proceedings or otherwise.”).

171. See *supra* Part IV(A).

arbitration with grossly unfair terms and forbidding aggregated action. Companies trying to become B Lab certified but using these legal maneuvers to evade civil litigation should be docked a sufficient number of points on their final assessment reports by B Lab.

Every two years, B Lab updates and improves its already-thorough BIA report in conjunction with assessment users, stakeholders, and B Lab's Standards Advisory Council.¹⁷² This is done to "incorporate user feedback, improve clarity and content, and stay up to date with market practices and social and environmental issues."¹⁷³ The most recent edition of the assessment, Version 5.0, was released in January 2016; Version 6.0 will be released in 2018 and will "involve a more comprehensive methodological review of the BIA and its scoring."¹⁷⁴ The assessment revision cycle begins after a given version is rolled out, with B Lab collecting feedback on areas and ways that edition can be improved.¹⁷⁵ B Lab uses this information to create a revised draft of the BIA "for initial review and testing"¹⁷⁶ and includes reviews by the Standards Advisory Council.¹⁷⁷ Thereafter, a private beta testing of the new assessment begins, followed by a public comment period.¹⁷⁸

Since Version 6.0 will involve a more thorough review of the assessment and scoring weights, this presents a wonderful opportunity for the inclusion of questions in the assessment that probe into an

172. *Version 5 of the B Impact Assessment coming January 2016*, THE BLOG – CERTIFIED B CORPORATIONS (Aug. 24, 2015), <https://www.bcorporation.net/blog/version-5-of-the-b-impact-assessment-coming-january-2016>.

173. *Public Comment Period for Draft B Impact Assessment Version 5.0*, THE BLOG – CERTIFIED B CORPORATIONS (Oct. 25, 2015), <https://www.bcorporation.net/blog/public-comment-period-draft-b-impact-assessment-version-50>.

174. *Version 5 of the B Impact Assessment coming January 2016*, THE BLOG – CERTIFIED B CORPORATIONS (Aug. 24, 2015), <https://www.bcorporation.net/blog/version-5-of-the-b-impact-assessment-coming-january-2016>.

175. *Id.* (stating that between Version 4.0 in January 2014 and Version 5.0 in January 2016, over 3,000 individual pieces of feedback for updates was provided).

176. *Id.*

177. *Standards Advisory Council*, CERTIFIED B CORPORATIONS, <http://www.bcorporation.net/what-are-b-corps/the-non-profit-behind-b-corps/standards-advisory-council> (The Standards Advisory Council is "an independent committee of 20–22 members, each respected in the field for their wisdom and with deep industry or stakeholder expertise. The Standards Advisory Council is divided into two subgroups—one to oversee the content and weightings for the version of the B Impact Ratings System that is appropriate for companies and funds in developed markets; the other for the version that is appropriate for companies and funds in emerging markets.").

178. *Version 5 of the B Impact Assessment coming January 2016*, THE BLOG – CERTIFIED B CORPORATIONS (Aug. 24, 2015), <https://www.bcorporation.net/blog/version-5-of-the-b-impact-assessment-coming-january-2016>.

entity's use of arbitration and class action waivers. Before the next version is rolled out, the Standards Advisory Council, whose members' information is publicly available online, should be lobbied and presented with evidence regarding the dangerous proliferation of arbitration and post-*Concepcion* class action waivers. Employees and consumers alike should be mobilized to participate heavily when public comments are opened as well.¹⁷⁹

Alternatively, B Lab could also work closely with institutions like the CFPB, which are already active in addressing forced arbitration and class action waivers, to create an addendum to the BIA dealing with those essential issues.¹⁸⁰ For instance, in 2014, B Lab created an addendum to the assessment dealing with new higher education standards.¹⁸¹ The addendum included “targeted questions to measure for-profit postsecondary providers’ unique impact—for instance, who they serve, how they serve them, and what positive outcomes are produced.”¹⁸² This addition was developed closely with numerous higher education institutions that are familiar with the industry.¹⁸³

Whether by way of an addendum to the assessment or a new version entirely, including questions for companies seeking certification that force them to disclose, in a detailed manner, their use of arbitration and waiver clauses would fit comfortably with the existing B Lab mission and framework. B Lab champions a commitment to all stakeholders, not merely business shareholders¹⁸⁴—workers and consumers being subjected to an unfair flavor of “justice” are unquestionably fundamental stakeholders, regardless of how one may define that loaded term. The B Corp Declaration of Interdependence also states that the organization believes that “all business ought to be conducted as if people . . . mattered” and that “through their products, practices, and profits, businesses should aspire to do no harm and benefit all.”¹⁸⁵ Preventing unfair, one-sided arbitration and plaintiffs from benefitting from class action procedures would go a long way towards benefitting the average person trying to vindicate his or her rights.

179. See *supra* text accompanying note 115 (this would provide an excellent opportunity and arena to present the CFPB's most recent report).

180. See *supra* text accompanying note 115.

181. *Call for Public Comment: New Higher Education Standards*, THE BLOG – CERTIFIED B CORPORATIONS (Aug. 10, 2015), <https://www.bcorporation.net/blog/call-public-comment-new-higher-education-standards>.

182. *Id.*

183. *Id.*

184. *The B Corp Declaration*, CERTIFIED B CORPORATIONS, <https://www.bcorporation.net/what-are-b-corps/the-b-corp-declaration>.

185. *Id.*

Moreover, the BIA already has an entire section devoted to analyzing a company's commitment to the betterment of its workers, and including the pertinent topics discussed here would fit very naturally within that part of the assessment.¹⁸⁶ Aside from asking about the nature and presence of waivers and arbitration clauses in a company's contracts, questions could also probe into how a company educates its employees about their available contractual legal remedies prior to official employment. Expanding the scope of the BIA in this manner allows B Lab to better and more completely gauge a company's negative social impact, and in turn, would also make B Lab a far better "third party standard" for the benefit corporation.

2. *Within the California Statutory Benefit Corporation Framework*

The existing California benefit corporation statute also presents an enticing opportunity for holding businesses incorporated as such accountable for failing to offer their workers and customers fair access to the court system. One way to do this is through the interpretation of statutory definitions. The definition of a general public benefit focuses on an entity's "material positive impact on society" which can very easily be interpreted to include social justice issues like employees' access to the court system.¹⁸⁷ This general public benefit is still "assessed against a third-party standard," meaning that organizations like B Lab would still have enormous influence in deciding whether a company has followed its general public benefit—making the discussion in the preceding section all the more relevant.¹⁸⁸ Of course, as far as a corporation's optional "*specific* public benefit" is concerned, whether or not this encompasses the use of forced arbitration or not is wholly dependent on what that specific public benefit is.¹⁸⁹ For instance, a benefit corporation can easily choose to list "fair employee access to courts," or "giving consumers and employees the option to forgo arbitration" as one of its specific benefits.

Another provision of the California benefit corporation statute bearing heavily on a business's use of unfair contracts to limit plaintiffs' access to courts is Section 14620, governing the duties of an

186. *Preview the Assessment, B IMPACT ASSESSMENT*, <http://b-lab.force.com/bcorp/impactassessmentdemo?id=a03C000000ISIoIAH>.

187. Cal. Corp. Code § 14601(c).

188. Cal. Corp. Code § 14601(c).

189. Cal. Corp. Code § 14610(b) (stating that a corporation "*may* identify one or more specific public benefits that shall be the purpose or purposes of the benefit corporation") (emphasis added).

entity's directors.¹⁹⁰ This section mandates that in discharging their duties, those in charge must consider the impact of any action on the workforce and the "interests of customers of the benefit corporation as beneficiaries of the general or specific public benefit purposes of the benefit corporation."¹⁹¹ These individuals must also take into account impacts on broader community and societal considerations.¹⁹² Together, these considerations suggest that those empowered to make substantive decisions regarding contracts within a benefit corporation must also take into account the impact on employees' and consumers' access to the courts—unfairly constructed contracts disadvantaging these groups or preventing them from access to certain judicial remedies would seem to directly clash with these obligations.

Section 14630, governing the compulsory distribution of annual benefit reports to a benefit corporation's shareholders, also has the potential to be able to hold these corporations accountable for how they decide to draw up their contracts.¹⁹³ Since entities must already describe "[t]he ways in which the benefit corporation pursued a general public benefit during the applicable year and the extent to which that general public benefit was created,"¹⁹⁴ the corporation should also have to disclose the ways in which its contracts are drawn. The section also states that, in accordance with the third-party standard, the report should also include "[a]n assessment of the overall social and environmental performance of the benefit corporation,"¹⁹⁵ which is yet another opportunity for the corporation to disclose information about its contracts.

Considering these opportunities for reflection on a company's impact on court access, the problem of enforcement remains. Even if a shareholder agrees that fair contract construction, without clauses waiving class litigation or forcing arbitration on unwilling parties, should be considered as a part of a benefit corporation's societal impact—so what? A benefit corporation, given the benefits individual arbitration provides to them, would still simply choose to omit these considerations while still reaping the positive branding effect of being labeled a benefit corporation. This is where the "benefit enforcement proceeding" has the potential to exert power that has been, up until now, dormant.¹⁹⁶

190. See Cal. Corp. Code § 14620(b).

191. Cal. Corp. Code § 14620(b)(2–3).

192. Cal. Corp. Code § 14620(b)(4).

193. See Cal. Corp. Code § 14630(b).

194. Cal. Corp. Code § 14630(a)(1)(B).

195. Cal. Corp. Code § 14630(a)(2).

196. See *supra* Part IV(A)(3).

These proceedings can be brought if a benefit corporation fails to pursue its general, or specific, public benefits.¹⁹⁷ It may also be brought if a director violates a duty imposed on him or her by the benefit corporation statute.¹⁹⁸ Given this, it seems plausible that such a proceeding could be initiated against a benefit corporation for failing to consider the impact of unfair, one-sided contracts, due to their harmful contributions to society¹⁹⁹—especially taking into account the fact that Section 14620 obligates directors to consider the impact of their actions on employees and customers.²⁰⁰ For example, consider a shareholder of a benefit corporation that uses contracts of adhesion with compelled arbitration, who is devoted to resolving the plight of employees that are so subjected. She could initiate a benefit enforcement proceeding against the corporation itself for acting contrary to the general public benefit, or against a director who signed off on the final form of these contracts. If victorious, a judge could perhaps issue an injunction on that entity's use of those contracts.

Of course, there are several limitations on the ability to bring these proceedings, and the impact even a successful outcome might have remains questionable. For one, benefit enforcement proceedings can only be commenced by those within the benefit corporation, *e.g.*, shareholders, directors, and others authorized to do so by the entity's articles of incorporation.²⁰¹ Also, the corporation is not liable for any monetary damages, making it difficult to punish a corporation where it truly hurts: their pockets.²⁰² Even if a plaintiff is successful in getting his or her case for benefit enforcement heard before a judge, there is a good chance discussion of the "business judgment rule" will dominate hearings.²⁰³ Since any proceeding will likely be an issue of first impression, judges will also have to wrestle with determining burdens

197. Cal. Corp. Code § 14601(b)(1).

198. Cal. Corp. Code § 14601(b)(2).

199. *See* Cal. Corp. Code § 14601(c) (describing that a benefit corporation must pursue a general public benefit defined as "material positive impact on society and the environment, taken as a whole, as assessed against a third-party standard, from the business and operations of a benefit corporation").

200. *See* Cal. Corp. Code § 14620(b)(2–3).

201. Cal. Corp. Code § 14623(b).

202. *See* Cal. Corp. Code § 14623(c).

203. Nass, *supra* note 158, at 891-92; *see also* Cal. Corp. Code § 309 (describing principles of the business judgment rule: "(a) A director shall perform the duties of a director, including duties as a member of any committee of the board upon which the director may serve, in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders and with such care, including reasonable inquiry, as an ordinarily prudent person in a like position would use under similar circumstances . . . (c) A person who performs the duties of a director in accordance with subdivision (a) and (b) shall have no liability based upon any alleged failure to discharge the person's obligations as a director").

of proof and resolving questions of just what kind of evidence would be sufficient to prove that benefit corporation has strayed from its commitments. And, of course, *Concepcion*'s pro-arbitration mandate would still cast an especially large shadow on any decision a court would make.

Issues notwithstanding, benefit enforcement proceedings still represent the only potentially viable, statutorily sanctioned means for enforcing a benefit corporation's obligations—and the only way to get one small but growing segment of the business community to be accountable for the way in which its agreements are crafted. While we may have ideas about how a proceeding might go, we cannot know for sure without any established precedent.

Obviously, the best scenario would be for benefit corporations and B Corps to recognize for themselves the precarious legal situation they have placed workers and consumers through the use of arbitration and class action waivers. As discussed above, committing themselves to fairer contract standards would mesh nicely with existing benefit corporation missions and obligations. Doing so may also have beneficial consequences for the corporation as a whole. For one, investors today are already seeking the kind of open and transparent qualities that make a modern corporation a force for good—taking a leadership position on a social justice issue receiving increased publicity and attention like forced arbitration could serve to re-energize investors.²⁰⁴

In the case a benefit corporation or B Corp *has* chosen to commit itself to allowing consumers of its products and its workers fair and equitable access to the court system, several substantive steps can be taken towards accomplishing this. The cleanest way would be to draft clauses allowing claimants a choice between arbitration and litigation. Alternatively, unnecessary legal jargon could be avoided, and sections of contracts pertaining to claims resolution could be removed and included in an entirely separate document, requiring a separate

204. See *Why do Investors Like Benefit Corporations?*, BENEFIT CORPORATION <http://benefitcorp.net/investors/who-investing-benefit-corps> (Jan 13, 2016) (quoting *Investment Rules 2.0: nonfinancial and ESG reporting trends*, ERNST & YOUNG, <http://www.ey.com/GL/en/Services/Specialty-Services/Climate-Change-and-Sustainability-Services/EY-tomorrows-investment-rules-2>) (“64% of investors say businesses do not adequately disclose non-financial risks and nearly half of investors would rule out investment based on certain non-financial disclosures”); *Investment Rules 2.0: nonfinancial and ESG reporting trends*, ERNST & YOUNG, <http://www.ey.com/GL/en/Services/Specialty-Services/Climate-Change-and-Sustainability-Services/EY-tomorrows-investment-rules-2> (“Nearly two-thirds of respondents indicat[ed] that issuers are not adequately disclosing environmental, social and governance (ESG) risks.”).

signature.²⁰⁵ This would serve to bring more attention to those relevant provisions mandating arbitration or waiving class actions. Parties bringing claims could also be given the freedom to elect the arbitration agency, and costs incurred as a result of electing arbitration could be paid by the defending corporation. Furthermore, agreements could “provide for a neutral arbitrator, allow discovery, and provide for a written decision by the arbitrator to allow judicial review.”²⁰⁶ Short educational programs could also be instituted by businesses informing “employees on their legal rights and how these can be enforced through the arbitration process.”²⁰⁷

C. *A Drop in the Bucket, or Something More?*

Even if benefit corporation standards and B Corp certification could be altered in a way to incorporate a commitment to more equitable contracts allowing for fairer access to courts, would this make a real difference? In the short run, it would probably not lead to any substantive changes in the way the vast majority of businesses draft their contracts; businesses are unlikely to give up their competitive advantage in the private claim resolution system simply due to the moral imperatives of a relatively small sliver of companies. However, in the long run and due to their growing relevance, public benefit corporations *do* have the potential to facilitate a more substantive pivot by the business community at large toward tackling issues with compelled arbitration.

Larger, more globalized benefit corporations and B Corps are slowly beginning to emerge in the media and public eye. The likes of Patagonia,²⁰⁸ Ben & Jerry’s,²⁰⁹ Seventh Generation,²¹⁰ New Belgium

205. See Lorene Park, *Be loud, clear, and fair in arbitration provisions or be prepared to litigate*, WOLTERS KLUWER (Aug. 7, 2012), <http://www.employmentlawdaily.com/index.php/2012/08/07/be-loud-clear-and-fair-in-arbitration-provisions-or-be-prepared-to-litigate/> (“Require signatures, including on the page with the arbitration provision. It is better to have an employee sign to agree to arbitration rather than using an opt-out agreement where the employee is deemed to agree unless he or she takes action to opt out.”).

206. *Id.*

207. *Id.*

208. Timm Herdt, *Patagonia first in line to register as a ‘benefit corporation’*, VENTURA COUNTY STAR (Jan. 3 2012), <http://archive.vcstar.com/business/patagonia-first-in-line-to-register-as-a-benefit-corporation-ep-364053739-352192261.html>.

209. *Ben & Jerry’s Joins the B Corp Movement!* BEN & JERRY’S, <http://www.benjerry.com/about-us/b-corp>.

210. *Seventh Generation Receives B Corp Recertification!* SEVENTH GENERATION (Jan 13, 2015), <http://www.seventhgeneration.com/learn/blog/seventh-generation-receives-b-corp-recertification>.

Brewing Co. Inc.,²¹¹ Method Products,²¹² Warby Parker,²¹³ and Plum Organics²¹⁴ are already well-known benefit corporations and B Corps. In the multinational corporation arena, consumer goods giant Unilever is working with B Lab to pave the way for its own path to becoming the world's largest publicly traded B Corp.²¹⁵ Unilever itself was perhaps inspired by Brazil's foremost cosmetics, fragrance, and toiletries maker, Natura, which became "the largest—and first publicly traded—company to attain B Corp sustainability certification" in 2014.²¹⁶ Etsy, another well-known B Corp specializing in handicrafts e-commerce, became the second B Corp to successfully IPO in April 2015, with shares sky rocketing 88% after it became publicly listed.²¹⁷

All of these companies show that not only are B Corps and benefit corporations here to stay, but that their structures are viable, financially strong, and growing in relevance. If these companies adopted provisions in their articles of incorporation committing them to giving their workers fair access to the public court system and aggregative litigation, or interpreted their general and/or specific benefits to do so, this would create real and very impactful waves.

V. CONCLUSION

There is a great and growing need for incorporating access to justice into conventional understandings of social responsibility and the public benefit. As of now, these perceptions completely fail to address the detrimental effect arbitration, driven by judicial interpretation, is having on a plaintiff's prospects for successful litigation against

211. *New Belgium Brewing Co, Inc.*, CERTIFIED B CORPORATIONS, <https://www.bcorporation.net/community/new-belgium-brewing-co-inc>.

212. *Method Products*, CERTIFIED B CORPORATIONS, <https://www.bcorporation.net/community/method-products-pbc>.

213. *Warby Parker*, CERTIFIED B CORPORATIONS, <https://www.bcorporation.net/community/warby-parker>.

214. *Plum Organics*, CERTIFIED B CORPORATIONS, <https://www.bcorporation.net/community/plum-organics>.

215. Jo Confino, *Will Unilever become the world's largest publicly traded B corp?* THE GUARDIAN (Jan. 23, 2015, 10:34 AM), <https://www.theguardian.com/sustainable-business/2015/jan/23/benefit-corporations-bcorps-business-social-responsibility>; see also *Unilever, Multinationals, and the B Corp Movement*, THE BLOG – CERTIFIED B CORPORATIONS (Sept. 29, 2015), <https://www.bcorporation.net/blog/unilever-multinationals-and-the-b-corp-movement>.

216. Jo Confino, *Will Unilever become the world's largest publicly traded B corp?* THE GUARDIAN (Jan. 23, 2015, 10:34 AM), <https://www.theguardian.com/sustainable-business/2015/jan/23/benefit-corporations-bcorps-business-social-responsibility>.

217. Matt Egan, *Etsy now worth over \$3 billion. Stock jumps 88% after IPO*, CNN MONEY (Apr. 16, 2015, 11:11 AM), <http://money.cnn.com/2015/04/15/investing/etsy-ipo-16-a-share-wall-street/>; see also Dennis Price, *How Etsy's IPO Could Spark Investor Interest in B Corps*, ENTREPRENEUR (Mar. 10, 2015), <http://www.entrepreneur.com/article/243162>.

powerful and vested business interests. But if companies like those mentioned above can prove that the average consumer cares about how the business he or she buys a product from, treats its workers with regards to claim resolution, the conventional corporation will also slowly integrate these principles into how it runs its business. This has already been exemplified with regards to many issues that socially conscious companies have championed that have found their way into mainstream business practices—issues once never thought to emerge as vital in a cut-throat, competitive, and capitalist society concentrated on profit generation at all costs. It is now time for businesses to finally take steps to prioritize access to courts as a social cause they can be proud in championing.