States – The Final Frontier: How State Law and State Courts Can Provide Avenues for Justice and Resist the U.S. Supreme Court's "*Lochner* Lite" Anti-Employee and Anti-Consumer Agenda

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Overview and Summary

A judicial specter is haunting the United States: Our nation's Supreme Court is in a Chamber of Commerce state of mind—even as the national economy struggles to recover from the COVID-19 pandemic, with individuals and small businesses bearing the brunt of the pain. In recent decades, the Court has tilted the scales of justice against workers and consumers and in favor of powerful corporate interests.[2] Several examples typify this trend:

(I) In 2018, the Court nullified approximately 80 years of employee-friendly interpretive principles under the Fair Labor Standards Act ("FLSA")—specifically, the venerable rule that exceptions to overtime pay are narrowly construed. *See Encino Motorcars v. Navarro*, 138 S. Ct. 1134, 1142 (2018). (Sec. I, *infra*). By overturning the narrow construction canon in favor of a so-called "fair reading" of exemptions, the court undermined the rights of many workers to receive a livable wage, reasonable working hours, and overtime compensation under the FLSA.

(II) Class actions under federal Rule 23 are critical procedural devices that enable victims of unlawful discrimination or consumers defrauded on a mass scale to band together and battle corporate goliaths on a more even playing field. But the Supreme Court now views class suits with hostility and demands that motions for class certification be "rigorously analyzed." Too often, "rigorous" in theory becomes fatal in fact. (Sec. III, *infra*)

(III) The Court has also placed critical constraints on class actions through expansive misinterpretations of a previously obscure 1925 law on arbitration contracts, the Federal Arbitration Act ("FAA"). Under the Court's jurisprudence, even though class and collective actions are often necessary for the enforcement of statutory rights and are explicitly embedded in statutes like the FLSA and Age Discrimination in Employment Act ("ADEA"), companies can now write these remedial procedures out of existence. Employers and large corporations are free

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to subject employees and consumers to arbitration agreements that waive class, collective, and consolidated actions. As a practical matter, this negates any meaningful remedy for pervasive violations such as wage theft and consumer fraud and operates as a repeal of pro-worker and pro-consumer laws. And the Supreme Court has nationalized its crusade so that even state court litigants can be forced into arbitration and deprived of class or collective relief that would be available to them under state class action rules. The Court has blessed these waivers, notwithstanding the fact that equivalent class waivers written into non-arbitration contracts would be deemed unenforceable as against public policy. (*See* Sec. II, *infra*)

(IV) The Supreme Court has promulgated a rule that the statute of limitations in unlawful termination suits under federal law begins running even before the employment relationship ends and the employee leaves the job. The clock starts ticking, says the Court, when the employer notifies the worker that he or she will be fired, even if the firing—the employee's last day of work—will take place months later, and even if there is a possibility that the decision will be reversed. This early-accrual trigger contradicts the ordinary understanding of "termination." Many employees, unaware of the Court's quirky early-accrual doctrine, will wait too long to sue and lose their claims. (*See* Sec. IV, *infra*)

This article calls the Supreme Court's pro-business jurisprudential framework "*Lochner* Lite" because it channels elements of the seemingly-exorcised substantive due process ideology of *Lochner v. N.Y.*, 198 U.S. 45 (1905). "Old *Lochner*," or "*Lochner* Classic," embodied the *laissez-faire* dogma that dominated the pre-New Deal era and became a vehicle to oppress workers and privilege big business. Today's "*Lochner* Lite" is a less virulent form but is still drenched in an anti-worker ethic that favors the already advantaged and disadvantages those at the bottom of the economic scale.

What is to be done? This Article tries to answer that question.

Legislative action to amend the FLSA, FAA, Rule 23, and federal anti-discrimination laws is one obvious solution. But given the gridlock that now stalemates Congress, a legislative fix may be unlikely.

Thankfully, the vintage wisdom of baseball legend "Wee Willie" Keeler and Supreme Court Justice Louis Brandeis can come into play. Wee Willie philosophized: "Hit 'em where they ain't." And Justice Brandeis proposed that, when federal law fails, states should serve as independent laboratories to supply relief. State law has a vital role to play in vindicating the rights of the less powerful. States have their own wage-and-hour laws, class action rules, and anti-discrimination statutes. State courts should not unthinkingly mimic the retrogressive federal approach to worker and consumer rights. As to their own laws, states are sovereign and unbeholden to federal jurisprudence.

In four case studies below, we show that many state courts have refused to adopt the *Lochner*-tinged federal approach and have relied on more enlightened state precedent to protect workers and consumers. This article is a clarion call to employees, consumers, and their counsel to take advantage of remedies available under state law. It is also a plea to state judges: Be bold; exercise independence. When issues of state law implicate important rights, don't follow poorly-reasoned, business-biased decisions simply because they emanate from the U.S. Supreme Court.[3]

Similarly, **federal** judges who address **state** statutes should not be bound by hostile federal rulings but instead turn to state jurisprudence for the rule of decision. And in the best traditions of Justice Brandeis, some cases have done just that. For example, in *Janikowksi v. Bendix Corp.*, 823 F.2d 945 (6th Cir. 1987), the Sixth Circuit applied a "**termination**" accrual for a Michigan **state** employment discrimination claim while using a "**notification**" accrual for a companion **federal** Title VII count. (*See* Sec. IV.D., *infra*.)[4]

Justice Brandeis' brand of federalism resonates even with today's Supreme Court. *See* Sec. V, *infra*, discussing Justice Clarence Thomas's recent pronouncements in *Transunion LLC v. Ramirez* and *Standing Akimbo, LLC v. U.S.*, which endorse the Brandeis prescription that states should act as laboratories of experimentation, independent of federal law.

What's Past is Prologue

Back to the Future: Substantive Due Process and *Lochner v. New York* (or, "*Lochner* Classic")

For more than 50 years—during the late 19th and early 20th centuries—the Supreme Court commandeered the Constitution's due process clause in service of a free-market ideology that entrenched corporate prerogatives and denied the most vulnerable Americans the right to humane working conditions and a livable wage.[5] In essence, if an employer was able to compel workers to labor for low wages and long hours, it had a right to do so—without the interference of meddling humanitarian legislation or regulation. Such legislation, declared the Court, was unconstitutional because "due process" contained a substantive component consisting of "freedom of contract." *New State Ice Co. v. Liebmann*, 285 U.S. 262,

311 (1932) (Brandeis, dissenting). Under the umbrella of "freedom of contract," employers were armed with the power to force workers to accept inhumane labor conditions.

The "freedom of contract" mantra was exemplified most infamously by *Lochner*, the case that gave the era its trademark moniker. *Lochner* invalidated as unconstitutional a New York statute that limited bakers' workweeks to a maximum of 60 hours. In a 5-4 ruling, the Court held that "the statute necessarily interferes with the right of contract between employer and employees… [L]imiting the hours which grown and intelligent men may labor to earn their living, [is] mere meddlesome interference[] with the rights of the individual." 198 U.S. at 61.[6]

The Court's fixation on a supposed Constitutional "freedom of contract" bore bitter fruit. "From the *Lochner* decision in 1905 to the mid-1930's, the Court invalidated nearly 200 [federal and state] regulations and laws on substantive due process grounds. Regulations affecting wages and hours were especially vulnerable… the Court also invalidated many other sorts of laws, including those protecting the right to organize unions." Noah R. Feldman & Kathleen Sullivan, *Constitutional Law,* 496 (20th ed. 2020).

A. States as "Laboratories of Experimentation"—Justice Brandeis's Antidote to *Lochner* Classic and a Remedy for *Lochner* Lite

During the height of *Lochnerism*, Justice Brandeis issued a series of famous dissents. He argued that the federal nature of our constitutional system empowered states to experiment with solutions to economic and social problems:

> It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.
>
> *Liebmann*, 285 U.S. at 311.

1. The Demise of *Lochner* Classic

A perfect storm broke the back of *Lochner's* substantive due process doctrine. In the 1930's, the country was gripped by a severe depression that inflicted mass unemployment, poverty, and misery on the American workforce. *See* Feldman & Sullivan, *supra,* at 496. Times of crisis demand strong action and *Lochner's* "hands-off business" ethic was divorced from the grim reality crushing the country's workers. *Id*. at 499, ¶7. The election of FDR and his success in shepherding a pro-employee program through Congress placed popular pressure on the Court to retreat from its servility to the false god of "freedom of contract" as an overriding Constitutional imperative.

In *Westcoast Hotel Co. v. Parrish,* 300 U.S. 379 (1937) the High Court ran up the white flag and upheld a minimum wage law for women:

> **The constitution does not speak of freedom of contract… [R]egulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.**
>
> *Id*. at 391. And in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the Court upheld the newly-enacted National Labor Relations Act ("NLRA").

Lochner died, and as it did, it gave birth to a new generation of reform legislation evening the scales of justice for employees. In 1938, Congress enacted the FLSA—establishing a national minimum wage and providing workers with overtime pay.

2. "Lochner Classic" Mutates into Today's *"Lochner* Lite"

But is *Lochner* really dead? The best answer to the question may be: "Yes" and "No." "Yes," "*Lochner* Classic," the line of cases that invalidated legislation regulating work hours and wages, is surely a relic of the past. But "no," there is more than one way to *Lochnerize* the law; today we see an insidious variant that still harms workers and consumers.

In an age of "*Lochner*-Lite," a worker-hostile Supreme Court has refined its tactics. Instead of unconstitutionalizing laws that guarantee humane working conditions and a living wage, the Court uses interpretive rules and canons of construction to crimp and narrow remedial statutes and to eviscerate procedures—*i.e.*, class and collective actions—that enable employees and consumers to achieve redress.

And, in true *Lochnerian* fashion, the Court has manipulated the FAA to privilege a new statutory form of freedom of contract and nullify substantive and procedural protections for workers and consumers. The FAA is intended to place arbitration agreements—generally between merchants—on an equal footing with other contracts. But the Court has reforged the FAA into a tool to undo employees' and consumers' right to pursue class and collective actions and redress corporate wrongs.[7] *Lochner* Classic relied on the Constitution's due process clause to federalize a laissez-faire freedom of contract doctrine and

invalidate employee-protective legislation. With *Lochner* Lite, the current Court invokes a statute, the FAA, to force workers to surrender their rights to band together and seek redress on a united front. And the FAA's nationalized vise clamps down on state courts and state law claims.

3. The Bible for *Lochner* Lite

Reading Law: *The Interpretation of Legal Texts* (Thomson/West 2012), a book on statutory construction by the late Justice Scalia and legal writing expert Bryan Garner, is a key weapon in *Lochner* Lite's anti-plaintiff armory. Here is the methodology in action. How should the Court treat the FLSA, whose declared goals are to award employees overtime pay for excessive hours? Under old *Lochner*, the FLSA would have faced an extinction event. The Court likely would have declared the law unconstitutional because it impinged on employers' contractual prerogative to control the workplace (and employees' supposed contractual freedom to submit).

Reading Law provides a roadmap for *Lochner* Lite and subverts the FLSA through interpretive strategies. It insists that "textualism"—fidelity to the text—and "fair reading" are the only proper ways to construe a law. The purpose of a statute must be derived from its words alone and no resort may be had to legislative history or other evidence. Scalia & Garner, *Reading Law*, at 10.

Scalia's tome also announces that the concept of "remedial" or "humanitarian" legislation is impossible to untangle and is, moreover, incoherent. And so too is liberally construing such legislation to effectuate its beneficent public purposes. *Id*. at 364-66. Citing *Blackstone*, Justice Scalia opines that *all* statutes are remedial departures from the common law, and therefore *none* are worthy of special consideration or a liberal construction. But the premise of this argument is a fallacy: Not all statutes are remedial—some are just the opposite; and some are more remedial than others.[8] Legislators have made clear that civil rights, employment, and other humanitarian laws are among the most important public policy enactments. *E.g*. 29 U.S.C. § 202 (FLSA); 42 U.S.C. § 3601; *Trafficante v. Metro. Life Ins. Co*., 409 U.S. 205, 211-12 (1972) (Fair Housing Act).

By adopting the tenets of *Reading Law*, the Supreme Court's conservative justices have unyoked congressional legislation from the goals that motivated lawmakers to enact certain laws, particularly those designed to protect workers. The Court has arrogated to itself the exclusive role of deciding what a statute means. One writer has described this cooptation as a "democracy deficit." Eskridge, *Book Review— Reading Law: The Interpretation of Legal Texts, By Scalia and Garner*, 113 Colum. L. Rev. 531, 568 (March 2013).

As this article describes, the Court has used "fair reading" and "textualism" as devices to smuggle in subjective pro-business, anti-employee rulings. *Reading Law* proclaims that "it is common usage that we are looking for." Scalia & Garner at 37. But, the Court's brand of textualist interpretation not only falls short on this goal, it accomplishes precisely the opposite. Under a veneer of impartiality and objectivity, it is subjectivity, purposivism, and skewed readings that prevail.

Here, we present several case studies showing that textualism is a promissory note that fails to deliver.

Section I discusses two decisions that deserve derision (*Encino Motorcars v. Navarro*, 138 S. Ct. 1134 (2018) and *Christopher v. SmithKline Beecham*, 567 U.S. 142 (2012)). These rulings twist the clear meaning of the FLSA's exemptions to deny overtime compensation to qualifying workers. *Encino* and *Christopher* represent faux textualism in sheep's clothing.

Part II addresses the Court's jurisprudence on the FAA. Abandoning textualism, the Court has taken the Act to places it was never meant to go. The 1925 statute was designed for commercial disputes between businesses and was intended to ensure that arbitration agreements are as enforceable as other contracts—*no more, no less*. Instead of adhering to this neutrality principle, the Court has "fabricated" a strong federal policy in favor of arbitration (Miller, *What Are Courts For? Have We Forsaken the Procedural Gold Standard?* 78 La. L. Rev. 739, 775 (2018)) and used that policy to transform the FAA into a carnivorous super-statute (on the order of *Lochnerian* due process) that gobbles up substantive protections—*e.g.,* employment, consumer, antitrust—in its wake. The FAA is now a vehicle for corporate defendants to impose terms that nullify class and collective actions, often preventing any claim at all.

Part III discusses the Court's hostility to Rule 23 class actions—more particularly, its invention of a "rigorous analysis" test for class certification, a standard nowhere to be found in the text of Rule 23 or the Advisory Committee Notes. If an action aimed at systematic corporate wrongdoing passes through the FAA gauntlet, a "rigorous analysis" may be next to nip it in the bud.

Part IV critiques federal precedent on when a cause of action accrues for an employee's discriminatory or retaliatory discharge. The Court has ruled that the limitations period begins running on the date that the employer notifies the employee of a forthcoming termination rather than the date that employment ceases. This counterintuitive start date will lull many fired employees to wait too long and lose their lawsuits under the statute of limitations.

Reading Law notwithstanding, "ordinary usage" is exactly what the Court is NOT looking for. As former

Chief Justice Charles Evans Hughes pointed out: "We live under a constitution, but the constitution is what the judges say it is." This well-known observation governs here, but with a twist:

> We're all textualists now,[9] but the text says what the Supreme Court says it does.

In this article, we urge state (and federal) courts construing state law to heed Justice Brandeis's exhortation: act as laboratories of justice and resist reactionary federal precedents. Many state courts have done so in the areas we discuss below.

I. *Encino Motorcars* and the Construction of FLSA Exemptions

In *Encino Motorcars*, the Supreme Court cavalierly cast aside black-letter precedent that the FLSA's exemptions to overtime pay must be construed narrowly.[10] This sea change merited barely a paragraph of the decision, and the primary authority cited is a passage from *Reading Law*. *See* 138 S. Ct. at 1142.[11] The Court did not even acknowledge that it was overturning many of its own cases dating to 1945 and rejecting foundational guidance on the FLSA going back to the creation of the law.[12] *See id.* [13]

Justice Ginsburg's dissent took the majority to task for its brazen approach: "In a single paragraph, the Court 'reject[s]' this longstanding principle as applied to the FLSA… without even acknowledging that it unsettles more than half a century of our precedent." *Id.* at 1148 n.7. FLSA exemptions, observed Justice Ginsburg, are "narrow and specific" carveouts to the Act's broad mandates; interpreting them expansively or enlarging them by implication impermissibly adds exceptions that Congress did not intend to provide. *See id.* at 1144, 1148.

Encino's blithe jettisoning of precedent is jarring given opinions from the Court (including Justice Thomas, the author of *Encino*) voicing fealty to *stare decisis. See Ramos v. Louisiana*, 140 S. Ct. 1390, 1421 (2020) (Thomas, concurring: precedent should not be overturned unless "demonstrably erroneous" and "outside the realm of permissible interpretation"). Justice Thomas made no effort to show that the stringent standard he advocated in *Ramos* was met in *Encino*; he merely cited general canons from *Reading Law* and ignored decades of established FLSA authority.

The upshot of *Encino* is that the Court has eroded the protections of the FLSA based on little more than its own predilections. Any consistency in the Court's recent opinions is marked not by logic or reasoning but a trend of chipping away at an employee-protective statutory scheme—*i.e.*, *Lochner* Lite.

A. *Encino Motorcars* and its Predecessor, *Christopher*, Misapply the FLSA and Are the Opposite of Textualism

1. The Court Stretches the Exemptions Beyond Reasonable Bounds in *Encino Motorcars*

In *Encino Motorcars*, a 5-4 decision, the Court discarded the narrow construction of FLSA exemptions in favor of a "fair reading" standard. But the Court failed to apply even a down-the-middle "fair" reading.

At issue in *Encino* was the FLSA's exemption denying overtime pay to a "salesman, partsman, or mechanic primarily engaged in **selling or servicing automobiles**..." 29 U.S.C. § 213(b)(10)(A). The natural, plain meaning of this exemption encompasses salespeople **"selling"** automobiles and partsmen and mechanics repairing and maintaining ("**servicing"**) automobiles. But the Court held that "service advisors" at a car dealership were exempt even though they never sold or touched a vehicle.

The Court concluded that the advisors came within the exemption because they (i) sold **services** to customers in connection with their vehicles and (ii) were engaged in "servicing" those **customers**, *i.e.*, giving them advice about their vehicles. Justice Thomas relied on the purported fact that advisors were "integral" to the servicing process. *Encino Motorcars*, 138 S. Ct. at 1140. This is a distortion that stretches the term "servicing" beyond its ordinary meaning of repairing or maintaining vehicles. *Id.* at 1144-45 (Ginsburg, dissenting); *see also* Jamie Golden Sypulski, *The Barking Cat, or Textualism Takes a Holiday—Judicial Legislation Fills In: Encino Motorcars, LLC v. Navarro, 138 S. Ct. 1134 (2018)*, 13 Charleston L. Rev. 1 (Fall 2018). And, as explained by Justice Ginsburg, the rationale for the exemption does not extend to service advisors. *See Encino Motorcars*, 138 S. Ct. at 1145-47. "Servicing" a vehicle means something altogether different than providing advice to its owner. It means doing something to the vehicle itself.

2. *Christopher*—You Are an Exempt Salesperson Even if You Can't Sell Anything*: Close Enough* Is Good Enough

In *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012), another 5-4 decision, the Court loosely interpreted the term "sale" in the "outside sales" exemption (29 C.F.R. § 541.500) to cover "detailers" (pharmaceutical representatives) who provide information to physicians about drugs and encourage the doctors to write a prescription for those products where medically appropriate.

Under the FLSA, the term "sale" "includes **any sale, exchange, contract to sell, consignment for sale, shipment for sale, or other disposition**." 29 U.S.C. § 203(k). But detailers have no authority to sell drugs, take orders, enter contracts, or otherwise effectuate any change in the status of pharmaceutical goods; it's illegal for them to do so. They cannot obtain actual commitments from their supposed customers, the doctors. Physicians must follow their best medical judgment in any given case and can't make a binding promise to a detailer to write a prescription for a specific drug.

What detailers do is **promote**—not sell—their employer's products. And the FLSA's regulations establish that, generally, promotional work is **NOT** sales work. 29 C.F.R. § 541.503 ("promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work."). Eschewing true textualism, the Court (Alito, J.) held that detailers' activities were *close enough* to a sale because such activities represented "**the most that [detailers] were able to do**" to facilitate "the *eventual* disposition of the products that [their employer] sells… in the unique regulatory environment within which pharmaceutical companies must operate." *Christopher*, 567 U.S. at 165.

a) The Tie that Doesn't Bind

Justice Alito discerned that detailers obtained "**non-binding commitments**" from doctors to prescribe the drugs being promoted, and this satisfied the "sale" component of the exemption. The Court, in short, decreed that someone in the organization had to serve in the capacity of exempt outside salesperson and jiggered the statute to make it so.

The Court essentially held that because detailers could *not* sell pharmaceutical products, the exemption must be stretched to include a doctor's illusory promise to write a prescription for a specific drug. But even under the Court's broad use of "sale," exempting detailers from overtime pay is indefensible. An oxymoronic "non-binding commitment" does not come close to qualifying. All of the examples of "sale" in § 203(k) involve either a contract or legally-enforceable change in relationships. Something happens. But with a "non-binding commitment," nothing happens. You can't take such a commitment to the bank or sue for it in a court of law.

b) Faux Textualism Subverts the Will of Congress by Broadly Construing Exemptions Against Employees

In retrospect, *Christopher* presaged the new rule announced in *Encino Motorcars*. The *Christopher* Court noted that it need not follow the deep-rooted narrow construction canon because the definition of "sale" was part of the main statute and incorporated in the exemption by reference. 567 U.S. at 164 n.21. *Christopher* then read the term "sale" expansively for purposes of the exemption, claiming that it was following the intent of Congress. After having declared narrow construction invalid in this circumstance, it took the Court only one small further step to scrap the canon entirely in *Encino*. Congress surely would have been surprised to learn that it intended the outside sales exemption to be broadly applied even where there was no whiff of a "sale."

B. Courts Applying State Law, Including Counterparts of the FLSA, Need Not Follow the Supreme Court's Employee-Hostile Interpretations

1. State Laws May Provide Greater Protections than the FLSA

It is well-established that the FLSA acts as a floor, not a ceiling, and that states may enact additional or greater protections for workers than those provided by the FLSA. *E.g.*, 29 U.S.C. § 218(a); *Rogers v. City of Troy, N.Y.*, 148 F.3d 52, 57 (2d Cir. 1998) ("The FLSA sets a national 'floor'… in order to protect workers from the substandard wages and excessive hours that might otherwise result from the free market."); *Knepper v. Rite Aid Corp.*, 675 F.3d 249, 262-64 (3d Cir. 2012) (FLSA does not preempt state wage-and-hour laws); *Brunson v. Colo. Cab Co., LLC*, 433 P.3d 93, 97 (Colo. App. 2018) ("well settled that states may provide employees with benefits beyond those set out in the FLSA…The FLSA sets a floor, not a ceiling, on compensation that employees must receive.") (citations omitted).

Not only have states enacted higher minimum wages than those provided by the FLSA, they have propounded broader overtime protections, more employee-favorable exemptions, and additional protections—wage payment rules, meal and rest break provisions, etc.—that do not have any counterpart in the FLSA. States have also frequently interpreted their wage-and-hour laws in more liberal fashion than federal courts' construction of the FLSA.

If states believed that the FLSA was sufficient to cover the needs of their citizens and the interests of the public, they would not have enacted their own laws. Yet, they chose to adopt their own state-wide protections, often including express statements of statutory purpose. *E.g.*, N.Y. Labor Law § 650; N.J. Stat. Ann. § 34:11-56a.

2. Many States Narrowly Construe Exemptions to Remedial State Statutes, Including Wage-and-Hour Laws

Legions of state courts have embraced the narrow construction of wage-and-hour exemptions. *E.g.*, *Peabody v. Time Warner Cable, Inc.*, 59 Cal.4th 662, 667 (2014);

Brunson, 433 P.3d at 97-99 (interpreting state exemption more narrowly than federal counterpart); *Shell Oil v. Ricciuti*, 147 Conn. 277, 283 (1960); *Jones & Assocs. Inc. v. D.C.*, 642 A.2d 130, 133 (D.C. 1994); *Arias-Villano v. Chang & Sons Enters., Inc.*, 481 Mass. 625, 628 (2019); *Branch v. Cream-O-Land Dairy*, 459 N.J. Super. 529, 543-44 (App. Div. 2019), *aff'd* 244 N.J. 567 (2021); *Key v. Butch's Rat Hole & Anchor Serv., Inc.*, 2018 WL 4222392, at *3 (D.N.M. Sept. 5, 2018) (citing *State Labor Comm'r v. Goodwill Indus.*, 82 N.M. 215, 217 (1970)); *Mohammed v. Start Treatment & Recovery Ctrs.*, 95 N.Y.S.3d 711, 715 (N.Y. App. 2019); *White v. Murtis M. Taylor Multi-Serv. Ctr.*, 188 Ohio App.3d 409, 414 (2010); *Ford v. Lehigh Valley Rest. Group, Inc.*, 2015 WL 13779474, at *9 (Pa. Ct. of Common Pleas Apr. 24, 2015) (noting that Pennsylvania exemptions "have been interpreted more narrowly than the parallel exemptions contained in the FLSA"); *Drinkwitz v. Alliance Techsystems, Inc.*, 140 Wash.2d 291, 301 (2000).

3. The Narrow Construction of Exemptions to Remedial Legislation is a Nearly-Universal Precept

Thi s body of law is grounded not only in federal FLSA jurisprudence but in broader state law principles that, where statutes are interpreted liberally to effe ctuate their remedial purposes, exceptions are construed narrowly. *E.g., Wyo. Dep't. of Transp. v. Int'l Union of Operating Eng'rs Loc. Union 800*, 908 P.2d 970, 973 (Wyo. 1995) (public records act); *Bowling v. Off. of Open Recs.*, 990 A.2d 813, 824 (Pa. Commw. Ct. 2010) (same: "exemptions to remedial legislation must be construed narrowly");[14] *N.Y. Times Co. v. City of N.Y. Office of the Mayor*, 144 N.Y.S.3d 428, 433 (N.Y. App. Div. 2021) (Freedom of Information Law);[15] *W. Home Transp., Inc. v. Idaho Dep't. of Lab.*, 155 Idaho 950, 952 (2014) (unemployment insurance coverage); *Exline v. Gillmor*, 2021 WL 3204199, at *3 (Cal. App. July 29, 2021) (anti-SLAPP statute); *Ben-Davies v. Blibaum & Assocs., P.A.*, 457 Md. 228, 264-65 (2018) (landlord-tenant statute); *Newell-Brinkley v. Walton*, 84 A.3d 53, 56 (D.C. 2014) (worker's compensation plan: "Such remedial [humanitarian] legislation is typically given liberal construction by the courts… with exemptions and exceptions narrowly construed and doubts resolved in favor of the employee.").[16]

Neither *Encino* nor *Reading Law* upsets these longstanding mandates on the narrow construction of exemptions to remedial state statutes. And until the Alaska Supreme Court's newly-issued decision in *Buntin v. Schlumberger Corp.* (discussed Sec. I.B.7 *below*), we were unable to identify any state precedents in which either authority was cited to overturn such principles and excise them from state jurisprudence.[17] *Buntin* is an outlier, and should remain so.

4. In Applying their Own Laws, States Are Not Obligated to Follow *Encino's* New Rule Against Narrowly Construing Exemptions

Interpretation of state statutes and regulations is a matter of state law. *E.g., Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) ("This Court… repeatedly has held that state courts are the ultimate expositors of state law… and that we are bound by their constructions except in extreme circumstances…"). The Supreme Court's sudden rejection of settled law construing the FLSA does not oblige states to alter timeworn rules of construction as to their own laws. While state courts have not issued precedential decisions explicitly rebuffing *Encino Motorcars*,[18] numerous cases continue to narrowly construe state wage-and-hour exemptions even after that decision. *E.g. Semprini v. Wedbush Secs., Inc.*, 57 Cal. App.5th 246, 251-52 (2020), *rev. denied*;[19] *Arias-Villano*, 481 Mass. at 628;[20] *Branch*, 459 N.J. Super. at 543-44; *Mohammed*, 95 N.Y.S. 3d at 715; *Rocha v. King Cnty.*,195 Wash. 2d 412, 421 (2020).[21] These courts disregard *Encino* and adhere to prior law.

5. Courts Interpreting State Wage-And-Hour Laws Are Not Bound to Follow *Encino Motorcars* Even Where State Exemptions Are Expressly Modeled on or Incorporate FLSA Exemptions

States may lift statutory and regulatory definitions from the FLSA, incorporating the concepts and language of the exemptions, but need not submit themselves irrevocably to the whims of FLSA case law, particularly *Encino's* turnabout against narrowly construing exemptions. *Cf. Jordan v. Maxim Healthcare Servs. Inc.*, 950 F.3d 724, 732-33 (10th Cir. 2020) (where plaintiff did not argue the issue, declining to consider whether Colorado law—based on FLSA precedent—calling for a narrow interpretation of exemptions survived *Encino Motorcars*). This is an open question that should be left for state courts (or federal courts interpreting state laws).

There are good reasons for states to adhere to their longstanding precedents and decline to follow *Encino Motorcars*. An overly employer-friendly reading of exemptions undermines the strong objectives of state wage-and-hour laws. Overtime laws serve essential public purposes: protecting employees and society from the evils of overwork and underpay, facilitating the flow of commerce, and reducing unemployment by providing employers an incentive to hire more workers.[22] When legislatures in certain states adopted the FLSA exemptions, the narrow construction rule was well-established. *Encino Motorcars*

thus represents a sudden, unforeseen reversal of the standing presumptions built into these laws. Accordingly, one should not assume that states will uncritically go along with *Encino Motorcars* where doing so would erode their worker protection statutes.

6. Federal Courts Adjudicating State Law Overtime Claims Should Continue to Narrowly Construe Overtime Exemptions

Where a state court has yet to weigh in on the issue, it is inappropriate for a federal court to invoke *Encino Motorcars* to dismiss or issue judgment against employees on a state wage-and-hour claim. Federal courts should resist the impulse to "[s]iphon state claims away from state court" and interpret them in accordance with federal law, thus "leaving state court precedent underdeveloped and dependent on federal precedent." Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. Penn. L. Rev. 703, 738 (2016). Instead, if the rule of construction could potentially make a difference, federal courts should treat the state claim as distinct. They should therefore pursue options such as predicting how the relevant state supreme court would decide the issue in light of that tribunal's precedent,[23] certifying the question to that court,[24] or remanding the case.[25] Or, the federal court could decline to exercise jurisdiction over the state claim once the federal claims are dismissed.[26] State courts are entitled to reach an independent judgment on this question.

7. *Buntin* Foul: The Alaska Supreme Court's *Buntin* Decision Is a Poorly-Reasoned Capitulation to *Encino,* and Fails to Carry Out the Court's Independent Role as Expositor of State Law

So things stood until June 2021. Enter a cold wind from the blustery North, with the Alaska Supreme Court partially adopting *Encino* on doctrinally shaky grounds. *Buntin v. Schlumberger Tech. Corp.*, 487 P.3d 595 (2021).

Alaska is one of the many states that has traditionally employed a narrow construction of overtime exemptions. In *Buntin*, a federal district court took one of the paths we suggest here and certified to the Alaska Supreme Court the question of whether it would abandon the narrow construction rule in favor of *Encino's* "fair reading" test.[27] The high court whiffed, holding that the *Encino* standard applied in instances where the Alaska statute explicitly requires alignment with FLSA interpretations. 487 P.3d at 598. *Buntin* relied on the fact that a 2005 amendment provided that the same definitions should be used for the state white-collar exemptions (executive, administrative, and professional) as for their FLSA equivalents and that those exemptions should be interpreted in accordance with the FLSA and its implementing regulations.

Buntin is an instance of blindly following federal precedent without due consideration for state law and policy. The court observes, in conclusory fashion, that the legislature chose to "link" the white-collar exemptions with their FLSA counterparts, and that disregarding *Encino* would thwart legislative will. *Id.* at 608.[28] But matching with statutory definitions and regulatory guidance is not the same as chaining oneself to an unforeseeable reversal of bedrock canons of construction. Narrow construction would not change the elements of the exemptions but simply enhance the employer's burden to show that a worker qualifies in a particular case. *Buntin* represents abdication in lieu of analysis. The saving grace is that *Buntin* expressly does not apply to other overtime exemptions apart from the white-collar exemptions. *Id.* at 609.[29]

II. States May Provide a Limited Haven from Hostile Federal Arbitration Law

A. The Supreme Court Manipulates the FAA to Undermine Class Actions

1. The Initial Impetus for the FAA

In 1925, Congress enacted the FAA to combat a trend of judicial hostility toward arbitration and a general refusal to enforce arbitration agreements and awards. The purpose of the Act was "to make arbitration agreements as enforceable as other contracts, *but not more so*." *Prima Paint Corp. v. Flood & Conklin Mfg. Corp.*, 388 U.S. 395, 404 n.12 (1967) (emphasis added).[30]

While the FAA was designed primarily for commercial disputes between sophisticated entities which have freely bargained for arbitration,[31] it has been turned into an unrecognizable behemoth. In recent years, the FAA has been distorted and exploited to erode individual rights and protections. Now, the FAA, as construed by the Supreme Court, empowers corporations to subject individuals to adhesive class waivers that would be deemed invalid and void in agreements other than arbitration contracts. As a result, the substantive protections of employment, consumer, and antitrust statutes are often rendered little more than a dead letter against a new *Lochnerian* freedom of contract ethos. Nothing about the FAA mandates this result, but the Court, in substance, has passed the torch of *Lochner* Classic's anti-worker animus to the FAA.

2. The First Link in the Chain—The Supreme Court Reads in a Strong Policy Favoring Arbitration in its Own Right

In *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), the Court newly announced that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability." *See also id.* ("questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration."). Hence, a statute aimed at placing arbitration clauses on an "equal footing" with other contracts[32] was transmuted into a strong policy in favor of arbitration.[33] We suspect, however, that Justice Brennan, the author of the opinion, would be dumbfounded and horrified by the ways in which his pronouncements have been applied to undermine individual rights.

3. The Court Holds that Statutory Claims, Including Civil Rights and Employment Claims, May Be Subject to Mandatory Arbitration—as Long as Individuals Can Theoretically Vindicate their Rights

Another major building block was put in place by *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20 (1991), which held that statutory employment claims could be subject to compulsory arbitration. The Court built on its recent precedents under other laws and held that mandatory arbitration is enforceable as long as employees may vindicate their substantive statutory rights in the arbitral forum. The Court rejected a number of challenges to the adequacy of arbitration procedures in resolving discrimination claims as well as arguments about the disparity in bargaining power between employers and employees.

Notably, the *Gilmer* plaintiff objected that the ADEA expressly provided for collective actions (29 U.S.C. §§ 626(b); 216(b)), but such procedures might not be available in arbitration. The Court brushed off this contention with the observation that "the fact that the [ADEA] provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred." *Id*. at 32 (citation omitted).

This simplistic comment fails on its face. Of course, parties may voluntarily resolve their disputes on an individual basis. But arbitration is neither conciliation nor voluntary negotiation. It is a substitute for a court action with many of the same coercive features as a trial in court. As the Court stated in *Hoffmann-LaRoche v. Sperling*, 493 U.S. 165, 170 (1989):

> The ADEA… expressly authorizes employees to bring collective age discrimination actions… **Congress has stated its policy that ADEA plaintiffs should have the opportunity to proceed collectively. *A collective action allows age discrimination plaintiffs the advantage of lower individual costs to vindicate rights by the pooling of resources.*** The judicial system benefits by efficient resolution in one proceeding of common issues of law and fact arising from the same alleged discriminatory activity.

Under this rationale, impediments to collective actions interfere with employees' ability to effectively vindicate their statutory rights.[34]

4. The Court Effectively Dispenses With the "Vindication" Caveat, Holding that Class Arbitration Bans Must Be Enforced Under the FAA Even When Such Bans Would Preclude a Claim and Forestall a Remedy for Corporate Wrongdoing

Following *Gilmer*, corporate attorneys and industry figures began publicly advocating for companies to impose arbitration agreements with class waivers on employees, consumers, franchisees, and others. *Cooper v. QC Fin. Servs.*, 503 F. Supp. 2d 1266, 1287-88 (D. Ariz. 2007) (citing Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near–Total Demise of the Modern Class Action*, 104 Mich. L. Rev. 373, 396–97 (2005)). Many courts had voided such adhesive class waivers where they would amount to exculpatory clauses preventing recourse for systematic class-wide violations. Not to be deterred, industry advocates sought to exploit the Supreme Court's burgeoning FAA jurisprudence to counter these doctrines. Corporations hoped to accomplish the same exculpatory purpose, immunizing themselves from liability for wrongdoing, by transplanting an otherwise-invalid class waiver into an arbitration clause and asserting that the FAA demanded enforcement of the clause *as written*.

For more than a decade, this tactic faced mixed results. Many federal and state courts struck down class arbitration bars that had the effect of preventing the vindication of substantive rights. And it would seem self-evident that the FAA posed no obstacle— under generally-applicable law, a court could strike down exculpatory class waivers whether contained in an arbitration clause or **any other contract**. These cases satisfy the FAA's neutrality standard. They are not about hostility to arbitration but about preserving individual rights.[35]

Yet, the strategy has paid off in a string of recent Court decisions.

a) *Stolt-Nielsen*: The Court Lays the Groundwork by Demeaning Class Arbitration as Inherently Different from Real Arbitration

Stolt-Nielsen, S.A. v. Animal Feeds Int'l Corp., 559 U.S. 662 (2010), held that a court or arbitrator cannot impose class arbitration on parties whose contract was "silent"—in the sense that they had reached no agreement on whether to authorize class procedures. The Court highlighted "fundamental changes" between bilateral and class arbitration and held that class arbitration "changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id*. at 668, 685-87. What the Court did not consider was whether the plaintiff intended to forego the right to pursue claims on a class basis and whether such a waiver would impede the vindication of its substantive rights.[36]

b) *Concepcion*: The Court Gets Metaphysical and Rules that Class Actions Are Inconsistent with the Essence of Arbitration

The Court expanded on its musings in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), holding that companies may impose class arbitration bars on customers even where the obvious effect would be to preclude claims and immunize violations. *Concepcion* invalidated California's *Discover Bank* rule in a consumer fraud case involving individual damages of $30.22. Under that rule, class waivers in consumer contracts of adhesion are unenforceable when "disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money." The rule does not disfavor arbitration. It is equally applicable to waivers of court-based class actions and waivers of class arbitrations. *Discover Bank v. Super. Ct*., 36 Cal. 4th 148, 162-63 (2005). Under prior jurisprudence, this doctrine would have passed muster as a rule of general applicability that did not discriminate against arbitration.

But that did not stop the Court. It held that a state cannot hinder the objectives of the FAA by imposing requirements that would change arbitration into something it is not—*e.g.*, by mandating judicially-monitored discovery. And, it concluded, requiring the availability of class arbitration, even in cases of mass-scale low-value fraud, "interferes with the fundamental attributes of arbitration"—namely, its bilateral nature—"and thus creates a scheme inconsistent with the FAA." 563 U.S. at 344. There is simply no foundation for the Court's supposition that class arbitration "is not arbitration as envisioned by the FAA." *Id*. at 351. The FAA nowhere denotes arbitration as a two-party creature; nor is there is anything "fundamental" about one-on-one arbitration. It is inconsistent with a textualist approach to squeeze modern employment and consumer arbitrations into a conception—seen nowhere in the statutory text—of arbitrations between businesses on individualized contract disputes.

And, by openly questioning arbitrators' competence to administer class proceedings, *Concepcion* exhibits the very hostility to arbitration condemned in prior decisions. *Compare id*. at 349-51 (doubting whether an arbitrator can be trusted to properly manage class cases) with, *e.g., Gilmer*, 500 U.S. at 30.[37]

Concepcion is a prime example of conservative judicial activism. It has had a devastating effect in many areas of the law, with companies exploiting arbitration to get a free pass for unlawful practices. While—long after *Moses Cone*—*Concepcion* found "it beyond dispute that the FAA was designed to promote arbitration," 563 U.S. at 345-46,[38] its corrosive innovation was its conclusion that "arbitration" meant *bilateral* arbitration and use of this conceit to leave defrauded consumers holding the bag. It is not actually a pro-arbitration decision, but a pro-business handout that prevents claims from being brought at all. *Cf. Carnegie v. Household Int'l*, 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30").

c) The Court Carries the Flag Forward in *Italian Colors*

The barrage continued in *Am. Express Co. v. Italian Colors*, 570 U.S. 228 (2013). While *Concepcion* elevated the FAA over state common law (the contractual unconscionability defense as applied in *Discover Bank*), *Italian Colors* crossed another bridge entirely. There, the FAA's "freedom-of-contract" rubric overcame decades of the Supreme Court's own precedent stating that arbitration terms will not be enforced where they would prevent the vindication of federal statutory rights.[39] In the Court's framing, the FAA requires courts to "rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* the parties choose to arbitrate their disputes and *the rules* under which that arbitration will be conducted"—*e.g.*, class and collective action waivers. *Id*. at 233 (citations omitted). By enforcing this rule over the dictates of the Sherman Act and other federal statutes, the Court dispensed with the veneer that it would stop short and invalidate clauses that prevent plaintiffs from vindicating their statutory rights. The Court rested on a feeble, fig-leaf distinction between conditions that would

deny access to the arbitral forum (an excessive filing fee) and those which would make it prohibitive to arbitrate (a class waiver where the costs of pursuing the claim would far outstrip any individual recovery). In either scenario, a plaintiff is thwarted from proceeding with claims, thereby forfeiting its rights, and a defendant is given license to break the law without consequence.[40]

After *Italian Colors*, *Concepcion* could no longer be seen as a matter of federal supremacy over state law; the case laid bare that one esoteric statute had been made into a sledgehammer against a host of seminal federal laws.

5. The Final Nail: the FAA Trumps Employee Rights

Finally, in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), the Court swept aside perhaps the last-ditch effort to preserve employee rights from the expanding maw of the FAA. Yet another federal statute, this time the NLRA, gave way to the FAA—with the Court indicating that its decision was dictated by a "mountain of precedent." *Id*. at 1630.[41]

The NLRA provides employees the right to engage in "concerted activities" for their "mutual aid or protection," 29 U.S.C. § 157—including, under longstanding NLRB precedent, the pursuit of class and collective actions for payment of wages and other suits relating to the terms and conditions of employment. *Id*. at 1637-38 (Ginsburg, dissenting). Hence, in 2012, the NLRB concluded that compulsory class waivers, including class arbitration waivers, violated § 157—giving rise to a Circuit split on the interaction between the NLRA and FAA. The *Epic* Court held that the NLRB's rule violated the FAA because it interfered with the fundamental attributes of arbitration under *Concepcion*. *Id*. at 1622-24. And, it concluded, the NLRA did not overcome the FAA; indeed, the Court rejected the NLRB's conclusion that § 157 provided a protected right to pursue class and collective actions. *Id*. at 1624-30.

In addition, the Court held that the FLSA's collective action provision, 29 U.S.C. § 216(b), was waivable and did not prohibit individualized arbitrations. *Id*. at 1626. As in *Gilmer*, the Court made no mention of *Hoffmann-LaRoche* or Congress' policy in favor of collective actions. And the Court has not explained why the supposed policy favoring arbitration—nowhere stated in the FAA—overcomes the policy making collective actions available to workers, particularly in low-value cases where group proceedings are needed to enforce FLSA rights.

The dissent chastised the Court for subordinating cardinal workers' rights statutes to a concocted version of the FAA and leaving employees without a remedy for wholesale wage theft. The Court, in essence, has re-*Lochnerized* the law by blessing take-it-or-leave it employment contracts that divest workers of the ability to pursue group action and thus deprive them of real recourse.[42]

The Court's jurisprudence has created a disheartening state of affairs in which individuals' substantive rights are often crushed under the weight of an FAA on steroids. The *Epic* Court stressed that modern class and collective actions did not exist when the NLRA was passed in 1935, but it has turned a 1925 law meant to foster evenhanded enforcement of commercial contracts into a wrecking ball that can effectively pulverize subsequent remedial statues in the areas of civil rights, labor, consumer protection, antitrust, and more.

In the Court's hands, the "principal advantage of arbitration"[43] is not efficiency but serving as a corporate refuge insulating defendants from liability. Exposing this cynical purpose, some companies have even imposed poison pill clauses negating arbitration and providing that disputes will proceed in court in the event that the class waiver is deemed unenforceable for any reason.

B. What Can States Do?

States are not free to evade the FAA or require class arbitration.[44] The best prescription would be federal legislative or executive action. Yet, states may take steps to temper the harshness of the FAA Goliath.

1. Neutral Rules for Ameliorating Procedural Unconscionability

In *Concepcion*, the Court recognized that "States remain free to take steps addressing the concerns that attend contracts of adhesion—for example, requiring class-action-waiver provisions in adhesive agreements to be highlighted." 563 U.S. at 347 n.6.[45]

But that is not all. California is the posterchild laboratory for devising solutions to the inequities of arbitration, **and other states might do well to follow the California approach we describe below.**

2. California Here We Come

a) PAGA as a Palliative?

The California Private Attorneys General Act (PAGA) permits employees to stand in the shoes of the State and recover civil penalties for Labor Code violations against themselves and other workers. Under the statute, 75% of the penalties go to the State and 25% to the employees. Under California law, the *qui tam*-like nature of PAGA claims[46] prevents an employer from compelling arbitration, even where the employee has "agreed" to a mandatory arbitration provision. The employee pursues the claims on behalf of the State, the real party in interest; the State has not agreed to arbitrate its claims and is not bound to do so. *E.g.*, *Iskanian v. CLS Transp. L.A. LLC*, 59

Cal.4th 348 (2014); *Contreras v. Super. Ct. of Los Angeles Cnty.*, 61 Cal. App.5th 461 (2021); *State ex rel Aetna v. Cal., Inc. v. Pain Management Specialist Group*, 58 Cal. App.5th 1064, 1069-70 (2020).[47] After all, it is black-letter FAA law that arbitration is a matter of contractual consent, not coercion.[48]

Several other states are considering enacting legislation, modeled after PAGA, which would allow employees to bring suit on the state's behalf. These states include New York, Massachusetts, and Washington, among others. *See*, *e.g.*, S. 12, 2021-2022 Reg. Sess. (N.Y. 2021) (Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act); S. 1179, 192nd Gen. Ct. (Mass. 2021) (An Act to prevent wage theft, promote employer accountability, and enhance public enforcement); H.B. 1076, 67th Leg., 2021 Reg. Sess. (Wash. 2021) (Worker Protection Act).[49]

b) California Reins in Unbridled Arbitration Abuses

In addition to PAGA, California has promulgated baseline minimum requirements for arbitration where unwaivable statutory rights are at issue, such as in the employment discrimination context. *Armendariz v. Foundation Psychcare Servs.*, 24 Cal. 4th 83 (2000). To enable the effective vindication of such rights, an arbitration agreement must: (1) provide for a neutral arbitrator; (2) provide for more than minimal discovery; (3) require a written award; (4) provide for all of the types of relief available in court; and (5) not require employees to pay either unreasonable costs or any arbitrator's fees as a condition of access to the arbitral forum. *Id.* at 102-107. As far as we can discern, the *Armendariz* factors remain intact as valid law. *See, e.g., Doe v. Brixinvest LLC*, 2021 WL 886249, at *4-5 (C.D. Cal. Feb. 11, 2021); *Ali v. Daylight Transp., LLC*, 59 Cal. App. 5th 462, 477-80 (2020) (finding arbitration agreement substantively unconscionable based on provisions shortening the statute of limitations, requiring workers to bear half of the costs of arbitration, and allowing only the employer to go to court to seek provisional remedies).

Finally, while it is settled law that the FAA applies in state court (Justice Thomas' dissents notwithstanding), California courts have held that this rule extends only to the FAA's substantive provisions entailing the federal law of arbitrability—namely 9 U.S.C. § 2, dictating when a claim must be arbitrated. Under principles of federalism, state courts apply their own procedural law on state claims. California courts have invoked this federalism doctrine to hold that the procedural provisions of the California Arbitration Act, such as those setting forth the processes and standards for judicial review and enforcement of an arbitration award, govern at the state level. *E.g. Mave Enters. Inc. v. Travelers Indemnity Co.*, 219 Cal. App. 4th 1408, 1428-30 (2013). This provides states some leeway as to the conduct of arbitrations and surrounding judicial proceedings, and they should exercise their discretion to ensure that arbitrations are as fair as possible to employees and consumers.[50]

III. In Construing Their Own Class Action Rules, State Courts Should Reject the Supreme Court's "Rigorous Analysis" Approach to Federal Rule 23

A. A Chimeric Chameleon– the Supreme Court Flip-Flops on a Liberal Versus Strict Standard for Certifying a Rule 23 Class

Just as the Supreme Court has radically altered the nature of the FAA, so too has it remade the law on class certification under Rule 23.

1. The Early Years of Rule 23, a Class-Friendly Court

a) Modern Rule 23 Becomes Effective in 1966

Pre-modern Federal Rule 23–in force from 1938 to 1966–had become "overencumbered and entangled," with a "trichotomy" of "true," "hybrid," and "spurious" class actions whose "unthinking formalism" rendered the old rule virtually useless. *Green v. Wolf Corp.*, 406 F.2d 291, 297 (2d Cir. 1968). Revised Rule 23 was the hoped-for antidote to these enervating encrustations.

Professor Arthur Miller helped draft the 1966 revision. Miller, *What Are Courts For?*, 78 La. L. Rev. at 740. He notes that Rule 23 was modernized to achieve a number of goals, including enforcement of civil rights for African-Americans. Congress envisioned that Rule 23 would:

> provide a receptive procedural vehicle for the civil rights litigation that emerged after… *Brown v. Board of Education*, 347 U.S. 483 (1954).

Early Rule 23 precedents recognized that "a class action may well be the appropriate means for expeditious litigation of the issues, because a large number of individuals may have been injured, although no one person may have been damaged to a degree which would have induced him to institute litigation solely on his own behalf." *Green*, 406 F.2d at 296, *cert. denied,* 395 U.S. 977 (1969). As Professor Miller emphasized, Rule 23 class actions were designed:

> to promote efficiency— litigants get more judicial [value]… when like things are aggregated and

> adjudicated together… Finally, the Rules were written to be useful for enforcing public policy embedded in national and state statutes…

Miller, *What Are Courts For?,* 78 La. L. Rev. at 740.

In the years after Rule 23's modernization in 1966, federal class actions expanded dramatically. *Id*. at 754-55; Robert H. Klonoff, *The Decline of Class Action*, 90 Wash. U.L. Rev. 729, 736 (2013) (federal courts "became… receptive to approving major class actions.").

b) To Err is Human, to Certify Divine

Esplin v. Hirschi, 402 F.2d 94, 101 (10th Cir. 1968) capsulized the then-dominant conception of Rule 23:

> **[T]he interests of justice require that in a doubtful case… any error, if there is to be one, should be committed in favor of allowing the class action.**

Other federal courts joined *Esplin's* strong presumption in favor of class certification, characterizing that presumption as "the guiding principle" of Rule 23 jurisprudence. *Green,* 406 F.2d at 298.[51] *See also Michaels v. Ambassador Group,* Inc., 110 F.R.D 84, 88 (E.D.N.Y 1986) ("[C]ertification is generally favored in this Circuit. . . ."); *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985) ("[T]he interests of justice require that in a doubtful case **any error, if there is to be one, should be committed in favor of allowing a class action.**") (emphasis added).

Even the U.S. Supreme Court, which would later turn against class actions, spoke positively about Rule 23:

> Rule 23… provides for class actions that may enhance the efficacy of private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture.
>
> *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 266 (1972).

c) Federal Rule 23 Inspires States to Enact Similar Class Action Rules—The New York Example

In 1975, New York approved N.Y. Civil Practice Law and Rules ("CPLR") Article 9. Governor Hugh L. Carey emphasized that New York's new class action rule emulated Rule 23:

> This bill, modeled on similar Federal Law, will enable individuals injured by the same pattern of conduct… to pool their resources and collectively seek relief. By permitting common questions… affecting numerous persons to be litigated in one form, the bill would result in greater conservation of judicial effort**.**
>
> In enacting its own class action procedure, New York incorporated the then-liberal approach of Rule 23 that favored certification of a class action. *See Friar v. Vanguard Holding Corp.,* 434 N.Y.S. 2d 698, 705 (N.Y. App. Div. 1980) ("[A]rticle 9… **essentially adopts the broad prerequisites of [R]ule 23… The policy of [R]ule 23 is to favor the maintenance of class actions and liberal interpretation.")**

3. Fickle Textualism: Same Rule 23 but now the Supreme Court applies a "rigorous analysis" which is often fatal to certification

Led by the Supreme Court, the federal judiciary has abandoned the pro-class policy underlying Rule 23. Once the shining star of the federal procedural firmament, the class action has lost its glitter. "[T]here has been a debilitation of the class action." Miller, *What Are Courts For?, supra*, at 753; Arthur R. Miller, *The American Class Action: From Birth to Maturity,* 19 Theoretical Inquiries L. 1, 25 (2018) (Rule 23 decisions have "constrained significantly" the "likelihood of an action being certified," and "the procedure's utility has been diminished").

a) The Birth of "Rigorous Analysis"

The Supreme Court first used the term "rigorous analysis" in *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). There the Court reversed a class certification order and held that the "across-the-board" class at issue was overly broad. The Court stated that Rule 23 certification motions must be "rigorously analyzed." However, the court did not explain what the "rigorous analysis" requirement means for class motions. The phrase "rigorous analysis" was delivered in an off-the-cuff manner and seemed more dicta than holding.

b) "Rigor" Becomes Rigor Mortis for Many Class Actions

In the decades following *Falcon,* there was a steady departure by federal courts away "from a presumptively favorable approach toward class certification to a more skeptical view coupled with a more exacting review process." *In re Kosmos Energy Ltd.*, 299 F.R.D. 133, 138 (N.D. Tex. 2014).

Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 350-51 (2011) saw the Supreme Court add bite to the requirement that motions for certification be "rigorously analyzed." In *Dukes,* the Court emphasized that judges must probe

behind the pleadings to determine whether plaintiffs have "affirmatively demonstrated" compliance with Rule 23—"that there are in fact sufficiently numerous parties, common questions of law or fact, etc." 564 U.S. at 350. A court may delve into the merits to determine whether the requirements are met.

The text of Rule 23 nowhere indicates that a motion for class certification must be "rigorously analyzed" (or that granting class certification should be a rare exception to an ordinary anti-class presumption, *see*, *e.g.*, *Dukes*, 564 U.S. at 348-49).[52] The Court's injection of a "rigorous analysis" test confirms that textualism is no bulwark against subjectivity nor a shield against the supposed evil it is meant to address: judicial lawmaking.

B. Exiting the "Rigorous Analysis" Regime (or, "Rexit"); States Should Serve as Laboratories of Justice and Apply a Liberal Approach to Their Own Class Action Rules

Most states have their own class action rules—originally modeled on Rule 23, when the federal procedure came embossed with a pro-certification stamp.[53] How should state courts respond to the Supreme Court's new antipathy toward Rule 23 class actions? The states should follow the exhortation of Justice Brandeis in *Liebmann* and carve their own path.

While federal decisions have repudiated the remedial intent behind Rule 23 and adopted an anti-class action animus, many state courts have balked. Independent-minded States have adhered to the impulse originally animating modern class actions: The class device is salutary in nature and should be broadly construed, with certification presumptively favored. New York and other States are part of a swelling tide of jurisdictions going "Rexit"—exiting the "rigorous analysis" school and resisting federal subversion of class actions.

1. The *New York Exemplar*

New York: *Stecko v. RLI Ins. Co.*, 995 N.Y.S. 2d 13 (N.Y. App. Div. 2014) (certifying class action on behalf of workers deprived of wages: "the motion court was not required to apply the 'rigorous analysis' standard utilized by the federal courts in addressing class certification motions under [FRCP] 23… given this Court's recognition that CPLR § 901(a) 'should be broadly construed'").

See also, e.g., *Cardona v. Maramont Corp.*, 993 N.Y.S. 2d 643, 2014 WL 2558176, at *13 (Sup. Ct. N.Y. Cnty. June 6, 2014) ("[a]lthough Article 9 is based in part on F.R.C.P. 23… and although New York State courts have looked to the federal courts for guidance… state courts are not constrained to follow federal courts' interpretation of F.R.C.P. 23… [and] have maintained their liberal interpretation of Article 9 despite the… *Dukes* decision[]"); *Banasiak v. Fox, Indus., Ltd*, No. 150233/2015, 2016 WL 1133805, at *3-4 (Sup. Ct. N.Y. Cnty. Mar. 23, 2016) ("[T]his Court rejects, as contrary to New York's well-settled law, *Fox's* contention" that it must apply the "higher standard for class certification as is found in Federal Rule 23… Article 9 is to be liberally construed and [a] searching inquiry into the merits of plaintiff's claims is not required."); *Maor v. Hornblower N.Y., LLC*, 38 N.Y.S.3d 831, 2016 WL 3240219 (Sup. Ct. NY Cnty. June 13, 2016) (same); *Isufi v. Prometal Constr., Inc.*, 79 N.Y.S. 3d 3, 4 (N.Y. App. Div. 2018) ("[defendant]'s contention that this Court should decide the class certification motion according to the rigorous standard… used by the federal courts… is in error").

2. From Sea to Shining Sea: "Rexit" Goes National

Other state courts have also employed a liberal interpretation of their own class action rules and rejected the class-phobic jurisprudence that now governs Federal Rule 23. *Jackson v. Unocal Corp.*, 262 P.3d 874, 881 (Colo. 2011) (Colorado Rule 23 "should be liberally construed in light of its policy favoring the maintenance of class actions"); *Mattson v. Montana Power Co.*, 368 Mont. 1, 18 (2012) ("Commonality [under Montana rule] is not a stringent threshold and does not impose an unwieldy burden on plaintiffs… **in contrast [with the] significantly tightened… federal rule**").[54]

See also, e.g., Henry v. Dow Chem. Co., 484 Mich. 483, 502 (2009) ("[T]he federal 'rigorous analysis' requirement does not necessarily bind state courts"); *THE/FRE, Inc. v. Martin*, 349 Ark. 507, 518 (2002) (**"our decisions… allow[] a less-than-rigorous analysis for establishing class actions."**); *Simpson Hous. Sols., LLC v. Hernandez*, 2009 Ark. 480, 17 (2009) ("Federal Courts apply a rigorous analysis test for class actions, **which this court has consistently rejected");** *Mich. Ass'n of Chiropractors v. Blue Care Network of Mich., Inc.*, 300 Mich. App. 577, 587 (2013) ("The federal 'rigorous analysis' approach does not apply under our state law…"); *W. Va. ex. rel Chemtall, Inc. v. Madden*, 216 W.Va. 443, 458 (2004) ("after carefully reading [West Virginia's] Rules of Civil Procedure… neither I nor my colleagues can find anything that requires a party to submit any motion to a 'rigorous' analysis…").

See further Thurman v. CUNA Mut. Ins. Soc'y, 836 N.W.2d 611, 618 (S.D. 2013) (certification favored even in "questionable cases"); *Comes v. Microsoft Corp.*, 696 N.W.2d 318, 324 (Iowa 2005) ("[E]xcept where the facts underlying the class are merely speculative, the proponent's burden is light").[55]

This impressive roster of cases shows that states often adhere to an independent policy in interpreting their class action rules.

IV. Notification of Firing or Last Day of Work: When Does the Statute of Limitations Begin Running on a Claim of Discriminatory or Retaliatory Discharge?

The U.S. Supreme Court holds that, under federal statutes, a wrongful discharge claim accrues **NOT** on the date the worker is actually terminated from the job, but rather, when the employer notifies the worker that he or she will be fired. Consequently, the limitations clock begins running **BEFORE** the employee's last day of work. This early jumpstart may mislead many employees to wait too long before filing a claim. In common understanding, someone who continues to work for a company hasn't been "fired," "terminated," or "discharged." Many states disagree with the Supreme Court's accrual rule and compute the running of the statute of limitations from the last day of work. That is the better rule and should be followed under State law.

A. The Supreme Court's Ill-Advised Decisions that Accrual Begins When Employees Are Notified that They Will Be Fired

In *Chardon v. Fernandez*, 454 U.S. 6 (1981), the Supreme Court held that the applicable limitations period begins to run when notice of termination is given and not on the last day that the employee works for the employer. The Court stressed that **"the fact of termination is not itself an illegal act."** *Id.* at 8. *Chardon* followed the doctrine of *Del. State Coll. v. Ricks*, 449 U.S. 250 (1980), that the clock begins running upon notification, not cessation of employment.

Chardon/Ricks has been sharply criticized. In *Chardon*, the Supreme Court reversed the First Circuit's ruling that the employee's last day of work is the accrual point that starts the running of the limitations period. But the First Circuit's reasoning is far stronger—more logical and consistent with the law:

> The plaintiffs… are complaining that they were demoted or discharged, not merely that a decision was made on a particular occasion of which notice was then given… *The alleged unlawful act was revocable, incomplete and, for practical purposes, nonexistent until the actual demotion or discharge.*
>
> [C]ases would surely arise in which resolution of that question would require lengthy proceedings. Notice might be oral, or it might be ambiguously phrased, or it might be transmitted by one whose authority is subject to question. We see no value in requiring courts and parties to devote their resources to litigating the adequacy of notice, when the date of the action itself is easily determined.
>
> *Rivera Fernandez v. Chardon*, 648 F.2d 765, 768–69 (1st Cir. 1981), rev'd sub nom. *Chardon v. Fernandez*, 454 U.S. 6 (1981).

In contrast to the clear, bright-line rule espoused by the First Circuit, the Supreme Court's holding is a trap for a typical employee who would believe that termination is effective on the last day of work. The *Chardon/Ricks* rule is inconsistent with an ordinary fair reading of "**dismissal**," "**fire,**" "**discharge**," or "**termination**." *See* Bryan Garner (co-author of *Reading Law*), *Black's Law Dictionary* (Deluxe 8th Ed.),1511, 666:

> "**Termination.**" "The act of ending something." *Termination of Employment.* The complete severance of an employer-employee relationship.
>
> Terminate. To put an end to; to bring to an end; to end; to conclude.
>
> Fire. To discharge or dismiss a person from employment; to terminate as an employee.

Nonetheless, In *Green v. Brennan*, 136 S. Ct. 1769, 1782 (2016), the Court reaffirmed the *Chardon/Ricks* principle: "An ordinary wrongful discharge claim accrues – and the limitations period begins to run – when the employer **notifies** the employee he is fired, **not on the last day of his employment**." (citing *Ricks* at 449 U.S. 258-259 and *Chardon* 454 U.S. at 8 (emphasis supplied).

B. States as Laboratories of Justice: Many States Refuse to Follow the Federal Accrual Doctrine and Hold that an Employee's State Law Termination Claim Starts Running on the Last Day of Work

In *Vollemans v. Town of Wallingford*, 103 Conn. App. 188 (2007), the court rejected the *Chardon/Ricks* rule. "[W]e conclude that the filing period contained in the

[anti-discrimination statute] commences upon actual cessation of employment rather than notice thereof." *Id*. at 219.

Vollemans advanced several rationales against adopting the federal rule. First, the term "discharge" means "to dismiss from employment; to terminate the employment of a person." Moreover, said the court, "it is basic to our law that a cause of action accrues when a plaintiff has been injured or damaged. The [*Chardon/Ricks*] rule confounds that principle by requiring an employee… to file a claim disputing events that have not yet come to pass." *Id*. at 214. And *Chardon/Ricks* perversely frustrates the possibility of conciliation: "Until the actual date of termination arrives, the employer's allegedly discriminatory act remains subject to change... There is no reason to encourage litigation which might preclude the possibility of reconsideration." *Id*. at 215.

C. Examples of States Rejecting *Chardon/Ricks'* Accrual Rule

Other states decline to follow *Chardon/Ricks* for similar reasons.

New Jersey–*Holmin v. TRW, Inc.*, 330 N.J. Super. 30, 46 (App. Div. 2000):

> We see no reason to adopt the arbitrary rule of *Ricks and Chardon*… neither of those cases nor any of the decisions that follow them contain any persuasive discussion of a sound policy basis for selecting that rule… Prior to [the actual termination] date, [an employee] is faced only with [the] anticipation of possible injury, which may or may not occur….

California–*Romano v. Rockwell Int'l, Inc.*, 14 Cal. 4th 479 (1996) (refusing to follow *Ricks* where there was a 2.5-year gap between notification of dismissal and employee's last day of work. State law defined discriminatory "discharge" as among the unlawful practices covered and it would be anomalous to conclude that the limitations period begins to run before termination. The California Supreme Court also "question[ed] the soundness of the reasoning… in *Ricks* and *Chardon*." It found that State decisions measuring accrual from the employee's last day of work were more persuasive than the *Ricks/Chardon* notification rule).

Hawaii–*Ross v. Stouffer Hotel Co.*, 76 Hawaii 454 (1994).

Ohio–*Oker v. Ameritech Corp.*, 89 Ohio St.3d 223 (2000) (distinguishing *Ricks* based on the fact that the Ohio statute specifically provided for a liberal construction. And, the plain language of the statute compelled the conclusion that the date the employee was terminated starts the limitation clock running).

Michigan–*Collins v. Comerica Bank*, 468 Mich. 628 (1995).

Montana–*Allison v. Jumping Horse Ranch, Inc.*, 225 Mont. 410 (1992) (Under Montana's Wrongful Discharge from Employment Act, statute of limitations did not begin to run until the date the employee stopped working; specifically rejecting the *Ricks* approach).

New Hampshire–*Pritchard v. N.H. Pers. Appeals Bd.*, 137 N.H. 291 (1993) (Action to appeal state layoff began running from actual date of layoff).

Accord: Rengar v. R.J. Reynolds Tobacco Co., 145 N.C. App. 78 (2001) (undisputed that statute of limitations for wrongful discharge action under North Carolina Law is 3 years from date of discharge); *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100, 116 (Colo. 1992) (finding *Ricks* unpersuasive: "[Employee] suffered no actual injury until he was deprived of his job and… [that] did not occur until the [end] of his last day of work.").

See also Haas v. Lockheed Martin Corp., 396 Md. 469 (2007) (As commonly understood, "discharge" occurs when the employee is actually terminated; listing 13 state decisions holding that the last day of employment starts the limitations clock and emphasizing that "[t]he *Ricks/Chardon* rule frustrates the conciliation process"); *Stupek v. Wyle Lab'ys Corp.*, 327 Or. 433 (1998) (The facts necessary to establish a wrongful discharge claim do not occur until the employee leaves the employment).[56]

As aptly stated in *Alderiso v. The Med. Ctr. of Ocean Cnty.*, 167 N.J. 191 (1999), which rejected *Chardon/Ricks*, "although Federal decisional law may serve to guide us in our resolution of New Jersey issues, we bear ultimate responsibility for the safe passage of our ship." *Alderiso* embraces the federalist antidote to *Lochner* Lite.

D. Rather than Construing State Law in Lockstep with Federal Precedent, at Least one Federal Court Has Applied a "Termination" Accrual for State Claims and a "Notification" Accrual for Federal Claims

In *Janikowski v. Bendix Corporation*, 823 F.2d 945, 948-49 (6th Cir. 1987), the Sixth Circuit utilized a "notification" accrual on a Federal ADEA cause of action and a "termination" accrual for a companion Michigan State law cause of action. ("[Plaintiff-employee] contends that Michigan law, unlike *Ricks* and *Chardon*, starts the statute of limitations from the date of actual discharge… Our

guess is that. . . the Michigan Supreme Court would veer away from the current federal precent and declare that the period of limitations . . . began to run on the date plaintiff actually stopped working.")

Janikowski embodies the Brandeis-centric position that is the theme of this article; state and federal laws occupy separate realms, and courts should fight the temptation to import poorly reasoned federal doctrines when they construe state laws. *Janikowski's* refusal to inflict U.S. Supreme Court precedent on a Michigan state anti-discrimination statute highlights the merits of the approach we advocate here.

V. Brandeis to Thomas to Thomas (Apologies to Tinkers to Evers to Chance)

Shortly before publication of this article, Justice Brandeis was joined by an unlikely ally – Justice Clarence Thomas. On June 25, 2021, the Supreme Court decided *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). By a 6-3 vote, the Court ruled that certain claims under the federal Fair Credit Reporting Act, 15 U.S.C. §168 ("FCRA") cannot be adjudicated in federal court because they do not satisfy the U.S. Constitution's "case or controversy" requirement, depriving plaintiffs of Article III standing. Justice Thomas dissented vigorously, but in the process, validated the major lesson of this article. He noted that while some FCRA plaintiffs were barred from federal court, they were still free to seek FCRA relief in state courts because many states have more capacious standing boundaries than the federal system. *See id*. at 2224 n.9 (citation omitted):

> [The majority's ruling] may leave state courts – which "are not bound by the limitations of a case or controversy . . . even when they address issues of federal law . . ." as the sole forum for such cases, with defendants unable to seek removal to federal court.

Three days later, in *Standing Akimbo, LLC v. U.S.*, 141 S. Ct. 2236 (2021), Thomas issued a statement regarding the denial of certiorari. He described the federal government's ambivalent and episodic enforcement of anti-marijuana laws and noted that "[i]f the government is now content to allow states to act 'as laboratories' and 'try novel social and economic experiments,'" enforcement (or non-enforcement) of such drug laws should be left to the states. *Id*. at 2238.[57]

Conclusion

Fighting *Lochner* Lite—States as Laboratories of Justice

For the Supreme Court, history repeats itself: The first time as *Lochner* Classic—the old, pre-New Deal substantive due process jurisprudence— and the second time as *Lochner* Lite, the contemporary Court's death by a thousand cuts to pro-employee, pro-consumer remedial case law and legislation.

While federal precedent may exert a "gravitational pull" on the interpretation of parallel state laws, state courts should resist the impulse to blindly follow federal authority. As discussed above, in adjudicating state law claims, many states have refused to rubber stamp ill-advised federal doctrines. States should not simply accept "abrupt and counterintuitive changes in federal law" that are contrary to the policies and objectives of state law. *See* Dodson, *Gravitational Force*, 164 U. Penn. L. Rev. at 703-706. The fact that "federal law says so" is not a good enough reason. *Id*. at 729. As Prof. Dodson opines: "The drift of state law away from its popular or legislative moorings erodes the legal legitimacy of the state law-speaking institutions." *Id*. at 747. "The gravitational force of federal law risks pulling state law in directions it ought not go." *Id.*

Encino Motorcars is a case in point. It represents an "abrupt" and arguably "counterintuitive" reversal of the 80-year-old dictate that overtime exemptions should be narrowly construed. In both *Encino* and *Christopher*, the Supreme Court construed overtime exemptions **broadly**, thumbing its nose at Congress. As sovereigns over their own laws, states should independently analyze whether this change is consistent with the policies behind their own wage-and-hour statutes and disregard *Encino Motorcars* in favor of existing state precedent. It is no accident that, even after *Encino*, courts in several states abide by timeworn canons of narrow construction. This trend should continue and the Alaska Supreme Court's ruling in *Buntin* should be rejected or otherwise confined to its facts.

Similarly, the Court's FAA jurisprudence represents a perversion and miscarriage of justice. In the Court's hands, the FAA has been transmogrified into a super-statute that acts as an often-impermeable obstacle to the enforcement of many substantive rights and protections. Until there is a legislative fix, states should do what they can to temper an arbitration law run amok while complying with clear and governing Supreme Court precedent.

Under our federal system, states are at the peak of their powers when they apply their own procedural laws—*e.g.*, class action rules and principles. They are captains of their

jurisprudential ships and should feel no compulsion to parrot the "rigorous analysis" federal courts now impose on Rule 23 motions.

So too for the accrual rule on firings in violation of state anti-discrimination and retaliation statutes. The federal standard is ill-advised and flouts textualism and a fair reading of "termination," "dismissal," and "firing."

Accordingly, we urge practitioners to consider state forums for their clients' claims and to advance constructions and arguments on state law causes of action that depart from hostile federal precedent. When practitioners do find themselves in a federal forum, they should advocate that the court adopt an independent analysis of state claims in the face of adverse federal decisions or defer to state courts to reach their own conclusions on state law claims.

Which shall it be: laboratories of justice or echo chambers for privilege? Justice Brandeis's federalist plea—that state courts exercise independence—speaks as powerfully now in our era of "*Lochner* Lite" as it did in the depths of the Depression—the height of "Lochner Classic." His plea compels the inescapable answer to our question—laboratories, not echo chambers, justice, not privilege.

ENDNOTES

[1] With much appreciation to Kate MacCary, Leor Rosen, Simon Schaitkin, Alisa Vithoontien, and Rosina Frankel, for their invaluable contributions and suggestions to this article.

[2] There has been extensive commentary on the Supreme Court's pro-business shift and hostility to plaintiff-oriented litigation. *See, e.g.*, Theodore Eisenberg & Kevin M. Clermont, *Plaintiphobia in the Supreme Court*, 100 Cornell L. Rev. 193 (2014); Arthur R. Miller, *What are Courts For? Have We Forsaken the Procedural Gold Standard?*, 78 La. L. Rev. 739 (Spring 2018); Zachary Clopton, *Procedural Retrenchment and the States,* 106 Cal. L. Rev. 411 (April 2018).

[3] A notable recent departure from this principle is the Alaska Supreme Court's decision in *Buntin v. Schlumberger*, which partially abandoned Alaska's established narrow construction rule in favor of the "fair reading" method established by the U.S. Supreme Court in *Encino Motorcars* (see Sec. I.A.1, *infra*). We argue that *Buntin* was wrongly decided and represents a reflexive and unwarranted capitulation to federal precedent that should not be followed by other states. (Sec. I.B.7, *infra*). *See* Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. Penn. L. Rev. 703 (2016).

[4] While this article suggests looking to state forums and state law when federal law falls short, municipal employment and civil rights laws may also offer an avenue of redress. Such laws often provide a cause of action and, in some cases, are explicitly more liberal than their federal counterparts. *See, e.g.*, New York City Human Rights Law ("NYCHRL"), NYC Admin. Code § 8–130 ("The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably–worded to provisions of [the NYCHRL], have been so construed."). Examples of municipalities with their own anti-discrimination laws include New York City, the District of Columbia, Pittsburgh, Los Angeles, and San Francisco. See generally New York City Administrative Code §§ 8-101, *et seq.*; D.C. Code §§ 2-1401, *et seq.*; Pittsburgh Code of Ordinances §§ 651.01 *et seq.*; Los Angeles Municipal Code §§ 51.00, *et seq.*; S.F. Police Code §§ 3100, *et seq*.

[5] Justice Robert H. Jackson, *The Supreme Court in the American System of Government*, 68 (Harper & Row 1963).

[6] *See also*, *e.g.*, *Adair v. U.S.,* 208 U.S. 161, 174 (1908) ("[t]he right of a person to sell his labor upon such terms as he deems proper is... the same as the right of the purchaser of labor to prescribe [working] conditions.").

[7] *See, e.g.,* Andrew Melzer, *The "Tough Noogies" Doctrine: Rights But No Remedies*, https://www.law360.com/articles/847396/the-tough-noogies-doctrine-rights-but-no-remedies. The hopeful note at the end of this article did not survive the elevation of Justice Gorsuch to the Court. In May 2018, Justice Gorsuch penned the 5-4 opinion in *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018), cementing a rule that the FAA entitles employers to extract class and collective action waivers from workers despite specific remedial statutes protecting employee rights. *See infra* at Sec. II.A.5.

[8] For example, in his classic 1930 work *The Bramble Bush*, leading legal scholar Karl Nickerson Llewelyn distinguishes between "remedial" statutes and "derogations" of common law protections—with the former to be "liberally" construed and the latter to be "strictly" construed. Karl Nickerson Llewelyn, *The Bramble Bush: Some Lectures on Law and its Study*, 79 (The Legal Classics Library, Birmingham 1986). *See also Woodford v. Ins. Dep't.*, 243 A.3d 60, 75-76 (Pa. 2020) (reaffirming the longstanding principle that courts should liberally construe remedial provisions and narrowly construe penal clauses of the same law).

[9] "We're all textualists now" is a prominent quote from Justice Kagan, commenting on Justice Scalia's influence on legal jurisprudence. Justice Elena Kagan, Scalia Lecture, Harvard Law School, November 18, 2015, *see* https://prawfsblawg.blogs.com/prawfsblawg/2015/12/justice-kagan-on-textualisms-victory.html; https://www.youtube.com/watch?v=dpEtszFT0Tg

[10] *See A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("The [FLSA] was designed 'to extend the frontiers of social progress' by 'insuring… a fair day's pay for a fair day's work.'… Any exemption from such humanitarian and remedial legislation must therefore be narrowly construed, giving due regard to the plain meaning of statutory language and the intent of Congress. To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."); *Mitchell v. Kentucky Fin. Co*., 359 U.S. 290, 295-96 (1959) ("It is well settled that exemptions from the [FLSA] are to be narrowly construed"); *Arnold v. Ben Kanowsky, Inc*., 361 U.S. 388, 392 (1960).

"This principle is a well-grounded application of the general rule that an 'exception to a general statement of policy is usually read… narrowly in order to preserve the primary operation of the provision.'" *Encino Motorcars*, 138 S. Ct. at 1148 n.7 (Ginsburg, dissenting; citation omitted).

[11] There, Justice Scalia opines that the common precept that exemptions to a remedial statute are to be construed narrowly is a "false notion" and interpretive error. *Reading Law* at 362-63. Scalia relies on little authority beyond his own say-so. *See id*. Further, Scalia's argument apparently derives from the textualist premise that the purpose of a statute can only be discerned from the text itself. *See id*. at 18-21. But, the FLSA contains an *express* statement of purpose: the Act's avowed object is "to correct and as rapidly as practicable to eliminate" "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 U.S.C. § 202. This certainly points to a limited rather than broad reading of exemptions.

[12] *See* U.S. Department of Labor Wage and Hour Division, *"Executive, Administrative, Professional… Outside Salesman" Redefined*, at 2-3 (1940) ("*Stein Report*") ("EXEMPTION SHOULD BE INTERPRETED NARROWLY": "The general rule in a statute of this nature, that coverage should be broadly interpreted, and exemptions narrowly interpreted, is so well known as to need little elaboration here.").

[13] The Court has since extended its new rule on the construction of exemptions to other statutes, namely the Freedom of Information Act ("FOIA"). *Food Marketing Institute v. Argus Leader Media*, 139 S. Ct. 2356, 2366 (2019); *see also BP P.L.C. v. Mayor and City Counsel of Baltimore*, 141 S. Ct. 1532, 1538-39 (2021) (specific exception to availability of appellate review); *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels, Ass'n*, 141 S. Ct. 2172, 2181 (2021).

[14] *See also Keystone Nursing & Rehab. of Reading LLC v. Simmons-Ritchie*, 2020 WL 40042, at *5, 14 (Pa. Commw. Ct. Jan. 3, 2020) (maintaining narrow construction of state Right-to-Know law even after the Supreme Court's application of "fair reading" rule to federal FOIA in *Food Marketing Institute*); *Office of Gen. Counsel v. Bumstead*, 247 A.3d 71, 78 (Pa. Commw. Ct. 2021).

Indeed, the Pennsylvania Supreme Court has now indicated that the U.S. Supreme Court's decision in *Food Marketing Institute* will not guide the interpretation of equivalent provisions of the state Right to Know Law. *McKelvey v. Pa. Dept. of Health*, 2021 WL 3073862, at *17 n.18 (Pa. July 21, 2021) ("We denied allowance of appeal with respect to whether *Food Marketing* is applicable to this case, and, in any event, find the RTKL provides sufficient guidance to resolve this appeal.").

[15] *See also, e.g.*, *Green v. Pierce Cnty.*, 487 P.3d 499, 504 (Wash. 2021); *Seacoast Newspapers, Inc. v. Portsmouth*, 173 N.H. 325, 330-31, 333-35 (2020); *Panicaro v. Langer*, 2021 WL 2935587, at *2 (Nev. App. July 12, 2021); *Allco Renewable Energy Ltd. v. Freedom of Info. Comm'n*, 205 Conn. App. 144, 152 (2021); *Traverse City Record-Eagle v. Traverse City Area Pub. Schs.*, 2021 WL 1931997, at *3 (Mich. App. May 13, 2021); *Ventura Cnty. Deputy Sheriffs' Ass'n. v. Cnty. of Ventura*, 61 Cal. App. 5th 585, 592 (2021); *Labs v. Chicago Mayor's Office*, 2021 WL 1381358, at *3 (Ill. App. Apr. 13, 2021) (maintaining "fundamental principle" of narrow construction of exemptions to disclosure); *Del Mar Coll. Dist. v. Paxton*, 2020 WL 3582886, at *6 (Tex. App. Jul 1, 2020) (Public Information Act "liberally construed in favor of" disclosure, with exceptions "narrowly construed").

[16] *See also Bolling v. Bay Country Consumer Fin., Inc.*, 2021 WL 2697350, at *15 (Md. App. July 1, 2021) ("exemptions from remedial legislation must be narrowly construed"); *Shaw v. Shand*, 460 N.J. Super 592, 608-609 (App. Div. 2019) ("it is well-established that where the purpose of legislation is remedial and humanitarian, any exemption must be narrowly construed, giving due regard to the plain meaning of the language and the legislative intent.") (collecting cases in various contexts, *e.g.*, wage-and-hour); *Taylor v. Conservation Comm'n of Fairfield*, 302 Conn. 60, 68 (2011) (under strict construction rule, "those who claim the benefit of an exception under a statute have the burden of proving that they come within the limited class for whose benefit it was established."); *Trevek Enters., Inc. v. Victor Contracting Corp.*, 107 Conn. App. 574, 583 (2008) ("The rules of construction governing exemptions from remedial statutes are unequivocal… it is appropriate to construe [such] exemptions narrowly…").

[17] The closest case we have found is from the tax context, *TOMRA of N. Am., Inc. v. Dep't. of Treasury*, 505 Mich. 333 (2020). There, the Michigan Supreme Court adhered to the narrow construction of tax exemptions but clarified that it is to be used as a "last resort" in cases of statutory ambiguity. *Id.* at 339-44. This is because, in the court's view, the rule is not an aid to interpreting the text but "a judicially created substantive canon." *Id.* at 340 & n.11 (citing, *e.g.*, *Reading Law*).

This clarification does not go as far as *Encino* or *Reading Law*, which would scrap the canon entirely. *See also City & Cty. of Denver v. Expedia, Inc.*, 405 P.3d 1128, 1133 n.7 (Colo. 2017) (plurality opinion: "While Colorado retains, as a last resort, these rules of construction favoring one over another class of litigants affected by the specific type of legislation at issue, many commentators actually argue that these presumptions have been, or should be, discontinued altogether"— citing *Reading Law*). Further, we would suggest that pro-taxpayer exemptions are different in kind than exemptions to remedial individual-rights statutes.

In contrast, a Florida court has apparently repulsed an attempt to invoke *Reading Law* to undo the narrow construction canon in the tax context. *Int'l Acad. of Design, Inc. v. Dep't. of Revenue*, 265 So.3d 651, 655-56 (Fla. App. 2018), *review denied* (reiterating that "statutes providing exemptions from a general tax are strictly construed against the tax payer"; implicitly rejecting the concurrence, which cites *Reading Law* against narrow construction); *accord*, *e.g.*, *StateLine Cooperative v. Iowa Property Assessment Appeal Bd.*, 958 N.W.2d 807, 812-13 (Iowa 2021) (adhering to established state law principle of narrow construction of tax exemptions, while noting the contrary view espoused in *Reading Law*); *Collison v. Dir. of Revenue*, 621 S.W.3d 165, 166-67 (Mo. 2021).

[18] One unpublished California appellate case expressly concludes that, even after *Encino Motorcars*, "California law still requires exemptions to be narrowly construed." *Davis v. Komoto Pharmacy, Inc.*, 2018 WL 3640555, at *4, n.2 (Cal. App. Aug. 1, 2018).

[19] *See also Marshall v. Landry's Inc.*, 2020 WL 4931759, at *3 (Cal. App. Aug. 24, 2020); *Richardson v. Ruan Transp. Co.*, 2020 WL 5362151, at *13 (Cal. App. Sept. 8, 2020).

[20] *See also Hickman v. Riverside Park Enters.*, 35 Mass. L. Rptr. 579, 2019 WL 3331107, at *3 (Mass. Super. Ct. June 21, 2019).

[21] *See further Gomez v. J.P. Trucking*, 2020 WL 6495093, at *5, 7 (Col. App. Nov. 5, 2020) (adhering to maxim that Colorado overtime exemptions should be construed narrowly, but construing motor carrier exemption in accordance with its federal counterpart), *cert.* granted 2021 WL 2769816 (Colo. June 28, 2021); *Rodriguez v. Kaiffa, LLC*, 2018 WL 4042428, at *1 (Conn. Super. Aug. 10, 2018).

[22] *E.g.* 29 U.S.C. § 202; *Barrentine v. Arkansas-Best Freight Sys. Inc.*, 450 U.S. 728, 739-40 (1981); *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 423-24 (1945).

[23] *E.g.*, *Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 665-66 (10th Cir. 2007); *Janikowski*, (Sec. IV.D, *infra*.)

[24] *E.g.*, *Chauca v. Abraham*, 841 F.3d 86 (2d Cir. 2016); *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 671-72 (7th Cir. 2001).

[25] *See* 28 U.S.C. § 1447(c). In some instances, it also may be permissible to transfer a state law claim from federal to state court. *E.g.*, Pa. Cons. Stat. § 5103(b).

[26] *E.g.*, *Raskas v. Lattice, Inc.*, 2019 WL 2865423, at *6 (D.N.J. July 3, 2019).

[27] The question presented is somewhat loaded because it asks whether Alaska's overtime exemptions "should be given a **narrow** or **fair** interpretation." (emphasis supplied). The forced dichotomy of "narrow" versus "fair" suggests that a narrow reading is an *un*fair one.But as we have argued here, the Supreme Court's "fair" readings are actually expansive distortions, and a narrow construction vindicates the humanitarian purposes of the statute.

[28] In reality, the amendment syncs with a 2004 revision to the FLSA by dispensing with the prior "long" and "short" tests for the white-collar exemptions.

[29] Note the court's signal of a potentially broader embrace of *Encino* in *Luong v. W. Surety Co.*, 485 P.3d 46, 54 n.44 (Alaska 2021). Still, the court subsequently reaffirmed the narrow construction of exemptions to the state Public Records Act, *Dept. of Corrections v. Porche*, 485 P.3d 1010, 1014-15 (Alaska 2021), and tax code. *Fairbanks Gold Mining Inc. v. Fairbanks N. Star Borough Assessor*, 488 P.3d 959, 967 (Alaska 2021) (as an "aid" to statutory interpretation, "[w]e construe tax exemptions narrowly.").

[30] *See also, e.g.*, *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687-88 (1996). The neutrality principle was captured by Judge Cardozo in *Marchant v. Mead-Morrison Mfg. Co.*, 252 N.Y. 284, 299 (N.Y. 1929):

> Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent any more than they may shirk it if their belief happens to be the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness. Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thought of others.

[31] *See*, *e.g.*, *Epic Sys.*, 138 S. Ct. at 1642-43 (Ginsburg, dissenting) (Congress' intent in the FAA was "simply to afford merchants a speedy and economical means of resolving commercial disputes").

[32] *Buckeye*, *supra*.

[33] In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), the Court reaffirmed the "national policy favoring arbitration" (*id.* at 10) and held that the FAA applied equally in state court as in federal court.

[34] As experience has shown, arbitration imposes other distinct burdens and disadvantages on individuals pursuing claims against institutions. For example, arbitrations may be shrouded in secrecy, diminishing the capacity of litigation to serve as a corporate accountability mechanism— sunlight as disinfectant (*see* Brandeis, *What Can Publicity Do?*, Harpers Weekly (Dec. 20, 1913)). Further, institutional defendants have the structural advantages of limited discovery and of serving as repeat players who are generally footing the costs of arbitration. *See*, *e.g.*, Jessica Silber-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, n.y. times, Oct. 31, 2015, https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'* n.y. times, Nov. 1, 2015, https://www.nytimes.com/2015/11/02/business/dealbook/ in-arbitration-a-privatization-of-the-justice-system.html

[35] *E.g.*, *Lowden v. T-Mobile USA, Inc.*, 512 F.3d 1213 (9th Cir. 2008) (invalidating class waiver as unconscionable under Washington law); *Skirchak v. Dynamics Research Corp.*, 508 F.3d 49, 57-60 (1st Cir. 2007) (class waiver unfair and oppressive under unconscionability analysis); *Dale v. Comcast Corp.*, 498 F.3d 1216 (11th Cir. 2007) (class waiver substantively unconscionable under Georgia law); *Shroyer v. New Cingular Wireless Services, Inc.*, 498 F.3d 976, 987-88 (9th Cir. 2007) (doctrine that class waivers are "unlawfully exculpatory" under California law not preempted by FAA); *Kristian v. Comcast Corp.*, 446 F.3d 25, 54-61 (1st Cir. 2006) (striking class bar under vindication of statutory rights doctrine); *Muhammad v. Cnty. Bank of Rehoboth Beach, Del.*, 189 N.J. 1 (2006).

[36] *Stolt-Nielsen* left unresolved the issue of what kind of contractual language is needed to infer an agreement to authorize class arbitration. In *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), the Court clarified that ambiguity, like silence, is insufficient; an "affirmative" contractual basis is required. Instead of being a neutral contract enforcement mechanism, the FAA now overrides longstanding general contract interpretation principles, such as *contra proferentem*.

[37] "Such generalized attacks… res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law… and as such, they are far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes… [w]e decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious and impartial arbitrators." *Gilmer* (citations omitted).

[38] Citing *Moses Cone* and the "liberal" federal policy in favor of arbitration. *See also Marmet Health Care Ctr. v. Brown*, 565 U.S. 530, 533 (2012) (reiterating the "emphatic federal policy in favor of arbitral dispute resolution") (citations omitted).

[39] *E.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 n.19 (1985) (if provisions of an arbitration clause would effectively operate "as a prospective waiver of a party's right to pursue statutory remedies… [the Court] would have little hesitation in condemning the agreement as against public policy."); *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 90 (2000) (acknowledging "that the existence of large arbitration costs could preclude a litigant such as [plaintiff] from effectively vindicating her federal statutory rights in the arbitral forum.").

[40] The arbitration clause at issue also contained other features which also stacked the deck and made it impossible to arbitrate the claim. In sum, it cut off "*any* avenue for sharing, shifting, or shrinking necessary costs," leaving Amex's victims the choice to "[s]pend way, way, way more money than your claim is worth, or relinquish your Sherman Act rights." *Id.* at 246 (Kagan, dissenting).

[41] Barely a month earlier, however, in *Encino*, a veritable Mount Everest of precedent did not hinder the Court from toppling the 80-year-old narrow construction rule for overtime exemptions.

[42] Justice Gorsuch bristled at the suggestion of *Lochnerization*, calling it an easy label. *Id.* at 1630. But one thinks that Gorsuch doth protest too much. The Court's arbitration jurisprudence—under which adhesive employer-imposed contracts may trample and undo the substantive protections of the FLSA, NLRA, and similar social regulation—is the closest modern incarnation of *Lochner* classic. Like *Lochner* classic, the Court's FAA jurisprudence disregards the gross imbalance of power between corporate employer and employee, and assumes that force-fed arbitration exemplifies "freedom of contract." Through the guise of arbitration, Court has recreated what Gorsuch characterizes as "*Lochner's* sin": "substitut[ing] its preferred economic policies for those chosen by the people's representatives." *Id.* at 1632. Why else would a distorted, unrecognizable version of the FAA best all other laws, if not out of an empire of a belief that class and collective actions are bad and that corporations should enjoy the liberty to exploit workers and consumers? *Cf. Italian Colors*, 570 U.S. at 252 (Kagan, dissenting) ("To a hammer, everything looks like a nail. And to a court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.").

[43] *E.g.*, *Lamps Plus*, 139 S. Ct. at 1416 (citing *Concepcion*).

[44] For example, under a leviathan FAA, states cannot categorically exempt certain types of claims from arbitration, however desirable as a policy matter. *See Marmet*, 565 U.S. 530 (FAA preempted West Virginia prohibition against arbitration of personal injury and wrongful death cases against nursing homes); *Concepcion*, 563 U.S. at 541 ("When state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA."). Nevertheless, in light of the #MeToo movement, and revelations that perpetrators were able to use confidentiality and secrecy provisions to shield their actions from scrutiny and enable them to prey on further victims, some states have passed laws barring mandatory arbitration of discrimination and/or harassment claims. *See*, *e.g.*, N.Y. CPLR § 7515; Cal. Labor Code § 432.6; *see also Lamps Plus*, 139 S. Ct. at 1422 (Ginsburg, dissenting: praising such laws). Such laws are largely symbolic, quixotic gestures that are likely to be deemed preempted. Numerous federal district courts have concluded as much. *E.g.*, *Wyche v. KM Sys., Inc.*, 2021 WL 1535529, at *2 (E.D.N.Y. Apr. 19, 2021); *New Jersey Civil Justice Inst. v. Grewal*, 2021 WL 1138144, at *7 n.3 (D.N.J. Mar. 25. 2021).

But cf. N. Ky. Area Dev. Dist. v. Snyder, 570 S.W.3d 531 (Ky. 2018), *cert den.* 140 S. Ct. 501 (2019) (upholding prior version of Ky. Stat. § 336.700, under which employer could not condition employment on waiver of claims, rights, or benefi ts of law—read as a generally-applicable bulwark against forced arbitration and agreements to forego exercise of other rights). The statute has since been amended to specify that employers can mandate arbitration, but the case suggests that a neutrally-framed law may not *necessarily* be doomed. *Compare Grewal*, 2021 WL 1138144, at *7 (invalidating similar statute that barred employment contracts waiving "any substantive or procedural right or remedy" in relation to discrimination, harassment, and retaliation claims); n.45, *infra*.

[45] The caveat is that "[s]uch steps cannot, however, conflict with the FAA or frustrate its purpose to ensure that private arbitration agreements are enforced according to their terms." *Id. See Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017) (applying FAA's neutrality principle, under which states may not single out arbitration for disfavored treatment, to invalidate Kentucky rule that agents could not waive their principals' fundamental constitutional rights of access to the courts and trial by jury under a general power of attorney; instead, the rule provided, the delegation of authority to enter into an arbitration agreement waiving these rights had to be clear and specific).

[46] A *qui tam* claim is one brought by a private citizen on behalf of the government to enforce its interests, such as to remediate financial fraud against the government under the False Claims Act, 31 U.S.C. § 3729.

[47] *See generally* Janet Cooper Alexander, "To Skin a Cat: *Qui Tam* Actions as a State Legislative Response to *Concepcion*," 46 U. Mich. J. L. Reform 1203 (2013), proposing that states follow California's lead and adopt PAGA-like laws for enforcement of their employment and consumer protection statutes. The main limitation of PAGA is that, given its nature as a public law enforcement action, employees cannot recover lost wages or other actual damages. *See ZB, N.A.*

v. Super. Ct., 8 Cal.5th 175 (2019). Thus, PAGA is not a panacea for the Supreme Court's FAA jurisprudence but still a mechanism for Labor Code enforcement.

[48] Perhaps unsurprisingly, a petition for certiorari to the U.S. Supreme Court is pending in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573. https://www.scotusblog.com/case-files/cases/viking-river-cruises-inc-v-moriana/ The petition argues that the FAA requires enforcement of bilateral arbitration and that permitting a representative PAGA action on behalf of the government violates the Act. Big business will not tolerate any inroads into its use of the FAA as a silver bullet to undo labor and employment rights. *See* https://www.law360.com/articles/1408245/the-paga-pre-emption-battle-knocking-on-high-court-s-door

The effort to shoulder out independent enforcement efforts does not end there. Similarly, a new petition challenges the Virginia Attorney General's ability, in a public enforcement action, to seek restitution on behalf of victims of usurious lending practices who are themselves subject to forced arbitration. While the Attorney General is not a party to the arbitration agreement, the petition argues that the State cannot circumvent arbitration by pursuing relief as the proxy of defrauded consumers. *NC Fin. Solutions of Utah, LLC v. Va.*, No. 21-111. https://www.scotusblog.com/case-files/cases/nc-financial-solutions-of-utah-llc-v-virginia/ If accepted, the appeal will likely turn on the interpretation and fate of the Supreme Court's decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), in which a six-member majority held that the EEOC, as a non-party to employer-employee arbitration agreements, may pursue victim-specific relief on behalf of employees subject to those agreements.

[49] *See generally* https://www.law360.com/employment-authority/discrimination/articles/1395480/employers-must-brace-for-paga-like-bills-across-us

[50] And, we note, while *Epic* is clear that the FAA empowers an employer to impose class and collective arbitration waivers, other attempts to prevent cooperation and collaboration among employee claimants may indeed violate the NLRA. *Cf. Iskanian*, 59 Cal. 4th at 374 (suggesting that agreements which broadly restrict all forms of collective activity on wage claims—such as clauses that "restrict the capacity of employees to discuss their claims with one another, pool their resources to hire a lawyer, seek advice and litigation support from a union, solicit support from other employees, and file similar or coordinated individual claims"—might not pass muster under the NLRA). Whether the NLRA would be preempted by the FAA in such a circumstance is at least an open question. Finding preemption would be yet another bold leap in the Court's FAA jurisprudence, and is neither warranted nor foreordained.

[51] *Accord Alameda Oil Co. v. Ideal Basic Indus., Inc.*, 326 F. Supp. 98, 102 (D. Col. 1971) ("Rule 23… has been liberally construed… **even, in doubtful cases the maintenance of the class action is favored.**")

[52] In *Italian Colors*, the Supreme Court's hostility to Rule 23 class actions reached an even greater extreme. Justice Scalia went a step beyond "rigorous" and declared that Rule 23 "imposes **stringent** requirements for certification that in practice exclude most claims" 570 U.S. 228, 234 (2013) (emphasis added).

[53] *See* Thomas A. Dickerson & Matthew D. Schultz, *Class Actions: The Law of 50 States*, 1-14 (Rel. 47. 2021) (2020) (noting that, with the exceptions of Virginia and Mississippi, every state and the District of Columbia have adopted specific rules governing class action litigation).

[54] *See additionally*, *Alberts v. Aurora Behav. Health Care*, 241 Cal. App. 4th 388, 414 (2015) (indicating that the federal standard announced in *Dukes* is "more exacting" than state law).

[55] *Accord*: *Freeman v. Grain Processing Corp.*, 895 N.W.2d 105, 114 (Iowa 2017); *Roland v. Annett Holdings, Inc.*, 940 N.W.2d 752, 757 (Iowa 2020) ("Our class-action rules are remedial in nature and should be liberally construed to favor… class actions.").

Liberal versus rigorous class action standards may make a real difference in the result. For example, *Braun v. Wal-Mart Stores, Inc.*, 24 A.3d 875 (Pa. Super. Ct. 2011), *aff'd*, 630 Pa. 292 (2014), upheld a $187 million judgment on behalf of a class of 187,000 Wal-Mart employees who were improperly denied rest and meal breaks and worked uncompensated off-the-clock hours. The court affirmed certification, relying explicitly on "the strong and oft-repeated policy of Pennsylvania that, **in applying the rules for class certification, decisions should be made liberally and in favor of maintaining a class action."** *Id.* at 892. **The Pennsylvania court brushed aside decisions from other states that denied off-the-clock class certification against Wal-Mart on identical facts, pointing out that, unlike Pennsylvania, those states did not liberally construe their local class action rules**.

[56] *See generally When Statute of Limitations Commences to Run as to Cause of Action for Wrongful Discharge*, 19 A.L.R. 5th 439 (1994).

[57] Indeed, following Judge Brandeis' dissent in *Liebmann*, the Court "has long recognized the role of the States as laboratories for devising solutions to difficult legal problems." *Ariz. State Leg. v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (urging "[d]eference to state lawmaking").