

# Undermining Justice: The Two Rises of Freedom of Contract and the Fall of Equity\*

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*This article explores a crucial moment in American legal history, known as the Lochner era, in which the rise of freedom of contract was sharp enough to defeat equity concerns, and then argues that a second rise of the freedom of contract has recently been developed by the Supreme Court in the domain of arbitration agreements. It contends that this second rise is not only a revival of Lochnerism but also, and more so, what the article names “neoliberal-Lochnerism”: a process of legal dissemination of neoliberal common sense outside of the world of contracts. Via close reading of leading recent cases, the article demonstrates that the genus of arbitration agreements now allowed by the US Supreme Court represents an assault on fairness, morality, and justice that is larger than the eye can see at first glance. The result, it is argued, is “law without equity”, a form of neoliberal jurisprudence that allows, and even incentivizes, humans who have accumulated enough power to act opportunistically. Without equity’s restraining power, the article concludes, those possessing a combination of economic means, political influence, and intellectual sophistication can and will exploit the legal rules to undermine justice.*

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\* The title of this article responds to Patrick Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford & New York: Clarendon Press & Oxford University Press, 1979). For an earlier response to the same book see FH Buckley, ed, *The Fall and Rise of Freedom of Contract* (Durham: Duke University Press, 1999).

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## I. Introduction

That a true freedom of contract necessitates legal enforcement of agreements by courts is an accepted premise from time immemorial. Throughout the years, and until today,<sup>1</sup> numerous American cases have quoted a famous English case from 1875 that stated the idea as follows:

if there is one thing which more than another public policy requires it is that men ... shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice.<sup>2</sup>

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- 1. See *e.g.* the 1900 case of *Baltimore & O.R. Co v Voigt*, 176 US 498 (1900) at 505-506; and the 2015 case of *Royston, Rayzor, Vickery, & Williams, LLP v Lopez*, 467 SW (3d) 494 (Tex Sup Ct 2015).
  - 2. *Printing & Numerical Registering Co v Sampson* (1875), 19 LR Eq 462 at 465 (CA (Eng)).

Although few would argue against the general presumption that the freedom of contract requires an enforceability of contracts, there has also been a much larger ongoing debate regarding the *limits* of this idea. Do courts always have an obligation, or a duty, to enforce contracts, or are they allowed to refuse enforcement under some circumstances? With regard to this question numerous American cases have quoted another old and famous English case, authored in 1751 in the “courts of conscience” — England’s courts of equity.<sup>3</sup> In this case, Lord Chancellor Hardwicke explained that the courts of conscience would not enforce agreements that “no man in his senses and not under delusion would make on the one hand, and . . . no honest and fair man would accept on the other”.<sup>4</sup>

Moreover, he also described those undeserving agreements by directly referring to equity and conscience, naming them “*unequitable* and *unconscientious* bargains”.<sup>5</sup> And, although it was not the first time that courts had refused enforcement of unfair contracts,<sup>6</sup> it was certainly one of the first times the refusal was theorized in conscience-oriented terms and reflected the logic of equity. Lord Chancellor Hardwicke’s words established the unconscionability principle as an equity-based limit on the freedom of contract and his words have proven appealing to generations of judges and legal commentators on both sides of the

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3. See *e.g.* Dennis R Klinck, “The Nebulous Equitable Duty of Conscience” (2005) 31:1 Queen’s Law Journal 206 at 208 [Klinck, “Nebulous”] citing *Ewing v Orr* (1883), 9 App Cas 34 (HL) (in which the court said “[t]he courts of equity in England are, and always have been, courts of conscience” at 40); see also Klinck, “Nebulous” (stating that “no doubt historically conscience and equity were intimately allied, even synonymous” at 211).
  4. *Earl of Chesterfield v Janssen* (1751), 28 ER 82 at 100 (Ch) [*Earl of Chesterfield*].
  5. *Ibid* [emphasis added].
  6. For the “ancient roots” of unconscionability, see *e.g.* Stephen E Friedman, “Giving Unconscionability More Muscle: Attorney’s Fees as a Remedy for Contractual Overreaching” (2010) 44:2 Georgia Law Review 317 at 334-43 (citing sources which connect the idea to ancient Jewish and Roman law).

pond.<sup>7</sup> Notably, Hardwicke LC's words have also proven influential in all courts, regardless of the traditional separation between courts of equity and courts of law.<sup>8</sup>

The conflict between the freedom of contract and the unconscionability principle — with the former construed as demanding courts to enforce contracts and the latter understood as ordering courts to refuse enforcement — has yielded an ongoing and intense jurisprudential debate, depicted by a number of scholars.<sup>9</sup> However, for the most part American courts have managed to strike some sort of balance by routinely enforcing contracts while occasionally utilizing unconscionability and other equity-based principles to deny enforcement. And, although the pendulum has shifted from time to time,<sup>10</sup> by and large there has been no definite loser or winner.

An exception emerged, however, during a defined period in American jurisprudence known today as the *Lochner* era.<sup>11</sup> During this

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7. The first American case to refer to the words of Hardwicke LC in *Earl of Chesterfield*, *supra* note 4 is *Powell v Spaulding*, 3 Greene 443 (Iowa Sup Ct 1852) [*Powell*]. The Supreme Court has adopted the full definition in *Hume v United States*, 132 US 406 (1889) [*Hume*]. To date, the latest case citing the definition in full (including the archaic term “unconscientious bargains” as opposed to only referring to *Earl of Chesterfield*, *supra* note 4 is *Brown v Genesis Healthcare Corp*, 228 W Va 646 (Sup Ct App 2011 (US)) at 67-80 [*Brown*], vacated, *Marmet Health Care Center, Inc v Brown*, 132 S Ct 1201 (2012 (US)) [*Marmet*].
  8. See the decision of the US Supreme court in *Hume*, *supra* note 7 (citing Hardwicke LC's definition, and other cases that had followed it, and affirming the lower court's finding that “[t]hese citations are sufficient to show that in suits upon unconscionable agreements the courts of law will take the matter in their own control, and will, without the intervention of courts of equity, protect the parties against their enforcement” at 406, 411).
  9. See *e.g.* Carolyn Edwards, “Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug of War Continues” (2009) 77:3 *University of Missouri Kansas City Law Review* 647.
  10. Charles L Knapp, “Rescuing Reliance: The Perils of Promissory Estoppel” (1998) 49:5&6 *Hastings Law Journal* 1191 at 1202.
  11. The era got its name from the infamous case of *Lochner v New York*, 198 US 45 (1905) [*Lochner*].

era, the Supreme Court created a new jurisprudence, giving the freedom of contract a *constitutional* status strong enough to command the enforcement of contracts even in the face of state legislation specifically designed to invalidate them. This article explores this crucial moment in history, in which the rise of freedom of contract was sharp enough to defeat equity concerns, and then argues that a second rise of the freedom of contract has recently been developed by the Supreme Court in the domain of arbitration agreements.

Much like in the *Lochner* era, this rise involves an emergence of a new jurisprudence, and in this case, one that entails an original form of interpretation of the *Federal Arbitration Act*<sup>12</sup> (“*FAA*”). First in *AT&T Mobility LLC v Concepcion*<sup>13</sup> (“*AT&T*”), and then in *American Express v Italian Colors Restaurant*<sup>14</sup> (“*American Express*”), the Court decided to reverse decisions of the lower courts that refused to enforce class arbitration waivers. In both situations, the lower courts had refused to enforce the waivers because enforcing them would deny the waiving parties — consumers in *AT&T* and a small restaurant in *American Express* — any access to justice. However, as the Supreme Court explained, each of the lower courts — California’s Supreme Court in *AT&T* and the US Court of Appeals for the Second Circuit in *American Express* — erred because, according to the new reading of the *FAA*, the freedom of contract is not limited by fairness or morality concerns in the arbitration context. Rather, “courts *must* rigorously enforce arbitration agreements”,<sup>15</sup> even if the drafting parties deliberately have used their superior bargaining power not to design a private forum of litigation, but as a way *to avoid* litigation, thereby circumventing their legal liability and leaving future claimers with no legal recourse.

What makes this approach comparable to the one developed in the *Lochner* era is that the Court, once again, has taken the freedom of contract to a new level, making it a concept that has the power to de-authorize and delegitimize state actors as they make efforts to prevent

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12. 9 USC §2 (1947) [*FAA*].

13. 131 S Ct 1740 (2011 (US)) [*AT&T*].

14. 133 S Ct 2304 (2013 (US)) [*American Express*].

15. *Ibid* at 2309 [emphasis added].

injustice. Surely, *AT&T* and *American Express* were not the first in which the Supreme Court reversed decisions that invalidated arbitration agreements. However, until recently such reversals were explained by the Court's belief that the terms were not as inequitable as the lower court had seen them. And here lies the "revolution":<sup>16</sup> under the new jurisprudence, arbitration agreements should be enforced even if they are inequitable. Put another way, never before were courts categorically forbidden from using equity principles to overcome extreme injustice caused by an opportunistic and manipulative use of the law. And, the change is especially remarkable given the fact that the ability to utilize equity tools in the context of arbitration is explicitly guaranteed under the *FAA* itself; in its relevant section the *FAA* clarifies that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or *in equity* for the revocation of any contract".<sup>17</sup>

While the parallels between the *Lochner* era and the new arbitration jurisprudence are prominent,<sup>18</sup> the current "neo-*Lochnerism*"<sup>19</sup> is more than a revival of an old belief for a few reasons. First, because applying *Lochnerian* ideas to our times exponentially magnifies their effect mainly due to the incalculable amount and variety of mass contracts that impose arbitration across the entire market. Secondly, despite the similarities, there is something thoroughly different about the new rise of the freedom of contract. This time around, I argue, we face a "neoliberal-*Lochnerism*", and this neoliberal version means, to quote political scientist Wendy

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16. J Maria Glover, "Disappearing Claims and the Erosion of Substantive Law" (2015) 124:8 Yale Law Journal 3052 [Glover, "Disappearing Claims"] (describing the Supreme Court's new arbitration as a revolution).
  17. *FAA*, *supra* note 12 [emphasis added].
  18. I am not the only one to point to this similarity. See *e.g.* Burt Neuborne, "Ending *Lochner* Lite" (2015) 50:1 Harvard Civil Rights-Civil Liberties Law Review 183. However, my focus is on the difference between the original *Lochnerism* and its contemporary version.
  19. For the use of this term in a different context (relating to the Supreme Court's new First Amendment jurisprudence that generally speaking assigned corporations the rights formerly reserved to humans), see Jedediah Purdy, "Neoliberal Constitutionalism: *Lochnerism* for a New Economy" (2014) 77:4 Law & Contemporary Problems 195.

Brown, that “more is at stake ... than support for capital in the name of freedom”.<sup>20</sup> This article suggests that what we are witnessing is no less than a very troubling phase in the neoliberal project — one that uses the power of law to thwart equity principles, denies the logic of equity, and will eventually eradicate the notion of justice.

Beyond the actual outcome of particular cases, neoliberal-*Lochnerism* is produced by the emergence of an original legal discourse that operates to transform the meaning of everything. Offering a close reading of the rhetoric used by Justice Scalia in both *AT&T* and *American Express*, this article demonstrates how the new arbitration jurisprudence works to disseminate neoliberal rationality, in at least three major ways. First, Scalia J’s analysis translates every idea to “*Economish*” — the language of economy — and reframes the issue to fit “the logic of profit-making”.<sup>21</sup> For example, unlike public litigation, private arbitrations are presented as offering “greater efficiency”,<sup>22</sup> by “reducing the cost and increasing the speed of dispute resolution”.<sup>23</sup> Second, the logic of speed and efficiency is used to conduct an assault on a collective agency of legal subjects. For instance, Scalia J asserts that allowing class arbitrations is “likely to generate procedural morass”,<sup>24</sup> and therefore only individual arbitration is rational. Such a “divide and conquer” tactic not only isolates weaker subjects, it also assigns to them the sole responsibility for their poor fate. And third, this neoliberal reasoning is capable of gaining broad popularity outside the elite because it is presented as universal, while the fact that it is biased and reflects only the viewpoints of the most powerful market actors is carefully disguised. All in all, the new rationality takes over not only the economy but also the justice system, which it leaves devoid of

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20. Wendy Brown, *Undoing the Demos: Neoliberalism’s Stealth Revolution* (New York & Cambridge, Mass: Zone Books & MIT Press, 2015) at 153.

21. Eric J Weiner, *Private Learning, Public Needs: The Neoliberal Assault on Democratic Education* (New York: Peter Lang, 2005) at 20 citing Henry A Giroux, “Neoliberalism, Corporate Culture, and the Promise of Higher Education: The University as a Democratic Public Sphere” (2002) 72:4 *Harvard Educational Review* 425.

22. *AT&T*, *supra* note 13 at 1751.

23. *Ibid* at 1749.

24. *Ibid* at 1751.

equity logic.

Before proceeding, an explanation is warranted for my use of the term equity and my recurrent references to equity principles, equity discourse, and the logic of equity. For the purposes of this article, “equity” is deliberately used in a non-technical and non-formalistic fashion. To be sure, as an old concept that survived centuries of use by different humans in a variety of countries and cultures, equity cannot possibly have a simple meaning. And yet, I believe that a *modern working definition* is essential in order to capture the problem at hand. I also believe that the old idea of equity would not have endured unless the specific doctrines developed under this broad title shared a core logic and together brought to modern law a unique focus that goes beyond the particulars.

To conceptualize such a general message, I start from adopting Dennis Klinck’s view that “[o]ne cannot delve very far into judicial equity without encountering the notion of ‘conscience’”;<sup>25</sup> combined with Irit Samet’s argument that conscience offers equity “a workable legal standard”.<sup>26</sup> I continue with an observation made by the former Chief Justice of Australia, Sir Anthony Mason, who wrote that “equity came to reflect a strong sense of morality”, and “equitable principles were shaped with a view to inhibiting unconscientious conduct and providing for relief against it”.<sup>27</sup> Additionally, I draw on two recent works done at the intersection of equity and private law by an American legal scholar, Henry Smith,<sup>28</sup> and a Canadian philosophy scholar, Dennis Klimchuk.<sup>29</sup> Both have attributed to equity the role of inhibiting opportunists from

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25. Dennis R Klinck, *Conscience, Equity, and the Court of Chancery in Early Modern England* (Burlington, Vt: Ashgate, 2010) at vii [Klinck, *Conscience*].

26. Irit Samet, “What Conscience Can do for Equity” (2012) 3:1 *Jurisprudence* 13 at 20.

27. Sir Anthony Mason, “Equity’s Role in the Twentieth Century” (1997-98) 8 *Kings College Law Journal* 1 at 1.

28. Henry E Smith, “Property, Equity, and the Rule of Law” in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014) at 224 [Austin & Klimchuk, *Private Law*].

29. Dennis Klimchuk, “Equity and the Rule of Law” in Austin & Klimchuk, *Private Law*, *supra* note 28 at 247 [Klimchuk, “Equity”].



exploiting the generality, formality, and strictness of the law. Thus, all in all, I use the idea of equity as an insistence that judicial discretion should be applied with conscience in mind, and that the legal outcome must deter exploitation of the law while promoting fairness, moral behavior, and social justice.<sup>30</sup>

This article unfolds in three parts. Part II tells the story of the first rise of the freedom of contract during the *Lochner* era. Part III argues and demonstrates that a second rise of the freedom of contract is taking place in recent years. It also contends that this second rise is not only a revival of *Lochnerism* but further reflects a process of legal dissemination of neoliberal rationality. Part IV explains why and how such neoliberal rationality works to defeat principles of equity, and cautions that “law without equity” severely undermines the quest for justice. The article concludes in a somewhat more hopeful tone, emphasizing the power of equity to counter neoliberal rationality and to offer a better narrative of justice.

## II. The First Rise of Freedom of Contract

The jurisprudence developed by American courts during the “*Lochner* era” had made the limitation of state powers the essence of the freedom of contract. Within a few decades, between the end of the 19th century and the first quarter of the 20th century,<sup>31</sup> the freedoms held by market actors were not only articulated as a chief liberty, but more importantly, were instilled with new meaning. In 1909, only four years after the *Lochner* decision, Roscoe Pound stated that “liberty of contract” was a new term in an article he authored, titled “*The Liberty of Contract*”.<sup>32</sup> In it, Pound

30. For a longer discussion of this role of the judiciary as applied to market behaviors see Hila Keren, “Guilt-Free Markets? Unconscionability, Conscience, and Emotions” (Forthcoming, 2016) Brigham Young University Law Review [Keren, “Guilt-Free Markets”].

31. See e.g. Morgan Cloud, “The Fourth Amendment During the *Lochner* Era: Privacy, Property, and Liberty in Constitutional Theory” (1996) 48:3 Stanford Law Review 555 (presenting different periods covered by the term).

32. Roscoe Pound, “The Liberty of Contract” (1909) 18:7 Yale Law Journal 454.

embarked on a description of the rise of freedom of contract and the meaning attached to the term. The result is an authentic portrayal of the inception of an idea that controls our life until today, without the problems attached to hindsight wisdom.

As Pound explained, the term “liberty of contract” itself was new then and was not used by courts as a legal constraint on governments’ powers prior to 1886. The novelty of the American courts of the period was less in recognizing the freedom of choice available to individuals dealing with one another within the market, and more in using this freedom, or liberty, as a *constitutional principle*. Case after case, the newly constitutionalized “liberty of contract” was used to invalidate state efforts to protect weaker market players, mainly workers, via regulation of the market. With a critical tone, Pound described how, by elevating the freedom of contract to the level of a constitutional principle, the courts have deemed unconstitutional regulations that limited labor hours of women<sup>33</sup> and workers of bakeries,<sup>34</sup> required employers to pay wages in money rather than with credit to the employer’s store,<sup>35</sup> determined how coal should be weighed for purposes of compensating miners,<sup>36</sup> and so on. As Pound generalized: “[i]n this way [freedom of contract] became a chief article in the creed of those who sought to minimize the functions of the state”.<sup>37</sup>

But what about certain individuals who may be pressured into agreeing to harmful contracts? Shouldn’t the state protect them? The answer emerging in the *Lochner* era was bluntly negative. Attempts to argue that some individuals or groups of individuals — such as industrial workers or women — are more vulnerable and need special protection by the state failed. The reasoning, which Pound himself criticized at length as “academic”<sup>38</sup> and hence false, is worth our attention. Freedom

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33. *Ibid* at 475, citing *Ritchie v People*, 155 Ill 98 (Sup Ct 1895).

34. *Ibid* at 479, citing *Lochner*, *supra* note 11.

35. *Ibid* at 472, citing *State v Goodwill*, 33 W Va 179 (Sup Ct App 1889); and citing *Frorer v People*, 141 Ill 171 (Sup Ct 1892) at 473 [*Frorer*].

36. *Ibid* at 471, citing *Jones v People*, 110 Ill 590 (Sup Ct 1884).

37. *Ibid* at 456.

38. *Ibid* at 487.

of contract, courts of the period insisted, is a natural liberty that, as such, applies equally to all. The employer and the employee, for example, were regarded as having equal rights in designing their contract, which included a determination of the amount of working hours. And, since “the employer and the employee have equality of right”, as one court famously stated, “any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land”.<sup>39</sup>

Courts further insisted that to decide otherwise — that is, to affirm protective legislation that invalidates certain contractual provisions — would mean not to protect, but rather, to mistreat and harm the seemingly protected parties. This is because according to this *Lochnerian* approach, only inferior people lack the full capacity — or liberty, or freedom — to contract. Thus, for example, preventing an employee from selling his ability to work for long hours, would mean to degrade and insult him, or to treat him like a fool.<sup>40</sup> Similarly, invalidating a statute requiring wages to be paid solely in money the Supreme Court of Kansas reasoned, “places the laborer under guardianship, classifying him in respect of freedom of contract with the idiot, the lunatic, or the felon in the penitentiary”.<sup>41</sup> What even Pound could see in the midst of the *Lochner* era and without the perspective of time was how hypocritical and unrealistic the hypothesis of equality between stronger and weaker market players was. The problem, of course, was that the equality logic and the presumption that weaker parties enjoy the same freedom of contract as their counterparts was used *against* these vulnerable parties to deprive them of state assistance or state protection.

This harmful effect is not surprising given the fact that insistence by the courts on the idea that miners, bakers, and women equally enjoy the same freedom of contract as their powerful employers never originated from a concern for the dignity of the less powerful individuals. Rather, the true motivation was an antiregulatory approach, aimed at delegitimizing any form of state intervention in the market, with special hostility to acts

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39. *Ibid* at 454, citing *Adair v United States*, 208 US 161 (1908) at 175.

40. *Ibid* at 463.

41. *Ibid* at 477, citing *State v Haun*, 61 Kan 146 (Sup Ct 1899) [*Haun*].

of legislation. The concept of a universal and natural liberty of contract and the persistence that such a liberty exists for all were merely tools used to that end. Or, as Pound remarked upon the new jurisprudence of his time: “the idea of liberty of contract has been invoked to defeat legislation”.<sup>42</sup>

However, the very use of the contractual idea in order to defeat the state has transformed the meaning of the idea itself. What once mainly stood for a celebration of individualism and private ordering has now begun to chiefly symbolize a paralyzed state lacking the power to take care of its own citizens or to promote public interests. As Pound himself warned back in 1909, the rhetoric of equal freedoms is not only “artificial”,<sup>43</sup> but also quite dangerous: it has the potential to “defeat the very end of liberty”.<sup>44</sup> When courts insist that the state cannot and should not interfere if vulnerable parties are exploited by contracts the result for those parties is *less* freedom.

Looking at things from a contemporary perspective, it is important to realize that the liberty of contract jurisprudence that had developed in Pound’s days significantly deviated from the law of contracts of the period. To be sure, *the common law* often called for the enforcement of promises regardless of gaps in bargaining power between the parties and without much concern for fairness. However, principles developed in *equity* were part of the law as well, offering legitimate legal ways to protect vulnerable parties from unfair contracts. As Pound reminds us: “[f]rom the time that promises not under seal have been enforced at all, equity has interfered with contracts in the interests of weak, necessitous, or unfortunate promisors”.<sup>45</sup> For example, equity courts have for a long time released sailors from promises to dispose of their wages “where they appeared unfair, one-sided, or inequitable”; and similarly ignored waivers of necessitous borrowers of their right for redemption.<sup>46</sup> And, despite the ongoing use of such equity-based protections, and prior to the emergence

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42. *Ibid* at 470.

43. *Ibid* at 487.

44. *Ibid* at 484.

45. *Ibid* at 482.

46. *Ibid* at 482-83.

of the *Lochnerian* logic, there was no assertion that their use degraded the protected parties or classified them with “the idiots, lunatics, or felons”.<sup>47</sup> Rather, these protections symbolized a concern for justice, arising from a realistic understanding that not all humans enjoy the same kind of freedom of contract.

Apparently, judges committed to the newly developed jurisprudence of liberty of contract were fully aware of this state of the law, which via principles of equity took into account gaps in the availability of the freedom of contract for individuals in differing socio-economic classes. In *Froerer v People*<sup>48</sup> (“*Froerer*”) for example, the court reviewed legislation requiring that employees be paid monetary wages rather than with credit to their employer’s store. In this context the judge explicitly discussed gaps of power between borrowers and lenders, explaining that “the borrower’s necessities deprive him of freedom in contracting and place him at the mercy of the lender”.<sup>49</sup> The *Froerer* court further explained that such inequality is the reason that “all civilized nations of the world, both ancient and modern” have some version of usury laws.<sup>50</sup> However, as Pound noted, it did not occur to the judge that the same logic was relevant to the miners and workers protected by the legislation under his review, that they too suffered from unequal freedom of contract, and that their inequality called for affirmation rather than invalidation of the reviewed protective legislation. Instead, and in the spirit of the new liberty of contract jurisprudence, the *Froerer* court decided that since all are equal in their freedom to contract no legislation can legitimately limit the ability of workers to “consent” to non-monetary wages.

The insistence of courts during the *Lochner* era that the freedom of contract is equally available to all members of society soon attracted criticism. Pound himself argued that such equality exists only in theory and blamed the courts of his time for their “academic” view of

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47. *Ibid* at 477 (referring to the reasoning of *Hahn*, *supra* note 41).

48. *Ibid* at 473, citing *Froerer*, *supra* note 35.

49. *Ibid*.

50. *Ibid*.

individualism that, he argued, has no factual basis.<sup>51</sup> Part of the damage of such an unrealistic approach, cautioned Pound, was a growing feeling of bias. Quoting “an acute and well-informed observer”, Pound reported “a growing distrust of the integrity of the courts”, coming from a “belief that the present judge has been a corporation attorney, that his sympathies and experience and his whole view of life is on the corporation side”.<sup>52</sup> The contemporary version of this salient bias argument will be further developed later.<sup>53</sup> For now, however, it is worth to note that the contention that letting freedom of contract take over equity principles risks the integrity of the law was expressed as early as in the midst of the *Lochner* era.

Much as Pound predicted in a hopeful tone, the *Lochner* era eventually came to an end. Specifically, the Supreme Court reversed its *Lochner* decision in 1937,<sup>54</sup> and more generally, protective legislation was no longer systematically deemed unconstitutional. However, as professor Robin West recently argued, the *concept* of freedom of contract as it was formed in the *Lochner* era — as “a natural right to determine whether, with whom, and on what terms we will take on other-regarding obligations, that in turn determines a sphere of freedom into which the state may not intrude” — remained alive.<sup>55</sup> As we shall now see our contemporary understanding of the idea of freedom of contract, to quote West, “is still strikingly *Lochnerian* in its content — we just do not think the Constitution protects it any longer”.<sup>56</sup> However, in the coming section I go beyond West’s argument to caution that our current version of *Lochner* has further transformed the original concept of freedom of contract, elevating its status and deepening its reach in a manner that

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51. For a similar contemporary argument see David Strauss, “Why Was *Lochner* Wrong?” (2003) 70:1 University of Chicago Law Review 373 at 383-86.

52. Pound, *supra* note 32 at 487.

53. See Part IV, below.

54. Robin L West, “The Right to Contract as a Civil Right” (2014) 26:4 Saint Thomas Law Review 551 at 558 [West, “The Right to Contract”], citing *West Coast Hotel Co v Parrish*, 300 US 379 (1937) at 391.

55. West, “The Right to Contract”, *ibid* at 558.

56. *Ibid.*

presents a new level of threat to equity principles.

### III. The Second Rise of Freedom of Contract

#### A. The New Arbitration Jurisprudence

For several decades it seemed as if the freedom of contract was on the fall. For a while, and with a dip in the period known in American history as the New Deal, legislators and judges had shown an increased willingness to limit the freedom of contract in order to promote public goals and social justice. For example, new antidiscrimination laws limited the freedom in selecting contractual partners, emphasizing that certain categories, such as gender or race, could no longer be a legitimate basis for rejecting a potential partner. Notably, courts had used their equity powers, and especially the unconscionability principle, to invalidate unfair contracts and to release parties with inferior bargaining power from predatory obligations.<sup>57</sup>

During this post-*Lochner* era it seemed as if the old rivalry between the state and the market had been settled; the state was no longer required to leave the market alone (“*laissez-faire*”); and some political supervision of the economy was appropriate. While the freedom of contract still functioned as a symbol of autonomy, agency, and choice, and as imposing on courts an almost absolute duty to enforce contracts, it seemed to have lost its *Lochnerian* face that had previously debilitated the state and its legal powers and as imposing on courts an almost-absolute duty to enforce contracts. The Supreme Court’s special liberty of contract jurisprudence — as described by Pound — was put to rest, and instead the Court’s constitutional attention, especially under the leadership of Chief Justice Earl Warren, turned away from the protection of the market and towards matters more associated with modern democracy and its operation.

However, at some point during the 1970s, things began to change,

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57. See *e.g. Williams v Walker-Thomas Furniture Co*, 350 F (2d) 445 (DC Cir 1965).

creating what many refer to today as our “neoliberal” age.<sup>58</sup> In addition to deregulation, privatization, and a general revival of the conflict between market and state, the neoliberal decades have brought back the *Lochnerian* understanding of freedom of contract. In this second rise of the freedom of contract, the idea has re-gained its meaning as a legal and political restraint on the state and its legal powers. And again, similar to the *Lochner* era, the renewed high status of the freedom of contract has resulted from the emergence of a new jurisprudence that has been developed by the Supreme Court: in this case, a new arbitration jurisprudence.

The Supreme Court’s new arbitration jurisprudence, recently referred to as the arbitration “revolution”,<sup>59</sup> is an original form of interpretation of the *FAA* established by the Supreme Court in recent years. Unlike the *Lochner* era, the Court’s new jurisprudence is aimed not at legislators but at the work of judges in lower courts who have used equity principles, and mainly the doctrine of unconscionability, to avoid enforcement of what they have perceived as unfair arbitration agreements. What is exceptional about this approach is that — parallel to the *Lochner* era — the Supreme Court has taken the freedom of contract to a new level, making it a concept that has the power to de-authorize and delegitimize state actors as they make efforts to prevent injustice.

At the beginning, long before this revolution, the *FAA* was an act of legitimization. Its enactment in 1925 was interpreted as establishing the once-doubted freedom of contractual parties to agree on private dispute resolution outside of the public legal system. At that period, enforcement of arbitration agreements was only a way to publicly support the freedom of contract of parties with similar bargaining power(s) who chose to negotiate and conclude an agreement to arbitrate their future disputes.

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58. See e.g. David Singh Grewal & Jedediah Purdy, “Introduction: Law and Neoliberalism” (2014) 77:4 *Law & Contemporary Problems* 1. Defining “neoliberalism” is a hard task that is beyond the scope of this work. However, the discussion that follows explains some of the main features of neoliberalism. See generally, David Harvey, *A Brief History of Neoliberalism* (Oxford: Oxford University Press, 2005) at 206.

59. Glover, “Disappearing Claims”, *supra* note 16.



In those times, most corporations and big businesses did not use this freedom in their relationships with their customers, workers, franchisees, or other weaker parties.<sup>60</sup> Indeed, in 1953, the Supreme Court indicated that enforceability is limited to transactions made at arm's length as opposed to situations in which the plaintiff "had no choice but to accept the arbitration stipulation, thereby making the stipulation an unconscionable and unenforceable provision in a business transaction".<sup>61</sup>

Next came privatization. In 1983, time that importantly accords with the inception of the neoliberal age, the Supreme Court announced that the *FAA* reflects "a liberal federal policy favoring arbitration agreements" and therefore "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration".<sup>62</sup> In the years that followed, the Court consistently applied its pro-arbitration policy, expanding the *FAA*'s reach far beyond enforcing agreements between businesses with similar powers. Most importantly, the Court affirmed, and by that encouraged, an increasing use of arbitration clauses in contracts of adhesion drafted by legal teams working at the service of big corporations. Those form contracts compelled millions of weaker parties — consumers, workers, clients, patients, franchisees, and other would-be-claimants — to forgo public litigation and instead commit to resolving disputes in arbitration.<sup>63</sup> To enhance the transference of disputes from the public to the private system, many restrictions on the types of claims considered arbitrable were removed, giving drafters of form contracts the leeway to subject to arbitration a variety of statutory rights which never before were discussed in arbitration, including those protected under antidiscrimination laws.

As in any other act of privatization, the shift from public to private legal services was followed by a transformation of the service itself.

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60. J Maria Glover, "Beyond Unconscionability: Class Action Waivers and Mandatory Arbitration Agreements" (2006) 59:5 *Vanderbilt Law Review* 1735 at 1740 [Glover, "Beyond Unconscionability"].

61. *Wilko v Swan*, 346 US 427 (1953) at 440.

62. *Moses H Cone Memorial Hospital v Mercury Construction Corp*, 460 US 1 (1983) at 24-25.

63. David Horton, "The Shadow Terms: Contract Procedure and Unilateral Amendments" (2010) 57:3 *UCLA Law Review* 605 at 621-22.

Using their excessive power and their control of the drafting process, corporations not only insisted on transferring litigation to a private forum, but also invested resources in changing the rules governing the private process and its results. Form contracts were used, for example, to limit discovery rights, shorten limitation periods, and eliminate specific remedies.<sup>64</sup>

The judicially supported privatization of dispute resolution services combined with the ability to modify the rules of private litigation in a way that would better serve the interests of the drafters of the arbitration agreements certainly sacrificed the interests of their weaker counterparts. And yet, before the most recent change of jurisprudence, this sacrifice was still somewhat cabined mainly by the idea of unconscionability. The Court's pro-arbitration approach prior to the revolution was explained by the virtues that the Court attributed to the mechanism of arbitration. Time and again, courts emphasized that their willingness to enforce the arbitration agreement is based on their belief, or assumption, that arbitration agreements benefit *both parties* by offering them an effective path of dispute resolution. Following this logic courts refused enforcement when the agreement dictated an arbitration that was clearly designed to harm one of the parties. Accordingly, courts used the doctrine of unconscionability to invalidate, for example, an arbitration agreement that was designed to make the arbitration process prohibitively expensive for purchasers of computers.<sup>65</sup>

The most significant change brought by this court-approved privatization was the imposition of class action waivers. Those waivers — which quickly became part of every standard arbitration agreement — work to ensure that weaker parties remain isolated from each other and forego the ability to join others similarly harmed by a corporation.<sup>66</sup> As we shall soon see, it is this change that eventually gave rise to the Supreme

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64. Glover, "Beyond Unconscionability", *supra* note 60 at 1742.

65. See *e.g. Brower v Gateway 2000, Inc*, 676 NYS (2d) 569 (App Div 1998) (invalidating a term requiring arbitration due to a minimum up-front fee of \$4,000 and explaining that such fee would "deter consumers from invoking arbitration" at 573).

66. Horton, *supra* note 63 at 631-32.

Court's new arbitration jurisprudence. Instead of merely turning a public process into a private one, those waivers have a special potential to harm weaker parties by effectively preventing them from the pursuit of their rights, even in a limited private forum. This effect is especially relevant within the context of claims that have a relatively small monetary value due to the cost of litigation far exceeding the potential reward. In those cases, enforcement of the arbitration agreement does not lead to private litigation but rather to the prevention of *any* litigation, vanquishing any legal right(s) the weaker party may have against the stronger party. This potential of class arbitration waivers to minimize or even eliminate litigation did not escape the awareness of drafters of form contracts, and the waivers became a widespread strategy used by big businesses in their contracts with consumers, employees, and other weaker parties. In this age of privatization, many courts enforced class arbitration waivers as part of the protected freedom of contract and despite their infringement on weaker parties' rights.

And yet, in 2005, California's Supreme Court famously responded to the problem by declaring class arbitration waivers unconscionable provided that these waivers were not negotiated and practically amounted to a deprivation of the right to litigate not only in courts but also in arbitration. Importantly, this admittedly narrow limitation was linked by the court to the idea of an exploitation of the legal right to contract by those with excessive bargaining power. Creating the *Discover Bank v Superior Court*<sup>67</sup> ("*Discover Bank*") rule, which would later be abrogated by the new arbitration jurisprudence, the California Supreme Court emphasized the need to limit in certain situations — and via the doctrine of unconscionability — the freedom of contract of the stronger party. The Court explained:

when the [class arbitration] waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and ... the party with the superior bargaining power has [allegedly] carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then ... the waiver ... [is] unconscionable under California law and should not be enforced.<sup>68</sup>

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67. 113 P (3d) 1100 (Cal Sup Ct 2005) [*Discover Bank*].

68. *Ibid* at 1110.

For several years, courts followed the *Discover Bank* rule and applied it both in the context of consumer contracts as well as in some employment contracts.<sup>69</sup> This is precisely what the California Court of Appeals did in the litigation between *AT&T* and its consumers who contested the fact that the company charged them taxes on mobile phones it advertised as being given for free.<sup>70</sup> Since the overcharge was relatively small and could not possibly allow for an individual litigation, the consumers initiated a class action thereby creating a need for the courts to decide the validity of the class arbitration waivers that were included in all of *AT&T*'s contracts. Following the rule of *Discover Bank*, the court of appeals decided to invalidate the waivers as unconscionable. The Ninth Circuit Court of Appeal affirmed.<sup>71</sup> And then came the “revolution”.

After granting a *certiorari*, the Supreme Court decided in 2011 to abrogate the *Discover Bank* rule, forbidding courts around the country to use the doctrine of unconscionability in order to invalidate class arbitration waivers. This, of course, was not the first time the Supreme Court reversed a lower court's decision ordering the enforcement of class arbitration waivers in consumer contracts.<sup>72</sup> However, before *AT&T*, such a reversal was explained by a belief that the terms were not as inequitable as the lower court had seen them. And here lies the revolution: under the new jurisprudence the arbitration agreement is enforceable even when it is inequitable. In *AT&T* the Supreme Court emphasized for the first time that, when it comes to arbitration, freedom of contract trumps even when it is strategically used by the stronger party, not to channel litigation away from courts and into the private sphere, but rather *to avoid litigation*

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69. The *Discover Bank* rule relates to consumers' contracts of adhesion. It was later extended to employment contracts: see *Gentry v Superior Court*, 165 P (3d) 556 (Ca Sup Ct 2007) [*Gentry*]. But compare with Peter Danysh, “Employing the Right Test: The Importance of Restricting AT&T v Concepcion to Consumer Adhesion Contracts” (2013) 50:5 Houston Law Review 1433 at 1462 (arguing that the court in *Gentry* ruled only on a claim for overtime pay pursuant to the Labor Code and its decision should not be read in a broader way).

70. *Laster v T-Mobile USA Inc*, 407 F Supp (2d) 1181 (SD Cal 2005).

71. *Laster v AT&T Mobility LLC*, 584 F (3d) 849 (9th Cir 2009).

72. See e.g. *Green Tree Financial Corp-Alabama v Randolph*, 531 US 79 (2000).

*altogether*. The Court confirmed corporates' opportunistic drafting of contracts in a way that would block both the path to public litigation *and* the path to collective private litigation, even in cases where the third path — of individual arbitration — is undoubtedly futile. Notably, the new jurisprudence requires lower courts to refrain from using equity principles, and especially the unconscionability doctrine, even when one party — namely a big corporation — has abused its freedom of contract, creating a set of terms appearing like an agreement to settle disputes in arbitration but realistically having the opposite goal and effect: to make any review of disputes as difficult and improbable as possible.

Later efforts of lower courts to narrow the new *AT&T* rule of unlimited freedom and disempowered courts failed. In fact, two years after *AT&T* the Supreme Court extended its new jurisprudence even further, clarifying that the *FAA* preempted not only protections awarded under contract state law — mainly via the doctrine of unconscionability — but also rights secured under Federal law. In a litigation between American Express and a small restaurant named Italian Colors, the Court affirmed a class arbitration waiver that effectively *prevented* arbitration with regard to rights secured under Federal antitrust laws.<sup>73</sup>

What is unique about this arbitration jurisprudence and what marks it as “new”, or even “revolutionary”, is the willingness of the Court to approve and enforce any product of the freedom of contract as exercised by stronger parties, regardless of the consequences to the other party and to society as a whole. While this is not the first time we have seen a strong pro-arbitration jurisprudence that admittedly shrinks the ability of weaker parties to enforce their rights, in the past there were some safeguards and some limitations that remained in place. Specifically, until recently, lower courts always kept the tools of equity at their disposal. And, what is more, the legitimacy of utilizing those equity tools is explicitly guaranteed under the *FAA* itself. In its relevant section, the *FAA* clarifies that arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or *in equity* for the

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73. *American Express*, *supra* note 14.

revocation of any contract”.<sup>74</sup>

In other words, never before *AT&T* and *American Express* had it reached a point in which the Court recognized the harm to the weaker party but responded by saying that it is, to quote Justice Kagan’s dissent, “[t]oo darn bad”.<sup>75</sup> And never before had the *FAA* been interpreted in a way that would officially offer corporations, to quote Kagan J again, “de facto immunity”,<sup>76</sup> and “a foolproof way of killing off valid claims”.<sup>77</sup> Finally, never before were courts categorically forbidden from using equity tools to overcome extreme injustice caused by opportunistic use of the law.

## B. The Meaning of New Arbitration Jurisprudence

What is the meaning of such new jurisprudence? At its most basic level, it reflects a heyday of the freedom of contract, comparable to the rise of the idea during the *Lochner* era. Again, we are witnessing a jurisprudence that refuses to limit the freedom of contract regardless of the consequences of such an unfettered version of freedom. And, similar to its predecessor, this second rise of the freedom of contract includes de-legitimization and a rejection of any state response that attempts to protect the rights of weaker parties and/or maintain a minimal level of social justice. To the extent that equity stands for the general quest for fairness and justice and for inhibiting the exploitation of the formality of law, the new jurisprudence does not leave room for it.

Moreover, and still in parallel to the *Lochner* era, the new jurisprudence aligns itself with the interests of stronger parties, such as those in *AT&T* and *American Express*, without admitting to it. The effect

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74. *FAA*, *supra* note 12 [emphasis added].

75. *American Express*, *supra* note 14 at 2313.

76. *Ibid* at 2315.

77. *Ibid*. For this aspect of the new jurisprudence see Glover, “Disappearing Claims”, *supra* note 16 (arguing that the “new approach erodes substantive law itself by empowering private parties, through contract, to frustrate or altogether eliminate claiming in any forum, and thereby to rewrite the scope of their obligations under substantive law” at 3066).

is achieved by celebrating, and relentlessly enforcing, contracts drafted by strong parties and imposed on weaker parties, while portraying the contractual process as equal and reciprocal. To see that suffice is to pay attention to Scalia J's rhetoric. In *AT&T*, Scalia J presents the logic of the freedom of contract in the context of arbitration, stating, "[t]he point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute".<sup>78</sup> This is the chosen rhetoric despite Scalia J's awareness of the fact that the consumers in this case, and in any other case for that matter, lacked any freedom to design the arbitration process. Such awareness is expressed when Scalia J concedes, albeit in a different part of his decisions, that "the times in which consumer contracts were anything other than adhesive are long past".<sup>79</sup> And yet, awareness of this reality does not stop Scalia J from presenting the contractual process as free and further referring to its result — six times along the decision — as establishing a "bilateral" arbitration,<sup>80</sup> implying that both parties exercised their freedoms and chose arbitration as the best way to mutually resolve their future disputes.

So far the new arbitration jurisprudence may seem as though it is mainly a revival of the *Lochner* era. However, much more is at stake. First of all, applying *Lochnerian* ideas to our times exponentially magnifies their effect. While old *Lochnerism* glamorized the freedom of contract mainly in the domain of industrial labor, the new jurisprudence covers incalculably larger amount of contracts that impact consumers, patients, clients, borrowers, franchisees, small investors, and virtually all other individuals and businesses who do not belong within a powerful "corporate America". Similarly, while *Lochnerism* limited state legislators from interfering in the market, the new jurisprudence additionally restricts, as seen in *AT&T* itself, the work of courts around the country. And finally, while *Lochner* deprived weaker parties of rights awarded to them under law, the new jurisprudence, as I will further discuss later, *additionally* deprives them of rights arising from the principles of equity. In other words, part of what is new here is the magnitude of the phenomenon of

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78. *AT&T*, *supra* note 13 at 1749.

79. *Ibid* at 1750.

80. *Ibid* at 1745, 1749-51.

celebrating the freedom of contract at the expense of other values.

However, this difference in scale, devastating as it is due to its role in intensifying inequalities and injustice, is only the tip of the iceberg. “More is at stake”, writes political scientist Wendy Brown, “than support for capital in the name of freedom”.<sup>81</sup> In the coming part I will argue and demonstrate that the new-*Lochnerism* amounts to a “neoliberal-*Lochnerism*” and that what we are witnessing is no less than a salient and very troubling phase in the dissemination of neoliberalism — one that thwarts equity principles both in theory and in practice.

### C. The New Jurisprudence as a Neoliberal-*Lochnerism*

To be able to evaluate the magnitude of the risk, it is imperative to consider neoliberalism beyond all the ways in which it promotes economic policies aligning with the idea of a free market. Conceived by Pierre Bourdieu as “a political project”, neoliberalism works *outside* the economic field, not only within it. Indeed, careful observation with a critical eye reveals that neoliberalism stealthily operates to create a new “order of normative reason”,<sup>82</sup> to redefine rationality, and to enforce itself as the common sense of all subjects, while denying the possibility of other logics. In this way, neoliberalism has the ability to change the way we understand the world, process our experiences, and respond to challenges. As Margaret Thatcher once said: “[e]conomics are the method, but the object is to change the soul”.<sup>83</sup> But how is the objective of changing souls achieved? As Wendy Brown argues, *law* is an important medium through which neoliberalism disseminates its logic beyond the economy; and, as I will argue next, the new arbitration jurisprudence provides a powerful demonstration of such an operation.

The legal reasoning of the Supreme Court in the cases creating the new arbitration jurisprudence works to disseminate neoliberal rationality and to revise our common sense in at least three major ways. First, it frames the legal question of arbitration contracts’ enforceability solely

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81. Brown, *supra* note 20 at 153.

82. *Ibid* at 30.

83. *Ibid* at 153.



in neoliberal terms, creating a strong economized discourse in an arena formerly belonging to the justice system: that of dispute resolution. This strong discourse silences and vanquishes a host of other discourses, with the main victim being — as later further discussed — an equity discourse aimed at the prevention of unconscionable conduct. Second, and relying on this economized discourse, the same legal reasoning operates as an assault on the collective agency of legal subjects, applying a “divide and conquer” tactic that not only isolates and wears off weaker subjects but also, and alchemically, makes *them* — and them alone — responsible for their poor fate. And third, this neoliberal reasoning is gaining broad popularity outside the elite because it is presented as universal, while the fact that it is biased and reflects only the viewpoints of the most powerful market actors is carefully disguised. All in all, the new rationality takes over not only the economy and the market, but also the justice system. Consequently, and for the second time in history, the law conflicts with equity and all it stands for. This time, however, King James I is not there to side with equity.<sup>84</sup> In what follows I will demonstrate each of the three neoliberal moves that, together, create this effect.

## 1. Economized Discourse

Under the new rule of *AT&T*, the *FAA* is interpreted as preempting the state-level contractual doctrine of unconscionability. Similarly, under *American Express*, the *FAA* preempts the doctrine of effective vindication of Federal rights. Together, these two decisions may leave parties with inferior bargaining power with no legal recourse against the big corporations that had them sign a class arbitration waiver. But why? What is the shared logic that justifies this dramatic result? The key, according to Scalia J and the four other justices that sided with him, is *efficiency*. And not just an abstract notion of efficiency: as Scalia J explains and then reiterates in *AT&T*, it is all about economic efficiency, concretely measured by “costs”, “savings”, and “speed”.<sup>85</sup> Instead of the “costliness

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84. King James I famously decided to favor equity after the *Earl of Oxford's Case in Chancery* (1615), Rep Ch 1 (Eng) at 7 [*Earl of Oxford*].

85. *AT&T*, *supra* note 13 at 1751-52.

and delays of [public] litigation”, states Scalia J as if he were the proud CEO of a successful firm, private arbitration offers “greater efficiency”, and allows for “streamlined proceedings and expeditious results”, while “reducing the cost and increasing the speed of dispute resolution”.<sup>86</sup> Similar rhetoric is used by Scalia J again in *American Express* both by him citing the words of *AT&T* and by branding arbitration as a “speedy resolution”.<sup>87</sup>

Admittedly, the mechanism of arbitration is not perfect even according to Scalia J, as without judicial review there is an increased risk that “errors will go uncorrected”.<sup>88</sup> However, to further economize the discourse, those possible errors, too, are framed not as justice-related issues, but rather are described in market terms. Translated to economic lingo those potential errors are analyzed as “costs”. Moreover, the proliferation of arbitration contracts despite the problem of errors — now re-termed as “costs” — is itself explained based on “the logic of profit-making”.<sup>89</sup> As Scalia J points out, drafters of arbitration contracts still prefer to opt out of the public justice system because it *makes sense* to do so under the only rationality presented in the case — that of a cost and benefit analysis. He explains: “[d]efendants are willing to accept the costs of these errors in arbitration, since their impact is limited to the size of individual disputes, and presumably *outweighed by savings* from avoiding the courts”.<sup>90</sup>

The constant use of the idea and jargon of “incentives” further transforms the issue of arbitration into a purely economic one. For example, as an important part of his legal reasoning, Scalia J stresses in *AT&T* that invalidating class arbitration waivers “will have a substantial deterrent effect on incentives to arbitrate”.<sup>91</sup> Similarly, in *American Express*, Scalia J translates the argument of the restaurant that was not able to fund an individual litigation into “Economish” (the language of

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86. *Ibid* at 1749, 1751.

87. *American Express*, *supra* note 14 at 2312.

88. *AT&T*, *supra* note 13 at 1752.

89. Weiner, *supra* note 21 at 20.

90. *AT&T*, *supra* note 13 at 1752 [emphasis added].

91. *Ibid*.

economics), presenting the problem not as a lack of access to justice,<sup>92</sup> but as having “no economic incentive to pursue [the restaurant’s] antitrust claims individually in arbitration”.<sup>93</sup> And, surrendering to Scalia J’s rhetoric, the dissent in *American Express* replies that with the enforcement of class arbitration waivers, “companies have every incentive to draft their agreements to extract backdoor waivers of statutory rights, making arbitration unavailable or pointless”.<sup>94</sup>

The economized message of the new jurisprudence is additionally amplified by the type of evidence offered by the court. To “prove” the efficiency argument, Scalia J presents empirical data often used in the domain of economics: statistics. The information, produced by the American Arbitration Association as *amicus curiae*, is introduced due to its ability, according to Scalia J, to illustrate *in numbers* both the efficiency of individual arbitration and the inefficiency of class arbitration.<sup>95</sup> This use of data is yet another signature move of neoliberalism where all things, including justice systems, could and should be measured in numbers and in terms of productivity. In order to decide whether to enforce arbitration contracts, the theory goes, we only need to measure how many disputes were resolved per time unit. Thus, “speed” is a repeating theme in *AT&T* and the arbitration proceedings are evaluated solely by their ability to bring a dispute to a quick resolution.

Notably, despite their appearance, numbers and statistics are far from being objective measuring tools and can be manipulated. For the purpose of calculating the speed and quantifying the efficiency of legal proceedings, Scalia J assigns the concept of “resolution” with an oddly narrow meaning. For him, the term resolution only refers to the production of “judgment on the merits”, while other possible resolutions, such as “settlement[s], withdrawal[s], or dismissal[s]” do not

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92. See *e.g.* Charles L Knapp, “Taking Contracts Private: The Quiet Revolution in Contract Law” (2002) 71:3 *Fordham Law Review* 761 (describing arbitration as the “denial of access ... to the law itself” at 782).

93. *American Express*, *supra* note 14 at 2310.

94. *Ibid* at 2315.

95. *AT&T*, *supra* note 13 at 1751.

count.<sup>96</sup> The choice to define a resolution so narrowly may be misleading, especially given the fact — recognized by Scalia J in another part of the decision — that class arbitrations often do not end in judgments on the merits precisely because defendant companies *prefer* to settle in order to avoid negative precedents. In any case, while the logic of defining a resolution in such an unusual manner is not explained in the case, it surely helps in presenting individual arbitrations as more “efficient” than class arbitrations. This special way of counting simply makes individual arbitrations produce more “resolutions”.

To conclude: by heavily using an economized efficiency rhetoric, applying a cost and benefit analysis, committing to incentive thinking, and supporting arguments with only quantitative measures, the legal reasoning in *AT&T* and *American Express* amounts to the building of what Bourdieu called a “strong discourse”.<sup>97</sup> What Scalia J achieves through creating such discourse is an “economization” of the domain of dispute resolution. As any other economization, this too is done by “extending a specific formulation of economic values, practices, and metrics”<sup>98</sup> to noneconomic dimensions of life, in this case the functioning of our justice system as well as the civic rights and values that the system stands for. And, because economization targets noneconomic domains, it works to disseminate neoliberalism not just as an economic approach, but more so as a rationality, defining a new common sense for all.

Another salient component of the neoliberal economization of everything is the strong negation of alternative rationalities. To use economic terms: economization is also an effort to create a neoliberal monopoly within the “market of ideas”, a monopoly that would have the unleashed power to crush already existing competing logics and prevent the emergence of new ones. A few examples from *AT&T* and *American*

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96. *Ibid.*

97. Pierre Bourdieu, “Utopia of Endless Exploitation: the Essence of Neo-liberalism”, *Le Monde Diplomatique* (December 1998), online: Le Monde diplomatique <<http://mondediplo.com/1998/12/08bourdieu>> (“neoliberal discourse is not just one discourse among many”; rather, it is a “strong discourse”) [Bourdieu].

98. Brown, *supra* note 20 at 30.

*Express* can illustrate this feature. First, in *AT&T*, Scalia J determines that “contrary to the dissent’s view”, his interpretation of the *FAA* as a norm designed to promote arbitration is “beyond dispute”.<sup>99</sup> The use of such language expresses not only disagreement with the dissent, but also a denial of the very effort to challenge the economized analysis and its presumption that arbitration is always positive (read: “efficient”). Put differently, once established that arbitration makes economic sense, the discussion ends and the matter becomes “beyond dispute” — so, it must be that the *FAA* means prioritizing arbitration under all circumstances and regardless of the consequences.

Second, initially in *AT&T* and later in *American Express*, Scalia J dismisses the issue of injustice, calling it “unrelated”. Remarkably, situations in which the enforcement of arbitration agreements consequently leaves plaintiffs without neither public nor private path to redress is somehow classified as irrelevant to the discussion. To clarify: my point here is not that Scalia J had an obligation to agree with the dissent. Quite to the contrary, I argue for the importance of pluralism of approaches and against the monopolization of economized logic. Thus, it is not the disagreement between the justices that is my concern, but the attempt of Scalia J to deny *the relevance* of the dissent’s reasoning. How and why concerns about the unavailability of remedies are “unrelated” to the very matter of private dispute resolution are questions that remain unanswered by Scalia J, and thus must be answered by the underlying claim of neoliberalism to exclusivity. Indeed, this last proposition is confirmed in *American Express*, when Scalia J bluntly dismisses the possibility of a competing rationality, declaring an approach that prefers the goals of antitrust law to the goals of arbitration as nothing but “simply irrational”.<sup>100</sup> The overall result is a claim that the economized understanding of the issue of private dispute resolutions is the only logical understanding and other perspectives are not less desirable, but rather, no longer imaginable or worth raising.

Interestingly, in both *AT&T* and *American Express*, the dissent

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99. *AT&T*, *supra* note 13 at 1749.

100. *American Express*, *supra* note 14 at 2309.

attempted to resist the monopoly of economized thinking. In *AT&T* Justice Breyer contests the need to make decisions based on efficiency as the sole criteria, stating: “[t]he intent of Congress requires us to apply the terms of the Act without regard to whether the result would be possibly inefficient”.<sup>101</sup> Likewise, in *American Express* Kagan J attacks the economized logic by pointing out its absurd result which offers corporations “a foolproof way of killing off valid claims”, instead of securing a “method of resolving disputes”.<sup>102</sup> Furthermore, Kagan J goes beyond rejecting the logic of efficiency and insists on introducing significant fairness concerns. Enforcing class arbitration waivers when the plaintiff has no real way to use the path of individual arbitration, argues Kagan J, deprives the plaintiff “of his day in court”,<sup>103</sup> and “confers immunity on a wrongdoer”.<sup>104</sup> And yet, as compelling as this resistance is, what is missing, perhaps due to long years of neoliberal dominance, is a fuller model of thinking; an alternative discourse which could be strong enough to counter the one produced by neoliberalism. As I later further discuss, it is at this point that equity-based discourse could have proved invaluable.

In any case, Scalia J’s response to Kagan J’s dissent in *American Express* further demonstrates that his economized logic tolerates no alternative approaches. “Truth to tell”, he writes quite impatiently, “our decision in *AT&T* Mobility all but resolves this case”.<sup>105</sup> However, since what was at stake in *AT&T* was state law and what was at stake in *American Express* was federal law, it is unlikely that whatever was already decided in *AT&T* could directly settle the dispute in *American Express*. Perhaps what Scalia J means to say in this part of his decision is that in *AT&T* neoliberalism had already won the race between competing rationalities and therefore Kagan J’s dissent is repetitive in trying to challenge the victory; there is simply no room to reopen the question of *how*, that is according to which

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101. *Dean Witter Reynolds Inc v Byrd*, 470 US 213 at 219 (1985) [*Dean Witter*] as cited in *AT&T*, *supra* note 13 at 1758.

102. *American Express*, *supra* note 14 at 2315.

103. *Ibid* at 2314.

104. *Ibid* at 2318.

105. *Ibid* at 2312.

rationality, to analyze the issue of class arbitration waivers.

## 2. An Assault on Collective Agency

Attention to rhetoric will also reveal that in both *AT&T* and *American Express* the Supreme Court did more than economize the issue of class arbitration waivers. Portraying class arbitrations as “slow” and “inefficient” is a necessary step but not a sufficient one for achieving the greater goals of the neoliberal project. Thus, an additional effort was made to represent class arbitrations as dangerous and malicious. Reading *AT&T*’s legal reasoning one first learns that class arbitrations are illegitimate because they are, to cite Scalia J, “manufactured”<sup>106</sup> by the pre-revolution *Discover Bank* rule. Second, readers are told about the specter of chaos when, in a move typical to neoliberalism, the very idea of collective dispute resolution becomes a metaphor for public disorder.<sup>107</sup> Allowing class arbitrations, writes Scalia J in *AT&T*, “is likely to generate procedural *morass*”.<sup>108</sup> And, proving that he chose his words intentionally and that these words are essential to his legal reasoning, Scalia J uses the same rhetorical reference to chaos, word for word, in *American Express*. Additionally, and in the same intimidating vein, the Court cautions that if courts are obligated to ensure that an individual resolution is viable as a condition to enforcing a waiver of class arbitration, the result would be a “litigating *hurdle*”,<sup>109</sup> which “would undoubtedly *destroy* the prospect of speedy resolution”.<sup>110</sup>

And third, in addition to describing class arbitrations as a manufactured, chaotic, and destructive method of dispute resolution, the procedure is also represented as unfair towards those being sued. According to this approach, class arbitrations are not a way for powerless claimants to make their small (*AT&T*) or prohibitively expensive

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106. *AT&T*, *supra* note 13 at 1751.

107. Henry A Giroux, “Neoliberalism, Corporate Culture, and the Promise of Higher Education: The University as a Democratic Public Sphere” (2002) 72:4 *Harvard Educational Review* 425 at 428.

108. *AT&T*, *supra* note 13 at 1751 [emphasis added].

109. *American Express*, *supra* note 14 at 2312 [emphasis added].

110. *Ibid* [emphasis added].

(*American Express*) claims. Instead, according to Scalia J, class arbitrations are a vicious tool utilized to bully corporations “into settling questionable claims”.<sup>111</sup> And, tantamount to class actions carried in courts, private class arbitrations too carry “the risk of ‘in terrorem’ settlements”.<sup>112</sup> The artificial victimization of powerful corporations will be further discussed in the next section, but for the time being the main point is this: the assault on collective legal actions includes judicial effort to demonize class arbitrations.

Awareness of the Court’s evident hostility to class arbitration as expressed in *AT&T* and *American Express* can aid in understanding why the new arbitration jurisprudence belongs with the neoliberal project. If neoliberalism is, as theorized by Bourdieu, “a programme of the methodological destruction of collectives”,<sup>113</sup> then the ongoing judicial attack on class arbitrations fits the premise. It is aimed at preventing consumers, workers, small businesses, and the like, from creating legal collectives. Furthermore, such an approach deprives individuals with less market power of the one tool that may help them protect themselves: the ability to “band together to fight corporate abuses”.<sup>114</sup>

But why does neoliberalism attack collectives? The rationale may be clear if we recall that the suppression of both counter ideas and attempts of resistance rests at the core of the neoliberal aspiration for hegemony. For that reason, when collectives try to use joint power as a method of countering the power of big businesses, neoliberals identify a target for attack. From a neoliberal perspective, and in a paradoxical treatment of autonomy and freedom, “while individuals are supposedly free to choose, they are not supposed to choose to construct strong collective institutions”.<sup>115</sup> The general neoliberal assault on collectives, and the particular attack on institutionalized legal collaborations such as class procedures, is fundamentally a way to divide and conquer.

And yet, even if the assault on collectives makes sense from a neoliberal

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111. *AT&T*, *supra* note 13 at 1752.

112. *Ibid.*

113. Bourdieu, *supra* note 97.

114. Brown, *supra* note 20 at 153.

115. Harvey, *supra* note 58 at 69.



viewpoint: why would the Court get involved and spread the anti-solidarity message? Since the judiciary is an arm of the state, the answer has to do with the general role of the state under the neoliberal scheme. The neoliberal state is supposed to have no public goals and is instead expected to serve the interests of powerful market actors. As a result, explains David Harvey, “the neoliberal state is necessarily hostile to all forms of social solidarity that put restraints on capital accumulation”.<sup>116</sup> And, if need be, the state will use its legal arm, resorting “to coercive legislation and policing tactics ... to disperse or repress collective forms of opposition to corporate power”.<sup>117</sup> Notably, this understanding of the role played by the Court accords with Kagan J’s metaphorical statement in *American Express*. Blaming the majority for promoting an ongoing and deliberate agenda against collective legal procedures, class actions and class arbitrations alike, Kagan J writes: “[t]o a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of [class procedures] everything looks like a class action, ready to be dismantled”.<sup>118</sup>

But the assault on collective actions not only forces people to cope with power in isolation. Rather, its effect is enhanced by the neoliberal signature practice of *responsibilization*. As demonstrated by the history of dispute resolution, the neoliberal order first leaves subjects to the mercy of the market via the process of privatization, and then assigns to them liability for whatever harm they suffer while operating in the market. If under *Lochnerian* classical liberalism the contractual “choice” was framed as somehow serving the self-interest of the person who agreed to work for very long hours, this is no longer the case today. Neoliberalism has long abandoned the idealization of individuals’ self-interests, freely defined, as well as the belief that an invisible hand ensures the outcome is beneficial for all. Instead, subjects are reconfigured as self-investors and self-providers and — regardless of their interests — are expected to align themselves with what would best serve the economy.<sup>119</sup>

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116. *Ibid* at 75.

117. *Ibid* at 77.

118. *American Express*, *supra* note 14 at 2320.

119. Brown, *supra* note 20 at 84.

Accordingly, because individual arbitrations — as we have seen — are presumed “efficient”, *i.e.* making economic sense, it is the responsibility of individuals alone, and not of the state, to use arbitrations to solve their disputes with each other. And, when individuals neglect to self-provide for justice by failing to arrange for a mechanism that actually secures resolution, they have no one else but themselves to blame. In other words, people — and not the state — are now responsible for both *supplying* a private mechanism of dispute resolution and for the *quality* of the resolution the mechanism yields.

It is important to note that neoliberal “responsibilization” is an imposed process that significantly differs from a liberal exercise of human autonomy and agency. As explained by Wendy Brown, people are being responsabilized because neoliberalism, for its own political goals, “solicits the individual as the only relevant and wholly accountable actor”.<sup>120</sup> Such responsabilization is evident in the legal reasoning of Scalia J in both *AT&T* and *American Express*. The Court goes a long way to place gaps of power aside and to emphasize the binding contract to which the weaker party in each case had committed itself to. As opposed to the times of *Lochner*, the obligation to arbitrate of the consumers in *AT&T* and the small restaurant in *American Express* is no longer portrayed as serving their interests and thus as deserving enforcement. Rather, the justification for enforcement stems directly from formalistically framing the entire issue a contractual matter and then responsabilizing the parties who signed the dotted line.

In *AT&T*, Scalia J opens his decision in describing the contract as if it were an agreement between equals, declaring: “Vincent and Liza Concepcion entered into an agreement for the sale and servicing of cellular telephones with AT&T Mobility LCC”.<sup>121</sup> Next, readers learn that the contract included a duty to arbitrate and, when AT&T was sued, it sought nothing more than to enforce its rights “under the terms of its contract with the Concepcions”.<sup>122</sup> To remove any doubt regarding the appropriate nature of the discussion Scalia J reminds readers that

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120. *Ibid* at 133.

121. *AT&T*, *supra* note 13 at 1744.

122. *Ibid* at 1744-45.

“arbitration is a matter of contract”,<sup>123</sup> strongly implying what it is not: a privatized form of dispute resolution carried as an alternative to a service once supplied exclusively by the state via the court system. And, defined as a contract, arbitration is, according to this logic, merely a matter of business exchange in which one simply gets what one bargained for. Or, as Scalia J describes the bargain: “parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution”.<sup>124</sup>

But what if the bargain conflicts with the interests of one of the parties? That, we learn, has no room in the analysis. The only line of reasoning is repeated, as if it were a mantra: “[a]rbitration is a matter of contract, and the *FAA* requires courts to honor parties’ expectations”.<sup>125</sup> And in this way, the Concepcions, like all people not lucky enough to receive services from an in-house legal department that drafts smart contracts, are configured as self-investors who may have made a bad investment decision. Did they have any alternatives? Could they have negotiated better with AT&T or purchased their mobile phones from another corporation that allows class arbitration in the event that things go wrong? Those questions lie outside of the responsabilizing neoliberal analysis under which responsibility is imposed notwithstanding context.

Similar logic is applied in *American Express*. Once again, Scalia J opens with representing the contract as if it suffered from no gaps in the bargaining power of the parties. Italian Colors, described by the dissent as “a small restaurant”,<sup>126</sup> is represented by the majority as “merchants who accept American Express cards”.<sup>127</sup> Next, the first and primary fact readers learn about those “merchants” is that “[t]heir agreement with ... American Express ... contains a clause that requires all disputes between the parties to be resolved by arbitration”.<sup>128</sup> Echoing *AT&T*, the Court then declares that “arbitration is a matter of contract”, adding that “courts

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123. *Ibid* at 1752.

124. *Ibid* at 1751.

125. *Ibid* at 1752.

126. *American Express*, *supra* note 14 at 2313.

127. *Ibid* at 2308.

128. *Ibid*.

must ‘rigorously enforce’ arbitration agreements”.<sup>129</sup> But what happens to the concern for “the policies of the antitrust laws”<sup>130</sup> that might be compromised if small restaurants cannot have any legal recourse against American Express? At this moment responsabilization seems to be the Courts’ only way of answering: small restaurants have “to litigate their claims individually — *as they contracted to do*”.<sup>131</sup>

It is important to recognize that responsabilization is a key stage in the “divide and conquer” strategy of neoliberalism. After institutionalized solidarities — such as class legal procedures — are extinguished, what remains is an isolated entity. At this point responsabilization finishes off what anti-solidarity has started: the subject, and the subject alone, is held responsible for the consequences of his or her behavior. Moreover, the assault on legal solidarities and the responsabilization that follow it are not only *facilitated by* the economization of everything, but are also *facilitators of* enhanced economization. At the most basic level economization invites anti-solidarity and responsabilization because, under economic measures, the inefficiency of class arbitrations justifies their abolition and the frame of a bargain (or contract) calls for “rigorous enforcement” of class arbitration waivers. However, perhaps less noticeably, anti-solidarity and responsabilization also operate to establish the supremacy of economized rationality. It is precisely because subjects are responsabilized that social questions regarding fairness and justice can be dismissed as “unrelated”, and not worth serious consideration. Due to the totality of responsabilization, which assigns a hundred percent of the responsibility to individual subjects, other candidates are completely released from responsibility. Accordingly, the Court does not have to discuss questions of fairness and justice because these issues were already fully resolved by responsabilizing the parties who signed arbitration agreements that effectively deprived them of access to justice. Or, as Kagan J more straightforwardly phrases it, when parties to contracts find themselves alone and with no legal recourse, it is “[t]oo darn bad”;<sup>132</sup> no

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129. *Ibid* at 2309.

130. *Ibid*.

131. *Ibid* [emphasis added].

132. *Ibid* at 2313.

other alternative can be imagined.

### 3. A Biased Approach in a Universal Disguise

As we have seen, the neoliberal approach to arbitration agreements aligns itself with the interests of the economic elite: arbitration is to be judged according to economic criteria, those criteria dictate resistance to collective resolution of disputes, and it is thus sensible to enforce arbitration agreements while leaving the powerless party without any recourse against their powerful drafters. However, an additional step is required in order to spread these ideas successfully and to turn them into the new common sense: the biased nature of the approach must be concealed and the supporting reasoning has to be represented as a universal truth. Indeed, the neoliberal turn was accomplished, and its results have since been maintained and enhanced, via an intentional effort to gain broad popularity and to appeal to everyone. A key strategy has been aligning neoliberalism with the American dream and establishing it “as the exclusive guarantor of freedom”.<sup>133</sup> This general strategy is particularly powerful whenever the law is used as a medium by which neoliberal ideas are disseminated. The foundation, as we have seen, has been in place since the *Lochner* era’s celebration of the idea of the freedom of contract as a universal freedom shared by employers and employees alike. In the new arbitration jurisprudence, however, freedom in the *Lochnerian* sense, defined as “the liberty of the individual in adopting and pursuing such calling as he may choose”,<sup>134</sup> is less emphasized, which should not be surprising given neoliberalism’s disregard for matters of personal fulfillment. Instead, the Court is making statements that, coming from the judiciary, seem universal and neutral but in fact represent only the perspective of the economic elite.

In reading *AT&T* we learn, for example, that the reason for allowing unlimited freedom of contract regarding the design of arbitration processes is “efficiency”. This freedom can be used in many ways; one such way may be to ensure “that the decisionmaker be a specialist in the

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133. Harvey, *supra* note 58 at 40.

134. *Lochner*, *supra* note 11 at 63.

relevant field, or that proceedings be kept confidential to protect trade secrets".<sup>135</sup> At first glance, this statement appears as a neutral description of the advantages of arbitration, one that applies equally to both parties regardless of each party's respective economic positioning. In reality, however, this is far from being the case.

First, at the most general level, counter to what is implied by Scalia J's rhetoric, it is not the "parties", in the plural, who are afforded the "discretion in designing arbitration",<sup>136</sup> but only the drafting party. The less powerful party has to follow the "design" imposed by the drafting party or otherwise forgo the transaction altogether — a step that would be pointless considering that all similar big businesses happen to insist on arbitrations with a similar "design". Second, another large crack in the neutral façade is the utilization of the freedom of design to protect trade secrets. Evidently, workers, consumers, patients, and other powerless parties simply do not have "trade secrets" to protect. And third, regarding the freedom to have experts decide disputes, data gathered and published by journalists and consumer advocates demonstrates that substituting public judges with specialists imposes an expensive burden often carried by plaintiffs who are required to pay filing fees.<sup>137</sup> For all these reasons combined, what is presented as a freedom enjoyed by both parties equally, in fact is only a freedom from the perspective of the powerful party, and in contrast, a major obstacle for the weaker party.

Furthermore, when the *AT&T* Court describes the disadvantages of class arbitrations, it does so while entirely adopting the perspective of the powerful drafters and ignoring that of their weaker counterparts. However, the biased analysis is still presented as a universal truth. For example, the Court counts as a general problem the fact that, in class arbitrations, "[c]onfidentiality becomes more difficult".<sup>138</sup> However, this is a detriment only from the perspective of the stronger party who is interested in fending claims off. The other, weaker party, in contrast, may

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135. *AT&T*, *supra* note 13 at 1749.

136. *Ibid.*

137. Jamie Court, *Corporateering: How Corporate Power Steals Your Personal Freedom* (New York: Jeremy P Tarcher & Putnam, 2003) at 102.

138. *AT&T*, *supra* note 13 at 1750.

be quite interested in sharing information with other similarly-situated claimants. Comparably, Scalia J states that “[a]rbitration is poorly suited to the higher stakes of class litigation”,<sup>139</sup> but readers should ask themselves: higher stakes for whom? Again, this general statement is only true for stronger parties while weaker parties, such as consumers or workers, each typically have much smaller individual claims. The same pattern appears when the Court comments that allowing class arbitrations “will have a substantial deterrent effect on incentives to arbitrate”;<sup>140</sup> once more, this statement only applies to big businesses while the opposite is true for their weaker counterparts.

In response to the bias argument one may answer that the new arbitration jurisprudence merely expresses a belief in free markets without necessarily reflecting a biased outlook in favor of economic elites. And yet, the decision in *American Express* demonstrates that, when faced with a need to choose between a loyalty to the market and a loyalty to big businesses, the Court chose to protect the interests of the economic elite, disguising its choice with a seemingly neutral formalistic reasoning regarding the hierarchy between two Federal norms. As mentioned earlier, in *American Express* a small restaurant claimed that a giant financial company used its monopolist power in a manner that threatens the level of competition in the market. The Court, however, blocked the claim from being discussed by limiting the restaurant to an individual arbitration that it could not possibly afford. In other words, the Court was willing to enforce a class arbitration waiver even when such enforcement risks the level of competition in the market by decreasing the effectiveness of antitrust laws.<sup>141</sup> Such willingness demonstrates that the Court adopted a legal reasoning that reflects a specific perspective — which belongs to the drafting powerful parties — even when it meant sacrificing central principles of economic efficiency.

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139. *Ibid* at 1752.

140. *Ibid* at 1752, n 8.

141. See Glover, “Disappearing Claims”, *supra* note 16.

## IV. The Fall of Equity

With its contribution to the dissemination of neoliberal rationality, the new arbitration jurisprudence does not leave much room for equitable principles and directly attacks the logic of equity. This theoretical and practical threat operates at various levels. First, and most evident, is the negative effect that recent decisions, and mainly the one in *AT&T*, have on judges' ability to use the unconscionability principle. However, my argument is not limited to this unfortunate result and seeks to go much deeper. The second problem is that in a contractual world without an effective unconscionability principle, the freedom of contract becomes a biased concept and thus a prison for most individuals. Third, and more broadly, when the law is being used to disseminate neoliberalism as a controlling rationality, the logic of equity, and with it, its theoretical justification are on the fall. Finally, as a result of this three-layer process, law itself loses touch with justice and its legitimacy is severely undermined.

### A. The Fall of Unconscionability

Recall that the *FAA* itself allows courts to refuse to enforce arbitration agreements on "such grounds as exist at law or in equity for the revocation of any contract".<sup>142</sup> According to this clear language, there should not have been a question regarding the legitimacy of using the unconscionability doctrine to invalidate the terms of arbitration agreements because the doctrine allows revocation of contracts under both equity and the law.<sup>143</sup> Admittedly, even before *AT&T* many judges and theorists argued against excessive use of unconscionability for the purposes of invalidating predatory contracts, within and outside of the context of arbitration.<sup>144</sup> And yet, there is something fundamentally different in *AT&T*'s approach. Unlike other unconscionability opponents Scalia J is not engaging in a debate regarding the desirability of frequent use of the doctrine. Instead,

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142. *FAA*, *supra* note 12.

143. In California, the state of the *AT&T* litigation, the unconscionability doctrine is part of a legislated code.

144. For a description of this approach see Keren, "Guilt-Free Markets", *supra* note 30.



his approach entirely *disallows* judges to use the doctrine in the context of arbitration. It does so despite the clear language of the *FAA* permitting the use, and more importantly, precisely at the core of the domain of the unconscionability principle — when it is obvious that the drafters of the contract have intentionally misused the contractual tool to prevent dispute resolution rather than to secure it.

Not surprisingly, some state courts have found the new ban on an old judicial tool frustrating and have demonstrated resistance.<sup>145</sup> In at least two states, namely West Virginia and Oklahoma, the state Supreme Court openly disregarded the decision, invoking a reprimanding response from the Supreme Court that powerfully enforced its new arbitration jurisprudence.<sup>146</sup> Other state courts have persistently tried to find ways to limit the scope of the new jurisprudence and also tried to define at least some areas in which unconscionability — or other tools — can continue to be utilized in order to release parties from unfair contractual waivers of their rights. Important examples of such an approach, within the context of employment, emerged post-*AT&T* in California. In *Sonic Calabazas A, Inc v Moreno*,<sup>147</sup> Justice Goodwin Liu wrote on behalf of the majority that, even after *AT&T* and *American Express*, “the exercise of [unconscionability] as applied to arbitration agreements remains intact, as the *FAA* expressly provides”.<sup>148</sup> However, this exercise “remains intact” primarily in theory, while in practice the new arbitration jurisprudence makes it hard to carve out areas not preempted by the *FAA*.

In a creative effort to define such areas, despite the decision in *AT&T*, Liu J drew a line between waivers of class arbitration, which can no longer be invalidated, and waivers of special protections offered to employees

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145. Lyra Haas, “The Endless Battleground: California’s Continued Opposition to the Supreme Court’s Federal Arbitration Act Jurisprudence” (2014) 94:4 Boston University Law Review 1419 at 1421 (describing California’s continued resistance to the Supreme Court’s expansive interpretation of the *FAA*); James Dawson, “Contract After Concepcion: Some Lessons from the State Courts” (2014) 124:1 Yale Law Journal 233.

146. See Salvatore U Bonaccorso, “State Court Resistance to Federal Arbitration Law” (2015) 67:5 Stanford Law Review 1145 at 1158.

147. 311 P (3d) 184 (Cal Sup Ct 2013).

148. *Ibid* at 201.

under a “Berman hearing” — an informal administrative proceeding designed to help employees bring wage claims. Justice Liu acknowledged that post-*AT&T*, courts can no longer use unconscionability in a manner that will categorically delay or prolong the arbitration process. And yet, he insisted, courts are still allowed to exercise an unconscionability inquiry regarding the total fairness of the scheme of arbitration because, in doing so, they are taking into account the substantive rather than the procedural protections that were surrendered by the employee. In this way, utilizing unconscionability does not necessarily have the effect of slowing down what is supposed to be a speedy process. Such an inquiry, explained Liu J, should focus “on whether the arbitral scheme imposes costs and risks on a wage claimant that make the resolution of the wage dispute inaccessible and unaffordable, and thereby ‘effectively blocks every forum for the redress of disputes, including arbitration itself’”.<sup>149</sup> As one court recently summarized, Liu J’s approach is “that post-*Concepcion*, California courts may continue to enforce unconscionable rules that do not ‘interfere with fundamental attributes of arbitration’”.<sup>150</sup>

Despite those efforts to save a sliver of the traditional uses of unconscionability much of the original power of this equity-based doctrine seems to be lost. For hundreds of years unconscionability has been used by courts as a broad standard and as an overarching principle. Its power — as well as its vulnerability to criticism — stem from its generality and resilience to manipulation. At least in theory, the principle applies regardless of whatever *form* of contractual harshness was used by the stronger party and courts are always authorized to undo the unfair results achieved by abusing the contractual mechanism and the freedoms it affords. Thus, chopping unconscionability to pieces while disallowing courts the use of most of the pieces — that is when there might be an interference with attributes of arbitration — is insidious to the core of the principle.

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149. *Ibid* at 293, citing *Gutierrez v Autowest Inc*, 114 Cal (4th) 77 at 90 (App Ct 2003).

150. *Carlson v Home Team Pest Defense Inc*, 2015 Cal App Ct Lexis 702.

To be sure, the “rise and fall of unconscionability”<sup>151</sup> is a general trend in American jurisprudence not limited to arbitration agreements and in and of itself relates to our neoliberal age.<sup>152</sup> However, it is imperative to realize that paralyzing the unconscionability principle in the context of arbitration looms larger than any other limitation of the principle and hence risks its *general* survival. This is the magnitude of the problem because, by drafting sophisticated arbitration schemes, stronger parties use their freedom of contract to avoid all their other obligations — statutory and contractual alike. Even in a neoliberal age, non-drafting parties such as workers and consumers may have some rights under applicable regulations and/or under their respective contracts. For example, employees may be entitled to a certain combination of wages and benefits. And yet, these rights are meaningless when they are subjected to an arbitration scheme that makes them virtually unenforceable — an effect that is achieved by arbitration terms that block access not only to the public justice system but also to its privatized alternative. Put differently, when courts are subject to the new arbitration jurisprudence and can no longer use unconscionability against unjust arbitration schemes, they are left powerless and helpless. Placed in this weakened position, courts cannot cope with abuses of the freedom of contracts. This, in turn, yields a passive affirmation of predatory behavior and encourages wrongdoers to further exploit their superior status and their unlimited — and ever growing — power.

## **B. Freedom as Prison**

Initially, the Court of the *Lochner* era established a general freedom of contract strong enough to constitutionally defeat the legislative power of the states. About a century later, the Court has engaged in a second wave of *Lochnerism*, framing private dispute resolution as a contract and demanding rigorous enforcement of its terms even if the drafters have used their freedom to design a contract that makes them immune

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151. Anne Fleming, “The Rise and Fall of Unconscionability as the ‘Law of the Poor’” (2014) 102:5 *Georgetown Law Journal* 1383.

152. For a discussion see Keren, “Guilt-Free Markets”, *supra* note 30.

to legal challenges. This version of freedom is strong enough to defeat the judicial power of the state, thereby rendering salient contractual and statutory rights unenforceable. Taken together, the two rises of the freedom of contract accumulate to a version of freedom that ends up imprisoning masses of people. Freedom turns into imprisonment because of the biased way it has been defined. As it stands today, the freedom of contract encompasses only aspects of freedom that are fully available and meaningful for the most powerful market players: big corporations and their most wealthy individual owners. At the same time, the concept does not include the kind of freedoms that matter most to all other members of society who have to work for a living and struggle with handling their finances. To see this point more clearly, it is important to distinguish between the different components of the freedom of contract and the way these components operate to both enhance legitimate choices and inhibit state interference.

Considering the freedom of contract as a freedom of private choice reveals that the freedom refers to several sets of choices. Organized chronologically, according to the typical progress of the conventional contracting process, there are three main freedoms of choice. First, people have a choice in assuming contractual liability. At the very core of private ordering lies the notion of self-imposed obligations and thus, at least in theory, a party should be subject to a contractual liability only if he or she voluntarily assumed such a liability. Unless and until one consents, one has what theorists call a freedom *from* contract — the right to avoid contractual liability despite being involved in a bargaining process.<sup>153</sup>

Second, once a desire to contract exists, a party should be free to choose with whom to form it, and thus can ignore or reject those he or she does not wish to engage with. I shall call this aspect of the freedom of contract the freedom *to select* a contractual partner. Third, and most commonly associated with the general idea of the freedom of contract, contracting parties have the freedom to choose the content of their contractual obligations. Following others, I shall call this aspect of the

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153. Omri Ben-Shahar, “Foreword to Freedom from Contract Symposium” (2004) 2 *Wisconsin Law Review* 261.

freedom of contract the freedom *to design* the contract.<sup>154</sup>

Combined, the three freedoms — the freedom *from* a contract, the freedom *to select* one's partner, and the freedom *to design* the terms of the deal — create the conventional positive meaning of the “freedom of contract” — a party's freedom “to decide whether, with whom, and under what terms to enter contracts that then become the source of his other-regarding obligations”.<sup>155</sup> Most of the time, however, theorists do not engage in an analysis of the idea, let alone in critically reviewing its meaning. This is partially a result of treating the freedom of contract as an axiom, or, under the influence of the *Lochner* era, as a *natural* right or liberty of humans that consequently needs no justification. Most importantly, as rooted in the human will and in the autonomy of individuals, the general idea of the freedom of contract has been presumed universal, held by *all* humans living in Western societies.

The freedoms comprising the freedom of contract have been understood as requiring the imposition of severe limitations on the exercise of state power. Put simply, for the freedom of contract to mean anything the state has to refrain from interfering in the private arena. Respecting individuals' autonomy essentially means enforcing the contracts they have made while using their freedom *to design* their contracts. As we have seen, in the name of the freedom of contract, state acts have been harshly criticized and emphatically invalidated. For more than a century, the idea of the freedom of contract has become synonymous with *laissez-faire* capitalism, anti-regulatory approach, and an outright rejection of centralized efforts to promote welfare. And, as the literal translation of “*laissez faire*” from French suggests, the main idea has been that the state must “leave alone” its citizens to determine their economic affairs.

My argument here is that the kind of freedom of contract that we ended up having post-*Lochner* and post-*Concepcion* celebrates the freedom of choice of the strongest market players at the expense of the many weaker parties who contract with them. Instead of a universal freedom guaranteed to all, as the myth goes, we face an unlimited

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154. *Ibid* at 263.

155. West, “Right to Contract”, *supra* note 54 at 555.

freedom for some while all others are weakened and enslaved by the idea. A leading feature of the biased nature of the freedom of contract is that the three recognized sub-freedoms discussed above — the freedom *from* contract, the freedom *to select* one's contractual partner and the freedom *to design* the deal — are mostly enjoyed by subjects who belong within the economic elite.

First, only the most powerful market players enjoy a true freedom *from* contract and can choose whether or not — and when — to subject themselves to contract law. Those with less market power seldom have such privileges. This is partially because in an age of growing privatization — after the state had removed itself from so many areas of life — people have to get what they need, including vital necessities such as education and health services, via private contracts. More importantly, oftentimes individuals with limited economic power are not as free to opt out of a contractual regime as their stronger counterparts may be. For instance, typically, a weaker party must get a job that requires signing a contract, followed by a cell phone and a service plan — via a contract — in order to keep in touch with his or her children while on the job. Moreover, since this individual may not own property he or she ought to rent the apartment to which he or she will return at night after a day on the job. It becomes clear that, in this way of life, there is little to no place for the freedom *from* contract.

Second, and related, with limited means comes a way of life that is remarkably different from that of the upper class. This difference often entails an inability to select one's contractual partner. For example, those living in smaller towns or rural areas have to work for the main employer in the area in order to support their families. Others, living in urban neighborhoods, must buy their groceries from the local food store, especially if they are limited to using public transportation due to a lack of a car. Many people around the country have no choice but to send their children to certain schools or colleges and to see only certain doctors primarily because other education or medical opportunities are not affordable. As these examples demonstrate, the freedom to select a contractual partner is not a universal privilege, but a luxury only enjoyed by the wealthiest within society.

Third, and most relevant to the arbitration context, is the freedom *to design* the contract. It goes without saying that with limited bargaining power and without the resources to hire the best lawyers or even receive legal advice, many subjects — like the bakery’s employees in *Lochner* or the consumers in *AT&T* — have virtually no such freedom to design nor any other way to influence the content of the contract. As Scalia J pointed out in *AT&T*, in our days most contracts are contracts of adhesion, which are drafted solely by the stronger party, or, more precisely, by the legal department held by the stronger party. The results, described in detail by Margret Radin in her notable book *Boilerplate*,<sup>156</sup> are lengthy and complex contracts that no common person can read or understand — a fact that gives the drafters ultimate control over the terms of the contract. It is now acknowledged and well documented, for example, that in the notorious case of subprime lending much of the damage to vulnerable borrowers has been caused by complex terms that were *deliberately* drafted to be incomprehensible due to the overuse of fine print and confusing legalese.<sup>157</sup> Moreover, the freedom to design the contract includes not only controlling the terms of the deal but also its fundamental structuring. A recent example is the design of the agreements between Uber and its drivers, in which the drafting company structured the relationship as existing outside of the employment realm, thereby depriving the drivers of rights that are only available to employees.<sup>158</sup> In other words, aside from rare occasions in which weaker parties interact with one another, they enjoy no freedom to design their contracts.

What is worse, more often than not the one-sidedly designed contracts are offered on a take-it-or-leave-it basis and thus weaker parties are also lacking the more basic freedom of *negotiating* the contract that was originally drafted by the other party.<sup>159</sup> Many times, the pre-

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156. Margaret Jane Radin, *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton: Princeton University Press, 2013).

157. Elizabeth Warren, *A Fighting Chance* (New York: Metropolitan Books, 2014) at 139.

158. See *e.g. O'Connor v Uber Techs*, 2015 US Dist Ct Lexis 116482 (ND Cal).

159. Brian H Bix, “Boilerplate, Freedom of Contract, and Democratic Degradation” (2013) 49:2 *Tulane Law Review* 501.

designed contract is not negotiable because weaker parties so badly and so urgently need the underlying transaction — a job, a loan, a place to stay — that they have no leverage to negotiate anything. At other times, even when alternative transactions are available — several phone carriers, various lenders, or a host of landlords — the parties offering the necessities all knowingly insist on the same terms and rely on the fact that their weaker counterparts have no other choice regarding the terms of the deal. Arbitration agreements are a pertinent example of this type of negotiability problem because most, if not all, of the drafting parties demand similar harsh terms such as the class arbitration waivers discussed earlier. For these reasons, whenever a gap in the bargaining power exists — which is the rule rather than the exception — only stronger parties enjoy the freedom to design their contracts and control their content.

Another considerable aspect of the biased conceptualization of the freedom of contract is that, at the same time that the recognized freedoms are those that matter most to stronger parties, other freedoms — crucially needed by subjects with less economic resources — are either completely unacknowledged or significantly undervalued. Despite the inherent difficulty in describing things that have no name, I would like to suggest that, in general, the missing freedoms reflect areas in which stronger parties typically do not struggle and therefore never had to phrase, frame, and defend as freedoms.

One missing freedom is the freedom *to have* a contract. Notwithstanding the myth of equality, not everybody enjoys this basic freedom.<sup>160</sup> When an owner of a property refuses to lease apartments to people who are, for example, disabled, elderly, or single mothers, the rejected tenants have no “freedom of contract” whatsoever. In fact, they cannot even enter the contractual arena. While the freedom to participate in the market via contracts is axiomatically guaranteed to powerful subjects, it is an uncertain and fragile freedom from the perspective of those with limited means. A current and prominent example is the rapidly growing fringe banking industry. This industry is based on vulnerable

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160. Hila Keren, “‘We Insist! Freedom Now’: Does Contract Doctrine Have Anything Constitutional to Say?” (2005) 11:1 Michigan Journal of Race & Law 133 [Keren, “We Insist”].



borrowers who have to take high-cost predatory loans, usually because big banks *refuse* to contract with them. Notably, such refusal relies on the recognized freedom — discussed above — of the banks to select their contractual partners — a freedom which allows them to reject those with nonexistent or unsatisfactory credit history. Deprived of “prime” lending options, those borrowers are then forced to pay interest rates ranging from 300% per annum to over 1,000% per annum — rates that are sometimes 100 times higher than what is offered in the mainstream credit market.<sup>161</sup> Notably, the freedom to have a contract has never been recognized as part of the canonic freedom of contract precisely because it has always been available for stronger parties and thus was taken for granted and did not require definition or protection.

Another absent freedom is the freedom *from* contract, not in the recognized sense of freedom from having a contract or being subject to contract law, but rather a freedom from exploitation by contract. Borrowers in desperate need of a loan, for example, and many others with limited bargaining powers, need a different kind of freedom *from* contract than their stronger counterparts. They necessitate neither the ability to be left alone (*laissez faire*) nor the power to reject the supervision of the state. This is because these weaker parties are constantly manipulated by stronger market players who are targeting and exploiting them while using their superiority and own unbounded freedom of contract,<sup>162</sup> and thus need support and protection in the form of relief from inappropriate contracts. They have very little freedom of contract when the contractual tool is used *against* them and further impoverishes their limited resources. Importantly, like the freedom to have a contract, this freedom from contractual exploitation has never been recognized as part of the canonic freedom of contract because it is not within the interests of the economic elite. Since powerful market players are unlikely to be

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161. Nathalie Martin, “Public Opinion and the Limits of State Law: The Case for a Federal Usury Cap” (2014) 34:2 Northern Illinois University Law Review 259 at 269.

162. Daniel Immergluck, *Foreclosed: High-Risk Lending, Deregulation, and the Undermining of America's Mortgage Market* (Ithaca: Cornell University Press, 2011).

exploited, but rather are more likely to take advantage of less-powerful parties, a meaningful solution to the risk of exploitation has never been developed as a part of the freedom of contract.

Yet another aspect of the biased freedom of contract has to do with the involvement of the state. Despite the myth of a neutral and non-interfering state that stays away from the free market, it must be recognized that the freedom from state intervention is selectively applied. Under the neoliberal rationality, the state is paradoxically “compelled to serve and facilitate an economy it is not supposed to touch, let alone ... challenge”.<sup>163</sup> One leading way by which the state actively supports the strongest market players is by offering them unyielding enforcement services and presenting these services as necessarily flowing from the idea of the freedom of contract. The Supreme Court’s decision in *American Express*, for example, actively “permits and creates an incentive for entities to self-deregulate through private contract”.<sup>164</sup> This form of active state support is crucial to the existence of the package of freedoms known as the freedom of contract since, without enforcement, the freedom to enter into a contract and freely design its terms would have meant very little. Furthermore, the biggest businesses and their organizations heavily rely on the state’s enforcement services and lobby for the preservation and expansion of these services. For example, many leading corporations and coalitions affiliated with them were involved in the legal battles over the enforceability of class arbitration waivers and invested considerable resources in convincing the Supreme Court to adopt the new arbitration

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163. Brown, *supra* note 20 at 40.

164. Glover, “Disappearing Claims”, *supra* note 16 at 3091.

jurisprudence<sup>165</sup> and, after their success, in resisting proposals to restore the pre-revolution order.<sup>166</sup> It is therefore false to say that the state takes a neutral and minimal approach, nor is it true that such an approach is what the biggest corporations demand from the state. Rather, in reality what takes place and what is lobbied for is an asymmetric and biased format of state action: high levels of support and involvement on behalf of the few, combined with little to no activity on behalf of all others.

To further explain the last point, it may be useful to take a second look at some of the biases discussed above and to realize that amending each one of them would require a type of state intervention that is

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165. See *e.g.* *AT&T*, *supra* note 13 (*amicus* brief submitted to the Supreme Court by the Pacific Legal Foundation (“PLF”), 2010 US S Ct Briefs Lexis 1043 stating that “PLF was founded more than 35 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide. Among other things, PLF’s Free Enterprise Project defends the freedom of contract, including the right of parties to agree by contract to the process for resolving disputes that might arise between them. To that end, PLF has participated as *amicus curiae* in many important cases involving the *Federal Arbitration Act (FAA)* and contractual arbitration in general, including this case at the petition stage” at 1); see also *American Express*, *supra* note 14 (*amicus* brief submitted to the Supreme Court by the Voice of the Defense Bar (DRI) 2012 US S Ct Briefs Lexis 3573 stating that DRI “... is an international organization of more than ... [23,000] attorneys involved in the defense of civil litigation”. And adding that “DRI has long been a voice in the ongoing effort to make the civil justice system more fair ... [and] efficient ... ” at 1). In addition to special legal coalitions such as PLF and DRI, many big corporations, such as DIRECT TV, Comcast, and Dell, have directly submitted *amicus* briefs supporting rigorous enforcement of individual arbitrations: see *e.g.* 2010 US S Ct Briefs Lexis 1044 (*amicus* brief by the above corporations).
166. See *e.g.* Brian T Fitzpatrick, “The End of Class Actions?” (2015) 57:1 *Arizona Law Review* 161 at 194-96 (describing the academic support of restoring the pre-Concepcion status quo and the pending bill that followed it, but estimating that “[g]iven the business community’s power in Washington, however, no one thinks this bill has much of a chance in the foreseeable future” at 197).

fundamentally different from the current “rigorous enforcement”<sup>167</sup> of contracts. As far as the freedom of design of the contract or at least the opportunity to negotiate the contract’s content is concerned, the state would need to regulate the length, language, and negotiability of standard contracts drafted by powerful businesses. Similarly, with regard to the missing freedom to have a contract, to ensure the freedom of those left behind would require the state to compel stronger market players to give up some of their freedom to select their partners and to impose on them a duty to contract with others without discrimination.<sup>168</sup> In the same vein, to establish freedom *from* exploitation by contracts would require the state to limit its enforcement services and refrain from offering enforcement services in cases in which the freedom to design the contract’s terms was abused to create a predatory result.

The two rises of the freedom of contract — in the *Lochner* era and under the new arbitration jurisprudence — demonstrate how the neoliberal state moves in the opposite direction, using freedom not to enhance true individual sovereignty and wellbeing for all, but rather to lock people into their inferior status. The combination of two freedom-branded ideas — the “freedom of contract”, which is in fact only the freedom of a small but strong group of subjects and the “freedom from the state”, which in reality includes extended enforcement services to the same group — turns the resulting “freedom” into a prison for all non-elite subjects. Surely, such an imprisoning notion of freedom severely harms those in the middle and the bottom of the socioeconomic spectrum while concealing the true nature of the process. The magnitude of the resulting harm equals the endless power reserved for contracts in a capitalist society. However, as the coming section suggests, another major harm is underway: as these changes occur in the market and within contract law, their effects spill over and corrode key principles of equity and with them the morality of the law.

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167. Dean Witter, *supra* note 101 at 221.

168. State action via antidiscrimination laws is not awarding people a contractual freedom but only a tort claim. On the advantage of recognizing a contractual freedom in those situations, see Keren, “We Insist”, *supra* note 160.

### C. Undermining Equity's Rationality

As my close reading of the new arbitration jurisprudence has sought to demonstrate, the dissemination of the neoliberal rationality via the medium of law entails an unwavering rejection of competing rationalities. Non-economic theories based on morality, fairness, justice, or equality — all once at the heart of any jurisprudence — are silenced, marginalized, and delegitimized. In the Anglo-American context, such a rejection of non-economized ways of thinking directly undermines equity's rationality.

To be sure, the legal tradition captured by the term equity is rich, diverse, and much contested among scholars, making it inherently imprecise to talk about equity's rationality. And yet, since much of the power of the neoliberal project stems from effectively marketing simplified ideas (*e.g.* arbitration is efficient), a willingness to generalize and draw the picture with broad strokes is needed in order to expose the full impact of neoliberalism. With this goal in mind, I will put aside specific procedural and doctrinal aspects of equity, despite their importance, and focus on two core ideas that have been associated with equity and are particularly relevant in times of neoliberal economization.

One core idea is the role equity plays in keeping the law in line with conscience, which includes the prevention of immoral abuses of the law's generality and formality. The other is the importance of a broad availability of legal remedies for any system of justice. Each of these interrelated core ideas, I argue, is an essential component of equity's rationality — a rationality that strongly supports limiting the power of the freedom of contract. Together, they create a distinct legal "common sense" that generally disagrees with the one offered by the neoliberal project and particularly conflicts with the celebration of an unleashed contractual freedom. For that reason, the increasing legal support of neoliberalism severely challenges equity's relevancy and legitimacy.

First comes the deep, and almost obvious, connection between equity and conscience. "[E]quity has long been associated with conscience",<sup>169</sup>

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169. Dennis R Klinck, "The Unexamined 'Conscience' of Contemporary Canadian Equity" (2001) 46:3 McGill Law Journal 517 at 574.

and there is little doubt that “historically conscience and equity were intimately allied, even synonymous”.<sup>170</sup> As declared in the seminal *Earl of Oxford’s Case*, equity’s defined purpose has been “to correct men’s consciences”.<sup>171</sup> Alternative explanations and criticisms regarding the ambiguity of the concept notwithstanding,<sup>172</sup> what matters most is *the strong discourse* created by equating equity and conscience, making equity “the official discourse of conscience in the legal sphere”.<sup>173</sup> Under such discourse, the law must include moral considerations and moral reasoning, features that have the effect of “taming” the law,<sup>174</sup> while enabling “judges to justify equitable intervention on a moral basis”.<sup>175</sup>

How does this conscience-informed discourse relate to judicial decisions regarding the enforcement of contracts? The answer was most famously articulated in 1751 when Hardwicke LC explained that courts of conscience would not enforce agreements that “no man in his senses and not under delusion [could] make on the one hand, and . . . no honest and fair man would accept on the other”.<sup>176</sup> Moreover, he also described those undeserving agreements by directly referring to conscience, naming them “unequitable and *unconscientious* bargains”.<sup>177</sup> And, although it was not the first time that courts had refused the enforcement of unfair contracts,<sup>178</sup> it was certainly one of the first times the refusal was rationalized in conscience-oriented terms. Lord Chancellor Hardwicke’s words, which emphasize the potential conflict between contractual rights and conscience, have proven to be appealing to generations of judges

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170. Klinck, “Nebulous”, *supra* note 3 at 211.

171. *Earl of Oxford*, *supra* note 84 at 7.

172. See *e.g.* Samet, *supra* note 26 at 14-17 (reviewing criticisms against anchoring equity in conscience).

173. Klinck, *Conscience*, *supra* note 25 at 11.

174. *Ibid.*

175. Mason, *supra* note 27 at 1.

176. *Earl of Chesterfield*, *supra* note 4 at 155.

177. *Ibid.*

178. For the “ancient roots” of unconscionability, see *e.g.* Friedman, *supra* note 6 at 334-43.

and legal commentators on both sides of the pond.<sup>179</sup> For centuries those words have been cited numerous times,<sup>180</sup> thus spreading a logic born in the “courts of conscience” to all modern courts, regardless of their operation under equity or law.<sup>181</sup> As the reason for unenforceability came to be known as “unconscionability”, alluding to Hardwicke LC’s “unconscientious bargains”, it retained conscience and morality as the logic that explains the refusal to enforce the contract. It can be contended, therefore, without much risk, that equitable limitations on the freedom of contract reflect a moral-based rationality.

More specifically, equity’s rationality defines as unconscientious the exploitation of the structure of the law, or the letter of the law, by opportunists. Accordingly, the role of equity is understood as discouraging opportunism, forbidding the abuse of legal rights,<sup>182</sup> and preventing a “behavior that is technically legal but is done with a view of securing unintended benefits from the system”.<sup>183</sup> Put another way, and following Aristotle’s account of equity, it is the role of equity to constrain the way people *exercise* their legal rights, and for that purpose motives matter. Thus, a person can be a stickler and formalistically insist on fully exhausting his or her legal rights, but he or she is not permitted to be a stickler “in a bad way”. Or, in other words, a person is not permitted to exercise his or her legal rights outside of the purposes for which they were created and in a manner that harms others. In that sense, the logic of

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179. The first American case to refer to the words of Hardwicke LC in *Earl of Chesterfield*, *supra* note 4 is *Powell*, *supra* note 7. The Supreme Court has adopted the full definition in *Hume*, *supra* note 7.

180. To date the latest case citing the definition in full (including the archaic term “unconscientious bargains” as opposed to only referring to *Earl of Chesterfield*, *supra* note 4) is *Brown*, *supra* note 7 at 678-80, vacated *Marmet*, *supra* note 7.

181. See the decision of the US Supreme court in *Hume*, *supra* note 7, citing Hardwicke LC’s definition, and other cases that had followed it, and affirming the lower court’s finding (“[t]hese citations are sufficient to show that in suits upon unconscionable agreements the courts of law will take the matter in their own control, and will, without the intervention of courts of equity, protect the parties against their enforcement” at 411).

182. Klimchuk, “Equity”, *supra* note 29 at 257-58.

183. Smith, *supra* note 28 at 233.

equity is moral as it fits Kant's view that it is immoral to treat people as mere means rather than as ends in and of themselves.<sup>184</sup>

Applying equity rationality instead of neoliberal rationality to the lengthy and complex contracts drafted by corporations will therefore yield the opposite result than the one achieved under the new arbitration jurisprudence. To be sure, the right to the legal enforcement of contracts according to their terms is a salient aspect of the freedom of contract and, under the *FAA*, this right includes the enforcement of arbitration agreements. However, to seek the enforcement of arbitration agreements that were intentionally designed to deprive the other party of access to any measure of legal help necessarily makes a party a stickler in a bad way and acting opportunistically in exploitation of the general law of enforceability. It is an abuse of the legal tool of contract and the legal rights that are aimed at securing this tool. To be clear, the main problem with the new arbitration jurisprudence is not with affirming the effort of stronger market players to cast the scope of their freedom of contract too widely. Rather, the wrong is in denying that those contractual rights must be exercised with a conscience, in the service of *allowing* rather than *preventing* dispute resolution.<sup>185</sup> While equity's logic would condemn such opportunistic behavior, the neoliberal rationality confirms and incentivizes it.

#### D. Law without Equity

In the context of the Anglo-American legal world, with its centuries-long tradition of equity, legal adherence to neoliberal rationality effectively means divorcing law from equity principles. The result, which I term "law without equity", presents severe risks to the legitimacy of law and to the future of the social contract holding subjects together. Law without equity allows — and even incentivizes — humans who have

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184. Robert Johnson, "Kant's Moral Philosophy" in Edward N Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Stanford: Stanford University, 2004), online: Stanford Encyclopedia of Philosophy Archive <<http://plato.stanford.edu/archives/sum2014/entries/kant-moral/>>.

185. Compare to the analysis of *Hollywood Silver Fox Farm v Emmett*, [1936] 2 KB 468 (CA (Eng)) in Klimchuk, "Equity", *supra* note 29 at 259.



accumulated enough power to act opportunistically. Without equity's restraining power, those with a combination of economic means, political influence, and intellectual sophistication can and will exploit the legal rules of private ordering to gain even more power and influence.

As the case of class arbitration waivers demonstrates, private entities increasingly use legal rules — such as rules pertaining to the enforceability of contracts — to “delete legal remedies” for others in order “to enhance their economic position”.<sup>186</sup> While the formal letter of the *FAA* may tolerate an interpretation that requires an enforcement of *any* arbitration agreement,<sup>187</sup> including one that is effectively designed to prevent arbitration, allowing an opportunistic exploitation of this possibility, and of the formality and generality of the law, is harmful not only to the weaker parties it directly leaves without redress. At a deeper level, a second-order harm occurs: the entire neoliberal legal regime which enforces contracts without equitable limitations increasingly conflicts with key principles of the rule of law.

Notably, in the context of private law in general and contract law in particular, most of the threat to the rule of law comes from powerful market actors and from the failure of the law to limit them. This, however, should not stop us from recognizing the big-picture problem. Although the rule of law has traditionally been a public law doctrine, there is a growing recognition of the importance of linking it to the way private law treats the exercise of private powers, especially in times of

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186. Margaret Jane Radin, “Boilerplate: A Threat to the Rule of Law?” in Austin & Klimchuk, *Private Law*, *supra* note 28 at 297 [Radin, “A Threat”].

187. But note that many have argued that this was never the intention of the legislator. See *e.g.* Hiro N Aragaki, “The Federal Arbitration Act as Procedural Reform” (2014) 89:6 *New York University Law Review* 1939 (contesting the contractual model of arbitration and arguing that “the FAA was understood by merchants, judges, and lawyers as a vehicle for improving the procedure by which commercial disputes were adjudicated fair and square” at 1943).

increasing privatization.<sup>188</sup> In other words, the rule of law pertains not only to the relationship between individuals and the state, but also to the interactions between individuals. On this view, then, when legal actors decide questions of private law they heavily influence the rule of law.<sup>189</sup> Or, as Radin has compellingly argued in the context of contracts:

[f]irms that use contract to destroy the underlying basis of contract, that deploy contract against itself, are using contract to destroy the ideal of contractual ordering, which the rule of law is formulated to protect. In this way, they not only undermine the idea of a regime of private ordering, *they effectively undermine the rule of law*.<sup>190</sup>

## 1. Arbitrariness

A core element of the rule of law is that “a right to exercise power arbitrarily cannot be conferred or upheld by law”.<sup>191</sup> And yet, the new arbitration jurisprudence does exactly that. By offering unconstrained enforceability services, this jurisprudence awards the strongest market players an ability to exercise their own power over those who need to contract with them. Accordingly, the new arbitration jurisprudence facilitates the subjection of large portions of the public — workers, consumers, clients and the like — “to the arbitrary will of others”.<sup>192</sup>

The will of powerful market players is arbitrary not because it is random or capricious; it is in fact quite systematic and deliberate in its uncompromising demand for waivers of rights and remedies. Rather, it is arbitrary in the sense that the power conferred by law — to design and enforce arbitration contracts — is being abused. The drafters of contracts use their legal power not as a way to shape a private mechanism of dispute resolution as authorized by the *FAA*. Quite to the contrary, these drafters deploy their power(s) arbitrarily to grant themselves immunity from legal

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188. Lisa M Austin and Dennis Klimchuk, “Introduction” in Austin & Klimchuk, *Private Law*, *supra* note 28 at 6-14 [Austin & Klimchuk, “Introduction”].

189. William Lucy, “The Rule of Law and Private Law, in Private Law and the Rule of Law” in Austin & Klimchuk, *Private Law*, *supra* note 28 at 41.

190. Radin, “A Threat”, *supra* note 186 at 301 [emphasis added].

191. Austin & Klimchuk, “Introduction”, *supra* note 188 at 1.

192. Klimchuk, “Equity”, *supra* note 29 at 249.

claims. Such an exercise of power “undermines the legal infrastructure of private ordering, and becomes a scheme of arbitrary power”.<sup>193</sup>

## 2. Inequality

Another core principle of the rule of law is equality before the law. Under this principle, Dicey famously explained, “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals”.<sup>194</sup> However, the neoliberal celebration of the freedom of contract — in a biased form — allows one group of powerful market actors to use their freedom in a manner that positions their group *above* the law, exempt from the “jurisdiction of the ordinary tribunals”.<sup>195</sup> At the same time, by enforcing the contracts drafted by this preferred group, the new arbitration jurisprudence deprives most other members of the public from having access to a working mechanism of dispute resolution, thereby marking their inferiority before the law. Put differently, when — with approval from the law — some can put themselves above the law while others remain with no “reasonable access to remedies”,<sup>196</sup> the principle of equality before the law is severely corroded.

## 3. Risking the Social Contract

Where does law without equity — which conflicts with core elements of the rule of law — leave us as a society? Not in a very hopeful place. When the freedom of contract has a biased definition and is subject to almost no limitation even in circumstances when it is clearly abused, the legitimacy of the law is at risk and the trustworthiness of courts is jeopardized. Recall that Pound had warned us about this risk back at the midst of the *Lochner* era, reporting that the then-new “liberty of contract” approach had generated “a growing distrust of the integrity of

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193. Radin, “A Threat”, *supra* note 186 at 300.

194. Austin & Klimchuk, “Introduction”, *supra* note 188 at 4-5 citing AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10d (London: Macmillan, 1959) at 193.

195. *Ibid.*

196. Radin, “A Threat”, *supra* note 186 at 290.

the courts”.<sup>197</sup> About a century later, a Montana judge responded to the pro-arbitration jurisprudence of his time with similar suspicions, albeit less carefully expressed, writing: “[i]t seems to me that judges who have let their concern for their own crowded docket overcome their concern for the rights they are entrusted with should step aside and let someone else assume their burdens”.<sup>198</sup>

And by risking the legitimacy of the law, the very fabric of our social contract is at risk. The belief that we all should sacrifice *some* of our individual freedoms for the sake of maintaining a safe and just civil society is severely undermined when the law so clearly works on behalf of a certain group affiliated with the economic elite. Instead of subjecting themselves to the rule of law — and in return, to being protected by the law — mass parts of the public are controlled by the unbridled interests of the elite as those elite interests are enforced by law. It does not help, of course, that in addition to the emergence of the new arbitration jurisprudence, other recent decisions of the American Supreme Court conferred upon corporations key political and constitutional rights traditionally reserved to individuals.<sup>199</sup> The problem is that the more the law aligns itself with neoliberal rationality and the interests of corporations, the more it becomes part of the general “shift from the social contract to savage forms of corporate sovereignty”.<sup>200</sup>

Indeed, our current situation may be even worse since the said “shift” sometimes seems to amount, as suggested by Wendy Brown, to a complete “*inversion*” of the social contract.<sup>201</sup> Instead of being equally limited and protected by the state, subjects are divided into winners and losers, and losers are treated as means rather than ends. As proved by the new arbitration jurisprudence, the end is no longer the wellbeing of individuals, but rather economic efficiency, which is defined from the

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197. Pound, *supra* note 32 at 487.

198. *Casarotto v Lombardi*, 268 Mont 369 at 386 (Sup Ct 1994).

199. *Citizens United v FEC*, 558 US 310 (2010) [*Citizens United*]; *Burwell v Hobby Lobby Stores, Inc*, 134 S Ct 2751 (US 2014).

200. Henry A Giroux, *Neoliberalism's War on Higher Education* (Chicago: Haymarket Books, 2014) at 54.

201. Brown, *supra* note 20 at 38, 64, 110, 134, 213.

perspective of the winners. To achieve the desired efficiency, those at the bottom are knowingly and deliberately left unprotected. And, rather than offering them safety via the law, the state demands that they will either protect themselves by not signing exploitative contracts or sacrifice themselves on behalf of the preservation of an efficient economy.

## V. Conclusion

In his highly influential book *Commentaries on Equity Jurisprudence as Administered in England and America*, Judge Story wrote:

[t]here may be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or some undue influence; and in such cases Courts of Equity *ought to interfere* ... such unconscionableness, or such inadequacy should be made out, as would (to use an expressive phrase) *shock the conscience*.<sup>202</sup>

Although written in 1836, Story J's words have gained much eminence throughout the years and have been quoted, with or without adequate reference to him, by numerous judges and scholars.<sup>203</sup> Notably, Story J's message has two separate prongs, both still relevant today. One relates to people's behavior and highlights that an unlimited freedom of contract may create bargains that are so unfair and immoral that they "shock the conscience". The other relates to the role of the judiciary and insists that when asked to enforce such unconscionable contracts, courts "ought to interfere".

Comparatively, outside of the American legal world, recent works have described and analyzed a rising agreement with Story J's influential ideas. For example, Irit Samet has argued that "[o]ne of the most interesting and controversial developments in the recent jurisprudence on

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202. Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (Boston: Little, Brown and Co, 1866) at 268 [emphasis added].

203. Since Story J's words were quoted in full in the known case of *Eyre v Potter*, 56 US 42 (1853), some have attributed them to the US Supreme Court: see e.g. Friedman, *supra* note 6 ("[t]he 'unconscionableness or inadequacy' must be such as would 'shock the conscience' – an 'expressive phrase' that retains a hold on the current unconscionability doctrine" at 339, and *ibid* at 60).

equity is the increasing use of conscience categories to discourage overly selfish behaviour among parties to commercial relationships”.<sup>204</sup> In the United States, however, the Supreme Court has recently developed — as this article has sought to demonstrate — an approach to agreements that directly conflicts with each of the prongs of Story J’s theory.

First, the Court has adopted an unfettered version of the freedom of contract that allows and encourages drafters of contracts to behave selfishly, while classifying conscience-related problems inapplicable, or “unrelated”. And second, the Court has strongly disagreed with the notion that courts “ought to interfere” in cases of unconscionability. To the contrary, according to the new arbitration jurisprudence courts “*must*” do the opposite: they “must rigorously enforce arbitration agreements”.<sup>205</sup> Accordingly, courts are no longer allowed to “interfere” by using equitable tools such as the unconscionability doctrine.

Again, it is urgent to recognize that this new approach, which this article refers to as neoliberal-*Lochnerism*, creates a second rise of the freedom of contract that operates not only in the domain of arbitration. Rather, *all* the rights of weaker parties — whether produced by regulations or by contractual terms — are rendered meaningless when stronger parties are permitted to use their freedom in a manner that obstructs access to remedies. The genus of arbitration agreements now allowed by the US Supreme Court thus represents a larger assault on fairness, morality, and justice than the eye can see at first glance.

The result, I have argued, is “law without equity” and it presents severe risks to the legitimacy of law and to the future of the social contract that necessarily holds subjects together. Law without equity allows — and even incentivizes — humans who have accumulated enough power to act opportunistically. Without equity’s restraining power, those possessing a combination of economic means, political influence, and intellectual sophistication can and will exploit the legal rules of private ordering in order to gain even more power and influence.

But is there any potential to counter the rising and spreading neoliberal

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204. Samet, *supra* note 26 at 13.

205. *American Express*, *supra* note 14 at 2309.

rationality? The task is extremely difficult, especially given the growing powers of corporations not only in the market, but also in the political arena.<sup>206</sup> Indeed, despite strong evidence and a dramatic study produced by the Consumer Financial Protection Bureau,<sup>207</sup> there is currently little to no hope that efforts to overcome the new arbitration jurisprudence by revising the *FAA* will be successful.<sup>208</sup> However, as any other quest for hope,<sup>209</sup> the ability to imagine things differently is key. Restoring old images of equity seems to be a good starting point for envisioning a better justice system. Courts must be allowed to see themselves — and act as — “courts of conscience”; they cannot be ordered to participate in exploitation conspiracies. Being moral actors themselves, judges simply “have no business coming to the aid of immoral business practices”.<sup>210</sup> And, despite the argument that no one knows precisely what “conscience” meant centuries ago,<sup>211</sup> or how its meaning is supposed to be applied in our days,<sup>212</sup> there must be a way to know what conscience *is not*.

Judges ordered by the Supreme Court to hold against their conscience and to approve manipulations of the law disguised as exercises of the freedom of contract are not only at risk of personal frustration. Given the expressive power of the law judges serve a social role of moral leaders and thus their role in limiting freedom by conscience is of utmost

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206. Brown, *supra* note 20 at 152-73 (offering a critical analysis of *Citizens United*, *supra* note 199).

207. US, Consumer Financial Protection Bureau, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, (2015) online: <[http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf)>.

208. Glover, “Disappearing Claims”, *supra* note 16 (explaining why “amending the *FAA* is an extremely difficult political task” at 3086).

209. Kathryn Abrams & Hila Keren, “Law in the Cultivation of Hope” (2007) 95:2 *California Law Review* 319.

210. Robin L West, “The Anti-Empathic Turn”, in James E Fleming, ed, *Passions & Emotions* (New York: NYU Press, 2013) 243 at 265.

211. See *e.g.* Richard Hedlund, “The Theological Foundations of Equity’s Conscience” (2015) 4:1 *Oxford Journal of Law & Religion* 119.

212. See *e.g.* Rohan Havelock, “Conscience and Unconscionability in Modern Equity” (2015) 9:1 *Journal of Equity* 1.

importance.<sup>213</sup> For courts to effectively fulfill this leadership role we ought to conceive conscience as “a metaphor for the dynamic interaction between changing social norms and shifting individual beliefs”,<sup>214</sup> and not as an arbitrary measure comparable to the Chancellor’s Food. On this view, courts are a crucial mediator between society and the self. Armed with equity principles, and especially the unconscionability doctrine, they have the power — and the duty — to restrain the freedom of contract, restore contractual justice, and protect the integrity of the law.

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213. Keren, “Guilt-Free Markets”, *supra* note 30.

214. *Ibid.*