

The Supreme Court’s *Lamps Plus* Arbitration Decision: A Fading Light for Class Actions

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I. INTRODUCTION

Back in 2000, Professor Jean Sternlight sounded the alarm that arbitration law was on a collision course with class action proceedings, and she prophetically asked whether class actions would survive.¹ Almost twenty years after Professor Sternlight’s thought-provoking article, the answer is becoming clearer. Simply put, the Supreme Court has placed an increasing chokehold on the availability of class proceedings. Through the use of an arbitration clause, a company can require a customer or employee to submit disputes to one-on-one arbitration, and the Court’s jurisprudence has made such clauses fully enforceable.² As a result, the availability of class proceedings has been shrinking, and without such proceedings, it may not be feasible for an injured victim to bring a small-dollar claim at all because the costs of litigating an individual claim likely outweigh the small recovery.³ As explained by one judge, “The *realistic* alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”⁴ This Article explores the troubling legal landscape and the increasingly

1. Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 20 (2000).

2. *See, e.g.,* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011).

3. *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in original); *Concepcion*, 563 U.S. at 365 (Breyer, J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.) (“In general agreements that forbid the consolidation of claims can lead small-dollar claimants to abandon their claims rather than to litigate.”).

4. *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (emphasis in original).

limited opportunities for class proceedings when an arbitration clause collides with a class proceeding.

The United States Supreme Court has been heavily involved with shaping arbitration law over the last few decades. Since the 1980s, the Court has issued almost fifty opinions involving arbitration law, and these decisions have dramatically expanded the legal framework for arbitration. The Court has enabled parties with stronger bargaining power, typically corporations, to opt-out of the traditional court system and create their own private system of justice, which is largely unsupervised and covers virtually every type of claim in America.⁵ Through this expansion of arbitration, the Court has minimized the role of the judiciary in American society, shut millions of ordinary consumers and employees out of the traditional court system, reshaped the civil justice system, and limited the availability of class proceedings, both in court and in arbitration.

During its October 2018 Term, the Supreme Court decided three cases concerning the Federal Arbitration Act (FAA), the primary federal law governing arbitration.⁶ One of these decisions was *Lamps Plus, Inc. v. Varela* (*Lamps Plus*), which involved the controversial issue of class procedures in the context of an employment dispute.⁷ Like other recent Supreme Court decisions involving arbitration and class proceedings, *Lamps Plus* was a splintered opinion, with a conservative majority displaying its typical dislike of class proceedings.⁸ The majority in *Lamps Plus* further limited the availability of class proceedings through the use of an arbitration clause by holding that ambiguity in an arbitration clause cannot be interpreted to permit class proceedings.⁹ In other words, ambiguities in an arbitration clause should be construed as requiring bilateral, one-on-one arbitration. Over the years, the Court has created presumptions or rules of interpretation for arbitration clauses, and *Lamps Plus* can be viewed

5. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (expanding arbitration law to cover statutory claims); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (developing a presumption that statutory claims are arbitrable unless Congress has decided otherwise).

6. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524 (2019); *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019); *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019).

7. 139 S. Ct. 1407 (2019).

8. See *id.*; *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018); *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

9. 139 S.Ct. at 1416.

as such a decision, but one that directly impacts the availability of class procedures.¹⁰

As a result of *Lamps Plus*, a company can unilaterally limit its own class action liability through a well-drafted and properly-implemented arbitration clause, or even through an ambiguous, poorly-drafted arbitration clause.¹¹ If an arbitration clause exists in connection with a transaction, only a sliver of fading light remains for the availability of class proceedings. To make matters worse, for these limited, remaining opportunities for class proceedings, *Lamps Plus* leaves unanswered a critical question about who decides whether class proceeding can occur.¹² This question has been splitting lower courts, and this Article provides a novel solution regarding the decision-maker.¹³

This Article, which is divided into four main Parts, explores *Lamps Plus* and what remains when class proceedings collide with an arbitration clause. Part II summarizes the Supreme Court's *Lamps Plus* decision, including the background of the district and appellate court decisions. Part III criticizes several of the flaws in the majority's reasoning. As explained below, the majority's decision displays a narrow, warped, flawed understanding of arbitration and the foundational principles of arbitration law. Part IV then explores the remaining, limited possibilities of when class proceedings may still be available in the wake of *Lamps Plus* if an arbitration clause exists in a consumer or employee contract. Finally, Part V of the Article examines the unanswered, critical question left open in *Lamps Plus* regarding the decision-maker: whether the court or an arbitrator should determine if an arbitration clause permits class proceedings. As will be explained in this article, both the Supreme Court and lower courts have framed this issue as an "either-or" proposition: either a court will make the determination, or an arbitrator will.¹⁴ Lower courts are currently split on this issue, with some decisions holding that a court makes this determination, and other decisions holding that it should be an arbitrator.¹⁵ However, this Article proposes a novel, hybrid solution, whereby *both* a court *and* arbitrator

10. See *infra* notes 70–71 and accompanying text.

11. See, e.g., *Hoober v. Movement Mortg., LLC*, 382 F. Supp 3d 1148 (W.D. Wash. 2019) (compelling employees to bring claims in arbitration on an individual basis and dismissing class claims).

12. See *infra* Part V.

13. *Id.*

14. *Id.*

15. *Id.*

would each play a related, but separate role to determine different aspects of the class arbitration problem.

II. A SUMMARY OF THE PROCEEDINGS AND THE SUPREME COURT'S DECISION IN *LAMPS PLUS*

A. *The District Court's Order Permitting Class Proceedings*

Lamps Plus involved a data breach of tax information for about 1,300 employees of Lamps Plus, a company selling light fixtures and related products,¹⁶ and such data breaches have become more commonplace in modern society.¹⁷ As a result of this data breach, someone allegedly used stolen information to file fraudulent income taxes on behalf of an employee, Mr. Frank Varela.¹⁸ Mr. Varela then filed a class action lawsuit in federal court against his employer Lamps Plus for the data breach.¹⁹ Like many employees, Mr. Varela had, on his first day of work, signed an arbitration agreement as a condition of employment.²⁰ Central to this case, the arbitration agreement did not contain a class action waiver explicitly banning class proceedings.²¹

In response to the lawsuit, Lamps Plus asked the district court to compel arbitration on an individual, instead of class-wide, basis.²² The employee countered that the arbitration clause was not enforceable, based on unconscionability and the scope of the arbitration clause. The Court rejected the employee's arguments and found the arbitration clause enforceable.²³ As to whether the arbitration would proceed as an individual claim or as a class, the district court construed the agreement to allow for class arbitration.²⁴ The district court reasoned that if the arbitration agreement contained an explicit waiver of class proceedings, some appellate decisions at the time had

16. *Varela v. Lamps Plus, Inc.*, 2016 WL 9110161, at *2 (C.D. Cal. July 7, 2016), *aff'd*, 701 F. App'x 670 (9th Cir. 2017), *rev'd and remanded*, 139 S. Ct. 1407, 203 L. Ed. 2d 636 (2019), and *vacated*, 771 F. App'x 418 (9th Cir. 2019), and *rev'd and remanded*, 771 F. App'x 418 (9th Cir. 2019).

17. *Congress Wants Capital One and Amazon to Explain Data Breach*, CBS NEWS (Aug. 1, 2019), available at <https://www.cbsnews.com/news/congress-wants-capital-one-and-amazon-to-explain-data-breach/> [<https://perma.cc/37L4-4XZH>].

18. *Supra* note 166, at *2.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* at *1.

23. *Id.* at *3–*5.

24. *Id.* at *7.

held that such waivers violated the National Labor Relations Act.²⁵ Additionally, the agreement provided for “all claims” related to employment to be submitted to arbitration, and the plaintiff argued there is an ambiguity whether the language “all claims” encompasses class claims.²⁶ Relying on the contract doctrine known as *contra proferentem*, namely, that ambiguities in a contract are construed against the drafter, in this case the employer Lamps Plus, the district court construed the contract as permitting class proceedings.²⁷

B. *The Ninth Circuit’s Decision Affirming the Order Allowing Class Proceedings*

The Ninth Circuit affirmed the district court’s order permitting class arbitration.²⁸ The Ninth Circuit reasoned that the plaintiff’s agreement with Lamps Plus was subject to “two reasonable constructions,”²⁹ and the Ninth Circuit cited various phrases or terms from the agreement as arguably allowing class proceedings.³⁰ For example, the court explained that the agreement provided for arbitration of claims that “would have been available to the parties by law,” and according to the Ninth Circuit, such claims included class claims.³¹ Further, the arbitrator was authorized to “award any remedy allowed by applicable law,” and the Ninth Circuit believed that “those remedies include class-wide relief.”³² Also relying on *contra proferentem* to resolve any ambiguities against the employer, the Ninth Circuit affirmed the district court’s order permitting class arbitration.³³

One appellate judge dissented from the Ninth Circuit’s decision, briefly stating that “I respectfully dissent because, as I see it, the Agreement was not ambiguous. We should not allow Varela to enlist

25. *Id.* at *7 (citing *Epic Systems, Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016)). The Supreme Court later reversed the Seventh Circuit and held that class action waivers are fully enforceable under the FAA and do not violate the National Labor Relations Act. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

26. *Id.* at *6–*7.

27. *Id.* at *7.

28. *Varela v. Lamps Plus, Inc.*, 701 F. App’x 670 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 1697, 200 L. Ed. 2d 948 (2018), *and rev’d and remanded*, 139 S. Ct. 1407, 203 L. Ed. 2d 636 (2019), *and vacated*, 771 F. App’x 418 (9th Cir. 2019).

29. *Id.* at 673.

30. *Id.* at 672–73.

31. *Id.*

32. *Id.* at 673.

33. *Id.*

us in this palpable evasion of *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*”³⁴

C. *The Supreme Court’s Splintered Decision Denying the Availability of Class Proceedings*

In a majority opinion written by Chief Justice Roberts, and joined by the conservative wing of Justices Thomas, Alito, Gorsuch, and Kavanaugh, the Supreme Court reversed the Ninth Circuit’s decision and held that a court cannot infer from ambiguous contract language that parties have agreed to class-wide arbitration.³⁵

The majority opinion first addressed a threshold issue involving the appellate jurisdiction of the Ninth Circuit.³⁶ Under 9 U.S.C. §§ 16(a) and (b) of the FAA, court decisions ordering arbitration are not immediately appealable, but court decisions refusing to compel arbitration are. Relying on section 4 of the FAA, Lamps Plus had sought a court order compelling arbitration,³⁷ which the district court granted.³⁸ Because section 16(b)(2) of the FAA states that “an appeal may not be taken from an interlocutory order . . . directing arbitration to proceed under section 4 of this title,” it would appear that the district court’s order compelling arbitration pursuant to section 4 is not appealable. However, to avoid this textual hurdle, the majority found a right to appeal based on a different provision of the FAA, section 16(a)(3), which states that an appeal may be taken from “a final decision with respect to an arbitration that is subject to this title.”³⁹ The majority was clearly troubled by the decisions below compelling arbitration on a class-wide arbitration, but in order to reverse this result, the majority had to overcome the specific text of the FAA explicitly barring appeals of orders compelling arbitration. The majority relied on more general language in the statute to allow for appellate jurisdiction and override the more explicit text barring appeals.

After clearing this initial hurdle involving appellate jurisdiction, the majority framed the core issue in this case as a conflict between a state contract law regarding ambiguous contractual language and

34. *Id.* citing 559 U. S. 662 (2010) (holding that silence in a contract cannot serve as the basis for class arbitration).

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

36. *Id.* at 1413-14.

37. *See* Notice of Mot. and Mot. to Compel Arbitration, *Varela v. Lamps Plus, Inc.*, Dkt. No. 34 (C.D. Cal. May 31, 2016).

38. 2016 WL 9110161, at *7.

39. 139 S. Ct. at 1414.

the FAA's fundamental principle that arbitration is a matter of consent.⁴⁰ The majority then emphasized that in order to respect the consent of the parties, courts need to be mindful of the "fundamental" difference between class arbitration and the individualized form of arbitration envisioned by the FAA.⁴¹ According to the majority, individual arbitration involves "lower costs, greater efficiency and speed," and "[c]lass arbitration lacks those benefits.⁴² In light of this difference between class and individual arbitration, the Court previously held in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U. S. 662 (2010), that silence in a contract cannot serve as the basis for class arbitration. The majority in *Lamps Plus* borrowed this holding from *Stolt-Nielsen* involving "silent" clauses and expanded the holding to also cover "ambiguous" clauses: "Like silence, ambiguity does not provide a sufficient basis to conclude that parties to an arbitration agreement agreed to 'sacrifice[] the principal advantage of arbitration.'"⁴³

Regarding *contra proferentem*, the majority framed this doctrine as distinct or detached from the intent of the parties.⁴⁴ The majority characterized it as one based on "public policy considerations," a doctrine that "seeks ends other than the intent of the parties," a doctrine based on "primarily equitable considerations about the parties' relative bargaining strength."⁴⁵ Because this doctrine does not focus on consent, and because consent is a fundamental policy of arbitration law, the Court explained that class arbitration cannot be based on the *contra proferentem* doctrine.⁴⁶ By creating distance between *contra proferentem* and consent, the majority was able to justify its holding and reject the use of *contra proferentem*. Ultimately, the majority relied on a preemption theory and found that the FAA preempted the contract doctrine of *contra proferentem*, as applied in this case, because application of the doctrine undermined a "fundamental attribute" of arbitration, its bilateral nature.

Justice Thomas issued a concurring opinion.⁴⁷ He believed that the agreement was silent regarding class arbitration.⁴⁸ Moreover, he

40. *Id.* at 1414–15.

41. *Id.* at 1416 (citations omitted).

42. *Id.* (citations omitted).

43. *Id.* (citation omitted).

44. *Id.* at 1417–19.

45. *Id.* at 1417.

46. *Id.* at 1418.

47. *Id.* at 1419–20.

48. *Id.* at 1419.

construed the language of the agreement as suggesting that the parties wanted bilateral arbitration because of references in the agreement such as “the Company and I.”⁴⁹ As in *Stolt-Nielsen*, Justice Thomas believed there was no basis in the agreement for class arbitration.⁵⁰ Just like in *Concepcion*, he also expressed skepticism at the majority’s use of an implied preemption analysis.⁵¹ This preemption analysis involves a judge analyzing whether a state law undermines the judge’s own perception of the general objectives or purpose of a federal statute, and this open-ended analysis troubled Justice Thomas.⁵²

Justice Ginsburg wrote a dissenting opinion, joined by Justices Breyer and Sotomayor, rebuking the majority for “treacherously” departing from the fundamental principle of consent in connection with arbitration.⁵³ She pointed out the paradox or irony with the majority’s focus on consent.⁵⁴ Justice Ginsburg criticized the majority because at the same time the majority bemoaned the employer’s lack of consent regarding class procedures, they imposed individual arbitration on employees who would not knowingly choose to do so.⁵⁵ Justice Ginsburg also described recent initiatives from state legislatures and private businesses to ameliorate concerns about the widespread use of arbitration.⁵⁶ For example, she recognized that some employers voluntarily dropped the use of arbitration for sexual harassment claims.⁵⁷ Justice Ginsburg concluded her dissent by recognizing that despite these initiatives, there is an urgent need for Congress to reform America’s arbitration laws in order to stop the Court’s jurisprudence from continuing to “thwart effective access to justice.”⁵⁸

Justice Breyer wrote a separate dissenting opinion focused on the lack of appellate jurisdiction.⁵⁹ He believed that the FAA prohibits appeals of interlocutory orders compelling arbitration, and because the lower court compelled arbitration, interlocutory review was not possible here.⁶⁰

49. *Id.*

50. *Id.* at 1419–20.

51. *Id.* at 1420.

52. *Id.*

53. *Id.*

54. *Id.* at 1421.

55. *Id.*

56. *Id.* at 1422.

57. *Id.*

58. *Id.* (internal quotations and citation omitted).

59. *Id.* at 1422–27.

60. *Id.*

Justice Sotomayor also wrote a dissenting opinion.⁶¹ Recognizing that a class action is merely a procedural device, she questioned the Court's prior jurisprudence treating class arbitration as fundamentally different from bilateral arbitration.⁶² Also, because the state law doctrine of *contra proferentem* could be applied in a neutral manner to all types of contracts, she believed this doctrine could be applied in this case without violating the FAA.⁶³

Justice Kagan also wrote a dissenting opinion.⁶⁴ Joined by Justices Breyer and Ginsburg, Justice Kagan cited and analyzed broad language in the contract to show that the contract is best understood as authorizing class arbitration.⁶⁵ Then, in a separate section of her dissent, joined by Justices Breyer, Ginsburg, as well as Sotomayor, Justice Kagan analyzed the contract as if its language were ambiguous.⁶⁶ Justice Kagan explained that under well-established precedent, state contract law should govern the interpretation of an arbitration agreement, as long as the state law does not discriminate against arbitration.⁶⁷ Because the state law doctrine of *contra proferentem* is a neutral law that does not discriminate against arbitration, Justice Kagan explained that this doctrine could be used to interpret the agreement as permitting class arbitration.⁶⁸

Within the larger context of arbitration law, one can view *Lamps Plus* as part of broader trend of the Court creating default rules for the legal framework supporting arbitration, as well as an attempt to undermine class proceedings. The majority created a general rule for interpreting arbitration agreements under the FAA: class arbitration cannot be based on an ambiguous arbitration agreement. One can view this rule as part of a growing body of law created by the Court and necessitated by the Court's expansion of the FAA. The text of the FAA is sparse, and the FAA was originally developed for a much narrower set of uses.⁶⁹ For example, the FAA was never intended to cover employment contracts or take-it-or-leave-it consumer contracts.⁷⁰ However, with the judicial expansion of the FAA's scope to

61. *Id.* at 1427–28.

62. *Id.* at 1427.

63. *Id.*

64. *Id.* at 1428–35.

65. *Id.* at 1428–29.

66. *Id.* at 1430.

67. *Id.* at 1430–31.

68. *Id.* at 1431–32.

69. See generally Imre S. Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013).

70. *Id.*

cover these settings, and to help facilitate this expanding system of arbitration as a means of dispute resolution, the Court over time has developed certain default rules for interpreting and enforcing arbitration agreements. For example, the Supreme Court has created a presumption in arbitration law that courts, not arbitrators, generally decide whether the parties entered into an arbitration agreement, and courts, not arbitrators, interpret the scope of an arbitration clause.⁷¹ Going another step further, the Court created a default rule of interpretation providing that ambiguities regarding the scope of an arbitration clause are resolved in favor of arbitration.⁷² One can understand the holding of *Lamps Plus* as the Court's creation of another default rule of interpretation for arbitration clauses covered by the FAA: ambiguities regarding class proceedings are resolved in favor of individual arbitration.

III. THE MAJORITY'S DECISION IN *LAMPS PLUS* IS FUNDAMENTALLY FLAWED ON MULTIPLE LEVELS

This Part provides several critiques regarding the majority's reasoning in *Lamps Plus*. The majority's opinion displays a narrow, warped, and inconsistent understanding of consent, the foundational principle for arbitration, propagates a deeply flawed myth about arbitration, and ultimately undermines arbitration law.

A. *The Majority Opinion Displays a Narrow, Warped Understanding of Consent, the Foundational Principle of Arbitration Law*

The fundamental principle of arbitration law is consent,⁷³ but the majority turns this principle on its head to favor the stronger, corporate party. As recognized by Justice Ginsburg in dissent, there is "irony" in the majority's focus and reliance on consent as the foundational principle of arbitration.⁷⁴ In ruling on and rejecting the availability of class action arbitration, the majority was enamored

71. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995).

72. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) ("The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . .").

73. *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) ("Arbitration under the [FAA] is a matter of consent, not coercion . . .").

74. 139 S. Ct. at 1421.

with the need for consent, the foundation for all of arbitration.⁷⁵ However, as pointed out by Justice Ginsburg in dissent, the majority then appears to trivialize this foundational principle of consent by “imposing individual arbitration on employees who surely would not choose to proceed solo.”⁷⁶

The majority in *Lamps Plus* correctly identified consent as the first principle or basis of arbitration.⁷⁷ But the majority focuses on consent in a narrow manner, for the wrong reasons. In describing the need for consent in light of the differences between class and individual proceedings, the majority candidly admits its concern that class arbitration “greatly increases risks to defendants.”⁷⁸ The majority’s reasoning should apply in arbitration more broadly, protecting all parties, not just corporate defendants.

To understand why the majority’s focus on consent is overly narrow, it is helpful to examine why the majority focuses on consent. A key component of the majority’s reasoning is the “crucial differences” between individual and class arbitration.⁷⁹ What are these “crucial differences”? The majority, at a high level of generality, claims that individual arbitration, compared to class arbitration, involves “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”⁸⁰ The majority also summarily states that “[c]lass arbitration lacks those benefits,” and class arbitration is “slower, more costly, and more likely to generate procedural morass than final judgment.”⁸¹ Notice that the majority’s reasoning boils down to a few general grievances against class procedures. The majority, without much support, attacks class procedures as slower, less efficient, and more costly.⁸² The majority’s decision may be better understood as not really concerning arbitration at all, but instead, a thinly-veiled attack against class procedures.⁸³ Because of these “crucial differences” involving general claims of costs

75. *Id.* at 1415 (citations omitted) (“[T]he first principle that underscores all of our arbitration decisions [is that] arbitration is strictly a matter of consent.”).

76. *Id.* at 1421.

77. *Id.* at 1415.

78. *Id.* at 1414 (citation omitted).

79. *Id.* at 1416.

80. *Id.* (citation omitted).

81. *Id.* (citation omitted).

82. *Id.*

83. *Cf. Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 252 (2013) (Kagan, J., dissenting, joined by Ginsburg and Breyer, JJ.) (“To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”).

and efficiency, and because consent is critical to arbitration, the majority concludes that consent to class proceedings cannot be easily inferred.⁸⁴ But what counts as consent in this setting involving possible class procedures? The majority does not fully explore the contours of consent. Instead, the majority concludes that silence or ambiguity regarding class proceedings would not justify class proceedings, and the majority suggests that a more specific showing of consent would be required for class proceedings.⁸⁵

The majority was correct to focus on consent as the core, driving value of arbitration, but the majority's application of consent was overly restrictive and limited to the narrow context of class procedures. If the majority would apply its concern about consent more broadly, the Court would correct decades of flawed arbitration decisions and help stop corporate abuses of arbitration. The majority's decision to distinguish individual and class procedures because of their "crucial differences" could easily expand to all arbitration matters, when compared to litigation in court. If these vague, generalized differences between individual arbitration and class arbitration are "fundamental" and "crucial," consider the differences between litigation in court (with the possible availability of class procedures) and individual arbitration. Aren't the differences between litigation and arbitration just as, if not more, fundamental or crucial than the differences between class and individual arbitration? For example, in federal court, parties involved in a civil action will have broad rights to discovery;⁸⁶ open, public proceedings;⁸⁷ the right to a jury trial in certain cases;⁸⁸ appellate rights;⁸⁹ in addition to the existence of class procedures.⁹⁰ Such broad procedural protections do not automatically exist under the rules for employment or consumer arbitration from the American Arbitration Association.⁹¹ Or consider this analysis of a particular employment discrimination dispute, where an employer has tilted the arbitration process in its favor by drafting

84. *Id.*

85. *Id.*

86. Fed. R. Civ. P. 26–37.

87. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (“[T]he public and the press possess a First Amendment and a common law right of access to civil proceedings.”).

88. U.S. Const. amend. VII.

89. *Martin v. Sullivan*, 876 F.3d 235, 236 (6th Cir. 2017) (“The losing party in a civil case has a right to appeal . . .”).

90. Fed. R. Civ. P. 23.

91. *Employment Arbitration Rules and Mediation Procedures* (Am. Arbitration Ass'n 2009); *Consumer Arbitration Rules* (Am. Arbitration Ass'n 2014).

harsh terms. In such a case, arbitration that tries to resolve an employee's claim of discrimination may involve severe limits on depositions or other forms of discovery;⁹² no ability to talk to others informally due to broad confidentiality provisions;⁹³ no public hearings;⁹⁴ no broad appellate rights;⁹⁵ with only 60 days to file a claim because of an abbreviated statute of limitations;⁹⁶ with hearings in a distant location;⁹⁷ and with the employee paying significant fees for the arbitration.⁹⁸ Contrast this with the same case filed in federal court, where the employee would have broad procedural protections, including but not limited to class procedures.⁹⁹

92. *Compare* Lovelance v. DEKRA N. Am., Inc., No. 3:17-CV-00318-BR, 2017 WL 2927153, at *5 (D. Or. June 30, 2017) (enforcing arbitration agreement limiting discovery to “one set of discovery requests and one deposition”); *Abrams v. Merz Aesthetics, Inc.*, No. 14-CV-03552-EDL, 2014 WL 12771127, at *3 n.1 (N.D. Cal. Nov. 4, 2014) (upholding arbitration agreement providing for one deposition); *Vulpis v. Credit Acceptance Corp.*, No. 16-61200-CIV, 2016 WL 10932954 (S.D. Fla. Sept. 22, 2016) (one deposition of fact witness); *with* Fed.R.Civ.P. 30 (generally providing for 10 depositions). *See also* U.S. ex rel. Beauchamp v. Academi Training Ctr., Inc., No. 1:11CV371, 2013 WL 1332028, at *3 n.8 (E.D. Va. Mar. 29, 2013) (“There shall be no discovery allowed in the arbitration, except that each party shall provide to the other five (5) days in advance of the hearing the written evidence upon which it intends to rely.”).

93. *Chin v. Advanced Fresh Concepts Franchise Corp.*, 194 Cal. App. 4th 704, 714 (2011) (upholding arbitration clause providing that “[e]xcept as may be required by law, no party or arbitrator(s) may disclose the existence, content or results of any arbitration hereunder without the prior written consent of both parties”); *Sanchez v. Carmax Auto Superstores California, LLC*, 224 Cal. App. 4th 398, 408 (2014) (enforcing confidentiality provision despite the employee’s argument that such provisions “inhibit employees from discovering evidence from each other or litigating common claims together”).

94. *See, e.g., Sanchez v. Carmax Auto Superstores Cal., LLC*, 224 Cal.App.4th 398, 408 (2014) (enforcing arbitration agreement with a confidentiality provision requiring “that the arbitration (including the hearing and record of the proceeding) be confidential and not open to the public unless the parties agree otherwise”).

95. *See, e.g., AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 508 F.3d 995, 1001 (11th Cir. 2007) (“judicial review of arbitration decisions is among the narrowest known to the law”) (citation and internal quotations omitted).

96. *See, e.g., Patterson v. Nine Energy Serv., LLC*, 330 F. Supp. 3d 1280, 1312 (D.N.M. 2018), adhered to on denial of reconsideration, 355 F. Supp. 3d 1065 (D.N.M. 2018). (discussing 60 day limitation period to commence arbitration after a claim arises).

97. *See, e.g., Evans v. TRG Customer Sols., Inc.*, No. CV 2:14-00663, 2014 WL 12659420, at *7 (S.D.W. Va. 2014) (requiring hearings to take place at employer’s executive offices, which were located hundreds of miles away from the plaintiff’s place of employment).

98. *Brne v. Inspired eLearning*, No. 17-CV-02712, 2017 WL 4263995, at *3 (N.D. Ill. Sept. 26, 2017) (enforcing provision in arbitration clause requiring employee and employer to “each pay one-half of the costs and expenses” of the arbitration).

99. *See supra* notes 88–90 and accompanying text.

The majority in *Lamps Plus* was troubled by the “crucial differences” between individual arbitration and class arbitration, namely the existence of class procedures. But this same difference exists when comparing litigation in court (and the typical availability of class procedures in court) and individual arbitration. Moreover, because of the broad procedural protections available in court, the differences between litigation and arbitration are probably more fundamental or crucial than the differences between class and individual arbitration. In both sets of comparisons (comparing litigation vs. individual arbitration and comparing individual arbitration vs. class arbitration), the availability of class procedures is one critical difference. If this single difference raised concerns with the majority and required a showing of specific, heightened consent, then the even greater differences between litigation and arbitration should also require a showing of specific, heightened consent. The majority’s reasoning in *Lamps Plus* makes the case for requiring more specific, heightened consent for all arbitration matters because a party foregoes the more robust procedural protections available in court.

The lack of meaningful consent is a significant problem in arbitration law. In the employment context, courts sometimes find that an arbitration clause has been accepted by a worker as a result of the worker’s continued employment, even where the worker was not aware of the arbitration clause.¹⁰⁰ In connection with the financial services industry, for example, the Consumer Financial Protection Bureau conducted a study finding that the vast majority of consumers were either unaware of the existence of an arbitration clause in their contracts or did not understand the significance of an arbitration clause and wrongly believed they could still sue in court.¹⁰¹ If most consumers and employees either don’t understand or even know of the existence of arbitration clauses, there is reason to doubt there was mutual consent to send their disputes to arbitration.

Since the majority doubted that a company would willingly consent to class arbitration, and the differences between litigation and arbitration can be just as “crucial,” there is “reason to doubt” that a vulnerable party would willingly consent to resolving disputes with

100. See, e.g., *Tinder v. Pinkerton Sec.*, 305 F.3d 728 (7th Cir. 2002).

101. Consumer Fin. Protection Bureau, *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(A)*, at § 1.4.2, 3.4.3 (2015) (citing survey evidence demonstrating that most consumers lack awareness of the existence or meaning of an arbitration clause).

the lesser procedural protections of arbitration.¹⁰² Accordingly, courts should not easily infer consent of consumers and employees. However, under current case law, where meaningful consent is lacking, courts routinely enforce arbitration agreements against consumers and employees who were unaware of the existence of the arbitration agreement and would have never willingly given up the right to court.¹⁰³ The majority's rationale in *Lamps Plus*, if applied more broadly to other arbitration settings such as the initial, underlying understanding to arbitrate, suggests that courts should require clear disclosures regarding arbitration as well as affirmative, express, knowing, opt-in consent from a consumer or employee who willingly chooses to arbitrate.¹⁰⁴

Either the Majority is Being Disingenuous About Arbitration Agreements or the Majority Fundamentally Misunderstands the Nature of Arbitration Agreements

The majority's conceptualization of consent and arbitration is problematic. It appears that either the majority has fundamentally misunderstood the reality of how arbitration agreements are formed, or the majority is being disingenuous. After stressing the centrality of consent for arbitration, the majority describes the process of making arbitration agreements as follows:

Parties may generally shape such agreements to their liking by specifying with whom they will arbitrate, the issues subject to arbitration, the rules by which they will arbitrate, and the arbitrators who will resolve their disputes.¹⁰⁵

102. *Cf.* *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1416 (2019) ("Because of these crucial differences between individual and class arbitration, . . . there is reason to doubt the parties' mutual consent to resolve disputes through classwide arbitration." (internal quotations and citation omitted)).

103. *See, e.g.,* *Couch v. AT&T Servs., Inc.*, No. 13-CV-2004 DRH GRB, 2014 WL 7424093 (E.D.N.Y. Dec. 31, 2014) (enforcing arbitration agreement even though employee had no knowledge or awareness of employer's arbitration agreement); *Wold v. Dell Fin. Servs., L.P.*, 598 F. Supp. 2d 984, 987, 989 (D. Minn. 2009) (enforcing arbitration agreement despite consumer's assertion that he never received the document containing an arbitration clause); *Regions Bank v. Herrington*, 630 F. Supp. 2d 722, 725, 727 (S.D. Miss. 2009) (ordering customer to submit claims to arbitration even though customer did not receive a copy of the bank's customer agreement containing the arbitration clause); *see also, Sanders v. Comcast Cable Holdings, LLC*, No. 3:07-CV-918-J-33HTS, 2008 WL 150479 (M.D. Fla. Jan. 14, 2008).

104. *Cf. Imre S. Szalai, The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America's Civil Justice System*, 24 VA. J. Soc. POL'Y & L. 195 (2017) (proposing a heightened standard of consent regarding consumer and employee arbitration agreements).

105. 139 S.Ct. at 1416 (citation omitted).

This description from the majority does not comport with the reality of how arbitration agreements are formed. I conducted a study of consumer arbitration agreements in America, and there are several hundred million of such agreements in place, with more than 80% of America's largest companies using arbitration agreements for consumer disputes.¹⁰⁶ For each of the companies I examined, it did not appear that any consumer was able to shape the agreement to their liking; the millions of agreements were all fine-print, take-it-or-leave-it agreements.

As an illustration, Procter & Gamble (P&G), one of the largest companies in America and a manufacturer of a wide variety of consumer goods, has a non-negotiable arbitration clause on its website.¹⁰⁷ If I purchase one of P&G's many products through its website, such as a Gillette razor or some Tide PODS laundry detergent, I am purportedly bound by this arbitration clause. Thus, if I am injured by one of P&G's products, perhaps my child swallows the brightly-colored laundry detergent pod thinking it is candy, or I am injured shaving because of a defectively-designed razor, the arbitration clause, which is broadly drafted, would appear to block my ability to bring a lawsuit in court. Consider the harsh, one-sided terms unilaterally imposed by P&G:

P&G has the sole, unilateral right to invoke arbitration, but the consumer does not have the right to demand arbitration. Thus, it is solely P&G's decision whether to arbitrate or not.

The arbitration will take place in Cincinnati, Ohio, regardless of where the consumer may be located.

The arbitrator cannot issue injunctive relief and solely issue an award for monetary damages, limited to actual damages.

The arbitrator cannot issue an award for punitive damages.

All claims must be commenced within one year after the claim or cause of action arises, even though governing law may provide for the filing of a claim within a longer time period.

In what ways can a P&G customer "shape" this agreement creating a tribunal slanted in P&G's favor? I recently purchased a washer

106. Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233 (2019)

107. Procter & Gamble, Terms of Use for Procter & Gamble Web Sites, (2016) available at https://www.pg.com/en_US/terms_conditions/terms_conditions.shtml#laws [https://perma.cc/79FF-UMCF].

and dryer from Home Depot, and because of my fascination with arbitration, I am constantly on the lookout for arbitration clauses. Not only did Home Depot include an arbitration clause in the small print on its website,¹⁰⁸ but also Home Depot affixed a small label, about 1 inch by 2 inches, taped on the front of the washer and dryer when these appliances were delivered. The label stated that all disputes related to the washer and dryer would be resolved “in binding arbitration on an individual basis.”¹⁰⁹ When my new washer began spraying water around my garage because of poor installation and a bent valve, I realized I would be stuck in a private tribunal designed by Home Depot if I wanted to pursue any claims against Home Depot.

The majority in *Lamps Plus*, with a fictional view of consent, seemed to assume that consumers and employees like me can generally “shape such agreements to their liking,” specifying the rules by which I would arbitrate and what issues I will arbitrate.¹¹⁰ However, P&G, Home Depot, and most other companies do not negotiate the terms of arbitration clauses with consumers or employees. Instead, P&G and Home Depot, like most major companies, unilaterally design their arbitration clauses, with zero opportunity for its customers or employees to shape the process. As demonstrated above, some companies like P&G unfairly tilt the arbitration process in their own favor, to its sole “liking,” not the customer’s “liking,” through several harsh terms advantageous to the company.

Instead of the majority’s naïve or disingenuous conception of consent, consumers and employees typically do not have the ability to shape the arbitration process. In reality, consumers and employees are not even aware of the existence or meaning of arbitration, and typically the stronger corporate party in consumer or employment transactions drafts the clause. This reality involves one of the most problematic areas of potential abuse concerning arbitration because it has become harder for courts to police or monitor abusively-drafted arbitration clauses. Over the years, the Supreme Court has developed doctrines insulating arbitration clauses from invalidation and judicial review, weakening the power of courts to monitor arbitration clauses for fairness.¹¹¹

108. The Home Depot, Customer Support: Terms of Use (2016), available at https://www.homedepot.com/c/Terms_of_Use [<https://perma.cc/5YY2-N9AT>].

109. A copy of the label is on file with the author.

110. 139 S.Ct. at 1416 (citation omitted).

111. See generally Imre Stephen Szalai, *More Than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 BERKELEY J. EMP. & LAB. L. 31 (2014) (explaining how the Supreme Court’s arbitration doctrines

B. *The Supreme Court's Lamps Plus Majority Propagates a Flawed Myth About Arbitration*

As explained above, the majority in *Lamps Plus* displays a narrow, flawed understanding of consent in connection with arbitration. Troublingly, the majority in *Lamps Plus* misunderstands the nature of arbitration and its benefits.

Professor Jill Gross has pointed out that the Supreme Court's view of arbitration is deeply flawed, "antiquated," and "built on a narrative of an arbitration process that no longer exists."¹¹² The majority in *Lamps Plus* conceptualizes arbitration as an efficient, simple, low-cost method of dispute resolution.¹¹³ However, arbitration can be just as, if not more, complex, expensive, and time-consuming as court proceedings. The Supreme Court's reasoning in *Lamps Plus* is premised on an overly-simplified view of arbitration as a one-size-fits-all process, without taking into account the rich variety and complexity that exists in the arbitration field.

A core part of the majority's reasoning in *Lamps Plus* is the following description of arbitration:

In individual arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.¹¹⁴

The majority also described the "virtues" of arbitration as "its speed and simplicity and inexpensiveness."¹¹⁵ The majority also stated "[n]either silence nor ambiguity provides a sufficient basis for concluding that parties to an arbitration agreement agreed to undermine the *central benefits* of arbitration itself."¹¹⁶

Speed, lower costs, and simplicity are potential attributes of some arbitration proceedings. However, the core principle of arbitration is consent,¹¹⁷ and parties can agree to arbitrate in ways that are not fast, cheap, or simple. For example, some arbitration agreements

are limiting available defenses against arbitration and reducing the power of courts to monitor arbitration clauses for abuse).

112. Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 115 (2015).

113. 139 S. Ct. at 1416.

114. *Id.* (citation omitted).

115. *Id.* (citation omitted).

116. *Id.* at 1417 (emphasis added).

117. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("[a]rbitration is simply a matter of contract between the parties.").

incorporate the Federal Rules of Civil Procedure, the same procedural rules that govern civil actions in federal court.¹¹⁸ Because arbitration is in theory a matter of consent, parties can enter into arbitration agreements with highly-tailored, complex procedures, and arbitrations can go on for years, with dozens of hearings and witnesses, hundreds of exhibits, and thousands of pages of briefings and submissions.¹¹⁹ As recognized by Professor Gross, the Supreme Court stubbornly sticks to a simplified view of arbitration as an efficient, cheap, fast method of dispute resolution,¹²⁰ and the majority in *Lamps Plus* continues to propagate this flawed view of arbitration. However, this overly simplistic view of arbitration fails to take into account the rich variety of arbitration and all the possibilities flowing from the core principle of arbitration: arbitration should be based on the agreement of the parties.¹²¹ There are several different arbitral institutions, each with various sets of rules,¹²² and parties can also

118. *Ophthalmic Consultants of Texas, P.A. v. Morales*, 2015 WL 6119490, at *1 (Tex. App. Oct. 15, 2015) (arbitration pursuant to the Federal Rules of Civil Procedure); *Air Liquide Indus. U.S. LP v. Garrido, Opposition to Petition for Certiorari*, 2016 WL 3194586, at *4 (U.S. June 6, 2016) (describing the arbitration proceedings as “governed by the Federal Rules of Civil Procedure”); *Marchant v. Maxim Healthcare Servs., Inc.*, 2018 WL 5793595, at *3 (D.S.C. Nov. 5, 2018) (“[T]he arbitration agreement requires discovery under the Federal Rules of Civil Procedure.”).

119. *In re Engel (Refco, Inc.)*, 193 Misc.2d 91, 96, 746 N.Y.S.2d 826, 831 (N.Y. Sup. Ct. 2002) (stating that “[t]he NFA arbitration panel heard evidence and argument between July 1998 and April 2001; thus, the complex consolidated arbitration spanned almost three years. There were over 24,000 pages of hearing transcripts, 59 witnesses, more than 400 exhibits, over 700 pages of post-hearing memoranda and numerous other submissions (all of which presumably were included in the 17 boxes of materials the parties submitted along with these petitions.”); *Manion v. Nagin*, 2003 WL 21459680, at *4 (D. Minn. June 20, 2003) (observing that “the procedural complexity of this arbitration was comparable to complex litigation in United States District Court”); *Fid. Brokerage Servs. LLC v. Deutsch*, 2018 WL 2947972, at *2 (S.D.N.Y. May 31, 2018) (arbitration involving over fifty non-consecutive days of hearings); *Cox v. Time Warner Cable, Inc.*, 2013 WL 5469992, at *1 n.1 (D.S.C. Sept. 30, 2013) (“On several occasions in recent years, when this court has granted a motion to compel arbitration, retaining the case on its docket so that the award can be formalized in a judgment, the arbitration process has required two to three years to run its course. This court would have been able to provide a much quicker forum for the resolution of those disputes.”); see also Thomas J. Stipanowich, *Arbitration: The New Litigation*, 2010 U. ILL. L. REV. 1 (2010) (describing arbitration as “‘judicialized,’ formal, costly, time-consuming, and subject to hardball advocacy”).

120. Jill I. Gross, *Justice Scalia’s Hat Trick and the Supreme Court’s Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOK. L. REV. 111, 115 (2015).

121. *Id.* at 137 (recognizing how Supreme Court decisions “do not distinguish among the many different types of arbitration practiced today—commercial, labor, securities, consumer, international, and construction—nor do they distinguish among the forums administering arbitrations under different rules, including AAA, JAMS, CPR, FINRA, ICC, and National Arbitration and Mediation (NAM).”)

122. *Id.*

draft their own individualized, ad hoc arbitral procedures, as simple or as complex as the drafting party or parties desire. When arbitration is being implemented properly with meaningful consent, parties are in effect able to design and purchase luxury, tailor-made justice, from a broad range of possibilities—from streamlined, minimalist procedures, to very detailed procedures that ensure a thorough vetting of every aspect of a case. Especially if there is much at stake and the parties want to ensure thorough consideration of all issues, parties may choose to provide for extensive opportunities for discovery, briefing, and the presentation of live fact and expert witnesses.

The “crucial” differences between complex class proceedings and individual arbitration, misconceptualized by the majority as simple and efficient, helped justify the majority’s holding regarding ambiguity and silence in *Lamps Plus*. However, the majority’s holding is premised on a flawed, outdated, overly simplistic view of the nature of modern arbitration. Individual arbitration proceedings can be just as complex as litigating in court.

How can the Supreme Court repeatedly make this mistake about the nature of arbitration? Perhaps the Justices conceptualize arbitration in homogeneous, simplified terms because the federal judiciary may be accustomed or preconditioned to think of the federal civil procedure system as a somewhat unified, one-size-fits-all, trans-substantive system, with a generalist judge who handles any type of dispute, whether intellectual property matters, slip and fall accidents, criminal law matters, employment disputes, and environmental law matters.¹²³ In other words, the federal judiciary’s view of dispute resolution and procedural rules involves a well-established, trans-substantive procedural system, and this view of procedure and dispute resolution may color how the Justices view arbitration. This narrative, although flawed, may help justify the Court’s expansive development of arbitration doctrines. For example, treating all arbitration as a uniform process helps justify the expansion of arbitration law to cover all possible disputes in all settings.¹²⁴ Under this view, the Court can announce a new doctrine without having to analyze

123. See Carl Tobias, *The Transformation of Trans-Substantivity*, 49 WASH. & LEE L. REV. 1501 (1992) (arguing that although the Federal Rules of Civil Procedure may give the impression of a one-size-fits-all, homogeneous, transsubstantive system of procedure, variations in local rules and practices have in reality undermined this vision of trans-substantivity).

124. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (expanding arbitration law to cover statutory antitrust claims).

how the doctrine would apply to the wide variety of arbitration settings or rules.¹²⁵ However, the overly-simplified conceptualization of arbitration in *Lamps Plus*, which does not take into account the rich variety of rules and settings where arbitration can be used, leads to flawed rulings and hinders the Court's ability to develop special rules or doctrines better tailored for particular contexts.

Instead of mistakenly viewing the core values of arbitration as involving "speed and simplicity and inexpensiveness,"¹²⁶ the Court should recognize a different fundamental value of arbitration. The late professor Ed Brunet powerfully argued that a central value of arbitration law is party autonomy, which should take precedence over the often-touted value of efficiency, which is just a myth.¹²⁷ Cheaper, faster, and more efficient are potential attributes of certain forms of arbitration, if the agreement structures such a proceeding. However, because arbitration is based on the fundamental principle

125. For example, the Court's recent decision in *Henry Schein, Inc. v. Archer & White Sales, Inc.*, involved two relatively sophisticated businesses, a distributor and manufacturer. 139 S. Ct. 524 (2019). The Court in *Henry Schein* developed a technical, specific rule providing that even baseless claims about arbitrability must be resolved by an arbitrator if the parties' contract contains a delegation clause whereby an arbitrator resolves whether the parties agreed to arbitrate. However, consider how this rule, developed in the context of an arbitration agreement involving sophisticated parties, would operate when there is inequality of bargaining power. A consumer who was legitimately harmed and who has a valid claim could sue a company in court, and the company in response may raise baseless arguments concerning the arbitrability of the dispute. For example, the arbitration clause may be narrow in scope and not cover the consumer's claims, but the company could raise a baseless argument that the arbitration clause did cover the consumer's claims. As a result of *Henry Schein*, the court would send the company's baseless arguments regarding arbitrability to an arbitrator. The consumer would now have to jump through and possibly even pay for an extra procedural hurdle, having the arbitrator consider, resolve, and reject the baseless arbitrability arguments, before the consumer could proceed in court. The *Henry Schein* ruling may not seem problematic in the context of a business-to-business dispute. But this ruling can create problems in other arbitration settings where there is inequality of bargaining power, and the ruling can be more burdensome in these settings. Conceptualizing arbitration as a uniform, homogeneous process enables the Court to develop arbitration doctrines that would apply in all arbitration settings, although the different settings, uses, and types of arbitration would arguably justify the development of more tailored, different arbitration doctrines that would be more appropriate for different settings. As another illustration, perhaps a manifest disregard of the law standard for vacatur of arbitral awards would be more appropriate for statutory claims in the consumer or employment setting, but not for a business-to-business setting involving a contractual dispute over the delivery or quality of goods. *But see Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010) (noting that it is undecided whether the manifest disregard standard continues to exist).

126. 139 S.Ct. at 1416.

127. Edward Brunet, et al., *Arbitration Law in America: A Critical Assessment* 3-6 (2006).

of consent, parties can structure their arbitration agreements to incorporate complex, costly, and more time-consuming procedures than court proceedings.¹²⁸ Decisions like *Lamps Plus*, while paying lip service to consent,¹²⁹ do not really honor consent or party autonomy as the central value of arbitration.

The majority in *Lamps Plus* used one set of flawed, incorrect values regarding arbitration—speed and simplicity and inexpensiveness—to justify its reasoning, but the true central benefit and core value of arbitration should be respect for party autonomy. If the Court would recognize that party autonomy is the core value of arbitration law,¹³⁰ it could in turn develop a doctrine more protective of meaningful, voluntary consent for all parties, helping restore respect for human dignity and self-determination by recognizing arbitration as a truly consensual process. By sending vulnerable parties into arbitration when meaningful consent is lacking, courts are in effect allowing waivers of the constitutional right to a jury trial, but without the knowing and voluntary consent typically required to waive such critical rights. Weaker parties are being sent, against their will, to tribunals lacking due process protections. If the Supreme Court were to truly require meaningful consent for all arbitration, the Court could advance respect for human dignity by restoring the right of individuals to choose how they will resolve their own disputes.

C. *The Majority's Critique of Contra Proferentem, Applied More Broadly, Reveals the Weaknesses of the Court's Arbitration Jurisprudence*

The majority in *Lamps Plus* criticized the lower court's use of the *contra proferentem* doctrine from state law.¹³¹ According to the majority, this rule is based on “public policy considerations” and “seeks ends other than the intent of the parties,” and as a result, violates the fundamental principle that arbitration is a matter of consent.¹³² In other words, arbitration doctrines should not stray away from the intent of the parties, the guiding principle in arbitration.

These concerns, if applied more broadly, would undermine other existing arbitration doctrines. For example, in *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, the Court created a rule that “any

128. See *supra* note 125 and accompanying text.

129. 139 S.Ct. at 1415–16 (citations omitted) (describing the foundational principle of arbitration law as consent of the parties).

130. Brunet, *supra* note 127, at 3–6.

131. 139 S.Ct. at 1417–19.

132. *Id.* at 1417.

doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. . . .”¹³³ This *Moses H. Cone* rule, however, does not appear to respect the consent of the parties, and this *Moses H. Cone* rule arguably violates the majority’s reasoning in *Lamps Plus*. For example, consider how the *Moses H. Cone* rule operated in the following case called *Charging Bison, LLC v. Interstate Battery Franchising & Dev., Inc.*, a franchising dispute.¹³⁴ The arbitration agreement between the franchisor and franchisee broadly covered all claims between the parties, but not claims involving “the propriety of any termination” of the parties’ agreement.¹³⁵ The franchisee eventually discovered that the franchisor had made misleading disclosures, and a dispute arose regarding the franchisee’s right to terminate the agreement based on the alleged false disclosures.¹³⁶ The franchisor argued that the exception in the arbitration clause for “termination” narrowly applied to an actual termination of the franchise agreement, but the agreement was still in force. Relying on the *Moses H. Cone* rule involving doubts or ambiguities, the court held that the franchisee’s claims regarding an anticipatory termination based on alleged false disclosures was subject to arbitration.¹³⁷

Under the *Moses. H. Cone* rule, courts treat uncertainties or ambiguities about whether a claim should be arbitrated to mean that the claim must be arbitrated. Because there is a lack of confidence about whether the parties agreed to arbitrate the claim (the anticipatory termination of the franchise agreement in the above example), shouldn’t this uncertainty regarding consent lead to a finding of non-arbitrability under the rationale of *Lamps Plus*? To help respect the foundational concept of consent, the *Lamps Plus* majority held that ambiguity about class proceedings in arbitration would mean that class proceedings would not occur and could not be based on a policy rule such as *contra proferentem*.¹³⁸ The well-established *Moses H. Cone* rule is based on policy considerations, not meaningful consent; the reasoning of the *Lamps Plus* majority undermines the *Moses H. Cone* rule and suggests that ambiguities involving the scope of an arbitration clause should be resolved against arbitration.

Similarly, consider a consumer who has strong arguments that his or her arbitration clause is not enforceable. Shouldn’t this mean

133. 460 U.S. 1, 24–25 (1983).

134. 2017 WL 1296454 (N.D. Tex. Apr. 7, 2017).

135. *Id.* at *1.

136. *Id.*

137. *Id.* at *4.

138. 139 S.Ct. at 1417–19.

that the consumer can bring their claims in court? Not necessarily. In the wake of the Supreme Court's holding in *Rent-A-Center, West, Inc. v. Jackson*,¹³⁹ the consumer may still have to pay for and undergo a time-consuming arbitration proceeding if the drafting party includes one extra sentence stating that an arbitrator resolves questions of arbitrability. For example, in *State ex rel. Newberry v. Jackson*,¹⁴⁰ the employees had arguments that there was a lack of consideration for their arbitration clause.¹⁴¹ Because there was uncertainty regarding the obligation to arbitrate, shouldn't arbitration be denied, consistent with the majority's ruling in *Lamps Plus* and its purported concern about consent, at least until a court resolves the issue of lack of consideration? The court in *Newberry* ordered the parties to arbitration, with the arbitrator to rule on the lack of consideration.¹⁴² As a result of pro-arbitration policies and the Court's ruling in *Rent-A-Center*, courts now routinely send vulnerable parties to arbitration, even where there is uncertainty about whether a valid obligation to arbitrate exists.¹⁴³ A consumer or employee may have strong arguments against the enforceability of an arbitration agreement, and courts will still order arbitration under the Court's ruling in *Rent-A-Center*.¹⁴⁴

The majority in *Lamps Plus* criticizes the use of the *contra proferentem* doctrine as straying from the foundational principle of consent, and this critique is ironic. Over the years, the Court has developed arbitration doctrines like the *Moses H. Cone* rule that are not really focused on the consent of the parties, and instead, these doctrines fill in the gap where consent may be lacking and require arbitration even where there is uncertainty about the obligation to arbitrate.

139. 561 U.S. 63 (2010) (holding that delegation clauses within an arbitration clause must be enforced unless the party raises a specific, narrow challenge to the delegation clause itself).

140. 575 S.W.3d 471, 473 (Mo. 2019).

141. *Id.* at 474.

142. *Id.*

143. *Brumley v. Austin Centers for Exceptional Students Inc.*, 2019 WL 1077683 (D. Ariz. Mar. 7, 2019).

144. *Song v. Charter Commc'ns, Inc.*, 2017 WL 1149286 (S.D. Cal. Mar. 28, 2017) (plaintiff must have arbitrator decide whether his claims for *injunctive* relief are subject to arbitration pursuant to a clause that requires arbitration of claims for *monetary* relief).

D. *The Lamps Plus Decision Reveals Concerns about the Development of Arbitration Law*

The majority in *Lamps Plus* concludes its opinion by boldly stating “the FAA provides the default rule for resolving ambiguity here,” as if the text of the statute provides a clear answer for this case.¹⁴⁵ However, the text of the FAA does not contain a rule that ambiguities are resolved in favor of individual arbitration. Instead, the Court in *Lamps Plus*, just like it has done for several decades in this field of arbitration law, is legislating from the bench and manufacturing arbitration doctrines of the Court’s own making.¹⁴⁶ Instead of saying “the FAA provides the default rule” for this case, it would be more accurate for the majority to state something like “we, the majority, have crafted our own default rule for this case based on our policy choices and dislike of class proceedings.”¹⁴⁷

Lamps Plus and the majority’s legislating from the bench highlight the nature of arbitration law. Federal arbitration law in the United States is largely judge-made. For example, the text of the FAA does not contain the *Moses H. Cone* rule regarding the scope of an arbitration clause discussed above.¹⁴⁸ Similarly, other arbitration principles, such as the rule that courts determine substantive arbitrability unless there is clear and unmistakable evidence for the arbitrators to make this determination,¹⁴⁹ are not found in the text of the statute.

The FAA is a short statute, drafted for a different era and for much more limited circumstances.¹⁵⁰ Over the decades, the Supreme Court has expanded the statute in several ways that clearly contradict the text and purpose of the statute as originally enacted, such as

145. 139 S. Ct. at 1419.

146. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring) (describing the majority’s interpretations of the FAA as a flawed “edifice of [the Supreme Court’s] own creation”).

147. In certain areas of law, the Supreme Court has recognized judicial power to develop rules. *See, e.g.*, *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957). (finding that, in connection with federal labor law, the Labor Management Relations Act embodies a judicial power to “fashion federal law where federal rights are concerned,” and the Court has exercised this power to develop arbitration rules in connection with collective bargaining agreements). Some of these arbitration principles developed in the labor context under the Labor Management Relations Act have become part of the FAA’s jurisprudence. *See, e.g.*, *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (citing cases involving labor arbitration).

148. *See supra* notes 133 and accompanying text.

149. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

150. *See generally* Imre S. Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (2013) (discussing the history of the FAA’s enactment and its narrow, original scope and purpose).

by expanding the statute to apply in state courts¹⁵¹ and cover statutory claims¹⁵² and employment claims.¹⁵³ Today, there is a large disconnect between the text of the statute and how the statute is interpreted. Justices of the Supreme Court have created many arbitration law doctrines bearing no relationship to the statute passed by Congress.¹⁵⁴ Decisions like *Lamps Plus* serve as a reminder of the need to amend the FAA through more democratic processes.¹⁵⁵

IV. THE DISAPPEARING AVAILABILITY OF CLASS PROCEEDINGS WHEN AN ARBITRATION CLAUSE EXISTS

Through cases like *Concepcion*,¹⁵⁶ *American Express*,¹⁵⁷ *Stolt-Nielsen*,¹⁵⁸ and the Court's most recent arbitration case involving class procedures, *Lamps Plus*,¹⁵⁹ the Supreme Court continues to close the door on the availability of class proceedings through the use of arbitration clauses. But possibilities still remain, even when an arbitration clause is involved. This Part of the Article explores the remaining sliver of possibilities.

A. *Class Proceedings May Occur if the Arbitration Clause is Defective or Members of the Class Never Entered into a Binding Arbitration Clause*

One possibility for class proceedings to occur when an arbitration clause exists is if there is a defect in the arbitration clause, or maybe some members of the prospective class never entered into an agreement to arbitrate. Using P&G's arbitration clause as an example,¹⁶⁰ a company may have an arbitration clause which some courts may invalidate as unconscionable. Thus, if a class action is filed against P&G, a court may find the arbitration clause to be unenforceable due to its harsh terms, and a lawsuit could proceed in court with the named plaintiff potentially able to take advantage of class procedures

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

152. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

153. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

154. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring) (describing the FAA as "edifice of [the Supreme Court's] own creation").

155. 139 S. Ct. at 1422 (expressing "urgent" need for Congressional amendments to the FAA).

156. 563 U. S. 333 (2011).

157. 570 U.S. 228 (2013).

158. 559 U. S. 662 (2010).

159. 139 S. Ct. 1407 (2019).

160. *See supra* note 107 and accompanying text.

available in court. An arbitration clause may be so poorly and harshly drafted or implemented that hundreds or thousands of agreements are invalid, in which case these customers or employees will have the ability to proceed in court and participate in class proceedings in court.

A defect could exist for the entire class, or on a more limited scale, with problems regarding consent or unconscionability for a smaller subset of all customers or employees. If the defect is more limited in scale, some individuals may still be bound to arbitrate, while others are free to pursue their rights in court, including the possibility of pursuing class proceedings. For example, it is possible that consumers or employees may have entered into purported arbitration agreements in different manners, at different times, with different language or variations among the agreements, so that some agreements are enforceable while others are not. Through individual or global defects in drafting or in the implementation of an arbitration agreement, it is possible that some or all members of a prospective class may have the ability to proceed in court and take advantage of class procedures in court.

B. *Class Proceedings May Occur Through a Qui Tam Action or Private Attorney General Statute*

In *E.E.O.C. v. Waffle House, Inc.*¹⁶¹, the Supreme Court recognized that an arbitration agreement between an employee and employer could not block an enforcement action brought by the government.¹⁶² The Court reasoned that the government is simply not a party to the contract, and thus cannot be bound by it. Taking this holding one step further, one could argue that an agent acting on behalf of the government should similarly be free from the restraints of an arbitration clause. There are some types of legal actions where a private party effectively brings an action on behalf of the government, and some courts are willing to find that arbitration agreements do not bar such proceedings.

Another possibility regarding the continued existence of class proceedings in the face of arbitration clauses can be found most prominently in California, through the use of a private attorney general statute or *qui tam* action. In these actions, a private individual

161. 534 U.S. 279 (2002).

162. *Id.* at 297.

brings a claim in the name of the government.¹⁶³ For example, pursuant to the California Private Attorney General Act (PAGA), an employee may bring an action in court in the name of the State of California against an employer, on behalf of an entire class of other workers, for violations of California's labor code, and the employee splits a recovery with the state.¹⁶⁴ Some courts reason that because the government is not a party to a private arbitration clause between an employee and employer, and because an employee bringing a PAGA representative action is merely serving as an agent or proxy for the government, these PAGA claims are not subject to an arbitration clause between the employer and employee.¹⁶⁵ Under California law, a law established for a public reason, such as a PAGA claim, cannot be waived, and thus, an employee has an unwaivable right to bring a representative PAGA action.¹⁶⁶ Similarly, courts have held that certain claims for public injunctive relief under California law are not subject to arbitration.¹⁶⁷ In summary, certain types of actions may involve private parties acting on behalf of the government, and an arbitration clause will generally not bind the government.¹⁶⁸

C. *The Mass Filing of Multiple, Individual Claims in Arbitration*

Consumers or employees may be able to mimic some aspects or benefits of class proceeding through the coordinated filing of multiple, individual arbitration proceedings. For example, if a law firm or group of firms acted in coordination and commenced hundreds or thousands of arbitrations against one defendant or respondent on behalf of similarly situated employees or consumers, the parties may consent, after the fact, to some joint procedures, such as joint briefings or joint hearings or even global settlements.¹⁶⁹

163. *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129, 145 (2014).

164. *Id.* at 145–48.

165. *Id.* at 145–53.

166. *Id.* at 148–49.

167. *Blair v. Rent-A-Ctr., Inc.*, 928 F.3d 819 (9th Cir. 2019).

168. *Cf. EEOC v. Waffle House, Inc.* 534 U.S. 279, 297 (2002) (holding that the EEOC is not bound by an arbitration clause between an employee or employer).

169. With a global settlement covering multiple clients, ethics rules may require special disclosures, and fee divisions among different firms would also have to satisfy ethics rules. See, e.g., ABA Model Rule 1.8(g) (discussing global settlements); ABA Model Rule 1.5 (splitting fees among lawyers from different firms). *But see*, Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 582 (2003) (arguing that ethics concerns always exist in connection with any type of litigation, and concerns about conflicts of interest may be particularly heightened in connection with class procedures.)

It has been reported that thousands of drivers have commenced individual arbitrations against Uber.¹⁷⁰ The fees associated with these thousands of arbitration proceedings have been daunting for Uber, and Uber has reportedly refused to pay the arbitration fees for such claims.¹⁷¹ With such a failure to pay its share of arbitration fees, a court may find that Uber has waived its right to arbitrate. This situation involving thousands of individually filed claims against Uber suggests a strategy that may be used to get around the problems of collective proceedings and arbitration clauses. Law firms may coordinate the filing of hundreds or thousands of individual arbitration actions against a company. If the company recognizes the inefficiency and cost of defending each arbitration proceeding separately, the company may be willing to discuss resolution of the underlying dispute or a settlement on a more global scale.¹⁷²

D. *The New Prime Transportation Worker Exception to the FAA*

In *New Prime Inc. v. Oliveira*,¹⁷³ the Supreme Court held that transportation workers are not covered by the FAA because of a narrow exception found in section 1 of the statute.¹⁷⁴ Thus, transportation workers may be able to file lawsuits in court and seek class action status for their claims. Although arbitration agreements of transportation workers would not be enforceable under the FAA, there is some uncertainty whether such agreements would be enforceable under state law.¹⁷⁵

170. Joel Rosenblatt, *Uber Gambled on Driver Arbitration and Might Have Come Up the Loser*, L.A. TIMES, (May 8, 2019), <https://www.latimes.com/business/la-fi-uber-ipo-arbitration-miscalculation-20190508-story.html>.

171. *Id.*

172. Uber has reportedly agreed to settle some claims involving the classification of its drivers as independent contractors. Caroline Spiezio, *Uber Settles Thousands of Driver Misclassification Claims Before IPO*, Corporate Counsel (May 9, 2019), available at <https://www.law.com/corpocounsel/2019/05/09/uber-settles-thousands-of-driver-misclassification-claims-before-ipo/> [<https://perma.cc/9SA9-5NMN>].

173. 139 S. Ct. 532 (2019).

174. *Id.* at 536.

175. Imre S. Szalai, *The Supreme Court's Landmark Decision in New Prime Inc. v. Oliveira: A Panoptic View of America's Civil Justice System and Arbitration*, 68 Emory L. J. Online 1059, 1079-81 (2019).

E. *Class Proceedings May Occur if an Arbitrator Construes the Contract as Permitting Class Proceedings*

If an arbitration clause contains an explicit class waiver, a court is unlikely to allow class proceedings, and the drafting party has immunized itself from class liability.¹⁷⁶ Subject to a few caveats, class proceedings could still occur in arbitration if the arbitration agreement does not contain an explicit class action waiver. Based on the rulings of *Stolt-Nielsen* and *Lamps Plus*,¹⁷⁷ the availability of class proceedings in arbitration cannot be based on policy arguments, silence, or ambiguities in the arbitration agreement. Instead, the decision to allow class arbitration must be grounded in the agreement of the parties.¹⁷⁸

For example, in a case involving financial advisors bringing overtime claims against Wells Fargo, an arbitrator carefully parsed the text of an arbitration clause and construed the clause to allow for class arbitration.¹⁷⁹ The arbitrator construed the broad terms of the arbitration clause to signify a “comprehensive and all-encompassing” obligation to arbitrate all possible claims, including both individual and class-based claims.¹⁸⁰ Also, the arbitrator interpreted an express exclusion of certain claims to support the conclusion that class proceedings were allowed because the exclusionary provision did not mention representational claims.¹⁸¹ Furthermore, the arbitrator noted that the parties were sophisticated, and class arbitrations were not novel at the time the arbitration clause was drafted.¹⁸² A court refused to vacate the arbitrator’s decision interpreting the arbitration clause to allow for class arbitration.¹⁸³ As demonstrated by this *Wells Fargo* case and similar cases, if a decision to allow for class arbitration is grounded in the text of an arbitration clause, it is possible for class proceedings to occur in arbitration.¹⁸⁴

176. See, e.g., *Blevins v. Teletech Holdings, Inc.*, 2019 WL 3291575 (W.D. Mo. July 22, 2019) (enforcing arbitration clause containing class action waiver and ordering arbitration of plaintiff’s individual claim).

177. 559 U. S. 662 (2010); 139 S. Ct. 1407 (2019).

178. *Lamps Plus*, 139 S. Ct. at 1412.

179. *Wells Fargo Advisors LLC v. Tucker*, 373 F. Supp. 3d 418 (S.D.N.Y. 2019).

180. *Id.* at 425.

181. *Id.*

182. *Id.* at 426.

183. *Id.* at 434.

184. See also *Sun Coast Res., Inc. v. Conrad* 2018 WL 6725407 (S.D. Tex. Dec. 21, 2018) (affirming arbitrator’s construction of an arbitration clause to permit class arbitration proceedings).

It must be emphasized that the construction of an arbitration clause to allow for class arbitration is more likely to be upheld if an arbitrator, not a court, is the decision-maker. If a court engages in contract interpretation, its interpretation may be subject to *de novo* review by an appellate court.¹⁸⁵ However, if an *arbitrator* construes contract language, the decision of an arbitrator is generally final and subject to one of the narrowest, most deferential reviews known in American law.¹⁸⁶ In *Oxford Health Plans LLC v. Sutter*,¹⁸⁷ the Supreme Court held that an arbitrator's decision to allow for class proceedings survived the narrow judicial review of arbitral awards allowed by the FAA.¹⁸⁸ Because of the deferential, narrow judicial review of arbitral awards, the Court in *Oxford Health* emphasized that "the arbitrator's construction [of the arbitration agreement] holds, however good, bad, or ugly."¹⁸⁹ In sum, a possible opportunity for a class action to occur in arbitration would involve an arbitrator relying on the text of an arbitration clause to permit a class arbitration. Even if the arbitrator's interpretation of the text is incorrect, the arbitrator's decision may survive pursuant to the limited judicial review of arbitral awards.¹⁹⁰

V. A NOVEL ANSWER TO A CRITICAL, UNANSWERED QUESTION FROM LAMPS PLUS: WHO DECIDES WHETHER AN ARBITRATION CLAUSE PERMITS CLASS ARBITRATION?

As explained above, the availability of class proceedings has been shrinking, and if an arbitration clause does not contain an explicit class waiver, there is a possibility for a class action to occur in arbitration if the contract is construed as permitting class arbitration. But who decides this issue or construes the contract? An arbitrator's construction of an arbitration clause is more likely to be upheld than a similar decision by a judge because of the narrow standard of judicial review of arbitral awards. Thus, a critical issue is who decides whether an arbitration clause permits class arbitration; is a court or an arbitrator responsible for construing the contract? Courts have

185. *Wood v. Detroit Diesel Corp.*, 213 F. App'x 463, 465 (6th Cir. 2007) ("Questions of contract interpretation are generally considered questions of law subject to *de novo* review.") (citation omitted).

186. *Way Bakery v. Truck Drivers Local No. 164*, 363 F.3d 590, 593 (6th Cir. 2004) ("A court's review of an arbitration award is one of the narrowest standards of judicial review in all of American jurisprudence." (citations and internal quotations omitted)).

187. 569 U.S. 564 (2013).

188. *Id.* at 572.

189. *Id.* at 573.

190. *Id.*

split on this topic. Some courts hold that judges are responsible for construing the contract, while other courts hold that arbitrators are the correct decision-maker. This Article proposes a novel, hybrid solution where both courts and arbitrators adjudicate different aspects of the class arbitration problem.

The Court in *Lamps Plus* expressly recognized that this issue of the correct decision-maker has not been decided yet.¹⁹¹ This issue of the correct decision-maker regarding the availability of class proceedings heavily split the Court years ago in the case of *Green Tree Financial Corp. v. Bazzle*,¹⁹² with some Justices believing the correct decision-maker to be the arbitrator, while other Justices believed a court should interpret the agreement.¹⁹³ Neither view, however, garnered the five votes necessary to resolve the issue.¹⁹⁴ In the years following *Bazzle*, a majority view has appeared to emerge among the federal courts of appeal that, as a default rule, the court should evaluate an arbitration clause to assess whether it permits class arbitration.¹⁹⁵ These courts tend to reason that whether an arbitration will proceed as a class is such a significant, game-changing, “fundamental” issue, parties would expect that courts should make this determination.¹⁹⁶ Another rationale for courts to serve as a decision-makers is that a court normally determines whether a party is bound to arbitrate, and class arbitration can potentially bind absent parties.¹⁹⁷ However, not all courts have agreed with these rationales, and there is a contrary view that an arbitrator is the correct decision-maker for what is viewed as a largely procedural decision – the form of the arbitration proceeding.¹⁹⁸

The Supreme Court will likely grant certiorari on the issue of the decision-maker regarding the availability of class proceedings. Because a majority of the justices appear to dislike class procedures,

191. 139 S.Ct. at 1417 n.4.

192. 539 U.S. 444 (2003).

193. *Id.* at 2408.

194. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 678 (2010) (“When *Bazzle* reached this Court, no single rationale commanded a majority.”).

195. *See, e.g.*, *JPay, Inc. v. Kobel*, 904 F.3d 923, 935 (11th Cir. 2018) (“availability of class arbitration is a fundamental question of arbitrability that should presumptively be decided by a court”); *id.* (stating that “every federal court of appeals to have considered the question anew since *Stolt-Nielsen* has determined that class availability is a fundamental question of arbitrability [for the courts to determine.]”).

196. *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013).

197. *Opalinski v. Robert Half Int’l Inc.*, 761 F.3d 326, 333 (3d Cir. 2014).

198. *Sandquist v. Lebo Auto. Inc.*, 376 P.3d 506, 523 (Cal. 2016) (“[T]he determination whether a particular agreement allows for class arbitration is precisely the kind of contract interpretation matter arbitrators regularly handle”).

because sending the issue to the arbitrator could lead to class arbitrations due to the narrow judicial review of arbitral awards, and because a majority view has emerged among the federal courts of appeal that a court is the correct decision-maker, a majority of justices on the Supreme Court will likely hold that as a general rule, courts should determine whether an arbitration clause provides for class arbitration. This general rule whereby courts are the decision-makers would be more likely to minimize the use of class proceedings, as arbitrators are potentially more inclined to permit class proceedings, contrary to the majority's desire to limit such proceedings.¹⁹⁹

Courts tend to frame this issue of the correct decision-maker regarding class arbitration as an "either-or" proposition: either courts construe the arbitration clause, or arbitrators should construe the arbitration clause. However, a novel solution involves a collaboration between a court and arbitrator, and a brief sketch of this hybrid solution appears below.

Traditionally, threshold issues, like whether there is an obligation to arbitrate and the scope of an arbitration clause, are reserved to the courts.²⁰⁰ Arbitrators, on the other hand, are well-suited to determine procedural questions, such as whether the parties have complied with two steps of a grievance procedure, whether proper notice was given, whether time limits have been satisfied, or whether expedited or regular procedures will govern the arbitration.²⁰¹

Suppose that a company has one thousand customers, each of whom has purportedly entered into an arbitration agreement that does not explicitly ban class proceedings. If Customer #703 sues the company in court, the court can determine whether there is a binding arbitration agreement and quickly compel arbitration. Regarding the procedures that will govern the arbitration, including whether class procedures are available, an arbitrator can interpret the terms of the agreement to determine whether class procedures should apply. Treating the availability of class procedures as a procedural question for arbitrators is consistent with how the Supreme Court has viewed

199. *Cf.* *American Express Co. v. Italian Colors Restaurant*, 570 U. S. 228, 252 (2013) (Kagan, J., joined by Ginsburg & Breyer, JJ., dissenting) ("To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.")

200. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

201. *Id.* at 84-85; *Bell Atl.-Pennsylvania, Inc. v. Commc'ns Workers of Am.*, 164 F.3d 197, 203 (3d Cir. 1999).

class action litigation - as a special type of joinder rule having no impact on substantive or legal rights. In *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*,²⁰² the Court explained class actions as follows:

A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged.²⁰³

As a neutral, procedural issue that leaves the rules of decision unchanged, the availability of class procedures would seem to be an appropriate issue for an arbitrator. An arbitrator can assess whether the particular agreement between a specific customer and the company provides for class procedures, as well as the other procedures that will govern the arbitration. Whether every other customer is bound to arbitrate, however, is a threshold question of substantive arbitrability, properly decided by a court. In other words, although the other customers may have entered into an agreement containing the same arbitration clause, it is possible that other customers may not be bound to arbitrate, if they entered into the agreement in different ways. For example, one customer may have purportedly entered into the arbitration agreement through an online kiosk at the local store with a store representative making certain representations about the clause, while another customer may have purportedly entered into the arbitration agreement through a smartphone where the arbitration terms were not conspicuous. Each customer is potentially entitled to a trial on whether the customer is bound to the arbitration agreement.²⁰⁴

There can be variations on the above fact pattern, such as if there are different versions of the arbitration clause instead of an identical clause for all customers. But the gist of the possible solution proposed by this Article is that issues concerning class arbitration can involve elements of both substantive arbitrability for a court and procedural arbitrability for an arbitrator. Generally, if there is a binding arbitration agreement between two parties (an issue for

202. 559 U.S. 393 (2010).

203. *Id.* at 408. Commentators have pointed out the tension between the Court's neutral treatment of class procedures in *Shady Grove* and the Court's view of class procedures as fundamental and game-changing in cases like *Stolt-Nielsen*. Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069 (2011).

204. 9 U.S.C. § 4 (providing for a jury trial if the making of an agreement is at issue).

courts), the arbitrator can determine what particular procedures will govern in arbitration and construe whether the text of the agreement provides for class procedures. However, absent class members should be entitled to a judicial determination, if they so desire, of the threshold issue of whether they are bound to arbitrate.²⁰⁵ Thus, both courts and arbitrators could potentially become involved in facilitating class arbitration.

VI. CONCLUSION

In recent decades, the Supreme Court has continued to build upon the legal framework supporting arbitration, which plays a critical, widespread role in American society. A common theme running through the Court's decisions is that the Court will tend to promote arbitration and expand the legal framework supporting arbitration in virtually every ruling, except when the arbitration may involve class proceedings. When examined more closely, the *Lamps Plus* decision reveals the majority's thinly veiled dislike of class proceedings, and one can also see the many flaws and inconsistencies in the majority's reasoning. There is a proper role for arbitration in American society. As we get closer to the centennial of the FAA's enactment, and as recognized by Justice Ginsberg in her dissent in *Lamps Plus*, it has become more urgent to recalibrate and reform the legal framework for arbitration to help ensure respect for party autonomy and to prevent stronger parties from abusing arbitration in an attempt to suppress claims.

205. As an alternative, some parties may willingly submit to the arbitrator's authority and pursue their rights in the class arbitration, like an opt-in class for claims under the FLSA, or some parties may willingly submit to the arbitrator the determination of whether they are bound to arbitrate. However, by default, any party would be entitled to a judicial determination of whether he or she is bound to arbitrate, if the party desires such a determination.