

## THE POLITICS OF ACCESS: EXAMINING CONCERTED STATE/PRIVATE ENFORCEMENT SOLUTIONS TO CLASS ACTION BANS

Myriam Gilles\*

*Procedural and substantive constraints on the ability of ordinary people to access the civil justice system have become all too commonplace. The “justice gap” owes much to cuts in funding for legal aid and court administration, heightened pleading standards, ever-rising costs of discovery, increasingly restrictive views on standing to sue, and the co-opting of small claims court by businesses seeking to collect debts, among other obstacles in the path to the courthouse. But the most consequential impediment, surely, is the enforcement of mandatory arbitration clauses with class action bans, which bar consumers and employees from bringing or being represented in any form of collective litigation. This Article, written for a colloquium dedicated to the persistent problems of representation and access, explores the politics of regaining citizens’ rights to aggregate litigation in the wake of the Supreme Court’s broad endorsement of these class-ban provisions in AT&T Mobility LLC v. Concepcion.*

*Given the political climate in Washington, D.C., it is a safe bet that federal legislation will not overrule Concepcion anytime soon. Meanwhile, state legislation constraining class-banning arbitration clauses faces the unremitting threat of FAA preemption. But scholars and access-to-justice advocates have begun to focus on a third avenue for overcoming claims—suppressing class action bans, referred to in this Article as “concerted state/private enforcement solutions.” Concerted state/private enforcement can take several forms—whether it’s state Attorneys General engaging private counsel to pursue parens patriae damages cases under the AG’s direction, utilizing a qui tam model, or creating a regime where government enforcers obtain liability verdicts that private parties can use as conclusive proof in individual arbitrations. Each holds its own promises and poses its own challenges. But unlike head-on state legislation, the concerted state/private options are all viable as a legal matter. The question of political*

---

\* Paul R. Verkuil Research Chair and Professor of Law, Vice Dean, Benjamin N. Cardozo School of Law. This Article was prepared for the Colloquium entitled *Access to Justice and the Legal Profession in an Era of Contracting Civil Liability*, hosted by the *Fordham Law Review* and the Stein Center for Law and Ethics on October 27, 2017, at Fordham University School of Law. Many thanks to David Seligman for thoughtful comments; Ben Zipursky, Bruce Green, and the Colloquium participants for wonderful discussions; and Angela Wanslow for helpful research.

*viability, however, is more nuanced. This Article explores the unique political calculus for states confronting the implications of the various forms of state/private concerted enforcement activity as a way to restore their citizens' access to justice in the post-Concepcion era.*

INTRODUCTION.....	2224
I. A “PROFOUND SHIFT IN OUR LEGAL HISTORY” .....	2227
II. MODELING CONCERTED STATE/PRIVATE ENFORCEMENT	
STRATEGIES.....	2229
A. <i>The Parens Patriae Model</i> .....	2231
B. <i>The Arbitration-Enabler Model</i> .....	2234
C. <i>The Qui Tam Model</i> .....	2236
CONCLUSION .....	2239

#### INTRODUCTION

Nearly every state in the country authorizes consumers to bring claims for injuries caused by unfair and deceptive practices pursuant to statutory private causes of action. The vast majority of states also statutorily protect employees from workplace violations by authorizing private enforcement of labor codes. Many of these state consumer and labor statutes expressly anticipate class and collective litigation as a principal means of private enforcement.<sup>1</sup> This is because conventional wisdom teaches that consumer fraud and workplace abuse typically injure large groups of victims in relatively small, nearly identical ways. Few of those victims, if any, would take on the cost and complexity of the legal system alone to recoup such small sums. Only by aggregating their claims and pooling resources can ordinary litigants realistically access the legal system.

But what happens to this access if class or collective actions are no longer available as a matter of federal statutory law? In the absence of procedural devices to efficiently and reliably aggregate numerous small claims, how can citizens remedy widespread violations of labor, consumer, employee benefits, debt collection, and antitrust laws? And how do they protect themselves against future rights-infringing conduct without the threat of such liability?

These questions are not theoretical. Today, millions of consumers and employees are subject to unilaterally imposed arbitration provisions containing class action bans.<sup>2</sup> These provisions prohibit aggregation of legal claims in public courts and demand that all disputes be resolved in one-on-

---

1. *See, e.g.*, D.C. CODE § 28-3905(k)(1)(B) (2018); FLA. STAT. § 501.201 (2017); IDAHO CODE ANN. § 48-608(1) (West 2017); IND. CODE § 24-5-0.5-4(b) (2017); KAN. STAT. ANN. § 50-634(c)–(d) (West 2017); MASS. GEN. LAWS ch. 93A, § 9(2) (2017); N.Y. GEN. BUS. LAW §§ 342-b, 349 (McKinney 2017).

2. Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic*, ECON. POL'Y INST. (Dec. 7, 2015), <http://www.epi.org/publication/the-arbitration-epidemic/> [https://perma.cc/ZL3U-FYKC].

one, private arbitrations. The practical reality is that no rational consumer or employee with a typical small- to mid- value grievance would undertake a costly individual arbitration—nor could she hope to find a lawyer willing to represent her on a contingency basis.<sup>3</sup> As a result, class action bans essentially immunize putative defendants against aggregate liability for wrongful activity. Unsurprisingly, these provisions have become standard practice in standard-form consumer contracts.<sup>4</sup> Equally disturbing, class action bans have bled into employment contracts, barring workers from bringing claims in court for widespread acts of discrimination, wage theft, unsafe conditions, and other workplace injuries.<sup>5</sup>

Federal legislative and administrative efforts to stave off the deleterious effects of these contractual provisions have largely failed. The proposed Arbitration Fairness Act (AFA), which would broadly invalidate predispute arbitration clauses imposed on consumers and employees, has been repeatedly introduced by congressional Democrats since 2005. But the AFA has never once made it out of committee and is surely no closer to enactment in today's political environment.<sup>6</sup> Less ambitious legislation—disallowing mandatory arbitration clauses in certain instances or as against certain narrowly drawn claimants—has occasionally passed, but these piecemeal efforts do not come close to addressing the broader problem.<sup>7</sup> Most distressing, the Consumer Financial Protection Bureau's long-awaited rule prohibiting forced arbitration and class action bans in consumer financial contracts was repealed by the Senate along party lines, with the Vice President casting the tie-breaking vote.<sup>8</sup>

---

3. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY § 1, at 11 (2015), [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf) [<https://perma.cc/SV5Y-SJW2>] (noting that, from 2010 to 2012, consumers filed an average of 411 individual arbitrations per year to resolve disputes—a staggeringly low number given the nearly ten million consumers represented in comparable class actions during the same period).

4. *Id.* § 2, at 22, 26 (reporting that over 87 percent of mobile wireless contracts and 99 percent of storefront payday loans are subject to forced arbitration).

5. *See, e.g.*, Kriston Capps, *Sorry: You Still Can't Sue Your Employer*, CITYLAB (July 11, 2017), <https://www.citylab.com/equity/2017/07/the-fine-print-that-keeps-you-from-suing-your-employer/533145/> [<https://perma.cc/JB4P-DZ6Q>] (reporting that Wells Fargo, Citibank, Comcast, AT&T, Time-Warner Cable, Olive Garden, T.G.I. Friday's, Applebee's, Macy's, Target, Amazon, Uber, and Lyft all impose arbitration and class action bans in employment contracts).

6. *See, e.g.*, Arbitration Fairness Act of 2011, S. 987, 112th Cong.

7. *See, e.g.*, Military Lending Act, 10 U.S.C. § 987(e)(3) (2012) (prohibiting mandatory arbitration in certain forms of credit extended to military service members and dependents); Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 1639c(e) (2012) (prohibiting mandatory arbitration in mortgage loan agreements); Department of Defense Appropriations Act, Pub. L. No. 111-118, § 8116, 123 Stat. 3409, 3454 (2010) (Franken Amendment) (prohibiting federal contractors in contracts in excess of \$1 million from forcing employees to arbitrate Title VII or sexual assault claims); Fair Contracts for Growers Act of 2007, S. 221, 110th Cong. § 17(b); Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001, S. 1140, 107th Cong. § 17(b).

8. *See* Zachary Warmbrodt, *Pence Breaks Tie in Senate Vote to Ax Arbitration Rule*, POLITICO (Oct. 24, 2017, 11:25 PM), <https://www.politico.com/story/2017/10/24/consumer-protection-arbitration-senate-pence-244140> [<https://perma.cc/X54H-AKFN>]. Among

As we careen toward the cliff's edge—"the virtual death of the class action in employment cases and consumer contracts involving the sale of goods and services"<sup>9</sup>—new coalitions of public interest lawyers and nonprofit entities have formed in search of state-based solutions to the dilemma of class action bans. Their goal is to find creative solutions to the problem of underenforcement of consumer and worker rights that (1) are not baldly preempted by the U.S. Supreme Court's expansive interpretation of the Federal Arbitration Act and (2) are politically and financially viable in the current environment.

This Article explores concerted state/private enforcement solutions to the problem of forced arbitration and class action bans. These solutions vary in terms of the political risk that each entails, the legislative effort, if any, that would be required, and the potential each has for effecting structural change.

The first model, as I proposed with coauthor Gary Friedman in the immediate wake of *Concepcion*, observes that state Attorneys General (AG) have authority to bring *parens patriae* suits on behalf of consumers and employees who are currently barred from collective litigation.<sup>10</sup> And, to overcome inevitable resource constraints, AGs could retain private attorneys under contingent-fee arrangements to augment their existing staffs and budgets. This approach requires no legislative changes and could go some ways toward replicating the pre-*Concepcion* litigation landscape by throwing in the beneficial filtering mechanism of the AG to weed out unmeritorious class action cases. The downside of this model is that until these practices are commonplace, AGs are politically sensitive to the accusation that they are "in bed with the plaintiffs' bar."

A second model, which I have also discussed in prior work, would simply have AGs bring their typical enforcement actions against rights violators. In this model, however, rather than settle those cases without admissions of wrongdoing, the public enforcer would seek full-dress liability judgments, capable of delivering maximum preclusive effect on later individual arbitrations alleging the same wrongdoing.<sup>11</sup> This do-it-yourself approach does not circumvent *Concepcion* so much as it embraces it: public judgment in hand, individual consumers and employees (and their entrepreneurial lawyers) could bring serial arbitrations without bearing the cost of proving liability. As with the first model, no enabling legislation is required. However, the daunting challenge here is how to incentivize the AG to go the extra mile and obtain a finding or admission of liability that could, in essence, turn the downstream arbitrations into nothing more than a series of damages inquests. In other words, it is hard to see how to get state enforcers (or, for

---

Republican Senators, only Lindsey Graham (R-S.C.) and John Kennedy (R-La.) voted against repeal. *Id.*

9. Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Response to Concepcion*, 46 U. MICH. J.L. REFORM 1203, 1204 (2013).

10. See generally Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012).

11. Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in the Post-Class Action World*, 63 DEPAUL L. REV. 447, 454–55 (2014).

that matter, their federal counterparts) to abandon their business-as-usual practice of concluding enforcement actions with consent decrees or settlements that allow the defendant to disclaim liability.

Finally, this Article will consider “private attorney general” legislation authorizing consumers and workers to bring representative claims in the name of the state. This model, which is the subject of proposed legislation in New York, Connecticut, Illinois, and Vermont, has vast potential. It avoids the political risks to AGs embedded in the *parens patriae* model—but it shifts that risk to state legislators, as it requires legislative amendment to existing consumer or labor laws to provide for private enforcement of statutory penalty provisions.<sup>12</sup>

### I. A “PROFOUND SHIFT IN OUR LEGAL HISTORY”

In prior eras, class actions provided access to the court system by making it economically feasible for ordinary litigants to enforce legal rules in small-value cases. Aggregating claims rendered them marketable and aroused lawyers to invest time and money to litigate complex issues on behalf of a class of victims. The net result was greater deterrence and compensation, as well as more extensive law enforcement.

But recent decades have witnessed a gradual dismantling of access to courts through aggregative proceedings (and indeed, access to courts in nonaggregative settings as well). Most insidiously, the Supreme Court in *AT&T Mobility LLC v. Concepcion*<sup>13</sup> upheld an arbitration clause containing a class action ban found in a standard-form consumer agreement.<sup>14</sup> In doing so, the Court adopted a staggeringly expansive view of the Federal Arbitration Act (FAA), one that rejects a duty to preserve any “state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.”<sup>15</sup> In the years since *Concepcion*, a narrow majority of the Court has repeatedly deflected legal challenges to forced arbitration clauses and class action bans in varied contexts.<sup>16</sup>

This jurisprudence heralds a “profound shift[] in our legal history”<sup>17</sup> as hundreds of companies have scrambled to insert class action bans into

---

12. By way of full disclosure, I have worked with a group of nonprofit advocates and lawyers in drafting and promoting the EMPIRE Act and other state private attorney general legislation.

13. 563 U.S. 333 (2011).

14. *Id.* at 352.

15. *Id.* at 343; *see also* Gilles & Friedman, *supra* note 10, at 638–39 (discussing obstacle preemption analysis in *Concepcion*).

16. *See generally* Kindred Nursing Homes v. Clark, 137 S. Ct. 1421 (2017) (preempting application of the state’s “clear statement” rule in nursing home admissions contracts); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013) (endorsing class action bans even where the costs of individually arbitrating claims would preclude victims from effectively vindicating their federal statutory rights).

17. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/R6J4-HV6C>] (quoting Judge William G. Young).

standard-form contracts in order to avoid liability.<sup>18</sup> In the wake of this campaign, motions to compel arbitration are now made and granted at a fast clip; lower federal courts—perceiving the Supreme Court’s hostility to policy-oriented arguments against arbitration and class action bans—have largely fallen into line to enforce these provisions.<sup>19</sup> And this, in turn, has left millions of ordinary citizens without remedy for violations of statutory and common law rights resulting in small per-plaintiff harm.<sup>20</sup>

While we should all care deeply about the spread of forced arbitration and class action bans, this Article takes as its starting point that state governments have the greatest cause for concern. It is primarily state consumer and labor law that goes underenforced when private attorneys general are disempowered, and it is the states that will be left to respond to these rights violations in the absence of enforcement via class and collective litigation.<sup>21</sup> More meaningfully, states have a fundamental obligation to protect their weakest citizens from continual exploitation—and in this context, that duty is primarily owed to the low-income groups that bear the brunt of abusive practices that class actions were designed to deter.<sup>22</sup> Forced arbitration and class action bans serve only to immunize bad actors who regularly prey on these disadvantaged groups and leave them without remedy and vulnerable to future exploitation.<sup>23</sup> For these reasons, among others, states should be

---

18. See generally Myriam Gilles, *Killing Them with Kindness: Examining Consumer-Friendly Arbitration Clauses After AT&T Mobility v. Concepcion*, 88 NOTRE DAME L. REV. 825 (2012) (reporting on dozens of companies that have added arbitration clauses to consumer agreements in response to Supreme Court decisions).

19. See, e.g., *Coneff v. AT&T Corp.*, 673 F.3d 1155, 1160–61 (9th Cir. 2012) (holding a Washington state contract law barring class waivers to be preempted by the FAA); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205, 1212–13 (11th Cir. 2011) (“[T]o the extent that Florida law would . . . invalidate the class waiver . . . [it] is preempted.”); see also Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 OR. L. REV. 703, 708 (2012) (“Most courts are rejecting all potential distinctions and are instead applying *Concepcion* broadly as a ‘get out of class actions free’ card.”).

20. See, e.g., DAVID SELIGMAN, NAT’L CONSUMER LAW CTR., THE MODEL STATE CONSUMER & EMPLOYEE JUSTICE ENFORCEMENT ACT 8 (2015), <https://www.nclc.org/images/pdf/arbitration/model-state-arb-act-2015.pdf> [<https://perma.cc/RB5D-ASJ5>] (noting that “class action waivers have effectively squelched hundreds of viable consumer and employment class actions—often in cases that are impossible or very difficult to bring on an individual basis”).

21. In addition to stepped-up public enforcement, abusive practices by dishonest businesses and shady employers may lead to downward spirals—lost jobs, child support delinquencies, unpaid medical bills, evictions, repeated bankruptcies—that ultimately land in the state’s lap, costing even more taxpayer dollars.

22. See Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 EMORY L.J. 1531, 1540 (2016) (noting that “lower-income groups are more regularly and perilously exposed to abusive practices by private business interests—abuses that often result in small-dollar consumer injuries or group-based workplace harms”); see also Susan E. Hauser, *Predatory Lending, Passive Judicial Activism, and the Duty to Decide*, 86 N.C. L. REV. 1501, 1508 (2008) (citing studies).

23. See Gilles, *supra* note 22, at 1552 (asserting that when low-income groups suffer group-based harm, there is a significant likelihood that the same or similarly situated individuals will suffer precisely the same harm in the future given the inability to escape poverty that results from current income inelasticity).

particularly sensitive to the impact of *Concepcion* and its progeny on their citizens.

And while some states have sought to maximize access to justice in the post-class action era,<sup>24</sup> legislative efforts to directly override *Concepcion* have been largely doomed by the Supremacy Clause.<sup>25</sup> For example, state laws that simply prohibit class action bans in consumer or employment contracts or assert that collective litigation is a “substantive” right that cannot be waived in standard-form contracts would be swiftly and unequivocally struck down by the current Court. Nor can state legislatures rest assured that any limits placed on contracts of adhesion will stand if doing so has any discernible effect on arbitration. Indeed, any state legislation that might arguably “disfavor” arbitration is subject to serious challenge, given the Court’s “healthy regard for the federal policy favoring arbitration.”<sup>26</sup> These difficulties are born out in the multitude of post-*Concepcion* cases upholding arbitration clauses in the face of state efforts to impose some control over private contracting that impinges on citizen access to courts.<sup>27</sup>

As it stands, federal legislation or rulemaking appears politically hopeless, and straight-ahead state legislation circumventing *Concepcion* is doomed by the Supremacy Clause, as understood by the current Court. Accordingly, tenacious consumer and labor advocates—and sympathetic legal scholars—have shifted their gaze to alternative strategies for restoring citizens’ access to justice in the face of mandatory arbitration, namely concerted state/private enforcement models. The following Part describes three such models and ruminates on the legal and political ramifications of each.

## II. MODELING CONCERTED STATE/PRIVATE ENFORCEMENT STRATEGIES

In states all across the country, legal activists are avidly urging public enforcers to respond in one fashion or another to the *Concepcion* problem. While the proposals vary—including the three ideas discussed below and also the simple expedient solution of stepped-up state-level enforcement activity—all rely fundamentally on the threshold supposition that the

---

24. For example, in the wake of *Concepcion*, the California legislature briefly considered an outright legislative ban on class action waivers in adhesion contracts. See S. 491, 2012 Leg., Reg. Sess. 1 (Cal. 2012). But the bill died in committee due to the likelihood of FAA preemption. See Cheryl Miller, *Legislation to Blunt Concepcion Is Killed in State Assembly*, RECORDER (July 3, 2012, 3:26 PM), <https://www.law.com/therecorder/almID/1202561826154/> [<https://perma.cc/7X6X-W22P>]; see also Alexander, *supra* note 9, at 1221 (reporting on unsuccessful attempts in Maryland and California to legislatively prohibit class action bans in the immediate wake of *Concepcion*).

25. See U.S. CONST. art. VI, cl. 2; see also, e.g., Sternlight, *supra* note 19, at 727 (“State legislatures have quite limited power to combat the effects of *Concepcion* given prior Supreme Court decisions. In particular, state legislatures can neither prohibit mandatory arbitration nor prohibit use of arbitral class action waivers.”).

26. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343–45 (2011) (noting that any right that would disproportionately and negatively impact arbitration agreements by requiring procedures that “interfere[] with fundamental attributes of arbitration” is suspect under the FAA); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 630 n.5 (2009).

27. See Gilles & Sebok, *supra* note 11, at 461 n.58.

Supreme Court's proarbitration jurisprudence does not block the right of a public enforcer to bring collective litigation for damages on behalf of citizen-victims who have waived their right to seek relief in court or in collective proceedings.<sup>28</sup> This is based on the view that the public enforcer, who is not a party to the underlying contract imposing arbitration and class action bans, is immune from their reach.

Much depends on whether that threshold supposition is safe. Historically, it has been. In its 2002 decision in *EEOC v. Waffle House, Inc.*,<sup>29</sup> the Court held that the EEOC could seek victim-specific damages for an ADA violation, even though the victims themselves had all signed class-waiving arbitration agreements with the employer.<sup>30</sup> The majority reasoned that the EEOC was not a party to the arbitration agreement and possessed independent statutory authority to bring suit.<sup>31</sup> In dissent, Justice Thomas strongly disagreed "that the EEOC may do on behalf of an employee that which an employee has agreed not to do for himself."<sup>32</sup> But that position only garnered three votes. Whether it might muster a majority today is unclear.

What's more, contemporary arbitration clauses can contain language in which the employee or consumer purports to waive the right to be represented in a *parens patriae* suit by a public enforcer.<sup>33</sup> Such a clause might be unenforceable. Can private parties really use contracts to restrict the

---

28. Note that AGs may bring these cases pursuant to quasi-sovereign, proprietary, and *parens patriae* authorities, as well as under state consumer protection and fair dealing statutes. See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 493 (2012).

29. 534 U.S. 279 (2002).

30. *Id.* at 289 (reasoning that the FAA does not mention enforcement by public agencies but instead ensures the enforceability of private agreements to arbitrate).

31. *Id.* at 294 ("It goes without saying that a contract cannot bind a nonparty."); see also Gilles & Friedman, *supra* note 10, at 661 (observing that the state's "quasi-sovereign" interest justifying *parens patriae* authority is not derived from an agency relationship with these individual citizens but rather from its own interest in representing large groups of injured citizens).

32. *Waffle House*, 534 U.S. at 298 (Thomas, J., dissenting). Chief Justice William Rehnquist and Justice Antonin Scalia joined the dissent.

33. While I have not found specific examples of *parens patriae* waivers in arbitration clauses, there are a handful of class action settlements where the parties agreed to release *parens patriae* claims. See, e.g., *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, No. 05-MD-1720, 2014 WL 12654593, at \*5 (E.D.N.Y. Jan. 14, 2014) (releasing any future claims "whether individual, class, representative, *parens patriae*, or otherwise in nature, for damages, interest, costs, expenses, attorneys' fees, fines, civil or other penalties, or other payment of money, or for injunctive, declaratory, or other equitable relief"); Master Settlement Agreement Between Forty-Six State Attorneys General and Five Tobacco Companies (1998), <http://www.publichealthlawcenter.org/sites/default/files/resources/master-settlement-agreement.pdf> [<https://perma.cc/9KNU-7F6Y>] (releasing claims by "persons or entities acting in a *parens patriae*, sovereign, quasi-sovereign, private attorney general, qui tam, taxpayer, or any other capacity, whether or not any of them participate in this settlement"). In the *Payment Card* litigation, the breadth of this release threatened to tank the deal—so the parties ultimately agreed that it only barred claims that state AGs might assert in a representative capacity on behalf of state resident members of the class and did not "extend to *parens patriae* claims that States assert in their sovereign capacity." *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 237 (E.D.N.Y. 2013).

government's enforcement authority? That is not clear either. A very close analogy is found in cases addressing the enforceability of contract clauses that require employees to waive their rights to representative litigation under California's Private Attorney General Act (PAGA). PAGA authorizes aggrieved employees to act as agents of the Labor Commissioner in bringing representative suits for violations of the state's Labor Code.<sup>34</sup> California state and federal courts have repeatedly held contractual waivers of these rights to be unenforceable on public policy grounds—namely that such waivers would “harm the state's interests in enforcing the Labor Code.”<sup>35</sup>

If we assume that *parens patriae* waivers embedded in arbitration clauses are a bridge too far and that *Waffle House* can survive a frontal attack, then we can take some comfort that public enforcers are immune from the reach of class-banning arbitration clauses. So for now at least, it seems fair to conclude that in the wake of *Concepcion*, state attorneys general and other officials remain free to bring cases on behalf of large groups of injured citizens—even if those individual citizens are themselves subject to arbitration clauses that preclude collective litigation.

Presently, I discern three models for state/private concerted activity that would leverage the standing of these public officials in order to escape the harmful effects of *Concepcion*. Each warrants discussion.

#### A. *The Parens Patriae Model*

Following *Concepcion*, I argued that a legally sound and economically viable way to promote access to justice for people subject to class bans was for public enforcers to increase their use of *parens patriae* actions and to retain outside counsel on a contingent-fee basis to prosecute the cases day to day, subject to the public enforcer's direction.<sup>36</sup>

The model has some obvious upsides. For one, it is legally viable. Under the current law of most states, AGs are authorized to hire private law firms on a contingent-fee basis to pursue claims in *parens patriae* on behalf of injured state residents.<sup>37</sup> The principal legal constraint is the requirement that

---

34. CAL. LAB. CODE §§ 2698–2699.5 (West 2016); *see also* *Arias v. Superior Court*, 209 P.3d 923, 933 (Cal. 2009) (“An employee plaintiff suing, as here, under the [PAGA] does so as the proxy or agent of the state's labor law enforcement agencies. . . . In a lawsuit brought under the act, the employee plaintiff represents the same legal right and interest as state labor law enforcement agencies—namely, recovery of civil penalties that otherwise would have been assessed and collected by the Labor Workforce Development Agency.”).

35. *Iskanian v. CLS Transp. L.A., LLC*, 327 P.3d 129, 133, 149 (Cal. 2014) (noting that the “FAA's goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state's behalf”); *see also* *Sakkab v. Luxottica Retail N. Am., Inc.*, 803 F.3d 425, 431 (9th Cir. 2015); *O'Connor v. Uber Techs., Inc.*, 311 F.R.D. 547, 555–57 (N.D. Cal. 2015).

36. *See* Gilles & Friedman, *supra* note 10, at 658.

37. For cases upholding contingency-fee agreements between AGs and private counsel, *see* *City of Grass Valley v. Newmont Mining Corp.*, No. 2:04-cv-00149-GEB-DAD, 2007 WL 4166238, at \*1 (E.D. Cal. Nov. 20, 2007); *Sherwin-Williams Co. v. City of Columbus*, No. C2-06-829, 2007 WL 2079774, at \*2–4 (S.D. Ohio July 18, 2007); *City & County of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1135 (N.D. Cal. 1997). *But see* Martin H. Redish, *Private Contingent Fee Lawyers and Public Power: Constitutional and Political*

the AG maintain total control over all key decision-making, lest the retainer agreement violate public policy as an unlawful delegation of the AG's authority.<sup>38</sup> This model addresses those constraints by installing a responsible, elected official at the helm to manage and make transparent decisions regarding case selection, litigation strategy, and settlement.<sup>39</sup>

Another virtue of the *parens patriae* state/private enforcement model is scalability: relying on contingent-fee law firms permits a state AG to ramp up public enforcement levels without affecting her agency's budget.<sup>40</sup> The size of the cases and potential for attorneys' fees certainly make them fundable. Outside firms (and funders) can be expected to line up for the chance to contribute the out-of-pocket costs required for major public-enforcer-led damages litigation. And the talent pool available in the private bar is both extraordinary and easy to monitor since the outside counsel is not billing the public agency for its efforts or outlays.<sup>41</sup> Moreover, settlements and verdicts obtained by state and local enforcement agencies produce both economic and political benefits. They generate money for the agency's own budget<sup>42</sup> and distributable funds for the client-community distributions that may in turn generate political benefits for an enterprising AG.<sup>43</sup>

But the political risks can be high. Backlash from the staggering fees some states paid to outside contingent-fee counsel in lawsuits against cigarette manufacturers in the 1990s—nearly \$14 billion in total<sup>44</sup>—led to a spate of

*Implications*, 18 SUP. CT. ECON. REV. 77, 101–06 (2010) (asserting that AGs hiring private counsel on contingency violates constitutional norms).

38. See, e.g., *County of Santa Clara v. Superior Court*, 235 P.3d 21, 36 (Cal. 2010) (upholding a contract where the county hired outside counsel on contingency in public nuisance actions against lead-paint manufacturers because “neutral, conflict-free government attorneys retain[ed] the power to control and supervise the litigation”); *State v. Lead Indus. Ass’n*, 951 A.2d 428, 477 (R.I. 2008) (same).

39. See, e.g., Gilles & Friedman, *supra* note 10, at 671 (“In terms of case selection too, the responsible AG acts as a filter—a bulwark against unmeritorious cases on which private lawyers might otherwise ‘take a flier’ in order to exploit *in terrorem* effects. And at the settlement stage, class counsels’ rational economic interests might drive them to eschew injunctive relief in favor of damages, but the final-cut authority belongs to the AG, ameliorating a principal basis for the agency costs critique of class actions.”).

40. See David B. Wilkins, *Rethinking the Public-Private Distinction in Legal Ethics: The Case of “Substitute” Attorneys General*, 2010 MICH. ST. L. REV. 423, 427 (observing that AGs face “shrinking state budgets and the growing list of potential big-ticket claims involving alleged harms to consumers or the environment”).

41. See, e.g., Gilles & Friedman, *supra* note 10, at 669.

42. The extent to which the state or agency retains litigation proceeds is generally determined by statute. In California, for example, there is a formula built into the unfair competition statute. See CAL. BUS. & PROF. CODE § 17206(c) (2018) (“If the action is brought by the Attorney General, one-half of the penalty collected shall be paid to the treasurer of the county in which the judgment was entered, and one-half to the General Fund.”).

43. Gilles & Friedman, *supra* note 10, at 671–72 & nn.218–19 (describing polls indicating high voter approval for state AGs who can take credit for litigation victories that were largely the product of private lawyering).

44. John O’Brien, *Bush Bans Contingency Fee Arrangements*, LEGAL NEWSLINE (May 17, 2007), <http://legalnewsline.com/news/195296-bush-bans-contingency-fee-arrangements> [https://perma.cc/JG8N-W7X3].

adverse publicity. Fierce lobbying from the U.S. Chamber of Commerce<sup>45</sup> and others led a handful of state legislatures to place limits on the ability of AGs to hire outside counsel.<sup>46</sup> And, presumably, the publicity and the lobbying have deterred some sizeable number of state enforcers from aligning with contingent-fee counsel.<sup>47</sup>

There is legal risk as well. It is not entirely clear whether *parens patriae* settlements and verdicts will bar subsequent damages suits by individual claimants who were not afforded an opportunity to opt out of the *parens patriae* litigation. As Maggie Lemos points out, some state statutes explicitly provide a right to opt out of *parens patriae* actions,<sup>48</sup> and some federal provisions do this as well.<sup>49</sup> Moreover, parties and courts can always agree to employ opt-out procedures to ensure the broadest possible preclusion effects for any settlement. But what about the non-opt-out *parens patriae* damages settlement, or verdict? Courts often recite—in a blithe and blanket way—that *parens patriae* judgments are entitled to broad preclusive effect, thus barring future damages claims.<sup>50</sup> And yet, following *Wal-Mart Stores, Inc. v. Dukes*<sup>51</sup> and related cases, it is hard to see how these settlements can foreclose subsequent damages claimants as a matter of due process.<sup>52</sup>

Whatever its theoretical merits and prospective challenges, the *parens patriae* model for state/private concerted enforcement action has not taken off as a counter to *Concepcion*. To be sure, some AGs regularly hire private counsel to handle large and complex litigation; examples include prominent

---

45. Barry Meier & Richard A. Oppel Jr., *States' Big Suits Against Industry Bring Battle on Contingency Fees*, N.Y. TIMES (Oct. 15, 1999), <http://www.nytimes.com/1999/10/15/us/states-big-suits-against-industry-bring-battle-on-contingency-fees.html> [<https://perma.cc/YC5G-R98K>] (reporting on the Chamber's "intensive lobbying campaign to get legislatures to drastically restrict states' use of contingency lawyers").

46. See, e.g., KAN. STAT. ANN. § 75-37,135 (West 2017) (subjecting any agreement between the AG and a private lawyer for over \$1 million in fees to public legislative hearings and approval); N.D. CENT. CODE § 54-12-08.1 (2017) (requiring an "emergency commission" to approve any contingency-fee contract between the AG and outside counsel where the amount in controversy exceeds \$150,000).

47. See Gilles & Friedman, *supra* note 10, at 673 (observing that in the post-*Citizens United* era, some elected officials may rightly worry about the "ability of business groups to amass war chests targeting consumer-friendly AGs"); see also Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES (Oct. 28, 2014), <https://www.nytimes.com/2014/10/29/us/lobbyists-bearing-gifts-pursue-attorneys-general.html> [<https://perma.cc/T2Y6-KH9W>]. See generally *Citizens United v. FEC*, 558 U.S. 310 (2010).

48. Lemos, *supra* note 28, at 545 n.265 (listing six state statutes but noting that "coverage is spotty").

49. See, e.g., 15 U.S.C. §§ 12–27 (2012).

50. See Lemos, *supra* note 28, at 500 & n.55 (listing cases and reporting that "the prevailing view is that the judgment in a state case is binding 'on every person whom the state represents as *parens patriae*'" (quoting Susan Beth Farmer, *More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 362 (1999))).

51. 564 U.S. 338 (2011).

52. See *id.*

lawsuits against lead-paint manufacturers,<sup>53</sup> polluters,<sup>54</sup> and long-term care facilities.<sup>55</sup> Likewise, some local officials—especially the city attorneys of San Francisco and Los Angeles—regularly bring damages claims on behalf of all statewide consumers under California’s Unfair Competition Law.<sup>56</sup> These city attorneys rely heavily on outside contingent-fee counsel to identify and help prosecute the cases, with damages distributed at the back end in the same fashion as a class settlement. Still, for whatever reason(s), the model employed in these cases has yet to scratch the surface of its potential to counter the access-denying effects of *Concepcion*.

### B. The Arbitration-Enabler Model

A separate model for concerted state/private enforcement is where a public enforcer—such as a state AG or a local authority—obtains in court a liability determination that can serve as a predicate for the application of nonmutual offensive collateral estoppel in subsequent one-on-one arbitrations by consumers and employees.<sup>57</sup> By absorbing the front-end costs of proving liability, the public enforcer enables individual citizens to bring arbitrations and allows entrepreneurial lawyers to “identify and contract with similarly situated claimants for serialized arbitrations.”<sup>58</sup>

First, the virtues. At the outset, no legislative inputs are required. The claim and issue-preclusion rules in arbitration are, in practice, similar to those in court.<sup>59</sup> Arbitrators presiding over damages arbitrations can be expected to apply issue-preclusion principles to judgments obtained by public enforcers. And with a public verdict available, consumers and employees can (in many cases) overcome the stacked economics of *Concepcion*.<sup>60</sup> Mass

53. See, e.g., *County of Santa Clara v. Superior Court*, 235 P.3d 21, 36 (Cal. 2010); *State v. Lead Indus. Ass’n*, 951 A.2d 428, 477 (R.I. 2008).

54. See Adam Liptak, *A Deal for the Public: If You Win, You Lose*, N.Y. TIMES (July 9, 2007), <http://www.nytimes.com/2007/07/09/us/09bar.html> [https://perma.cc/H28R-Z44B] (describing how an Oklahoma AG hired private counsel to sue poultry companies for polluting waterways with chicken manure); Lynne Tuohy, *NH Appeals Order to Set Aside \$195M of Exxon Award*, SAN DIEGO UNION-TRIB. (Oct. 3, 2013, 11:39 AM), <http://www.sandiegouniontribune.com/sdut-nh-appeals-order-to-set-aside-195m-of-exxon-award-2013oct03-story.html> [https://perma.cc/9FAU-3UQN] (describing how a New Hampshire AG hired private counsel to sue chemical manufacturers for groundwater contamination).

55. See, e.g., *GGNSC Clarion LP v. Kane*, 131 A.3d 1062, 1064–65, 1067 (Pa. Commw. Ct. 2016) (upholding the right of the Pennsylvania AG to hire private counsel to pursue statutory consumer protection actions against long-term care facilities).

56. Hillel Aron, *L.A. City Attorney Will Hire Outside Counsel to Defend NIMBY Lawsuits*, LA WKLY. (Dec. 22, 2014), <http://www.laweekly.com/news/la-city-attorney-will-hire-outside-counsel-to-defend-nimby-lawsuits-5301349> [https://perma.cc/PGV2-4CZS].

57. See Gilles & Sebok, *supra* note 11, at 470.

58. *Id.* at 455 (observing that the transaction costs of identifying potential clients “are significantly reduced when discovery under [this] model produces the identities of affected consumers, enabling lawyers to contact potential clients to determine their willingness to sell, assign, or otherwise have their claims arbitrated”).

59. See, e.g., Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 746 (1999).

60. See J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 WM. & MARY L. REV. 1137, 1210 (2012) (“[I]t is inconceivable that a private

production of individual damages claims is generally feasible for enterprising law firms—that is, unless damages are both small *and* idiosyncratic, entrepreneurial lawyers will be able to bring large economies of scale to bear by efficiently processing individual damages claims in arbitration.

One downside of this model is that it requires changes from both arbitration providers and public enforcers. First, under this model, major arbitral bodies (such as the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Service (JAMS)) would need to adopt reliable rules regarding the res judicata effect of public liability judgments, as well as manageable procedures for administering postjudgment serial arbitrations. The former is fairly straightforward; the latter entails designing a mass-arbitration regime that provides litigants and lawyers dependable information on “how to obtain a single arbitrator for a set of related arbitrations, how to schedule related arbitrations in a compressed time frame, or how to use a single expert report across multiple arbitrations.”<sup>61</sup> In late 2015, this author met with AAA administrators to discuss the viability of serial arbitrations under this model and suggested that existing rules leave too much discretion to individual arbitrators to determine some of these bedrock issues—a lack of transparency and trustworthiness that doomed any serious effort to efficiently bundle arbitrations. The AAA appeared, at that time, unwilling to make broad rule changes—but acknowledged that successive waves of individual arbitrations might force them to reconsider.

The arbitration-enabler model also requires public enforcers to radically adjust their everyday objectives. Public civil enforcement attorneys invariably enter into settlements that allow the defendant to disclaim any wrongdoing.<sup>62</sup> In other words, AGs often negotiate “settlement[s] in which liability attaches” but with “no factual admission of wrongdoing”<sup>63</sup>—presumably because they regard the penalties shelled out or injunctive relief agreed to by the wrongdoer as the real engines of deterrence. The arbitration-enabler model would require government lawyers to spurn these “nolo-type” settlements and to expend additional resources to obtain a liability verdict or concession of wrongdoing. This may be quite a bit to ask, especially if it makes settlements impossible to obtain.<sup>64</sup>

---

attorney, who might have sufficient expertise in consumer fraud, will have the economic incentive to root out consumer fraud if the only economic gain to be had is through individual arbitrations. The significant investment of resources required to identify wronged individuals and to pursue their small claims on an individualized basis likely will not justify any eventual gains.”).

61. Gilles & Sebok, *supra* note 11, at 467 (observing that neither the AAA nor JAMS currently have any such procedures in place).

62. See, e.g., Samuel W. Buell, *Liability and Admissions of Wrongdoing in Public Enforcement of Law*, 82 U. CIN. L. REV. 505, 509 (2013) (observing that the “standard settlement of an SEC enforcement action brought in federal district court is in the form of a consent decree in which the defendant ‘neither admits nor denies’ liability”).

63. *Id.*

64. See, e.g., Stephen B. Burbank, Sean Farhang & Herbert M. Kritzer, *Private Enforcement*, 17 LEWIS & CLARK L. REV. 637, 669 (2013) (“If cooperatively negotiated informal bargains with regulators, aimed at enhancing compliance, will not protect

But requiring public enforcers to secure declarations of wrongdoing may become a new standard in any event, as numerous observers and judges have disparaged settlements that fail to do so (quite apart from the arbitration-enabler model). Consider the public maelstrom when Judge Jed Rakoff rejected a 2011 settlement between the SEC and Citigroup that failed to demand that the bank acknowledge its wrongful actions.<sup>65</sup> In his ruling, Judge Rakoff criticized the SEC's custom of entering "neither admit nor deny the allegations" settlements, especially given its "duty, inherent in its statutory mission, to see that the truth emerges."<sup>66</sup> These public setbacks may eventually compel public enforcers to adjust their approach to settling actions, with the beneficial by-product of enabling downstream individual arbitrations.

### C. *The Qui Tam Model*

A third model for state/private concerted enforcement activity is derived from qui tam procedures, akin to those found in the federal False Claims Act.<sup>67</sup> In a qui tam regime, a whistleblower—known as a "relator"—files an action in the name of the state and provides detailed notice to the relevant enforcer (the DOJ in False Claims Act cases, and the state AG under the proposals discussed here). The public enforcer then has several options. It may intervene and take the case over, in which case the relator stands to receive a modest fee if the case is resolved successfully. Or, the public enforcer may take a pass on getting involved, thus allowing the relator to prosecute the litigation on behalf of the state (in which case the relator stands to receive a percentage of any recovery).<sup>68</sup> Or the AG may, if she wishes, intervene in order to dismiss the case—exercising, in essence, a veto power over the litigation.<sup>69</sup>

The traditional rationale for qui tam is that it harnesses self-funded private lawyers to augment resource-constrained public enforcement agencies. In a post-*Concepcion* world, the ability to tap private enforcement resources is particularly valuable. As the class action mechanism is diminished, public enforcement portfolios swell. And there is no indication that any jurisdiction

---

organizations from private suits on the same issues, then the prospect of facing private suits will make voluntary agreements far harder to achieve.”)

65. SEC v. Citigroup Glob. Mkts., Inc., 827 F. Supp. 2d 328, 333 (S.D.N.Y. 2011).

66. *Id.* at 335.

67. Professor Janet Alexander first proposed this model as a “way out of the *Concepcion* dilemma.” Alexander, *supra* note 9, at 1221 (suggesting that, by enacting “a statutory penalty for consumer fraud or violation of state labor laws and provid[ing] for private enforcement through a qui tam or private attorney general action,” states could ensure that their citizens were protected from systematic wrongdoing).

68. The FCA provides that successful relators receive between 15 and 25 percent of the recovery—enough of an incentive that, in 2016 alone, the Department of Justice recovered \$2.9 billion from qui tam-initiated FCA suits. See Press Release, U.S. Dep’t of Justice, Justice Department Recovers over \$4.7 Billion from False Claims Act Cases in Fiscal Year 2016 (Dec. 14, 2016), <https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016> [<https://perma.cc/4C77-P8YS>].

69. See generally David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913 (2014).

has responded to post-*Concepcion* developments by increasing funding to public enforcement agencies.

Taken together, the public nature of the qui tam action and the penalty structure should allow enabling legislation to elude FAA preemption under *Concepcion* and its progeny. First, the public nature of qui tam actions is critical to avoiding preemption because, as discussed earlier, “private individuals cannot contract away the state’s right to enforce the law.”<sup>70</sup> Directly on point, the Ninth Circuit recently held in *Sakkab v. Luxottica Retail North America, Inc.*<sup>71</sup> that qui tam actions fall under the “historic police powers” delegated to the states by the Constitution and therefore cannot be preempted by federal law.<sup>72</sup> Second, as applied here, the qui tam model would allow relators to file suit seeking statutory per-incident penalties on behalf of in-state consumers or employees. As such, the penalties are intended to punish and deter wrongdoers who violate the statutory rights—not to compensate victims for their injuries.<sup>73</sup> And, because the model applies only to cases seeking the prescribed penalty, it leaves individual claimants free to pursue damages for their losses without implicating double-recovery concerns. In other words, the qui tam enforcement model does not seek “damages,” but a specific penalty that complements the individual damages action or arbitration.<sup>74</sup> Viewed in this way, the qui tam model also sidesteps a potential pitfall of the *parens patriae* model—avoiding messy questions about opt-out procedures and preclusive effects.<sup>75</sup>

At the same time, the qui tam model does not put funds into the pockets of injured victims. The penalties flow to the state and, to a lesser extent, the relator. Accordingly, the qui tam model may do a good job of promoting deterrence but an awful job of compensating injured parties. One way to ameliorate this shortcoming is to join qui tam legislation and the arbitration-enabler model. For example, enabling legislation might prohibit relators and AGs from receiving benefits under a settlement in which the defendant does not acknowledge liability. Access-to-justice advocates should cheer such a provision because, as discussed above in the arbitration-enabler model, a

---

70. See Alexander, *supra* note 9, at 1228 (observing that, because “[t]he private plaintiff stands in the state’s shoes to litigate the action” for civil penalties, qui tam claims are not subject to FAA preemption).

71. 803 F.3d 425 (9th Cir. 2015).

72. *Id.* at 439.

73. *Id.* at 430–31 (observing that “the penalties contemplated under the PAGA . . . punish and deter employer practices that violate the rights of numerous employees” (quoting *Brown v. Ralph’s Grocery Co.*, 128 Cal. Rptr. 3d 854, 862 (Ct. App. 2011))).

74. Arguably, there is friction between qui tam actions and individual cases where punitive damages in the individual case, when added to the qui tam penalty, implicate overpunishment concerns. See generally *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996) (finding that a \$2 million punitive damage award was disproportionate to both the conduct alleged and the compensatory damages awarded).

75. See Alexander, *supra* note 9, at 1226 (“A private plaintiff can pursue an individual claim for compensatory damages in addition to a PAGA claim, and a judgment in a PAGA action does not preclude absent employees from bringing their own claims for compensatory damages.”).

finding or concession of liability will enable entrepreneurial lawyers to deploy broad-scale nominally individual arbitrations on behalf of victims seeking compensation. Business groups should take comfort that this provision—no settlements without admissions of liability—will protect against aggressive relators and AGs using qui tam cases to shake down corporate defendants.<sup>76</sup>

But the biggest disadvantage of the qui tam model may be that it requires enabling legislation. Enacting such legislation can be a perilous, uncertain, lengthy, and frustrating process. Over the past two years, consumer and labor advocates have offered up draft qui tam legislation in at least five states—a minimovement designed to encourage legislatures to embrace qui tam as a viable mechanism. For example, in its 2017 legislative session, the Connecticut House of Representatives considered a bill to allow consumers harmed by fraud or unfair business practices to “bring an action in the name of the state” for injunctive relief and to recover statutory penalties.<sup>77</sup> If successful, Connecticut relators could have recovered between 10 and 25 percent of the penalties recouped on behalf of the state.<sup>78</sup> While the bill had significant support and made it out of the Joint Committee on Banking, it ultimately failed to win enough votes in the general body.<sup>79</sup>

Similarly, the Illinois Senate is considering creating a qui tam mechanism for public enforcement of both employment and consumer protection statutes.<sup>80</sup> That legislation would allow private individuals to bring actions on behalf of the state seeking recovery of civil penalties for multiple consumer or employment violations so long as “those violations are of a sufficiently similar kind that they can be efficiently managed in a single action.”<sup>81</sup> As of the publication of this Article, the Illinois bill had not made it into committee. Vermont’s private attorney general bill was also recently introduced in committee,<sup>82</sup> with hearings held on the capacity of this legislation to counteract the negative impact of forced arbitration.<sup>83</sup> New York’s twin bills—the EMPIRE Worker Act and the EMPIRE Consumer Act—are also currently under consideration in Albany; both promise to expand the state’s enforcement capacity by enlisting citizens to investigate

---

76. See, e.g., Burbank et al., *supra* note 64, at 669 (noting that corporate defendants generally believe that “private litigants will be more likely to file non-meritorious suits that are brought for strategic or extortionate purposes against innocent defendants in the hope that they will find it cheaper to settle than to litigate”).

77. Act Protecting Victims of Fraud by Certain Financial Institutions, H.R. 7162, 2017 Gen. Assemb., Reg. Sess. (Conn. 2017).

78. *Id.* § 1(g).

79. *Bill Status: H.R. No. 7162*, CONN. GEN. ASSEMBLY (Mar. 22, 2017), [https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill\\_num=HB07162&which\\_year=2017](https://www.cga.ct.gov/asp/cgabillstatus/cgabillstatus.asp?selBillType=Bill&bill_num=HB07162&which_year=2017) [<https://perma.cc/D63E-3G2H>].

80. Limitations on Forced Arbitration Act, S. 0983, 100th Gen. Assemb., Reg. Sess. (Ill. 2017).

81. *Id.* § 10e(c).

82. Act Relating to Delegating Public Enforcement Powers to Private Attorneys General, H.R. 789, 2018 Gen. Assemb., Reg. Sess. (Vt. 2018).

83. Elizabeth Hewitt, *Lawmakers Consider Cracking Down on Forced Arbitration*, VT. DIGGER (Jan. 9, 2018), <https://vtdigger.org/2018/01/09/lawmakers-consider-cracking-forced-arbitration/> [<https://perma.cc/CZ2A-4FZ7>].

potential violations and enforce important laws.<sup>84</sup> But again, despite intense lobbying efforts, the EMPIRE acts have not yet received legislative hearings, much less approval.

#### CONCLUSION

In the wake of *Concepcion*, states are increasingly motivated to find legally sound and economically viable means of promoting access to justice for citizens subject to forced arbitration and class action bans. Especially promising are concerted state/private enforcement solutions, which can take several forms—including state AGs engaging private counsel to pursue *parens patriae* damages cases; a regime where government enforcers obtain liability verdicts that private parties can use as conclusive proof in individual arbitrations; or a qui tam model. These solutions vary in terms of the political risk that each entails, the legislative effort that would be required (if any), and the potential each has for effecting structural change.

---

84. Empowering People in Rights Enforcement (EMPIRE) Worker Protection Act, Assemb. 7958, 2017–18 Leg., Reg. Sess. (N.Y. 2017); Empowering People in Rights Enforcement (“EMPIRE”) Consumer Act, S. 6553, 2017–18 Leg., Reg. Sess. (N.Y. 2017) (considering the EMPIRE Worker Act, which authorizes an aggrieved employee or representative organization to initiate a public enforcement action on behalf of the Labor Commissioner for violations of any provision of the New York labor law, while the Consumer Act allows aggrieved consumers to initiate similar public actions on behalf of the Attorney General to enforce specified consumer-protection statutes).