

FORCED ARBITRATION AND THE FATE OF THE 7TH AMENDMENT

THE CORE OF AMERICA'S LEGAL SYSTEM AT STAKE?



REPORT OF THE 2014 FORUM FOR STATE APPELLATE COURT JUDGES



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CIVIL JUSTICE
INSTITUTE

FORUM ENDOWED BY HABUSH HABUSH & ROTTIER S.C.

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“If people think they still have the right to sue after signing a contract, that means they are clinging to something very deep—their right to bring an action that they don’t believe they could possibly have signed away.”

—A judge attending the 2014 Forum

“The courts are supposed to be the place where we get it right, where we see that all of the cards get played. I don’t think that is happening anymore. I don’t buy it for a second that arbitration is there to protect any consumer. It is not. It is there to protect the business model.”

—A judge attending the 2014 Forum



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FOREWORD

The Pound Civil Justice Institute's 22nd annual Forum for State Appellate Court Judges was held on July 26, 2014, in Baltimore, Maryland. As with all of every past Forum, it was both enjoyable and thought-provoking. In the Forum setting, judges, practicing attorneys, and legal scholars were able to consider the increasingly important issue of forced arbitration and its impact on Americans' Constitutional right to trial by jury.

The Pound Civil Justice Institute recognizes that the state courts have the principal role in the administration of justice in the United States, and that they carry by far the heaviest of our judicial workloads. We try to support them in their work by offering our annual Forums as a venue where judges, academics, and practitioners can have a frank, pertinent dialogue in a single day. These discussions sometimes lead to consensus, but even when they do not, the exercise is always fruitful. Our attendees always bring with them different points of view, and we make concerted efforts to include panelists with outlooks that differ from those of most of the Institute's Fellows. That diversity of viewpoints always emerges in our Forum reports.

Our Forums for State Appellate Court Judges have been devoted to many cutting-edge topics, ranging from the court funding crisis, to the decline of jury trial, to separation of powers and secrecy in litigation. We are proud of our Forums, and are gratified by the increasing attendance we have experienced since their inception, as well as by the very positive comments we have received from judges who have attended in the past. A full listing of the prior Forums and their content is provided in an appendix to this report, and their reports and papers—along with most of our other publications—are available free on our website, www.poundinstitute.org.

The Pound Institute is indebted to many people for the success of the 2014 Forum for State Appellate Court Judges:

- Professor Myriam Gilles and Professor Richard Frankel, who wrote the academic papers that framed our discussions;
- the Honorable Mary Ellen Barbera, Chief Judge of the Court of Appeals of Maryland, for welcoming us to Baltimore;
- our lunch speaker, Professor Jeff Sovern of St. John's University School of Law, for briefing us on a new and important study of consumers' understanding of mandatory arbitration provisions in contracts;
- our panelists—Professor Andrew Popper, the Honorable Janice Holder, Archis Parasharami, Alan Gilbert, the Honorable Marilyn Kelly, the Honorable Simeon Acoba (ret.), Michael Weston, and Leslie Bailey;

- the moderators of our small-group discussions—David Arbogast, Linda Atkinson, Kathryn Clarke, Mark Davis, Molly Hoffman, Betty Morgan, Barry Nace, Gale Pearson, Kathleen Flynn Peterson, Ellen Relkin, and John Vail—for helping us to arrive at the essence of the Forum, which is what experienced state court judges think about the issues we presented;
- and the Pound Civil Justice Institute’s efficient and dedicated staff—Mary Collishaw, our executive director, and Jim Rooks, our consultant and Forum reporter—for their diligence and professionalism in organizing and administering the 2014 Judges Forum.

It goes without saying that we appreciated the attendance of the distinguished group of judges who took time from their busy schedules so that we might all learn from each other. To echo the sentiments of Professor Popper, you judges are “the real architects of civil justice.” We hope you enjoy reviewing this report of the Forum, and that you will find it useful to you in your future consideration of matters relating to arbitration and trial by jury.

A handwritten signature in black ink, reading "Herman J. Russomanno". The signature is written in a cursive, flowing style with a large initial 'H' and 'R'.

Herman J. Russomanno
President, Pound Civil Justice Institute, 2013-15



INTRODUCTION

On July 26, 2014 in Baltimore, Maryland, 144 judges representing 36 states took part in the Pound Civil Justice Institute's 22nd annual Forum for State Appellate Court Judges. The judges examined the topic, "Forced Arbitration and the Fate of the Seventh Amendment: The Core of America's Legal System at Stake?"

Their deliberations were based on original papers written for the Forum by Professor Myriam Gilles of the Benjamin N. Cardozo School of Law, Yeshiva University ("The Demise of Deterrence: Mandatory Arbitration and the 'Litigation Reform' Movement"), and Professor Richard Frankel, of the Earl Mack School of Law, Drexel University ("State Court Authority Regarding Forced Arbitration after *Concepcion*"). The papers were distributed to participants in advance of the meeting, and the authors also made oral presentations of their papers to the judges during the plenary sessions. The paper presentations were followed by commentary by panels of distinguished legal experts: Andrew Popper of Washington College of Law, American University; the Honorable Janice Holder, Justice of the Tennessee Supreme Court; Archis Parasharami, a partner with the Mayer Brown law firm; Alan Gilbert, Solicitor General of the State of Minnesota; the Honorable Marilyn Kelly, retired Justice of the Michigan Supreme Court; the Honorable Simeon Acoba, Justice of the Hawai'i Supreme Court (ret.); Michael Weston, president of the Defense Research Institute; and Leslie Bailey, staff attorney with the Public Justice organization. All provided incisive comments on the issues based on a wealth of diverse experience in the law. The judges also heard welcoming comments by the Honorable Mary Ellen Barbera, Chief Judge of the Court of Appeals of Maryland, and a lunch address by Professor Jeff Sovern of St. John's University School of Law.

After each plenary session, the judges separated into small groups to discuss the issues, with Fellows of the Pound Institute serving as group moderators. The paper presenters and commentators visited the groups to share in the discussion and to respond to questions. Under ground rules set in advance, comments by participating judges were not made for attribution in this report of the Forum. A selection of the judges' comments representative of the discussions that occurred at the Forum appears in this report.

Discussion group moderators noted points of dissent or agreement within their group, and Forum Reporter Jim Rooks summarized these at the concluding plenary.

This report is based on the papers written and presented by Professors Gilles and Frankel, and on transcripts of the Forum's plenary sessions and small group discussions.

James E. Rooks, Jr.
Forum Reporter



WELCOME BY HONORABLE MARY ELLEN BARBERA CHIEF JUDGE, MARYLAND COURT OF APPEALS

Welcome to all of you, my appellate colleagues, to Maryland for this year's Pound Civil Justice Institute Annual Forum for State Appellate Court Judges.

Maryland is well represented here today by so many colleagues from my court, the Court of Appeals of Maryland, as well as the Court of Special Appeals of Maryland, our court of direct appellate review. I was on that court for six and a half years, and I know that it's one of, if not the, hardest-working court in Maryland.

I spent the last couple of days with the other state chief justices at the Conference of Chief Justices in West Virginia. I must say I have never been to a more spectacular presentation. It was a great, great several days, with an opportunity like you will have today to exchange ideas with your colleagues. There is really no better opportunity to do that than when you are all gathered together and you are presented with provocative thoughts.

For those of you who do not hail from Maryland, or do not know much about our state, allow me just a moment or two to speak proudly about Maryland. Maryland, you may or may not know, goes by two monikers: "The Old Line State" and "The Free State." The name "The Old Line State," my friends, dates back to the American Revolution, in which Maryland's regiment in the Continental Army, the Maryland Line, fought at the battle of Long Island, there earning a reputation for bravery and sacrifice, much like my appellate colleagues well know here in Maryland. We must be brave and we must sacrifice in order to do the job well. It's very time-consuming.

According to popular lore, George Washington himself bestowed on the Maryland troops the moniker, "The Old Line." You may remember the "fifty state quarters" program of the United States Mint about a decade or so ago. Maryland's quarter, issued in 2000, was engraved with the dome of our state house and two branches from our state tree, both above the caption, "The Old Line State."

Since 1864, Maryland has also been known as "The Free State." In that year, a new constitution took effect, abolishing slavery in the state. The moniker "The Free State," though, has had several iterations of and explanations for it. It took on new meaning during the Prohibition Era. You may or may not know this, but Maryland was, at the time, the only state in the nation that failed to pass laws to enforce temperance. Here in Maryland, prohibition was viewed as an infringement on state's rights.

Finally, Maryland is also known as "America in miniature." Within our borders, we enjoy a variety of topography, climate, and culture.

But however one refers to our great state, we are delighted to have you here, and for Maryland to be the site of this year's Forum.

Over the past 22 years, the Pound Forum has been a model for judicial education programming, providing the opportunity for thoughtful, informed discourse on current issues in civil law. This year's Forum looks to

be no exception. As I speak with lawyers and judges across the state, I often discuss the subject of access to justice. As you all are well aware, there are very different points of view on access to justice. Access to civil representation and legal services is beyond the reach of millions of Americans. Today's Forum highlights yet another dimension to the issue of access to justice with its title, "Forced Arbitration and the Fate of the 7th Amendment," a topic that for sure is critical to the plaintiff's bar, the defense bar, and all of us judges alike.

I am certain that today's presentations and discussion groups will be thought-provoking, informative, and indeed productive. And after such an intellectually stimulating day, I encourage you to relax and enjoy the city of Baltimore, my hometown. You might hear it in my voice, those of you who are familiar with or at least have heard the Baltimore accent.

If you are looking for a place to dine, Baltimore is known as a city of neighborhoods that are chock-full of culinary hotspots: Harbor East, Little Italy, and Fell's Point, to name a few. I'm sure my colleague, Judge Glenn Harrell, would be happy to specific recommendations. He is a connoisseur of all fine restaurants. Judge Harrell knows much about good eating; we've been to many a restaurant over the years. He can give you some good suggestions.

If you are interested in sight-seeing tomorrow, this is a wonderful time, my friends, to visit Fort McHenry, as this is the 200th anniversary of the Battle of Baltimore, which inspired, as you know, our National Anthem. You may not know this, but after being on loan to the Smithsonian National Museum of American History, the original, handwritten manuscript of the lyrics to the Star Spangled Banner is back at its *permanent* home at the Maryland Historical Society, about a dozen blocks north of here, where it is displayed for just a few minutes each hour of the day to protect it from the effects of light.

If you can travel a bit farther, I recommend a day trip to Annapolis, our state capital, where my court, the Court of Appeals, sits. The Court of Appeals is the name for Maryland's Supreme Court. We are one of only two of the highest state courts in the country to go by this name. You know the other quite well: the New York Court of Appeals. And we are the only state supreme court to wear scarlet robes and white tabs in accordance with traditional English legal dress. The modern court has been doing so since 1972.

I have mentioned two ways in which the Maryland Court of Appeals is unique, but in the end, as state appellate court judges, we all, every one of us in this room, confront similar challenges and we share the same goals. It is so wonderful to have the opportunity to come together and explore collaboratively some of those challenges and goals. In providing this opportunity through the annual Forum, the Pound Institute offers a great benefit not just to the judges in attendance here today, but to all the people we serve.

Please enjoy the day. I am so sorry I am not going to be able to spend the entirety of the day with you, but I'm sure I will hear back from my colleagues on what I know will be a fascinating presentation.

Thank you all for your time and attention this morning.



MORNING PAPER, ORAL REMARKS, AND COMMENTS

THE DEMISE OF DETERRENCE: MANDATORY ARBITRATION AND THE “LITIGATION REFORM” MOVEMENT

Myriam Gilles,^{1*} Cardozo Law School, Yeshiva University

Executive Summary

Professor Gilles contends that widespread deployment of arbitration clauses in standard-form contracts with consumers, employees and others is part of a larger movement aimed at reducing the incidence and impact of private litigation. In this paper, Gilles charts the development of the movement to “reform” litigation from the 1980’s to the present, revealing the near-total failure of “anti-lawsuit” advocates to secure sought-after legislative victories. Eventually, as Gilles traces, litigation reformers realized that their best bet was not legislative change but, rather, private contracting: inserting class action bans and other prohibitions into dispute resolution clauses governed by the Federal Arbitration Act. Today, private ordering has become the most powerful means for achieving long-sought anti-lawsuit objectives, as a majority of Supreme Court Justices have upheld arbitration clauses as against a number of serious legal challenges. The result is the imminent replacement of court-based litigation by arbitration—a change that threatens to weaken American law’s historic deterrence of wrongful conduct, and the rule of law generally.

In her Introduction, Gilles summarizes briefly the history of the movement to transform both civil litigation procedure and—especially in the case of tort litigation—substantive law. The movement began in the 1970s with a focus on medical negligence litigation, but soon migrated into other areas of law. Ultimately, anti-lawsuit advocates failed to achieve major changes through legislation, and eventually turned their attention to the establishment of a parallel, private dispute-resolution regime.

In Part I, Professor Gilles outlines the history of the movement to suppress litigation as the usual means of resolving disputes, tracing publicity campaigns against the civil justice system and executive branch activity in each Republican presidential administration from Reagan to Bush II.

In Part II, Gilles turns her attention to specific efforts to displace litigation with arbitration and other forms of “alternative dispute resolution,” roughly beginning with the 1976 Pound Conference (not related to the Pound Institute) and running through the 1980s to the U.S. Chamber of Commerce’s full-scale promotion

* Professor of Law, Cardozo Law School. Thanks to the Trustees of the Pound Institute for inviting me to present this paper, as well as to the participants and attendees of the Conference. Thanks also to the Robert L. Habush Endowment and the AAJ for generously supporting the past research that underlies this paper, and to Gary Friedman for generously supporting the author.

of arbitration and the Supreme Court's early decisions upholding arbitration clauses in standard-form employment agreements. She then analyzes the ever-growing trend by business entities to impose mandatory arbitration clauses containing class action bans on consumers of their goods and services in an effort to avoid liability exposure for widespread injuries. At least in the case of class action bans, those efforts received a major boost in the Supreme Court's recent 5-4 decisions in *Concepcion* and *Italian Colors*.

In Part III, Professor Gilles addresses the consequences for the law itself should mandatory arbitration come to supplant litigation as the dominant means of resolving disputes. She points out that, while arbitration has long been promoted as quicker, simpler, and less costly than litigation through publicly funded court systems, this private regime does not afford equivalent social benefits. Specifically, Gilles points out that decisions made in a court of public record generate written, accessible explanations anchored in precedent and offering guidance for future conduct, and deterrence of future wrongful conduct. In contrast, arbitration occurs in a private, sequestered universe with no information-generating or conduct-altering effects.

Gilles also reviews some of the arguments of the "deterrence deniers," including claims that deterrence is difficult to measure, that legislation and publicity go farther than litigation to control behavior, and that arbitration is the exception, not the rule, in dispute resolution. Gilles replies that deterrence has value no matter how hard it may be to measure, that litigation before an independent judiciary provides a powerful supplement to other regulatory regimes, and that mandatory arbitration conducted in secret is becoming ever more ubiquitous. In the end, she argues, it is access to justice and the rule of law itself that are most vulnerable in the contests over forced arbitration.

INTRODUCTION

"I cannot emphasize too strongly to those in business and industry . . . that every private contract of real consequence to the parties ought to be treated as a candidate for binding private arbitration."

Chief Justice Warren Burger (1981)

**"The docket seems to be changing . . . A lot of big civil cases are going to arbitration.
I just don't see as many of the big civil cases."**

Justice Anthony Kennedy (2011)

When we think of "tort reform," what generally comes to mind are the series of legislative changes adopted by many states over the past few decades in an effort to reduce the incidence and impact of personal injury and other forms of litigation. In the name of "reform," states have shortened the statute of limitations, required

the losing party to pay some or all of the winner's fees and expenses, raised standards for the admissibility of expert testimony, implemented heightened pleading standards, capped damages and attorneys' fees, and eliminated joint and several liability.² This "reform" movement began in the 1970's, spurred by allegations that the tort system was broken—that there were too many frivolous claims and runaway jury verdicts, resulting in higher medical malpractice premiums and increased costs.³ These claims—often backed up by reports commissioned by corporations and insurance companies⁴—ultimately led to multiple waves of legislative changes aimed at cabining tort litigation.⁵

But, by the late 1970's, what had begun as a set of changes focused on controlling medical malpractice and other forms of personal injury litigation had morphed into a broader set of measures aimed at curbing lawsuits more generally.⁶ At both the state and federal level, conservatives began to view "regulation-by-litigation" as problematic and, thus, sought to limit access to courts in a variety of ways.⁷ Anti-lawsuit advocates pointed to a significant and disturbing rise in litigation activity and eye-popping jury verdicts,⁸ which they argued had resulted in increased costs of goods and services, bankruptcies, lost jobs and a crippled economy.⁹ To these advocates, the sole beneficiaries of the "litigation explosion" were plaintiffs' lawyers, who extracted "exorbitant windfall fees" which they then plowed back into new and increasingly harmful litigations.¹⁰ A related critique was that the threat of litigation discouraged Americans from participating in socially-useful activities, making citizens fearful and chilling innovation,¹¹ and that America's "lawsuit culture" had spawned a caste of parasitic opportunists looking to the courts for personal enrichment.¹²

Reformers sought change via federal and state law to curtail litigation and neuter plaintiffs' lawyers. But, after multiple unsuccessful attempts to legislate away American-style litigation practices, the anti-lawsuit crowd eventually saw the promise of real reform in private ordering—*i.e.*, in the standard-form contracts for

The anti-lawsuit crowd eventually saw the promise of real reform in private ordering.

goods, services, employment and other amenities of modern life that people sign every day. In these private contracts—and particularly within arbitration clauses governed by the Federal Arbitration Act ("FAA")—lay the possibility of true containment of litigation.

This paper seeks to trace, contextualize and explore the convergence of the anti-lawsuit and pro-business agendas in the battle over mandatory arbitration.

What began as a corporate strategy to avoid some forms of liability exposure by inserting class action bans or other prohibitions into dispute resolution clauses has, today, become the most powerful means for achieving long-sought anti-lawsuit objectives. Part I provides an historical sketch of anti-lawsuit efforts at the federal level from President Reagan through President George W. Bush. Part II examines the development of the Supreme Court's arbitration jurisprudence, with particular attention to recent decisions enforcing class action waivers embedded within arbitration clauses. In the wake of these decisions, almost any situation where the defendant stands in a contractual relation to the plaintiffs is a candidate for an arbitration clause.¹³ Part III takes up the normative question at the heart of this essay: if the anti-lawsuit crusaders have finally achieved their goal of curtailing litigation via arbitration, what will be the effects upon the law more generally—and upon the deterrent function of litigation specifically?

What had begun as controlling medical malpractice had morphed into a broader set of measures aimed at curbing lawsuits more generally.

I. The Anti-Lawsuit Wars

By the early 1980's, the United States was—at least in the view of conservatives¹⁴—in the midst of a full-blown “litigation crisis.” There was too much law, too many lawsuits, too many legal rights, too many lawyers. Whether grounded in truth or anecdote, the anti-lawsuit movement had, by this point, been hugely effective in its public relations efforts, and its message that litigation was a plague that had to be controlled had broadly permeated public perceptions of litigants, lawyers, judges, and lawsuits.¹⁵ The moment was ripe for a broad, federal intervention aimed at limiting lawsuits.

A. Reagan-Era Litigation Reform, 1980-1988

As Stephen Burbank and Sean Farhang document, Reagan-era conservatives came to office with the shared belief that the major causes of the “litigation explosion” were left-leaning public interest groups and entrepreneurial lawyers, who were using “litigation and courts to shape the substantive meaning of the new social regulatory statutes,” creating regulatory policies that hurt business interests.¹⁶ The anti-lawsuit movement therefore finds its roots in the broader deregulation movement—the political force that rose to power in the 1980's seeking to resist this litigation-based form of privatized business regulation.¹⁷ A favorite target was the Legal Services Corporation (LSC), which had done battle against Reagan while he was Governor of California, and which was viewed by the President and his close advisors as a “hotbed of liberal lawyers dedicated to funding politically-oriented public impact cases.”¹⁸ For Reagan officials, these sorts of “radical, socialist” “ideological ambulance chasers” had to be blocked.¹⁹

Conservative leaders—including then-members of the Reagan Justice Department John Roberts and Samuel Alito, and University of Chicago law professor Antonin Scalia²⁰—therefore sought legislative reforms to reduce these groups' access to the courts. In particular, these leaders sought to eliminate “sources of funding” via statutory fee-caps as part of an overall strategy to “defund the Left.”²¹ Indeed, a signature plank of the Reagan administration's anti-lawsuit agenda was “an ambitious litigation-reform proposal that would have simultaneously amended over 100 federal statutes to restrict the availability of attorney's fees to private parties enforcing those statutes.”²² The bill, brought in both the 99th and 100th Congresses,²³ “signaled the emergence of a movement”²⁴ aimed at closing the courthouse doors to private enforcers.

As the anti-lawsuit movement progressed, Reagan administration officials openly “called for law's curtailment,” joining with groups “from within the medical profession, insurance industry, business community and others who saw themselves increasingly victimized by the law.”²⁵ Reagan administration true believers grew openly “confrontational: calling for immediate and massive judicial, regulatory and legislative reform.”²⁶ For example, the administration established a “Tort Policy Working Group” to fix the “malfunctioning tort system.”²⁷ The Group issued a breathtakingly broad, unabashedly business-friendly proposal to nationalize products liability law and severely limit consumer rights. As Neal Devins describes, movement conservatives at the U.S. Justice Department and the Reagan White House saw themselves as fighting “a holy war,” with a mantra of: “Let the chaos come. . . This is part of the revolution! Pragmatism is cowardice and weakness!”²⁸

There was too much law, too many lawsuits, too many legal rights, too many lawyers.

As the anti-lawsuit movement progressed, Reagan administration officials openly “called for law's curtailment.”

And yet, as legislative reform goes, the Reagan era's anti-lawsuit movement was strikingly unsuccessful. The “defund the Left” strategy, including efforts to eliminate LSC and to directly regulate attorneys’ fees, were failures, crashing on the rocks of interest-group politics.²⁹ At the federal level,³⁰ the one area where the movement was successful was at the agency level, where administrators like Equal Employment Opportunity Commission chief Clarence Thomas enacted policies strategically designed to curtail enforcement efforts. Chairman Thomas, for example, closed down the group charged with investigating systemic discrimination,³¹ “devoted limited resources to cases that had no significant precedential or monetary value, or even involved significant numbers of employees,”³² and brought no adverse impact cases during his entire tenure.³³ Still, given the ambitions of the Reagan true believers, the inherently transitory successes at the agency level were thin gruel by any measure.

As legislative reform goes, the Reagan era's anti-lawsuit movement was strikingly unsuccessful.

B. Litigation Reform Under George H.W. Bush, 1988-1992

Though the Reagan administration largely failed to accomplish serious litigation reform, George H. W. Bush took up the cause during his presidency.³⁴ Bush’s point man for the anti-lawsuit agenda was Vice President Dan Quayle, whose shot across the bow came in a controversial speech to the American Bar Association on August 13, 1991 in which he lambasted lawyers and lawsuits, claiming that litigation costs the economy \$300 billion annually.³⁵ Quayle followed up with speeches all across the nation criticizing a “legal system spinning out of control” and the “explosion of frivolous lawsuits.”³⁶

Taking a page from the Reagan reformers, Quayle proposed fifty anti-lawsuit reforms through the President’s Council on Competitiveness, which he chaired along with Solicitor General Ken Starr.³⁷ However,

The Bush I proposals focused on implementing a loser-pays regime, imposing caps on punitive damages, and enforcing strict discovery limits.

having watched the Reaganites fail in their bid to cap, shift and restrict attorneys’ fees, the Bush I proposals focused instead on implementing a loser-pays regime, imposing caps on punitive damages, and enforcing strict discovery limits.³⁸ These anti-lawsuit reforms were at the heart of the “Access to Justice Act” that the Bush I administration introduced along with Senators Grassley, McConnell and Garn.³⁹

But here again, as with President Reagan, the Bush I legislative drive for lawsuit reform was a failure.⁴⁰ On this issue—as on others—reformers viewed the Bush I presidency as lacking the focus of the Reagan Revolution; the Bush team was “not a group of like-minded individuals seeking to advance” a shared anti-lawsuit vision, as Reagan’s core group of advisors had been.⁴¹ Still, the Bush I presidency did manage to solidify lawsuit reform as a core value of the Republican party.

In October 1991, President Bush signed Executive Order 12778—a sort of manifesto placing “the President’s imprimatur” on a detailed laundry list of litigation reform measures as applied to government participation in civil litigation.⁴² And as he left office, Bush placed litigation reform squarely in the spot light, trumpeting the issue to extended applause in the 1992 State of the Union Address.⁴³ Likewise, on the campaign trail, Bush and Quayle in their unsuccessful 1992 reelection bid ramped up their focus on lawsuits, arguing repeatedly on the stump that Americans are “suing each other too much and caring for each other too little.”⁴⁴

Following the 1992 election, some commentators speculated that the Bill Clinton presidency would bring an end to the anti-lawsuit crusade.⁴⁵ But if anything, the issue picked up steam as Newt Gingrich's "Contract with America" emphasized litigation reform measures, including caps on punitive damages and federal products liability reform.⁴⁶ The Speaker's troops repeatedly placed lawsuit reform measures on the legislative docket—such as the ill-fated but pithily named "Loser Pays Act of 1993"—and they eventually won significant, if narrow, victories curtailing securities and prison litigation.⁴⁷ Media coverage of the continuing "litigation crisis" also accelerated during this period.⁴⁸ So as the Clinton years drew to a close, the Republican base remained as interested as ever in curtailing litigation.

C. Litigation Reform Under George W. Bush, 2000-2008

When George W. Bush campaigned for the presidency in 2000, he ran on a platform that was explicitly anti-lawsuit,⁴⁹ trumpeting tort reform measures he had achieved while Governor of Texas. He "used his support for federal tort reform measures to distinguish himself from Al Gore during the campaign," and, once elected, outlined plans for massive medical malpractice, asbestos and class action litigation reform at the federal level.⁵⁰ In every State of the Union address, President Bush asked Congress to act on his litigation reform bills,⁵¹ and he gave rousing speeches across the nation on fixing the "broken medical liability system."⁵²

But legislative successes continued to prove elusive. The Bush II administration's signature tort reform effort was the "Help Efficient, Accessible, Low-Cost Timely Healthcare" (HEALTH) Act of 2002, which incorporated the most popular proposals from state tort reform legislation—i.e., capping noneconomic damages to \$250,000, abolishing joint and several liability, capping attorneys' fees and punitive damages, and shortening the statute of limitations for most medical injuries.⁵³ The bill squeaked through the Republican-controlled House, only to fail in the Senate.⁵⁴ Asbestos litigation reform efforts met a similar fate.⁵⁵

George W. Bush outlined plans for massive medical malpractice, asbestos and class action litigation reform at the federal level.

In the end, the Bush II administration's anti-lawsuit rhetoric may have helped with electoral politics and motivating the base⁵⁶—and it surely helped with reelection, as Republican fire was trained on trial lawyer extraordinaire John Edwards⁵⁷—but it did little to advance the anti-lawsuit legislative agenda itself. Ultimately, the Class Action Fairness Act of 2005, enacted after a "grinding eight-year effort," was the only significant lawsuit reform legislation achieved by this administration.⁵⁸



For all the *Sturm und Drang* that attended the anti-lawsuit movement from the Reagan through the George W. Bush presidencies, little substantive reform was enacted. But the efforts were hardly for naught. The

For all the *Sturm und Drang* that attended the anti-lawsuit movement, little substantive reform was enacted.

greatest achievements of all three Republican administrations, insofar as the anti-lawsuit agenda is concerned, were the successful nominations of Antonin Scalia, Clarence Thomas, John Roberts and Samuel Alito to the Supreme Court.⁵⁹ All of these "sons of the Reagan Revolution" had experienced

the substantial frustration of the litigation reform movement before ascending to the bench. And while their positions as Supreme Court Justices would not quite give them the latitude to enact the bold measures of the Reagan and Bush II litigation reform agendas, they would encounter on the bench one reform opportunity that exceeded the impact of even the most radical legislative proposals put forth by their political patrons: the opportunity to use the Federal Arbitration Act to allow companies to insulate themselves against liability.

II. The Arbitration Wars

Enacted in 1925 to promote arbitration among equally sophisticated parties in commercial and maritime contracts,⁶⁰ the FAA provided that an arbitration agreement “written in any maritime transaction or contract evidencing a transaction involving commerce” was enforceable, subject only to “such grounds as exist at law or equity for the revocation of any contract.”⁶¹ For over fifty years after the FAA was enacted, arbitration remained a niche practice, deployed primarily by business interests seeking ways to channel disputes out of

Fifty years after the FAA was enacted, arbitration remained a niche practice, deployed primarily by business interests

the traditional litigation system and into less expensive and more private forms of alternative dispute resolution (ADR).⁶² By waiving the right to a formal judicial hearing, these parties voluntarily submitted their disagreements to experts in the field, with limited rights of appeal and the promise of complete confidentiality.⁶³

Over these years, arbitration became the norm for resolving complex, commercial disputes arising under collective bargaining agreements, international trade contracts, and certain other large-scale commercial arrangements.⁶⁴

Throughout this period, the Supreme Court repeatedly affirmed its view that the FAA encouraged the arbitration of claims between equally-sophisticated parties, rejecting efforts to impose arbitration upon guileless consumers or employees via standard-form contract.⁶⁵ In the 1953 case *Wilko v. Swan*, a unanimous Court concluded that claims brought by an investor under the federal securities laws could not be forced into arbitration.⁶⁶ And for the next thirty years, the Court maintained a policy of disallowing the arbitration of federal statutory claims, consistently holding that “Congress did not intend to funnel public law causes of action into a forum that lacked full-bore discovery, rigorous evidentiary rules, and appellate rights, and therefore did not ‘provide an adequate substitute for a judicial proceeding.’”⁶⁷

Chief Justice Burger had long been an unapologetic opponent of the “litigation explosion” and he saw in arbitration significant potential to address the issue.

But by the 1980’s, the Court’s position on arbitration had changed. Chief Justice Burger had long been an unapologetic opponent of the “litigation explosion” and he saw in arbitration significant potential to address the issue.⁶⁸ But while the Chief did not have a Court that fully shared his “profound hostility to litigation”⁶⁹—such a Court would only come to fruition under his successors—his enthusiasm for ADR found adherents among even his liberal brethren. Thus, Justice Brennan’s majority opinion in the 1983 *Moses H. Cone v. Mercury Construction Corp.* decision recognized the FAA as “a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”⁷⁰ And, as the decade progressed, this “liberal federal policy”

fully rolled back the rule of *Wilko*, with the Court holding that claims arising under the federal securities,⁷¹ antitrust,⁷² RICO⁷³ and employment statutes⁷⁴ were fully arbitrable.

By the 1990s, the utility of arbitration as a vehicle for achieving long-sought anti-lawsuit objectives was unmistakable. In *Gilmer v. Interstate/Johnson Lane Corp.*,⁷⁵ and then again in *Circuit City Stores, Inc. v. Adams*,⁷⁶ the Court applied arbitration agreements imposed in standard-form employment contracts to preclude the litigation of claims in federal court. Recognizing the significant stakes involved, Justice Stevens sounded the alarm in his *Gilmer* dissent, warning that “the Court ‘has effectively rewritten the statute’ and abandoned its earlier view that statutory claims were not appropriate subjects for arbitration.”⁷⁷ But by this point, the potential for widespread use of arbitration clauses to avoid liability to workers and consumers was coming into focus for anti-lawsuit advocates; the U.S. Chamber of Commerce began submitting amicus briefs to the Supreme Court in support of arbitration starting in 1990 and soon other conservative groups started to get involved in the legal battles surrounding the FAA.⁷⁸ As the Roberts Court took up a string of arbitration cases in the 2000’s, a sort of permanent 5-4 split emerged, with the Court’s liberal justices routinely dissenting from decisions enforcing arbitration clauses.⁷⁹ Apparently, somewhere between Chief Justice Burger’s mid-1970s embrace of ADR and Chief Justice Roberts’s investiture, the Court’s liberal wing woke up to the potential of arbitration to simply preclude the prosecution of claims by consumers and workers.⁸⁰

The utility of arbitration as a vehicle for achieving long-sought anti-lawsuit objectives was unmistakable.

At the same time, the ability of arbitration to advance the Reagan-Bush II agenda of decimating the “lawsuit industry” appears to have tempted the conservative Justices—most prominently Justices Scalia and (more slowly) Thomas—into abandoning long-held views that the FAA does not apply to state law cases.⁸¹ Justices Scalia and Thomas dissented on these federalist grounds from the decision enforcing an arbitration clause in *Allied-Bruce Terminix v. Dobson*.⁸² After that, Justice Thomas kept up the states-rights fight alone in *Doctor’s Associates v. Casarotto*,⁸³ and *Green Tree Fin. Corp. v. Bazzle*.⁸⁴ But by the time the Court turned its attention to class actions in *AT&T Mobility v. Concepcion*, federalist principles had been fully laid aside – collateral damage in the service of the Reaganite cause.

A. *Concepcion* and *Italian Colors*

Buoyed by the Court’s arbitration decisions, corporate counsel in the late 1990s began to redraft standard-form consumer contracts to include arbitration provisions expressly waiving the right to act in any collective way.⁸⁵ These clauses ensured that any claim against a corporate

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defendant could be asserted only in a one-on-one, non-aggregated arbitral proceeding. For the early adopters, the class action bans promised virtual immunity from liability, given the certainty that consumers and employees would almost never be able to arbitrate small dollar claims individually, or attract counsel on a contingent fee basis. Within a few years, these “get out of jail free” provisions were standard fare in credit card, telecom and e-commerce agreements, among many others.⁸⁶

Mandatory arbitration was the ideal inheritor of the anti-lawsuit movement.

As plaintiffs' lawyers and access-to-justice advocates began to challenge the class bans, shortly after the turn of this century, corporate defendants found themselves cosseted by the same players that had led the efforts for litigation reform. Groups including the Chamber of Commerce, the American Tort Reform Association, the Pacific Research Institute, and the Manhattan Institute brought to the pro-arbitration campaign their stables of reliable researchers, faux-grass-roots organizations, sympathetic journalists, off-shoot institutes, lobbyists, and an army of amicus writers.⁸⁷ The talking points were clear: mandatory arbitration is a faster, cheaper and more efficient means of resolving claims,⁸⁸ and companies would prefer to look their customers and employees in the eye, in an informal arbitral setting, rather than stare down the fully loaded barrels of weapons wielded by rapacious class action lawyers. Mandatory arbitration was the ideal inheritor of the anti-lawsuit movement.

The initial battlegrounds were state and lower federal courts faced with motions to compel arbitration of putative class actions. And while corporate defendants enjoyed early success in many states, by the end of the decade the access-to-justice forces appeared to have turned the tide.⁸⁹

And then *AT&T Mobility v. Concepcion* happened.⁹⁰ In a 5-4 decision, authored in 2011 with evident relish by Justice Scalia, the Court struck down under the Supremacy Clause a California common law contracts doctrine under which arbitration clauses in consumer agreements were generally regarded as unconscionable and unenforceable unless they allowed for class proceedings inside the arbitral forum. Finding that class proceedings are antithetical to the idea of arbitration as enshrined in the FAA, the Court held the California unconscionability rule was preempted because it posed an obstacle to the very object of the FAA, which is to ensure enforcement of the agreement as written.⁹¹ Justice Scalia was openly dismissive of the argument, made by the dissent, "that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system."⁹² Brushing the dissent away, Justice Scalia held flatly that "States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated reasons."⁹³

And then, in 2013, came *American Express v. Italian Colors*—featuring the same five-Justice majority, and an opinion authored with equal relish by Justice Scalia.⁹⁴ The plaintiffs, who were small merchants, had proven, as a factual matter, that the imposition of American Express's clause mandating one-on-one arbitration stripped them of their ability to pursue an antitrust claim because it forced each plaintiff to shoulder non-recoupable expert and

other costs that vastly exceeded any amount the individual plaintiff could hope to win.⁹⁵ The Supreme Court rejected the challenge, holding that the FAA demands enforcement of the clause as written.⁹⁶ In a scathing dissent, Justice Kagan restated the majority's entire argument in three words: "too darn bad." The fact that an arbitration clause would impose burdens upon a claimant that render the vindication of rights impossible is, on Justice Kagan's retelling, just "too darn bad."⁹⁷

American Express's clause mandating arbitration stripped small merchants of their ability to pursue an antitrust claim because it forced each plaintiff to shoulder non-recoupable cost.

B. Arbitration Tomorrow

The status quo is straightforward. Unless legislative or regulatory measures overrule *Italian Colors* and *Concepcion*,⁹⁸ or the Supreme Court reverses itself, it will be very difficult for any consumer, employee or small business to avoid mandatory one-on-one arbitration of any dispute arising out of a relationship that is based on an arbitration clause in a standard-form agreement.⁹⁹ Some arguments surely remain at the state court level, should lawyers continue to expend the time and money to challenge arbitration clauses.¹⁰⁰ Consequently, as I have discussed elsewhere, almost any situation where the defendant stands in a contractual relation to the plaintiffs is a candidate for an arbitration clause and class action waiver.¹⁰¹

Going forward, then, we should expect that all companies for whom the ministerial costs of implementing arbitration clauses are outweighed by the desire to eliminate class action liability will adopt class bans. In a small subset of areas, the costs of implementation may be high—for example, if pharmaceutical companies would require FDA approval to place an arbitration clause and class waiver on their labels or ancillary materials.¹⁰² And it is also possible, in some cases, that consumer backlash to the imposition of arbitration and class waivers will impose a formidable cost.¹⁰³ But by and large, I assume that the targets of class litigation will effectively insulate themselves. And the available evidence bears out the supposition that, in areas where class

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exposure has traditionally been a concern, arbitration clauses and class bans are already becoming universal.¹⁰⁴

The adoption of arbitration by companies seeking to avoid class action exposure has implications for non-class cases as well. After all, the same contracts that form the predicate of class liability are also the basis of individual

suits. When a company imposes an arbitration clause in its standard-form employment agreement, it may be motivated by class-exposure-avoidance, but it also is ensuring that any individual employment dispute will be arbitrated rather than litigated. Likewise, as manufacturers and shippers add arbitration language to their standard forms in a bid to avoid class exposure, they ensure that *all* disputes with counterparties will unfold in the arbitral forum. So as entire industries decamp for the green pastures of arbitration—as they exit the judicial system, taking with them entire categories of cases from antitrust to consumer to employment law—we should ask: what are the implications for the deterrence functions of litigation?

III. The Demise of Deterrence

The rhetoric that attends the contemporary anti-lawsuit/pro-arbitration agenda portrays arbitration and litigation as offering equivalent services—the adjudication of disputes—but insists that arbitration is faster, cheaper and more efficient.¹⁰⁵ According to proponents, arbitrators are not hampered by the rigamarole that characterizes much of contemporary legal practice—*i.e.*, expensive discovery¹⁰⁶ and motion practice,¹⁰⁷ the toil of drafting precedential opinions.¹⁰⁸ In addition, industry experts were traditionally selected as arbitrators due to their more intimate knowledge of the substantive field of dispute than generalist judges.¹⁰⁹ This expertise is, today, said to further reduce the time and expense of resolving claims.¹¹⁰ Alongside these efficiency-based claims, the anti-lawsuit brigade contends that employees, consumers and other small-value claimants do better in arbitration than in litigation.¹¹¹ Not surprisingly, the Supreme Court has joined the chorus in praising the “simplicity, informality and expedition of arbitration” as compared to litigation in the courts.¹¹²

This all makes for good copy, but terrible policy. Focusing on efficiency and compensating small-value claimants (who are unlikely to arbitrate their individual claims in any event) ignores entirely the myriad social benefits that result from providing open access to courts—most critically, the deterrent and regulatory functions of litigation in public courts.¹¹³

Once regarded as the central justification for enabling litigation,¹¹⁴ deterrence has somehow ceased to resonate in a world inflected by anti-lawsuit bluster.¹¹⁵ But the inability of arbitration to articulate and publicize legal norms so as to regulate conduct and prevent future harm is a serious casualty of the anti-lawsuit movement, one that ought to draw the attention of policymakers and jurists alike.

Focusing on efficiency and compensating small-value claimants ignores entirely the myriad social benefits that result from providing open access to courts.

A. Assessing the Deterrence Value of Litigation vs. Arbitration

It seems inarguable that legal claiming results in deterrence against future wrongdoing. Every effort to hold an offender responsible for violations of statutory or common law “creates the potential for normative articulation and deterrent impact.”¹¹⁶ As Andrew Popper writes: “The force of a clear judicial determination of liability is undeniable. Similarly situated entities assess such findings and either reconfigure their action or behavior (a deterrent response) or choose not to do so and, thereby, risk downstream liability.”¹¹⁷

The deterrence capacity of litigation relies, in large part, upon publicity. In order for standards or norms to have any influence on behavior, they must be made public for all to see, to “become known, feed expectations, and breed a common understanding of the legal culture of the country.”¹¹⁸ Lawsuits provide for this—for the

exposure and public dissemination of legal directives, precedents, and other information about norms of behavior, duties and potential liabilities.¹¹⁹

The deterrence capacity of litigation relies, in large part, upon publicity.... By concealing adjudication or by suppressing claims altogether, arbitration allows for no publicity of claims.

Arbitration, on the other hand, does not. Either by concealing adjudication within the private sphere of the arbitral fora or by

suppressing claims altogether, arbitration allows for no publicity of claims.¹²⁰ For example, no arbitral body requires that a legal record of the proceedings be kept, or that an arbitrator explain his or her reasoning for any particular ruling or resolution.¹²¹ Indeed, any such disclosure would run counter to the promise of complete confidentiality, which is central to the institution of arbitration.¹²² Further, even where an arbitral resolution is known, it has no preclusive effect upon subsequent proceedings.¹²³ As such, arbitrators are not required to abide by principles of stare decisis,¹²⁴ and outcomes in arbitration are often non-appealable.¹²⁵ As Richard Alderman explained in his testimony before Congress:

“Arbitrators cannot create the common law; arbitrators cannot modify the common law. . . . Essentially, we have frozen the law by submitting everything to arbitration, denying the courts the ability to develop and adapt the law as society and business changes.”¹²⁶

In sum, unlike lawsuits adjudicated in public courts of record, arbitration decisions do not become part of an accessible judicial history or common law; these built-in features of arbitration destroy any deterrent effect of resolving claims in these fora by eliminating the practical means of “forc[ing] information into the public about the kinds of claims that millions of ordinary” people may possess.¹²⁷

B. Deterrence Deniers

Predictably, anti-lawsuit reformers have developed ready responses to the concerns over the demise of deterrence. “Deterrence deniers” (as Andrew Popper terms them), often point out that, even in the absence of mandatory arbitration, the deterrent function of litigation is neither certain nor consistent. For one, deterrence is terribly difficult to measure with any precision.¹²⁸ Among the reasons for this empirical difficulty is that the vast majority of lawsuits settle.¹²⁹ Further, there are a multitude of variables present in any given case that may

Skepticism concerning optimal levels of deterrence hardly gives cause for turning to a form of dispute resolution that eschews deterrence altogether.

blunt its deterrent impact; for example, some argue that the presence of “liability insurance may dilute the effects” of lawsuits, as might other instances of liability-absorption by an entity other than the defendant itself.¹³⁰

These are undeniably valid concerns—deterrence *is* hard to measure and certainly *may* be affected by many variables—but critiques of this sort presume rather than deny the fundamental capacity of litigation to impact behavior. Skepticism concerning optimal levels of deterrence—*i.e.*, whether litigation over- or under-deters—calls out for better methods of assessing the quality and quantity of the deterrent function of lawsuits.¹³¹ It hardly gives cause for turning to a form of dispute resolution that eschews deterrence altogether.

Another set of responses to the concern over the demise of deterrence points to the inefficiencies of litigation as a means of preventing future harm or regulating bad actors.¹³² Litigation is described as a “cumbersome and expensive” process with “large administrative costs” that cannot be justified on the basis of deterrence.¹³³ Anti-lawsuit types thus regularly assert that disincentives towards misconduct are more efficiently generated by other forces—*i.e.*, the fear of criminal prosecution or agency enforcement actions,¹³⁴ or reputational concerns and the dynamics of market competition—so that private litigation adds nothing to the deterrence mix.¹³⁵ Proponents also insist that judicial precedents are not the sole means of announcing legal norms: “legislatures and regulatory agencies can [also] clarify law by amending statutes and regulations to resolve previously open issues.”¹³⁶

But these claims are also weak: historically, private litigation has supplemented enforcement by prosecutors and government agencies, and it is this one-two punch that optimizes detection and deterrence.¹³⁷ Companies tempted to skirt legal rules to the detriment of their customers or employees are concerned with *both* the possibility of ruinous liability at the hands of the plaintiffs’ bar and the corrective measures and fines that might be meted out by a federal or state enforcement agency.¹³⁸ Arguments about preferring one to the other are certainly merited, but standing alone, cannot justify shutting down adjudication altogether.

Finally, some deterrence deniers have argued that the demise of deterrence is overblown because arbitration will always remain the exception, not the rule, and that “courts will continue to develop the laws that govern” and “to generate useful precedent.”¹³⁹ But this view is anachronistic in light of the decisions in *Concepcion*

Today, we should expect broad adoption of arbitration by all companies interested in eliminating their exposure to class actions.

and *Italian Colors*; today, we should expect broad adoption of arbitration by *all* companies interested in eliminating their exposure to class actions. The available evidence already bears out this supposition in areas where class exposure has traditionally been a concern.¹⁴⁰ And the imposition of class bans in arbitration obviously has implications for non-class cases as well: after all, the same contracts that form the

predicate of class liability are also the basis of individual suits. When Wal-Mart imposes an arbitration clause in its standard-form employment agreement, it may be motivated by class-exposure-avoidance,

In sum, none of the arguments made by the anti-lawsuit deterrence deniers is persuasive. The demise of deterrence is real, and will be felt in every corner of the law—from consumer, employment, antitrust, and many other vital areas of legal regulation. Now that companies have unprecedented incentives and latitude to deploy arbitration clauses, “large areas of U.S. life and commerce [may be] silently insulated from the lawsuit culture.”¹⁴¹ As a result, the public benefits of private adjudication will diminish, and rules and norms generated by open court judgments will fade away.

The demise of deterrence is real, and will be felt in every corner of the law.

CONCLUSION

At its core, the debate over shifting legal claims out of public courts and into private arbitration asks us to reconsider the role and function of the public civil justice system. The anti-lawsuit campaign has been effective, in large part, because it has focused citizens and conservative policymakers on the problems and weaknesses of this system, ignoring entirely the benefits—namely that authoritative, public judgments are central to the rule of law, generating valuable information about the application of legal doctrine to real-world conduct.¹⁴² A full-throated defense of the litigation system is necessary to defeat the anti-lawsuit message and to restore public adjudication of claims as a point of pride, rather than a badge of dishonor. Or else, the primary casualties in the anti-lawsuit war will be the law itself, in its capacity to deter wrongful conduct, publicize norms of behavior, transparently and fairly resolve disputes, and provide access to all who seek justice.

Notes

¹ * Professor of Law, Cardozo Law School. Thanks to the Trustees of the Pound Institute for inviting me to present this paper, as well as to the participants and attendees of the Conference. Thanks also to the Robert L. Habush Endowment and the AAJ for generously supporting the past research that underlies this paper, and to Gary Friedman for generously supporting the author.

² See generally David M. Studdert et al., *Medical Malpractice*, 350 NEW ENG. J. MED. 283, 287 (2004) (describing reform measures enacted during the three main medical malpractice “crises”).

³ Lawrence J. McQuillan et al. Pacific Research Institute, *Jackpot Justice: The True Cost of America’s Tort System* 35 (2007), available at http://www.pacificresearch.org/docLib/20070327_Jackpot_Justice.pdf; PETER HUBER, *LIABILITY* (1988) (claiming the tort system costs Americans \$300 billion each year in a “tort tax”).

⁴ See, e.g., TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 28-30 (2005) (reviewing and debunking various defendant-generated studies and reports claiming a medical malpractice “crisis”).

⁵ Stephanie Mencimer, *The Myth of America’s ‘Lawsuit Crisis’*, WASHINGTON MONTHLY, Oct. 5, 2004, available at http://www.alternet.org/story/20082/the_myth_of_america's_lawsuit_crisis (reporting that the insurance industry in the mid-1980’s “began to heavily lobby legislators to restrict citizens’ ability to sue,” pursuing “strict caps on damage awards, tougher standards for proving liability, and caps on plaintiffs’ attorney fees”); see also Ronen Avraham, *An Empirical Study of the Impact of Tort Reforms on Medical Malpractice Payouts*, 36 J. LEGAL STUD. 1983 (2007) (reporting that by 2003, 21 states had enacted some form of tort reform legislation).

- ⁶ See generally Stephen Burbank and Sean Farhang, *Litigation Reform: An Institutional Approach*, __ U. PENN. L. REV. __ (forthcoming 2014), available at www.ssrn.com/abstract=2360272; see also Stephen Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 UCLA LAW REV. 1752, 1771 (2013) (“Lawsuits became a threat to the stability and even the continued existence of a number of potential defendants. Unsurprisingly, defendants fought back, not only by vigorously defending lawsuits but also by launching broad political and public relations efforts. One result of those efforts was the new salience of civil litigation as a political issue.”); see also THOMAS F. BURKE, *LAWYERS, LAWSUITS AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICA* at 26 (2002) (“The notoriety of tort litigation, combined with the powers of persuasion of corporate and personal interests, has put personal injury lawsuit reform at the top of the anti-litigation agenda. Yet the range of anti-litigation politics sweeps much more broadly than tort suits.”).
- ⁷ Burbank & Farhang, *supra* note 5, at 7 (describing the nascent deregulatory movement, started by “business, trade associations, state and local officials, and newly emergent conservative public interest groups”).
- ⁸ See, e.g., Yeazell, *supra* note 5, at 1783–4 (noting that substantial jury verdicts “stir the defendants’ blood, open their pocketbooks, and mobilize the attacks on civil litigation”).
- ⁹ See generally PETER HUBER, *LIABILITY* (1988) (arguing that excessive litigation is harmful to economic growth); see also Yeazell, *supra* note 5, at 1758 (quoting Republican party platform of 1988, when George H.W. Bush was the presidential candidate, warning that “[j]obs are being lost . . . and sometimes lifesaving products are being discontinued, and America’s ability to compete is being adversely affected”); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform*, 54 DUKE L. J. 447, 450 (2004) (“Americans have fulminated against the bar as . . . plagues of locusts tormenting the nation with epidemics of unwarranted litigation and sapping the vitality from the free enterprise system.”).
- ¹⁰ Burbank & Farhang, *supra* note 5, at 21 (quoting Orrin Hatch in 1984 Senate hearings on The Legal Fee Equity Act, a fee-cap bill that ultimately failed to pass).
- ¹¹ See, e.g., Stuart Taylor & Evan Thomas, *Lawsuit Hell: Doctors, Teachers, Coaches, Ministers*, NEWSWEEK Dec. 15, 2003, available at http://www.lifestream.tv/dinarupdate/mediaplayer/articles/Newsweek2003_Cover%20Article_Lawsuit_Hell.pdf (chronicling a series of incidents—many later shown untrue or misrepresented—in which ordinary Americans faced the consequences of excessive litigation); see also Yeazell, *supra* note 5, at 1758 (quoting George H.W. Bush complaining: “we’ve got Little League coaches that are afraid to coach; we’ve got doctors that are afraid to bring babies into the world because of a lawsuit; we’ve got people that are afraid to help people along the highway because they’re afraid to be sued. We’ve got to put an end to these crazy lawsuits.”).
- ¹² See Burke, *supra* note 5, at 26 (noting that “for many Americans . . . tort litigation symbolize[s] the decline of personal responsibility in society”).
- ¹³ See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 413 (2005); (“it is apparent that sufficient contractual bases for the imposition of arbitration clauses and class waivers, under current doctrine, are present in virtually all areas of contemporary class action practice”); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 640 (2012) (same).
- ¹⁴ And some liberals. See, e.g., Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 638 (1994) (describing President Jimmy Carter’s attack on “excessive litigation and legal featherbedding”) citing, James E. Carter, Address at the 100th Anniversary Dinner of the Los Angeles Bar Association (May 4, 1978), reprinted in *President Carter’s Attack on Lawyers, President Spann’s Response, and Chief Justice Burger’s Remarks*, 64 A.B.A. J. 840 (1978).
- ¹⁵ Robert F. Dee, *Blood Bath*, ENTERPRISE, Apr. 1986, at 3 (“Like a plague of locusts, U.S. lawyers with their clients have descended on America and are suing the country out of business. Literally.”); Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science*, 100 W. VA. L. REV. 1097, 1100 (2008) (“The anti-lawsuit rhetorical messages were repeated over and over by business-funded institutes and Fortune 500 companies and are now omnipresent in popular culture.”) See also WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA AND THE LITIGATION CRISIS* at 39 (2004) (conservatives used the media “to condition public attitudes and supply the public information that would advance” the anti-lawsuit agenda)).
- ¹⁶ Burbank & Farhang, *supra* note 5, at 8. See also Paul Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L.J. 597, 601 (2010) (describing the uptick in litigation caused by “the substantial increase in the number of civil actions filed by citizens seeking enforcement of civil rights or civil liberties,” in “new categories of civil filings [such as] employment discrimination cases and cases brought to enforce federal environmental laws”); Edwin Meese, Foreword, *BRINGING JUSTICE TO THE PEOPLE* (HERITAGE FOUNDATION, 2004) at ii (“the term ‘public interest law’ . . . describes groups of attorneys around the country—mostly liberal in their political views—that had turned from representing individual poor people with their ordinary legal problems to maintaining novel legal actions on behalf of political activists and special-interest social causes”).
- ¹⁷ Carrington, *supra* note 15, at 609 (“Champions of the deregulation cause acquired substantial control of the federal government in the elections of 1980.”).
- ¹⁸ Abner Mikva, *Deregulating Through the Backdoor: The Hard Way to Fight a Revolution*, 57 U. CHI. L. REV. 521, 532 (1990) (“These lawyers’ court victories had forced Governor Reagan’s administration to restore cuts totaling \$210 million to the Medicaid program and to guarantee farm laborers the minimum wage.”); see also Kimberly McKelvey, *Public Interest Lawyering in the United States and Montana: Past, Present and Future*, 67 MONT. L. REV. 337 343–4 (2006) (“The restoration of the funds hampered then-Governor Ronald Reagan from balancing the budget as he had promised. In response, Governor Reagan spent most of the 1970s restricting or attempting to eliminate” public interest lawyering programs in California).
- ¹⁹ McKelvey, *supra* note 17, at 344; Mikva, *supra* note 17, at 532. Ultimately, the Reagan administration was unsuccessful in its highly visible attempts to dismantle the LSC after “deans of 141 law schools, over 100 judges from New York State (in addition to hundreds from other states) and fourteen past ABA presidents, among others, rose up to thwart the effort.” McKelvey, *supra* note 17, at 344, citing William Chapman, *Legal Services Unit Survives Senate Vote*, WASHINGTON POST A2 (Nov. 14, 1981).
- ²⁰ John Roberts served in the Reagan Justice Department and then as Special Assistant to the Attorney General and as Associate Counsel to the President. Samuel Alito also worked in the Reagan Justice Department, serving as Assistant to the Solicitor General and Deputy Assistant to the Attorney General. Antonin Scalia was a law professor at the University of Chicago in the 1980’s, after heading up the Office of Legal Counsel under President Ford. See <http://www.supremecourt.gov/about/biographies.aspx>. In addition, Clarence Thomas, “who had become active in the black conservative movement after arriving in Washington, D.C. in 1979 to work for U.S. Senator John C. Danforth (R-Mo.), was named assistant secretary for civil rights in the U.S. Department of Education by President Ronald Reagan.” Scott Gerber, *Justice for Clarence Thomas: An Intellectual History of Justice Thomas’s Twenty*

Years on the Bench, 88 U. DET. MERCY L. REV. 667, 671 (2011). See also Tonja Jacobi, *Obamacare as a Window on Judicial Strategy*, 80 TENN. L. REV. 763, 772, n. 40 (2013) (describing John Roberts' tenure in the Reagan White House as one marked by conservative positions, and providing the example of a Roberts-authored "memorandum that gathered material for use in the campaign to amend or abolish the exclusionary rule"), citing Memorandum from John G. Roberts, Assoc. Counsel to the President, to Kenneth Cribb, Jr., Assistant Counselor to the President (Jan. 4, 1983), available at <http://www.reagan.utexas.edu/Roberts/Box24JGRExclusionaryRule1.pdf>.

²¹ Burbank & Farhang, *supra* note 5, at 3. The authors detail the strategy of deregulation, which sought not to "repeal or modify legislative mandates," but instead to demobilize administrative and private enforcement of those mandates. Essentially, political leaders "were deeply concerned that private rights of action coupled with fee shifting . . . were producing 'a state-sponsored, private governing apparatus' that was beyond the control of the elected branches." *Id.* at 10. As such, the first order of business was to enact fee caps to "bar fee awards to entrepreneurial attorneys who engage in contingency litigation." *Id.* at 11 (internal citations omitted). See Michael S. Greve, *Why 'Defunding the Left' Failed*, 89 PUBLIC INTEREST 91, 92 (1987) ("Conservative activists committed to defunding were appointed to the Board of the Legal Services Corporation, to the Office and Budget (OMB), to the Justice Department, and to various grant-making and regulatory agencies.").

²² Burbank & Farhang, *supra* note 5, at 3. The authors also describe a number of other litigation reform proposals of the Reagan era, such as punitive damage caps and tort reform measures. See *id.* at 8-9. See also Yeazell, *supra* note 5, at 1757 (quoting Ronald Reagan speech: "American society is mired in excessive litigation . . . our system of justice has become weighted down with lawsuits of every nature and description") (internal citations omitted); John Coffee, *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986) (reporting on the Reagan administration's proposals to "restrict the availability of treble damages in antitrust actions and [to] limit both damage awards and attorneys' fees more generally").

²³ See S. 2162, 99th Cong., 2d Sess. (1986); S. 539, 100th Cong., 1st Sess. (1987).

²⁴ Burbank & Farhang, *supra* note 5, at 4 (describing "the emergence of litigation reform as a Republican issue in Congress"); Yeazell, *supra* note 5, at 1771-1.

²⁵ Samuel Brakel, *Using What We Know About Our Civil Justice System*, 31 U. GA. L. REV. 77, 86 (1996) (observing that "it was during the early Reagan years that the public first began to hear a well-versed chorus complaining of the exorbitant social and economic costs imposed on society by excessive law and lawyering"). See also STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* (2008).

²⁶ Neal Devins, *Reagan Redux: Civil Rights Under Bush*, 68 NOTRE DAME L. REV. 955, 960 (1993).

²⁷ Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1897 (2008), citing Tort Policy Working Group, Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability 2, 35 (1986) (blaming many of the nation's problems on "a veritable explosion of tort liability in the United States," and attributing the rise to the "undermining of causation through a variety of questionable practices and doctrines" and a reliance on "junk science").

²⁸ Devins, *supra* note 25, at 961, citing Terrel H. Bell, *Education Policy Development in the Reagan Administration*, PHI DELTA KAPPAN, March 1986, at 487, 491.

²⁹ Greve, *supra* note 20, at 93 ("Not a single one of the [Reagan] Administration's proposals for defunding its sworn enemies has been fully implemented.")

³⁰ Reformers had achieved, by this time, great success in implementing state tort reform measures across the country. See, e.g., Mencimer, *supra* note 4 (reporting that the insurance "industry's crusade [to curtail tort liability] was taken up by small government conservatives, who believed that tort reform paralleled their own efforts to fill the federal bench with pro-business jurists and roll back government regulations").

³¹ Devins, *supra* note 25, at 965-6 (reporting that EEOC litigated 32% fewer class actions under Chairman Thomas, and that the agency "retooled" its systemic discrimination lawsuits to focus on "smaller employers").

³² Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 22 (1996).

³³ Nancy Modesitt, *Reinventing the EEOC*, 63 S.M.U. L. REV. 1237, 1247 (2010); see also Devins, *supra* note 25, at 965, 967 (quoting Thomas as refusing to discover new "vistas" of the law); *id.* at 967 ("During the Reagan years, for example, the agency rejected comparable worth as a mechanism for determining job discrimination under Title VII, declined to extend Title VII to professional certification and licensing, and refused to adopt regulations extending the Age Discrimination in Employment Act") (internal citations omitted).

³⁴ See, e.g., Stephen J. Ware, *Is Adjudication a Public Good?: "Overcrowded Courts" and the Private-Sector Alternative of Arbitration*, 14 CARDOZO J. CONFLICT RESOL. 899 (2013) (noting that "hanging over the 1990's was a 'looming crisis in the nation' due in part to 'dangerously crowded dockets' and 'overburdened judges'") (internal citations omitted); Karen O'Connor, *Civil Justice Reform and Prospects for Change*, 59 BROOK. L. REV. 917, 921 (1993) ("no matter what the data actually show, there is no doubt that some people believe that a crisis or, at minimum, a need for reform exists").

³⁵ Burke, *supra* note 5, at 24 (quoting Quayle: "Does America really need 70% of the world's lawyers? Is it healthy for our economy to have 18 million new lawsuits coursing through the system annually?"); Deborah Hensler, *The Council on Competitiveness's Agenda for Legal Reform*, 75 JUDICATURE 244 (1992) (noting that the Council was "a brainchild of the Reagan administration").

³⁶ Dan Quayle, Vice President of the U.S., Remarks to the American Business Conference, FED. NEWS SERV., Oct. 1, 1991 ("Despite the obvious—that there are social and economic costs when litigation is overused or abused—some lawyers with an interest in preserving the status quo have maintained that there really are no problems in our legal system."); Deborah Rhode, *Too Much Law, Too Little Justice*, 11 GEO. J. LEGAL ETHICS 989, 1003 n. 113 (hereinafter, Rhode, *Too Much Law*) (quoting President Bush as lamenting that "Sharp lawyers are running wild. Doctors are afraid to practice medicine, and some mom and pops won't even coach Little League anymore.") (internal citations omitted).

³⁷ PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991). See also Carrington, *supra* note 15, at 627 ("Vice President Dan Quayle was appointed to lead a Council on Competitiveness staffed largely—if not entirely—by loyal Republicans committed to protecting the ability of American business to compete profitably in global markets.") (citing DAVID S. BRODER & BOB WOODWARD, *THE MAN WHO WOULD BE PRESIDENT: DAN QUAYLE* 125-28 (1992) ("[Quayle] made his chairmanship . . . a command post for a war against government regulation of American business."); Warren T. Brookes, *The President's Council on Competitiveness*, NATION'S BUS., May 1989, at 32 (noting that Vice President Quayle was the perfect candidate to run "this potentially path-finding effort").

³⁸ Dan Quayle, Civil Justice Reform, available at <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1822&context=aulr>. Notably, these proposals specifically rejected mandatory, pre-dispute arbitration.

³⁹ S. 2180, 102d Cong. (1992).

⁴⁰ See, e.g., Barry Meier, *Bill to Curb Consumer Lawsuits Falls Short*, N.Y. TIMES, Sept. 13, 1992, available at <http://www.nytimes.com/1992/09/13/weekinreview/the-nation-bill-to-curb-consumer-lawsuits-falls-short.html>. President George H.W. Bush did come close to achieving one Reagan-era goal: in 1991 and 1992, Congress placed significant restrictions on LSC funding, and in 1992, “the House debated over a bipartisan proposal to eliminate LSC” that came close to passing. McKelvey, *supra* note 17, at 345-6.

⁴¹ Devins, *supra* note 25, at 982. Indeed, the enactment of the Civil Justice Reform Act of 1990 proved a countermeasure to the Bush I anti-lawsuit efforts. In an effort to reduce the cost and delay of civil litigation, the Act “empowered district courts to experiment with diverse forms of case management,” and encouraged “earlier judicial engagement, voluntary exchange of information, early resolution of discovery disputes before the filing of motions, and referral of appropriate cases to alternative dispute resolution programs.” Carrington, *supra* note 15, at 625-6.

⁴² Executive Order 12778 (Oct. 23, 1991). The executive order sought “reforms in the methods by which attorneys for the government conduct discovery, seek sanctions, present witnesses at trial, and attempt to settle cases.” See Memo of preliminary guidance on Implementation of the litigation reforms of Executive Order no. 12778, 57 FED. REG. 3640, 3640-41 (1992). See also Carl Tobias, *Common Sense and Other Legal Reforms*, 48 VAND. L. REV. 699, 713 (1995) (noting that the executive order “and the accompanying guidelines [developed by the Bush Justice Department] include numerous expense-and-delay-reduction procedures that apply to the government when it participates in federal civil litigation”).

⁴³ Burke, *supra* note 5, at 25; O’Connor, *supra* note 33, at 919.

⁴⁴ Rhode, *supra* note 8, at 451.

⁴⁵ See, e.g., Greg Rushford, *Fewer Hassles for the Tassels: Tort Reform Efforts May Be Dead in the Water*, LEGAL TIMES, Nov. 9, 1992 at 24.

⁴⁶ The ninth plank of the contract was the “Common Sense Legal Reforms Act” (CSLRA), upon which the Speaker promised a vote within the first hundred days of the 104th Congress. See H.R. 10, 104TH CONG., 1ST SESS. (Jan. 4, 1995).

⁴⁷ The Republican Congress enacted the Private Securities Litigation Reform Act of 1995 (PSLRA) over President Clinton’s veto. PUB. L. NO. 104-67, 109 STAT. 737. Three years later, Congress passed the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), requiring removal of state securities fraud class actions to federal court. PUB. L. NO. 105-353, 112 STAT. 3227. Further, Congress limited civil rights suits brought by prisoners in the Prison Litigation Reform Act of 1995. PUB. L. NO. 104-134, 110 STAT. 1321 (1996). But see Purcell, *supra* note 26, at 1900 (“In a near success, [Congress] passed the Common Sense Product Liability Legal Reform Act . . . which limited claims in product liability cases . . . [but] President Clinton vetoed the bill, and the Republic majority failed to marshal the two-thirds necessary to override it.”).

⁴⁸ See, e.g., John Leo, *The World’s Most Litigious Nation*, U.S. NEWS & WORLD REP., May 22, 1995, at 24; Stephen Budiansky, *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995.

⁴⁹ See Rhode, *supra* note 8, at 451 (“Without apparent irony, a president who owed his election to a lawsuit has lamented that ‘we’re a litigious society; everybody is suing, it seems like.’”).

⁵⁰ Allison H. Eid, *Tort Reform and Federalism: The Supreme Court Talks, Bush Listens*, 29 HUMAN RIGHTS 10 (2002).

⁵¹ See, e.g., 2004 State of the Union (calling for the elimination of “wasteful and frivolous medical lawsuits”); 2005 State of the Union (“We must free small business from needless regulation and protect honest job-creators from junk lawsuits.”); *id.* (“Justice is distorted, and our economy is held back by irresponsible class actions and frivolous asbestos claims.”); 2007 State of the Union (calling for legislation to “curb junk lawsuits”).

⁵² Julie Davies, *Reforming the Tort Reform Agenda*, 25 WASH. U.J. L. & POL’Y 119, 121 n.7 (2007) (describing a 2005 speech by President Bush in Collinsville, Illinois “in front of an audience of cheering doctors in white coats”); Yeazell, *supra* note 5, at 1759 (quoting George W. Bush speech: “To make sure that jobs exist here in America so people can find work, we’ve got to protect our small-business owners and workers from the junk lawsuits that threaten jobs across America. I don’t think you can be pro-homebuilder, pro-small-business, pro-entrepreneur, and pro-trial-lawyer at the same time. I think you have to choose. My opponent made a choice. He put a trial lawyer on the ticket. I made my choice. I’m for legal reform to make sure this economy continues forward.”).

⁵³ S. 2793; HR 4600 (2002). The bill was reintroduced in 2003 and 2004, and versions of the bill continue to find their way into proposed legislation to this day. See, e.g., *Beyond the Soothing Titles, Some Legislative Debacles*, www.washingtonpost.com, Dec. 26, 2012 (reporting on efforts to enact a version of the HEALTH bill as part of the Spending Reduction Act).

⁵⁴ Eid, *supra* note 49, at 10 (reporting the HEALTH Act passed by a 217-203 vote in the House).

⁵⁵ Not for lack of trying. The FAIR Act of 2003, S. 1125, proposed by Senator Orrin Hatch, would have established a \$108 billion trust fund as the exclusive source of compensation for asbestos injury claims. Though the bill cleared the Judiciary Committee, it failed on the Senate floor. A revised, \$140 billion trust fund proposal (S. 852) cleared the committee two years later, but intervening events (Hurricane Katrina) got in the way, and the bill again died on the Senate floor.

⁵⁶ See Rhode, *supra* note 8, at 451-2 (reporting that between 2001-2005, the U.S. Chamber of Commerce alone had spent over \$100 million “on television commercials and strategies,” that ATRA coordinated PR and lobbying efforts for “over three hundred well-financed corporate and trade groups, as well as thirty state reform organizations,” and that advertising by “business and insurance interests” was at an all-time high); F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 536 (2006) (reporting that conservative anti-lawsuit groups spent over \$100 million into the 2003-2004 campaigns in seven states).

⁵⁷ See, e.g., David Savage, *A Trial Lawyer on the Ticket Has Corporate U.S. Seeing Red*, L.A. TIMES, Sept. 13, 2004 at A1 (reporting on the negative views of vice presidential-hopeful John Edwards by both the business community and conservative leaders).

⁵⁸ PUB. L. NO. 109-2, 119 STAT. 4 (2005); Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008). Overall, modern Republican presidents proposed and failed to pass a significant number of anti-lawsuit legislative measures. See Burbank & Farhang, *supra* note 5, at 12-20 (describing legislative failures of the Limitation of Legal Fees Act of 1981, the

Frivolous Suit Reduction Act of 1994 and 1995, the Loser Pays Act of 1993, the Small Business Lawsuit Abuse Protection Act of 1998, the Civil Rights Attorneys' Fees Award Act of 1976, the Trade Employment and Productivity Act of 1987, the Community Bank Regulatory Relief Act of 1992, Civil Justice Fairness Act of 1995, Small Business Growth Act of 2007).

⁵⁹ An equally important achievement of the Reagan-Bush II administrations was the appointment of nearly 900 federal judges, nearly all conservative, pro-business, and loyal to the Republican cause. See Robert A. Karp, Kenneth L. Manning & Ronald Stidham, *Right On: The Decision-making Behavior of George W. Bush's Judicial Appointees*, 92 JUDICATURE 312 (2009).

⁶⁰ The legislative history reveals that the Act's drafters were focused exclusively on opponents of "roughly equivalent bargaining power," and the primary purpose of the statute was to encourage arbitration for purposes of preserving business relationships. See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FL. S. U. L. REV. 99, 102 (quoting Charles Bernheimer's testimony at the Joint Hearings of the Senate and House Subcommittees that arbitration "preserves business friendships . . . it raises business standards, it maintains business honor") (internal citations omitted).

⁶¹ FEDERAL ARBITRATION ACT, 9 U.S.C. § 2. See also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991) (explaining that the FAA's "purpose was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts"). But see Aaron-Andrew Bruhl, *The Unconscionability Game: Strategic Judging and the Evolution of Federal Arbitration Law*, 83 N.Y.U. L. REV. 1420, 1426 n.15 (2008) ("There has developed a standard lore that, before the enactment of the FAA, courts were hostile to arbitration," but "the history may be more complicated.").

⁶² See *Moses*, *supra* 59, at 99 (asserting that the drafters of the FAA were focused exclusively on opponents of "roughly equivalent bargaining power," and the primary purpose of the statute was to encourage arbitration for purposes of preserving business relationships); *id.* at 111-112 (explaining that the legislative history clearly reveals that supporters of the FAA believed the Act would enable "merchants to resolve their disputes more cheaply and easily," and that it was a "bill of limited scope, intended to apply in disputes between merchants of approximately equal economic strength to questions arising out of their daily relations").

⁶³ See 9 U.S.C. § 10 (describing limited grounds for challenging enforcement of an arbitral award).

⁶⁴ See, e.g., *Moses*, *supra* note 59, at 102. See also *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 151 (1968) (White, J., concurring) (emphasizing the "amicable and trusting atmosphere" and "frankness" of a mutually selected arbitral forum).

⁶⁵ See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) ("On several occasions [legislators] expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees.") (internal citations omitted).

⁶⁶ 346 U.S. 427 (1953).

⁶⁷ David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 459, 491 (2014), citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 222-23 (1985).

⁶⁸ See, e.g., Address by Warren E. Burger, National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Pound Conference, Apr. 9, 1976); see also Burbank & Farhang, *supra* note 5, at 38 (noting that Chief Justice Warren Burger "made no secret of his antipathy toward the 'litigation explosion' of the 1970s," and describing the 1976 Pound Conference as "the most important event in the counteroffensive" against litigation); Warren E. Burger, *Using Arbitration to Achieve Justice*, ARB. J., Dec. 1985, at 3, 6 ("[I]n terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases.").

⁶⁹ Andrew M. Siegel, *The Court Against the Courts; Hostility to Litigation as an Organizing Theme in the Rehnquist Court's Jurisprudence*, 84 TEXAS L. REV. 1097 (2006).

⁷⁰ 460 U.S. 1 (1983). See also *Dean Witter Reynolds v. Byrd*, 470 U.S. 213 (1985) (Marshall, J., reversing lower court judgment denying motion to compel arbitration); *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (Burger, J., joined by the liberal wing, Brennan and Marshall).

⁷¹ *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989) (overruling *Wilko*, which "res[te]d on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, was "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes"); see also *Dean Witter Reynolds Inc.*, 470 U.S. at 218 (enforcing an agreement to arbitrate state law securities claims).

⁷² *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 262 (1985) ("we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals should inhibit enforcement of the Act in controversies based on statutes").

⁷³ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987) (holding that claims under the Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act were arbitrable).

⁷⁴ See text accompanying notes 74-75 (discussing *Gilmer* and *Adams*).

⁷⁵ 500 U.S. 20, 33 (1993) ("Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.").

⁷⁶ 532 U.S. 105 (2001) (finding the FAA applies to all employment contracts, except those of transportation workers).

⁷⁷ *Gilmer*, 500 U.S. at 42-43 (Stevens, J. dissenting) ("When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment relationship.").

⁷⁸ *Gilmer* was the first arbitration-related case in which the U.S. Chamber of Commerce filed an amicus brief urging the Court to enforce an arbitration clause under the FAA. See Brief Amicus Curiae of the Chamber of Commerce of the United States of America in Support of the Respondent, Dec. 19, 1990, 1990 WL 10009002. See also Brief of Amicus Curiae Securities Industry Association in Support of Petitioner, *Circuit City Stores, Inc. v. Adams*, 2000 WL 1132780; Brief Amicus Curiae of the Equal Employment Advisory Council in Support of Petitioners, *14 Penn Plaza LLC v. Pyett*, 2008 WL 2066114.

⁷⁹ See, e.g., *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) (5-4); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (5-4).

⁸⁰ Justice Stevens may have become aware of the liability-limiting possibilities of arbitration as early as his dissenting opinion in *Southland*, 465 U.S. at 17-21, where he expressed concern that the majority's ruling would prohibit states from invalidating "as contrary to public policy" arbitration clauses which "exclud[e] wage claims from arbitration . . . or provid[e] special protection for franchisees." *Id.* at 21. A year later, Justice Stevens was joined by Brennan and Marshall dissenting in *Mitsubishi* on the grounds that antitrust claims are not arbitrable. 473 U.S. at 650-2. Noting that *Mitsubishi* was the first time the Court had enforced mandatory, pre-dispute arbitration in a standard-form contract, and worrying about the effects of the decision on private enforcement of the federal antitrust statutes, the liberal wing seems here to have finally understood the anti-lawsuit implications of arbitration. *Id.* at 655. See also *Gilmer*, 500 U.S. at 42-43 (Stevens, J. dissenting).

⁸¹ See, e.g., *Southland Corp. v. Keating*, 465 U.S. 1, 858 (1984) (Burger, J.) (finding the FAA applied to the states and preempted California's Franchise Investment Law).

⁸² 513 U.S. 265, 284-5 (1995) (Scalia, J., dissenting) (asserting that *Southland* was wrongly decided, and that adhering to its ruling that the FAA applies to state court proceedings "entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes"); *id.* ("I . . . stand ready to join four other Justices in overruling . . . *Southland*"). Justice Thomas alone dissented on federalism grounds in *Doctor's Associates, Inc. v. Casarotto*, 517 U.S. 681 (1996), in which eight of his brethren held the FAA preempted a Montana statute conditioning enforceability of arbitration upon special notice provisions.

⁸³ 517 U.S. 681 (1996) (Thomas, J., dissenting) (asserting the FAA does not apply to state court proceedings).

⁸⁴ 539 U.S. 444, 460 (2003) (Thomas, J., dissenting) ("[T]he FAA cannot be a ground for pre-empting a state court's interpretation of a private arbitration agreement."); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 (1995) (Thomas, J., dissenting) (arguing that the choice-of-law provision in an arbitration agreement should make it an issue of state law, thus not governed by the FAA).

⁸⁵ Gilles, *Opting Out of Liability*, *supra* note 12 at 396 ("In this fertile environment, corporate lawyers created the collective action waiver and wrapped their newborn in the cloak of an arbitration clause, protecting it against attack with the now sacrosanct policies of the FAA."). See also Robert Alexander Schwartz, Note, *Can Arbitration Do More for Consumers? The TILA Class Action Reconsidered*, 78 N.Y.U. L. REV. 809, 810 (2003) (noting that businesses have taken advantage of the many benefits of arbitration because of a "series of developments in the law of arbitration during the twentieth century").

⁸⁶ See, e.g., Samuel Isaacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 388 (2012) ("Across a range of services, such as cell phones and credit cards, and increasingly in the employment context, standard form contracts now prohibit the accepting party from seeking redress"); David Horton, *Arbitration As Delegation*, 86 N.Y.U. L. REV. 437, 439 (2011) ("Arbitration clauses appear in hundreds of millions of consumer and employment contracts."); Gilles & Friedman, *supra* note 12, at 623 (asserting that arbitration clauses are now used by most companies that "touch consumers' day-to-day lives," including "telephone companies, internet service providers, credit card issuers, payday lenders, health clubs, nursing homes, retail banks, investment banks, mutual funds, and the sellers of all manner of goods and services").

Nursing homes, in particular, were pioneers of incorporating binding, pre-dispute arbitration clauses into their contracts with patients. See, e.g., Nathan Koppel, *Nursing Homes, in Bid to Cut Costs, Prod Patients to Forgo Lawsuits*, WALL ST. J., Apr. 11, 2008 ("Nursing homes have been among the biggest converts to the practice [of mandating arbitration] since a wave of big jury awards in the late 1990s. Attorneys litigating nursing-home cases on both sides say arbitration has quickly become the rule rather than the exception."). Studies of the nursing home industry have consistently found that arbitration has helped reduce liability costs. See, e.g., AON RISK SOLUTIONS, 2012 LONG TERM CARE: GENERAL LIABILITY AND PROFESSIONAL LIABILITY ACTUARIAL ANALYSIS (2012), available at http://www.ahcancal.org/research_data/liability/Documents/2012_LongTermCare_Report_full.pdf. This study examined the cost of liability facing the long-term-care industry, and specifically, the "cost difference associated with the presence of valid arbitration agreements." *Id.* at 3. According to its findings, the average total cost of arbitrating a claim is approximately \$140,000 (inclusive of the costs of defending the validity of the arbitration clause), while the cost of litigating a similar claim is about \$180,000.

⁸⁷ Mencimer, *supra* note 4 (describing the growth and development of the anti-lawsuit coalition).

⁸⁸ See, e.g., Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements, With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255 (2006) ("[W]hatever lowers costs to businesses tends over time to lower prices to consumers."); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91-93 (asserting that adhesion agreements to arbitrate are fair in that they allow companies to pass on savings in costs from standard forms to their customers and employees); Archis Parasharami, Testimony before Senate Committee on the Judiciary, Dec. 17, 2013 ("Arbitration before a fair, neutral decision-maker leads to outcomes for consumers and individuals that are comparable or superior to the alternative—litigation in court—and that are achieved faster and at lower expense.") available at <http://www.judiciary.senate.gov/pdf/12-17-13ParasharamiTestimony.pdf> (last visited Jan. 14, 2014).

⁸⁹ See, e.g., Gilles, *supra* note 12, at 633 (describing "flood of state court decisions invalidating class action waivers" between 2005-2011, with "at least fourteen states [] ruling class action waivers unenforceable" on broad public policy grounds).

⁹⁰ 131 S.Ct. 1740 (2011).

⁹¹ *Id.* at 1748 (finding California's *Discover Bank* rule "stands as an obstacle" to the purposes of the FAA).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ 133 S.Ct. 2304 (2013).

⁹⁵ See *In re American Express Merchants' Litigation*, 554 F.3d 300, 307-8 (2009) (finding that plaintiffs had met their burden with evidence that they "would incur prohibitive costs if compelled to arbitrate" because the non-recoverable, per-claimant costs of bringing their claims in arbitration would exceed their expected recoveries many times over).

⁹⁶ 133 S.Ct. at 2314 ("the fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy") (citing 681 F.3d, at 147 (Jacobs, C. J., dissenting from denial of rehearing en banc)).

⁹⁷ *Id.* at 2316.

⁹⁸ There have been a smattering of area-specific legislative prohibitions against mandatory arbitration. *See, e.g.*, The Franken Amendment, § 8116 of 2010 Defense Appropriations Act (prohibits federal contractors who receive funds under the Act for contracts in excess of \$1,000,000 from requiring their employees or independent contractors to arbitrate “claims involving Title VII of the civil rights act or any tort arising out of alleged sexual assault or harassment”); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) § 748(n) (providing that an employee cannot waive his right to a judicial forum regarding a dispute that arises under the whistleblower protection section of the act); Truth In Lending Act, 15 U.S.C.A. § 1639c (no mortgage lender may include a pre-dispute arbitration clause in its loan agreements); Sarbanes-Oxley Act, 18 U.S.C. § 1514A(e) (contracts requiring pre-dispute arbitration of whistleblower claims under the Sarbanes-Oxley Act not enforceable); 10 U.S.C. § 987(e)(3), (f) (4) (voiding arbitration clauses in payday loan or any consumer credit contracts, with the exception of residential mortgages and car loans, for members of the military or their families); 15 U.S.C. § 1226(a)(2) (prohibiting automobile manufacturers from imposing pre-dispute arbitration clauses in their franchise agreements with dealers).

Numerous bills also seek broader overriding of the Supreme Court’s pro-arbitration jurisprudence. *See, e.g.*, The Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 2929 (2011). This bill, introduced by Senators Al Franken (D-MN), Richard Blumenthal (D-CT) and Sheldon Whitehouse (D-PA) immediately after *Concepcion* was decided, would prohibit class action bans in all consumer, employment, and civil-rights-related contracts. *See* David Lazarus, *Bill Aims to Restore Consumers’ Right to Sue*, L.A. TIMES, Oct. 18, 2011, available at <http://articles.latimes.com/2011/oct/18/business/la-fi-lazarus-20111018>. *See also* The Consumer Mobile Fairness Act Of 2011, S. 1652, 112th Cong. § 3 (2011). This bill, introduced by Senators Blumenthal and Whitehouse, would void arbitration clauses in mobile phone contracts. While both bills were referred to the Senate Judiciary Committee, which held hearings under the chairmanship of Senator Patrick Leahy (D-VT), neither bill cleared the committee. *See* Michelle L. Caton, *Form Over Fairness: How the Supreme Court’s Misreading of the Federal Arbitration Act Has Left Consumers in Lurch*, 21 GEO. MASON L. REV. 497, 527 (“Of the 139 bills introduced into Congress between 1995 and 2010 that sought to restrict or eliminate various uses of mandatory arbitration, only five were eventually passed into law.”).

Regulations limiting or prohibiting mandatory arbitration clauses could also be promulgated by the Consumer Financial Protection Bureau (CFPB) or the Securities and Exchange Commission (SEC), pursuant to powers accorded by the Dodd-Frank Wall Street Reform and Consumer Protection Act. Dodd-Frank Act § 1028(b), 12 U.S.C. § 5518(b); § 1414, 15 U.S.C. § 1639c(e). On December 12, 2013, the CFPB released the preliminary results of its year-and-a-half study of arbitration in consumer financial contracts—a precursor to promulgating regulations. *See* http://files.consumerfinance.gov/f/201312_cfpb_arbitration_study_preliminary_results.pdf. Based on the findings and tenor of the Study, some observers expect the agency to prohibit class action bans in standard-form consumer contracts, on the view that class proceedings are necessary to protect consumers. *See, e.g.*, James McGuire & Kay Fitzpatrick, *CFPB Builds Its Case Against Arbitration Clauses*, MONDAQ, Jan. 6, 2014 (predicting the CFPB will “issue a rulemaking that either bans or limits the use of arbitration clauses with class waivers in connection with financial products”). *But see* Gilles & Friedman, *supra* note 12, at 658 (questioning the efficacy of a CFPB rule prohibiting mandatory arbitration which would apply, under the terms of the Dodd-Frank grandfather clause, “only to contracts entered into more than 180 days after that rule is issued”) (internal citations omitted).

⁹⁹ *See, e.g.*, *Porreca v. Rose Group*, 2013 WL 6498392 (E.D. Pa. Dec. 11, 2013). The *Porreca* court observed that, while class action bans have been employed with “increasing frequency” because “arbitration is the favored venue” of the business community, it viewed this development as “unfortunate, and in many situations, unjust.” *Id.* at *16. But, while philosophically opposed to the Supreme Court’s decisions in *Concepcion* and *Italian Colors*, the *Porreca* court remained cognizant that it was “not at liberty to ignore the decisions of the United States Supreme Court.” *Id.*

¹⁰⁰ *See, e.g.*, Richard Frankel, *State Court Authority Regarding Forced Arbitration After Concepcion*, Pound Civil Justice Institute (2014).

¹⁰¹ *See, e.g.*, Gilles, *supra* note 12, at 413 (“it is apparent that sufficient contractual bases for the imposition of arbitration clauses and class waivers, under current doctrine, are present in virtually all areas of contemporary class action practice,” but also explaining that the lack of a contractual nexus renders many civil rights and environmental cases immune); Gilles & Friedman, *supra* note 12, at 640 (same).

¹⁰² FDA Prescription Drug Product Labeling Requirements, 60 FED. REG. 44,182-83 (Aug. 24, 1995).

¹⁰³ The archetypal case for consumer backlash would be online communities and social media companies. For example, three months after it purchased the photo-sharing app Instagram in 2012, Facebook altered its “Privacy and Terms of Service” to announce its right to license and sell all public Instagram photos its users had shared—without any notice or payment. In addition (and in anticipation?), the new terms also imposed upon Facebook users a mandatory arbitration clause with a class action ban. *See* Dan Levine, *Instagram Furor Triggers First Class Action Lawsuit*, REUTERS (Dec. 24, 2012), available at <http://www.reuters.com/article/2012/12/24/us-instagram-lawsuit-idUSBRE8BN0J20121224>. An uproar ensued and Facebook quickly back-pedaled, retracting the mandatory arbitration provision; Instagram, however, has retained its arbitration clause, which prohibits users from joining a class action lawsuit unless they mail a written “opt-out” statement to Facebook headquarters within 30 days of joining Instagram. Instagram, Terms of Use, <http://instagram.com/legal/terms/#> (Jan. 19, 2013).

More recently, General Mills sought to impose mandatory arbitration terms on consumers in “virtual privacy”—i.e., those “downloading coupons, ‘joining its online communities like Facebook,’ participating in sweepstakes and other promotions, and interacting with General Mills in a variety of other ways” on the internet. Stephanie Strom, *General Mills Reverses Itself on Consumers’ Right to Sue*, N.Y. TIMES, April 20, 2014, available at http://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html?hp&_r=1. The company also indicated that even just buying its products would bind consumers to mandatory arbitration. Stephanie Strom, *When ‘Liking’ a Brand Online Voids the Right to Sue*, N.Y. TIMES, April 16, 2014 at B1. In a “stunning reversal” made after intense media and public pressure, General Mills withdrew its mandatory arbitration provisions. *See* Kirstie Foster, *WE’VE LISTENED—AND WE’RE CHANGING OUR LEGAL TERMS BACK*, available at <http://www.blog.generalmills.com/2014/04/weve-listened-and-were-changing-our-legal-terms-back-to-what-they-were/> (“We’re sorry we even started down this path.”).

Both Facebook and General Mills present, to my mind, sui generis circumstances—what appellate advocate Deepak Gupta aptly described to me as a “perfect storm,” wherein social media, corporate clumsiness, and a highly-visible product/service come together to focus the public’s attention (briefly) on the issue of mandatory arbitration. But the reality is that these clauses are now so pervasive that minor roll-backs and reversals such as these “are no more than speed bumps on a road inevitably leading” to universal inundation.

¹⁰⁴ See, e.g., CFPB Preliminary Study, *supra* note 97, at 12-13 (finding that 94 percent of credit card issuers and 44 percent of insured deposits were subject to arbitration, and that nearly all arbitration clauses contained class action waivers); Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REF. 871, 882-84 (2008) (study of internet, phone, and data service contracts finding that 75 percent contained mandatory arbitration clauses and 80 percent contained class action waivers).

¹⁰⁵ See *supra* text accompanying note 86.

¹⁰⁶ See, e.g., Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, POL'Y ANALYSIS, Apr. 18, 2002, at 3 (“[A]rbitration typically reduces costs . . . by streamlining discovery.”).

¹⁰⁷ See, e.g., Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public Law Disputes*, 1995 U. ILL. L. REV. 635, 662 (1995) (noting that arbitrators, “in keeping with the prevailing notions of informality and the therapeutic purposes of arbitration, commonly allow the introduction of hearsay testimony and apply a relatively loose standard of relevance and materiality”); *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956) (observing that the record of arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable”); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. DISP. RESOL. 843, 850 (2010) (“arbitration is less formal than litigation, with less discovery and fewer motions, and appellate review of awards is limited”).

¹⁰⁸ See, e.g., Bruce L. Hay, et al., *Litigating BP's Contribution Claims in Publicly Subsidized Courts: Should Contracting Parties Pay Their Own Way?*, 64 VAND. L. REV. 1919, 1931-32 (2011) (“Even if arbitrators were as qualified as judges to make precedent, it is doubtful that the parties would be willing pay the price for comparable services. And that price would be quite steep, far higher than the cost of simply deciding the legal questions for the sole benefit of the present parties. To begin with, arbitrators would labor longer and more intensively to decide legal questions for the benefit of parties other than those financing the proceedings; indeed they do this for the benefit of an entire industry.”); Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 785 (2002) (“Arbitrators neither follow the law, nor contribute to it.”).

¹⁰⁹ In fields which have long favored arbitration, such as labor and construction, the expertise of arbitrators has been touted as a means of reducing strife and costs. See, e.g., *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (“The labor arbitrator is usually chosen because of the parties’ confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.”). But as contemporary arbitration has migrated away from claimed areas of arbitral expertise—to address more generalized questions of common law, contract, and statutory interpretation—the “law of the shop” claim is no longer justified. See *Alexander v. Gardner-Denver*, 415 U.S. 36, 57 (1974) (observing that “the specialized competence of arbitrators pertains primarily to the ‘law of the shop,’ not the law of the land”).

¹¹⁰ See, e.g., *Concepcion*, 131 S.Ct. at 1749 (observing that in arbitration, “the decisionmaker [is] a specialist in the relevant field”). See also Clark Freshman, *Privatizing Same-Sex “Marriage” Through Alternative Dispute Resolution: Community Enhancing Versus Community-Enabling Mediation*, 44 UCLA L. REV. 1687, 1706 (1997), citing Lon L. Fuller, *Collective Bargaining and the Arbitrator*, 1963 WIS. L. REV. 3, 11 (“Parties may be better off with arbitration than with court because ‘arbitrators . . . are compelled to acquire a knowledge of industrial processes, modes of compensation, complex incentive plans, and job classifications . . .’”); Christopher R. Drahozal & Keith N. Hylton, *The Economics of Litigation and Arbitration: An Application to Franchise Contracts*, 32 J. LEGAL STUD. 549, 558 (emphasizing the efficiency benefits of specialized arbitrators).

¹¹¹ Parasharami, Testimony before Senate Committee on the Judiciary, *supra* note 87, at 5 (asserting that “[c]laims that are modest in size do not—and could not—attract lawyers willing to work on a contingency-fee basis, because the fees earned would be far too low”); Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 792 (2008) (asserting that, for many employees with workplace disputes, the “realistic choice is arbitration—or nothing”).

¹¹² *Gilmer*, 500 U.S. at 31. See also *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 280 (1995) (“The advantages of arbitration [over litigation] are many.”); *Stolt-Nielsen v. AnimalFeeds*, 130 S.Ct. at 1775 (“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”); *Concepcion*, 131 S.Ct. at 1749 (observing that arbitration “allow[s] for efficient, streamlined procedures tailored to the type of dispute” and that “the informality of arbitral proceedings is itself desirable, reducing the cost and increasing the speed of dispute resolution”). But see Thomas Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1959 (1996) (“[T]he Court does not communicate in its opinions any sense of having a fundamental understanding of the institution of arbitration . . . Logical difficulties and intellectual problems are dismissed by invoking slogans, misrepresenting prior opinions, and incanting ritualistic confidence in arbitration.”).

¹¹³ See, e.g., William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235 (1979) (distinguishing between the resolution of the dispute, which the authors classify as a private good, and the creation of legal precedent, which they classify as a public good).

¹¹⁴ See, e.g., Myriam Gilles & Gary Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006) (“All that matters is whether [litigation] causes the defendant-wrongdoer to internalize the social costs of its actions.”); RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 349-50 (1972) (observing that “the most important point, from an economic perspective, is that the violator be confronted with the costs of his violation [as] this achieves the allocative purpose of the suit”).

¹¹⁵ Andrew Popper suggests that part of the explanation for the dearth of deterrence-talk is that, “for consumer advocates and those who litigate on behalf of plaintiffs and oppose tort reform, acknowledgement that certain cases have little or no deterrent effect could be seen as undercutting their anti-tort reform position.” Andrew Popper, *In Defense of Deterrence*, 75 ALB. L. REV. 181, 183 (2011-12).

¹¹⁶ *Id.*, at 183.

¹¹⁷ *Id.* at 183-4.

¹¹⁸ Jack B. Weinstein, *Some Benefits and Risks of Privatization of Justice Through ADR*, 11 OHIO ST. J. ON DISP. RESOL. 241, 249 (1996).

¹¹⁹ See, e.g., JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS* (1994) (“Members of the public must know what the law is if they are to predict the probable outcomes for acting a certain way, and modify their behavior accordingly.”); Robert Bone, *Lon Fuller's Theory of Adjudication and the False Dichotomy Between Dispute Resolution and Public Law Models of Litigation*, 75 B.U. L. REV. 1273, 1275 (1995) (“adjudication is about articulating public norms as well as settling private disputes”); Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 417 (1987) (“norms are generated in the course of the interaction among disputants and adjudicator, and among disputants, adjudicator and the public”).

¹²⁰ See, e.g., Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 835 (2002) (noting that a hallmark of mandatory, binding arbitration is the “eliminati[on] [of] the claimant’s right to present claims to a judge or jury . . . preventing litigants from setting public precedents”).

¹²¹ See *United States Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. at 598 (recognizing that “(a)rbitrators have no obligation to the court to give their reasons for an award”); Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 357 (2003) (“[A]rbitration often involves a form of contractual ‘lawlessness’ that is especially undesirable in claims that involve new legal issues. This lawlessness not only adversely affects the parties to each dispute, but the legal system as a whole.”).

¹²² See AAA CONSUMER DUE PROCESS PROTOCOL, Principle 12.2 (arbitrator must “maintain the privacy of the hearing to the extent permitted by applicable law”); AAA Commercial Rule 25 (directing arbitrators to “maintain the privacy of the hearings unless the law provides to the contrary”). See also Michelle Andrews, *Signing a Mandatory Arbitration Agreement With a Nursing Home Can Be Troublesome*, WASH. POST., Sept. 17, 2012, available at http://articles.washingtonpost.com/2012-09-17/national/35497405_1_arbitration-john-mitchell-vital-signs (reporting that arbitration hearings “are conducted in private and [these] proceedings and materials are often protected by confidentiality rules”).

¹²³ See, e.g., *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 222 (1985) (noting that “it is far from certain that arbitration proceedings will have any preclusive effect on the litigation of nonarbitrable federal claims”); *McDonald v. West Branch*, 466 U.S. 284 (1984) (finding that neither the full-faith-and-credit provision of 28 U.S.C. § 1738, nor a judicially fashioned rule of preclusion, permits a federal court to accord res judicata or collateral-estoppel effect to an arbitration award); Lillian T. Howan, *The Prospective Effect of Arbitration*, 7 BERKELEY J. EMP. & LAB. L. 60, 62 (1985) (“In contrast to the judicial doctrine of stare decisis, an arbitrator’s interpretation of the contractual relation is not technically binding on a future arbitrator. Instead, the arbitrator must exercise independent and impartial judgment in each case.”) (internal citations omitted).

This point has been weakly contested by some scholars. See, e.g., Keith N. Hylton, *Agreements to Waive or To Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 243–47 (2000) (“In certain settings, parties may develop an institutional common law through repeated dealings. An arbitral forum may have an advantage in developing and interpreting that institutional common law.”); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703 (1999) (suggesting that, theoretically, arbitrators “can be contractually required to follow precedents” though no arbitration provisions or forum rules impose such a requirement).

¹²⁴ Matthew T. Bodie, *Questions About the Efficiency of Employment Arbitration Agreements*, 39 GA. L. REV. 1, 59 (2004) (noting that “one frequent criticism” of arbitration “is that arbitrators do not properly apply the law”), citing *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1477 (D.C. Cir. 1997) (“[T]he competence of arbitrators to analyze and decide purely legal issues in connection with statutory claims has been questioned.”).

¹²⁵ Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 42 (2005) (“arbitration provides little accountability, as arbitration awards are generally not subject to the substantive review that is available for decisions in public adjudication”).

¹²⁶ S. 1782, Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 110th Cong. 10 (2007) (statement of Richard Alderman).

¹²⁷ Resnik, *supra* note 118, at 132. See also Paul Butler, *The Case for Trials: Considering the Intangibles*, 1 J. EMPIRICAL LEG. STUD. 627 (2004) (“With fewer trials, we lose some public stories, and their official morals (i.e., verdicts). This leads to public uncertainty about the law, as well as mores.”).

¹²⁸ Popper, *supra* note 114, at 194 (“Part of this attack was based on the fact that ‘it is extremely difficult to find any empirical evidence that the tort system produces deterrence.’”), citing Jerry L. Mashaw, *A Comment on Causation, Law Reform, and Guerilla Warfare*, 73 GEO. L.J. 1393, 1394 (1985) (“[I]t is extremely difficult to find any empirical evidence that the tort system produces deterrence.”). See also, Michelle M. Mello & Troyen A. Brennan, *Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform*, 80 TEX. L. REV. 1595, 1604 (2002) (stating that “empirical evidence of deterrence is indeed difficult to come by”). But see Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 425–27 (1994) (vigorously defending the idea that deterrence is quite real and is also generally effective, with variations across areas of tort law).

¹²⁹ See, e.g., John Coffee, *Rescuing the Private Attorney General, Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 225 (1983) (concluding that “the deterrent threat of the private attorney general has been blunted” because so few private litigations reach the judgment stage). In a related vein, a number of scholars have argued that shrouding settlements in silence violates the public interest in open and transparent resolution of legal claims, impairing the deterrent function of law. See Owen Fiss, *Against Settlement*, 93 YALE L. J. 1073 (1984); Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 650–58 (2005); Marc Galanter & Mia Cahill, *“Most Cases Settle”: Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994).

¹³⁰ Popper, *supra* note 114, at 189, citing Seth J. Chandler, *The Interaction of the Tort System and Liability Insurance Regulation: Understanding Moral Hazard*, 2 CONN. INS. L.J. 91, 93 (1996) (questioning whether liability insurance dissipates the “deterrent force that the tort system possesses”). Professor Popper counters that American tort law fails to “reflect the presence of insurance.” *Id.*, citing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* at 10 (1987) (“[W]hat empirical evidence there is indicates that tort law deters, even where . . . liability insurance is widespread.”). On the effects of liability determinations in constitutional torts, compare Daryl Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345 (2000) (doubting the effects of constitutional tort damages on street-level police or city managers) with Myriam Gilles, *In Defense of Making Government Pay: The Deterrent Effect of Constitutional Tort Remedies*, 35 GA. L. REV. 845 (2001) (countering that the imposition of constitutional tort damage awards against individual officers or their municipal employers does have a deterrent effect on the behavior of these governmental actors).

¹³¹ Gilles & Friedman, *supra* note 12, at 106 (“A distinct question is whether current rules and practices fail to provide optimal deterrence, either by forcing corporations to internalize costs that go beyond those inflicted upon society, or by allowing them to escape the full costs of their wrongdoing.”).

¹³² Certainly, there are externalities associated with litigation, so that forcing the defendant to internalize the full costs of its wrongdoing is not cost-neutral. For a more thorough discussion of these externalities and the balancing of costs and benefits in the context of small-claims class action litigation, see William Rubenstein, *Why Enable Litigation?: A Positive Externalities Theory of the Small Claims Class Action*, 74 UMKC L. REV. 709 (2006).

¹³³ Troyen A. Brennan, *Environmental Torts*, 46 VAND. L. REV. 1, 21 (1993).

¹³⁴ See, e.g., *Johnson v. West Suburban Bank*, 225 F.3d 366, 375 (3d Cir. 2000) (upholding arbitration clause in part because “the statute’s administrative enforcement provisions . . . offer meaningful deterrents to violators of the TILA if private enforcement actions should fail to fulfill that role”).

¹³⁵ See, e.g., W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285, 288-99 (1998).

¹³⁶ Stephen Ware, *Is Adjudication a Public Good?: “Overcrowded Courts” and the Private Sector Alternative of Arbitration*, 14 CARDOZO J. OF CONFLICT RES. 899, 911 (2013).

¹³⁷ See, e.g., Gilles & Friedman, *supra* note 12, at 626 (observing that “[p]rivate involvement in public civil law enforcement is deeply embedded in our politics and culture,” and that public “enforcement agencies . . . are funded and organized on the clear, if largely unspoken, understanding that a vigorous and well-stocked private bar sits ready to deploy its ample resources to redress frauds and other harms perpetrated upon the general public”), citing Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L. J. 107, 126-27 (2005) (“Because the SEC lacks adequate resources to effectively police the national securities market, supplemental enforcement is essential to achieve an appropriate level of deterrence.”); Janet Cooper Alexander, *To Skin a Cat: Qui Tam Actions as a State Legislative Response to Concepcion*, (asserting that private and public enforcement together “increase [] deterrence and compliance with the law”).

¹³⁸ Gilles & Friedman, *supra* note 12, at 106.

¹³⁹ Martin Oppenheimer & Cameron Johnstone, *A Management Perspective: Mandatory Arbitrations are an Effective Alternate to Employment Litigation*, 52-FALL DISP. RESOL. J. 19, 22 (1997).

¹⁴⁰ See, e.g., CFPB PRELIMINARY STUDY, *supra* note 97, at 12-13; Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REF. 871, 882-84 (2008) (study of internet, phone, and data service contracts finding that 75 percent contained mandatory arbitration clauses and 80 percent contained class action waivers).

¹⁴¹ Patti Waldmeir, *How America is Privatizing Justice By the Back Door*, FINANCIAL TIMES, June 30, 2003, at 12.

¹⁴² Linda Mulcahy, *The Collective Interest in Private Dispute Resolution*, 33 OXFORD JOURNAL OF LEGAL STUDIES 1 (2013).

ORAL REMARKS OF PROFESSOR GILLES

Good morning. I am so happy to be here. Thank you to the Pound organizers for inviting me to write this paper and to present it to all of you, and to all of the judges who came out and hopefully read the paper, because I know you are busy, busy people with lots of things to read. I really appreciate that you took the time to read this paper especially because you know you are doing all of the heavy lifting of our civil justice system in your day-to-day work.

A “Gloomy and Depressing Thesis”

That actually relates to what I want to talk to you about this morning: the gloomy and depressing thesis of my paper, which is basically that in the wake of a long string of pro-arbitration decisions by the Supreme Court, most recently *AT&T Mobility vs. Concepcion*, and *American Express vs. Italian Colors*, a lot of claims, a lot of civil claims that would otherwise be brought in public courts of record before judges like yourselves will now be shunted into the hermetically sealed vault of arbitration.

This wholesale eviction of cases out of the public adjudicative system will have significant impact on the tools of your trade, on the ability of law to be law – to govern, to deter. That is what I am going to talk to you about this morning. It is a little depressing for this early in the morning, but try to stick with me.

This wholesale eviction of cases out of the public adjudicative system will have significant impact on the ability of law to be law—to govern, to deter.

Let me start with the beginning of the story. I think the story starts in the late 1970s. The country is in the midst of what a lot of people are calling a litigation explosion, an unprecedented increase in private litigation that began about a decade earlier.

Private litigation more than quadrupled between 1968 and 1977. Much of that is taking place, actually, in your courts, the state courts, but the federal civil docket, the 1970 federal civil docket doubles by 1980 and it triples by 1986. That is pretty significant. Along with that, of course, the number of practicing lawyers doubles from about 1970 to 1982 and the scope, the range of litigation just really broadens beyond recognition.

We are litigating by this point ordinary consumer transactions, everyday workplace interaction. The air we breathe, the water we drink, these things are becoming part of the litigation world that we are living in. It is pretty significant.

Beginnings of the Anti-Lawsuit Movement

Not too surprisingly, in response to this increase in litigation, we get an anti-lawsuit movement, sort of a budding anti-lawsuit movement by the beginning of the 1980s. This is a mash-up of interests. These are business interests, libertarian, social conservatives, who were pretty unnerved by this point by judicial determinations on abortion or school prayer or criminal law. All of these groups come together and they are trying to sort of figure out how to reform the litigation system, which, *they believe*, must be broken if there is just so much litigation going on.

These groups—or this anti-lawsuit movement—finds a pretty energetic champion in the new president, Ronald Reagan, who comes to office with a genuine and passionate devotion to reversing the litigation explosion, which he and his ilk think is really hurting the country in all sorts of ways. Pretty quickly, the anti-lawsuit movement becomes a dominant feature of modern political discourse. When I became a politically sentient being, I sort of understood that there was something wrong with so much litigation. It really became part of what we talked about, what we think about.

There are lots of legislative proposals in the next 30 years, brought by both Republicans and even some Democratic presidential administrations, but it is pretty clear, looking back, that not a whole lot of these proposals at the federal level really went anywhere. There is a lot of legislative failure during this period.

The current conservative bloc on the Supreme Court were energized early in their careers by the anti-lawsuit movement and by the legislative failures of the anti-lawsuit movement.

One thing that didn't fail—and the one thing I think that the anti-lawsuit movement did really well—is that the movement, itself, became a big part of how we think about lawsuits and litigation and civil justice. It inspired a generation of committed adherents, Supreme Court justices, lower court judges, business interests, the public, and the movement itself. That is important. The greatest legacy of the anti-lawsuit movement, I think, is the movement itself.

Justices Scalia, Thomas, Kennedy, Robertson, Alito, the current conservative bloc on the Supreme Court, all of these “sons of Reagan,” were energized early in their careers by the anti-lawsuit movement and by the legislative failures of the anti-lawsuit movement.

I am not saying that, in their current positions on the Supreme Court, they have the latitude to enact these broad legislative agendas, but they are open—they do embrace the idea that there is too much litigation and that there might be ways to eliminate some forms of particularly troublesome litigation from the docket altogether.

That gets us to chapter two of our story. It also starts around 1980, just as the anti-lawsuit movement is capturing the imagination of conservatives, the Supreme Court starts to blow the dust off of the 1925 Federal Arbitration Act, which had really been rarely invoked outside of niche areas of the law—labor, international trade. In the course of a couple of decades, the majority of the Supreme Court justices go from finding that ordinary claims are generally not arbitrable to discovering a liberal policy favoring arbitration, so that there is not a whole lot today that isn't subject to arbitration.

Recent Arbitration Decisions

Then we get to these recent decisions. In 2011, the Court decides *Concepcion*. Basically, the majority there says 14 state supreme courts have held that it is unconscionable under their state contract law and public policy for companies to impose, in standard form agreements, arbitration clauses which deny consumers and other claimants the ability to bring class actions in court or in the arbitral forum. Fourteen state supreme courts have done this. It is too bad. All of that state law is pre-empted by the Federal Arbitration Act (FAA).

In 2013, with the same majority, the same opinion writer (Justice Scalia) says, “Wait, small business owners say they can’t vindicate their rights under the anti-trust laws, important rights under the anti-trust laws, unless they can bring a class action, unless they can pool costs, share information, aggregate their claims, because no one individual, small merchant has any incentive to bring such an expensive claim if they have so little to recover at the back end. Nope, the FAA trumps Rule 23. It doesn’t matter if you can’t vindicate your rights. In the words of dissenting Justice Elena Kagan, it is “too darn bad.” Too darn bad.

Now, Professor Frankel is going to talk this afternoon about *Concepcion*. He has a much more optimistic view of *Concepcion*. I hope that he is right and that I am wrong. I would be happy to be wrong on this one. I think we could all agree that, in the wake of these cases, all sorts of companies, anxious to avoid class action liability, anxious to avail themselves of what is really a very pro-business set of decisions, are pretty highly motivated to insert confidential arbitration clauses into their contracts with all sorts of counterparties, employees, consumers, and purchasers.

They are doing this in their standard form contracts. As state court judges, you know this better than anybody. Over the 30 years I have been talking about this, standard form contracts have become the predicate for most of the claims that you see every day. This has just become the way business regulates its relationships with a number of counterparties.

This is important. What this means is that it is really easy—really, really easy—for companies to insert confidential arbitration clauses into their standard form agreements, which means that all disputes, whether they would have otherwise been brought as class actions or as individual claims, will be taken out of the public justice system, away from judges like you, and put off into confidential arbitration.

It is really easy—really, really easy—for companies to insert confidential arbitration clauses into their standard form agreements, which means that all disputes will be taken out of the public justice system, away from judges like you.

Now, I am not saying that people with valid claims won’t find a forum. I actually think it is likely that high-value individual claims will find their way into arbitration, whereas small-value, mass-form claims will likely die. But that is not my point.

Claims “Evicted” from the Public Justice System

I think the point here is that all of these claims are removed from the public justice system. That, in and of itself, that eviction, has serious implications for law, for you, for us as a society. I think this has a lot to do with the fundamental private, single-use characteristics of arbitration.

In arbitration, for example, there is no legal record of the proceeding. Arbitrators are not required to explain their decisions. Indeed, arbitrators don’t write, nor are they paid to write, precedential opinions. If they were paid to write such precedential opinions, I think the cost of arbitration would grow exponentially. You all know how time-consuming, how hard it is to write precedential opinions, to grapple with precedent, to think about the implications of what you are doing. Plus, it is difficult work. It is the work of the public civil justice system. It is not what companies are bargaining for or expect in arbitration. It is not what arbitration is set up to do.

Let's assume, actually, that somehow arbitration resolutions do get known somehow, despite confidentiality agreements, despite the privacy rules governing arbitration. Let's say the resolutions in arbitration become known. It doesn't really matter, because there is no formal preclusive effect given to prior arbitral determinations. There is no *stare decisis*, no value accorded to precedent, because arbitration is not a precedent-generating institution. It is not set up to be that. That is what *you* all do. That is *your* institution.

Then there are all the small-ball characteristics, which differentiate arbitration from public adjudication, from what real judges do—the serious limits on discovery, the limits on briefing, the limits on expert reports, all of which are viewed, probably rightly so, as overly expensive and overly time-consuming. It *is* true. It *is* expensive. I am sure judges don't like discovery disputes, although, as appellate judges, you may be pretty immune from that stuff. Nobody likes discovery disputes and expert reports. All of this stuff can be heavy and thick.

It is, nonetheless, the guts of the law. It is how parties know about the strength of their claim, and the path of the legal argument. It is expensive, but process always is. We can debate and dispute some of these particulars, how much precedent there is in arbitration, just how arbitration works, how parties can figure out different arbitral forums.

The institution of arbitration fundamentally precludes common law development. There is no precedent. There is no *stare decisis* here.

I think Professor Frankel will talk about different ways that arbitration can work, but at least these are some of the general characteristics that we would think are going to be available. They leave me, at least, with no doubt that the institution of arbitration fundamentally precludes common law development. It just does. There is just no common law. There is no precedent. There is no *stare decisis* here.

The Demise of Deterrence

Where does that leave us? I will end here with my true parade of horrors. If I have depressed you up until now, this is the really bad stuff. I think we are at a very unique point in our legal history, one that portends quite literally the end of doctrinal development in entire areas of the law—consumer, employment, anti-trust. A tremendous number of ordinary claims won't be brought in public courts of record before judges like you. If those inputs cease, if claims cease to be brought in public fora, and instead are decided in confidential proceedings, brought in private venues far from public view, never to be heard from again like that proverbial

We will observe a gradual contraction of legal knowledge, precedent, and professionalism. The very significance of the law will diminish in our society.

tree in the forest, the law itself will atrophy and will eventually calcify and weaken. We will eventually observe a gradual shrinking and contraction of legal knowledge, precedent, and professionalism. The very significance of the law will diminish in our society.

A natural corollary to all of this, of course, is that the legal regime will do a poorer job of deterring future wrongdoing. Reasonable people can and should debate whether we are doing such a good job of deterring currently. Let's have that debate, because that means we are still committed to the law. Let's figure out what optimal deterrence looks like. Optimal deterrence, however, does not look like taking all claims out of the public justice system and putting them into private arbitration. Because without the signals coming from

the law, without the publicity of your judicial determinations, no information about norms of conduct, about behavior can filter down into society. There can be no deterrence without the publicity that is required.

The demise of deterrence, I think, is one of just many interconnected consequences of enforcing these one-on-one, confidential arbitration clauses. I think it is a serious consequence, one that ought to focus us as a legal community to look beyond the arguments about freedom of contract, the primacy of the FAA, and lead us to think about the destabilizing effects of what I think is a really massive and important shift of claims—ordinary, everyday claims—out of courts and into private arbitration.

Thank you. I really look forward to talking to you about these ideas today. Thank you so much.

COMMENTS BY PANELISTS

PROFESSOR ANDREW F. POPPER

It really is a delight to be here. It is nice to speak to such a distinguished group of jurists—to speak to *any* judge without having to start by saying, “You know, those radar guns can’t possibly be accurate.”

Also, it is so nice to speak to a class where there are people actually sitting in the front of the room. If you haven’t been in a law school class in recent years, you probably recall from your own experience that everybody goes to the back as if something terrible is going to happen in the front of the room. It does happen, because professors are old and short-sighted. Who do you think we are going to call on? I can’t even see the back of the room anymore. You sit in the front and you are toast.

The “Holy Grail” of Tort Reform

In mythology, the archetypes represented by the Ark of the Covenant and the Holy Grail had multiple component parts. They weren’t singularities. The Holy Grail, depending on how much you believe Dan Brown and the recent misconception of the Holy Grail in *The Da Vinci Code*, had multiple components to it. So does the Holy Grail of tort “reform.” It includes the elimination of punitive damages, the elimination of strict liability in tort, the elimination of joint and several liability, and a reduction in the capacity to sue in five or six different ways.

That Holy Grail is loaded with limitations on liability. One of the critical pieces of it has become compulsory arbitration—and why not? Look at what arbitration does. Arbitration, among other things, is secretive, unitary, private, and predictable. The biggest thing those who seek tort “reform” want is predictability, certainty. The capacity to project in advance your liability—that is a grail worth seeking. Once you know in advance what your exposure is going to be, there goes deterrence, there goes the incentive for safer and better products, there goes the competitive force in the marketplace that the legal system can provide.

Once you know in advance what your exposure is going to be, there goes deterrence, there goes the incentive for safer and better products, there goes the competitive force in the marketplace that the legal system can provide.

I am going to mostly talk about civil justice tort “reform” and arbitration. Some of the conclusions are in an article I wrote in the *Albany Law Review* a year or two ago.¹

These are my beliefs: I believe deeply in civil justice. I believe that civil justice, the system we have currently, deters misconduct. I think it goes beyond the remedy that victims experience. I think victims, whether they are victims of negligence or worse, whether they suffer from misconduct in a malpractice case or a product liability case, whether they are families who suffer the loss of a loved one or, as was the case in my family, a brain injury, want more than money. They want more than a singularity. They want injustice corrected.

They want to know that whatever loss they sustained won’t be in vain. That doesn’t happen with arbitration. It happens through the civil justice system. It happens with a public narrative. Cases speak volumes. (They are *in* volumes, actually, now that I think about it.) Everyone reads them. There are hundreds of thousands of cases. They have been accumulated over literally a thousand years. They tell a story about what is acceptable and what is not.

The Potential for Punishment

B.F. Skinner couldn’t have been that wrong. When the potential for punishment is known in advance, it changes behavior. If the potential for punishment is unknown, that potential has no effect on behavior. Arbitration is secretive—thus the potential for punishment vanishes. To those who don’t think deterrence is

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real, let me give you a piece of advice. You cannot wish away deterrence. It won’t happen. It is common to the human experience. People avoid punishment. That, as a consumer lawyer, is what we want. We don’t necessarily want more litigation. We want safer and better products.

From my perspective, if you look at this and you don’t see how deterrence is diluted by arbitration, if you don’t see how it strips it of its force and its impact, if you are one of the deniers, then there really isn’t much I can do for you. I have come to learn that you really can’t change people.

If that is what someone believes, have at it. Go for it. Sing your song. You have a willing chorus. In fact, you have the entire GNP. You have all of industry. You have all of manufacturing. You have all of retailing. You have all of health care. You have all of insurance. You have the press. Who else do you need? Think about the fight. This has never been a fair fight. Who is on the other side? Victim’s groups, a group of consumer organizations that are underfunded and, sorry to say, often bickering, and my heroes, the judges—the real architects of civil justice.

If you do the math you’ll see that the consumer side is bound to lose. Professor Gilles, in her wonderful, wonderful piece—and it is a magnificent piece of scholarship and will be a great article—says that, at least in terms of the grand federal legislative effort, the tort reformers lost. It is the one thing in her article with which I have disagreement.

Have Consumers Lost the War?

What the tort reformers won is public opinion. Evidence of this can be found in the number of plaintiffs' lawyers who are cautious about asking for a jury. They want bench trials. They have been won by commercials that many of you will remember. It is a swing set in the park and the kids are playing and it is going back and forth, flip from color swing set to black and white. Now, the swings are alone and they are squeaking. There are no kids in them. Flip further to the next scene and now there is no park at all. The voiceover says, "Lawyers, you did this to us." If you run enough of those ads, you contort the truth. You pretend that things are not the way they are. You develop scholarship that is false and argues that we are suffering from a litigation explosion from which we are not suffering.

What the tort reformers won is public opinion.

You pretend that punitive damages give people millions of dollars when the average in the United States is \$73,000. The number of cases in which punitive damages are awarded is miniscule. You say that enough times, to enough people. You stick tort reform in presidential party platforms. Sooner or later, the American people believe you. To that extent, tort reformers, you won.

Now, getting back to arbitration—I don't think it's a good idea, in case you haven't noticed. Tell me that the tablets that you take were not made safer by the litigation over Tylenol. Tell me that cars are not safer because of litigation. Tell me that children are not safer in what they wear, the things they eat, and the play equipment they use. Tell me that the lawsuits regarding asbestos and tobacco and even deep sea drilling haven't made a difference.

You know why I know? Because you are judges. You have to tell the truth. You wouldn't believe such nonsense, but people read the publications, tens of thousands of pages of articles touting tort reform, with this message about plaintiffs and plaintiffs' lawyers: you have to beat them down. It reminds me of a scene in *The Great Gatsby* where Tom Buchanan is speaking and it is this kind of bizarre, racist, superior stuff where he is talking about Nordics. He is at the table and he is off on a rant. Daisy looks at Nick and she winks her eye and she says, "We have got to beat them down." She knew he was full of it.

If the civil justice system weren't so important, why would the other side spend \$5 billion in the first five years they were fighting it? Because they had a lot to gain. It wasn't justice that they were seeking to gain. It was relief from the litigation system—from accountability.

Effect of the Common Law

The common law of torts, the hundreds of thousands of cases I spoke about earlier, is not a religion. It articulates norms. It changes behaviors. It is an elaborate, remarkably complicated system, and it works. It has worked for generations. Here we are on the brink. *Concepcion* has brought us there formally, but we have been heading in this direction for a third of a century. There is a lot at stake. There is a lot at risk. To think that it would all be compromised so blithely by a rights-robbing model like arbitration is really unacceptable.

I want to tell you one other story. I think it is probably best to end with it. Many years ago, before I was married and had kids, I was going to meet the family that would become my in-laws. My litigation partner at the time, a wonderful guy named Bob Verdisco, was getting me prepped. It was Thanksgiving. He was telling

The common law of torts is an elaborate, remarkably complicated system, and it works.

me what to say and what not to say. He was older than I was, and wiser, and so I listened to him.

He said to me, “Listen, no matter what you do, your in-laws—where are they from?” I said, “They are from Pittsburgh.” He said, “Okay, here is what you do. When you get there talk to them

about whatever you want, but don’t talk about religion, and don’t talk about sex, and don’t talk about politics, no matter what. You will lose. It will be bad.”

I go to Pittsburgh. I meet my in-laws. Within five minutes, my father-in-law-to-be is talking about new court decisions about abortion, and the Pope, and Watergate. I am thinking about what Bob said to me. So I said “This is the year for the Steelers, isn’t it, Jack?” It worked.

Today, if I were going to give advice to somebody who was about to meet their in-laws, I would tell them, “When you go to meet them don’t talk about religion, or sex, or politics, *or arbitration or tort reform*. You don’t know who is going to be sitting at the table. You don’t know if somebody in that broadly defined family lost a business because of a piece of litigation that really shouldn’t have been brought. You don’t know if someone in that family had an awful thing happen to a loved one or to them and tried to go to court, but because of tort reform couldn’t get a remedy. You don’t know which side of the coin you are looking at. If you start talking about malpractice and how there is a malpractice explosion and somebody says the reason there are so many malpractice cases is because there is so much malpractice and you get into that discussion (and God forbid you cite the Harvard study,² which no one should ever cite on malpractice!) and you get into it, I can tell you this: drumsticks are going to fly.”

With that, I commend to you the magnificent scholarship of Professor Gilles. It is a wonderful, wonderful article.

HONORABLE JANICE HOLDER

I want to thank Professor Gilles, as well, for a wonderful and very thought provoking paper. What I want to talk to you all about is where we are as state courts and how we got here and how the state courts are going to respond going forward.

I don’t know about your states, but when I read these papers—and they are wonderful papers—I went back over our litigation over the last 15 years to see what we had done with respect to arbitration clauses. I found exactly three cases that really had to do with the FAA or an issue of whether the FAA or the Tennessee arbitration statute applied. One was very much on point as to *Concepcion*, concerning the mutuality of forum, and it turns out we have just granted permission to appeal on another case that will call that 2004 case into question. We have been involved with arbitration a little bit. I wonder if you all aren’t in about the same place that we are. We aren’t overburdened with issues involving arbitration up to this point.

How Judges Have Contributed to the Arbitration Movement

I also want to think a little bit about how we got where we are. I don’t disagree with the deterrence issue and the deterrence position of Professor Gilles, but I want to posit to you that we, ourselves, are responsible for some

of where we are. I will speak only for our Tennessee system. I will say that I think that we have contributed to the rising use of arbitration because we have contributed to a system that is not faster, cheaper, and more efficient. I know those are the talking points about arbitration—that it is “faster, cheaper, and more efficient,” but I don’t think we have ever been accused of being faster, cheaper, and more efficient. I think we have to wonder why that is.

I think it is because we, in Tennessee, have approached our system as being the only game in town. Well, people using our system have told us we aren’t the only game in town. There is arbitration out there. There are other alternative dispute resolution mechanisms out there, as well. I bet all of you have seen a lot of mediation in your jurisdictions. Those cases that mediate, those cases that settle, also do not contribute to deterrence because they are, by and large, confidential. Settlements are confidential. They aren’t done in a public forum either.

What happened to me several months ago was somebody came up to me who knows me well enough to say something like this to me and said, “I am mediating every case I can. The last thing I want to do is to walk into the courthouse.” I think we need to examine where we are in each of our systems and determine whether we are contributing to a desire to remove cases from our systems.

Secondly, the question is, How are the state courts going to respond to *Concepcion*? I have a little different thought process as to all of this. As I said, as I went back, there were only three cases that really have to do with the FAA and whether the FAA applies or a Tennessee statute applies. Some of that will involve whether or not there is interstate commerce, and other parts of it will involve what the parties desire and what they put in their contracts. From what I saw from the cases that we have had up to this point, some parties are going to choose the Tennessee version of the arbitration statute and not the FAA.

There is still room for the state courts to have a role in what happens post-*Concepcion*.

Another thing that will impact us going forward is the choice of law provisions in contract. We have reviewed choice-of-law provisions when they specify Tennessee law as meaning they also are choosing the Tennessee arbitration statute. To the extent that the people who are arbitrating in Tennessee are choosing the state statute that might also impact the effect of *Concepcion* on those cases.

I think state courts will continue to look at state contracts to determine whether they are unconscionable or whether they violate public policy. I don’t see *Concepcion* as taking that out of the mix. I think state courts will continue to do that.

I don’t disagree with much of what has been said. I think there is still room for the state courts to operate, for the state courts to make themselves more attractive to parties, and for the state courts to have a role in what happens going forward post-*Concepcion*.

ARCHIS PARASHARAMI

I am a partner at Mayer Brown and co-leader of the firm’s class action practice. I represent businesses. I was one of AT&T’s counsel on *Concepcion*, although, I am speaking for myself today and not for my clients, if you will forgive the disclaimer.

State court judges have an enormously important role to play in addressing issues relating to arbitration and class actions.

I think I am here to provide the alternative point of view. It is different, but I agree that it is absolutely true that this audience, state court judges, have an enormously important role to play in addressing issues relating to arbitration and class actions.

The Supreme Court has repeatedly observed that, under the Federal Arbitration Act, state courts are often the primary interpreters/expositors/appliers of federal arbitration law. I think along with that comes, in my view, a duty to apply and enforce the law as the Supreme Court has laid it down. In recent years, I think, as many state courts have seen, the Supreme Court has been willing to step in when it has perceived defiance or at least significant straying from the Court's precedents.

I think that that principle should be kept in mind when hearing Professor Frankel's talk. He is an enormously distinguished professor with, I think, some very interesting ideas. To preview the alternative point of view on that, those are my thoughts.

I think the first paper, by Professor Gilles, really takes the law much more as it is. I think it is much more focused on policy. I welcome that policy debate. I think we have room for rich disagreement.

Professor Gilles and I have met on a number of occasions. Each time, we have had an opportunity to disagree. I don't think there is much we agree on, but I am honored to say that every time we have disagreed, it has been in a very respectful way. I have enjoyed our debates.

Most recently, in March, I spoke at Professor Gilles's class action seminar at Cardozo Law School. That was a fantastic experience. She had a great group of students, who gave me the very warm embrace of the Socratic dialogue. Actually, really great questions, a great group of students. It made me think more about my positions, and of course reinforced my views. In that same tradition, I respectfully disagree with Professor Gilles today.

Class Actions and Matters of Faith

It is obvious to me that this debate centers on class actions. I think that most of Professor Gilles's analysis rests on two articles of faith. I think we agree that the notion of deterrence is an article of faith. I think we might disagree on whether the benefits of class actions are a matter of faith.

I do think that reasonable people can disagree about matters of faith. My parents are from India so my background is Hindu. It is very important to me that people can disagree on matters of faith. Otherwise, I would be in real trouble in this country. Here, today, I am going to (hopefully) reasonably disagree about some matters of faith.

The first piece that I want to talk about is: Do class actions serve an important deterrent function? Second, do class actions benefit anyone? I don't think that either is true.

I don't believe class actions are needed to deter wrongdoing. How does deterrence theory work? It assumes that a party will not engage in wrongdoing if the party believes that it will incur costs for acting wrongly. It won't incur those costs if it complies with the law.

I think that is very easy to see in the criminal justice system. If you break the law, you go to jail or, if you think you might go to jail, you are presumably deterred in some sense (although obviously not enough, because it is not like no one commits crimes). There is some deterrence that comes from punishment. If you don't commit the crime, you don't go to jail. There is some rational connection between the wrongdoing and the costs that are associated with the wrongdoing.

The problem is that in class actions that connection isn't there. I have friends who are plaintiff's lawyers. They are mad at me sometimes when they learn that I handled *Concepcion*. Sometimes the disagreement is less respectful. Be that as it may, I believe, and I hope they believe, that we are people of good faith. I don't think that, plaintiff's lawyers, at least the ones I know, are bringing cases in bad faith.

I do think that, when they bring cases, they are economic actors. Their incentive structure is not necessarily to focus on the merits. I don't think that plaintiff's lawyers ignore the merits. I think they clearly look at them. They have to develop their cases. When they choose whether or not to bring a class action, simply as a matter of economic incentives, they don't have strong incentives to choose whether to bring the case based solely on the merits of the case. Really what they should be looking for, economically, is to find the claim for which the complaint can withstand a motion to dismiss, get into discovery, and that can have a shot of satisfying the relatively high hurdles of class certification or convince a company to settle.

The Paucity of Class Action Trials

But the reality is that once a class is certified, as you know, settlement virtually always follows. I have a question for the audience. How many of you have actually reviewed cases in which a class action went to trial? I see some hands. That's more than I expected, but I have to tell you that in the cases that I handle, where there is a potential for trial in a class action, it almost never happens. To me, to have a full-blown trial of millions of claims, where there are billions of dollars at stake, is like a snowflake in August. The cases I can think of almost never go to trial. There are some companies that will always take cases to trial, but it is very rare.

One of the reasons it is very rare is because of the massive transaction costs that are associated with class actions. I think the burdens, in those cases, are almost entirely unrelated to the underlying merits of the lawsuit. They have to do with the relative risk of whether the class gets certified. Even a one percent chance of a billion dollar verdict, or a five percent chance of a \$500 million verdict (which would suggest that the case is not all that powerful in the merits), nonetheless motivates a company to settle.

I understand that appellate courts don't really confront issues of discovery on a daily basis, but I can tell you that typical class actions cost literally in the millions of dollars for electronic discovery, whether the company did anything wrong or not. That is just the system. It is a very asymmetrical system. When I seek discovery from the name plaintiff in a class action, I get a manila folder about the size of what you have on your desks. When the plaintiff asks us for a discovery, it is millions, maybe *tens* of millions, of emails. It is a very asymmetric system.

As a business you see that class actions are more a cost of doing business, and are unrelated to wrongdoing. There is not meaningful deterrence.

All of that is factored into the calculus of bringing the class action. These costs strike arbitrarily. These costs are experienced in class actions whether or not the company has done anything wrong. As a business, once you know that, you see that class actions are more a cost of doing business, and are unrelated to wrongdoing. For that reason, there is not meaningful deterrence.

Companies have changed their behavior in response to mass outcry from consumers and employees.

Where does deterrence actually come from? In my mind, it comes from the reputational consequences of engaging in improper behavior, because reputational harm often is directly correlated to a business' success or failure. I think times have changed. What we see now is that when a business makes a misstep that upsets people, consumer complaints go viral. They go viral on Facebook, on Twitter. There is a website called www.Change.org. Companies have changed their behavior in response to mass outcry from consumers and employees. That directly leads to changes in practices. I don't think that class actions have the same effect. I think that, because class actions often end in settlements, typically changes in behavior are relatively modest and often are not much more than changes in disclosures.

Is the “Nutella” Class Action Valuable?

I don't know how many of you have seen things like the lawsuits about “all natural” foods. One of the more famous ones that I hear about a lot is the Nutella case, in which the plaintiffs claimed that they did not realize that Nutella was not part of a healthy breakfast. The case settled, and that is totally rational. I have to say I don't think the company did anything wrong in selling its chocolate/hazelnut spread. It is very tasty. It is not all that good for you, as the label discloses if you read the calorie counts. A concerned parent said, “I didn't realize this was not part of a healthy breakfast.” A class action followed—I think more than one, actually, believe it or not. The company settled that case.

I don't think that there was bad behavior there. I think the class action in that case was not deterring wrongdoing. It was imposing costs on a business. The business made a rational calculation to settle. If they do anything, it will be like a change in the label where they maybe take away references to a healthy breakfast. So what? That is not to say that every class action is that way. My view is that more are like that than not.

An Empirical Assessment: How Much Do Class Actions Actually Help People?

Let me talk about another important piece of this, which is whether or not class actions help people. On balance, I think no. I think there are two classic rationales for class action: compensation and deterrence. I have talked about deterrence. Compensation maybe would be great if everybody benefitted from class actions and they were getting paid large sums of money and their problems were satisfied.

Maybe some audience members have had the following experience in the course of sitting at home and getting your mail. You get a class-action notice in the mail. Maybe there is a form that you might fill out. Most people don't fill it out. Statistically, most people don't. Then this class action results in broad attorney fees to both sides. I get attorney fees for representing businesses; the plaintiff's bar gets attorney's fees if the case

settles. What do the class members get? Not a lot. I think that is the answer: not a lot. I am not above anecdotes like the Nutella example I gave you, but my firm tries to bring at least some empirical rigor to this. We studied a set of 148 punitive consumer and employment class actions that were filed in federal court or were moved to federal court in 2009.

Why am I talking about federal courts to an audience of state and appellate judges? A, I apologize for that. B, the reason is that it is just extraordinarily hard to study the state court system because it is harder to get information online with 50 different states and 50 systems, maybe more. I think California has different systems in each county. It is just extraordinarily hard to study them.

I think, though, that the experience is probably not too different. What we found was that in this dataset, not one of the class actions ended in a final judgment on the merits for the plaintiff's. None of the class actions, at least during the time period that we studied, went to trial. That obviously doesn't mean that they never go to trial. We saw a lot of hands raised when I asked about that earlier. We didn't study every class action because that was impossible.

What we did find was that the vast majority of class actions provided no benefits to most members of the putative class. I would say that, of the cases that were resolved, over one-third were dismissed voluntarily by the plaintiff. Either that means it was settled on an individual basis, with no benefit for the class, or it was just dropped. One-third were dismissed by courts on the merits, again, meaning class members got nothing. The remaining third were settled on a class basis.

The vast majority of class actions provided no benefits to most members of the putative class.

The settlements, in theory, should have benefitted everyone who was in the class. In fact, they don't. Most class actions I am aware of are resolved on a claims-made basis, which means you have to send in a form to get a recovery.

In one case, they didn't have that, so everybody got a recovery. In five of the six cases for which the data were available, in each case, it was a small number. Two were well under one percent. One was 1.5 percent. The best were 9.66 and 12 percent. Think about it. In one of the best cases, a 12 percent recovery, so 88 percent of the class members didn't benefit.

I think people get it. I think that is one of the reasons there is a lot of skepticism about whether class actions benefit people.

***Italian Colors* and the Sharing of Costs Among Multiple Arbitration Claimants**

I am just going to end with a last thought, which is that in the *Italian Colors* case, which I think most people have probably read here, in Justice Kagan's dissent that Professor Gilles is fond of quoting (appropriately so, from her position), Justice Kagan said, "Too darn bad."

I think, actually, if one reads the majority and dissenting opinions in *Italian Colors* closely, you will see that there is less disagreement than meets the eye. A line that isn't quoted in the paper is when Justice Kagan writes

that non-class options abound for the effective vindication of rights. Both sides agreed—the dissenting opinion agreed that there are possibilities of sharing informal coordination among claimants that would allow for groups of individual claimants to band together, share experts, share lawyers, and bring a series of individual arbitrations, and still benefit from aggregation without the problems of the class action device. There was actually no disagreement on that point. The sole disagreement really boiled down to the particulars of the American Express arbitration clause. American Express actually said that you could share, so it was sort of an odd thing for Justice Kagan to say. I do think the parade of horrors is a little bit overstated.

Thank you for this opportunity to speak with you. It was a delight. I look forward to questions.

ALAN I. GILBERT

Good morning. I do want to say that the Minnesota Attorney General’s office filed an amicus brief in *Concepcion*. Our side was able to convince four justices of our position. Unfortunately, someone else convinced five. That, of course, is the reason why we are here today—the *Concepcion* case.

First, I want to comment on Professor Gilles’s wonderful and well-reasoned paper. I certainly agree with the issues she has raised about deterrence and precedent, but very frankly, if I were in your shoes, if I were an appellate judge, I think my immediate reaction would be, “I have so much work to do, I could use the help of these arbitration services.” I understand that. That is a practical effect of all of this.

What I think needs to be focused on, and what the Attorney General’s Office in Minnesota is focused on, is the practical effect of mandatory arbitration on what I refer to as real people—real, everyday people. In that regard, I would like to focus on two principal issues that are of great concern to me and the Attorney General’s Office about the use and effect of mandatory arbitration in consumer cases.

“Agreements” Without Consent

The first issue that I would like to talk about is what I refer to as the purported agreement to arbitrate that is not, in reality, mutually consented to by the parties (which, of course, includes the consumer). Secondly, I want to talk about the real effect on consumers, which is that the arbitration process can be biased against consumers, resulting in what I would characterize as a kangaroo court—or, more appropriately, a kangaroo arbitration.

Two commercial entities of equal bargaining power is what was envisioned in the Federal Arbitration Act in 1925.

As to the first concern, I believe, and the Attorney General’s Office in Minnesota believes, that there is a false premise that an agreement to arbitrate is knowingly and voluntarily agreed to by a consumer. I distinguish the consumer context from the context where you have two commercial entities of equal bargaining power, which was envisioned in the Federal Arbitration Act in 1925. When you have a situation like that, there is no problem with those corporations agreeing to an arbitration in the event there is a dispute with respect to a contract.

All of us have seen and experienced what it is like in a consumer context. The arbitration clause is typically in the fine print of a contract. It is presented to the consumer—even appellate court judges—on a “take it or leave it” basis. We have all seen that.

It could be that you get your credit card bill, or your cell phone bill, and there is an insert stuffed into the bill. That insert says something like, “We are going to impose an arbitration clause,” or “We are going to change the terms of the arbitration clause that you never knew even existed. If you decide to use your credit card or you decide to use your cell phone, we regard that as you consenting to that change or that new arbitration agreement.”

In most cases, the consumer doesn’t even know that the arbitration clause exists. If the consumer knows it exists, he doesn’t know what it means. Arbitration is really, I believe, in the consumer context, a form of an adhesion contract between parties of clearly unequal bargaining power, whereby the consumer gives up some very substantial rights.

Arbitration is, in the consumer context, a form of an adhesion contract between parties of clearly unequal bargaining power, whereby the consumer gives up some very substantial rights.

Pervasive Arbitration Provisions

Just as importantly, even if a consumer could shop around and say, “I am going to go to a provider that doesn’t have an arbitration clause,” he usually can’t do that because, at least in the industries that are most important to one’s day-to-day life, the arbitration clause is a pervasive provision of any contract. A consumer can’t go to an alternative provider or vendor and say, “I want to go with you on my cellphone, my credit card, my lending,” or whatever it might be from a bank, because they all have arbitration clauses. These industries include services that I think most people would consider to be essential. That includes banking services, credit cards, consumer lending, internet service, cable, and satellite TV.

Worse yet, as has been noted and I am sure you are familiar with it, these arbitration clauses go beyond just arbitration. They also impose additional restrictions on rights that a consumer would otherwise have in a court. I am often, frankly, amazed by the creativity shown by corporations and their counsel to limit the rights of consumers as part of an arbitration clause. These provisions include shortening the statute of limitations from applicable law, severely limiting the damages that a consumer could recover under applicable law, precluding an award of attorney’s fees that is authorized under law, and limiting discovery that one would otherwise have in court. The list goes on and on, subject only to the creativity of a company or its counsel.

The notion that a consumer has knowingly and voluntarily given up his rights of redress in court is really not accurate.

The notion that a consumer has knowingly and voluntarily given up his rights of redress in court is really not accurate. It has an impact on people. As a result of that clause that they don’t know about, and if they knew about it and they knew what it meant, they probably wouldn’t have agreed to it. It has a real impact on people.

It has an especially pernicious effect on people because of concerns that relate to the impartiality of arbitration services in consumer disputes. In that regard, the Minnesota Attorney General’s Office, on July 14th 2009, brought a civil case against the National Arbitration Forum (NAF). The complaint alleged that the Forum deceptively represented to consumers and the public that it was independent and neutral and operated like an impartial court.

The lawsuit contended that the Forum worked behind the scenes with credit card companies and other creditors to provide for mandatory arbitration and use the Forum as the designated arbitration service. The complaint asserted that, in soliciting the creditors, the Forum made representations contrary to the interest of consumers to get the business from the creditors.

Just a couple of the statements, and I will quote them, that were in the materials. One was, “The customer does not know what to expect from Arbitration and is more willing to pay.” Another example is, “Consumers will ask you to explain what Arbitration is, then basically hand you the money.” That is the kind of attitude and perspective that was exhibited by this particular arbitration service to get the business.

Hidden Relationships

The complaint that we filed against the Forum also alleged that the Forum had ties to the debt collection industry, that weren’t disclosed to consumers, through a New York hedge fund that had invested \$42 million in the Forum and, at the same time, owned a majority interest in one of the nation’s largest debt collection enterprises. This particular debt collection enterprise was a very big user of the Forum. That was never disclosed to consumers.

On July 17th, several days after our complaint was filed, the Forum executed a consent judgment, which prohibited the Forum from arbitrating credit card and other consumer disputes or participating in the administration or the processing of consumer arbitrations.

Even beyond the circumstances of the NAF case, it is apparent, based upon our communications with consumers and our investigation of this case dealing with the Forum, that when a corporation selects the arbitrator and/or when the arbitrator is reliant on repeat business from the corporation, there is a much greater risk of bias in the decision of the arbitrator.

An arbitrator is more likely to favor the party who will send the arbitrator cases in the future.

Some people are aware of this phenomenon and refer to it as “repeat player bias.” I had never heard the phrase until this investigation took place. What it denotes is that an arbitrator is more likely to favor the party who will send the arbitrator cases in the future. This bias certainly does not exist in the courts. It is an important ingredient in terms of the appropriateness of arbitration.

I want to mention two other things. Probably the most creative attempt at an arbitration clause was the recent one by General Mills, that you might have heard about. General Mills put on its website that if you download a coupon, for example, to buy some cereal, that you are subjecting yourself to arbitration if you have a complaint about a General Mills product. General Mills did retract that based upon public outcry.³ Frankly, I am hopeful that there is going to be public outcry at some point about arbitration more generally as it relates to consumer cases.

The last thing I want to mention is that both state and federal rules of civil procedure provide for class actions. They do that for a very important reason. There are some cases, some issues, some rights that cannot be vindicated without the mechanism of a class action. To suggest that class actions shouldn’t be allowed in any form, I, frankly, think is ridiculous and would essentially immunize various wrongdoers from bad acts that should be vindicated by consumers

RESPONSE BY PROFESSOR GILLES

Thank you so much, all of you, for your great comments and for reading my paper. As an academic, I sit in my office and I write and it is not clear to me that anybody ever reads anything. That is why we often have to assign our papers to our students and then test them on it at the end of the semester.

I got so much agreement and so much love from this panel. I am obviously going to focus on Archis like a laser in just a moment.

I love Professor Popper's suggestion that John Grisham read my article. If I were ever getting on a plane and I saw John Grisham with my articles tucked under his arm, ready to read that on his flight, I would feel so vindicated.

I actually don't think we disagree about the tort reformers. I do agree that they won the hearts and minds. They won the PR battle. I have to convince a group of first year students in about a month, a hundred tort students, that the torts course is important. It is not about slip-and-fall lawsuits, and it is not about rapacious lawyers and it is not about the system gone awry, but that these are important concepts. Negligence matters. It is not just about whiplash.

The tort reformers won in a big, big way, I agree. They just haven't won many *legislative* battles, which is why we see ourselves in the courts arguing over private ordered arbitration and other sorts of things.

Justice Holder said that she has only found three Tennessee cases. I think that is actually not so surprising, because the lawyers I talk to who do consumer work and employment work tell me that, nowadays, if they see an arbitration clause in a contract, they are staying the heck away from that contract. They are not bringing that case. Challenging these arbitration clauses can be so difficult and so time-consuming and so expensive it is generally not worth doing.

Companies do so much better in arbitration, where they can choose the rules and those rules immunize and exculpate them from liability.

Arbitration with Danish Pastry

If I were Archis, I would be advising companies to draft really consumer-friendly arbitration clauses. I wouldn't be drafting the ones that Alan talked about that lack mutuality or deny consumers lots of rights. I wouldn't strip remedies. I would write a really good, consumer-friendly arbitration clause. I would say to consumers, "Bring your arbitration. We will pay for it. If you do better in arbitration than our last best offer, we will pay your attorney fees." There would be a red carpet. There would be Danish pastries.

I would give them anything because, you know what? What is the skin off my nose? It doesn't matter to these companies. Most people are not going to bring these arbitrations at all. They are just not going to bring them. As all parents in the room know, it is pretty easy to promise things that you are not going to have to give.

Also, Justice Holder said that there is still room for all of you to make yourselves more attractive. First of all, you are a very attractive group. It is not about making yourselves *more* attractive, because there is nothing that you can do that can make companies feel more comfortable about the default rules of civil procedure, rules such as Rule 23 and the state court analogs. Companies do so much better in their private order universe of arbitration, where they can choose the rules and those rules immunize and exculpate them from liability—especially class action liability.

I don't want to take up too much time with these responses, but briefly, Archis spent a lot of time talking about class actions. That is because I think Archis and I have gone up and down the eastern seaboard debating class actions for years and years. I don't want to actually focus too much on class actions. I do think that the corporate strategy of embedding class action bans into arbitration clauses where they are protected by this super-statute, the FAA, is a brilliant strategy, an evil-brilliant strategy.

I don't want to argue whether class actions deter. We can have that debate, but having it would mean that we are back in the public adjudicative system and trying to figure out how to fix class actions. We are trying to figure out how to empower all of you with the tools to determine whether a class has been certified or has not been certified, whether that was rightly decided. We are trying to figure out how to make our system better. That is not where we are now. I think that debate is probably a debate we could have had in 2010 and really can't have it now.

Arbitration's Effect on *All* Cases

I think the truth is that the corporate strategy to impose these class action bans now means that all cases can potentially be taken out of your courts and put into arbitration. If Walmart inserts an arbitration clause into its standard form employment contract with its employees, and that arbitration clause contains a class action ban, it means that you can't bring a class action in court *or* in an arbitration. It also means that any individual claim that could have been brought in a court also has to go to arbitration.

I think of this as dolphins that get caught in those tuna nets. Nobody likes it when the dolphin gets caught in the tuna net. It is a horrible image. That is what those individual cases are for me. Those are cases that are just not going to be brought. When the arbitration clause says thou shalt go to arbitration, it means it.

I don't actually think we need to have the debate about class actions. I think that debate helps Archis and his colleagues, because they can talk about the Nutella case. We all hate the bad class actions. I would like to strangle those lawyers. I hate that stuff. I think that just sort of obfuscates the reality that that is not the debate anymore. They are retreading all of that 1980s "bad lawsuit" rhetoric, with stories and anecdotes to get us all riled up. I can't get riled up because, you know what? You are not going to see that Nutella case ever again. You are not going to see a lot of cases of *any* kind.

You better trust that all of those cases were Nutella cases. There was never a good one in there. There was never a case in which Time Warner overcharged every single subscriber \$6 a month for no apparent reason. There was never a case in which of all the for-profit schools completely lied to hard-working people about their graduation statistics and job prospects. None of those cases, none of those class actions were valid? You would have to believe that in order to accept Archis's argument.

Thank you all for your time and attention this morning.

Notes

¹ Andrew F. Popper, *In Defense of Deterrence*, 75 Albany L. Rev. 101 (2012).

² *Patients Doctors and Lawyers: Medical Injury, Malpractice Litigation, and Patient Compensation in New York*, Report of the Harvard Medical Malpractice Study. Boston: Harvard University, 1990.

³ The retraction was published on the General Mills blog: <http://www.blog.generalmills.com/2014/04/weve-listened-and-were-changing-our-legal-terms-back-to-what-they-were/>



LUNCHEON ADDRESS

CONSUMER UNDERSTANDING OF ARBITRATION CLAUSES IN CONTRACTS¹

‘Whimsy Little Contracts’ with Unexpected Consequences

Professor Jeff Sovern, St. John’s University School of Law

This is a sneak preview of a paper that we’re planning to post to the web on the Social Science Research Network. This is the first time we’ve unveiled it, so I would be very interested in comments any of you have.

You heard this morning, of course, that arbitration is a creature of consent. And you also heard Alan Gilbert talk about how consumers do not knowingly agree to arbitration clauses. My colleagues and I wondered whether that was accurate. So we conducted an online survey.

The Survey

Ultimately we got 668 respondents, though not all answered every question. Our respondents reflect generally the population of adult Americans with respect to a number of criteria.

Here’s how we did it: we showed them a credit card contract. Ours was seven pages which sounds like a lot but if you look at the depository of credit cards that the Consumer Financial Protection Bureau maintains on the web, you’ll see that some run over 20 pages, and, in fact, ours was pretty typical for credit card contracts.

As for the arbitration clause, Alan Gilbert mentioned this morning that the arbitration clauses often appear in fine print. There was a bold face reference to ours on the second page of the contract, saying, “It is important that you read the entire arbitration provision section carefully.” The arbitration clause itself appeared on pages six and seven of the contract, again in bold, with key parts printed in italics and all caps.

So all together the arbitration clause in our contract was either referred to or appeared on three of the seven pages. Our clause was also slightly more readable than the typical credit card arbitration clause, which doesn’t mean it was all that readable. They typically still require two years of college to understand, but ours was better than average.

We wanted to find out if consumers actually understand four key aspects of typical arbitration clauses. Those four key aspects are that the clause bars suit in non-small claims courts, blocks class actions, prohibits jury trials, and provides that the arbitrator’s decision is final. Our arbitration clause, in common with many arbitration clauses, had a small claims court carve-out permitting consumers, or the company for that matter, to file suit in a small claims court, but it prohibited suit in a court having a larger jurisdictional amount. Our

arbitration clause, in common with most, blocked class actions. It prohibited jury trials, and it provided that the arbitrator's decision was final.

We drafted eight questions to see if consumers understand these clauses or not. Five of those questions asked about the sample credit card contract that we provided. Three of them asked about a hypothetical contract with what we described as “a properly-worded arbitration clause.” We wanted to pick up people who might have skipped over the contract, and we also wanted to find out if they thought these contract provisions were enforceable.

Our instructions to the respondents told them to read this credit card contract with the same care that they would if they'd received a real credit card and this contract had come with it. The average respondent spent slightly over 4 minutes on the screens with the credit card contract displayed.

Each question had a correct answer and a wrong answer; six questions had only one wrong answer that respondents could click; two of them had multiple wrong answers, and they could also click “I don't know.”

The Survey Results

So how'd they do? Only two respondents out of 663 answered all eight questions correctly; 117 did not answer *any* of the questions correctly, which is more than answered at least half the questions right. I don't

What has surprised me is how many consumers think they do know, but what they think they know is simply wrong.

know about you, but when I was in high school a passing grade on a test was 65 percent. By that standard, 96 percent of our respondents would have failed.

What about the individual questions? Not one of the eight questions elicited a majority of correct answers; although, on one, a majority of the respondents gave wrong answers.

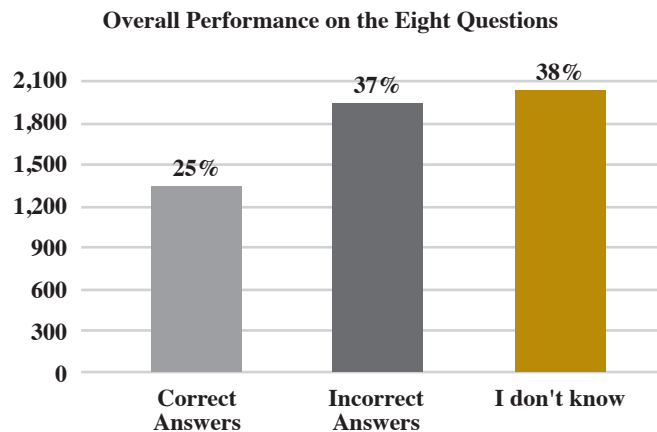
Before we conducted the survey, we expected to find that consumers would not really know what these arbitration clauses provided. So that piece of it may not be such a big surprise. What has surprised me, at least, is how many consumers think they do know, but what they think they know is simply wrong. Many of the respondents gave wrong answers, showing that not only do they not know what these clauses say, they think the clauses say something that they do not in fact say. I'll come back to that.

More respondents gave correct answers than incorrect answers on only two of the questions; two were within the survey's margin of error. That's a statistical tie. On four of the questions, more respondents gave wrong answers than right, sometimes by margins of three or four to one. So again, you see a lot of them think they know something, but it's wrong.

A majority of the respondents were not aware that this contract had an arbitration clause binding them to arbitrate.

Overall, out of more than 5000 answers we recorded on the questions that had right-or-wrong answers, only a quarter were correct. Respondents were 44 percent more likely to put down a wrong answer than a right answer. More than half the respondents got at least three of our eight questions wrong, again suggesting lots of misconceptions about what these clauses say.

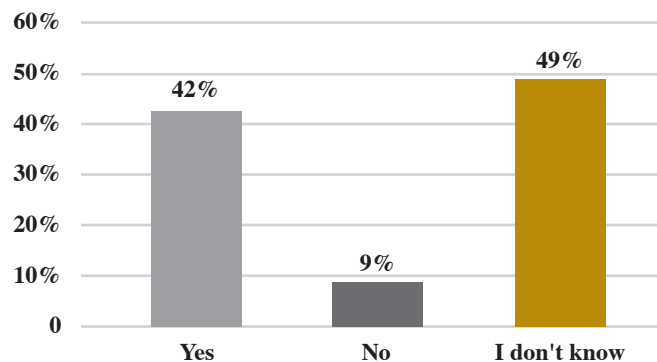
We also asked the respondents how much of the contract they'd read and understood. What we saw suggests a lot of misplaced confidence. Those who said they read and understood "all" of the contract were twice as likely to answer incorrectly as answer correctly. And they were also more than twice as likely to record wrong answers as those who reported reading and understanding very little of the contract. Again they think they know and in many of these cases that was simply wrong.



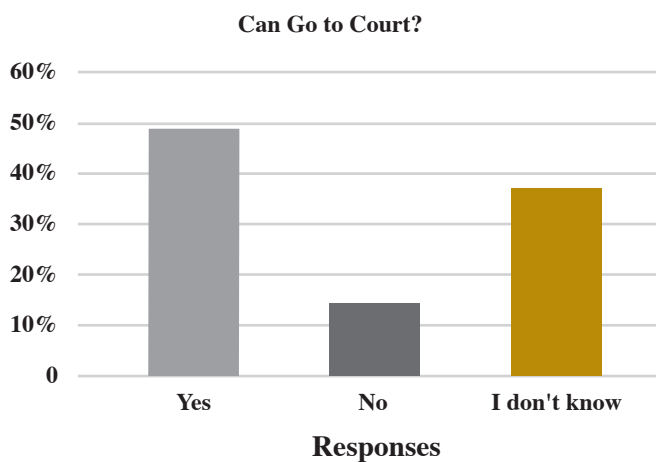
So now I want to move to some of the specific questions we asked. I don't have time to go through all of them, but I'll go through some.

If you're looking for good news from this study this next slide has the best news I can give you. Here's one of the questions we asked: if you and the credit card company have a dispute that is too large to be brought in a small claims court, did the contract you just saw say you've agreed to arbitrate it? Forty-three percent said yes. There was an arbitration clause, so that was somewhat heartening. The first part of the bad news, though, is that that still leaves a majority of respondents saying either "no" or "I don't know," and it suggests that a majority of the respondents were not aware that this contract had an arbitration clause binding them to arbitrate.

If you and the credit card company have a dispute that is too large to be brought in a small claims court, did the contract you just saw say you have agreed to arbitrate it?



The other bad news is what happens when you ask people if they think they can go to court. We gave them a scenario and then we asked, “Would you have a right to have a court decide the dispute even if the credit card company did not want the court to decide the dispute?” And here are the answers to that one. Again, lots more thought they could still go to court, even though the contract said they couldn’t, than realized that they couldn’t. Forty-nine percent said, “I can go to court;” 14 percent said, “No, I can’t go to court.” Again, most don’t know but they think they know.



What about the people who realized that the contract had an arbitration clause—the 43 percent? Of them, more than half, 61 percent of them, also believed that consumers would have a right to have the court decide the dispute. Only 59 respondents, less than nine percent of the total, realized both that the contract provided for arbitration and that it precluded litigation in court.

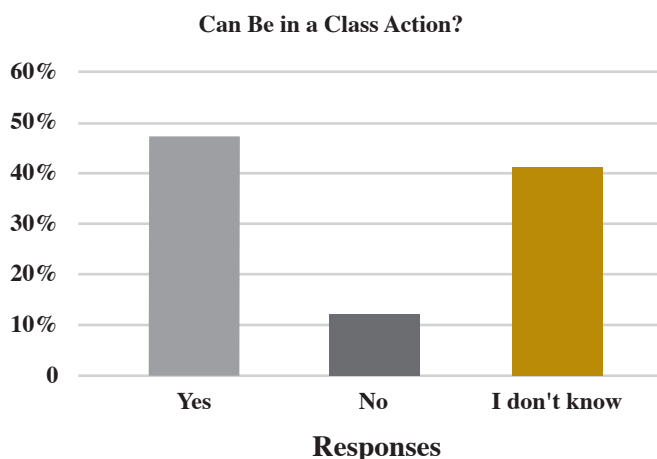
Forty-three percent of the respondents knew there was an arbitration clause, but they didn’t know that it meant they couldn’t go to court.

There’s a quote from the Nobel Prize-winning physicist Richard Feynman about “the difference between knowing the name of something and knowing something.”² And I think this may be an illustration of it. Forty-three percent of the respondents knew there was an arbitration clause (after all, arbitration was mentioned on three of the seven pages), but they didn’t know what that meant. They didn’t know that it meant they couldn’t go to court.

Well, maybe you’re wondering just how clear the contract was about the ability to go to court. So let me show you that. Here’s an excerpt from the arbitration clause. Again, it’s in bold. And if you look down at the bottom in caps, italics, it says “Neither you nor we will have the right to litigate a claim in court.” So the contract was pretty clear about that.

Now I want to move to class actions. Here’s what the contract said about class actions. On the second page, there’s a bold face reference, “**CLASS ACTION ARBITRATION WAIVER.**” On the sixth page, bolded, capitals, italics, “***YOU WILL NOT HAVE THE RIGHT TO PARTICIPATE AS A REPRESENTATIVE OR MEMBER OF ANY CLASS OF CLAIMANTS.***”

We asked two class action questions. The first was about the contract: “Could you be included with the other consumers in a single lawsuit (that is a class action) against the credit card company?” And here are the results. Again, four times as many people said, “Yes, I can be in a class action under this contract,” as those who said no—48 percent to 12 percent. So that’s pretty strong evidence that they did not understand that this contract says you can’t bring a class action.



Here is the second class action question. (Remember I said we asked three questions involving a properly worded clause.) Down at the bottom, the last two sentences say, “Suppose the contract said you could not join with other consumers to bring a class action. Could you be included in a class action?” Now, here they did better. Thirty-seven to 29 percent is not wonderful, but remember the survey’s margin of error, so this one is a statistical tie on the yesses and nos.

But if you add the “I don’t knows” to the “yesses,” you get 71 percent not knowing, versus 29 percent who recognize that you could not bring a class action or be part of a class action if the contract said that. That’s more than a 2-to-1 margin of confusion.

After each objective question we invited comments. Let me show you some of the comments in response to the class action question: “I don’t see how they could preclude us from filing a class action suit through a whimsy little contract.” The Supreme Court takes a somewhat different view. “I believe that would be my rights as a citizen.” “You can’t sign away your rights.” Again, people think they know something and it’s just wrong.

Now I want to switch gears. We also wanted to know if respondents knew whether they had agreed to an arbitration clause in the past. So we asked them, “Have you agreed to an arbitration clause?” Three hundred three people said they never had. We then asked them if they’d agreed to certain contracts which we knew had arbitration clauses (but we didn’t say that in the survey): Sprint, AT&T Mobility, Verizon Wireless, PayPal, and Skype. Eighty-seven percent of the people who said they had never entered into a contract with an arbitration clause had entered into one of those contracts that has an arbitration clause, and more than a third had entered into multiple contracts with arbitration clauses.

Now that still leaves 13 percent, because we know only about the 87 percent, but we don’t actually know that the other 13 percent have never agreed to an arbitration clause. All we know is they haven’t agreed to the one in

the contracts we asked about. It is possible that they had agreed to an arbitration clause in a credit card contract or a checking account that we didn't ask about. So we don't know exactly how many actually had agreed to an arbitration clause, but we know that it's a very large percentage.

If you compare the contracts entered into by the people who said they'd never entered into a contract with an arbitration clause, if you compare those to the people who said, "Yes, I have entered into an arbitration clause," they're pretty much the same. They are not different at a statistically significant level. In other words,

We have people giving up their legal rights—their Constitutional rights, the right to a jury trial—without knowing it, all the while thinking that they're doing something completely different.

if you want to predict whether or not somebody has entered into an arbitration clause, it's useless to ask them, because their answer will have nothing to do with whether they've actually entered into an arbitration clause.

Where we found a correlation was with people who answered the survey questions better. People who'd said, "I entered into a contract containing an arbitration clause" were significantly more likely to record correct answers

to the eight questions which had right answers than those who hadn't. So what determines whether people think they've entered into an arbitration clause is not whether they have, but how careful they are at things like answering questions on surveys.

We also wondered how salient arbitration is to consumers. I'm sure you've all heard about the information overload studies that say that there's only so much information people can take into account when they're making a decision. (And maybe my slides are giving you a case of information overload right now, but I'm almost done.) If you look at the studies, there's disagreement about how many things people can think about at a time when they're making a decision. Some say five items, some say seven, some say 10. Maybe it depends on what you're asking them to think about, and on the particular individual.

We wanted to find out if arbitration made the cut. So we asked the respondents, after looking at the contract, to write down five items that they remembered from the contract. Twenty-three people, about three percent of the respondents, mentioned arbitration or some aspect of the arbitration clause like class actions. That was one percent of the total mentions. There were almost 2000 mentions all together.

That ranked tied for 14th in frequency of the items referred to. So unless you think that, when taking out a credit card, people are going to think about 14 different aspects of that credit card in making their decision, that suggests that people are not thinking about arbitration at all when making decisions, when thinking about what credit card to get.

And that suggests that when a company crafts its arbitration clause or decides whether to include it or not, it doesn't have to worry about how consumers will respond. It might have to worry about how *the courts*—you guys—will respond, but it doesn't have to worry about how consumers will respond, because this is not something that consumers are thinking about.

I don't want to claim too much for our study. Like just about every study, it has some methodological problems, and I'm not going to talk about those here, but if you're interested in them, I hope you will read the study when we post it on the Social Science Research Network.

But let me talk about what I think of as the key takeaways from our study. Remember that you have to have consent for arbitration. So our study I think raises real questions about whether we have consent. Almost none of the respondents understand arbitration clauses. Only two out of 663 remember got all eight questions right.

On top of that, more than half thought the clause didn't do what it did or even thought that "a whimsy little contract" can't do what it does. They have misconceptions about arbitration clauses. So we have people giving up their legal rights, their Constitutional rights, the right to a jury trial, giving up their ability to get effective redress without knowing it, all the while thinking that they're doing something completely different—and that's if they're thinking about this at all. I think that raises serious questions about how meaningful their consent to arbitration is, and even how valid that consent is.

I'll leave it there. I'd be happy to hear comments people have because we are still working on the paper. Thank you.

Notes

¹ The full paper may be downloaded at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2516432. For further discussion of, and reaction to, the study, see Jeff Sovern, "Arbitration Clauses Trap Consumers with Fine Print," <http://www.americanbanker.com/bankthink/arbitration-clauses-trap-consumers-with-fine-print-1071436-1.html>; Adam D. Maarec, "Sixteen State Attorneys General Urge CFPB to Limit Pre-Dispute Arbitration," <http://www.lexology.com/library/detail.aspx?g=f27f1756-0624-494d-bd96-bd4df0e4e9f9>; and Sheryl Harris, "Arbitration—what you don't know about fine print can hurt you: Plain Dealing," http://www.cleveland.com/consumeraffairs/index.ssf/2014/11/arbitration_--_what_you_dont_k.html.

² See, e.g., <http://www.haveabit.com/feynman/2>.



AFTERNOON PAPER, ORAL REMARKS, AND COMMENTS

STATE COURT AUTHORITY REGARDING FORCED ARBITRATION AFTER *CONCEPCION*

Richard Frankel,^{1*} Earl Mack School of Law, Drexel University

Executive Summary

Professor Frankel's overall thesis is that state courts have ample roles to play in arbitration. Recent U.S. Supreme Court decisions have not radically transformed the arbitration regime, and the Federal Arbitration Act (FAA) does not preempt most state court application of general contract rules to challenges to arbitration agreements.

In his Introduction, Professor Frankel discusses the background of the Federal Arbitration Act (FAA), emphasizing the FAA's purpose of putting arbitration agreements on equal footing with other contracts. That "equal footing" should make such agreements as enforceable as other contracts, and subject to all of the defenses that can be raised against such enforcement. Under this framework, the FAA only preempts rules that single out arbitration agreements for disfavor, and thus do not place them on "equal footing" with other contracts.

*In Part I, Professor Frankel begins with a review of federal preemption doctrine, which governs the impact of the FAA on state rules relating to arbitration provisions. He then summarizes the U.S. Supreme Court's 2011 decision in *AT&T Mobility v. Concepcion*, which concluded that the FAA preempted a state rule that labeled "unconscionable" adhesion contracts that prohibited (or "waived") class actions for small-dollar claims. The Court held that a rule that required the availability of classwide arbitration interfered with "fundamental attributes of arbitration" and thus was preempted by the FAA. Frankel also discusses briefly the Supreme Court's 2013 *Italian Colors* decision, which concluded that the plaintiffs' invocation of the federal "effective vindication doctrine" regarding a claim under the Sherman Antitrust Act was ineffective to invalidate a class action waiver. Frankel concludes that, despite the early view that the *Concepcion* and *Italian Colors* decisions dramatically altered the arbitration landscape, their actual effect on future fact-specific unconscionability challenges may be less than expected.*

*In Part II, Professor Frankel reads *Concepcion* closely to determine exactly what the Supreme Court did and did not do—and, to the extent possible, explores what the Court intended as to the effects of its decision. He demonstrates that challenges to arbitration provisions based on unconscionability arguments remain viable, so long as the state contract rules in question apply to both arbitration agreements and other contracts in the same way. He also shows that the Court's ruling on classwide arbitration was driven by the concern that it was inconsistent with the "fundamental attributes of arbitration," especially in that classwide rulings (unlike most*

arbitration rulings) would bind absent class members. He concludes that fact-specific unconscionability claims are less likely to be preempted than are categorical determinations of unconscionability, and that the mere fact that a contract doctrine will have disproportionate impact on arbitration agreements, by itself, will not be grounds for preemption.

In Part III, Frankel considers the critical question for the state courts: How will *Concepcion* play out in the state courts when mandatory arbitration provisions are challenged under state contract law in the future? He cites numerous decisions from both state and federal courts to demonstrate that courts have held mandatory arbitration provisions unconscionable (and that unconscionability was not preempted by the FAA) where they: lacked mutuality between the parties; precluded certain categories of damages; dramatically shortened the applicable statute of limitations; imposed “loser pays” rules inconsistent with relevant statutes; imposed prohibitively high arbitration fees or other costs; imposed confidentiality requirements that are not fundamental to arbitration; limited discovery in ways that practically preclude relief; or utilized biased processes for arbitrator selection.

With so much judicial emphasis on “fundamental attributes of arbitration,” Professor Frankel closes his paper in Part IV with an analysis of what exactly should be considered “fundamental.” He notes that there are many variations in arbitration, but that, historically, the essential attribute has been the contracting parties’ meaningful, freely-negotiated choice. The antithesis of choice is the adhesion contract in the typical business-to-consumer (“B2C”) relationship. Frankel observes that the European Union and many other countries, concerned about inequality of bargaining power and loss of consumer protections, permit significant regulation of arbitration clauses in B2C adhesion contracts. The adhesion contract, then, is the defining characteristic of the American arbitration regime, and it is at odds with arbitration’s fundamental nature. Thus, state regulation of adhesion contracts should not run afoul of the FAA.

INTRODUCTION

It is widely acknowledged that the Federal Arbitration Act (FAA) was enacted in 1925 with a simple goal: to overcome existing judicial unwillingness to enforce arbitration clauses by placing arbitration clauses on “equal footing” with other contracts.² The Act made such clauses as enforceable as any other contract and also subject to the same defenses as applied to other contracts.³

This “equal footing” principle provides the framework for analyzing most questions relating to the FAA. For instance, the Supreme Court has stated that in determining whether a valid arbitration agreement was formed, a court must look to general state law regarding contract formation.⁴ Similarly, courts must look to state contract law when interpreting the scope of an arbitration clause or in deciding who is bound by the clause.⁵

This same “equal footing” principle also provides the foundation for understanding when the FAA preempts state law and when it preserves state law. Because the FAA was designed to overcome the prior “judicial hostility” to arbitration reflected in judicial refusal to enforce arbitration clauses simply because they were arbitration clauses, the statute has been interpreted to preempt state laws or rules that single out arbitration clauses for unfavorable treatment. Thus, a law that explicitly prohibits arbitration of a specific type of claim is preempted,⁶ as is a law “that takes its meaning precisely from the fact that a contract to arbitrate is at issue.”⁷

At the same time, the FAA expressly preserves generally applicable state-law contract principles from preemption. The FAA establishes that arbitration clauses shall be enforceable, “save upon such grounds as exist at law or in equity for the revocation of any contract.”⁸ This includes contract doctrines like unconscionability and public policy defenses.⁹

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The Court recently reaffirmed these principles in two major cases involving the enforceability of class action waivers in arbitration clauses: *AT&T Mobility LLC v. Concepcion*¹⁰ and *American Express Co. v. Italian Colors Restaurant*.¹¹ In *Concepcion*, the Supreme Court found that the FAA preempted California’s application of its unconscionability doctrine to invalidate an arbitration clause’s class action waiver in certain circumstances because it found that requiring classwide arbitration “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”¹² *Italian Colors*, which was not a preemption case, applied *Concepcion* to require enforcement of a class action waiver even if the waiver undermined enforcement of federal statutory rights.¹³

Some commentators have suggested that *Concepcion*’s invalidation of a state unconscionability doctrine and its focus on “fundamental attributes” of arbitration means that the FAA preempts most, or even all,

Case-specific applications of general contract law principles, such as unconscionability, do not interfere with fundamental attributes of arbitration and are not preempted.

unconscionability challenges to arbitration provisions.¹⁴ But most courts, state and federal, have sensibly and correctly read it not to do so. Rather, they have recognized that categorical rules making arbitration clauses unenforceable may disfavor arbitration and hence may not survive, but that case-specific applications of general contract law principles, such as unconscionability, do not interfere with fundamental attributes of arbitration and are not preempted.

In this paper, I will provide what I call the “standard view” of FAA preemption following *Concepcion*, and what I call the “strong view” of *Concepcion*—a bolder reading, but one that I believe is the most consistent with *Concepcion*.

The standard view is that most case-specific challenges to arbitration clauses, including unconscionability challenges, are not preempted because they do not specially disfavor arbitration or involve fundamental attributes of arbitration. In other words, there is nothing about dramatically shortening a statute of limitations from a matter of years to a matter of days, insulating a party from liability for punitive damages, requiring a consumer to pay prohibitively expensive costs and fees, making a consumer pay the opposing side’s attorneys’ fees and costs if the consumer loses, giving one side unilateral control over arbitrator selection, or writing an agreement that requires one side to arbitrate disputes but permits the other side to go to court that is fundamental to arbitration. Since *Concepcion*, many courts have held (as described in detail below) that nothing in the FAA voids generally applicable state contract doctrines that find such provisions unconscionable or otherwise unenforceable.¹⁵

The strong view takes a closer look at what truly are “the fundamental attributes of arbitration” that the *Concepcion* Court was concerned with protecting. When actually examined, it appears that very few, if any, procedures that are “fundamental.” Arbitration is not a monolithic concept. Parties design their arbitration systems in myriad different ways; there is no one specific procedure or format that is universal to arbitration. Rather, it seems that what arbitration is really concerned about, and that what the Court wanted to preserve,

was the concept of fairly-negotiated private choice. The essence of arbitration, if there is one, is that parties can freely and fairly negotiate to adopt their own terms of dispute resolution rather than being subject to the fixed and immutable rules of public litigation. As a result what truly interferes with the fundamental attributes of

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arbitration is the lack of free and fair negotiation—i.e. adhesion. And most arbitration clauses, at least in the consumer and employment arenas, are embedded in adhesive contracts.

This is not to say that contracts of adhesion should not be enforceable or even that arbitration clauses in adhesion contracts should not be enforceable. Even *Concepcion* recognizes that “the times in which consumer contracts were anything other than adhesive are long past.”¹⁶ But, what it does mean is that if *Concepcion* is really to be taken at its word, state regulation of adhesion contracts, or of arbitration clauses within adhesion contracts, is not preempted because adhesion contracts necessarily fall outside of the fundamental essence of arbitration. Thus, the most honest reading of *Concepcion* is that outside of the class action waiver context, the FAA does not preempt application of state law to arbitration clauses in adhesion contracts.¹⁷

I. The Supreme Court’s Decisions in *Concepcion* and *Italian Colors*

Initially it may be helpful to provide a few background principles regarding federal preemption. There are two main types of preemption: express and implied.¹⁸ Because the FAA has no express preemption provision, it falls under the doctrine of implied preemption. Under implied “obstacle” preemption, the FAA preempts state rules that interfere with or stand as an obstacle to achievement of the federal statute’s purposes.¹⁹ However, where the issue touches an area of traditional state regulation whether a state rule interferes with the FAA must be determined against the backdrop of the presumption against federal preemption.²⁰ Consumer and employee protection is an area of traditional state regulation and thus the presumption against preemption should apply to most consumer and employment arbitration matters.²¹

As explained above, because the FAA’s purpose is to put arbitration clauses on equal footing with other contracts, the FAA does not preempt generally applicable state contract rules simply because those rules are applied to arbitration clauses. On the other hand, state laws that single arbitration clauses out for disfavor, say by prohibiting the enforcement of arbitration clauses outright, or by creating rules that apply specifically to arbitration clauses but not to other contracts, are preempted.²² Under that framework, unconscionability defenses remain a valid ground for challenging the enforceability of an arbitration clause, because unconscionability is a general principle of state contract law.

A. *Concepcion*

Concepcion leaves that basic framework largely unchanged, except perhaps in the area of class action waivers. In *Concepcion*, the Court found that the FAA preempted California’s application of its generally applicable unconscionability doctrine to invalidate an arbitration clause’s class action waiver on the ground that requiring classwide arbitration would interfere with the fundamental attributes of arbitration. Because few other procedures will interfere with the arbitration’s fundamental attributes, courts should find, and have found, that *Concepcion* preserves generally applicable state law and that most unconscionability challenges will not implicate *Concepcion* and will not be preempted.

Concepcion concerned a putative class action against AT&T Mobility alleging that AT&T advertised free phones but in fact charged customers \$30 in sales tax.²³ AT&T moved to compel arbitration based on the arbitration clause contained in the customers' purchase agreement.²⁴ Moreover, although the litigation was filed as a class action, AT&T sought to compel each injured consumer to arbitrate individually, based on the arbitration clause's ban on joint or class action proceedings.²⁵ The consumers contended that the arbitration clause's class action waiver was unconscionable because each consumer's individual damages were so small to make individual arbitration infeasible.²⁶ In essence, the consumers contended, the class action waiver served as a functional immunity provision for AT&T because no reasonable person would arbitrate on an individual basis.

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The district court agreed with the plaintiffs and struck down the class action waiver as unconscionable, relying on the California Supreme Court's holding in *Discover Bank v. Superior Court*²⁷ that class action bans in adhesive contracts are unconscionable when applied to small dollar claims.²⁸ The Ninth Circuit affirmed. It rejected AT&T's argument that the FAA preempted California's *Discover Bank* rule, holding that the rule was simply an application of California's general contract doctrine of unconscionability.²⁹ The court also noted that because the *Discover Bank* rule applied equally to class action waivers in arbitration clauses and in other contracts, the rule placed arbitration clauses on the “exact same footing” as other contracts.³⁰

The Court seemed especially troubled by the prospect of classwide arbitration, much more so than any other procedural constraint on arbitration.

The Supreme Court reversed. The Court acknowledged the “equal footing principle” and specifically articulated that the FAA permits “agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’”³¹ At the same time, it noted

that while generally applicable contract defenses ordinarily are not preempted, “the inquiry becomes more complex when a doctrine normally thought to be generally applicable, such as duress, or as relevant here, unconscionability, is alleged to have been applied in a manner that disfavors arbitration.”³² Thus, the Court indicated that generally applicable contract defenses could be preempted where they “stand as an obstacle to the accomplishment of the FAA's objectives.”³³

The Court held that the *Discover Bank* rule was preempted on the ground that “requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.”³⁴ The Court was less clear, however, about what precisely constitute the “fundamental attributes” of arbitration. In several places in the opinion, it focuses on choice—specifically on the parties' ability to freely negotiate their own rules so as to allow for “efficient, streamlined procedures tailored to the type of dispute.”³⁵ At other points, it mentions various procedural outcomes, ranging from efficiency, greater procedural flexibility, arbitrator expertise, quicker resolution, lower cost, and finally, just general “informality.”³⁶

Whatever its view of the fundamental attributes of arbitration, it is clear that the majority determined that classwide arbitration ran afoul of them. Indeed, the Court seemed especially troubled by the prospect of classwide arbitration, much more so than any other procedural constraint on arbitration.

First, the Court has addressed classwide arbitration in some form four different times in the last four years, and in each decision has emphasized how severely classwide arbitration deviates from the majority's conception of traditional arbitration.³⁷ This is virtually unprecedented. In the past, it has not expressed the opinion that any particular procedural device was incompatible with arbitration. To the contrary, the Court's default presumption has been that it is up to the arbitrator to determine which procedural mechanisms the parties intended to apply to their arbitration proceedings.³⁸

Second, the Court engaged in an extensive discussion explaining why it viewed class procedures as fundamentally incompatible with arbitration. The Court's primary concern was that classwide arbitration would theoretically bind absent class members, which raised significant questions about the arbitrator's authority over absent parties.³⁹ The Court also noted that (a) classwide arbitration limited the parties' ability to choose subject-matter experts as arbitrators because they would need an arbitrator who was capable of addressing class certification questions; (b) that classwide arbitration sacrifices "informality" and "requires procedural formality" in order to protect absent parties; (c) that classwide arbitration is much slower than individual arbitration and will take a long time to get to final judgment, and (d) that class actions involve greater risks to defendants, who would be unlikely to agree to take such a risk, especially given the limited appellate review of arbitrator decisions.⁴⁰ Based on its extended analysis of the specific ways in which it viewed class procedures as incompatible with arbitration, the Court held that the FAA preempted California's *Discover Bank* rule.

Justice Thomas wrote a brief concurrence. He acknowledged that under the majority opinion, unconscionability and public policy defenses remained viable avenues for challenging arbitration clauses.⁴¹ While expressing his disapproval of the doctrine of obstacle preemption upon which the majority relied, Justice Thomas read the text of the FAA to permit challenges only to the formation of an arbitration agreement, not challenges to the agreement's validity.⁴²

B. *Italian Colors*

Other than reaffirming that courts ordinarily should enforce class action waivers, even where doing so would prevent a plaintiff from vindicating federal statutory rights, *Italian Colors* does not add significantly to the doctrine of FAA preemption. *Italian Colors*, which involved a claim under the federal Sherman Antitrust Act,⁴³ was not a preemption case. The crux of its holding was that opponents of class action waivers could

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not use federal law to accomplish what they could not do under state law, namely, invalidate a class action waiver.⁴⁴ In *Italian Colors*, the plaintiffs attempted to apply a "judge-made" doctrine under which courts would not enforce an arbitration clause that prevented a party from effectively vindicating federal statutory rights.⁴⁵ The Court rejected that doctrine as applied to class action waivers. As in *Concepcion*, the Court was concerned with how the class device disrupted the nature of arbitration, particularly through the effects on absent class members. It explained that

the result in *Italian Colors* was virtually compelled by *Concepcion*, stating that "[t]ruth to tell, our decision in *AT&T Mobility* [*v. Concepcion*] all but resolves this case."⁴⁶ Also, as in *Concepcion*, the court took care to indicate that other non-class-action-based public policy defenses remained viable, noting that the FAA might still permit invalidation of certain unfair provisions outside the class action arena, such as "filing and

administrative fees attached to arbitration that are so high as to make access to the forum impracticable.”⁴⁷ Thus, *Italian Colors* simply reaffirmed that the Supreme Court viewed class procedures as incompatible with arbitration. It followed *Concepcion*’s view of FAA preemption, but did not change or expand it.⁴⁸

C. Conclusion

Although *Concepcion* and *Italian Colors* have seemed like dramatic opinions because of their impact on class actions, their reach outside of the class action context may be narrower than first predicted. While they undoubtedly have exerted a significant impact on class action waivers,⁴⁹ it is far from clear that they will have, or should have, an effect on other fact-specific unconscionability challenges to arbitration clauses. The next section attempts to distill critical principles of *Concepcion* to explain why it was not intended to have a broad effect beyond class actions.

The reach of *Concepcion* and *Italian Colors* outside of the class action context may be narrower than first predicted.

II. Takeaways from *Concepcion*

There are several takeaway principles from *Concepcion* that underscore why it does not mandate preemption of all unconscionability and public policy challenges to arbitration clauses, and why there remain plenty of areas of state law that will still apply to arbitration clauses. Boiled down, *Concepcion* comprises two essential principles: (1) the FAA does not preempt state unconscionability or public policy defenses as a general matter; and (2) the FAA only preempts such defenses when they impose rules that are incompatible with fundamental attributes of arbitration or that are aimed at destroying arbitration. Because most fact-specific unconscionability challenges do not run afoul of those criteria, they ordinarily will not be preempted.

A. Unconscionability Remains a Viable Means of Challenging Arbitration Clauses

Although some commentators initially predicted that *Concepcion* would lead to the preemption of all unconscionability or public policy challenges to arbitration clauses,⁵⁰ it is clear that the Court did not intend such a broad reading. First, the Court expressly identified unconscionability as one type of generally applicable doctrine of state contract law that can be used to invalidate an arbitration clause.⁵¹ Second, soon after *Concepcion*, the Supreme Court decided *Marmet Health Care Center, Inc. v. Brown*, in which it held that the FAA preempted West Virginia’s categorical rule against enforcement of arbitration clauses to claims against nursing homes and remanded the case for determination of whether the arbitration clause was “unenforceable under state common law principles that are not specific to arbitration and not pre-empted by the FAA.”⁵² If unconscionability or public policy defenses were necessarily inconsistent with arbitration, that language would have been unnecessary.

The Court expressly identified unconscionability as one type of generally applicable doctrine of state contract law that can be used to invalidate an arbitration clause.

Third, if *Concepcion* held that all public policy challenges were preempted, there would have been no need for Justice Thomas to write a concurrence stating that, in contrast to the majority, he would read the FAA to prohibit virtually all public policy challenges to the validity of arbitration agreements. Similarly, if the majority

intended such a broad reading, it likely would have focused its opinion on public policy defenses in general instead of singling out the specific implications and drawbacks of classwide arbitration procedures for such extended discussion.

Consequently, as long as a state’s “doctrine of unconscionability applies to arbitration and to other agreements according to the same basic criteria,” unconscionability will not disfavor arbitration and will not be preempted.⁵³ As a general matter, unconscionability does not interfere the FAA’s goal of procedural informality because unconscionability doctrine “determines enforceability of an agreement not by whether it includes procedures that are inconsistent with arbitration’s formality, but by examining the one-sidedness of its provisions and the circumstances in which it was formed.”⁵⁴ Thus, as explained below, many courts have continued to address unconscionability challenges to arbitration clauses after both *Concepcion* and *Italian Colors*.⁵⁵

B. Particular Emphasis on Class Procedures as Incompatible with Fundamental Attributes of Arbitration

It also appears, from reading *Concepcion* together with *Italian Colors* and the Court’s other recent arbitration opinions, that *Concepcion* was primarily about classwide arbitration, not about unconscionability more generally. As mentioned above, the Court has shown an outsized concern about classwide arbitration in particular and the procedures it entails. It has addressed classwide arbitration four times since 2010, which is virtually unprecedented when compared to other procedural devices used in arbitration.

This contrasts sharply with the way the Court has addressed other procedural rules relating to arbitration. In fact, it has typically refused to address questions regarding the appropriate procedural devices for arbitration, and has often concluded that such questions are best decided by the arbitrator.⁵⁶ This reinforces the point that that most questions of arbitration procedure, unlike class processes, are consistent with the

fundamental attributes of arbitration. If such procedures were incompatible with arbitration, it would be meaningless to say that arbitrators should address them because there would be nothing to address.

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Moreover, the Court’s main concern in its classwide arbitration cases has always been the arbitrator’s authority to bind absent class members, which it discussed in several

places in *Concepcion*, and how the complexities of class certification questions would hinder the parties’ choice of arbitrators, issues which the Court has also raised in other decisions.⁵⁷ These issues are unique to the class action device and do not arise with other types of challenges to arbitration clauses. The Court’s repeated emphasis on the specific problems attendant to classwide arbitration procedures, and particularly the problem of binding absent class members, suggests that classwide arbitration is sui generis. As explained in further detail in Part III, *infra*, most other provisions in arbitration agreements that parties have challenged, such as shortened statutes of limitations, damages restrictions, biased arbitrator selection mechanisms, fee-shifting provisions, discovery restrictions, and confidentiality restrictions, do not implicate fundamental attributes of arbitration.

C. Fact-Specific Applications of Unconscionability are Less Likely to Risk Preemption Than a Categorical Rule Declaring Particular Types of Provisions Unconscionable

A third takeaway is that there is a difference between categorical rules declaring certain provisions unconscionable and fact-specific applications of unconscionability to a particular provision as applied to a particular set of circumstances. From the Court's perspective, drawing a distinction between categorical rules and individualized assessment makes sense because categorical rules can be seen as disfavoring arbitration while fact-specific applications are not. For example, a rule that all limitations on discovery render an arbitration clause unconscionable without regard to whether the limitations in fact hindered the party in the case from obtaining necessary evidence would be a rule that disfavors arbitration. It indicates that arbitration itself is unfair because it limits discovery. As a result, the rule would apply traditional unconscionability principles to arbitration in a different manner than to other contracts by invalidating the discovery limitation even where the limitation did not create an unconscionable result. By contrast, a specific finding in a specific case that a discovery limitation was unconscionable because it was so onerous that it made it impossible for the plaintiff to pursue a claim would be a valid application of unconscionability. It would treat arbitration clauses just like other contracts and thus would not be preempted.

Nothing about that latter, case-specific rule disfavors arbitration. Rather, it reinforces the point that arbitration clauses can limit discovery, though that limitation may become unenforceable in a particular case where the plaintiff meets his or her burden of demonstrating unconscionability. Such a reading best harmonizes *Concepcion*'s competing concerns about preserving generally-applicable state law while also stopping states from discriminating against arbitration.⁵⁸ If even fact-specific applications of unconscionability were preempted (outside of the class action context where even fact-specific applications of unconscionability may be incompatible with fundamental attributes of arbitration), then the Court's emphasis that unconscionability remains a valid ground for invalidating arbitration clauses would be an empty letter.⁵⁹

The examples the *Concepcion* Court provided of invalid restrictions on arbitration reinforce this distinction because each example involved a categorical rule. Those examples included rules declaring arbitration clauses unenforceable if they failed to provide for judicially monitored discovery, failed to require compliance with Federal Rules of Evidence, or failed to allow for disposition by a jury, regardless of how those rules impacted a particular party in a particular case.⁶⁰ The Court noted that even though all could be general contract principles, they would disfavor and have a "disproportionate impact" on arbitration agreements.⁶¹ Each of those examples involves a categorical rule that foregoes consideration of whether such limitations, when applied to a particular case, would impede a party's access to arbitration and thus would be unconscionable. Accordingly, such categorical rules would have an overbroad effect by invalidating arbitration agreements that were not actually unconscionable. In this way, such rules disfavor arbitration and are preempted.

Moreover, the Court seemed to treat the class action waiver at issue in *Concepcion* the same way. It noted that while California's *Discover Bank* rule was ostensibly limited to particular circumstances, the conditions of the rule were so broad and malleable that the rule would functionally apply to almost any class action, even where there was evidence that the plaintiff could individually litigate his or her claim. The Court concluded that it was far from clear that the plaintiff lacked incentive to individually litigate, noting that because the agreement guaranteed that AT&T would pay claimants a minimum of \$7,500 and twice their attorneys' fees if they received an arbitration award greater than AT&T's last settlement offer, both the district court and the

Ninth Circuit concluded that aggrieved plaintiffs had incentive to seek individual relief.⁶² In other words, the *Discover Bank* rule was overbroad and applied even in situations where the facts did not satisfy California's general unconscionability principles. In that way, the rule treated arbitration clauses differently from other contracts and thus impermissibly disfavored arbitration.

In one of the most thorough examinations of *Concepcion*, the California Supreme Court relied on this distinction in holding that the FAA does not preempt generally-applicable unconscionability principles when applied in a fact-specific manner so as not to disfavor arbitration. It determined that, while the FAA preempted California's rule that any contract, arbitration or otherwise, prohibiting a wage and hour claimant from pursuing an administrative remedy known as a "Berman hearing" was unconscionable, the FAA did not

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preempt California's unconscionability doctrine generally and did not preclude a court from holding that a Berman waiver is unconscionable in a case where it prevented a claimant from seeking redress.⁶³ The court explained that the rule "categorically prohibiting waiver of a Berman hearing" would delay the onset of arbitration and interfere with the goal of encouraging streamlined proceedings.⁶⁴ However, the court then went on to hold that if the Berman waiver prevented the plaintiff from vindicating his rights, the agreement could

be unconscionable as a matter of California law and would not be preempted.⁶⁵ It explained that arbitration agreements can be unconscionable in ways that have nothing to do with the fundamental attributes of arbitration.⁶⁶ In that case, the Court construed the Berman hearing as consistent with arbitration's fundamental attributes because it was designed to promote speedy resolution of disputes before an expert adjudicator.⁶⁷ Other courts have agreed that *Concepcion* was concerned with categorical rules that had an overbroad reach, not with fact-specific applications of generally applicable unconscionability principles.⁶⁸

This is not to say that a rule is necessarily preempted simply because it has a categorical impact. Rather, the concern is that categorical rules risk overbreadth—i.e. that they would invalidate arbitration clauses even when those clauses do not satisfy the traditional test for substantive unconscionability. As particular arbitration provisions become increasingly restrictive or unfair, a categorical rule precluding their enforcement is less likely to be overbroad and to be preempted. One could imagine an arbitration clause that reduced the statute of limitations of bringing a claim from one year to one day.

Such a clause would be unconscionable in virtually every case, and it is doubtful that anyone would suggest that it would be preempted simply because a court might say that a one-day statute of limitations is always unconscionable. There is nothing about a rule barring one-day statutes of limitations that disfavors arbitration.

The sensible reading of *Concepcion* is that unconscionability survives when it is applied to arbitration in the same way that it is applied to other contracts.

In short, the sensible reading of *Concepcion* is that unconscionability survives when it is applied to arbitration in the same way that it is applied to other contracts. That ensures that unconscionability does not disfavor arbitration, and also ensures that the doctrine is not eliminated altogether.

D. A Disproportionate Impact on Arbitration Agreements Will Not, Standing Alone, Give Rise to FAA Preemption

Some uncertainty has developed regarding whether the FAA preempts any rule that has a “disproportionate impact”⁶⁹ on arbitration agreements. However, courts interpreting *Concepcion* have taken the sensible view that a disproportionate effect, standing alone, is not enough to trigger FAA preemption. Rather, courts have explained that the rule must have a disproportionate effect in a way that disfavors arbitration or that interferes with arbitration’s fundamental attributes.

The uncertainty stems from the *Concepcion* Court’s statement that categorical rules requiring litigation-style discovery and application of the federal rules of evidence to all arbitration proceedings would be preempted. The Court noted that such rules are generally applicable, but have “a disproportionate impact on arbitration agreements.”⁷⁰

Some have suggested that this should mean that the FAA preempts any rule that has a “disproportionate impact” on arbitration. However, that is an awkward and untenable reading of the decision. First, remember that the Court’s examples of preempted rules were limited to categorically overbroad rules that went beyond traditional unconscionability and therefore treated arbitration clauses differently from other contracts, rather than all rules that fell disproportionately on arbitration clauses.⁷¹

Second, that reading does not withstand close scrutiny. There are various kinds of rules that would have a disproportionate or even exclusive effect on arbitration provisions, but that are clearly not preempted. Take a challenge to an arbitration provision that allows the drafting party to choose all the arbitrators and gives the opposing party no input into arbitrator selection, or any other arbitrator selection provision that gives rise to a substantial risk of arbitrator bias. A rule invalidating such provisions as unconscionable will necessarily have a disproportionate effect on arbitration clauses because the rule involves arbitrator selection. However, such a rule does not conflict with the FAA.⁷² Rather, it is fully consistent with the FAA, which identifies “evident partiality or corruption in the arbitrators” as a ground for vacating an arbitration award.⁷³ Similarly, a rule that an arbitration clause is unconscionable where the clause required the parties to split the costs of the arbitrator when doing so makes arbitration cost-prohibitive is one that would necessarily have disproportionate effect on arbitration clauses.⁷⁴ Virtually any provision that seeks to contract around litigation rules and procedures likely will have a disproportionate effect on arbitration, because such provisions only come into play when parties bypass the litigation system and opt for some form of private dispute resolution.

Consequently, most courts have refused to find that a disproportionate impact on arbitration clauses, standing alone, will automatically give rise to FAA preemption.

The California Supreme Court recently held that “a facially neutral state-law rule is not preempted simply because its evenhanded application ‘would have a disproportionate impact on arbitration agreements.’”⁷⁵ The court held that a state-law rule is preempted only when it “interferes with fundamental attributes of arbitration.”⁷⁶ The Washington Supreme Court recently rejected a “broad reading” of *Concepcion* under which general unconscionability principles would be preempted “if they interfere with the fundamental attributes of arbitration such as its informality and speed.”⁷⁷ It adopted the “narrower view” that generally applicable

Most courts have refused to find that a disproportionate impact on arbitration clauses, standing alone, will automatically give rise to FAA preemption.

unconscionability principles are not preempted and that what the FAA instead preempts are “state rules *specific to arbitration* that interfere with the purposes of the FAA.”⁷⁸

Similarly, the Fourth Circuit recently affirmed a finding that a defendant’s arbitration clause was unenforceable where it required the plaintiffs to arbitrate their claims but placed no reciprocal obligation on the defendant—meaning that the defendant was free to bring any affirmative claims it wanted in court.⁷⁹ The court rested its decision on a Maryland contract rule requiring that an arbitration clause itself be supported by consideration, regardless of whether the contract as a whole has consideration.⁸⁰ The court noted that, while the Maryland rule “does single out an arbitration provision in a larger contract,” it was simply a specific application of the general doctrine of consideration and thus was not preempted. It also held that a rule requiring reciprocal arbitration obligations does not disfavor arbitration but in fact encourages arbitration by binding both parties to arbitrate.⁸¹ Thus, a specific application of a general unconscionability doctrine is not preempted simply because it affects arbitration.

Finally, the Ninth Circuit has come to a similar understanding of *Concepcion*. In *Mortensen v. Bresnan Communications, LLC*, the Ninth Circuit found that the FAA preempted a Montana rule declaring it against public policy for a contract to include a waiver of fundamental rights where the waiver is not within the party’s reasonable expectations.⁸² In finding the rule preempted, the court discussed how the rule disproportionately affects arbitration clauses.⁸³ However, the court subsequently clarified in a later decision that *Concepcion* “cannot be read to immunize all arbitration agreements from invalidation, no matter how unconscionable they may be, so long as they invoke the shield of arbitration.”⁸⁴ Rather, the rule must be “*unfavorable to arbitration*” to be preempted.⁸⁵ Thus, the court found that a rule protecting against biased arbitrator selection had a disproportionate impact on arbitration but was not preempted because the rule did not disfavor arbitration; it merely required that the arbitration process be fair.⁸⁶

This reasoning underscores that a disproportionate impact is not determinative. What the preemption question boils down to is whether the rule is incompatible with fundamental attributes of arbitration or singles out arbitration for disfavor. While a disproportionate impact may be relevant to that assessment in certain circumstances, it is not a justification for preemption on its own.

Moreover, there may be several other reasons, which courts have not specifically discussed, why a disproportionate effect, standing alone, should not be a basis for invoking preemption. First, the language of “disproportionate impact” is adopted from anti-discrimination law, but under anti-discrimination law, disparate impact is the beginning of the story, not the end of it. In the employment context, a disparate impact will be found non-discriminatory if the employer has a legitimate justification for the practice that gives rise to it.⁸⁷ In other words, only unjustified disparate impact is unlawful. Analogizing to arbitration means that a rule that disproportionately impacts arbitration clauses should not automatically be preempted. As other scholars have persuasively argued, a rule should be preserved from preemption unless there is no valid justification for the rule or the rule is just an attempt to intentionally discriminate against arbitration.⁸⁸

Finally, a disproportionate impact framework would have the odd result of placing the scope of preemption into the hands of drafting parties. If more parties put a particular provision in an arbitration clause, any rule finding that provision unconscionable would be increasingly likely to have a disproportionate impact on arbitration. Similarly, the expansion of the use of arbitration would make arbitration clauses more common and

would give rise to disproportionate impact arguments when those clauses are challenged. In essence such a rule would tie preemption to what drafting parties choose to include or not include in their arbitration clauses. This seems to run directly counter to the Court’s focus on the fundamental attributes of arbitration—that is, those features that are essential to arbitration regardless of what the parties intend. This further undermines the notion that disproportionate impact, standing alone, gives rise to FAA preemption.

At bottom, the fairest reading of *Concepcion* is, as courts have found, that preemption occurs only when a rule specifically disfavors arbitration or conflicts with arbitration’s fundamental attributes.

III. Judicial Application of *Concepcion*

What the principles described above indicate is that *Concepcion* should not be read as broadly preemptive of all or even most unconscionability defenses. Consequently, it is important to be aware of the danger of reading *Concepcion* at a level of generality so high that it would preempt almost any challenge to an arbitration clause. *Concepcion* identifies some of the perceived benefits of arbitration as including “lower costs, greater efficiency, and speed,” as well as “informality,” and “the ability to choose expert adjudicators to resolve specialized disputes.”⁸⁹ When read at a high enough level of abstraction, almost any restraint on what terms parties may place in an arbitration agreement can be seen as conflicting with those principles.⁹⁰ One could say, for example, that rules that state that shortening a statute of limitations to two days is unconscionable arguably conflict with the goal of speedy dispute resolution; that rules requiring mutuality of obligation—i.e. that both sides bind themselves to arbitration—arguably demand a level of formality by restricting a party’s choices; that rules finding particular discovery limitations unconscionable could be seen as conflicting with the goal of lower costs or decreased formality; and that rules against provisions insulating parties from punitive damages or other damages may be seen as conflicting with the goal of lower costs. On some level, any restraint increases formality, because it places a procedural restriction on the party’s ability to set whatever rules it likes for arbitration, no matter how one-sided they may be.

Concepcion should not be read as broadly preemptive of all or even most unconscionability defenses.

If increased formality were enough to give rise to preemption, then almost every challenge is preempted. And if so, there is nothing that would stop a drafting party from writing an arbitration clause in a way that fully insulates itself from all relief. Take the example of a provision shortening the statute of limitations. If the FAA preempted any restriction on a party’s ability to shorten a statute of limitations, on the ground that such a restriction interfered with the goal of speedier dispute resolution, then nothing would prevent parties from reducing statutes of limitations from three years to three days, or even one day, or even one hour. As one court noted, even after *Concepcion*, “[f]ederal law favoring arbitration is not a license to tilt the arbitration process in favor of the party with more bargaining power.”⁹¹

As discussed below, many courts, either explicitly or implicitly, have recognized this danger and have not read *Concepcion* in such an expansive manner. This section discusses some of the specific types of provisions that, since *Concepcion*, courts have invalidated as unconscionable and have found are not preempted by the FAA.

A. Mutuality

Many courts have found that provisions requiring one side to arbitrate disputes but permitting the other party to pursue judicial remedies in court can be struck down as unconscionable or against public policy and are not preempted.⁹² There is nothing fundamental to arbitration about a provision that requires one side to forego its right to a judicial action and pursue arbitration, but permits the other party to go to court. If anything, as the Fourth Circuit found, requiring mutuality encourages arbitration by giving both sides a reason to utilize it.⁹³

Provisions requiring one side to arbitrate disputes but permitting the other party to pursue judicial remedies in court can be struck down.

B. Damages Caps

Many courts have found that provisions precluding an arbitrator from awarding punitive damages or damages specifically authorized by statute can be struck down as unconscionable or against public policy and are not preempted.⁹⁴ Although one might assert that damages caps help reduce costs and therefore are fundamental to arbitration, that is not the case. First, the arbitration goal of reducing costs refers to procedural costs, not the ultimate remedy that the arbitrator might award. Supporters of arbitration assert that arbitration is more cost-effective and efficient than litigation in the manner that proceedings are conducted, and the *Concepcion* Court's discussion of how the class certification process would undermine the goal of a procedurally cost-effective arbitration process reinforces that point.⁹⁵

Provisions precluding an arbitrator from awarding punitive damages or damages specifically authorized by statute can be struck down.

Second, the Supreme Court has emphasized that the default presumption is that arbitrators are fully capable of addressing the same claims, and awarding the same relief, as courts. One of the basic notions of arbitration is that it does not require a party to forego any claims or remedies but simply shifts the resolution of those claims

into a different forum.⁹⁶ In *Mastrobuono v. Shearson Lehman Hutton*, the Court explained that a New York rule allowing courts to award punitive damages but *barring* arbitrators from doing so would be preempted by the FAA.⁹⁷ In that case, the Court took pains to construe an arbitration clause with a New York choice-of-law provision (thus incorporating the above rule) to also incorporate otherwise applicable federal law, which it construed as authorizing an award of punitive damages.⁹⁸ In other words, the arbitrator's ability to award the same relief as a judge is part of the basic background fabric of arbitration. This does not mean that a rule limiting punitive damages would be preempted by the FAA in every case, but it does show that limiting punitive or other damages is in no way essential to arbitration.

C. Statute of Limitations

Courts have found that provisions greatly reducing the statute of limitations for bringing a claim can be struck down as unconscionable or against public policy and are not preempted.⁹⁹ There is no reason to think that a shortened statute of limitations is a fundamental feature of arbitration, especially where the limitations period is so short to make it virtually impossible for a plaintiff to file a timely claim.

Provisions greatly reducing the statute of limitations for bringing a claim can be struck down.

D. “Loser Pays” Rules

Many courts have found that provisions requiring the losing party to pay the other side’s attorneys’ fees and costs, or that shift fees in ways inconsistent with relevant statutes, can be struck down as unconscionable or against public policy and are not preempted.¹⁰⁰ Such provisions can be unconscionable because placing the risk of substantial attorneys’ fees and costs on the financially weaker party creates a significant disincentive for that party to pursue a claim. Courts have noted that provisions bypassing statutory fee- and cost-shifting provisions and imposing loser-pays rules instead seem specifically designed “to impose upon the employee a potentially prohibitive obstacle to having her claim heard.”¹⁰¹

Provisions requiring the losing party to pay the other side’s attorneys’ fees and costs, or that shift fees in ways inconsistent with relevant statutes, can be struck down.

Rules finding such provisions unconscionable in appropriate circumstances do not undermine the goal of reducing costs.¹⁰² Instead, they merely shift the costs and fees of arbitration from one party to the other. Thus, application of general contract principles to invalidate such provisions does not interfere with the FAA.

E. Fees and Costs

Many courts have found that provisions that make arbitration prohibitively expensive so as to deny access to the arbitral forum altogether can be struck down as unconscionable or against public policy and are not preempted. These provisions can take any number of forms. They may require the parties to split the costs of

Provisions that make arbitration prohibitively expensive so as to deny access to the arbitral forum altogether can be struck down.

the arbitrators’ fees in cases where those fees dwarf the amount at stake in the dispute or substantially exceed the cost of judicial proceedings.¹⁰³ Or they may require a party to travel to a venue so far away that the costs of getting to the arbitral venue far exceed the damages at stake.¹⁰⁴

These rules do not conflict with arbitration’s fundamental values. If anything, applying unconscionability or public policy doctrines to rein in such clauses when they deny an individual the ability to seek relief reinforces the goal of reducing costs and of providing an affordable alternative to litigation.¹⁰⁵ In *Italian Colors*, the Supreme Court explicitly noted that a provision requiring the plaintiff to pay costs and fees so high as to make the arbitral forum inaccessible could still be a valid ground for invalidating an arbitration clause.¹⁰⁶

F. Confidentiality

Although not every confidentiality provision in an arbitration clause is necessarily unconscionable, courts have found that provisions requiring parties to keep information confidential can be struck down as unconscionable or against public policy when they give one side an extremely unfair advantage, and are not preempted.¹⁰⁷ Confidentiality agreements threaten to tilt the playing field by giving repeat players an information advantage and by preventing the other party from obtaining information that would level it.¹⁰⁸

Although many may instinctively associate arbitration with confidentiality, forced secrecy is not a fundamental attribute of arbitration. Significantly, the *Concepcion* Court identified confidentiality not as an

essential feature of arbitration, but as one of the many optional features that parties may or may not choose to include in their arbitration provisions depending on the nature of the relationship of the parties and the type of dispute involved. The Court noted that, under the FAA, parties may, if they wish, specify “that the decisionmaker be a specialist in the relevant field, or that proceedings be kept confidential to protect trade secrets.”¹⁰⁹ Just as arbitrator specialization is an option, but not a fundamental attribute of arbitration, so too is confidentiality.

Provisions requiring parties to keep information confidential can be struck down when they give one side an extremely unfair advantage.

The FAA’s text and structure appears to support the conclusion that confidentiality is not a necessary or fundamental attribute of arbitration. The FAA appears to presume that arbitration materials could become public, even if the arbitration provision includes a forced confidentiality clause. The Act allows parties to go to court to seek to confirm or vacate an arbitration award, and requires parties to file certain documents when doing so.¹¹⁰ The information submitted in arbitration will likely be relevant to that determination, and thus will become a public record as part of the court proceeding, subject to any protective order that the trial court might impose.

Empirical evidence also supports this result.¹¹¹ One review found that arbitration communications are generally admissible in court and are not automatically privileged.¹¹² This stands in contrast to mediation, which is more protective of confidentiality. The Uniform Mediation Act, for example, creates an evidentiary privilege against disclosure of mediation communications.¹¹³ Thus, confidentiality is not an essential feature of arbitration.

G. Discovery Limitations

Not every provision limiting discovery in arbitration will be unconscionable. Parties are certainly entitled to agree to limit the amount of discovery that can be conducted.¹¹⁴ However, as courts have held, provisions

Provisions restricting discovery can be unconscionable, and not preempted, when they are so limiting that they preclude a party from pursuing relief.

restricting discovery can be unconscionable, and not preempted, when they are so limiting that they preclude a party from pursuing relief.¹¹⁵

Intuitively, one might think that arbitration is designed to be a speedier and more informal alternative to court, and thus discovery should be limited. Similarly, the *Concepcion* Court provided the hypothetical example of a rule requiring judicially monitored discovery in all disputes as an example of a generally-applicable rule that could be preempted by the FAA.¹¹⁶ However, as explained above, the Court’s hypothetical involved a categorical rule that would require extensive discovery in all cases, regardless of whether the lack of discovery prevented the plaintiff from raising a claim.

By contrast, a fact-specific application of unconscionability principles to discovery limitations that prevent a plaintiff from pursuing a claim does not interfere with any fundamental attribute of arbitration.¹¹⁷ Discovery is not inherently inconsistent with arbitration. Rather, the FAA itself contemplates that parties to an arbitration agreement would be permitted to conduct some fact gathering. Section 4 of the FAA, for example, requires a court to hold a jury trial when there is a dispute over whether an arbitration agreement has been validly

formed.¹¹⁸ Once the validity of the arbitration agreement is questioned, “[t]he FAA provides for discovery and a full trial in connection with a motion to compel arbitration.”¹¹⁹ Similarly, once the dispute gets to arbitration, the FAA grants the arbitrator power to develop evidence, including the power to subpoena witnesses and to require witnesses to bring “any book, record, document, or paper which may be deemed material as evidence in the case.”¹²⁰ Thus, the FAA itself indicates that arbitration does not necessarily mean that parties cannot conduct any discovery, or can only conduct limited discovery.

Second, the assumption that arbitration is synonymous with limited discovery is incorrect. Studies of contemporary arbitration provisions indicate that “proceedings under standard arbitration rules are likely to include prehearing motion practice and extensive discovery,” and that “[a]rbitration proceedings are now often preceded by extensive discovery, including depositions.”¹²¹ The fact that sophisticated parties in particular are increasingly choosing to include discovery as a component of their arbitration regimes reinforces that the point that limiting or prohibiting discovery is not a fundamental component of arbitration.

H. Arbitrator Selection

Many courts have found that provisions establishing biased or partial processes for arbitrator selection can be struck down as unconscionable or against public policy and are not preempted.¹²²

As explained above,¹²³ regulating against arbitrator bias does not interfere with the FAA. It is fully consistent with the FAA, which itself permits invalidation of an arbitration award on the ground of bias.¹²⁴

Most courts have refused to find that a disproportionate impact on arbitration clauses, standing alone, will automatically give rise to FAA preemption.

IV. What Is Fundamental To Arbitration?

Concepcion requires us to think about what it is that truly is “fundamental” to arbitration. The above discussion suggests that, perhaps with the exception of the absence of class proceedings, there is no particular procedure, rule, device, or structure that is an essential or necessary part of arbitration. Rather, society’s idealized notion of what arbitration looks like—speedy, informal, less costly—is more likely a myth that we have created for ourselves than a reflection of what actually takes place in arbitration or what Congress envisioned when enacting the FAA.¹²⁵

Arbitration is not a monolithic device.¹²⁶ It takes all shapes and sizes, and in many cases looks precisely the opposite of our mythologized view. Although we think of arbitration as informal, it is common for arbitration provisions to include “trial-like procedures for discovery,” and to incorporate judicial litigation rules including the federal rules of civil procedure.¹²⁷ Although we think of arbitration as cost-effective, it often ends up being as expensive or more expensive than litigation, especially when accounting for the fact that the parties must pay the cost of the arbitrators themselves.¹²⁸ Ironically, the limits on collective, consolidated or other multi-party proceedings that *Concepcion* authorized have resulted in, at least in business arbitrations, greater costs and inefficiencies by requiring multiple arbitrations rather than a single proceeding.¹²⁹ Although we think of arbitration as being speedy, the parties in many cases agree to procedures that make arbitration proceedings lengthier than court proceedings, and some arbitrators may be less inclined than judges to use procedures like summary judgment to resolve a case more quickly.¹³⁰ Different arbitration agreements embed different procedures. Some provisions require confidentiality, some do not. Some limit discovery, some do not. Some call for truncated proceedings, some do not.

There is no one procedural device that is necessary for arbitration. Rather, in the words of Professor Thomas Stipanowich, “[c]hoice is what sets arbitration apart from litigation.”¹³¹ And by “choice” I mean freely-negotiated, real choice exercised by both parties to the transaction. Unlike litigation, which sets unwaivable default rules of procedure, in arbitration the parties can themselves negotiate over the particular facets of the arbitration process that they think best fit their business relationship and the types of disputes that are likely to arise. Parties can design streamlined arbitration procedures aimed at reaching a quick result or more extensive proceedings if they want to preserve various procedural protections, at least within the confines set by the FAA itself.¹³²

Concepcion recognized the importance of true choice exercised by both parties. It described the FAA not necessarily as mandating speedy and cheap dispute resolution, but as “affording parties discretion in designing arbitration processes” in order to “allow for efficient streamlined proceedings tailored to the type of dispute.”¹³³

The characteristic that conflicts with the “fundamental attributes” of arbitration is the absence of choice—i.e. adhesion.

In other words, different types of disputes may demand different types of proceedings, and arbitration is about providing the parties with a real opportunity to negotiate and choose the procedures they feel align best with the dispute at issue.¹³⁴

If arbitration is about preserving meaningful choice, then the characteristic that conflicts with the “fundamental attributes” of arbitration is the absence of choice—i.e. adhesion. Adhesion

contracts, particularly in situations of unequal bargaining power, reflect an absence of real choice. The parties have little or no opportunity to collectively design the terms of their arbitration process. Rather, one side imposes an arbitration process on the other. This is not the “choice” that the FAA’s framers envisioned.

There is evidence that it is the adhesion regime of consumer and employment arbitration provisions that is at odds with arbitration’s fundamental nature. Several scholars and commentators have addressed how the FAA was intended for commercial transactions between sophisticated parties with roughly equal bargaining power rather than for take-it-or-leave-it business-to-consumer transactions.¹³⁵ Other scholars have addressed how the Act’s enactors envisioned that public policy defenses would be applied to arbitration clauses just as they are with other contracts.¹³⁶

Similarly, scholars who examine comparative arbitration practices have noted how the United States is “exceptional” and virtually unique in the way that it rigidly enforces forced arbitration agreements in adhesive contracts and limits state regulation of such agreements intended to protect the weaker party.¹³⁷ By contrast, “many other countries refuse or strictly limit arbitration enforcement in B2C [“business-to-consumer”] relationships due to concerns regarding power imbalances and public enforcement of consumer protections.”¹³⁸ Several European countries, as well as the European Union, place significant restrictions on the enforcement of arbitration clauses in business-to-consumer contracts because of the absence of bargaining power and the risk of unfairness.¹³⁹ The fact that the United States stands alone in its treatment of adhesive arbitration agreements reinforces that it is the absence of real choice that is seen as inconsistent with arbitration.

Under *Concepcion*, states should be free to regulate adhesive arbitration provisions without interfering with the FAA.

This is not to say that forced arbitration provisions contained in adhesive contracts are never enforceable. It simply means that, under *Concepcion*, states should be free to regulate adhesive arbitration provisions

without interfering with the FAA, perhaps with the exception of adhesive class action waivers.¹⁴⁰ The FAA bars states from regulating away the fundamental aspects of arbitration. Because the essence of arbitration is non-adhesion—true choice exercised by all parties to the transaction—adhesive contracts fall outside that sphere.¹⁴¹ Any regulation of adhesive contracts therefore does not interfere with the FAA.

CONCLUSION

Despite concern that the Supreme Court's recent decisions in *Concepcion* and *Italian Colors* dramatically transformed the scope and reach of FAA preemption, that has turned out not to be the case, and correctly so. While *Concepcion*'s focus on protecting arbitration's "fundamental attributes" from state regulation may exert a significant effect on class actions and on categorical rules disfavoring arbitration, it should have little effect on fact-specific applications of general contract doctrines like unconscionability to arbitration agreements which are so unfair as to prevent a party from pursuing his or her rights. Moreover, if anything, examination of arbitration's "fundamental attributes" reveals

Concepcion's focus on protecting arbitration's "fundamental attributes" should have little effect on fact-specific applications of general contract doctrines like unconscionability.

that the characteristic most inconsistent with arbitration is not any particular procedure or rule, but adhesive agreements that deny parties a voice in designing the terms and conditions of arbitration, which is the hallmark of private dispute resolution. *Concepcion* enables us to re-examine what is and is not fundamental to arbitration and, when fairly read, authorizes state courts and legislatures to regulate adhesive agreements in a way that preserves choice instead of taking it away.

Notes

¹ * Associate Professor of Law, Drexel University School of Law. Thanks to the Trustees of the Pound Institute for inviting me to present this paper, as well as to the other participants and the attendees of the Forum.

² *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 293 (2002) ("The FAA directs courts to place arbitration agreements on equal footing with other contracts . . ."); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404, n.12 (1967) ("[T]he purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so").

³ *See* 9 U.S.C. § 2 (making arbitration clauses enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract"). Typical contract defenses may include fraud, duress, unconscionability, lack of consideration and waiver. *See generally* E. ALLAN FARNSWORTH, *CONTRACTS* (4th ed. 2004).

⁴ *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (stating that courts "should apply ordinary state-law principles that govern the formation of contracts" when it comes to interpreting arbitration clauses).

⁵ *Arthur Andersen, L.L.P. v. Carlisle*, 556 U.S. 624, 632 (2009) (suggesting that a non-signatory can enforce an arbitration clause "if the relevant state contract law allows him" to do so).

⁶ *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1747 (2011) (stating that "[w]hen state law prohibits outright the arbitration of a particular type of claim," that rule is preempted by the FAA).

⁷ *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987).

⁸ 9 U.S.C. § 2.

⁹ *Concepcion*, 131 S. Ct. at 1746 (including unconscionability in a list of generally-applicable contract doctrines that can be applied to invalidate arbitration clauses).

¹⁰ 131 S. Ct. 1740 (2011).

¹¹ 133 S. Ct. 2304 (2013).

¹² 131 S. Ct. at 1748.

¹³ 133 S. Ct. at 2310-12.

¹⁴ See, e.g., Arpan A. Sura & Robert A. DeRise, *Conceptualizing Concepcion: The Continuing Viability of Arbitration Regulations*, 62 U. KAN. L. REV. 403 (2013); Stephen E. Friedman, *A Pro-Congress Approach to Arbitration and Unconscionability*, 106 NW. U. L. REV. COLLOQUY 53, 53-54 (2011) (“While *Concepcion* sanctions the continued theoretical applicability of unconscionability to arbitration provisions, it leaves very little room for actual application of the doctrine.”); see also David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1242-44 (2013) (describing how some judges have interpreted *Concepcion* as “spilling over” into other areas of unconscionability besides class action waivers).

¹⁵ See *infra* parts II and III.

¹⁶ 131 S. Ct. at 1750.

¹⁷ Other scholars have presented persuasive cases that *Concepcion* should not be interpreted as broadly preempting unconscionability or public policy defenses. See, e.g., Horton, *supra* note 13; Hiro N. Aragaki, *AT&T Mobility v. Concepcion and the Antidiscrimination Theory of FAA Preemption*, 4 Y.B. ON ARB. & MEDIATION 39 (2012) (asserting that *Concepcion* highlights how FAA preemption should be viewed through the lens of antidiscrimination theory and thus the FAA should only preempt rules that illegitimately discriminate against arbitration). One of the most compelling arguments comes from Professor David Horton, who argues that *Concepcion*’s focus on the FAA’s purposes and objectives shifts FAA preemption away from its traditional textual focus on § 2’s savings clause and toward a purposivist analysis. Horton, *supra* note 13, at 1223-25. Based on his detailed analysis of the FAA’s purposes, Horton argues that the FAA only preempts rules that “unjustifiably disfavor arbitration,” i.e. that regulate arbitration for no reason other than inherent suspicion of arbitration. *Id.* at 1255. Because most unconscionability and public policy defenses rest on sound and justified considerations of fairness and do not reflect unjustified suspicion of arbitration, they do not unjustifiably affect arbitration and are not preempted. *Id.* at 1265-72.

¹⁸ See, e.g., *Hines v. Davidowitz*, 312 U.S. 51, 67 (1941). There also is a rarer form of preemption known as “field” preemption. *Id.*

¹⁹ *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

²⁰ *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005) (“In areas of traditional state regulation, we assume that a federal statute has not supplanted state law unless Congress has made such an intention clear and manifest.” (internal quotation omitted)).

²¹ See, e.g., *General Motors Corp. v. Abrams*, 897 F.2d 34, 41-42 (2d Cir 1990) (“Because consumer protection law is a field traditionally regulated by the states, compelling evidence of an intention to preempt is required in this area.”).

²² See, e.g., *Marmet Health Care Center, Inc. v. Brown*, 132 S. Ct. 1201 (2012) (holding that the FAA preempted West Virginia’s rule prohibiting enforcement of arbitration clauses in tort and wrongful death claims against nursing homes); *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (holding that the FAA preempted a Montana law requiring arbitration clauses, but not other contractual provisions to be underlined and to appear on the first page of the contract).

²³ *Concepcion*, 131 S. Ct. at 1744.

²⁴ *Id.* at 1744-45.

²⁵ *Id.*

²⁶ *Id.* at 1745.

²⁷ 113 P.3d 1100 (Cal. 2005).

²⁸ *Concepcion*, 131 S. Ct. at 1745.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 1746.

³² *Id.* at 1747.

³³ *Id.* at 1748.

³⁴ *Id.*

³⁵ *Id.* at 1749; see also *id.* at 1748 (describing the FAA’s purpose as “ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings”).

³⁶ *Id.* at 1749 (“efficient, streamlined proceedings”); *id.* at 1750-51 (referring to procedural formality, having the ability to choose arbitrators with subject-matter expertise, informality, and speediness).

³⁷ *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *Oxford Health Plans, LLC v. Sutter*, 133 S. Ct. 2064 (2013) (holding that the trial court did not err in confirming arbitrator’s decision to allow classwide arbitration); *id.* at 2071-72 (Alito, J., concurring) (expressing discomfort with classwide arbitration procedures); *Concepcion*, 131 S. Ct. 1740; *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (holding that arbitrators exceeded their authority in ruling that the parties’ arbitration agreement permitted classwide resolution).

³⁸ See e.g., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003) (holding that whether arbitration clause authorized classwide arbitration was a question for the arbitrator rather than for the court); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002) (holding that procedural questions about the structure of arbitration generally are questions for the arbitrator to decide in the first instance, while “gateway” questions pertaining to the arbitrability of the dispute are presumptively for the court to decide in the first instance).

³⁹ *Concepcion*, 131 S. Ct. at 1750; see also *Sutter*, 133 S. Ct. at 2071-72 (Alito, J., concurring) (expressing discomfort with classwide arbitration procedures because of the uncertainty over whether it could bind absent parties)

⁴⁰ *Concepcion*, 131 S. Ct. at 1750-52; accord *Stolt-Nielsen*, 559 U.S. at 685-87 (expressing similar concerns about how class procedures may cause “fundamental changes” to the nature of arbitration).

⁴¹ *Concepcion*, 131 S. Ct. at 1753 (Thomas, J., concurring)

- ⁴² *Id.* at 1753-1756.
- ⁴³ *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2308 (2013).
- ⁴⁴ *Id.* at 2312 (holding that “[t]he FAA does not sanction such a judicially created superstructure” as would arise from classwide arbitration).
- ⁴⁵ *Id.* at 2310.
- ⁴⁶ *Id.* at 2312.
- ⁴⁷ *Id.* at 2310-11 (citing *Green Tree Fin. Corp.—Ala. v. Randolph*, 531 U.S. 79, 90 (2000)).
- ⁴⁸ *See, e.g., Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184, 208-11 (Cal. 2013) (explaining that *Italian Colors* does not change the analysis of FAA preemption or expand the holding of *Concepcion*), *cert. denied* 2014 WL 199531 (U.S. June 9, 2014)..
- ⁴⁹ *See, e.g., PUBLIC CITIZEN, Cases that Would Have Been: Three Years after AT&T Mobility v. Concepcion, Claims of Corporate Wrongdoing Continue to Pile Up* at 3-4 (April 2014), available at <http://www.citizen.org/documents/concepcion-third-anniversary-corporate-wrongdoing-forced-arbitration-report.pdf> (identifying 140 class actions that have been stopped from going forward because of *Concepcion* and *Italian Colors*).
- ⁵⁰ *See supra* note 13 and accompanying text.
- ⁵¹ 131 S. Ct. at 1746 (stating that the savings clause in § 2 of the FAA “permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress or unconscionability,’ but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” (quoting *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996))).
- ⁵² 132 S. Ct. 1201, 1203-04 (2012).
- ⁵³ *In re Checking Account Overdraft Litig.*, 685 F.3d 1269, 1277 (11th Cir. 2012); *accord Kilgore v. Key Bank Nat’l Ass’n*, 673 F.3d 947, 963 (9th Cir. 2012) (stating that “*Concepcion* did not overthrow the common law contract defense of unconscionability” but instead “reaffirmed” it).
- ⁵⁴ *In re Checking Account Overdraft Litig.*, 685 F.3d 1269, 1278 (11th Cir. 2012)
- ⁵⁵ *See* Part III, *infra*.
- ⁵⁶ *See supra* note 37 and accompanying text.
- ⁵⁷ *See Concepcion*, 131 S. Ct. at 1750-52; *accord Italian Colors*, 133 S. Ct. at 2312; *Sutter*, 133 S. Ct. at 2071-72 (Alito, J., concurring); *Stolt-Nielsen*, 559 U.S. at 685-87.
- ⁵⁸ *See, e.g., Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 492 (Mo. 2012) (holding that “*Concepcion* permits state courts to apply state law defenses to the formation of the particular contract at issue on a case-by-case basis” and concluding that those defenses include generally applicable unconscionability principles); *Schnuerle v. Insight Communications, Co.*, 376 S.W.3d 561, 580 (Ky. 2012) (Schroder, J., concurring in part and dissenting in part) (“The Supreme Court concluded that the *Discover Bank* rule ‘interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.’ *Concepcion*, 131 S. Ct. at 1748. Such interference is not present when, as here, a particular arbitration agreement is unconscionable under the unique facts of that particular case.”).
- ⁵⁹ *See, e.g., Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 490-91 (Mo. 2012) (explaining that if the FAA preempted all unconscionability defenses, then the Court’s extended discussion of unconscionability as a viable ground for invalidating arbitration clauses would be superfluous).
- ⁶⁰ *Concepcion*, 131 S. Ct. at 1747.
- ⁶¹ *Id.*
- ⁶² *Id.* at 1753.
- ⁶³ *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013), *cert. denied* 2014 WL 199531 (U.S. June 9, 2014).
- ⁶⁴ *Id.* at 199.
- ⁶⁵ *Id.* at 200-08.
- ⁶⁶ *Id.* at 201-02 (discussing examples such as a provision requiring a \$50,000 amount-in-controversy threshold for receiving a right to appeal an arbitration award, provisions limiting damages, allowing only the drafting party to recover attorneys’ fees, or provision imposing prohibitively expensive costs, as ones that do not affect fundamental attributes of arbitration); *see also Noohi v. Toll Bros, Inc.* 708 F.3d 599, 612-13 (4th Cir. 2013) (holding that a rule requiring that an arbitration agreement be supported by independent consideration, irrespective of consideration in the rest of the contract, does not undermine arbitration or treat it differently from other contracts).
- ⁶⁷ *Moreno*, 311 P.3d at 205, (stating that “the Berman statutes promote the very objectives of ‘informality,’ ‘lower costs,’ ‘greater efficiency and speed,’ and use of ‘expert adjudicators’ that the high Court has deemed ‘fundamental attributes of arbitration.’” (quoting *Concepcion*, 131 S. Ct. at 1748, 1751)).
- ⁶⁸ *Gandee v. LDL Freedom Enterp., Inc.*, 293 P.3d 1197, 1203 (Wash. 2013) (“When *Discover Bank* was applied in *Concepcion*, the rule became, in essence, an overbroad rule invalidating an arbitration clause that might otherwise be conscionable under California law. As our above analysis shows, the arbitration clause at issue here contained numerous unconscionable provisions based on the specific facts at issue in the current case.”); *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 489-92 (Mo. 2012) (stating that *Concepcion* establishes that categorical rules which disfavor arbitration are preempted but that factually-specific applications of Missouri’s unconscionability doctrine are not preempted). *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 502 (2012) (distinguishing the “categorical” *Discover Bank* rule from fact-specific unconscionability defenses in holding that arbitration clause which unreasonably limited the statute of limitations and failed to impose reciprocal obligations on the parties was unconscionable and not preempted by *Concepcion*); *Schnuerle v. Insight Communications, Co.*, 376 S.W.3d 561, 580 (Ky. 2012) (Schroder, J., concurring in part and dissenting in part) (“The Supreme Court concluded that the *Discover Bank* rule ‘interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.’ *Concepcion*, 131 S. Ct. at 1748. Such interference is not present when, as here, a particular arbitration agreement is unconscionable under the unique facts of that particular case.”).
- ⁶⁹ *Concepcion*, 131 S. Ct. at 1747.

⁷⁰ 131 S. Ct. at 1747.

⁷¹ *Id.*

⁷² *Chavarria v. Ralph's Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013) (noting that a rule ensuring fairness in arbitrator selection will necessarily disproportionately affect arbitration “because the term is arbitration specific” but holding that it is not preempted because it does not disfavor arbitration); *In re Checking Account Overdraft Litig.*, 685 F.3d 1269, 1277 n.10 (11th Cir. 2012) (holding that a South Carolina rule that requires arbitration to be “geared toward achieving an unbiased decision by a neutral decision-maker” to be fully consistent with and not preempted by the FAA because the FAA similarly seeks to ensure arbitrator impartiality).

⁷³ 9 U.S.C. § 10.

⁷⁴ *Sonic-Calabasas, Inc. v. Moreno*, 311 P.3d 184, 201 (Cal. 2013) (giving example of an arbitration clause imposing prohibitive costs as one that is unrelated to fundamental attributes of arbitration), *cert. denied* 2014 WL 199531 (U.S. June 9, 2014).

⁷⁵ *Id.* (citing *Concepcion* 131 S. Ct. at 1747).

⁷⁶ *Id.* at 201.

⁷⁷ *Brown v. MHN Gov. Servs., Inc.*, 306 P.3d 948, 953 (Wash. 2013).

⁷⁸ *Id.* (emphasis in original).

⁷⁹ *Noohi v. Toll Bros, Inc.* 708 F.3d 599 (4th Cir. 2013).

⁸⁰ *Id.* at 606-07.

⁸¹ *Id.* at 612-13; *accord Figueroa v. THI of N.M. at Casa Arena Blanca, LLC*, 306 P.3d 480, 484-87 (N.M. Ct. App. 2012) (holding non-mutual arbitration clause unconscionable and not preempted by the FAA because the court was applying New Mexico’s general contract law of unconscionability, even if the particular manner in which it applied that doctrine pertained to an arbitration clause);

⁸² 722 F.3d 1151 (9th Cir. 2013).

⁸³ *Id.* at 1161. This does not mean that the FAA preempts every state-law doctrine requiring a knowing, voluntary and intelligent waiver of fundamental rights. For example, many states have a constitutional right to a jury trial that can only be waived only if the waiver is knowing, voluntary and intelligent. That constitutional right applies to any contract, not just arbitration clauses, and so is not preempted. *See, e.g.*, *Siopes v. Kaiser Found. Health Plan, Inc.*, 312 P.3d 869, 892-96 (Haw. 2013) (Acoba, J., concurring) (explaining that the plaintiffs were not required to arbitrate because their waiver of a jury trial was not knowing and voluntary under the Hawai’i Constitution).

⁸⁴ *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013).

⁸⁵ *Id.* (emphasis in original); *accord Newton v. Am. Debt Servs., Inc.*, 549 F. App’x 692 (9th Cir. 2013) (holding that arbitration agreement that had various unfair provisions was unconscionable and concluding that this result “harmonize[d]” with *Concepcion* because the decision was not founded on any policy unfavorable to arbitration but was “based on general California law respecting unconscionable contracts”).

⁸⁶ *Chavarria*, 733 F.3d at 927.

⁸⁷ *Griggs v. Duke Power Co.*, 424 U.S. 404 (1971).

⁸⁸ *See, e.g.*, *Aragaki*, *supra* note 16; *Horton*, *supra* note 13. Moreover, in anti-discrimination claims, the disparate impact will not be assumed. Rather it is the plaintiff’s burden to demonstrate disparate impact, and they often must utilize detailed statistical analysis to meet their burden. *See, e.g.*, *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 993-99 (1988) (discussing the plaintiff’s evidentiary burden).

⁸⁹ 131 S. Ct. at 1748 (check other parts of *Concepcion* too).

⁹⁰ *See Sura & DeRise*, *supra* note 13, at 447 (“At a high enough level of abstraction, unconscionability rules level the playing field between disputing parties of unequal bargaining power. Thus, there is good reason to believe that, at least as those rules relate to arbitration, they will tend to result in more process, not less. The flipside of that coin is that unconscionability rules tend to sacrifice efficiency, and thus fall afoul of *Concepcion*’s logic.”).

⁹¹ *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 927 (9th Cir. 2013).

⁹² *Noohi v. Toll Bros., Inc.* 708 F.3d 599 (4th Cir. 2013) (holding that arbitration clause that obligated one side to arbitrate but allowed the other to pursue all claims in court lacked consideration and also that its holding was not preempted by the FAA); *Day v. Fortune Hi-Tech Marketing, Inc.*, 536 F. App’x 600, 604 (6th Cir. 2013) (holding that the arbitration clause was illusory and unenforceable for lack of consideration where the plaintiff was required to arbitrate but the “Defendant retained the ability to modify any term of the contract, at any time”); *Brewer v. Missouri Title Loans*, 364 S.W.3d 486, 494-95 (Mo. 2012) (striking down arbitration clause that bound the consumer to individual arbitration but allowed the Title Lender to go to court to bring repossession actions, and holding that the FAA did not preempt its application of Missouri unconscionability law); *Figueroa v. THI of N.M. at Casa Arena Blanca, LLC*, 306 P.3d 480 (N.M. Ct. App. 2012) (holding that non-mutual arbitration clause was unconscionable and was not preempted by the FAA); *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 499-500 (2012) (holding that while not every lack of mutuality would render an arbitration clause unconscionable, the fact that the arbitration clause both (a) requires the employee to arbitrate all claims while allowing the employer to bring claims for declaratory and injunctive relief to protect proprietary information in court, and (b) “requires plaintiffs to pay any attorneys’ fees incurred by Empire, but imposes no reciprocal obligation on Empire” was unconscionable and unenforceable under the facts of that case); *Lou v. Ma Laboratories, Inc.*, 2013 WL 2156316, at *4 (N.D. Cal. May 17, 2013) (holding That arbitration clause was substantively unconscionable where employer was authorized to bring claims for injunctive relief in court but employee could not); *McFarland v. Almond Bd. of Cal.*, 2013 WL 1786418, at *7-8 (E.D. Cal. Apr. 25, 2013) (holding that arbitration clause was illusory where plaintiff was required to arbitrate but the defendant reserved the right to alter the arbitration policy at any time, meaning that the defendant could “modify the agreement on the fly, picking and choosing when the arbitration policy applies and when it does not”).

⁹³ *Noohi*, 708 F.3d at 612-13.

⁹⁴ See, e.g., *Newton v. Am. Debt Servs., Inc.*, 549 F. App'x 692 (9th Cir. 2013) (finding unconscionability in part because “the arbitration agreement limits damages otherwise available to Newton under the statute”); *Franks v. Bowers*, 116 So.3d 1240 (Fla. 2013) (holding that an arbitration clause’s limitation on damages violated the state’s Medical Malpractice Act, and therefore was void as against public policy); *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 798-99 (2012) (holding substantively unconscionable an arbitration provision that precluded arbitrators from awarding special or punitive damages but permitted the corporate party to recover liquidated damages on top of other damages); *Zaborowski v. MHN Gov. Servs., Inc.* 936 F. Supp. 2d 1145, 1155 (N.D. Cal. 2013) (finding unconscionable a provision barring arbitrators from awarding punitive damages); see also *Brown v. MHN Gov. Servs., Inc.*, 306 P.3d 948, 955-56 (Wash. 2013) (refusing to find a bar on punitive damages unconscionable where it remained unclear whether the plaintiff could still obtain statutory double damages).

⁹⁵ *Concepcion*, 131 S. Ct. at 1751.

⁹⁶ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum”).

⁹⁷ 514 U.S. 52, 59 (1995).

⁹⁸ *Id.* at 59-61. Notably, the Revised Uniform Arbitration Act, which has served as a model for many state arbitration statutes, authorizes arbitrators to award punitive damages. Revised Uniform Arbitration Act, § 21, 7 U.L.A. 60-61.

⁹⁹ See, e.g., *Hill v. Garda CL Northwest, Inc.*, 308 P.3d 635 (Wash. 2013) (holding that significantly shortened statutes of limitation in arbitration provision were unconscionable); *Gandee v. LDL Freedom Enterp., Inc.*, 293 P.3d 1197, 1201 (Wash. 2013) (striking down provision reducing statute of limitations from several years to thirty days); *Brown v. MHN Gov. Servs., Inc.*, 306 P.3d 948, 956 (Wash. 2013) (holding that clause reducing the statute of limitations from three years to six months was unconscionable); *Potiyevskiy, v. TM Transportation, Inc.*, No. 1-13-1864, 2013 IL App (1st) 131864-U at *7-8 (Ill. Ct. App. Nov. 25, 2013) (holding that arbitration provision’s ten-day statute of limitations was unreasonable as applied to the facts of the case and unenforceable as a matter of generally applicable state law that was not preempted by *Concepcion*); *Samaniego v. Empire Today LLC*, 140 Cal. Rptr. 3d 492, 499 (2012) (holding that arbitration provision limiting the statute of limitations to six months was unconscionable when considered in conjunction with other unfair provisions in the arbitration clause); *Zaborowski v. MHN Gov. Servs., Inc.* 936 F. Supp. 2d 1145, 1153 (N.D. Cal. 2013) (holding six-month statute of limitations unconscionable as applied to plaintiff’s Fair Labor Standards Act claim in part because, in the employment context, “the cause of action may not be discovered for a long period of time”).

¹⁰⁰ *Brown v. MHN Gov. Servs., Inc.*, 306 P.3d 948, 957-58 (Wash. 2013) (holding that fee-shifting provision that was inconsistent with state statutes was substantively unconscionable); *Newton v. Am. Debt Servs., Inc.*, 549 F. App'x 692 (9th Cir. 2013) (finding that arbitration clause was unconscionable in part because “the arbitration agreement increases Newton’s potential liability for attorney fees as compared to California’s codified fee shifting regime”); *Gandee v. LDL Freedom Enterp., Inc.*, 293 P.3d 1197, 1200-01 (Wash. 2013) (striking down “loser pays” rule as unconscionable as applied to the plaintiff); *In re Checking Account Overdraft Litig.*, 685 F.3d 1269, 1276-78 (11th Cir. 2012) (holding that an arbitration provision that required a bank customer to bear all of the bank’s costs, fees and expenses incurred in connection with any dispute, regardless of which side prevails, was unconscionable); *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773, 799-800 (Cal. App. 1 Dist. 2012) (holding that a provision which required employee to pay employer’s attorneys’ fees if the employer prevailed but did not allow employee to collect attorneys’ fees if she prevailed was non-mutual and also unconscionable because it was inconsistent with state law prohibiting the employee from having to pay an employer’s attorneys’ fees regarding certain claims); *Lou v. Ma Laboratories, Inc.*, 2013 WL 2156316, at *5 (N.D. Cal. May 17, 2013) (holding that an agreement allowing the arbitrator to allocate attorney and arbitrator fees across one or both parties without providing guidelines for when the arbitrator would do so, was unconscionable because it created a significant disincentive for an employer to pursue arbitration); *Zaborowski v. MHN Gov. Servs., Inc.* 936 F. Supp. 2d 1145, 1154 (N.D. Cal. 2013) (holding that fee-shifting provision had the potential to make the plaintiff liable for fees in violation of relevant statutory law and thus was unenforceable); *Winston v. Academi Training Center, Inc.*, 2013 WL 989999 at *2 (E.D. Va. Mar. 13, 2013) (refusing to enforce arbitration provision that required plaintiffs to pay all fees and costs even though the False Claims Act allows prevailing plaintiffs to collect attorneys’ fees).

¹⁰¹ *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 925 (9th Cir. 2013).

¹⁰² See, e.g., *In re Checking Account Overdraft Litig.*, 685 F.3d 1269, 1277-78 (11th Cir. 2012) (holding that applying South Carolina’s generally applicable unconscionability doctrine to invalidate a contractual fee-shifting provision did not “interfere with the procedural informality” of arbitration).

¹⁰³ See, e.g., *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 925-26 (9th Cir. 2013) (striking down provision requiring the parties to evenly split the arbitrators’ fees where the plaintiff showed that he would likely have to pay \$3,500-\$7,000 in fees, an amount the court found “likely dwarfs the amount of Chavarria’s claims”); *Gandee v. LDL Freedom Enterp., Inc.*, 293 P.3d 1197, 1200 (Wash. 2013) (holding that arbitration provision was unconscionable because plaintiff met her burden of showing that the costs of travel to a distant venue plus the costs of the arbitrators’ fees exceed the damages at stake as well as her ability to pay); *Clark v. Renaissance West, LLC*, 307 P.3d 77, 81-82 (Ariz. Ct. App. 2013) (holding that arbitration provision requiring the parties to split arbitrator fees was unconscionable where the plaintiff built a detailed factual record showing that the costs of the arbitrators, based on the estimated length of the hearing, made arbitration prohibitively expensive in light of the plaintiff’s limited and fixed income); *Potiyevskiy, v. TM Transportation, Inc.*, No. 1-13-1864, 2013 IL App (1st) 131864-U at *8 (Ill. Ct. App. Nov. 25, 2013) (noting that the arbitrators’ fees, which the parties were required to split, would be at least \$975 for claims that could be as small as \$25 in striking the arbitration provision as unconscionable); *Zaborowski v. MHN Gov. Servs., Inc.* 936 F. Supp. 2d 1145, 1154 (N.D. Cal. 2013) (finding that arbitration clause was unconscionable where the \$2,660 arbitration filing fee was seven times greater than the filing fee in court and almost fifteen times greater than the arbitration fee for employment disputes).

¹⁰⁴ See, e.g., *Newton v. Am. Debt Servs., Inc.*, 549 F. App'x 692 (9th Cir. 2013) (finding unconscionability in part because “the arbitration forum provision requires Newton, who resides in California, to arbitrate in Tulsa, Oklahoma—Global Client Solutions’ headquarters.”); *Potiyevskiy, v. TM Transportation, Inc.*, No. 1-13-1864, 2013 IL App (1st) 131864-U at *8 (Ill. Ct. App. Nov. 25, 2013) (holding that arbitration clause’s choice of Illinois as a forum was not per se unconscionable, but that under the facts of the case, “requiring the drivers to make repeated trips to Illinois from out of state to arbitrate numerous low-dollar-amount claims is [unconscionable].”).

¹⁰⁵ See, e.g., *Moreno*, 311 P.3d at 202 (giving example of an arbitration clause requiring the plaintiff to pay \$8,000 in fees, which was well beyond her ability to pay, as an issue that has nothing to do with fundamental attributes of arbitration).

¹⁰⁶ 133 S. Ct. at 2310-11; *Chavarria*, 733 F.3d at 926-27 (relying on *Italian Colors* in concluding that the FAA did not preempt applying state unconscionability law to strike down a fee-sharing provision that made arbitration prohibitively expensive).

¹⁰⁷ *Schnuerle v. Insight Communications, Co.*, 376 S.W.3d 561, 578 (Ky. 2012) (striking down an arbitration clause’s confidentiality provision where it gave the drafting party an unfair advantage and concluding that *Concepcion* does not require upholding confidentiality provisions).

¹⁰⁸ *See, e.g., id.*

¹⁰⁹ *Concepcion*, 131 S. Ct. 1749.

¹¹⁰ 9 U.S.C. § 13 (requiring the party seeking to confirm, vacate or modify an award to submit various documents to the court including the arbitration agreement, the arbitration award, the identities of the arbitrators, as well as notices and affidavits and other papers used in support of the motion).

¹¹¹ *See* Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 U. KAN. L. REV. 1255, 1281 (2006) (suggesting that “confidentiality is not an essential characteristic of arbitration in that a rule of evidentiary exclusion is not necessary to the functioning of arbitration as an adversarial process”).

¹¹² *See id.* at 1273 (“The overwhelming majority of states do not have statutes or court rules that generally preclude the admission of arbitration in formal legal proceedings . . .”).

¹¹³ Uniform Mediation Act, § 4, 7A U.L.A. 104, 122.

¹¹⁴ *See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991) (indicating that reduced discovery may be part of the tradeoff that comes with choosing arbitration over litigation).

¹¹⁵ *See, e.g., Winston v. Academi Training Center, Inc.*, 2013 WL 989999 at *2 (E.D. Va. Mar. 13, 2013) (holding that arbitration clause that prohibited any discovery in arbitration precluded the plaintiff from vindicating federal statutory rights when applied to plaintiff’s False Claims Act (FCA) claim because “FCA claims are often document intensive,” making it “difficult, if not impossible, to prove those claims” without access to the allegedly falsified documents that form the basis of the claim); *Unimax Express, Inc. v. Cosco N. Am., Inc.*, 2011 WL 5909881, at *4 (C.D. Cal. Nov. 28, 2011) (taking into account that the party bringing a claim has no right to discovery to rebut the opposing party’s response in arbitration clause substantively unconscionable); *see also Zaborowski v. MHN Gov. Servs., Inc.* 936 F. Supp. 2d 1145, 1154 (N.D. Cal. 2013) (holding that, although a discovery limitation could be unconscionable if it precluded plaintiffs from having a realistic opportunity to pursue their claims, the plaintiffs in this case failed to meet their burden); *but cf. Lucas v. Hertz Corp.*, 2012 WL 5199384, at *2-3 (N.D. Cal. Oct. 22, 2012) (questioning whether rules regulating limits on discovery in arbitration survive *Concepcion*); *Tierra Right of Way Servs., Ltd. v. Abengoa Solar Inc.*, 2012 WL 2292007, at *5 (D. Ariz. June 9, 2011) (enforcing blanket discovery prohibition against unconscionability challenge where the party asserting unconscionability failed to “allege how an inability to conduct discovery or demand production of documents will render it incapable of presenting and proving its case, particularly when its similarly situated corporate opponent also is so limited.”). Numerous courts have permitted parties to take discovery regarding the validity of an arbitration clause. *See* F. PAUL BLAND, JR. ET AL., CONSUMER ARBITRATION AGREEMENTS: ENFORCEABILITY AND OTHER TOPICS, § 2.4.2 (NCLC 6th ed. 2011).

¹¹⁶ *Concepcion*, 131 S. Ct. at 1747.

¹¹⁷ *See Gilmer*, 500 U.S. at 31 (noting that the arbitration regime at issue provided for some discovery in determining that the plaintiff would be able to pursue his claim in arbitration).

¹¹⁸ 9 U.S.C. § 4.

¹¹⁹ *Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 726 (9th Cir. 1999).

¹²⁰ 9 U.S.C. § 7. The Revised Uniform Arbitration Act (RUAA), which is a model for many state arbitration statutes, also authorizes arbitrators to subpoena witnesses and order discovery. Revised Uniform Arbitration Act, § 17, 7 U.L.A. § 61. Moreover, the RUAA’s provisions permitting arbitrators to issue subpoenas and order depositions are non-waivable, meaning that the parties cannot limit the arbitrator’s discovery authority contract. *Id.*, § 17(a)-(b).

¹²¹ Thomas J. Stipanowich, *Arbitration: The “New Litigation,”* 2010 U. ILL. L. REV. 1, 6, 13; *see also* Lawrence W. Newman, *Agreements to Arbitrate and the Predictability of Procedures*, 113 PENN. ST. L. REV. 1323, 1323 (2009) (noting that business arbitration “has become more similar to litigation—particularly U.S.-style litigation in United States courts—in large part because of increased procedural activity, including discovery”).

¹²² *See, e.g., Brown v. MHN Gov. Servs., Inc.*, 306 P.3d 948, 957 (Wash. 2013) (provision allowing one party to select the pool of three arbitrators was “overly harsh and one-sided” and thus unconscionable); *Chavarria v. Ralphs Grocery Co.*, 733 F.3d 916, 923-24 (9th Cir. 2013) (striking down provision that effectively ensured that drafting party would be able to choose the arbitrator); *Newton v. Am. Debt Servs., Inc.*, 549 F. App’x 692 (9th Cir. 2013) (finding that the arbitration clause was unconscionable in part because “the arbitration agreement reserves the selection of an arbitrator solely to defendants”); *Zaborowski v. MHN Gov. Servs., Inc.* 936 F. Supp. 2d 1145, 1153 (N.D. Cal. 2013) (holding arbitration provision unconscionable where the provision gave the drafting party unilateral control over the pool of arbitrators).

¹²³ *See supra* notes 71-73 and accompanying text.

¹²⁴ In addition, courts have rejected preemption arguments related to various other types of rules when applied to arbitration clauses. *See, e.g., Rent-A-Center, Inc. v. Iowa Civil Rights Commission*, 843 N.W.2d 727 (Iowa 2014) (holding that provision of the Iowa Civil Rights Act permitting the Iowa Civil Rights Commission to bring enforcement actions against employers was not preempted by the FAA when the Commission brought an enforcement action in court on behalf of an individual who signed an arbitration provision); *Sonic-Calabasas A, Inc. v. Moreno*, 311 P.3d 184 (Cal. 2013) (holding that FAA did not necessarily preempt application of state law unconscionability principles to invalidate an arbitration clause that prevents a party from pursuing an administrative remedy prior to arbitration).

¹²⁵ Some Justices have similarly criticized the Supreme Court’s arbitration doctrine as having “abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation.” *Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 283 (1995) (O’Connor, J., concurring).

¹²⁶ *See Sura & DeRise, supra* note __, at 425 (“Arbitration, like litigation, is not a monolith, and can vary greatly depending on the nature of the dispute.”).

¹²⁷ Stipanowich, *supra* note 120, at 13.

¹²⁸ See, e.g., Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROBS. 133 (2004); PUBLIC CITIZEN, THE COSTS OF ARBITRATION (2002), available at <http://www.citizen.org/publications/publicationredirect.cfm?ID=7173#o> (asserting that arbitration often is as costly or more costly than litigation); see also Benjamin J.C. Wolf, *On-Line but Out of Touch: Analyzing International Dispute Resolution Through the Lens of the Internet*, 14 CARDOZO J. INT'L & COMP. L. 281, 306-07 (2006) (complaining that arbitration has become just as expensive as litigation).

¹²⁹ Stipanowich, *supra* note 120, at 22; see also Bernal v. Burnett, 793 F. Supp. 2d 1280, 1287-88 (D. Colo. 2011) (enforcing arbitration clause's class action waiver despite the fact that individualized arbitrations would require the same witnesses to testify in 800 different individual proceedings rather than in a single consolidated proceeding).

¹³⁰ *Id.* at 15-16; Charles D. Coleman, *Is Mandatory Employment Arbitration Living Up to Its Expectations? A View from the Employer's Perspective*, 25 ABA J. LAB. & EMP. L. 227, 236-37 (2010) (indicating that in many disputes, particularly ones involving pro se litigants, arbitration is likely to cost more and take longer than going to court); Amr A. Shalakany, *Arbitration and the Third World: A Plea for Reassessing Bias Under the Spector of Neoliberalism*, 41 HARV. INT'L L.J. 419, 434-35 (2000) (arguing that international arbitration has become just as lengthy as litigation and identifying the cause as the American arbitration model of including many of the procedural protections of litigation).

¹³¹ See Stipanowich, *supra* note 120, at 51

¹³² The parties' choice, however, is not unfettered under the FAA. For example, the FAA prohibits the parties from contracting for greater judicial review than provided in the statute itself. See *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008).

¹³³ *Concepcion*, 131 S. Ct. at 1749.

¹³⁴ Not everyone agrees that the essence of arbitration is choice. Some assert that the goal of the FAA was not to preserve party choice, but that it was designed as a procedural reform during the era of overly-technical litigation rules that predated the adoption of the Federal Rules of Civil Procedure. See Hiro N. Aragaki, *The Federal Arbitration Act as Procedural Reform*, 89 N.Y.U. L. REV. ____ (forthcoming 2014).

¹³⁵ See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking The Supreme Court's Preference for Arbitration*, 74 WASH. U. L.Q. 637, 647 (1996) ("Most commentators have concluded that the FAA was envisioned as applying to consensual transactions between two merchants of roughly equal bargaining power and not necessarily to transactions between a large merchant and a much weaker and less knowledgeable consumer."); David S. Schwartz, *Enforcing Small Print To Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 75-81 (arguing that the framers intended for the FAA to be limited to commercial disputes between business entities).

¹³⁶ See David Horton, *Federal Arbitration Act Preemption, Purposivism, and State Public Policy*, 101 GEO. L.J. 1217, 1255-61 (2013) (explaining how public policy was a common contract defense at the time of the FAA's enactment and that members of Congress would have understood it as a general contract doctrine applicable to contracts for arbitration).

¹³⁷ See Amy J. Schmitz, *American Exceptionalism in Consumer Arbitration*, 10 LOY. U. CHI. INT'L L. REV. 81, 82 (2012)

¹³⁸ *Id.*

¹³⁹ *Id.* at 94-99 (describing different approaches).

¹⁴⁰ *Concepcion*'s holding that the FAA preempts state regulation of class action waivers as applied to arbitration arguably is consistent with the notion that the FAA is about free, non-adhesive choice. The problem with classwide arbitration is imposing an award or decision on absent parties who did not choose to be part of the proceeding. See Aragaki, *supra* note 132 (arguing that the *Concepcion*'s Court's problem with classwide arbitration was that it "effectively imposed class arbitration on parties who did not consent to it"). In short, other than through an opt-out provision, absent parties lack any choice about whether to participate in the arbitration proceeding or not.

¹⁴¹ Arguing that states are free to regulate arbitration provisions that are part of adhesive contracts does not mean that states lack any power to regulate arbitration in non-adhesive, freely-negotiated contracts. Such contracts are still governed by generally-applicable contract principles in the same way that any other non-adhesive contract is. The FAA's savings clause makes it clear that any arbitration clause, adhesive or non-adhesive, can be invalidated "upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2.

ORAL REMARKS OF PROFESSOR FRANKEL

It is really a privilege to get a chance to speak with you today.

The primary course that I teach at Drexel is an appellate litigation clinic. My students represent indigent clients in appeals before state and federal appellate courts. My primary emotion when standing before a group of appellate judges or watching my students appear before a group of appellate judges is anxiety. Hopefully, I will be able to settle that down a little bit.

Professor Gilles joked this morning that she was the presenter of doom and gloom and I was the presenter of optimism. She hoped that of the two of us, my view was right. I am here to say, “Of course I’m right”—but not in a self-serving way. A lot of what my paper talks about is what you and your colleagues, as appellate judges, have been doing in thinking about arbitration after *Concepcion* and *Italian Colors*, in interpreting those Supreme Court decisions and how sensibly you and your colleagues have approached those decisions, to say that they are not as far reaching in terms of what they mean for FAA preemption, and in terms of invalidating state law. They actually leave open a very large amount of room for the application of state law to arbitration agreements.

I am going to talk a little bit first about what I think the *Concepcion* and *Italian Colors* decisions mean from my reading of them—though I have just learned from Professor Sovern that, while I have read the opinions and I *think* I know what the opinions mean, that probably means that I know *nothing* about what they really mean. Probably everything I say is completely wrong.

The first point I want to make is about what *Concepcion* means and why it stands for the proposition that unconscionability remains a perfectly viable rule of state contract law that applies to arbitration agreements—perhaps not in the class action arena, but outside of the class action arena. It only gets displaced if the application of it is somehow inconsistent with what the Supreme Court called the “fundamental attributes of arbitration,” a term that it didn’t define other than to say that class actions were inconsistent with that fundamental attribute. That is the first point I am going to talk about.

In some ways, *Concepcion* actually made FAA preemption really narrow, rather than expanding it.

The second point is that I think, under a close reading of *Concepcion*, we see that, by introducing this new concept of a “fundamental attribute of arbitration,” *Concepcion* opens up an opportunity for those who are tasked with applying the case. It opens up a door to really rethinking what the Federal Arbitration Act means, what FAA preemption is supposed to mean. And in some ways, *Concepcion* actually made FAA preemption really narrow, rather than expanding it.

Was There a Bargain?—The Role of Choice

I will talk about a few different ways in which that might be so. The one I talk about most closely in the article is that if there is anything that seems to be a truly fundamental attribute of arbitration, if you can define one, it is the idea of a real sort of bargain or free choice in designing what an arbitration clause and the procedures of arbitration look like. I mean arm’s-length negotiation by equal bargaining power, that kind of choice.

If that is really what is fundamental about arbitration, then the thing that is inconsistent with choice is adhesion, and adhesion contracts and arbitration clauses within adhesion contracts. That suggests that when

the framers of the FAA were thinking about what they wanted arbitration to do, they weren't thinking about adhesion contracts. That is outside of what is fundamental to arbitration. That leaves us a whole lot of room to say that arbitration clauses in adhesion contracts can be regulated either through common law, through general contract law, or through state statutory law, without being preempted, because adhesion contracts were not

When the framers of the FAA were thinking about what they wanted arbitration to do, they weren't thinking about adhesion contracts.

what the FAA was concerned with. I will address that towards the end of my talk.

I know in the paper I talked both about *Concepcion* and *Italian Colors*. Today, I am going to use *Concepcion* as a sort of shorthand for both decisions, because *Concepcion* was the case that was really more directly about federal preemption

of state law. *Italian Colors* was a follow-on case that was applying a federal law doctrine in a federal antitrust case. It doesn't directly involve preemption. That is why I refer to *Concepcion* for both.

Unconscionability Lives On

I think there has been a lot of debate by commentators about what *Concepcion* should mean. Several people have written that they think it contains language that would broadly wipe away the application of unconscionability or public policy defenses to arbitration agreements. I don't think that is true, and I believe court decisions since *Concepcion* have sort of confirmed that is not true.

In the paper, I try to identify four important points to take away from *Concepcion*. The first is that the case, I think, very strongly reaffirms, rather than vitiates, the role of unconscionability and public policy and the role of state contract law, generally, in interpreting and regulating arbitration agreements. The Court very strongly reinforces the meaning of Section 2 of the FAA, which says that arbitration agreements can be invalidated on grounds that are applicable to any contract. In other words, an arbitration clause should be treated just like any other contract. If another contract is unconscionable and can be declared unenforceable, then an arbitration clause can too. The Court identified unconscionability in the decision as one of those grounds for arbitration. I think unconscionability very clearly lives on after *Concepcion*. That is the first point.

Fundamental Attributes of Arbitration

The second point is that what the Supreme Court seemed to be identifying as the key to whether something was preempted was whether the provision, or the application of a state law rule to an arbitration provision, would somehow interfere with what it called "fundamental attributes of arbitration." As I said, it didn't define that term.

In its decision, and in a series of decisions, I think the Supreme Court has been particularly concerned with class actions specifically, and the specific problems that class actions create, and what it thought were problems created in an arbitration context. For example, it was particularly concerned about the ability of an arbitrator to bind absent class members. It is not at all clear that an arbitrator is able to bind people who were never in the proceeding. To have a class action arbitration that purports to bind people who were not part of the proceeding arguably gets away from the idea that Jeff Sovern mentioned in his lunch talk—that arbitration is a matter of consent.

The Supreme Court also seemed particularly concerned that, if you were going to protect absent class members, or build in the due process protections that would be needed to allow arbitrators to bind absent class members, it would require such a high degree of procedural formality that it would dramatically transform what they thought arbitration should look like. That's more of the very strong focus on class actions. If you look at the Supreme Court's arbitration jurisprudence, I think they have had four class action arbitration cases in the last four years. I think that is very telling for a court that usually only takes one, maybe two arbitration cases a year. That is, I think, what they were really driving at.

Once you get outside of the class action context, I don't think most unconscionability challenges raise those same types of "fundamental attribute of arbitration" concerns. Unconscionability is supposed to be designed for what we might call "the worst of the worst" provisions in a contract—provisions that are so unfair, or so abusive, or so one-sided that you think no reasonable person would agree to them. Certainly, I don't think anyone would say that it's a fundamental attribute of arbitration to have an unfair and one-sided system. It is to have an evenhanded, fair, neutral dispute resolution that is an alternative to the neutral, fair, and evenhanded dispute resolution system that we have in court. Unconscionability regulation of those specific terms, by and large, is not going to interfere with fundamental attributes of arbitration. That is what you and your colleagues have consistently found, I think, in the three years since the case was decided.

Fact-Specific Challenges to Arbitration Provisions

The third point is that fact-specific challenges to unconscionable contract provisions are less likely to be preempted than categorical challenges. That is because unconscionability, itself, is a fact-specific doctrine. You don't say that a particular contractual provision is unconscionable in every case. You look at how it affects the particular party in that case.

In the same way, I think a rule that would say that you can have no discovery in arbitration, say, is categorically unconscionable. That is sort of a different application of unconscionability. That would treat arbitration clauses less favorably than other contracts. That is why I think the Supreme Court was saying those types of rules are preempted. A fact-specific challenge to arbitration would not be preempted. Courts have repeatedly made that distinction after *Concepcion*.

"Disproportionate Impact on Arbitration"

The fourth point is that the mere fact that an application of the unconscionability doctrine might have a disproportionate impact on arbitration clauses is not, in itself, sufficient to trigger preemption. The Supreme Court in *Concepcion* used this language of "disproportionate impact" when giving examples of particular rules that might be preempted.

Arbitration clauses that have a biased process for choosing the arbitrator have often been struck down as unconscionable.

Of course, I very clearly recognize that a disproportionate impact on arbitration clauses can't be enough. I think the easiest example is that it is common for courts to declare unconscionable an arbitration clause that has a biased process for choosing the arbitrator. Either it leaves all decision making in the hands of one party or it allows one party to choose its own employees or officers to be arbitrators. Those have often been struck down as unconscionable.

Now, obviously, a rule declaring unconscionable provisions that call for biased arbitrators are going to have a disproportionate impact on arbitration clauses relative to other contracts, because it is an arbitration-specific thing. It is also perfectly consistent with the Federal Arbitration Act, which, itself, says in §10 that arbitration awards can be vacated where there is evident partiality or bias of an arbitrator. That type of rule very clearly

Concepcion introduces for the first time the concept of “fundamental attributes of arbitration” as being something important for FAA preemption.

would not be preempted. It is perfectly consistent with the FAA’s purposes, even though it has a disproportionate impact on arbitration clauses. I think that language needs to be read with great care.

Those are the four points that I wanted to make about what *Concepcion* means. I also think that, as I said in the paper, *Concepcion* introduces for the first time the concept of “fundamental attributes of arbitration” as being something important for FAA preemption. That creates a whole new lens for viewing how courts should determine whether an application of a state law, like a contract rule, would be preempted.

Once we start thinking about “fundamental attributes of arbitration,” I think we actually see that there are very few of them. Arbitration clauses look different in different situations. Some call for a lot of discovery, some call for very little discovery. Some include procedures that take a very long time, some take a short time. Some are confidential, some are not. They are designed in different ways. So rather than saying that any particular aspect of arbitration is fundamental to arbitration, it seems that the Supreme Court was saying that choice among the parties is what is fundamental to arbitration—their ability to design the particular procedures that they want to govern any particular dispute.

The Supreme Court was saying that choice among the parties is what is fundamental to arbitration—choice by both parties, not just by one party.

The choice, at least as I read it, is choice by *both* parties, not just by one party—real arm’s-length choice. Adhesion, in my opinion, is the opposite of that, or at least anathema to that. That falls outside of that arena of choice, and outside the idea of what is fundamental to arbitration. I think that is important from a preemption standpoint.

I am not saying that contracts of adhesion shouldn’t be enforceable, or even that arbitration clauses in contracts of adhesion shouldn’t be enforceable. Of course they can be, and they are going to continue to be. What I am saying is that the FAA doesn’t prevent a state from trying to regulate such contracts, from trying to ensure fairness in such contracts. The FAA was concerned with choice. Once you are outside of that area of choice, FAA preemption doesn’t really apply.

Implied Obstacle Preemption

I am going to quickly talk about one more idea. This is not my idea, but one that was put forth by Professor David Horton from UC Davis Law School. He says that *Concepcion* is one of the first cases that very explicitly frames FAA preemption as what is called “implied obstacle preemption.” It is a doctrine whereby, if you interfere with the purposes or the objectives of a legislative act (like the FAA), then state law is preempted.

Horton says is that that doctrine requires that we take a much closer look at what are the real purposes and objectives of the FAA. He says the purpose of the FAA was not to get rid of any law that disfavored arbitration, but rather laws that *unjustifiably* disfavor arbitration, that derive not out of a goal to make the arbitration process fair, but derived from an inherent suspicion of arbitration as a dispute mechanism, a resolution mechanism, generally. When you think of it that way, efforts to regulate how arbitration works are perfectly fine. It is the wholesale effort to throw out arbitration entirely that is not okay. When you think about it that way, things that courts may have previously thought were preempted might not really be preempted after *Concepcion*.

The FAA was concerned with choice. Once you are outside of that area of choice, FAA preemption doesn't really apply.

I think those two ideas—the idea of choice and the idea of unjustified discrimination against arbitration—are important avenues to think about after *Concepcion*. Thank you so much for listening. I appreciate further discussion.

COMMENTS BY PANELISTS

HONORABLE MARILYN KELLY

I congratulate Professor Frankel on his paper. In my opinion, it is well written. It is well written because it is clear. He makes concepts that are complex easy to digest. He puts citations to authority in footnotes. He uses frequent bold headings. These features make for plain, easily understood English. They may not be necessary for experienced judges and lawyers when reading the paper, but they certainly are helpful for everybody else.

I found when writing judicial opinions over 24 years that using these features—easily understood words, not jargon; frequent helpful headings; and putting citations into footnotes—allowed me to avoid muddy reasoning, allowed me to catch and add missing logical sequences and to add explanatory sentences, and to strike unnecessary and aggravating repetitions.

In my opinion, the conclusions in Professor Frankel's paper are persuasive. They are persuasive because I think they are accurate and they are well reasoned.

Now, as you heard, Professor Frankel summarizes the holdings of *Concepcion* and *Italian Colors*, concluding that they do not greatly expand or change the scope and reach of the Federal Arbitration Act. After *Concepcion* and *Italian Colors* have been applied, the FAA exemption does not necessarily reach other arbitration contract clauses that have been found to be unconscionable in the past. The preemption does not necessarily include, in its scope, contracts of adhesion.

Professor Frankel points out that, had the justices wished *Concepcion* to have greater reach than barring class action suits in arbitration, they would have written it differently. He explains that reasoning. I agree with him.

Basic Fairness

In analyzing *Concepcion* and *Italian Colors*, Professor Frankel observes that the United States Supreme Court held that class arbitration interferes with fundamental attributes of arbitration, thus causing a scheme

inconsistent with the FAA. He goes on to consider what are the fundamental attributes of arbitration, preliminary to considering what else might interfere with them. He doesn't find any. He seems to conclude that there may not be any other fundamental attributes of arbitration other than this concept of basic fairness that the Supreme Court describes.

I agree that that is possible, even likely. I conjecture that the justices didn't identify other fundamental attributes of arbitration in *Concepcion* because they didn't feel a need to. We know that sometimes appellate judges are content to leave questions like that for another day, for another case. It is possible that is what happened here.

Because *Concepcion* and *Italian Colors* are so recent, Professor Frankel's analysis may serve appellate judges well when, in the course of litigation, cases involving the Federal Arbitration Act reach them. The Michigan Supreme Court has not been asked to apply *Concepcion* or *Italian Colors* yet. It appears to me that it is true in Michigan, as Justice Holder observed with regard to Tennessee this morning, that there isn't a lot of appellate review of arbitration clauses in state courts these days. I think Professor Gilles is correct in concluding that this is because most lawyers find it is not worth appealing arbitration clauses.

The business community has found it possible and in its interest to engineer the immense growth of mandatory arbitration.

In the discussion group conversations this morning, it was observed that we, the judges, have failed in recent decades to keep the operation of courts up to date, have failed to make them faster and cheaper and more efficient. It has been suggested that because of that, alternate dispute resolution has flourished. We can certainly debate

how well we have done in the courts to make them faster, cheaper, and more efficient. Without question, as Professor Popper opined, the business community has found it possible and in its interest to engineer the immense growth of mandatory arbitration.

I have been very favorably impressed by the presentation here, today, and by the give and take that I heard in the discussion groups. Clearly, there is an enormous amount of judicial experience and knowledge among us. I thank you for the opportunity to share some of my views and experience with you. With that, I will turn the floor over to Justice Acoba.

HONORABLE SIMEON ACOBA

There are three matters I would like to cover. First, Professor Frankel's contention that under *Concepcion*, the fundamental attribute of arbitration is free choice. Second, his view that many court decisions do not read *Concepcion* broadly. Third, the right to a jury trial with respect to the FAA.

Free Choice

In part four of his paper, I believe that Professor Frankel posits that under *Concepcion*, the fundamental attribute of arbitration is a freely bargained decision to choose arbitration and to define its terms of structure according to the situation involved. He suggests that state courts would not bump up against the FAA by viewing *Concepcion* in this way. I am sympathetic with that view, but, because state courts are bound by the Supremacy Clause, I am not so sanguine about that conclusion.

Let me say, first of all, that what the professor suggests *should* be the case, because it comports with our traditional view of how contracts, much less arbitration agreements, should be formed. *Concepcion* exudes indications that the adhesive character of contracts is not a significant factor that must be considered in enforcing consumer contracts—and, one could extrapolate, other contracts.

In rejecting California’s rule that a class action waiver in adhesion contracts was unconscionable, Justice Scalia noted that, and I quote, “The rule is limited to adhesion contracts, but the times in which consumer contracts were anything other than adhesive are long gone.” Thus, he seemingly dismisses the adhesive nature of such contracts as a nonfactor.

Further, in response to Justice Breyer’s dissenting argument that Congress believe the FAA would be used primarily where merchants possess roughly equivalent bargaining power, Justice Scalia replied that such a proposition nowhere appears in the text of the FAA and “has been explicitly rejected by our cases.”

The *Italian Colors* restaurant case adopted the same approach as *Concepcion*. In opposition to a class action waiver, the plaintiff maintained that proceeding by way of individual arbitration rather than by way of class action would make proof of its federal anti-trust claim cost prohibitive. The majority, again, by Justice Scalia, held that the principles of *Concepcion* applied to federal causes of action because in *Italian Colors*, as in *Concepcion*, a class action procedure would interfere with fundamental attributes of arbitration.

For the dissenters, Justice Kagan argued that, although the burden rested on the plaintiff to show prohibitive expense, the court should protect against arbitration agreements that make federal claims too costly to bring. Otherwise, the FAA would result “in de facto immunity for the defendant.”

That de facto immunity might similarly impact state cases seemed to be confirmed by Justice Scalia in *Italian Colors*. There he said, referring to *Concepcion*, “We specifically rejected the argument that class arbitration was necessary to prosecute claims that might otherwise slip through the legal system.” In a footnote to that sentence, Scalia said the *Concepcion* case “established that the FAA’s command to enforce arbitration agreements trumps any interest in ensuring the prosecution of low value claims. Accordingly, the FAA does, contrary to the dissent’s assertion, favor the absence of litigation when that is a consequence of a class action waiver.”

Concepcion, then, seems to be a triple whammy of sorts, rejecting adhesion, unequal bargaining power, and also “de facto immunity” arguments.

Concepcion seems to be a triple whammy, rejecting adhesion, unequal bargaining power, and also “de facto immunity” arguments.

As a general matter, then, these arguments no longer seem to afford much of a safe haven for state statutes or court decisions. Given a narrow reading, both *Concepcion* and *Italian Colors* can be construed as emphasizing that class action suits or class arbitrations are hostile to the fundamental attributes of arbitration because they would be lengthier, more costly, more complex than individual arbitration proceedings and third persons not otherwise privy to the litigation would be bound by the result. As set forth before, the Supreme Court may have seemed to say more than that in discarding along the way the arguments in opposition to mandated arbitration provisions in adhesive contracts.

State Courts' Interpretation of *Concepcion*

As a second matter, in part three of his paper, Professor Frankel cites numerous cases as evidence that states and lower federal courts have not given a broad construction to *Concepcion*. What appears safe from preemption are those state rules that support the fairness of the procedural aspects and the efficacy of arbitration. These factors can be so apparent that categorical rules should survive preemption under the FAA. Professor Frankel cites, for example, rules invalidating a shortened statute of limitation or procedures allowing one-sided selection of arbitrators that deservedly would be labeled unconscionable.

I largely agree with Professor Frankel. In a sense, many of these cases might fit under the rubric of ensuring that the fundamental attributes of arbitration are protected. Thus, they would not conflict with the FAA.

Trial by Jury

As to the third matter, Justice Scalia and *Concepcion* propose that, even if a ground for revocation, such as unconscionability, applied generally to all contracts, the FAA might still preempt that ground if the effect of the state rule is to disfavor arbitration agreements. In *Concepcion*, Justice Scalia offered hypothetical examples of state rules that would run afoul of the FAA even though they applied to every contract. He mentioned rules invalidating arbitration agreements that lack court-monitored discovery, or that restricted discovery, or that failed to abide by the rules of evidence. He concluded that such state rules could adversely affect streamlined proceedings and of arbitration and, therefore, would be inconsistent with the FAA.

Another rule Justice Scalia would object to would be a state rule that would require ultimate disposition by a jury. Such a rule would mandate a jury trial. That, obviously, would disfavor arbitration. Arguably, that is not the same thing as a rule requiring that notice of a jury trial waiver be provided and/or that a waiver be personally executed by the person waiving that right. Language in *Concepcion* suggests that incorporating notice of a jury waiver in an arbitration agreement would not violate the FAA. The majority said, in footnote six, that “states remain free to take steps addressing concerns that attend contracts of adhesion, for example, requiring class action waiver provisions in adhesive arbitration agreements to be highlighted.”

I would like to take a moment to mention that Professor Frankel does cite in one of his footnotes *Siopes v. Kaiser Foundation*, a case from our own jurisdiction, which was filed by Mark Davis, who is one of the discussion leaders here. In that case, in an opinion written by Justice Pollack, the Hawai'i Supreme Court

Since a rule directing that a right to jury trial be expressly waived is grounded in the Federal and state constitutions, a jury waiver would arguably fall outside of the intended purview of the FAA.

held that the Kaiser arbitration clause was void for lack of mutuality. Justice Pollack and Justice Nakayama, who are both here, were part of the majority. A concurrence in which Justice McKenna joined—she is here also—would have also invalidated the arbitration agreement for lack of an executed individual jury waiver.

Requiring that written notice of a jury waiver be incorporated in any adhesive arbitration agreement would be analogous to the act of highlighting class action waiver provisions that is expressly approved in *Concepcion*, and so should be permissible under the FAA. Assuming that under state law a waiver must be personally given, it would seem a necessary addition to mandate that the waiver be signed by the beneficiary.

Since a rule directing that a right to jury trial be expressly waived is grounded in the Federal and state constitutions, a jury waiver would arguably fall outside of the intended purview of the FAA. Also, because the rule would apply equally to every contractual waiver of that right, it would not objectionably single out arbitration agreements for invalidation. Further, a waiver rule cannot be said to interfere with fundamental attributes of arbitration, inasmuch as it would have no impact on the procedural aspects of an arbitration proceeding.

A jury waiver rule would not interfere with the favored status afforded arbitration, since the question is a threshold one that should be individually answered. Does one choose a jury proceeding or agree to an arbitration proceeding? Affording that choice would not seem to disfavor arbitration since the rule is neutral. It simply recognizes that a jury trial is of constitutional dimension. Thank you.

MICHAEL WESTON

Good afternoon, everybody. I am the black knight. There has to be one of us. I asked one of my colleagues, who was a past president of DRI, and who has been fortunate enough to speak at the Pound Forum before, what to expect. I said I feel a little bit like Daniel going into the lion's den. He said, "No, no, it is not like that. It is like that great American movie *Jurassic Park*, where they tied the little fawn down and let the Tyrannosaurus Rex loose on him."

I will have to tell you that it is anything but that. The folks at the Pound Institute are gracious hosts. Along with you, we share the hope that our justice system will improve. In fact, we in the defense bar work carefully with the folks in the plaintiff's bar, AAJ, and with the International Academy of Trial Lawyers, with the American College of Trial Lawyers, and with the various sections of the ABA, to bring civility to our courts, better funding for all of you, and a better process to all of our courts. It is something that we take very seriously.

I want to say a word about DRI and then I am going to get to my remarks, if I can read them. It is like any other thing when you prepare remarks and then you hear such outstanding speakers. You scribble all over your notes, so I will do my best.

DRI has 22,000 members, approximately 21,000 of whom are trial lawyers. We try cases. We are often confused with corporate America, but we are not. We do not, for example, go around our nation and weigh in on the tort reform efforts, good or bad, in the various states. We are process people.

If the general counsel of the corporations we represented were here today, they would tell you that they are not afraid of American juries—they are afraid of the time it takes to get there, the cost of getting there, and the disruption to their business processes to get there. When you talk to corporate counsel who have 30, 40, 50, or 100 stays in place on their electronic data, they have a difficult time running their businesses. That is what they tell me.

But my remarks today are not really about their view, because I don't represent their view. I am going to share with you what I think they might say if they were here about *Concepcion* and what it means and what your challenge is as appellate judges from all over our country. How should you use *Concepcion*? What difference does it make? More importantly, has it changed your role in protecting the social fabric?

Existing Protection for Consumers

In other words, suddenly, because of the decision in *Concepcion*, do you need to take a different view to protect the people who would adhere to contracts, contracts of adhesion, consumer contracts, because of *Concepcion*? I am here to suggest to you that you do not have to take a different approach, because, first, you have well-worn, well-developed common and statutory law to review contracts of adhesion, which is really what we are talking about today, and, second, the consumers who are parties to contracts of adhesion are protected in many other ways. As I look out at you, the distinguished group that you are, including me and the panelists to my left, we are all parties to contracts of adhesion, every one of us. Those contracts of adhesion have arbitration provisions in them. The question is, Do you need to do something special because of *Concepcion* to protect yourselves? The answer is no. Not only do you have your common law of your states to look at contracts of adhesion, which you scrutinize in any event, but we also have other touches by government that protect those who would contract with arbitration provisions.

First, these are generally regulated industries. Not only do we have the court system as a protector, we also have agencies of our government, created by statute and administered by our executive departments, that operate in the areas of insurance, banking, health insurance, consumer credit, all with government-sponsored watchdogs that look at the relationship between the provider of those services and products and the consumers.

There is an enforcement group out there in almost any area of consumer touch with a contract of adhesion.

In many of our states, the provisions of those contracts are governed by statute or regulation. As a result, the people who contract—the adherers, if you will—are protected.

The regulatory schemes that those agencies bring to the table license the individuals who provide those services, regulate the people who provide those services, and sometimes fine the individuals who provide those services. There is an enforcement group out there in almost any area of consumer touch with a contract of adhesion.

The other thing we know is that in all of our states, as far as I recall, we have robust consumer fraud statutes that are both actively prosecuted and pursued by our attorneys general, and in many states, if not most states, relief can also be pursued privately. I can tell you that in many states they are pursued actively. The attorneys general of our states, including the State of Iowa where I practice, do pursue actively the statutory remedies that are available in those states. The actions of our attorneys general, your consumer fraud statutes and statutory scheme also provide protection to the adherers.

The third thing we have today, which is not really a touch by government, is the Internet. Suddenly, there is sunshine on almost any consumer transaction that you can think of, because people comment on it. There are different comments that change the course of the way businesses interact with their customers. You can make decisions—consumer decisions based upon the opinions of consumers about the products that have been purveyed and the services that have been purveyed. That is a power that consumers have that they never had before. Our clients listen to those. They monitor those.

We have new problem-reporting schemes like the Consumer Product Safety Commission, that has a robust complaint mechanism for people to interact electronically and provide

It is not corporate conduct run amok if judges don't suddenly scrutinize contracts of adhesion differently because of *Concepcion*.

comments about products and services, all providing a check on corporate conduct. So it is not corporate conduct run amok if you judges don't all suddenly scrutinize contracts of adhesion differently because of *Concepcion*.

Concepcion has been heard and read by corporate America. They are changing the contracts with those who adhere for their services.

Finally, you have the *Concepcion* case, itself. Justice Acoba did an outstanding job of really talking about the limitations and teachings of that case. Once the Supreme Court pronounces that AT&T has an enforceable arbitration agreement in one of its consumer contracts, corporate America responds. To the extent that you believe that the AT&T arbitration provision was robust and fair, let me assure you (and you have probably already read) that much of corporate America is parroting it. That case does have an effect, even though it precludes and preempts certain claims. Corporate America has responded. *Concepcion* has been heard and read by corporate America. They are changing the contracts with those who adhere for their services.

If *Concepcion* Had Been Decided Differently . . .

Now, let's think about what would happen if *Concepcion* had gone the other way and we had the remedy available to consumers, to adherers, and small claims truly was a series of class action suits. Well, we know now that the vast majority of class actions that are brought—you can look at a number of empirical studies—never get certified, and are dismissed, with payments to no one. We also know that, for those that are certified, the recovery rate, the actual payment to those who are in the class, typically runs 20 percent or less. So even if *Concepcion* were gone, and we had one more vote with the four justices who dissented, would we really be better off with the class action system? Would the adherers be better protected?

Finally, the whole process of dealing with the class is onerous. I am certain that all of you have been notified of your participation in a class that you knew nothing of. We probably are all members of various classes today, and we don't even know it. I would suggest to you that, as described in *Concepcion*, the process of opting in, or making a claim in a class, or opting out sounds as complicated and most consumers would think is as complicated as participating in AT&T's arbitration proceeding. That is why so few people in consumer class actions actually ask to be compensated or are compensated. They don't want to get involved. I would suggest to you that consumer class actions as an economic vehicle to provide a remedy to people is not the most efficient vehicle in the world.

People who adhere to consumer contracts and are subject to arbitration provisions are well protected in our society.

All of you are capable of construing contracts. You do it every day. You do it very well. You all know how you look at contracts of adhesion. I would suggest to you that *Concepcion* has clarified, but has not changed, the field. I would suggest to you that those people who adhere to consumer contracts and are subject to arbitration provisions are well protected in our society.

It has been my great pleasure to be with you so far. I look forward to being with you this afternoon. Thank you.

LESLIE BAILEY

I want to start by saying something that nobody has talked about yet—and that is what happened *after* the *Concepcion* decision. It is just an interesting tidbit that I thought you would all want to be aware of. After AT&T won the *Concepcion* case in the Supreme Court, an enterprising plaintiff's lawyer actually tried to do something that AT&T, itself, had said it would encourage in its papers to the Supreme Court. That is, he found several hundred consumers across the country who all had a beef with AT&T. He filed hundreds of individual arbitration cases against the company, all seeking injunctive relief against AT&T. Guess what AT&T did? They actually ran to federal court to seek an injunction against all of those arbitrations, arguing this was an end run around the class action ban. Apparently you *can't* file hundreds of individual claims.

I raise this with you to just raise the question in your minds whether businesses really want arbitration, or are they trying to use arbitration clauses to achieve a different end? I want to raise three points which go to the importance of your role as state court judges, to try to put this all in perspective, and bring it down to the practical level a little bit, out of the theoretical.

Contract formation is always a state law question.

The first point—and I think we have got consensus on all of the panels so far on this—is that *Concepcion* did not make all arbitration clauses enforceable. It simply didn't. It is not a license for companies to force consumers to travel 3,000 miles away to arbitrate. It is not a license for them to write a clause saying the corporation's own CEO is the arbitrator. All of that stuff that wasn't okay before, is still not okay.

The second thing, which nobody has talked about yet, is this: when you get a motion to compel arbitration on your desk, you will often see the company argue that it is not even for you, the court, to decide whether the arbitration clause is enforceable. There is a push in a lot of clauses to put *the arbitrator* in charge of deciding

There is one thing that is always, *always* for the court to decide: that is the threshold question of whether a valid agreement was formed at all.

whether the arbitration clause is enforceable. I kid you not. There is one thing that is always, *always* for the court to decide: that is the threshold question of whether a valid agreement was formed at all. That's a very important point that I hope you'll leave with today. I am going to talk a little bit more about how formation is different.

The third thing that I am going to talk about is that when you decide whether to enforce an arbitration clause in a case, that decision has a huge impact not just on the civil justice system, which Professor Gilles talked about, which is very important, but on the parties and on what happens after that. I am going to talk a little bit about that, all in less than 10 minutes.

***Concepcion* and Enforceability**

Number one, *Concepcion* did not make all arbitration clauses enforceable.

Some of the things that I look for when I review these clauses (and I review a lot of them in my job), is whether the claim is outside the scope of the clause. We had a case where somebody was claiming a sexual assault. The employer was claiming that was arbitrable. But that didn't arise from the scope of her employment. Rape is not a condition of somebody's employment. That was outside the scope.

Next, is it an illusory clause? Does the corporation retain the right to unilaterally change the terms? If so, that is not a promise. There is no contract there.

Next, has the corporation waived the right to arbitrate? Are they just happily litigating in your court until something happens they don't like and then, "Oh, wait. We have an arbitration clause!" Watch out for that.

Next, are they a *non*-party trying to take advantage of a co-defendant's arbitration clause?

The Supreme Court held that when God created arbitration, He wanted it to be between one man and one corporation.

Next, are they trying to impose the arbitration clause against a non-party, somebody else who, say, signed the contract when the loved one was admitted to a nursing home? This is a very common tactic. We see it a lot in nursing home cases, which are very often in state court.

Last, but not least, of course, unconscionability. Professor Frankel's paper goes into great detail about all of the things that are unconscionable—shortened statute of limitations, distant forum, these kinds of things—which are not fundamental to arbitration, so state law is not preempted.

Now, obviously, class action bans are in a separate category after *Concepcion*. We lost that battle. The Supreme Court held that when God created arbitration, He wanted it to be between one man and one corporation. You can't have more than one person against the corporation. Not okay.

Those are just some things to look for.

Contract Formation is Different

Second point, contract *formation* is different. That's always a state law question. We are talking about questions like, was there consideration? Was there really notice, or is this something hidden in the back, three links down on a website? Was there really assent? Depending on the way the clause is worded, it is possible that some issues may be delegated to the arbitrator, but never, never, never contract formation questions. This makes sense because the arbitrator derives her power to decide stuff *solely* from the arbitration agreement. It is not like Descartes ("I arbitrate, therefore I am."). It all comes from the contract.

Another thing about formation that you are going to see a lot is something called "the presumption in favor of arbitration." This presumption does exist. There is language in Supreme Court decisions on it. But it does not apply to the threshold question of whether a valid agreement was formed. It only applies if you find that there is a valid agreement.

Real-Life Impact of Arbitration Clauses

Third and finally, I want to talk for a minute about the real-life impact. What happens after you rule that one of these things is enforceable? Obviously, this is separate from your legal analysis, but a lot of judges ask me about this, so I thought you might want to think about it.

Claim suppression is the single biggest effect of enforcing arbitration clauses.

We have some data on this. In the consumer cases, the Consumer Financial Protection Bureau (CFPB) recently released part of its study on consumer arbitration clauses in the financial sector. What they found was that, in the year 2012, out of tens of millions of consumers who were subject to arbitration in these markets, a total of 300 arbitrations were filed by consumers against companies. This goes to the question of whether corporations really have these clauses because they want arbitration or whether they are actually looking to suppress claims. Claim suppression is the single biggest effect of enforcing arbitration clauses.

Six years, 70 million people, 30 arbitrations against AT&T Wireless.

This is consistent with the data that I have seen in my own cases. We had a class action against AT&T wireless before *Concepcion*. This was the company that was the market leader among mobile companies, with 70 million customers. Also (forgive me, Archis), AT&T had the highest complaint rate of any mobile company with the FCC. When we filed the class action we got thousands of emails and calls from consumers wanting to know if they could be helped. We thought, “Why don’t we look and see?” There must be a lot of arbitrations filed against AT&T, right? Especially with all of these fancy bells and whistles and incentives in the clause that make it fair and make other companies want to copy it. In the six years preceding our case, 30 people had brought arbitrations against AT&T wireless. Six years, 70 million people, 30 arbitrations against AT&T Wireless. All right.

Statistics show that the more arbitrations an employer is involved in, the less likely it is that the worker will win.

You may be thinking, well, what about employment cases? We have a little bit of different data there. The data there shows not so much the level of claim suppression, but it does show that employees fare far worse in arbitration than they do in court. Professor Alex Colvin did a study of employment cases before the AAA. He showed that workers only won 21 percent of the time, far less frequently than in court. But

more importantly, I think, the average awards that workers get in arbitration are 25 percent of what the same case would have garnered in a regular court. Also, his statistics show that the more arbitrations an employer is involved in, the less likely it is that the worker will win. This goes to the question of whether there is, in fact, the repeat player bias we hear about. The arbitrations also took a long time—284 days, on average. So it questions whether arbitration is that much faster.

Conclusion

Three things I hope you will leave with today, just on a practical level:

- Number one, *Concepcion* did not make all arbitration clauses enforceable. A lot of businesses will want you to think that there is nothing for you to do—“You have to rubber stamp these things.” That is not true. When you look, you will see a lot of terms in there that are not enforceable. I think in the wake of *Concepcion*, you are going to see businesses pushing the envelope, going back to the kinds of terms that they used to put in before state supreme courts struck them down, trying to see if they can slip them by you now that there is *Concepcion*. It is more important now to pay attention than ever.
- Number two, formation is different. No presumption. Always for the court.

- Last, but not least, please never forget that your decision to “send a case to arbitration” may more often than not result in the case not being brought at all.

Thank you.

RESPONSE BY PROFESSOR FRANKEL

I don’t have too much to say in response, other than I wish I had thought of the line “when God created arbitration.” I think that is the line of the day.

I wanted to briefly address some of the remarks, first, that Mr. Weston made. As I understood his point, he said we don’t really need to worry about whether or not arbitration clauses suppress claims. He gave three reasons. The first was that a lot of the consumer claims involve heavily regulated areas with state and federal regulation so consumers are still protected. I think Ms. Bailey addressed that point very well in suggesting that, perhaps, that doesn’t necessarily mean much if the effect of the arbitration clause is that the case doesn’t get heard as opposed to just being moved to another forum.

The second point he made was that we have the state attorney general offices. We have public actors who can step in and address the problems that afflict consumers. I think in the ideal world that would be great. If every attorney general office was staffed to the gills and had a huge budget and could go after every single instance of misconduct, it would be great. I don’t think that is the reality. Just hearing the talk this morning about court budgets and judicial budgets and government budgets, we know that government budgets aren’t adequate for that. In the arbitration cases that I have seen, when state attorney general offices have come in to file amicus briefs on particular cases, I am not aware of a state attorney general brief that has said, “We don’t need private action in this area because we are able to handle all of these cases ourselves.”

We don’t have enough resources to go after every single instance of misconduct.

Regulatory Resources

Rather, they always say the opposite—“We don’t have enough.” This is exactly the point Mr. Gilbert raised this morning – we don’t have enough resources to go after every single instance of misconduct. That is why private attorneys general are so important. You need both. Most federal and state consumer protection statutes were created with that idea in mind: creating that opportunity for a private attorney general to fill in where the government cannot.

I think the third point that he made was that we don’t need to worry because we have the Internet. The Internet is there. People can register complaints. That will change corporate action. I think that there is no doubt that there is probably some truth to that. I think someone mentioned the General Mills/Cheerios example this morning. I think that is probably one example where it did work. To suggest there is a level of awareness by consumers in every situation of misconduct or that we even know what is going on, that the Internet is going to change that – I would suggest it is unlikely, although, I do not have data to support it.

I think the other point I would make about that is most of the time when I hear people I know who run small businesses talk about the Internet, what they complain about is all of the people who lie about them on Yelp or

The Supreme Court was not necessarily thinking about what were the fundamental attributes of arbitration outside of the class action.

give them bad reviews and things that they feel like they are almost being defamed for what they have done. I think you have to take the bitter with the sweet there, and wonder about the ability of the Internet to serve as an effective regulator of giant corporations.

The last point I want to make is that Justice Acoba did a great of dismantling my sanguine view of *Concepcion* in thinking about how Justice Scalia might perceive the case. I don't think the

Supreme Court was necessarily thinking about what were the fundamental attributes of arbitration outside of the class action. I agree with Justice Kelly, and you know better than I that you often don't necessarily want to speculate about what it might be before that next case comes along. I do think that Justice Scalia's language about adhesion contracts and the fact that all consumer contracts are now adhesion contracts, is still consistent with my view. As I read the case, what Justice Scalia was saying is, "Look, class actions are inconsistent with fundamental attributes of arbitration. It doesn't matter whether that thing comes in an adhesion contract or a non-adhesion contract." You just can't have a class action arbitration in his view.

Class Actions Are a Special Case

But given the fact that the Court allowed FAA preemption to operate in a context of an adhesion contract, I think we are still reading the case the same way, because it involves class actions, and I think class actions are a special case for the reasons that we have talked about. Outside of that arena, that doesn't necessarily mean that other types of adhesion contracts necessarily are inconsistent with fundamental attributes of arbitration. I really do think that their use of the term, and the Court's adoption of that idea as a framework for thinking about FAA preemption, does require us to think about what those fundamental attributes are. I still think the idea of non-adhesive choice is a critical element of that. I don't think *Concepcion* in any way rules that out because of the unique features of class actions.

I also wanted to second Justice Acoba's point about the importance of a knowing and voluntary waiver in arbitration clauses—the idea that to waive your right to a jury trial in an arbitration clause, it has to be truly knowing and voluntary, much in the way we think of plea bargains or other types of things that would involve knowing and voluntary waiver of constitutional rights. That is not an idea that has gotten much play in courts so far, but I do think, in light of Professor Sovern's research about what consumers really know when they are signing arbitration clauses, and what they really believe when they are signing the contract with an arbitration clause, that it may be time to once again look at that idea that a waiver of a jury trial has to be knowing and voluntary. Perhaps there is some room to give teeth to that doctrine as more empirical data comes out about what consumers know and don't know. Thank you again.

To waive your right to a jury trial in an arbitration clause, it has to be truly knowing and voluntary.



THE JUDGES' COMMENTS

In each of the discussion groups, the judges were invited to consider identical pre-ordained questions relating to the papers and oral remarks. The judges devoted more time to some questions than to others, and they raised other interesting topics.

Remarks made by judges during the discussions are excerpted below, arranged according to the discussion questions. These remarks have been edited for clarity only, and the Forum Reporter did not intentionally alter the substance or apparent intent of any comments. Although some comments may appear to be responses to those immediately above them, they usually are not. Actual conversational exchanges among judges are indicated with dashes (—).

The excerpts are individual remarks, not statements of consensus. For general points of agreement that arose out of the discussion groups, please see page 151 of this report. No attempt has been made to replicate precisely the proportion of participants holding particular points of view, but we have tried to ensure that all viewpoints expressed in the group discussions are represented in the following excerpts.

Do you see the campaign for alternative dispute resolution (“ADR”) as part of a larger “anti-lawsuit” movement?

Yes.

I don't think it matters, honestly, if it is part of a movement. As one of the speakers said, the plaintiff bar is losing the fight; we have 86 percent defense verdicts in our county. The plaintiff bar is begging for ADR to get away from the juries. Other areas of my state are very pro-plaintiff. But if the jurors are coming in with a predisposition that they haven't met a plaintiff they like, then perhaps elective arbitration is serving the purpose—but not mandatory arbitration.

I don't see the settlement process, even though it's not voluntary, as part of a larger movement. It's simply an effort to give the parties one more opportunity to settle. For the trial that we say everybody is entitled to and everybody wants, the truth is, they end up going to trial and they don't really want to be there; they would like to find a way out. So I don't see it as part of an anti-lawsuit movement. There are other more specific mechanisms that are clearly identified in that way.

—I think that I have seen fewer and fewer cases filed as civil lawsuits. Now, exactly why that is I don't know. I can't specifically say it is tort litigation or it is arbitration or something like that. I do see that there have been fewer cases filed at what we call our trial court level. There are fewer cases that actually get to the court of appeals so we were trying to keep it in context with what we were really talking about.

—The anti-litigation movement seems to be focused on malpractice and things like mass torts. The question is whether closed arbitration is part of the anti-litigation movement. I say no, I don't think it is.

If you call it arbitration instead of ADR, then the answer is plainly yes.

I would say it depends. I wouldn't put mediation into the same grouping as arbitration. I think mediation is not part of an anti-lawsuit movement as much as it is an effort to resolve matters in an appropriate way, in an appropriate forum without having to involve courts directly.

It is not part of an anti-lawsuit movement. I wouldn't put it into that category.

—I think the arbitration agreements are part of the larger scheme to keep folks out of court. I hope it does not result in less access to the courts, but I think you are going to see that in the long-term. It is absolutely going to deny certain folks access to the courts, lack of access, denial of access.

—Is that good?

—It is bad. It is terrible.

—I would expect some people to say that is good because it limits the need for the judicial system.

That is the whole thing. There was this push by the people who were afraid of lawsuits, big business or whatever. First, they tried to change the law. Then they tried to change the courts. Then they pushed for arbitration. Yes, my view is that it is directly part of the whole scenario by big business and big money to change the whole system. I think we are losing. And I think trial judges are losing.

One thing that might be the most essential thing to keep in mind is that from the consumer's viewpoint, access to the courts means something different than it does from a business model and always has been, always will.

I thought Professor Gilles's paper was very interesting and provocative, and it made me remember something I hadn't remembered for a number of years: that when I started out in practice, I recall that there seemed to be a movement—that I was going through a lot of seminars where the idea of the value of arbitration was being promoted, and with, as I recall, some vehemence, as though there might be a contrary point of view. "Everybody should have an alternative: no jury." That kind of thing. I was perplexed about it. I said, "Yes, of course, why not?" Before I became a judge, I was put on a committee with judges and lawyers. We actually pushed arbitration, mandatory arbitration or mediation in all forms as available to litigants. We actually pushed this. Now I have a completely different point of view about what might have been behind that push. If you read the decisions, you can't help but see the thin premises about why the FAA would apply. Yes, this was orchestrated maybe.

I think it's an indictment on our inability to move cases in our courts of general jurisdiction. But lately we've been getting the cases with the arbitration agreements that are so draconian. The employment

arbitration agreements, the HMO arbitration agreements—they're so fantastically one-sided that maybe I begin to see a broader picture. I don't think I was very astute at the beginning, to not notice it was going to be pervasive.

I don't think consumer advocacy groups pushed for mandatory mediation.

"Anti-lawsuit" is sort of inflammatory. I would rather say it grew out of a lack of recognition of the concerns of common people.

Yes.

—It is anti-juries. I think the idea with the movement is you stop the juries and have one person or a judge doing mediation or arbitration.

—It is also anti-judge, because it takes cases out of the judicial system. There is nothing wrong with that. The FAA in 1925—or whenever it was written—did it to reduce the cost of business litigation in the court system.

I think all forms of ADR, mediation/arbitration, came about more from the liberal side of the profession initially than from the conservative side. The ills that have come from it were not expected. Those who advocated ADR have now found themselves in a position they never thought they would be in.

—I think it is. I think there are certain industries that don't want to go to trial or deal with the lawsuit. This is the alternative.

—What defendant wants to go to trial? To me, none. We see nursing home agreements, also, that had to deal with something similar, but I don't recall many nursing home cases, abuse cases before the last 10 or 15 years. For whatever reason, they were there.

—It seems to me it is always anti-lawsuit. What is the motivation? Is the motivation to limit people's rights or is the motivation to get into a system that is more efficient?

Yes.

—I don't think it's necessarily anti-litigation. I think the attorneys welcome it if it's administered fairly and properly. On the other hand, if it's used in the context of what we were talking about this morning, to enforce what is an unconscionable arbitration provision, then I think it's a bad ADR. So there's good ADR and bad ADR.

—It's like cholesterol. There's good cholesterol and bad cholesterol. So do something about the bad, and take care of the good. Some forms of ADR are very helpful. The courts like them, the lawyers like them. That is good for us. Certain forms can be very bad like some forms of arbitration that we heard of. That is your bad cholesterol.

I think that, with respect to the medical negligence cases, the ADR movement was an anti-lawsuit movement. Even though most of the medical negligence cases, if they go to trial, are decided in favor of the hospitals and the doctors, the verdicts are still pretty big. And in our state recently there have been efforts to prevent those cases from going to trial at all. There are brain-damaged babies, there is forced ADR. So I think what somebody else said earlier about good ADR and bad ADR is happening in our state.

In my area of the country, after the tort reform, the medical malpractice defense work is drying up. The lawyers are gone. There is no work.

—It is inherently anti-lawsuit. The question is whether that is a good thing or not. There will be differences of opinion on that.

—Well, it seems like it is a good thing when it is mutually agreed upon. When one party is unaware, it is not such a good thing.

To what extent is ADR in your state a response to insufficient funding for the courts?

None. Not at all.

In our state, it's clearly a response to lack of funding for the courts. We're kind of the ugly stepchildren the way it is instead of the coequal branch of government that the civics class tells us it is.

I don't think it is in our Midwestern state at all. The courts are funded to a degree, but when we're competing with other states for business clients, we want to one-up every other state to get them to our state, so we try to streamline the system. Our legislature tries to put cases into arbitration, or allow it more and more, and use mandatory mediation, settlement conferences, and all sorts of things to create a penalty if you don't accept it right at the start. Therefore, it makes a very pro-business climate, kind of anti-consumer to a degree. We've swung one way to other.

I think it's a practical matter. Our criminal caseloads are going up. There's an epidemic of heroin, and funding is not going up at all for courts. Even in the criminal arena we have felony arbitration or mediation. They do that. I just don't know how we're supposed to do it without that. I think it's unfortunate, because I don't think we should allow the almighty dollar to control our side of the law, especially appellate courts.

Well in our Northeastern state civil cases are down all over, because cars are safer. We're seeing less and less snow, which was always good for a few accidents. I think where originally the case congestion was pretty severe, it's not as severe anymore because the personal injury world is changing. Vehicles are safer, they're not crashing as much, they're almost driving themselves. Even if you roll it over three

times, people are dusting themselves off, thanking God, and walking away. So you're seeing a big drop in violence but it has little to do with ADR.

The way ADR was initially sold was that the courts were overcrowded and there wasn't enough money. They said, "This is a way to more efficiently get to the issues without all of the cost and the overcrowded court systems." When I was a young lawyer and ADR was first becoming very popular, that was what everyone said. It was a way to save money and be more efficient.

—I don't agree about the funding. I think ADR mediation became routine because of poor case management. The public wanted the cases heard in a forum and it was perceived that could be the quickest way to get in and get out.

—I think you are absolutely right. We did it for efficiency. I remember back in the 1980s, when I was in practice, if you appealed a case in our Western state it would take three or four years.

—It wasn't funding.

In our Western state, most of our funding comes from cases being filed. We are down almost 15 to 20 percent. I am not talking about appeals, I am talking about filing cases in the trial court. If you don't have a case started in the trial court, it is definitely not coming up to the appellate court.

I think mediation is hopeful. We have got about 20 percent of our people coming in pro se. There is a huge shortage of lawyers, but worse yet, of people who can *pay* lawyers. I think mediation is invaluable to the pro se litigant. I think the whole concept of access to justice overall is helping us. I am sure it doesn't help the pro se gentlemen who can't find a lawyer and who has got a binding arbitration clause in an adhesion contract. The pro se issue is kind of overwhelming.

—I see the trial judge and appellate judge. The trial judge can get a case to trial and resolved quicker than in arbitration. ADR has served its purpose in terms of reducing our numbers for case management purposes. But I don't see that arbitration is more efficient than traditional civil litigation. I see civil litigation giving a better value than the confidential arbitration.

—Not all of the numbers are down, by the way. From 2005 to 2010, our numbers doubled in civil cases. We went from 30,000 to 60,000 cases filed in our Southwestern state. Our appellate number stayed constant. We are still getting 4,000 appeals a year. I would hesitate to say that we take as a given that there has been a direct cause and effect that caused the numbers going down.

I think it started out that way but now it's just a whole different animal, because our courts aren't necessarily overloaded. They're not in court all the time. I think just so much of it is now just a different avenue that you're taking.

These are issues where the individual still has problems having access to justice. They don't understand it. We have self-help centers, and I don't want to make this a major thing but it's not only underfunding

of the judicial system, it's about how do we afford the individual the access to defend himself in situations in a judicial setting.

—I think ADR, as it started in the 80s and so forth, really didn't have this insufficient funding as a factor. I don't think that is really a factor today. It is a fact today that almost every state court system is underfunded or maybe all of them are underfunded. There are a lot of problems with that. The alternative dispute resolution movement, when it started in the '80s, was all small personal injury lawsuits and property damage. You saw some systems where you could go to arbitration, but you didn't have to accept it. Now, when you talk about class actions and these nursing home cases, it is a far different setup than what you originally saw in the early '80s, with all of these programs that started, typically, first in the larger metropolitan areas and then filtered into the smaller areas as attempts to "help the court system." That is not what we are talking about now. We are talking about an agenda-driven movement.

—I think it is minimizing risk more. Avoiding delay and cost and minimizing risk was what worked before.

—I don't think any litigant looks at a case and says, "Oh, the courts are underfunded, so I am going to make an ADR decision on my case based upon that."

—Courts are jammed. I mean we are jammed. Without ADR mediation, especially, I don't know if we could function, especially with the cutback in funds that we have.

I think the initial impulse was sort of indirectly because of the funding of the courts. It is because the courts were crowded. Maybe it remains a motivating factor. I don't think there is any question that it has had the effect of reducing court dockets. It has had the effect of reducing jury trials, for example. I think that is true everywhere. Whether you think that is good or bad sort of depends on how you feel about litigation as an ideal tool for conflict resolution. If you think ADR has beneficial effects, both in terms of cost savings and in terms of customer satisfaction, then in an indirect way, at least, it relates to the funding of the courts. If you could get a court order on any day, at any time, step right in and have a judge decide your case and it zooms up to the appellate courts and get it resolved in a couple of weeks, probably the impulse for ADR would be considerably less.

Do you really think that the impetus was as a cost reducer? Let's be reasonable. They started arbitrating in the securities area because judges didn't know what the hell they were doing. Juries didn't know what they were talking about. They wanted to arbitrate their cases in front of fellow stock exchange members who knew what the best practices were within the exchange. The same is true with the construction industry, between architects and general contractors. They didn't want their case in front of a judge. The only thing he knew about construction is how to put up a picket fence in his backyard. The original impetus was expertise, I think, when it first began. Now, it is an entirely different area. We are past that. I think we are in an area now where we are trying to *prevent* consumer litigation. I think you have to view arbitration in the areas of expertise entirely different from arbitration in the area of consumer litigation or personal injury. Those are the areas where it is really questionable whether you really want to have forced arbitration at all. Leave the businessmen to their own devices. To them,

it is a business decision. They are going to settle that case or not settle that case based on business decisions. They are not going to settle it based on emotion. But it's a little different from in the tort area and in consumer protection.

Some of the selling points for arbitration these days are related to the fact that the courts are crowded, whether it is foreclosure cases or underfunding a number of judges and so forth. I think it has become somewhat of a mantra that alternative dispute or arbitration is a good thing because you can get it resolved quicker.

—I doubt that any court has asked for mandatory arbitration as a way of keeping the costs of the courts down. I doubt that any court has done that.

—I haven't really seen anything in the legislature. When the courts are looking at funding, I haven't seen the ADR question arise in connection with funding in the legislative process.

—Initially in a big way, our arbitration system was a response to underfunding of the courts. But the case numbers have gone down in the courts, and of course the funding has too. The population has not, so it's still a problem.

—If the purpose was to get cases out of the court, it was successful. Whether it's less expensive and quicker, I'm not so sure. With all these judges retiring and becoming arbitrators and making three times as much money as they were, does that suggest that arbitration is a less expensive process?

Mediation and settlement are a direct result, over and over again, of the lack of jury trials, which we're not having because of the lack of funding. But for arbitration, I don't think it has any impact.

For the cases that actually go to trial in court or are decided in arbitration hearings, do you consider arbitration to be more efficient than traditional civil litigation?

It depends on the judge.

Before I was a district judge I was a mediator and arbitrator for 10 years. The answer to your question is that, if everybody agrees to everything that goes along, it can be cheaper and faster. However, there are disputes, and there is no incentive for an arbitrator who is paid by the hour to say, "Move along, counsel, I've got people waiting." And as an arbitrator you don't have as many tools to resolve the disputes efficiently. There is a market model. You can agree to streamline the process, but if the two sides or four sides or eight sides don't agree to streamline, and have not really empowered the arbitrator to do that, then it won't work. And if you get three arbitrators who are busy and have to work within their schedules, it's nine times as cumbersome.

In our Southern state we have early ADR right after the scheduling conference. I think that is really helpful because there are situations where the lawyer is not interested in settling. If you get the parties together, a lot of times cases will settle out before you have waited a year for the trial to come up. So I think early court-sponsored mediation is really effective. Part of it is we can lead and bargain. If we go forward it's going to cost all this money. I think it's a better setting because the parties especially feel that the judge is doing his or her job correctly and is really an independent party. And judges can be very effective in settling these cases.

Arbitration awards aren't self-effectuating in most cases. I don't know how many of you have ever had one where they come before you at the trial court level on an action to enforce the arbitration agreement. It just adds another layer, and there's no end to the mischief that can happen there.

—In my experience as a trial judge before I got to the appellate level, I never saw an arbitration that was more efficient than a trial. Of course, I didn't see the ones that weren't in dispute. But once it gets off track, you will languish in no man's land forever.

—Either off track or the paying party wants to drag.

—Right. It just gives you another layer to drag.

—It seems to me that's the basis of an economic model. If you have two parties interested in resolving their dispute, it is more efficient. If you have one party without an interest in resolving it, it can be cumbersome to say the least. And those are the cases we see in the courts sometimes, where somebody doesn't want this to come to an end.

—I just personally went through one. It's really good. The first thing you have is a meeting with them, and then you're separated. And then the arbitrator goes back and forth. They had lunch catered, and we went right in there and ate. Reason being you don't disperse them, they're not gone and they're not influenced by other people. That arbitrator stayed in charge, we went in and got our food and came back to our room and ate. Then the other group went in and got their food and went back. Courteous, coffee, quiet, very businesslike, very kind, very considerate.

—What you're describing sounds exactly like mediation.

—Mediation with a mandatory result.

—It was very easy.

—So you don't have both parties in there at the same time?

—No, they're in different rooms. They go back and forth. There's nothing confrontational about it.

If you're a company, arbitration can certainly be more effective than litigation because your costs are relatively restrained. Although I am told that arbitration is becoming a fairly expensive endeavor now, with arbitrators charging as much as \$500, \$600, \$750 an hour. And some arbitrations take a

considerable amount of time. But nonetheless, it is going to be a lot less than the money that gets tied up in discovery and motions. Discovery, I think, in many ways has become the big bug-a-boo that is giving the courts a bad name. I was on the trial bench eight years ago, and the last year I was on the trial bench most of my trial dockets consisted of discovery disputes. Every Friday here would come these discovery disputes and they seemed to be endless. Part of it I think is due to our notion that we should have really full and really broad discovery. In corporate entities, I find that you get into a lot of complicated hiding the ball. So that is really lengthening the process and has added to the cost. If you are just looking at it like the public might be looking at it, I think they see that the time is quicker, the cost is less.

I was actually in private commercial litigation practice until last year, so we had a lot of discussions in our firm about arbitration. We always viewed it as more efficient in that it would typically be faster. But notwithstanding that, over the course of my 12 years in the firm we moved decisively away from favoring arbitration for our clients—our corporate clients—in their contracts with other business entities, because we concluded that our confidence level in the arbitration process was so much lower than what we thought we could get in court. That despite some efficiency gains, which I think are still there. But it has gotten much more costly and the results are a real crap shoot.

I guess for me the answer is, “It depends.” The reality is that the cases that are going into arbitration are better prepared than they used to be. So I am not sure there is any negation of cost factor, except the cost for trial, in terms of prep and discovery that they go into before, depending on the nature of the issue. But I think for me fundamentally, I look at the access to justice for small consumers. We are dealing with those little flaws. When they were talking this morning, I visualized the Congress wanting to take the executives of GM before them and ask them “Did you know this product was defective?” Compare that to the average consumer whose car won’t start in the morning on a regular basis. It is a \$20 part, and the attorney won’t take it if it can’t be a class action, because there is an arbitration clause. On my docket next week, we are in the middle of payday loan issues, and also some minimum wage issues, and some contracts. That is the reality of what we have.

I don’t know how you can quantify the efficiency in arbitration versus trial. It depends on the trial judges, as you said. In our Midwest state a few years ago, our former chief justice established commercial dockets in the major cities. There are just a couple of designated judges on each of those trial courts that handle these major litigations. The lawyers are clamoring for it and they are very happy with how it is working. So those things come to resolution faster—and, more often than not, without a trial.

The word “efficient” creates kind of a quagmire. To be efficient for most state courts is how many trial judges do you have available to deal with litigation that is coming through the system. Traditional litigation has not necessarily been as efficient. So that is kind of problematic when you look at this, as opposed to a straight question of what is more efficient from an academic standpoint of going to trial or going to arbitration.

“Efficient” means different things to different people. Now if you want to ask if it is more efficient for defendants, large companies and corporations, why certainly. Didn’t they just skirt the jury trial? I have never seen a court where you had to pay the judge or pay the jury. You usually just pay the filing fee. The cost is not the cost of the expensive litigation; the cost is the issue that surrounds the deprivation of the jury trial.

Efficient for whom? Is it for the state and the legislators who fund the courts? And if judges are left sitting around and doing nothing, then I guess it is efficient for the legislators, and I guess they can cut out some more judges. In terms of arbitration, it certainly does not cost the state or the public as much for judicial time as it costs for arbitration. Sometimes the businesses would rather pay more if they have quicker access and quicker the chance of faster resolution. They would rather pay more to go into arbitration, get it done with, get out, and be done.

If you are in our state courts you get a jury trial in a year. They are fast. Very quick docket. So it is more desirable to do that. So what you would choose really depends on the jurisdiction you are in. At least in our state courts they have trust that they can get to court quickly.

I was formerly a trial judge and my background is with criminals, so I always think of setting trials. When the counsels walk in with the case, we are fortunate to have resources. I would say, “Okay, we will set the trial in three or four months.” And they go, “What, are you kidding?” It was never the court for us that had the backlog, it was the attorneys. So I’m not sure the efficiency is so dependent on resources. So whether it is more efficient I think it depends on a lot of variables. It is truly nice to hear that a lot of courts are being responsive and are setting up these fast-track courts. I think it is a good thing that we compete with arbitration. I think we can do it better.

But I do think that the paper suggests there is an agenda and a competition between the social and democratic principles embedded in a judicial system and what goes on in an arbitration system. Even if one assumes pure cost efficiency from the arbitration system (and we can no longer assume that to be the case) there is something else that is of greater value to us in a democratic society, which is definitely lost or potentially at risk for being lost. That strikes me as a different way of approaching this question.

They are obviously more efficient. The question really is do they become overreaching on one side or the other. I think in business cases they are exactly the way to go. No question about that. Save those discovery costs. In such things as the contract someone signs to pay for a necklace they are buying for their girlfriend on credit at a jewelry store that has one in every mall in America, they have no idea what they are signing when they are paying \$4.35 for insurance in case they lose their job and can’t make their \$25 payment. Those are the matters where you have to think about whether it is worth it or not.

We are settling a lot of cases, too—a tremendous number of settlements. We have seven judges on our court just settling cases. Every trial judge should be a settlement judge.

In our state we abolished mediation. It cost us \$5 million a year. We abolished it. We leave it up to the attorneys. I tell the attorneys to mediate, “But you are on your own. You are attorneys. You are big boys or girls, so do it.”

It is almost like we are assuming that efficiency means quicker. Well, the ideas about that are really a broad spectrum. You don’t hear a lot of definitions about it. You hear about efficiency without getting the definitions. “We are done in two months and it didn’t cost us too much.” That is the business side.

What is efficiency? Who controls efficiency? I actually went and put in some artificial time standards for cases. The volume of dissent from both the bench and the bar was tremendous because lawyers didn’t want to be told how quickly they had to try their case. Judges didn’t like having someone who could post how many cases they were trying a year in their advertisements for re-election. When you talk about efficiencies a lot of that is relative because there are some people who believe they are efficient if they can get the case tried within four years. Other people believe that from filing the lawsuit to trying the case should take no more than nine months.

I think efficiency also has a concept involving fairness in the result or the outcome of the trial. In business-to-business, commercial-to-commercial entities, there is a different analysis than business-to-consumers, where adhesion contracts are so one-sided and the incorporation of terms into the contract present such a major obstacle to the plaintiff that they don’t have the ability to even pursue the lead in some of these cases.

How do we know? We don’t see cases that get resolved in arbitration. I would have no idea.

—If it’s true what they were saying this morning that the people—the companies or whoever—that come repeatedly into arbitration and the arbitrators want the repeat business and that this might bias the view, that’s troublesome if that’s really going on.

—Oh, I think it is. In my city, in the employment area, the arbitrators want repeat business and they know that they’re being selected, so my experience was that they were oftentimes splitting the baby. I found arbitration to be very frustrating because you knew you were never going to win 100 percent. There was always a little bit for each party so the arbitrator could be selected again.

—Well, I think also this idea of assessing costs particularly in consumer things, assessing the cost to consumers who lose is terrifying to people who live on a pretty short budget so they constantly live with not having access to civil justice because they can’t afford the fees. For example, I reversed a case where this man’s four-wheeler was being stored at his friend’s house and it got stolen. And by the time it got into court, he owed the storage company that the sheriff had put it in \$8,000 (for a \$4,000 vehicle), all because of the court’s assessment against him.

—Does anybody think that law firms have anything to do with any of this—the cost of billable hours? That’s changed since I started practicing law. How many people do you have to put on a case to try the size of cases that you have now? It’s millions.

—I think the inflation in attorney fees is really depressive to court things.

—The time in discovery really balloons that.

—We recently had a motion for reconsideration, and one of the parties sent three attorneys over there to argue this motion. When they won they wanted \$29,000 in attorney's fees.

In our New England state, going back to my days as a trial attorney in the early '70s, I can recall how we had this unbelievable backlog of cases. It would sometimes take you five years to get a civil case to trial. And I believe as a result of that, not so much because we were opposed to litigation, but because we had to have a more efficient method of doing it, we concluded that we should have arbitration as a mechanism for moving cases along. As a result of that, we began to mandate arbitration in civil cases. It has now reached a point where we have precious few civil cases going to trial. We may be a victim of our efficiencies, but we do improve dramatically the efficient processing of civil cases.

I think I agree with Justice Holder, who said we brought a lot of this on ourselves. We got here because we didn't want to do those messy things like try cases. We had more important things to do.

There are mediation services where you go to specialists. The reason they do that is because the courts have failed. How have the courts failed? There is a backlog in a lot of jurisdictions, especially big jurisdictions. In some of the mediations they don't have to take what the mediator does. They can go back to court if they have to.

I do think that maybe we, as judges, don't do enough. I don't know how we fix it, to have people have confidence in us. We will be fair. We will be above the political fray. We will be people who we are supposed to be—the people who actually read those records and make a determination on them in good faith. Maybe that is part of the reason why tort reform has been able to occur—because of a lack of confidence.

—It is hard to be a consumer and have any faith in this system.

—I don't think they do. I don't think they expect, necessarily, to get recompense if they lose money.

Here is the basic question, the question that is posed to this whole Forum: How can we expect the people to believe that they are getting fairness or getting justice if they are forced to arbitrate?

Like Justice Holder, I kind of see it as a response to the criticism that we're too slow and too expensive, and that the citizens are not willing to devote enough resources to having enough judges to get cases decided in a timely fashion.

I have to agree. My city has a very large court system, allegedly one of the biggest in the world. Within that court system, in every division, they have created a whole system of mandatory arbitration, mandatory mediation. Settlement procedures are encouraged all over the place. The enemy is us. We have created this problem.

I think part of it was a recognition that the courts were backed up and we didn't have the resources to efficiently handle a lot of the cases. So we see we've kind of set up this triage system, not only in civil but we even have mediation in criminal cases, and with domestic cases. There are a number of different things that we put in place to try to figure out which of the cases the courts actually need to handle and which are cases that don't need to go through the whole court process so that we can use the time that we have on the cases that are needing our attention. And I think the unintended consequence of that, unintended by some, intended by others perhaps, is that we now have set up this alternative to the court system which appears now much more attractive because it is oftentimes faster and less expensive. So I think in some ways we've done it to ourselves, not with an intent to, but that's been a consequence.

—What about the cost to the consumer? Some of these arbitration clauses require the consumer to actually pay for arbitration. How in the world is a consumer going to pay half of arbitration?

—Some of those, I would hope, would be declared unconscionable.

I agree that in the run-of-the-mill consumer case, those clauses are put in to discourage people from bringing claims.

I don't think it is more efficient.

—I was a trial judge for 14 years, and I have been on the appellate court for 25. Arbitration is not more efficient. The only rationale I personally see for it is when you are looking for a panel with expertise that can arbitrate a decision—not mediation, but arbitration. The most efficient way found to run a trial court docket was to handle all of the motions and say, “The jury will be in after lunch.” That got their attention and focused their minds.

—There is a huge push on time management and effectively disposing of cases. In our court we have 230 days to get the decision out the door after the oral argument. Usually it is 12 months from start to finish. Trial courts are under similar guidelines, which are published and sent to the Supreme Court. There are certain ways to reduce the time. If it goes to mediation or arbitration you can reduce the time.

—It's the combination that the party is being forced to agree to arbitration and it's also structured so that you're going to lose. And that's when I have a problem. If arbitration were required but could provide you with some real benefits, the idea might be efficiency and cost. But that's not the animal we have.

—Also, when class actions are not an option, I think that certainly tilts the scale pretty much.

I agree that efficiency is a tough word to use here. In arbitration clause cases it is faster. A lot of these cases are wrapped up in four or five months. But one of the reasons why it is faster is because there is no right to appeal. You can go into court and enforce the judgment, but only on very limited grounds can a trial court overturn the arbitration. So it is faster. I think we are trying to evolve a little bit and create some competition with arbitration. So we are experimenting with quicker dockets, “rocket

dockets,” where certain classes of cases are going through a more streamlined procedure and get to trial much quicker. I think that doesn’t work for some classes of cases, but we have actually had great success in consumer protection cases where a lot of the arbitration is happening.

The legislature creates certain areas that are accelerated, and most arbitration appeals are accelerated. Obviously, it’s the influence of the business community. They generally get appealed only if they are contrary to the business benefits.

I am wondering if there is a proposal for a truly efficient system. I am as much of a skeptic on the way most class actions are handled as anyone. I am concerned that all of the creative minds in this profession have failed to come up with a better system.

Due process is inherently inefficient.

Do you believe the confidential nature of arbitration and the reduced influence of precedent undermine the rule of law?

Absolutely.

I think there are cases where, absent the requirement of arbitration, there would have been litigation that would have been reported and precedent would have been established. But there still are arbitration cases that get into the literature. So it’s not a complete absence of a public record. There are parallels. It’s not only arbitration that is causing cases not to be tried. If you go into your trial courts, find out how many jury trials are taking place for any reason. As we’ve talked, there is some pressure to resolve meritorious cases earlier.

My mother had her 100th birthday two days ago. During her lifetime, aviation law has developed; automobile law has developed; communications law, all these things are developing. We’ve got all this great body of law that we can go to the library or our computers and look at. And just to think of the technology we have now and all the emerging legal questions that we are thinking, well, the law is going to develop on things pertaining to the communications age and all this stuff that’s new to us. But there’s a great potential that it won’t develop because of the very thing we’re thinking about. So that’s an angle that I hadn’t even considered. I think it’s a very important aspect of our discussion today.

I don’t think there’s any question that it’s going to stultify the development of common law, and it is becoming more and more encompassing as to what arbitration is going to gobble up. I agree that historically we’re going to look back and there will be kind of a void.

It seems as if the proliferation of research databases and highly robust legal research mechanisms is something of a counter-weight to the non-transparency of some proceedings. In our state, the bulk of our appellate decisions are non-precedential, for example, much to my chagrin. So the fact that now so many non-precedential cases around the country can be accessed electronically, despite what the courts

say about them being non-precedential, it tends to combat a bit of the privatization of justice. With respect to your point about the technology, if it's decided in a private arbitration to which litigants were forced by contract, it doesn't matter how robust the automation is and the technology; you're still going to be divested of any even persuasive value because there's no rationale identified. You'll never get the benefit of the reasoning process.

The lack of precedential value, I think it does undermine development of common law.

If a case goes to trial there are a plethora of issues. You might get evidence, you might get procedure, you might get jury charges, you might get jury instruction, and things like that. The integrity of jury verdicts, punitive damages—that you don't get in the body of law from an arbitration. If you look a little bit farther than just the parties immediately before the courts, that is a value that we need to uphold. That is something we need to press for, too.

Where do we get the idea that there is a reduced influence of precedent? Arbitrators are supposed to apply the law. Where do they get the law? They get it from the common law. They get it from statute. Why does it have a reduced influence of precedent? Now, it doesn't *create* precedent. That is for sure. But there is no reduced influence of precedent on the system, itself, if the arbitrators are properly applying the law.

Can't you say that about settling cases? We had one of the most significant cases in our state that had gone to Supreme Court two or three times on procedural matters and discovery matters. It settled for \$150 million. It has no precedent.

If you have an imbalance of power, a large corporation on one side and a small individual consumer on the other, over time, with respect to services, nursing homes, business law, then you do have a lack of development of principles of law that benefits one side of the equation.

When you are dealing with contested matters, and the arbitration is confidential, then you have this hidden set of decisions that take away accountability. Part of the traditional nature of public hearings and so forth, with the public nature of these decisions, is that you're accountable, in a broader sense, to the public. Exposure is one of the important aspects of common law tradition.

If you are in private litigation and you settle your case, you have to keep it confidential. When there was a contested thing and you couldn't settle the case and a decision had to be made by someone, then that was public and was exposed to everybody. When you have these confidential arbitration decisions being made, then you take away the benefits from that other system, which were accountability, responsibility for what is going on. That is very different.

—It is very different, like when somebody has a litigation and they voluntarily settle the case and they keep that confidential. They are not forcing someone else to make the decision. When you have someone assigned to make the decision, then shouldn't there be some accountability for following with the law?

—Let's not get under the delusion that confidentiality is an agreement between the parties. Usually, it is a hammer put over one of their heads forcing them to accept the confidentiality in exchange for the money.

I was once upon a time a trial judge. I refused to let a party seal a settlement when a hospital was sued for multiple Staph infections that ran rampant. One of the parties wanted to seal the settlement. I said, "No, no, no, this affects the public." They went ahead and settled. There wasn't much else they could do, I agree.

Even in the business-to-business context there is this inefficiency about arbitration and that is the continual need to reinvent the wheel. The one time that I was an arbitrator, many years ago so I have now forgotten the details, but it was a business-to-business dispute. It was a distributorship agreement that was in issue and an ambiguous clause about the distributor's compensation through the manufacturer. After two and a half days or something, the three arbitrators unanimously came to what struck us as being an appropriate construction of this clause. Now, some other state, some other time, that same agreement comes up and gets arbitrated. There is no record of what we decided. It struck me as being very logical. Had that gone to court, had somebody been unhappy and then appealed, an appellate court would have said, "Well, here is what this very strange provision means in practice." You wouldn't have had confusion down the road. Everybody would have read the decision and been governed by it. That opportunity is lost when you have a confidential arbitration and just an award at the end of the day. The ability to let that decision govern other disputes is lost entirely, even in a business-to-business decision.

In the context of the particular dispute, it is great, but there is that sort of institutional inefficiency in doing it that way because the next two business people who have a similar dispute are not going to be able to go to the arbitrator's reporter and see how this was last resolved. They have to start all over. So long as it is between big boys or big girls, that is okay. The need to constantly re-adjudicate, using the term loosely, a particular dispute with a particular cost strikes me as being inefficient.

It seems to me there are two other things that potentially undermine the rule of law more than confidentiality and the reduced influence of precedence. One was discussed this morning, which is the right of access to the courts. If folks are not getting into the arbitration process because they can't get a lawyer to take the case into arbitration because there is not enough at stake in arbitration, it seems to me that litigant's confidence in the rule of law is undermined because now they don't feel they have a forum they can go to. The other is if you go into arbitration and the arbitrator makes whatever decision is made and one party feels aggrieved, their ability to get review of that is either gone or severely limited. Again, I think that, ultimately, in their minds, creates a suspicion that the law just doesn't work anymore.

If we are saying the confidential nature of arbitration undermines the rule of law, wouldn't we also have to say that the confidential nature of settlements undermines the rule of law? I understand the idea of arbitration. You have come to a decision, whereas in settlement, you have resolved it "amicably."

The bottom line is that if there is no admission of some wrongdoing, “but I am willing to pay \$1.5 million,” there is some value to the public knowing that settlement occurred.

Of course it does. I mean there’s not even an issue there. But that’s not the point. The point is do the parties want to go to the arbitration. Mostly the professor was talking about parties who didn’t want to go to arbitration and were forced in to arbitration. Mostly what we’re talking about is parties that say, “Yes, give me a contract, let’s sign it and go to arbitration.” She’s talking about those cases that are forced because you got your cut of the cards, and those are the people that are using their own arbitrators with their own company and the statistics show that the consumer loses 97 percent of the time, maybe 98 percent of the time.

It certainly has potential to significantly undermine access to civil justice.

One of the speakers talked about settlements in trial courts and said those are confidential, too, or at least not publicized—nor are the ways the parties get to the settlement publicized in a way that can act as a deterrent. If 90 percent of the trial court cases are settled, then you take that number out of any deterrence equation as well.

When you hide things, people have less confidence in everything and people won’t bring their lawsuits, and then the bigger gets bigger and the smaller gets smaller. I think that’s probably the worst part of everything, is the secrecy.

What bothers me about the arbitration is that they’re not public. They’re secretive. Therefore, the person in the tunnel waiting to bring their arbitration doesn’t have any idea of what they’re settling for to give them a benchmark.

—In our Midwest state, about 97 percent of our cases are unpublished cases, so they don’t become case law.

—That’s mind-boggling. How do you do that?

—Real easy. Don’t publish it.

—You have that discretion?

—Yes. First case out controls anyway. They can cite unpublished cases but they’re only for persuasion, and basically for holding your feet to the fire. That’s about it.

—Are the unpublished cases accessible by the Internet?

—Oh, yes. The first thing they do is they research the judges on the panel to see who is on the panel and check the cases they have decided.

—But the point is they're out there, and in this day, they're increasingly out there. I would say to you that this is a major difference in my mind, that they are out there and that the person who's having trouble with the Widget Company can check. While they can't cite it, at least they can get a frame of reference for it—they can understand what the previous problem might have been, they can understand that somebody else may or may not have been successful by using a particular thrust or attack. I think there's a big difference, I really do.

I actually don't think arbitration necessarily undermines the rule of law, at least broadly. Most arbitrators I know really do try to apply the law. But what it does do is it undermines the *development* of the law. There is no question about that. Our civil docket is way down, particularly in complex matters and consumer protection matters. So you have a situation in which there is no development. You just have a lot of arbitrators deciding things in a one-off manner and you don't have any development. I don't think it undermines the rule of law but I do think it undermines the development of the law and keeps it static.

Especially when I was a mediator, I relied on the published, everything I could get my hands on, even the settlements a lot of times, because they had to go the court to get them approved. We had publications that put those out. And that was my bread and butter.

That body of information, that's secret. You don't know what the arbitration awards were so it's kind of hard to get that.

It is difficult to say. I have been a lawyer long enough to see a sea change with the advent of tort reform, to actually see the impact on the public of the commercials that one of the professors was talking about. I have been a trial judge long enough to be able to see the impact of those decisions on jury verdicts and to see the plaintiff bar pretty much drying up because they would bring a case to trial and the jury would give some nominal award if anything at all. Is it better? It is difficult to say as a result of the opinions that we write. I do agree that it is important to have those reported decisions so that companies can at least understand which conduct is going to get them in trouble and which conduct is not.

I have been concerned for some time about the development of the common law. Where are we getting it? If this trend continues, the development of the common law I think is impeded at the state level. You are leaving it up to the legislature to enact law by statute, because nature abhors a vacuum, and if there is a vacuum in regard to law, the legislature is going to fill it. We do not have cases going to trial. The development of the common law is time honored, and I think it is impeded to the extent that cases are not going to trial.

My view is a little different than a lot of people. I think the purpose of the law is to protect the poor from the rich and the rich from the mob. The mob will come into play if the rich keep trampling on the poor.

The courts are supposed to be the place where we get it right and where we see that all of the cards get played. I don't think that is happening anymore. I think business is openly involved in the litigation process. I don't buy it for a second that arbitration is there to protect any consumer. It is not. It is there to protect the business model.

Arbitration stymies the system. Business-to-business is a different world. They don't want to educate a lay judge like me on something insanely complicated like engineering. But when you talk about the consumer aspect of it, it seems to me it is a deliberate stultification of common law development.

—We have a different experience in our Northwestern state, because we have an open-justice constitutional provision. It has been effectively used to not completely eliminate, but almost completely eliminate, the sealed files.

—I know we have the same one in our state. I am not so sure it is written so clearly. I am going to look at that.

—It is the same thing in our Midwestern state. We have that, but nobody uses it.

—We look at a set of five factors. You have an open court hearing on the record and evaluate five factors to establish if there is compelling reason that outweighs the public's access to the information.

Everything that happens in the court, somebody can report on that. You need the public awareness. Everything that happens in our court, we've got a legal blog that comments on every court decision out there, and I think it's wonderful. It can impact how well we do our job.

—As a former trial judge, one of the issues that I confronted in cases that settled was that the parties wanted there to be a judgment, but they wanted it to be confidential. I said, "You could have all the confidentiality you want if you have a separate agreement, if you want to dismiss the case, but I am not going to sign an order saying this information is going to be withheld from the public. I am not going to be party to keeping that secret. That is between the two of you. You can agree to that, but I will not be party to it as a public official."

—In your situation, was it actually both parties wanted the confidentiality?

—The plaintiff obviously wanted the settlement, and the only way they could get the settlement was to agree to the confidentiality.

—In most arbitrations, it seems like it is just the defendant who has an interest in the confidentiality.

—The plaintiff did not want it, but had to accept it.

—I have seen requests that the whole file be put under seal. If the lawyers can do that, they can remake the public record. Lots of times lawyers say, "I am just not going to do it. What has happened thus far is available if anybody wants to look at it."

The biggest objection I have to arbitration is that there is no record. There is no precedent. There is no standard for making a decision. All of us have to write opinions with standards. We have to judge the case by certain standards. Those opinions are reviewed. If you don't use the right standard of review, you are going to make a mistake before you even get started. As I understand arbitration, there is no rule to go by. There is no appeal, unless you can prove the arbitrator was corrupt and partial, and that is a very difficult—almost impossible—task. To me, there is just no review.

Sitting here today, we can't appreciate 50 or 100 years from now what kind of decision or report might have emanated from this body of disputes that's being shunted into an arbitral forum now. We are all beneficiaries in our work of the decisions the courts have passed. Well, our judicial descendants 50 or 100 years from won't have that benefit. I think it's not fully appreciated.

In your view, does civil litigation deter wrongful conduct? Does the prevalence of mandatory arbitration provisions undermine deterrence?

Absolutely yes, and I think confidentiality really works in that.

—Somebody mentioned Grisham's book *The Runaway Jury*. If there's no potential for a "runaway jury," if there's no chance for a big, huge verdict, as we all know, it's just a matter of pricing out a cost of doing business. It's totally different.

—It's a different model.

—It's obvious that's what this is all about, in my view. It's just an entirely different paradigm. No wonder there's such a war about it, and no wonder the opinions in *Concepcion* and *Italian Colors* were so bitterly divided. It's the war between one paradigm and the other.

Imagine insurance bad faith litigation, which is about the only big jackpot available. It really, really changed the manner in which insurance companies dealt with their insureds. If all that had been done through arbitration, and if it had changed their behavior, we'd never know about it. I would venture to say it wouldn't change it that much. It's just a cost of doing business that you could predict.

Civil litigation plays an important part in deterring wrongful conduct, but I don't know what we know about what's happening in arbitration. I don't know about the second part, whether arbitration itself has had any effect one way or the other about permitting bad conduct to continue, because it has been adjudicated in a confidential forum.

On the issue of deterrence, I think it also depends on the size of the company, the size of the defendant. If you're a GM or AT&T, they have reserves. Or a 1,000-vehicle trucking company. When I was practicing I represented several trucking companies, and every time we got sued I would send a discovery request out to the trucking company, and they had to pull people out of real jobs and stop that part of the business. Pretty soon, it was easier to settle than go through the discovery. I would even ask,

“Does it deter *alleged* wrongful conduct?” Once it affects the bottom line, I often asked them, “Is this a marketing issue or is this a legal issue? I can defend your legal issues; I can’t defend your marketing and bottom line issues.” So, for the mid-cap and small-cap companies, it’s a totally different paradigm than for the GMs and ATT&Ts.

—I do not know how you measure deterrence. You never know.

—Arbitration does not deter wrongful conduct, because nobody knows about it.

—They used to say about the death penalty—it deterred that one person.

Yes and yes.

I think it’s yes to both questions, but we can argue about the amount and the degree that is impacted, how much deterrence is already there, and how much it was affected, but I think you have to say yes, that there is some to each of those questions.

You never see an arbitration award reported in the news. It doesn’t get out. If it’s a court verdict, it will.

Another example of that is the decline in production of tobacco. You used to drive around in Kentucky this time of year and there was tobacco everywhere. It was the same way in North Carolina. It’s because of the civil lawsuits.

—The second one was the more interesting question. Civil litigation does deter wrongful conduct. It does. The second question is the hard one. Does mandatory arbitration undermine deterrence?

—No.

You can have big judgments in mandatory arbitration, which is a deterrent. The important thing is to have *fair* arbitrations. That is one of the things you have to look at. In our Western state you can challenge any arbitrator. Attorneys today are looking at the arbitrators. They know who they are, who is fair for which side. They have to list how many times they have ruled for the defendant, how many times they’ve ruled for the plaintiffs in different cases. It gives a hedge as to the fairness of the arbitration, which is important.

I think you have to focus on what the provisions of the mandatory arbitration agreement are. The example that was cited today deals with the telecommunications giant who overbills every customer \$30. There was a class action waiver, which implicitly prevents recovery by the millions of people they have overcharged. Does the company feel deterrence when the United States Supreme Court steps in and says, “A class action is not permitted in this instance?” Which of those consumers is now going to pursue that \$30 fee? Deterrence on their part is pretty much eliminated. “We can do this again.” The provisions within the agreement, I think, within the mandatory agreement become important in answering that question.

—The answer in my mind is no.

—Well wait a minute. Let's talk about Pinto. Did the lawsuits against the Pinto put the Pinto out of business? So, yes.

It's a question whether they changed the design of the vehicles so it wouldn't injure more people. The tort system, in my opinion, works in that we have a lawsuit for products because of product liability—not because of class actions, but we now have kill switches on lawnmowers so that you have safety mechanisms on handles. We have flammability standards. None of this would have happened without the tort system. So I believe the tort system, left to its own devices with the lawyers, works. You need access to justice, because that wouldn't happen otherwise.

—It does seem like there's plenty of evidence that litigation over the years has changed some of the conduct and some of the products, and that a lot of things are different than they would have been without civil lawsuits.

—I think we have to add that it's almost in tandem with government regulation, but it also attracts the government's attention. For anybody who has ever traveled to the Third World, you will notice that the cars that we see here from Honda, Toyota, Hyundai and so on, are different than the Toyota Corollas you will see in the Middle East or in other areas. I used to do archeology in Egypt. The first time I got into a brand new Toyota Corolla in Egypt, I was shocked. The bumpers were painted on. There is no side beam construction in the doors. There is no safety glass. That probably has something to do with governmental regulation. But I'm confident also that it's something to do with the fact that there is no products liability system in Egypt. Now, does the fact that we have these cases cause safer products? My hunch is yes, but I think it also has a lot to do with spurring the government to get involved. I'm not sure the government would have gotten involved with seatbelts if it weren't for the litigation. So I think the lawsuits do bring the realizations in the company or the producer that they have to do something, but I think it also helps to educate the government watchdogs.

—Well, asbestos is a good example. I used to do some asbestos litigation back long ago when I was in practice, so I've seen the boxes of the smoking gun documents from the '30s and before. It's kind of astonishing what the companies knew, but they went ahead and sold the product until the government got involved after a bunch of lawsuits were brought. Asbestos was *required* to be in all the public schools in the country, so it's still out there in everything built before 1973. They made it illegal to put it in new construction, but it's still out there, everywhere. That is regulation that I think was the result of government action in response to extensive litigation.

—I think it is safe to say that litigation does in fact change the culture of business and it also changes the culture of some of the government regulation.

—I think the money makes a difference, but I think a lot of it has to do with the public aspect of having cases go through the court. And if you're having congressional hearings and there is exposure to the companies by that means as well, that can have probably as great an effect. But I think it's probably

a much longer process, because you're looking at changing public opinion, and then having the public opinion, and perhaps the demand for a particular product, driving the change. And I think that's probably a much longer process if you have no new lawsuits that become well-publicized and are being written up in op-ed articles.

We have so many synergies in our country that it seems to me you can't really identify with any degree of certainty what the cause of this so-called deterrent effect might be.

—So you've got these class actions that are perhaps causing a change of behavior on the manufacturer's side, perhaps, but the people aren't seeing a penny.

—If you ask the manufacturer at the beginning of the lawsuit, "Will you change your behavior and let's forget about all this litigation?", the answer would be "Of course."

—I don't think so.

We're told by the general counsels that we should sleep tight because we have regulations protecting us, and we don't have to worry about actually having meaningful rights to sue. Those same general counsels are now vested with First Amendment rights and religious rights and everything else, while they are working hard to destroy those same regulations. I assume that those general counsels are not going to welcome a robust class action structure and then do away with arbitration clauses once they succeed in swinging the pendulum back to zero regulation climates.

When I get one of those class action notices, I am not interested. I am not interested in getting the coupon that gives me \$30.00 in spending. The thing is I want their bad conduct to stop. I don't want it to happen again. I am perfectly happy for somebody else to get paid for making it stop, whether I get my \$15.00 coupon or not.

If you leave companies and manufacturers to their own devices, they're just going to choose the most cost-effective thing for them. If that's going to affect the safety of the consumer, at this point they don't care, because there won't be those cases brought to force them to do the right thing. They are just going to do what their bottom line tells them to do.

How often does your court address arbitration issues?

Not often.

Every once in a while.

I would say not very often.

I used to see a lot as a trial judge. I was on the trial court for about 12 years, and I would say at least monthly I would see a motion to compel arbitration. Since I've been on the appellate court, about 6 years, we still see a number of issues.

We see three or four a year, most often in nursing home cases which we uphold if the resident of the nursing home is the one who signed it and was lucid. We strike them down usually if the nursing home resident is not the one who signed it, but somebody signed it for him or her.

Not very often in our Midwestern state. We address them periodically. I have been on our intermediate court for almost two years and I have had one.

I have never seen an FAA case. All of ours are under state law. We probably do two to three a year. We do almost the same amount of class actions. I have not yet seen an arbitration case in conjunction with a class action.

It has been the last year that we have really started seeing them. I was talking to one of my fellow judges on the court of appeals. He said he had 10 in the last seven months. I sat on two or three of his. Then I myself had another eight or nine.

We don't hear a ton of these cases. We hear more on the statutory side. In terms of the arbitrary clauses, what we have seen the most is employment cases. I have a very limited set of examples that come before me.

My division has reviewed one in two years.

We have had several. It was alluded to in the afternoon session where litigation is underway and then somebody says, "Ooh, wait a minute, we have an arbitration clause. We meant to arbitrate." Well, you know, it's a little late to be picking that horse. The trial judges have been quite inconsistent. Sometimes they stay the action and send it to arbitration. Other times they don't. There have been, I would say, at least a dozen cases in the last three or four years where the issue has been whether or not an arbitration remedy or an arbitration avenue is available once litigation has gotten underway.

—Lawyers say, "We are going to have an agreement, but in order for it to be enforceable, you have to take parts of it and put them in 15 point font. This other part, this can be in nine point font. This can be tucked into page seven, but this has to be on page one."

—At least one state, and I am sure others, have seen the wisdom of putting some portions of these standard form contracts in higher and larger fonts in some way that makes them more visible and more likely to be read.

—I am highly offended, as a lawyer and a human being, that we can't educate our children today to see that a contract is important. "Read the darned thing!" Still we have to say, "We know you are not going to read it, so here we are, we have to give you the highlights, the 'Cliff Notes' version."

In our Southern state, we have had two arbitration cases in the almost eight years that I have been on the court.

—We have a lot.

—We have had a lot in the last two years.

In our Midwestern state, we get them all the time.

In our Plains state we have had five cases in nine years on mandatory arbitration. Most of those have been credit card situations.

In our Midwestern state we just don't get a lot of these cases. This has been an eye-opening day for me, education for the future.

I wonder whether litigators are reading *Concepcion* and the other cases more broadly than was suggested today, because we get almost no contract formation challenges. I have only been on the court for four years, but I have probably looked at 2,800 to 3,000 petitions for review. I don't think I remember a single one where anyone was asserting that there was a lack of formation of an enforceable contract. The only cases we see are the back-end ones after the arbitration has happened. We have five statutory grounds that are all very limited in which you can overturn the arbitration or send it to a different arbitrator. I wonder whether the rank and file litigators out there are reading *Concepcion*, all the other cases from the court, very broadly to say that it is a losing proposition to try to challenge an arbitration contract in court.

I think we are going to get a lot more of these cases that test the limits of *Concepcion*, especially in one area. The doctrine of obstacle preemption or frustration of purpose, as it is sometimes called, is the weakest of all the preemption grounds for a federal court to use.

Are there fact patterns that are encountered more frequently than others in arbitration cases (e.g. nursing homes, credit cards, sale of consumer goods)?

Physician-patient cases—we see a lot of those.

In our Northwest state we see a lot of payday loan cases. You go take out your loan now at 25 percent interest, and repay them when you get your check next month.

Construction contracts.

Salary claims.

We had the power of attorney sign and whether the power of attorney holder can waive the right to jury trial.

We decided a case a few months ago about a daughter signing the mother into a rest home under a power of attorney. And we held that you can't assign through a power of attorney the power to give up your right to go to court. The case came in as an arbitration case but left as a power of attorney case.

We've had a lot of employment cases.

We had a race discrimination case. It was a major civil rights case. But our state says if there is an arbitration clause, you have to go to arbitration to resolve a civil rights case.

Some of the attorneys in our Midwest state are putting arbitration clauses in their contracts with their clients. If there is a disagreement with their clients, the client has to go to arbitration.

It is a matter of time, I think, before cigarette companies start putting on their packs, "If you buy these cigarettes and smoke them and something happens to you, you have to go to arbitration."

A lot of nursing homes cases.

Very often, it is a matter of arbitrators being biased. If the American Arbitration Association rules are not followed on bias, that is appealed to us.

We see a lot of police officer cases where the Fraternal Order of Police or the Police Officer Association has a disagreement with an arbitrator. Even though their contract says any disagreements will be resolved through arbitration, all of our teachers' unions, all of our fire departments bring their arbitration appeals to court. They couch it in a little different words, but it is basically a disagreement with the arbitrator when they lose. Every single union contract that I know of involving police officers and firemen and teachers has an arbitration clause. The governor is trying to get rid of it for public sector employees, saying that public sector employees are different and they shouldn't even be allowed to join unions.

—Employment cases. When I was practicing law I saw one where a guy worked in a tire store, and the people that ran the store said, "Hey, sign this." He had been working there for years and one day they decided all the employees needed to sign a document that said, "If we get hurt, we're not going to file a worker's comp claim, we're going to go to binding arbitration." He didn't know what binding arbitration was and he asked me what it was. I explained it to him and I said I wouldn't sign this in 1,000 years. He said, "Well, I've got to if I want to continue to be employed," so he signed it.

—I think most employees, just like most consumers, will sign whatever so they can get the thing they want.

Assisted living.

We see these clauses most often in nursing home litigation. If you come to us because you can appeal a trial judge's decision that you have to arbitrate, or not, the issues are generally "Did the person who had the power of attorney have the right to waive the right to trial? Was this person competent if it was the actual patient to sign this?" I have seen factual scenarios all over the place. In the past six months I have had at least 10 nursing home cases. That is where we see them in the appellate court.

With the police and other unions.

We've had five or six this year, involving the banks; we've had the nursing homes; we've had LegalZoom; we've had credit cards.

We're still evolving. Most of ours are nursing homes with power of attorney cases, a number of them. Among the intermediate courts there's a number of them headed up to the supreme court, and I see maybe a couple a month right now.

Every month, I would say, we were having nursing home cases. We had them over and over. There have been enough cases decided now that it has filtered out a little bit.

Most of the contracts we see are one-sided, and the consumers are very, very unhappy about the arbitrator's ruling. They find ways to say that the arbitrator was biased, the arbitrator was prejudiced, the decision was against the weight of the evidence. They come up with lots of issues. Of all of those issues, I have only brought into one of them so far, and my colleagues disagreed with me. A city clerk in one of our larger cities got a million dollar award for wrongful discharge after she committed a couple of crimes. The arbitrator determined that committing the crimes didn't affect her ability to do her job as a city clerk. One of the crimes was related to an election, and she was in charge of the election. It was election fraud. She actually registered to vote in a city she didn't live in, and then she voted in that city so she could get a reduction in her taxes. The case went all the way up to our Supreme Court, they wrote an opinion on it. They basically said, "Once an arbitrator rules, that is it." I have been on our Southern state's court of appeals for five years, and I have only seen one case. It was basically an issue of whether or not the parties even agreed to even arbitrate in a construction contract.

We reviewed an arbitration agreement among some lawyers and judges who organized a duck-hunting trip. They agreed that if a dispute arose among them (and one did—a big one!), they would go to binding arbitration. We upheld that one. We thought those people went into it with their eyes open. That's one that wasn't on a printed form; it was one they negotiated, and they *really* negotiated it. We upheld that.

It is almost like certifying a class. On the arbitration side it is almost always nursing homes.

We get a lot of wage law stuff. You hire 100 office cleaners as independent contractors. You don't pay them a wage. We get a fair amount of those.

We have seen these cases involving Rent-A-Center. I am sure most companies, they put in arbitration clauses. When you get sexually harassed, you have to go through the federal and the state commissions. Then you have to go to arbitration. That is the real problem with those clauses. Those are the people who are getting affected the most. I haven't seen it in malpractice cases or in products cases.

That is similar. In our Southern state, we had a question involving U-Haul. What was happening is you would go rent a U-Haul. There would be a little form in front of you, and you would just sign it. I don't even think it said arbitration agreement on there. At the end of it, it said, "I agree with all of the terms." You sign it. At the end of it, they would hand you your form with an arbitration agreement.

Web sales: cars being sold on the Internet. You get presented a single-space form, click it so you can get to your next form, but you are signing up for arbitration, and these sales are on the Internet.

We had a case involving car insurance. Before the insurance declines to renew your policy they have to send you a notice. A woman signed up for some kind of electronic document provision from her insurance company. There was a dispute about whether it was just correspondence or also notices like the non-renewal notice. Neither side could produce the document that showed up on the screen. It was only a specimen copy in what they normally did. She said she only checked box one. The insurance company said she checked boxes one, two and three, and they got a summary judgment.

When these medical plans negotiate with the big unions all the terms and conditions, if you accept the plan, you accept everything they negotiated. Your signature on a mandatory arbitration agreement is not even required. I have seen that issue. They have actually been successful in saying, "This is a contract between the health care entity and the union." You can choose to take that agreement or go to a Blue Cross plan or something. You wouldn't have necessarily even seen a copy of the arbitration agreement, because it was not you that was waiving it. It is your union that was doing it.

We have not really had much in the area of consumer contracts—we have not had that many cases.

—You're not talking about health care, though. You're talking about giving up your right to go to court. And so we decided a case about a month ago and said it's a personal right, you can't assign it. We just said, "To enter into an arbitration agreement you have to do it yourself, you can't assign someone to do it. You can't give someone a power of attorney to take your time in the penitentiary. It's a personal right or a personal responsibility that cannot be assigned.

—I can't give you my right to vote.

I tell my students about a wrongful death case that was arbitrated that shocked me. You know the cheerleaders that some of the Bowl games bring in? They bring in high school cheerleaders from all across the country. They brought in a group of cheerleaders from New Jersey to the Hula Bowl, which is played in Hawaii. The high school cheerleaders are cheerleading. Of course, at night, they checked on them, but lo and behold, one of them sneaks out of her room, goes up to the ninth floor, and is partying with a bunch of 21 year olds. Next morning, they find her dead on the rocks below. She fell

off of the balcony. They arbitrated the case, which I found strange. They sued a number of people, including the school; they sued the hotel; they also sued the chaperone, and the question was whether or not the chaperone was liable for this girl. She was 18, and I think she had a .19 blood alcohol when she fell off. The arbitrator's award was like \$1.4 million, paid out of the chaperone's home owner's policy. So in defense of arbitration, you can still get big verdicts, if there is such thing as a big verdict.

The U.S. Supreme Court has said that arbitration clauses are generally enforceable, but there are some exceptions. Have your state's courts encountered any of the exceptions?

Lack of mutuality. You can allege that about just about any adhesion contract. Most of the contracts we're talking about are adhesion contracts. That is primarily the issue that we look at when we are looking at them.

In dealing with Native American tribal litigation, they assert sovereign immunity sufficient to defeat not only the contract but the arbitration, even if they agreed properly to waive it in the contract. Even if it's very clear that they separately waived it on arbitration, they assert sovereignty as a defense.

This comes up when the parent or family member is released from the hospital with about 24 hours' notice to the family, and they need to put them into some sort of a nursing home or assisted living home. A family member signs the documents, whether they have power of attorney or not, for the family member. And then when the person who is admitted dies because of some negligence, there is a wrongful death suit brought. The nursing home tries to invoke that clause against the person who admitted the patient. That gets litigated quite a bit.

When the case comes up and you are trying to determine unconscionability, you look at the parties' levels of education, sophistication, and knowledge of business, and so on. Many of the people that we are looking at, some of them maybe have a high school education. How will they even know what these terms mean?

—Limited statute of limitations.

—We had a collective bargaining agreement between an armored car company and its drivers. They weren't part of any national collective bargaining unit. They had a short statute of limitations and a limitation of remedies. Our court felt that was unconscionable. We have had a couple of other cases in our state where the procedural provisions in the arbitration agreement were voided, but the arbitration agreement itself was still enforced. For example, we had one where the hearing was supposed to take place in Denver. The court said it would enforce it if it took place within our state.

—Actually I was involved as counsel before I went on the bench in a case where the challenge was that the arbitrator had exceeded his authority and the trial court should not adopt it because he refused to follow the law, and succeeded in making some law against our position. Our entitlement was only to

have ratification or not, if the arbitrator basically says, “The law requires me to do one thing, but I am going to ignore the law and do the opposite.”

—That is the rule. That is what you have to do in order to have it not ratified. Short of that you are okay. You have got a record from the arbitration that shows the arbitrator refused to follow the law.

—You can’t be wrong on the law.

—They can be dead-wrong, and that is fine.

—In our Northwestern state we had a case that involved a law enforcement officer who was fired for lying. He went to arbitration, and he was reinstated. The jurisdiction that fired him appealed to our supreme court. Our supreme court said we didn’t have a public policy against law enforcement officers lying that was sufficiently strong to void the arbitrator’s award. It is a really narrow exception. “No strong public policy.”

—We did the same thing with a fireman and drug use. He was reinstated. It was eye-opening in terms of that.

Bias.

—Once you determine that you have a valid, enforceable contract, that is it. The trial court can make that determination. If the trial court makes that determination, it goes to arbitration. From that point, it goes to the arbitrator.

—Until it’s time for enforcement, and then they bring it back. That is the thing that I resent the most, frankly—just being a rubber stamp for an arbitrator’s decision.

We have had very few arbitration cases in our Southeastern state, but in one that we did have we were called upon to decide whether the state arbitration act or the FAA applied. Because of the choice of law provision in the contract, we held that they had chosen state law for the arbitration.

Excessive fees for arbitration.

Waiver.

Delay in requesting arbitration, right to the end of the trial.

In our Midwest state we have both procedural and substantive unconscionability. The bar is high to invalidate a contract. In other states you only need one. If you need two, it becomes a little more difficult to get an unconscionability ruling.

—You have to get sort of a national dialogue going, not just us, to push back on this. The Supreme Court will retreat.

—Does anybody see any pushback? I don't.

What impact have the *Concepcion* and *Italian Colors* decisions had on your court's arbitration decisions?

—It's too soon to tell.

—It has to percolate up.

—We are seeing an impact already.

We haven't seen the impact of *Concepcion* and *Italian Colors* decisions—or we haven't seen any impact on the work that you're doing in your court related to arbitration.

It has changed everything for us. Before *Concepcion*, we had many cases saying it is our strong public policy that class actions can be pursued, must be available in consumer fraud cases, in discrimination cases, in Wage Act cases. We had a whole series of cases to that effect. Our courts held that that public policy interest trumps the arbitration. All of that is gone. It is a whole new beginning in a way, at least with respect to class actions.

Really, the long-term effect is going to be that you are going to have tort reform in certain states. You have people who are not going to go into that practice. People are not going to go into class action practice. They think it is going to be dead. There aren't going to be class actions even in those areas where there can be class actions. The firms that are tooled up to do this now will continue doing that, but new people may not go into this because it may not become viable anymore. I think that is how it is going to really affect us. That is how it is going to affect the practice of law. There will be few class actions in the years to come, because people are not going to go into that area.

I think there is going to be a backlash against this arbitration from the business side if you actually have to face all of these separate arbitrations and the attorney fees on all of them. I think that is a possibility. When I started years ago really there wasn't discovery in arbitration. That was one of the benefits of it. Now, it is kind of like litigation. Arbitration is so expensive. If that is what the business side really wants, then I think they are going to end up paying for all of these separate lawsuits. I think the plaintiff's bar could be filing all of these separate arbitrations as in AT&T and it is going to get really expensive down the line, if you have to pay thousands of dollars in attorney's fees for every \$30 case. Right now, it is probably weighted more towards the corporations than it should be. The question is, Where will it go if it becomes a real growth field?

As to *Concepcion* and *Italian Colors*, I want to be clear that the effect has been negligible because we haven't seen many cases about it. Its effect, as far as I'm concerned, is to be determined.

If you speak to class action lawyers, they are all worried.

—I really think it is the death knell for class actions. I think people are not going to go into it. Maybe the firms that are around are going to try to survive for a while, but I don't think new attorneys are going to go into it unless there is going to be another decision, which turns the tide. Individuals who are considering going into it are going to have to retool themselves.

—That's for consumer class actions, not things like securities class actions.

—There is a feeling that there is no money in it. It is not corporate against corporate, people against people. It is basically just consumers. It is small dollar amounts. What does this \$34 mean? Nothing. It is just the lawyers getting rich—that is the attitude.

It is contrary to every legal principle in the book, and I don't care if the U.S. Supreme Court wrote it or not. It's wrong. But we're kind of stuck with it. And I don't mind saying so in black and white. Some think that we shouldn't have elected judges, we should have appointed judges. I think this shows me that they don't know what they're talking about.

I remember from my law school days, and that was some time ago, the whole concept of unconscionability had a vitality to it. I haven't seen arguments about unconscionability in years, not serious arguments about unconscionability. The law may be well-developed, but it certainly hasn't been developed in our New England state in the recent past. Many people also feel it is also fixed, and there is no point in challenging any of it.

After that case, it's all about determining whether or not you have a valid, enforceable contract. Once that determination has been made, what is there left for plaintiff's counsel to do? You are in arbitration. One point that speaks to me this morning is that many plaintiff counsels will not even take these cases now because you are bound by arbitration. Maybe we don't see as many cases at the appellate level because the determination has already been made that you have a valid, enforceable agreement.

What is the breadth of the two cases? Does it trump state public policy? Does it trump state jury trials? They are written in a different language, in addition to all of the things they talked about out there. What is a contract of adhesion? What is unconscionable? What is a uniform commercial code on these kinds of things? What is in the ALI Restatements about this stuff?

—When the U.S. Supreme Court decides a case, it creates about three or four cases for us to decide. They usually reach us very quickly. A case gets decided by the U.S. Supreme Court within two years, and we have had three or four cases interpreting it. I just find it crazy that, in the *Concepcion* context, we haven't seen that. I just think that the language may be confusing. People are reading it more broadly than perhaps they should.

—By the time *Concepcion* came down, it was in our state legislature. They were in the process of looking at some possible changes to our class action procedures. All the oxygen was sucked out of the room when that case was decided. I do think that the trial bar was kind of shell-shocked by that decision. Probably a lot of cases just haven't been filed. I think what we are seeing here at the Forum is a rebirth of creative thinking about how to get around some of this. I think, for example, unconscionability is usually the throwaway argument you put at the end of a brief on contract cases. That might change.

Our Southwestern state has a statute that says that arbitration clauses are subject to voiding on the same grounds as contracts generally. Now we've got an asterisk with the *Concepcion* and *Italian Colors* cases, but we've interpreted that and published on it a number of times that it still preserves an unconscionability analysis.

Are there arbitration-related issues on which your state's supreme court has not yet ruled?

I think the biggest flaw is that there is an assumption that people read these things. It's probably less than one percent, probably not even one percent of the time, particularly when it is on the computer. Whatever you call those—click, grab or whatever. Whatever it is, you are signing that you agree to the terms. But you're sitting there thinking, "I am not going to sit here and read this for 10 minutes."

In our Southern state, I think the most fertile ground is going to be nursing home litigation. There are a lot of ways to attack it. Some will work and some won't work. Those cases are percolating up, and I anticipate they will start to answer those types of issues within the next few years.

The more we move into a society where we are paperless, the more you are going to see that type of thing happen.

If people think they still have the right to sue after signing the contract, that means they are clinging to something very deep—their right to bring an action that they don't believe they could possibly have signed away.

OTHER TOPICS OF DISCUSSION

Criminal ADR

—We're starting to see arbitration in criminal cases now. Mediators are getting the criminal cases.

—Right. There's been an effort in our Southern state to try to get the elected prosecutors to participate, and it's been very successful. Typically it's one of the judges handling a lot of criminal cases

- that's now retired, and he or she is very familiar with the "value" of the case. There's one judge in particular that's really advocating it.
- A retired judge would serve as a mediator? On what types of cases, though? Are you talking felonies, misdemeanors?
- Both. They're all plea-bargained out, but they'll go to the prosecutor and say, "You're being totally unreasonable." Then they'll go to the defense lawyer and say, "Look, here's what you're looking at in terms of a sentence." So the discussion is starting to take place.
-
- Our trial courts do felony mediation. They do a whole day's docket worth. You bring it in and the court oversees it. They settle a lot of them. The prosecution comes in and says, "I'll reduce it to this." Defendant says, "Okay, if you do that, what will my bail be?" And you can give a cap.
- I'm not so sure we would allow that.
-

Specialized Courts for Business Disputes and Complex Litigation

We have done something in our state to try to bring business back into the court system. We instituted business court, which is really for the company-to-company cases. We call it a "dual track." For cases under a certain money value, you will get a trial with no expert opinions, to try to get these people back in the courts. I think they want to get back into the court system now because arbitration isn't everything it was meant to be. I think its purpose might have been to do it, but there is a real downside to them. They can't decide how to settle cases. They don't know what they are worth anymore. Arbitrators are not always going their way—it is done with a neutral arbitrator. The cost is just as much as a lawsuit, if not more. I think there is an opportunity to get these people back in the court system if they see a court system that is more friendly to visit.

Business courts are very big. We have very strict timelines which the lawyers don't like but their clients do. So they can get a resolution in a business case in less than a year. And it's that promptness that, when we talk to the companies, they really, really like—plus the fact that judges, who have the sophistication and desire, move cases along very quickly. The discovery is not fishing expeditions but the judge gave very strong control. Maybe we as judges need to leave the 19th century behind and maybe come into the 21st century and change the way we do things a little bit. We have mandatory mediation as part of the program, but it's done by state court judges. So you get the benefit of having the state system, but you get the speed and you get a little bit more certainty. And, of course, if you're the business you don't have to pay for arbitration or anything like that.

In our state's business court we have regular judges who are designated as business court judges. There are three of them, and they're getting ready to expand that to five, I think. And they're usually business-versus-business cases, although not exclusively. They're by designation from the chief justice, with cases going into the business court. They are litigated fully in the business court, but it's a bench trial, and it's required by statute that there be a written opinion and the written opinions from the business court do provide precedent for other cases coming up in the business court. So that's a

big difference between that method and arbitration. The response in the business community has been pretty overwhelmingly positive. Cases are able to be resolved satisfactorily and relatively efficiently, without paying an outside person.

In our Southern state, to appease the business community, we have a complex litigation court where we have a special track for complex litigation.

—You are not going to get a \$6 billion decision against R.J. Reynolds in an arbitration. I don't think any arbitrator is going to make a billion dollar decision against another company. It is just not going to happen.

—A jury might, though. I know in our Mid-Atlantic state we do have a commercial court. We found that that has brought business back into the court system. Those judges are supposedly interested in business disputes. They have acquired, if they didn't have before, a familiarity with it. There are ways, I think, of dealing with this movement out of the court system. I am not sure it works. As for bringing malpractice cases into business courts, some courts are calling it "complex litigation." That brings in a lot of product liability and medical malpractice.

What I thought was very interesting in listening to everybody's comments is that there is a common theme. The common theme has been that at least a majority of the arbitration provisions that we typically have seen have basically been contracts of adhesion. There is also a common theme where businesses, even though they are of the opinion that they think arbitration will be helpful to them, come to realize it is very costly. Some states have specialized courts for business cases, because they are coming to the conclusion that arbitration is not the way to go. I just thought it was very fascinating to hear that that is pretty consistent throughout the states.

In our Southern state we have a special business court. We've hardly ever seen any appeals from them. They must take care of preliminary matters and they are gone. They don't get to us.

I agree with Justice Holder that we judges bear some responsibility for the shift to private litigation, because we haven't made the court process easier and more efficient. But I am skeptical that, even if we were making changes such as establishing business courts and making the process less onerous and more efficient, more cases would go through the court system.

Cost-Shifting

Our Midwestern state has a great system. For a while they all called it "mediation," but it had nothing to do with mediation. By court rule, every civil case had to go in front of three attorneys and they would evaluate the case and they'd put a number on it, say \$100,000, \$150,000. That's what the case was worth. Now here's the wicked part, and it's really wicked. If you choose to go, you can settle. If both sides accept \$150,000, the case is over. You can't appeal, you're done, you're out of court, you're finished. However, if one side rejects it, then you can go to trial, and if the verdict doesn't come back within 10 percent, you pay all the other side's costs from the point when you rejected the mediation

award. Many litigants will say, “I want to go to court, but I won’t do it because of the possible costs.” And the ones who do choose to do it sometimes get hit for more in costs than what they were asking for in the original instance. But some people are calling it “mediation.”

Mutuality and the Relative Power of the Parties

Equal parties I think are the main thing. When you have the consumer against the corporation, you have unequal bargaining power. A lot of times you have contracts that are not even made clear.

We have had cases that involve people who were in equal bargaining position, but most people are saying, “Those are the big boys that have a lot of resources.”

I don’t have any trouble if two big companies want to do that and they decide, “Yes, I want to give up my jury right. I want to give up my right of appeal, my right of review.” These other contracts, which are the vast majority, are adhesion contracts. As was just pointed out during lunch, people don’t have a clue what they are signing.

The parties are rarely of equal bargaining power.

I think arbitration has a place. But it’s kind of like the camel with his nose under the tent. How far does it get in? And you really have a problem dealing with the consumer at the bottom rung of the food chain. Where does that individual go?

—I don’t think it’s the courts’ fault. It’s those who have the power. If you’re in an equal power position, you have a big company against a big company, arbitration does wonderful work. If you take away the ability of the little guy to have a class action, then he doesn’t ever get vindicated. I don’t think it’s us. I think it’s the publicity over the last 30 years, saying trial lawyers are greedy and all they want is money, and that court systems are slow. The brainwashing that we have in the press is that the greedy, litigious, private lawyers are making all this money, and therefore we need to stop them from making money and drying up business and making people lose their jobs. That’s what we’ve been fed for 30 years.

—As long as I’ve been a judge we’ve been pushing people to alternative dispute resolution. And it had nothing to do with corporations and it had nothing to do with our disparities, it had to do with our perception that we were too busy.

—People have kind of pushed us to the side in these kinds of litigation. They don’t look at the court the same as they used to. They look for who has the power. Who has the strong arm?

—And we have passed all of these rules on how judges cannot get out and talk and you can’t do this and you can’t do that. So we have taken ourselves out of being political figures by our rules.

—I don't write a lot of articles, because one of our judges just got disciplined for writing. So we've cut our hands off and we taped our mouths and we're not out there being supportive of our system where those arbitrators are advertising every day of the week.

It's the mandatory arbitration in contracts where there's not equal bargaining power that's troubling.

—I think, as a former practitioner, the trial courts were not all that concerned with this aspect because from my perspective it was the trial courts that brought on the ADR. They did not want to try cases. Their whole emphasis was in resolving cases short of trial. So that was not an important aspect of the trial courts.

—I disagree with that, as one who was, as they say, a pioneer with regard to mediation. It was not a question of not wanting to try the cases. It was a question of efficiency of the court. How can I give more people access to the court? There are some things that you feel could better be settled that they did not teach us in law school, quite frankly. I learned some things on the bench where I was like, "Where was this?" I just think that the issue of arbitration is going to come down to whether or not there is overreaching with regard to the smaller consumer. But as to business litigation, where we get a lot of our law, this was in large part not just imposed by the courts. They decided that they wanted it.

—We talked about arbitration contracts as being adhesion agreements. I think we have to look at that portion of arbitration agreements that are between equal partners, parties on equal footing, companies who are very sophisticated and who make the business choice to go to arbitration as opposed to litigation. We need to ask the question of why they make that choice.

—Obviously, if you agree to do it, it is not a contract of adhesion.

—But why do they agree? These people are very sophisticated in their consumption of legal services. They know what the court system is and they choose not to go to the court system. I think it is a big problem. Why would they make that choice? It is because of lack of confidence in the courts to resolve their cases.

—I think it has to do with the timeliness. They want to get it done right away.

—It is a question of control, too.

—The amount of discovery I think is perhaps a feature too where they think they can limit discovery more than it might happen in a civil case.

I think it is probably worthwhile to take it a step further. Arbitration is a very sensible decision for people in a roughly arms-length relationship to make. They want to say that they are going to have this dispute. "The value of what we are fighting over is probably less and we can squander money fighting over it if we go through the whole legal process. Let's agree to a shorter process. It is going to be less accurate and have fewer guarantees, but we can get an answer and then we can move on." That

makes sense in the arms-length contract. The problem that is bothering us here arises when it is done in adhesion contracts for the purpose of creating an unequal playing field.

I think there are two types of arbitration. There is the arbitration for parties who really do agree to it. We see a lot of that now in the international sphere, because of reluctance to go to courts in countries where you don't necessarily have an impartial judiciary. Those kinds of arbitrations are quite different from the consumer arbitrations that we are concerned about, where you have no choice with these contracts of adhesion. There are cases where people really do agree to arbitration in part because they have an ongoing relationship with each other. The arbitral forum may be less adversarial than going to court. I think we have to distinguish the different types of contracts.

Arbitration makes perfect sense for large entities—a heck of a lot of sense. I have absolutely no problems with that. It's a completely different ballgame when you're putting it in every single employee agreement and every independent contractor agreement, and every nursing home agreement.

The little people we're talking about didn't do too good in the courts, either, against the large corporation. If you've been a small attorney taking on General Motors, you're up against a giant, and you are just lawyered to death. So the little people may not do too good in arbitration, but if you're up against the big guy you don't do too good in the courts either.

I think it's not only a question of underfunding the state courts. I think it's also a question of self-represented individuals and somehow the issue of having self-represented individuals in the court structure. I sit in the district court, which is our appellate court during the summer times, and it is a major problem to have self-represented people in a judicial setting. And so that I think presses more into the mediation/arbitration question, especially with respect to custody matters. How do we deal with self-represented individuals? That's aside from the individual versus the corporate but that's now an issue that has to be put in there.

I wrote an opinion a few years ago in a case where the company could disavow the arbitration unilaterally if they didn't like it. The individual had no ability to do that. So there's a disparity in the provisions, where the company could walk away, but the other party was stuck with it. Amazing.

—I think the norm is more that when people are going into arbitration, particularly consumers, they have no idea what arbitration means. They have no idea what an arbitrator is. They have never heard of an arbitration association. All they know is that a lawyer said, "This is going to cost you a thousand dollars up front." They say, "I can't do that. I will just have to drop this thing."

—Or their case gets dismissed from court.

We haven't addressed arbitration this year, but I guess we addressed three before that, last year. What we are seeing now, which is interesting, given what Professor Gilles said this morning, is that they are writing really lenient, consumer-friendly clauses. They are offering to pay for the arbitration. We are seeing a lot of waivers of jury trial.

When you go in for surgery, you have six pages of forms to fill out. They give you no time to read them before you are admitted during surgery. You just sign the pages and you turn them in. I did. I am sure there was an arbitration clause in there. Luckily, the doctor did a good job. I don't know why you should be bound by it. You have an unlevel playing field.

We get employment contracts where both parties have to pay the arbitrator, whether both parties can afford to pay or not. I was on one case a number of years ago where we validated that portion that required the terminated employee to pay half. It was reversed by our highest court and was sent back to determine whether the employee had the wherewithal to pay their half.

—There is the issue of the marketplace. As a consumer, if you don't like the terms of a contract, then you don't take it. If you don't like the fact that the arbitration agreements are included in the sale of your car, you say either "I am not signing it" or "I am going to go somewhere else." Isn't that what has happened in society, that these large conglomerates that control telecommunications or other fields have all bound together and have put in these arbitration clauses? You really, as a consumer, don't have anywhere else to go.

—It is take it or leave it.

—You are trapped.

—Let's say that Apple comes out with a new technology, and says, "We are going to provide this to you if you will agree to arbitrate." You say, "Golly, I am trapped." No, you are not. You don't have to buy that line.

We have the cost of arbitration. Under AAA rules, that could be \$4,000 or \$5,000 for some people.

Is it truly mutual if you never have an opportunity to ask a question about it? There are so many things out there now that it is just accepted. You have to click on "Accept." Stuff comes through from your credit card that says, "We are making changes in your agreement." Everybody here has gotten mad about notices like that. I guarantee you most of us don't sit down and read through every little change.

—One of the speakers was talking about the consumer protections that were available from the attorney general's office. That's *Alice in Wonderland*. I began law practice doing civil rights cases. The reason that there were private lawyers doing civil rights cases was that the attorney generals swore that they certainly were not going to do it in the South. Ask the Mississippi or Tennessee Attorney General to enforce that?

—In our Southern state we had a very robust consumer protection act, with private enforcement and everything else. The legislature gutted all of the private enforcement and moved enforcement over to the attorney general's office.

We don't have a democratic system that forces you to go to court. That sounds good to me—good for the courts and good for everyone. But is there now a system whereby there are not real choices? It is

not an equal position—not just for the consumer, but also in labor and employment settings, and other kinds of areas of law.

I have been on the bench 24 years. I have never seen an arbitration agreement that was truly reached as an arm's length transaction. It is all about money. We filter everything we do through our life experiences to some extent. If you want to see it at its worst, go back and look at what happened after Hurricane Katrina in Louisiana. There was a total system failure of every authority. From the government, no accountability. The Army Corps of Engineers was off the hook. The people who were responsible for it, off the hook. What is left? Private insurers. Citizens paid the highest insurance rates in the country. There were billions of dollars in damage, but the year after that the insurance companies reported billions in profit. If you were able to get a Katrina case to court, it was only because you were able to find a defendant outside of the structures of what you thought were protecting and insuring against your loss as a consumer, which you had paid for. That runs counter to what the court system is about and what this country was founded on.

The “ADR Industry”

- The retirement plan for most state court judges, appellate court, district court, is to supplement their retirement income by becoming arbitrators.
 - I have a buddy who is an AAA arbitrator. He arbitrates complex medical malpractice cases, and he charges \$50 an hour more than the top lawyer.
 - Does that become a question of judicial ethics? Can those people interpret decisions relating to whether or not to enforce an arbitration clause?
-

A lot of my former colleagues are making a lot of money as arbitrators.

We have a lot of judges retired now, so there's a huge business for arbitrators and they are a force to be reckoned with. As a matter of fact, our state just put in a bill to require all arbitration decisions to be reviewable in court, which is a weird thing. But we must have 24, 30 judges who have a group, a block of arbitrators.

I've been told by former colleagues that you get paid a lot. It's hard work, especially if you've got two companies in a big deal. You've got the same volume of paper. You're getting ready for a trial.

We have mediating organizations in our Eastern state, which consist of retired judges or people who practice in that field. There is an inherent conflict in this, because this is the retirement home for judges to go into mediation and arbitration.

We have a lot of retired judges that have gone into mediation, not so much arbitration, and they're not making a lot of money. They complain a lot because now there's so many mediators.

Even lawyers can't believe how much the mediators are receiving hourly.

Are you going to spend your money on a reasonable arbitrator who may be a former judge that's seen a lot of these cases, or are you going to spend it on the possibility and the risk associated with a jury verdict? They want to eliminate the risk. Jury trials do not do that.

—We have one senior judge on our court who spends a lot of her time just mediating cases. The parties will pick out cases they think can settle, and then she goes to work on them, and it's been quite successful.

—And when she retires, she'll form one of those mediation firms and be very successful and make a lot more money.

Your colleagues, when they retire, what do they do? They go into private arbitration. We have actually got our former colleagues competing against us, charging \$500 to \$600 an hour. In our state, we have seen, in the past 14 years or so, commercial dockets going way down. We are quickly becoming a court of criminal jurisprudence and family law. The resources are going. As a result, we are designating civil judges to hear just complex cases. And right now we have a task force looking into what response to make to our business community starting to complain about paying \$500 to \$600 per hour for arbitration.

In our state, when the judges leave the court, they are going to JAMS or some national mediation group, and make four or five times what you make on the bench.

Our Midwestern state is seeing the same thing. If an area is being litigated, there is a push to put it into mandatory arbitration, not mediation. I have always thought it was a strange anomaly. In the 1960s, we passed a ballot which modernized the court system. We got away from justices of the peace and judges who often were paid by the number of cases that they got in. Now we are going to mandatory arbitration, which is sort of a glorified JP process in many respects. It is financially dependent on those participants so they can attract and keep those repeat customers. It seems very strange. We have an intentional short-circuiting of the traditional system with all of the ills that Professor Gilles has laid out in her paper.

The interesting thing is that, when you get a big judgment—like with the baseball contracts, and even in big business—that arbitrator is never going to work again for them. With the independence of the judiciary, they can't just say, "Oh, we are not going to go before that judge again." You are going to get a fair hearing on the next case. When an arbitrator goes against big business, they are never going to be an arbitrator again for that company. That is a chilling effect for the arbitrator, because the arbitrator knows if he wants to work again in this business climate, he has to be moderate and not award what the case may deserve.

If you have someone doing arbitration between Boeing and Lockheed, you are paying \$1,000 an hour. No judge is getting near \$1,000 an hour. The state picks up the cost.

There's not many trials in the civil courts anymore, so if trial lawyers want to go to work, they go into arbitration.

In our county where I live, all the retired judges are going into mediation. One got hired by a corporation to handle all these individual mass torts, and he's their mediator. Not to say that he's going to be prejudiced, but I found it odd that he got hired by the company. So I think this repeat business is very, very important.

As a result of finding out how much money there was to be made with ADR, most of the judges are retiring when they get to retirement age to work for arbitration associations, and they've tripled their income.

Appellate ADR

We have nonbinding mediation and arbitration in our Midwestern state. We actually have a really good system in our appeals courts. We actually mediate appeals. It has been very successful. I don't look at ADR strictly as binding arbitration.

We have about 30 percent now of our cases being referred at the appellate level into mediation. They do not all settle, but a lot of them do. Some of our retired judges come back and sit to do them. It is a nice way to keep our retired judges busy and the cases off of our docket.

—I was very surprised, years ago, that any litigants would want to mediate at the appellate level, but there has been a lot of success.

—Both parties have to agree.

—Yes.

—But it keeps the published decision off the books, though, which maybe is to someone's advantage.

Predictability of Arbitration vis-à-vis Jury Trial

Predictability? Well, predictability comes from the fact that you can look at what other cases have come before you. You have some predictability there. Past that, it is about money. That is my opinion. You filter what you know through your own life experiences. After Hurricane Katrina, I saw firsthand businesses, the Mom-and-Pops that went under, people who lost their homes, people who still don't have a place to come home to, because of arbitration costs, under some set of laws that didn't make any sense.

Some of the writers that are anti-litigation call litigation a pathological event. It takes the ordinary person outside of their realm of comfort, puts them in a boxing ring where they don't get to speak, and

they have two lawyers talking in a language they don't understand. So maybe jury trials are like what Forrest Gump said about the box of chocolates—you never know what's going to come out of them, whereas at least arbitrators are predictable on the percentage basis much more than a juror.

I think some of the litigants also like to have an alternative dispute resolution system because it's not as unpredictable, not knowing what's going to happen. And it also helps shorten the time period. Because justice delayed is justice denied and they want resolution and they want answers. So I think that's a positive from the litigant's perspective as well.

I was on the trial bench for 21 years and I heard all these arguments about how unpredictable juries were and how there were runaway verdicts and all that. I can tell you that in all those years, I cannot really remember jury verdicts that I thought were completely ridiculous.

I've been at this 35 years and I try lots of cases. I can think of two that surprised me.

—The reason for the mess of expansion of arbitration is businesses looking for more predictability. It becomes an argument really about the jury. I think that is the basis of this, that businesses do not like juries. They want more predictability.

—I am wondering. How is it more predictable for businesses, even with an arbitrator, when you really do not have a record? Unless what one of the speakers suggested is true, that the arbitrators are pro-business. What that really means is that you are going to do better because you keep bringing business to the arbitration.

I rented a U-Haul 30 years ago, and I didn't have to fill out all of this stuff. It is there because of lawyers. It is there because business people are trying to have predictable liability.

—Well, 97 percent of the time the consumer loses.

—If that's really true, if it's really true, what's pushing that? Professor Popper said arbitration is predictable, but clearly the process is failing consumers. So I don't know what he meant by the word "predictable."

—I think that's exactly what he meant by the word "predictable."

I think it is important to start thinking of ways for us to compete with arbitration. So if you can have predictability in a more streamlined process, I think there are real advantages to that.

This is America. It is all about business. They want to control their costs. They don't want lawsuits, because you can't control lawsuits. You don't know what the cost is going to be. They want to make sure there are no big surprises.

Contract Formation and Other Issues

In our Southern state we litigate endlessly the validity of those contracts, whether it is in 15 point type or whatever size. The question is, “Was it sufficiently brought to the attention of the family or the incoming patient? Was it buried in a sheet in 15 or 20 pages? Did the nursing home administrator downplay the significance of the document as opposed to highlighting the significance of the document?” We have a split in authority in our state with regard to procedural and substantive unconscionability. Some courts say, “If you are unconscionable on either of those arms, then the contract is unenforceable.” Others use a sliding scale. The more procedural unconscionability there is, the less substantive unconscionability you need, and vice versa.

We had a case that involved a bank that just really got messed up about depositing checks and caused a lot of problems. A customer filed a lawsuit, and the bank raised an agreement that said that, “When you agree to be a customer of our bank, you agree that if you have any dispute about the way we manage your accounts, this would be resolved by arbitration.” Sure enough, that was in the bank’s documents. However, the bank could not prove that he had ever been presented with those documents or had signed those documents. We determined that it was a formation question.

—Not only do the consumers not understand the word “arbitration,” they don’t understand that the process is supposed to be in arbitration, including no right to appeal and all these other things.

—I agree. I think that many people, when they see the word “arbitration,” tend to think it means mediation. That is why they think they still have a Constitutional right to trial by jury. They hold to that. A lot of people talk about their Constitutional rights and don’t have a clue as to what they are. They hold to the fact that they have the Constitutional right to go to court anyway, no matter what. This thing about arbitration, they think that is like meditation. They are like, “Okay, fine. We will try to settle it. I don’t mind trying to settle it.” In their minds, there is nothing in there that really explains what arbitration is or what impact it would have. I mean, they use the word, the terminology, but nobody gives them an explanation.

I thought our lunch speaker made an interesting point about the percentage of people who sign arbitration agreements and have no earthly idea of what they are signing. They don’t know what it means. They sign it. I wonder how much litigation there is on this question of the superior knowledge of the drafter as opposed to almost no knowledge of the people who enter into these arbitration agreements.

—What about the principle that you don’t have to read it if you are agreeing? The law is going to presume that you have read it.

—Read and understood.

—But the fact is that you didn’t read it, and you made a choice by clicking a button on a computer screen. Is this more of a statement of where we are in society, that people can’t read a contract and

- understand what it says? I come from the poorest state in the Union. People do have that trouble. I bought a car last week and I signed an arbitration agreement. Did I have to?
- You have a law degree.
- Previously, I have said, “No, I am not going to sign this. I have to get the general manager to come in there.”
- That is what happened to me. I refused to sign it.
- I understood it is a lot different for me because I have a law degree than it is for someone else who graduated from one of our fine high schools and can read and write and can understand arbitration. I lose my right to a jury trial. In essence, that is what we are getting to. We are assuming that all of these poor, dumb people can’t understand it. If we get into a case-by-case basis where we say, “You are too dumb. It doesn’t apply to you, but it applies to all of these smart people.”
- There are situations, though, where you think, “If I want this item, I want this app, I want whatever this is, I have to agree to whatever they wrote in there.” You want that. You agree. You can’t go and red line like I did when I bought my car.
- You don’t have to have the app.
-

Too often we say, “Well, all consumers don’t understand it.” I don’t know that we can accept that. I don’t have a right to an iPad. I don’t necessarily have a right to cable TV. What is to prevent the companies that come up with this technology to say, “Look, if you are going to use our iPad, you are going to receive the benefit of this technology, we want to resolve our disputes in arbitration?” I understand that some people don’t understand, but I click that I agree every time and I don’t scroll down there. Am I different from somebody else who buys an iPad and does the same thing?

- I want to go back to this principle that we have in contract law, that if you sign a contract, you are presumed to have read it and understand it. I signed one last week. I looked at it, and I thought, “How many people sign this agreement without thinking?” What do we have to do? Do we have to tell people, “If you want an arbitration agreement, you have to also have another box in really bold face, much bigger than the part that says ‘I promise to pay you the \$35,000 for the car,’ and you have to have that in bold face in order to enforce it?”
- There are other principles of contract, too. It must be a meeting of the minds. There must be consideration. It can’t be overreaching. There are all kinds of other principles in contract. That one alone doesn’t trump everything else. I think it is your perfect right to take what I will call the “conservative” position. You have a perfect right to do that. But some of us ought to be able to stand up and say, “This is nonsense that these large corporations can overreach.” We shouldn’t just smile and say, “That is okay.”
- What large corporation? I bought it from my local company. It is not a large corporation. Arbitration agreements have gone down to where you have small businesses that are putting them in there, and they believe it is necessary to protect their company. We have a lot of principles. Can there

- have been a meeting of the minds if somebody is not able to understand that there is an arbitration provision in there? Was there ever really a meeting of the minds? Well, they drove off with that car.
- Aren't some rights just so fundamental? We ought to emphasize those.
- You have a right as a criminal to a jury trial. You can waive that at any time.
- Yes, but you don't waive it before a colloquy before counsel. Here you have a right to a jury trial. You have pages and pages of fine print. Somewhere buried in there is this arbitration provision. Maybe it should be highlighted in bold print.
-

It is one thing to have to read seven pages to acquire a free app. It is another thing when you might have a malpractice claim against a hospital or surgeon.

- I am not a big fan of arbitration agreements, but I do struggle with this idea that, simply because it is boilerplate language or it is put in a contract down very deep, that we just out of hand disregard it. I think the whole nature of a contract, whether it is my contract with AT&T Mobility or whoever else, is that I am entering a contract with them. I don't have to do that. I don't have to have a cell phone.
- You tell my kid she can't have a cell phone.
-
- What if you have a misrepresentation? We had a case where the nursing home administrator, in going over the papers, said of the arbitration agreement, "You can still have a jury." She thought it was true. She testified to it in court. She said, "I told her that because that is what I thought it was."
- Then you get to contract formation. Have they been misled in order to enter the contract? The other is simply interpreting a contract provision. What if there is no misleading? What if it is clearly understood that if either of us has a disagreement, we are going to arbitration?
-
- In the nursing home cases, the forms now have separate pages, bold, highlighted, all sorts of things. You have to initial the page with arbitration and so forth. One of the questions I would throw out is, why treat that part of a contract any different than the other pages of the contract? I think it is important. I understand the rationale. Are the other 19 pages of a contract meaningless?
- Every word is important.
-
- Attorney fee clauses, aren't they right up there with the arbitration?
- How about repossession? Can the repossession clause in a car deposit only be enforceable if it is highlighted?
-

This is of great interest to us, but I have to suggest a bit of a reality check. I don't know that members of the public really care, which is epitomized by my state's situation with cell phones. You have a startup cell phone company that showcases its main advertising point. Verizon, Sprint, and AT&T all have arbitration clauses. The XYZ Phone Company says, "If you are unhappy with our service, you

can sue us in court. We have a guaranteed court access provision in our contract.” The consumers seem to be saying, “Who cares? Do I get unlimited text? What is my monthly rate? Do I get a free phone?” That is what people care about. If you are in the marketplace and trying to make a big deal about the fact that you don’t have an arbitration clause, there are a handful of judges and lawyers who are going to be very excited about that, but for 99.9 percent of the public, that is going to go in one ear and right out the other. That is not what they care about.

It sounds to me like we are all basically offended by adhesion contracts. At this point, there isn’t a lot we can do about them. In the larger society, you have to live with it. But *Concepcion* still left to us the question of contract formation. True legislation can make a determination of what it takes to make a valid contract in your state. If they want to add a provision that in order to enter into a valid contract, if it contains an arbitration clause, it must be in bold print, then they will do it. If they don’t want to make it part of the public policy, they won’t.

If you are saying that, in order to deal with this problem, we need to put it in bold print, I am telling you the consumers haven’t read it to begin with. Even if you put it in huge print, they are not going to know. Does the company then have to say we are going to read it to you?

We had to write a novel in our state when an attorney was suing a law firm. She was saying she was terminated improperly, and they had an arbitration agreement that she said she didn’t really understand. I said, “You are a lawyer.” She said she didn’t understand the contract that she signed. She got an attorney and brought suit. We affirmed the trial court’s summary judgment. I had never seen an attorney saying the arbitration clause was not put forth clearly enough. It was in bold type and everything else. She said the type was not as high as it should be.

—What would happen if somebody said, “I am not going to sign the clause”?

—You don’t get a cell phone.

—What about these websites where you don’t even click to agree? Just by visiting the website, you are agreeing. There are a few of those out there.

—Some of them say that “By entering this website”

—You have to put it in as part of the terms. Some of them put it in the terms or as part of the terms. Then there are others that say “By using this website, you agree to our terms and conditions.”

—I wrote an opinion on that, saying that in our Southern state you have a shared relationship with your doctor. The doctor has to go over the arbitration clause with you if you are going to give up your right. There is a duty for him to disclose and speak. I voided the clause on fiduciary involvement for pre-existing relationships. That got arbitration ended for medical malpractice. It is a contract formation question.

—I like the fiduciary approach. I must say I am going to put that in the back of my head: the doctor as a fiduciary.

To give you an example, one case where we did uphold that the provision was appropriate, it was done in caps. It was bold. There was evidence presented below that this was truly a meeting of the minds. To the person who signed the actual agreement, it was very, very clear, very evident. For those, we thought, “It is very clear. It is a contract. You did agree to that. It is okay.”

There is a difference between buying a \$50 ticket to a baseball game and dragging your left leg into the hospital with sciatica because you have a bulging disc. That may be an elective procedure. It was an elective procedure for me last Christmas Eve. Did I want to have the surgery or did I want to continue walking around on one leg?

If it is any comfort to you, the American Arbitration Association, as I understand it, is refusing to arbitrate medical malpractice, because they don’t believe that the arbitration agreements are binding. They believe it is unethical for a doctor to do that. They refuse to even hear those claims.

Most of our cases are not the sort of core question like we have been discussing today, but come up around the periphery of the thing. Was the arbitration demand made in a timely enough fashion? Has it been waived? Can the arbitration be in my state, or must it be in some other state, either in accordance with the choice of laws provision in the contract or on some other basis?

In our Southern state, we have had not a whole lot of arbitration cases, but I have probably had a half dozen in the last few years. Most of them concern the issue of whether the state arbitration or the Federal Arbitration Act applies. Those are what we deal with more.

We get a fair amount of unconscionability cases. For the last six years we had only one class arbitration case. Our supreme court took review of it and reversed. The trial court judge held that we couldn’t arbitrate a class action based on the agreement. The supreme court took the case and ruled that the contract was unconscionable, where it said they couldn’t litigate as a class.

We had a case where a business was advertising on Spanish-speaking television. A customer who spoke no English signed a contract that was all in English, that had an arbitration clause. The business never even tried to explain. It is just ridiculous. We reversed that case.

You are just sitting there and you just sign it and just say, “I know I am just screwed.” That is just what you are doing.

—Has anybody ever read all of the papers when they finance their house? Has anybody actually read the documents the bank gave you? You actually read them?

—Yes, and negotiated some changes.

—With the ease of entering into contracts on the Internet, anytime you want to buy something, it says, “Read this and check this box.” You are in there. Believe it or not, I don’t read them.

—There are like 17 pages that you have to click through.

—I did that maybe three or four times, and I thought, “I’m not going to do this.”

—What I am saying is, when we look at contract formation and things like that, it is still a factual determination. Just because you have two signatures on a contract does not mean you have a valid contract. I think we have not lost that sort of threshold.

LegalZoom has an arbitration contract. You can read it on their website. If you accept LegalZoom’s website, then you are agreeing to arbitrate.

Arbitration is, in most instances that I have seen, forced upon people unwittingly. From my perspective, where I saw arbitration, it was with small actions with individual consumers who had gone to see the doctor and they gave them all these forms to fill out when they went to the doctor’s office. And then they said, “Oh, by the way, here’s another form,” and it was an arbitration agreement where the patient unwittingly, while signing all these forms at the doctor’s office, signed a form that said if you have a dispute with your doctor, you’ve got to go to arbitration; you can’t go to court. So the patients didn’t know they were signing that kind of thing and probably wouldn’t have done it if they had known what they were getting into. Or they went to buy a car, and there was an arbitration agreement there. Or they put their mother in a nursing home and they signed an arbitration agreement, and the mother didn’t even know what world she was in, and she certainly didn’t sign an arbitration agreement. So you have people that have arbitration agreements signed for them by somebody else. These things, in my mind, are not so good. I’m on the state supreme court now and we typically uphold arbitration agreements, as the state law requires us to do so. But then you see one where the mother didn’t know somebody was signing one for her, and in those cases we struck them down. Or a minor had one signed for him or her by a parent and didn’t know what was being done. These are quite different from people who voluntarily enter into settlement negotiations or people who go into a mediation that the parties can walk away from if they’re not successful.

I see this as an entirely different animal, which is something that deprives people of their right to utilize the court system. And if they go into this with their eyes open, if they are people with equal bargaining power, like the 1925 Act contemplated, I don’t have a problem with it. But if there are people who are hoodwinked and don’t know what they’re getting into, I do have a problem with that, and I think that’s a pervasive and deceptive thing. Other than that, I have no problem with it.

—Sometimes ADR increases litigation instead of diminishing it. There have been so many cases, at least in our area, challenging the arbitration clause, and not merely in the nursing home cases. Those have been the most prevalent for us, but we have had construction cases, other cases where the arbitration clause itself was the cause of litigation.

—I think that is an excellent point. We have had a fair amount of litigation in my state and appellate decisions around the question of the arbitration clause itself, and the award and whether or not an ancillary lawsuit can go forward while this piece of it is being resolved through arbitration. I don't know that it has been the panacea that was intended in terms of reducing litigation. It is more to change the nature and the course of litigation, I think.

—What about the suggestion that was made by Professor Gilles that the parties who are in favor of arbitration make those arbitration agreements more consumer-friendly? There is really no risk to doing that.

—I am not sure it would matter, because I just do not think that many people recognize the whole issue of arbitration. They sign these agreements, or they purchase a particular product, expecting that they are just getting a product, and not really understanding what else is going on. I would not think from a business point of view it makes any sense to change it.

—So many of these things are handed to you at the onset of the transaction, like just as you are going to get onto the jet boat, just as you are climbing into the hot air balloon, just as you are getting on the helicopter for the ride, just as you are getting on the zip line, just as you are getting on the horse. “It is just company policy. Sign here.”

Most people do not sue, but they have a general understanding of how the courts work. They have seen it on TV. I have not seen too many television series based on arbitration. It is much more unknown.

I think every company that is doing business with a consumer has now or will soon have arbitration clauses. There's a fast-food restaurant chain that the students I teach tell me has the best burger in the whole world. The company posted a big poster sign in the front of their restaurants that says that anybody who enters the restaurant, buys any products, enters into the premises, hereby agrees to waive their right to sue for any negligence and agrees to go to arbitration. I show it to the students in the class I teach, and I say, “Is that a binding agreement?” Of course, we all know that you can't get into arbitration unless it is by contract. Then we get into a big debate about whether it is a contract. Most of the kids are second- or third-year students so they know contracts. They go back to whether there was an offer. Yes, there was an offer. Consideration? Yes, there is consideration. Acceptance? Did they accept the agreement? Well, no, but it says if you eat anything, that is an acceptance of the agreement. At least half of them think it is a binding arbitration agreement. I would toss it in a minute.



If I don't understand something then I have an obligation to look at it. Or at least I understand or get somebody. The question is, Can I access the product, and am I being forced to hit the "agreed" button to get through to the next item?

When you are presented with these contracts, even if it is the written contract that is presented to you when you rent a car, how many billable hours would I need to spend to examine this contract to determine whether or not I want to negotiate about any of these clauses? And if I want to negotiate any of these clauses, they will say, "Fine, go to Hertz," which will give me exactly the same contract.

—The fallacy of all of these discussions is the assumption that arbitration clauses are unitary concepts. I don't think they are. There is a sliding scale. I am going to look at the arbitration clause very carefully if I am buying real estate. I am not going to look at it at all if I am renting a movie. Along that continuum, I think you can expect people to have varied degrees of concern with the transaction.

—Arbitration agreements really are a legal fiction.

—They don't have to be. We don't have to take a one-size-fits-all view under state contract law to these clauses.

—One thing that really struck me about the lunch speaker's remarks was the fact that so many of the respondents said, "They cannot take my rights away from me. I am an American and I have certain fundamental rights and they cannot encroach on those. I am signing this, but even if I sign it, it is not going to make any difference, because my rights trump your right to make me waive them." And that is not correct. It was just such a fundamental misconception.

—There are studies that indicate that, the way most contracts are written, they are difficult for people to read psychologically—multi-part forms, fine print, gray type on a dark background like dark pink, and those types of things. Anything that has a line length more than 25 characters per line, the old way we used to type, studies show people do not read them.

If you just say, "You have to arbitrate," people still won't know what that means.

—Even if you had it in bold print, I wonder if a layperson has any idea of the consequences of saying "I agree."

—They know the consequences of saying "I do *not* agree." They say, "You cannot come into our nursing home."

—Or "If you do not agree, we are not going to sell you this car."

—"We are not going to let you have your app."

—Even if folks know what in their state is maybe enforceable, even if you have just a little bit of knowledge that you cannot do that, these contracts can have a choice-of-law provision. You think, living in one state, you know what the law is, but then there is a choice-of-law provision for some

other state that may have a completely different law you are not familiar with. I think consumers can be fooled that way too.

I just told the representative, “There is no way that I am going to sign the contract with this in it.” He said, “You can cross out whatever you want. Just put your initials on it.”

It says something—it says something about the inherent belief in the rights you get as a citizen. People think that they have them. Then they are being told, “Well, you really don’t.” As the justice said, “Too darn bad.”

Loss of jury trials

We’ve had a decrease in our Plains state, and I think principally it’s because of mediation on the civil side.

We’ve had a 55 percent decline in jury trials in our Southern state since 2005.

We used to try at least one case a week 20 years ago. We would have a trial, be it the misdemeanor or family trial. It’s the end of July now and we’ve had four this year.

Jury trials are rare. A lot of the lawyers advertising on TV have ads where they say, “The minute the insurance adjuster hears that this firm is involved, they are going to settle.” They are setting their clients up not for a jury trial, but for a quick settlement to get a percentage of the case. We never see them in court. These guys are just insurance-adjusting.

I think the bottom line for the plaintiff bar is, “What is it doing for jury trials?”

I was a trial lawyer for 20 years. I tried an average of 25 jury trials a year. Now, a trial judge in our area tries four, five, six a year at the most.

—You know, I’ve been a big proponent of arbitration throughout my career, and I’m beginning to think that may have been wrong-headed. You listen to the discussions these days about whether we are going to lose the right to trial by jury because we won’t try jury cases anymore. That’s of some concern.

—Absolutely. I tried over 100 jury trials, and now nobody knows how to do jury trials.

—I have had this theory for awhile that we have few lawyers now who are equipped to go into court and try a case—knowing the evidence rules or procedure rules. They will do will do anything to avoid trying the case. I suggest that that is a reason for the great move to mediation and arbitration. But what I find unusual about it is that it effectively takes the court totally out of the process. My theory is if so many lawyers do not want to or cannot try even a bench trial, certainly not a jury trial, then they will search for means of finishing up their cases without walking into the courtroom.

In our Southern state only two percent of our cases in court are resolved by a jury. So we have settlement or alternative dispute resolution, one way or the other, in 98 percent of our cases. I think that access to justice for poor people and middle income people is just gone. Unless you offer a basket of opportunities to resolve disputes, whether it is in small claims courts, mandatory arbitration, modified by the possibility of having a judge or a jury trial, you are not providing the different models to give people at least a chance to be heard by a neutral. And you have massive industries like construction industry, securities industry, a lot of these other industries who simply have no faith that a judge who handles a lot of criminal matters and automobile torts and other things is going to be able to handle a complex construction case.

—We're running out of people who know how to try jury cases.

—I think there's another effect. One of the ways that people who aren't lawyers or judges know about what a court is about is by being on a jury. And most people who are asked about it think it's a wonderful experience. And if you don't have that experience, increasingly because you don't get it in school anymore in your civics, you don't know how significant it is that we have a judicial system that's independent. I think that's a huge loss.

Regulation of Arbitrators

—I found a very interesting issue in a legal malpractice case that I had never thought of, but apparently, this is an issue in the world of people who are arbitrators, and that is the unauthorized practice of law. For example, if there is an arbitration in Mississippi, and the lawyers are from Atlanta and Dallas, are they practicing law in Mississippi without a license? Do they have to get approval to practice? If someone from Texas and New York arbitrated in Chicago, would they have to have an Illinois lawyer to participate, or would they be practicing law without a license?

—Does an arbitrator have to be a lawyer?

—Well, he doesn't necessarily have to be, but if he is a lawyer, is he practicing law? You have two issues: One, can an Alabama licensed lawyer go and sit in Atlanta and consider arbitrations without having a Georgia license? Two, even better than that, can a Texas lawyer and a New York lawyer meet in Atlanta for an arbitration?



POINTS OF AGREEMENT

In the discussion groups, the moderators were asked to seek out consensus—to the extent that it could be achieved—on issues raised in the Forum. At the end of the Forum, these points of agreement were summarized. Most, but not all, of the standardized discussion questions were mentioned, and several other relevant topics not covered specifically in the standardized questions also received attention.

- Judges have no complaint if parties of equal bargaining power want to agree to arbitration, but they are concerned that compulsory arbitration often pits parties of different bargaining power against each other (e.g. consumer v. business, employee v. employer).
- Court-annexed ADR (alternative dispute resolution) generally, especially mediation, are not part of an anti-lawsuit movement, but forced arbitration is.
- Mandatory arbitration is part of the anti-jury and anti-judge movements.
- The arbitration movement—as distinct from the overall ADR movement—is not a response to underfunding of the courts or desires for greater efficiency.
- The campaign to promote forced arbitration has been successful, with some judges seeing much less litigation in certain areas in recent years.
- Forced arbitration diminishes the skill and experience of lawyers and judges, and makes them less willing to take on jury trials.
- ADR (as opposed to forced arbitration) is part of the overall evolution of the courts, stemming from the desire for efficiency and better case management.
- Judges believe that arbitration may sometimes be faster and cheaper than litigation, but diminishes access to justice.
- Due process is inherently inefficient. The definition of efficiency needs to include fairness.
- The confidential nature of arbitration, and the reduced influence of precedent, limit the development of the common law and undermine the rule of law.
- Judges are concerned about what the lack of precedent produced in arbitration proceedings will mean for future courts. Judges are beneficiaries of their predecessors' decisions, and arbitration takes cases completely out of the system of creating a body of law.
- Arbitration turns more of the development of the law over to the legislatures.
- Arbitration can bypass issues of fairness and due process when the rules and the qualifications of the arbitrators are determined by the legislature, not the courts. Courts must evolve to control the process.

- Civil litigation is effective in deterring wrongful conduct. The prevalence of mandatory arbitration provisions, with confidential arbitration proceedings, undermines the deterrent function.
- Some appellate courts see dozens of arbitration-related cases each year; others see few.
- Subjects of arbitration cases that judges encounter frequently include: bank loans; car and truck rental contracts; civil rights complaints; condominium association rules and regulations; construction contracts; employment cases; labor union cases; medical negligence; nursing home litigation, and activities of “payday loan” companies.
- Arbitration-related issues on which judges said their courts have not yet ruled include consumers striking out or redlining arbitration provisions; choice of law; whether or not arbitration provisions trump the state’s public policy; the relationship between arbitration provisions and the Uniform Commercial Code and the Restatements; and the impact on the right to jury trial.
- Among the exceptions to the general enforceability of arbitration provisions identified by the U.S. Supreme Court, the judges have encountered: consent and choice issues; lack of mutuality; contract formation issues; waiver; scope; authority (e.g. in power-of-attorney cases); agency; limited remedies; short statutes of limitation/delay; clarity of the arbitration provision; and unconscionability.
- Public policy is not often invoked as a basis for a challenge to an arbitration award.
- The Supreme Court’s *Concepcion* and *Italian Colors* decisions have not yet had much impact on cases before the judges who attended the Forum.
- Arbitration makes perfect sense for larger entities, but it makes no sense when it is applied to many other kinds of cases.
- An individual’s right to jury trial cannot be waived by a third party—a situation that emerges frequently in nursing home situations.
- The idea that the public understands the significance of mandatory arbitration provisions in contracts is a big “mis-*Concepcion*.”
- Consumer protection from unfair use of arbitration through regulatory agencies and attorneys general is insufficient.
- Judges doubt that the typical consumer believes he or she can get justice when disputes arise with business entities with whom they are dealing.
- The arbitration “horse” is out of the barn. Now courts and the bar must evolve to ensure that they provide fair choice and ethical processes, through such mechanisms as commercial and business courts.
- Fewer jury trials means less civic participation, less familiarity with what the courts do, and less political support for the courts.



APPENDICES

FACULTY BIOGRAPHIES

Paper Presenters and Moderator

Myriam Gilles has taught at the Benjamin N. Cardozo School of Law, Yeshiva University, since 2000. A graduate of Harvard-Radcliffe College and Yale Law School, she was a litigation associate at Kirkland & Ellis before beginning her academic career at Cardozo. She teaches Torts, Products Liability, and Class Actions & Aggregate Litigation, and has written extensively on class action waivers in arbitration clauses. She also writes on structural reform litigation, medical malpractice, access to justice, and tort law. Her articles have appeared in numerous law reviews and have been cited in many judicial decisions. In December 2013, she testified before the Senate Judiciary Committee in support of the Arbitration Fairness Act. She regularly appears on panels and gives lectures sponsored by the American Bar Association, Law & Society, the American Constitution Society, American Legal Institute, and other groups. She was a visiting professor at the University of Virginia Law School in 2004, and was a 2005-06 Fellow in the Program of Law and Public Affairs at Princeton University.

Richard H. Frankel is an Associate Professor at the Earl Mack School of Law, Drexel University. He directs the law school's Appellate Litigation Clinic, in which law students litigate appeals in state and federal courts under applicable student practice rules. Professor Frankel's scholarship focuses on access to justice issues, and he has written frequently about binding mandatory arbitration agreements, including the 2014 article, "The Arbitration Clause as Super Contract" in the *Washington University Law Review*. He is a co-author of the treatise *Consumer Arbitration Agreements: Enforceability and Other Topics* (Public Justice, 6th Ed. 2011), and he has written amicus curiae briefs on behalf of professional arbitrators, arbitration scholars and other groups. He also has testified before the U.S. Congress and the Consumer Financial Protection Bureau regarding mandatory arbitration. Before beginning his academic career, Professor Frankel was an attorney with Public Justice, P.C. in Washington, D.C. He received his A.B. and J.D. degrees from Yale University.

Herman J. Russomanno (Forum Moderator) is President of the Pound Civil Justice Institute. He is a founding partner of Russomanno & Borrello, P.A., in Miami, Florida. Admitted to practice in Florida and Alabama, he is certified as a trial lawyer by both the State of Florida and the National Board of Trial Advocacy. He is a Phi Beta Kappa graduate of Rutgers University and holds a J.D. degree from Cumberland School of Law. He has served as President of the Florida Bar and of the International Academy of Trial Lawyers and is a member of the American Bar Association's House of Delegates. He is a Fellow of the American College of Trial Lawyers, a governor of the American Association for Justice, and has been active in, and honored by, numerous other legal and civic organizations.

Honorable Mary Ellen Barbera is the Chief Judge of the Court of Appeals of Maryland, Maryland's highest state court. Following her graduation in 1984 from the University of Maryland School of Law and service as a judicial clerk, she served as a Maryland Assistant Attorney General. From 1998-2002 she served in the Governor's Office of Legal Counsel, becoming Chief in 1999. She was appointed to the Court of Special Appeals in 2002, and to the Court of Appeals in 2008, becoming the Court's first female Chief Judge in 2013.

Chief Judge Barbera has taught Criminal Procedure at the Washington College of Law, American University, and both Legal Writing and Appellate Advocacy at the University of Baltimore School of Law, where in 1998 she received the award for outstanding teaching by an adjunct faculty member. She also served as Chair of the Board of Directors of the Judicial Institute, which provides continuing education for Maryland judges, and on the Judicial Ethics Committee and as Chair of the Criminal Law and Procedure Committee of the Maryland Judicial Conference. She has held numerous leadership positions in the Maryland State Bar Association (MSBA). Chief Judge Barbera is also a member of the American Law Institute, several Maryland local bar organizations, and the National Association of Women Judges. Chief Judge Barbera is also a member of the International Rule of Law Consortium, participating in seminars and round table discussions with delegations of Russian and Ukrainian judges both in the U.S. and in Russia and Ukraine.

Panelists

Honorable Simeon R. Acoba, Jr., was appointed to the Hawai'i Supreme Court in May 2000, and served until his mandatory retirement age in 2014. Prior to his appointment to the Supreme Court, he was an associate judge on the Intermediate Court of Appeals from 1994-2000, and a circuit court judge from 1980-1994. Justice Acoba received a Bachelor of Arts degree from the University of Hawai'i, and his Juris Doctorate from the Northwestern University School of Law. He was admitted to practice law in the federal and Hawai'i state courts in 1969. He started his career as a law clerk to then-Chief Justice William Richardson of the Hawai'i Supreme Court, was a special assistant to Harlan Cleveland, then-President of the University of Hawai'i, served as a deputy attorney general, and later was engaged in the private practice of law. During his practice he also served as a special deputy attorney general in the occupational safety and health area and in the public utilities area, as a state House of Representatives majority attorney, and as an adjunct professor at the Richardson School of Law, University of Hawai'i.

Justice Acoba was the founding Chair of the Hawai'i Access to Justice (ATJ) Commission from 2008-2010 and currently serves on various Commission committees. He is Chair of the Judiciary's Strategic Planning Committee for ATJ. He is also Co-chair of the Judicial Administration Committee of the Hawai'i State Bar Association (HSBA) and is a director of the Hawai'i Justice Foundation. In 2013, Justice Acoba received the Dwight D. Opperman Award for Judicial Excellence from the American Judicature Society, the Distinguished Service Award from the Japanese American Citizens League, Honolulu Chapter, the Hawai'i State Bar Association's Golden Gavel Award and President's Award, and the Hawai'i Pacific University Fellow of the Pacific Award.

Leslie A. Bailey is a staff attorney at Public Justice, where she focuses on consumer rights and has been lead counsel in numerous appeals challenging forced arbitration clauses. She graduated cum laude from Claremont McKenna College and received her J.D. cum laude from the New York University School of Law, where she was an Arthur Garfield Hays Civil Liberties Fellow and Executive Editor of the N.Y.U. Review of Law and Social Change. In addition to consumer rights cases, she has also worked on civil rights cases, challenges to court secrecy, and numerous other matters involving access to justice. She has testified before subcommittees of the Judiciary Committees of both the Senate and House about how secret settlements and sealed court records undermine public health and safety, and has been a featured speaker on mandatory arbitration and other consumers' rights issues at conferences across the country. She is a co-author of the annually-published treatise *Consumer Arbitration Agreements*. Leslie serves on the Board of Directors of the National Association of Consumer Advocates and is a member of Consumer Attorneys of California and the American Association for Justice.

Alan I. Gilbert has served as Solicitor General for three different Minnesota Attorneys General. He advises and represents various Minnesota public officials and appears in state and federal courts in litigation, involving primarily constitutional and consumer issues. Mr. Gilbert has been involved in a variety of matters regarding the validity and other aspects of mandatory arbitration, both as a member of the Minnesota Attorney General's Office and in private practice.

Honorable Janice Holder is a *summa cum laude* graduate of the University of Pittsburgh and a 1975 graduate of the Duquesne University School of Law. After serving as a law clerk for the United States District Court for the Western District of Pennsylvania, she entered the private practice of law in Pittsburgh, Pennsylvania, in 1977 and in Memphis, Tennessee, in 1980. In 1990, she was elected to Division II of the Circuit Court of Tennessee for the Thirtieth Judicial District at Memphis where she served for six years. In December, 1996, she was appointed to the Supreme Court of Tennessee and was elected to eight-year terms in August 1998 and in August 2006. On September 1, 2008, she was sworn in for a two-year term as the Tennessee Supreme Court's first female Chief Justice. As a circuit court judge, Justice Holder served on the Conference of Chief Justices Mass Tort Litigation Committee and as the chair of the Silicone Gel Breast Implant Sub-Committee. After her appointment to the Tennessee Supreme Court, she served as liaison to the Alternative Dispute Resolution Commission and created a mediation pilot project that predated the adoption of rules governing the use of alternative dispute resolution in Tennessee. She was instrumental in the creation of the Tennessee Supreme Court's Tennessee Lawyer Assistance Program and the Tennessee Access to Justice Commission, and has served as the Supreme Court's liaison to both commissions. She received the Grayfred Gray Public Service Mediation Award from the Coalition for Mediation Awareness in Tennessee and the Frank F. Drowota III Outstanding Judicial Service Award for her work with access to justice issues and with the Tennessee Lawyers Assistance Program. She was honored by the American Bar Association's Commission on Lawyer Assistance Programs, and received the W.J. Michael Cody Pro Bono Attorney of the Year Award for her work in promoting access to justice. In 2010, she was honored by the University of Pittsburgh as a Legacy Laureate, and in 2013 received the University's 225th Anniversary Medallion in recognition of leadership and service to Tennessee's legal community.

Honorable Marilyn Kelly is currently the Distinguished Jurist in Residence at Wayne State University Law School in Detroit. She retired from the Michigan Supreme Court in January, 2013, after serving 16 years (two as Chief Justice). Before that, she was twice elected to and served eight years on the Michigan Court of Appeals. Earlier, Justice Kelly practiced law for 17 years. She has been President of the Women Lawyers Association of Michigan and the Women's Bar Association and is a former member of the Representative Assembly of the State Bar of Michigan. Justice Kelly has written numerous articles on the law, and lectures frequently. She is a past president of the Michigan State Board of Education, where she served for 12 years. In 1998-2003 she co-chaired the State Bar of Michigan Open Justice Commission, which was dedicated to access-to-justice issues. More recently, she co-chaired Michigan's Judicial Selection Task Force, which has recommended changes to the state's practices in the election of Supreme Court Justices. Justice Kelly is a member of the ACLU and the American Constitution Society, and is a past president of the National Consortium on Racial and Ethnic Fairness in the Courts.

Archis A. Parasharami, a litigation partner in Mayer Brown's Washington DC office, is a co-chair of the firm's Consumer Litigation & Class Actions practice. He also is a member of the firm's Supreme Court & Appellate practice. He is a graduate of Princeton University and Harvard Law School, and joined Mayer Brown after clerking for Judge Leonard I. Garth of the United States Court of Appeals for the Third Circuit. Mr. Parasharami defends businesses in class action litigation in federal and state courts around the country, and also assists companies in drafting arbitration agreements—particularly in the consumer and employment contexts—and in litigating the enforceability of those agreements. He was one of the Mayer Brown lawyers who represented AT&T Mobility in *AT&T Mobility LLC v. Concepcion*, in which the U.S. Supreme Court held that the Federal Arbitration Act preempts state-law rules that would refuse to enforce arbitration agreements that waive class actions. With his colleagues, he also represented one of the petitioners in *Marmet Health Care Center, Inc. v. Brown*, in which the U.S. Supreme Court held that the West Virginia Supreme Court's rejection of pre-dispute arbitration agreements that apply to personal-injury or wrongful-death claims against nursing homes was preempted by federal law. Mr. Parasharami frequently speaks on developments in the class action arena, and has been quoted in a number of publications, including the *Wall Street Journal* and *National Law Journal*. He also is a co-editor of *Class Defense*, the firm's blog on key issues affecting class action law and policy.

Andrew F. Popper is a Professor at American University's Washington College of Law. He is the author of more than 100 published works including two novels, *Rediscovering Lone Pine* and *Bordering on Madness* (focused on a violent land use battle) and three non-fiction books, *Materials on Tort Reform*; *Administrative Law: A Contemporary Approach* (with McKee, Varona, and Harter), and *A Companion to Bordering on Madness: Cases, Scholarship, and Case Studies*. He is the 2010 American University Scholar-Teacher and past recipient of the ABA Robert B. McKay Award in Tort Law. He has testified on more than 30 occasions before Congressional committees, and recently published a series of poems appearing (or forthcoming) in *The Grey Sparrow Review*, *The Hudson View*, *The Red River Review*, *The Tipton Poetry Review*, *Forge* and other journals.

J. Michael Weston, is the President of the Defense Research Institute—The Voice of the Defense Bar. He is a founding member of Lederer Weston Craig, PLC in Des Moines and Cedar Rapids, Iowa, practicing primarily in the areas of commercial litigation, insurance coverage and bad faith, product liability, toxic torts, and bodily injury and property damage defense. He has been selected as a member of the Federation of Defense and Corporate Counsel, the International Association of Defense and Corporate Counsel, the Association of Defense Trial Attorneys, ABOTA, and as a fellow of the Iowa Academy of Trial Lawyers. He is a past President of the Iowa Defense Counsel Association and has served as a governor on the board of the Iowa State Bar Association. Mike is a Fellow of the American Bar and Iowa State Bar Foundations, and has served as Chair of the Cedar Rapids Area Chamber of Commerce.

Luncheon Speaker

Jeff Sovern is a Professor of Law at St. John's University in New York City, where he teaches Civil Procedure, Consumer Protection and Introduction to Law. The New York Times has called him “an expert in consumer law.” His writing is addressed to the general public, law students, and legal academics. For the public he has written numerous op-eds and essays. For law students he has co-authored textbooks (Consumer Law: Cases and Materials (4d ed. 2013 West) and Selected Consumer Statutes (2013). For legal academics he has written many law reviews and other publications, and is a coordinator of the Consumer Law and Policy Blog (www.clpblog.org). His writing has also been cited in numerous casebooks, treatises, law review articles, and court decisions. The American Council on Consumer Interests awarded Professor Sovern the Russell A. Dixon Prize in 2002 and the 2010 Applied Consumer Economics Award. He has served as Reporter to the Eastern District Discovery Oversight Committee and on committees of the American and New York State Bar Associations and the Association of the Bar of the City of New York. Before joining the St. John's law faculty, served as a law clerk and practiced law in the litigation department of a major New York City law firm. He holds A.B. and J.D. degrees from Columbia University.

Discussion Group Moderators

David M. Arbogast practices law in Los Angeles, concentrating in complex and class action litigation. He has been involved with complex litigation matters involving a number of disciplines, including consumer lending, tobacco, antitrust, defective products, and technology-related matters. He received his B.A. degree from Western State College, and his J.D. degree from Thomas Jefferson School of Law. He has been an active member of the American Association for Justice, and is currently a governor of Consumer Attorneys of California (“CAOC”).

Linda Miller Atkinson is a partner in the firm of Atkinson, Petruska, Kozma & Hart, with offices in Gaylord and Channing, Michigan. She is licensed in Georgia, Indiana, Michigan and Wisconsin. A 1963 graduate of Oberlin College, Oberlin, Ohio, and a 1973 graduate of Wayne State University Law School in Detroit, Michigan, she is an author and editor of *TORTS: MICHIGAN LAW AND PRACTICE*, published by the Institute of Continuing Education since 1994, and of *LAWYERS DESK REFERENCE* (8th edition, Thomson-West), and is author of the “Depositions” chapter of *LITIGATING TORT CASES* (AAJ Press, published by Thomson-West). She was the recipient of the American Association for Justice’s Champion of Justice Award in 2007, the Trial Lawyer of the Year Award in 1995, and the Women Trial Lawyer’s Caucus Marie Lambert Award in 2000. She is a past president of the Michigan Association for Justice, a member of the American Association for Justice, and a Fellow and trustee of the Pound Civil Justice Institute. In her life outside the courtroom she is in her 20th year of providing outdoor emergency care with the National Ski Patrol.

Kathryn H. Clarke is the Immediate Past President of the Pound Civil Justice Institute. She is an appellate lawyer and complex litigation consultant in Portland, Oregon. She specializes in medical negligence, products liability, punitive damages, and constitutional litigation in both state and federal courts. She received her undergraduate degree from Whitman College, and her law degree from the Northwestern School of Law of Lewis and Clark College. She has served as president of the Oregon Trial Lawyers Association, and is a governor of the American Association for Justice.

Mark S. Davis is a partner in the Honolulu law firm of Davis Levin Livingston, concentrating his practice in personal injury cases, especially medical malpractice claims against private institutions and military facilities. He has also served as lead counsel in numerous civil rights and class action matters throughout the country. He was lead counsel in *Siopes v. Kaiser Permanente*, in which the Hawai’i Supreme Court struck down the mandatory arbitration provision in the Kaiser Health Plan Agreement. Davis is a fellow of both the American College of Trial Lawyers and the American Board of Trial Advocates, and a member of The International Academy of Trial Lawyers and International Society of Barristers. He is a past president of the Consumer Lawyers of Hawai’i and is a governor of the American Association for Justice (formerly the Association of Trial Lawyers of America (ATLA®)). He was recognized as the 2014 Distinguished Alumnus of Washington University in St. Louis.

Kathleen Flynn Peterson is a certified civil trial specialist and a partner in the firm of Robins, Kaplan, Miller & Ciresi, LLP, in Minneapolis. She holds a B.A. degree in nursing from the College of St. Catherine, and a J.D. degree from the William Mitchell College of Law, *cum laude*. Her practice is focused on medical negligence litigation. She is a Fellow of the American College of Trial Lawyers, and is a member of the American Board of Trial Attorneys, the International Society of Barristers, the International Academy of Trial Lawyers, and the American Bar Foundation. In 2007-07 she served as president of the American Association for Justice (formerly the Association of Trial Lawyers of America (ATLA®)). She has also served as president of the Minnesota Chapter of the American Board of Trial Attorneys and chair of the Minnesota State Committee of the American College of Trial Lawyers.

Molly Patricia Hoffman practices with Fay Kaplan Law, P.A., in Washington, D.C., concentrating on medical negligence, birth injuries, terrorism-related litigation, bullying cases, and general civil litigation. She is a graduate of the Art Institute of Dallas, the University of Texas, and the David A. Clarke School of Law of the University of the District of Columbia, where she was Senior Editor of the law review. She is a member of the Trial Lawyers Association of Metropolitan Washington, D.C. and the American Association for Justice.

Elizabeth Ann “Betty” Morgan received her B.A. degree from the University of Florida, and her J.D. degree from Emory University School of Law. She was board certified by the Florida Bar as a specialist in business litigation from 1997 to 2007 and is certified in intellectual property law through 2013. She is admitted in Florida and Georgia, has significant jury trial experience in state and federal court, and has handled cases in many different states.. She is experienced in alternative dispute resolution and is a registered mediator in Georgia. Ms. Morgan teaches trial techniques at Emory University School of Law, has taught trademarks and trade secrets as adjunct faculty at the University of Miami School of Law, and has lectured extensively on intellectual property and employment issues.

Barry J. Nace heads the Washington, DC, law firm of Paulson and Nace. He received his B.S. degree in chemistry from Dickinson College, and later received J.D. and LL.D. degrees from Dickinson School of Law. His practice emphasizes medical negligence and drug product liability, and he is certified as a civil trial lawyer by the National Board of Trial Advocacy and the American Board of Professional Liability Attorneys. In 1993-94 he served as president of the American Association for Justice, and has been president of the National Board of Trial Advocacy since 2005. He is an elected member of the American Law Institute and a trustee of the Pound Civil Justice Institute, and has also been active in the International Academy of Trial Lawyers and Public Justice (Founding Member).

Gale Pearson is a partner with the law firm of Pearson, Randall & Schumacher, P.A., in Minneapolis. Her practice concentrates on environmental, pharmaceutical, medical device and corporate fraud litigation, including class actions. She received her bachelor’s degree from California State University at Northridge with a major in Laboratory Medicine, Physics and Chemistry and her law degree from Loyola Law School in Los Angeles. She is a Certified Clinical Laboratory Scientist. She is a member of the Minnesota and American Associations for Justice and has served in the speakers bureaus for Minnesota’s “We the Jury” project.

Ellen Relkin is of counsel to Weitz & Luxenberg, P.C. in New York City and Cherry Hill, New Jersey, where she represents plaintiffs in pharmaceutical device product liability and toxic tort cases. She holds a law degree from Rutgers School of Law and an undergraduate degree from Cornell University, and is certified by the New Jersey Supreme Court as a Civil Trial Attorney. She was law clerk to the Honorable Sylvia Pressler, former Presiding Judge of the New Jersey Superior Court, Appellate Division. She has been a speaker on scientific evidence and mass tort issues and has published articles on the subject in the *Hofstra Law Review*, *Cardozo Law Review* and the *Dickinson Journal of Environmental Law and Policy*. Ms. Relkin is an elected member of the American Law Institute, the American Association for Justice (AAJ), the New York State and New Jersey Trial Lawyers Associations, and the New Jersey, New York and American Bar Associations. She is a governor of the New Jersey Association for Justice and a former chair of AAJ’s Section on Toxic, Environmental, and Pharmaceutical Torts and. She is a Member of the Sedona Conference’s Working Group on Mass Torts and Punitive Damages, and is a Fellow and Trustee of the Pound Civil Justice Institute.

John Vail is the proprietor of John Vail Law PLLC, “An appellate voice for the trial bar.” Since 1997 Mr. Vail has focused his work solely on access to justice issues, representing clients in numerous state supreme courts and in the Supreme Court of the United States. He has received the Public Justice Achievement Award from Trial Lawyers for Public Justice for his “outstanding work and success challenging the constitutionality of legislation limiting injury victims’ access to justice.” His legal theories, and the evidence he has developed to support them, have been used widely to keep open the doors to America’s courtrooms. His articles, such as

Blame it on the Bee Gees: The Attack on Trial Lawyers and Civil Justice, 51 N.Y.L. Sch. L. Rev. 323 (2006) and *Big Money v. The Framers*, Yale L.J. (The Pocket Part), Dec. 2005, <http://www.thepocketpart.org/2005/12/vail.html>, have enlivened scholarly debate and have guided practitioners. Mr. Vail spent seventeen years doing legal aid work, concentrating on major litigation to advance rights. He has been recognized by the legal services community for “inspired vision and outstanding leadership” and for “tireless devotion as a champion for the rights of low income people.” He was an original member of the Center for Constitutional Litigation, where he was Vice President and Senior Litigation Counsel. Mr. Vail has served as Professorial Lecturer in Law at the George Washington University School of Law. He is a graduate of the College of the University of Chicago and of Vanderbilt Law School.

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Honorable Virginia C. Kelly, Court of Appeals
Honorable Peter Swann, Court of Appeals
Honorable Jon W. Thompson, Court of Appeals
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Honorable Karen Michele Ashby, Court of Appeals

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Honorable Nelly N. Khouzam, Court of Appeal
Honorable Mark W. Klingensmith, Court of Appeal
Honorable Joseph Lewis, Jr., Court of Appeal
Honorable James E. C. Perry, Supreme Court
Honorable Morris Silberman, Court of Appeal
Honorable Carole Y. Taylor, Court of Appeal

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Appeals

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Honorable Paula A. Nakayama, Supreme Court
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Honorable Judy Cates, Appellate Court
Honorable Melissa A. Chapman, Appellate Court
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Honorable Gilbert V. Indeglia, Supreme Court

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Honorable James E. Lockemy, Court of Appeals
Honorable Paula H. Thomas, Court of Appeals

TENNESSEE

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Honorable Alan E. Highers, Court of Appeals
Honorable Janice M. Holder, Supreme Court

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ABOUT THE POUND CIVIL JUSTICE INSTITUTE

What is the Pound Civil Justice Institute?

The Pound Civil Justice Institute is a legal think tank dedicated to the cause of promoting access to the civil justice system through its programs, publications, and research grants. The Institute was established in 1956 to build upon the work of Roscoe Pound, Dean of Harvard Law School from 1916 to 1936 and one of law's greatest educators. The Pound Institute promotes open, ongoing dialogue between the academic, judicial, and legal communities, on issues critical to protecting and ensuring the right to trial by jury. At conferences, symposiums, and annual Forums, in reports and publications, and through grants and educational awards, the Pound Civil Justice Institute initiates and guides the debate that brings positive changes to American jurisprudence and strives to guarantee access to justice.

What Programs Does the Institute Sponsor?

Annual Forum for State Appellate Court Judges—Since 1992, Pound's Forum for State Appellate Court Judges has brought together judges from state supreme courts and intermediate appellate courts, legal scholars, practicing attorneys, legislators, and members of the media for an open dialogue about major issues in contemporary jurisprudence. The Forum recognizes the important role of state courts in our system of justice, and deals with issues of responsibility and independence that lie at the heart of a judge's work. Pound Forums have addressed such issues as rule making, electronic discovery, mandatory arbitration, secrecy in the courts, judicial independence, and the civil jury. The Forum is one of the Institute's most respected programs, and has been called "one of the best seminars available to jurists in the country."

Howard Twigg Memorial Lecture on Legal Professionalism—Founded in 2010 to honor attorney Howard Twigg, a legal giant, consummate professional and champion of justice for Americans, this lecture series trains attorneys on ethics and professionalism in the legal field. Lectures have been delivered by Justice James Kitchens of the Supreme Court of Mississippi, Justice R. Fred Lewis of the Supreme Court of Florida, attorney Oliver Diaz, formerly of the Supreme Court of Mississippi, and attorney Mark Mandell of Rhode Island.

Academic Symposia—One of the primary goals of the Pound Civil Justice Institute is to provide a well-respected basis for challenging the claims made by entities attempting to limit individual access to the civil justice system. To this end, the Institute inaugurated the Law Professor Symposium, which offers an alternative to the "law and economics" programs being cultivated on law school campuses by tort reformers; it seeks to develop a new school of thought emphasizing the right to trial by jury and to provide a fertile breeding ground for new research supportive of the civil justice system. The Institute held its first Symposium on the subject of mandatory arbitration in conjunction with Duke University Law School in October, 2002. The papers from the 2002 Symposium appear in a special issue of the Duke law journal, 67 *LAW & CONTEMPORARY PROBLEMS* (2004). The Pound Institute held its Symposium in 2005 on medical malpractice at Vanderbilt Law School, and the papers from that program appear in 59 *VANDERBILT LAW REVIEW* (2006).

Papers of the Pound Institute—Pound has an expansive collection of research resulting from its Judges Forums, Warren Conferences, academic research grants, Academic Symposia, Roundtable discussions, and other sponsored publications. Reports of these activities, called *Papers of the Pound Civil Justice Institute*, are available via Pound's website (www.poundinstitute.org) or by contacting the Pound Institute.

Fellows Receptions—Members of the Pound Institute, called Fellows, gather twice annually to celebrate the work of the Institute. Invited guests include the Officers and Trustees of the Pound Institute, Pound Fellows, legal academics, and judges.

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PAPERS OF THE POUND CIVIL JUSTICE INSTITUTE

Reports of the Annual Forums for State Appellate Court Judges

(All Forum Reports or academic papers are available for full viewing at www.poundinstitute.org.)

2014 • Forced Arbitration and the Fate of the 7th Amendment: The Core of America's Legal System at Stake?

Myriam Gilles, Cardozo Law School, Yeshiva University, *The Demise of Deterrence: Mandatory Arbitration and the "Litigation Reform" Movement*

Richard Frankel, Drexel University School of Law, *State Court Authority Regarding Forced Arbitration After Concepcion*

2013 • The War on the Judiciary: Can Independent Judging Survive?

Charles Geyh, Indiana University Maurer School of Law, *The Political Transformation of the American Judiciary*

Amanda Frost, American University, Washington College of Law, *Honoring Your Oath in Political Times*

2012 • Justice Isn't Free: The Court Funding Crisis and Its Remedies

John T. Broderick, University of New Hampshire School of Law, and Lawrence Friedman, *New England School of Law, State Courts and Public Justice: New Challenges, New Choices*

J. Clark Kelso, McGeorge School of Law, *Strategies for Responding to the Budget Crisis: From Leverage to Leadership*

2011 • The Jury Trial Implosion: The Decline of Trial by Jury and its Significance for Appellate Courts

Marc Galanter, University of Wisconsin Law School, and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*

Stephan Landsman, DePaul University College of Law, *The Impact of the Vanishing Jury Trial on Participatory Democracy*

Hon. William G. Young, Massachusetts District Court, *Federal Courts Nurturing Democracy*

2010 • Back to the Future: Pleading Again in the Age of Dickens?

A. Benjamin Spencer, Washington and Lee University School of Law, *Pleading in State Courts after Twombly and Iqbal*

Stephen B. Burbank, University of Pennsylvania Law School, *Pleading, Access to Justice, and the Distribution of Power*

2009 • Preemption: Will Traditional State Authority Survive?

Mary J. Davis, University of Kentucky College of Law, *Is the "Presumption against Preemption" Still Valid?*

Thomas O. McGarity, University of Texas School of Law, *When Does State Law Trigger Preemption Issues?*

2008 • Summary Judgment on the Rise: Is Justice Falling?

Arthur R. Miller, New York University School of Law, *The Ascent of Summary Judgment and Its Consequences for State Courts and State Law*

Georgene M. Vairo, Loyola Law School, Los Angeles, *Defending against Summary Justice: The Role of the Appellate Courts*

2007 • The Least Dangerous but Most Vulnerable Branch: Judicial Independence and the Rights of Citizens

Penny J. White, University of Tennessee College of Law, *Judicial Independence in the Aftermath of Republican Party of Minnesota v. White*

Sherrilyn Ifill, University of Maryland School of Law, *Rebuilding and Strengthening Support for an Independent Judiciary*

2006 • The Whole Truth? Experts, Evidence, and the Blindfolding of the Jury

Joseph Sanders, University of Houston Law Center, *Daubert, Frye, and the States: Thoughts on the Choice of a Standard*

Nicole Waters, National Center for State Courts, *Standing Guard at the Jury's Gate: Daubert's Impact on the State Courts*

2005 • The Rule(s) of Law: Electronic Discovery and the Challenge of Rulemaking in the State Courts

Report of the thirteenth Forum for State Appellate Court Judges. Discussions include state court approaches to rule making, legislative encroachments into that judicial power, the impact of federal rules on state court rules, how state courts can and have adapted to the use of electronic information, whether there should be differences in handling the discovery of electronic information versus traditional files, and whether state courts should adopt new proposed federal rules on e-discovery.

2004 • Still Coequal? State Courts, Legislatures, and the Separation of Powers

Report of the twelfth Forum for State Appellate Court Judges. Discussions include state court responses to legislative encroachment, deference state courts should give legislative findings, the relationship between state courts and legislatures, judicial approaches to separation of powers issues, the funding of the courts, the decline of lawyers in legislatures, the role of courts and judges in democracy, and how protecting judicial power can protect citizen rights.

2003 • The Privatization of Justice? Mandatory Arbitration and the State Courts

Discussions include the growing rise of binding arbitration clauses in contracts, preemption of state law via the Federal Arbitration Act (FAA), standards for judging the waiver of the right to trial by jury, the supposed national policy favoring arbitration, and resisting the FAA's encroachment on state law.

2002 • State Courts and Federal Authority: A Threat to Judicial Independence?

Discussions include efforts by federal and state courts to usurp the power of state court through removal, preemption, etc., the ability of state courts to handle class actions and other complex litigation, the constitutional authority of state courts, and the relationship between state courts and legislatures and federal courts.

2001 • The Jury as Fact Finder and Community Presence in Civil Justice

Discussions include the behavior and reliability of juries, empirical studies of juries, efforts to blindfold the jury, the history of the civil jury in Britain and America, the treatment of juries by appellate courts, how juries judge cases in comparison to other fact-finders, and possible future approaches to trial by jury in the United States.

2000 • Open Courts with Sealed Files: Secrecy's Impact on American Justice

Discussions include the effects of secrecy on the rights of individuals, the forms that secrecy takes in the courts, ethical issues affecting lawyers agreeing to secret settlements, the role of the news media in the debate over secrecy, the tension between confidentiality proponents and public access advocates, and the approaches taken by various judges when confronted with secrecy requests.

1999 • Controversies Surrounding Discovery and Its Effect on the Courts

Discussions include the existing empirical research on the operation of civil discovery; the contrast between the research findings and the myths about discovery that have circulated; and whether or not the recent changes to the federal courts' discovery rules advance the purpose of discovery.

1998 • Assaults on the Judiciary: Attacking the "Great Bulwark of Public Liberty"

Discussions include threats to judicial independence through politically motivated attacks on the courts and on individual judges as well as through legislative action to restrict the courts that may violate constitutional guarantees, and possible responses by judges, judicial institutions, the organized bar, and citizens.

1997 • Scientific Evidence in the Courts: Concepts and Controversies

Discussions include the background of the controversy over scientific evidence; issues, assumptions, and models in judging scientific disputes; and the applicability of the *Daubert* decision's "reliability threshold" under state law analogous to Rule 702 of the Federal Rules of Evidence.

1996 • Possible State Court Responses to American Law Institute's Proposed Restatement of Products Liability

Discussions include the workings of the American Law Institute's (ALI) restatement process; a look at provisions of the proposed restatement on products liability and academic responses to them; the relationship of its proposals to the law of negligence and warranty; and possible judicial responses to suggestions that the ALI's recommendations be adopted by the state courts.

1995 • Preserving Access to Justice: Effects on State Courts of the Proposed Long Range Plan for Federal Courts

Discussions include the constitutionality of the federal courts' plan to shift caseloads to state courts without adequate funding support, as well as the impact on access to justice of the proposed plan.

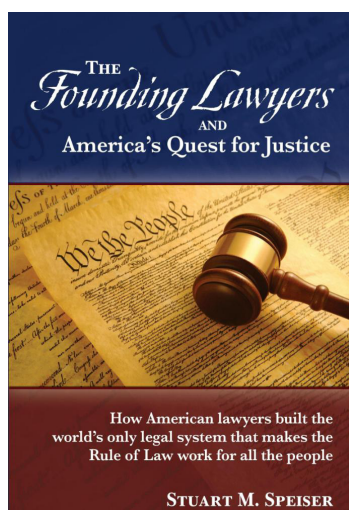
1993 • Preserving the Independence of the Judiciary

Discussions include the impact on judicial independence of judicial selection processes and resources available to the judiciary.

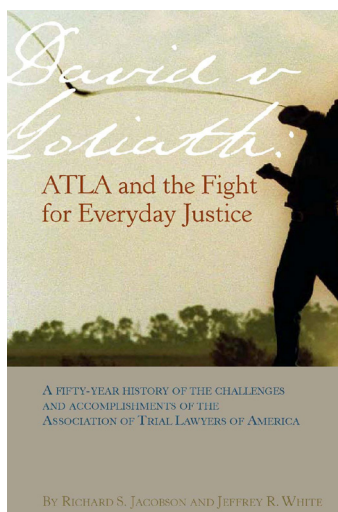
1992 • Protecting Individual Rights: The Role of State Constitutionalism.

Report of the first Forum for State Court Judges. Discussions include the renewal of state constitutionalism on the issues of privacy, search and seizure, and speech, among others. Also discussed was the role of the trial bar and academics in this renewal.

Books distributed by the Pound Civil Justice Institute

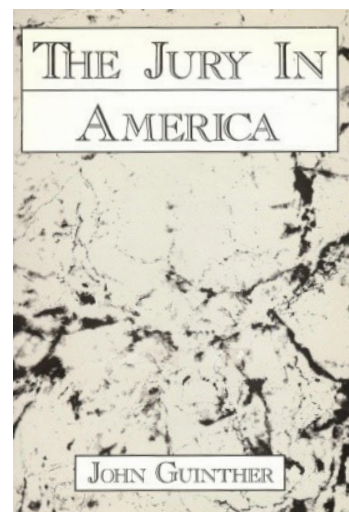


The Founding Lawyers and America's Quest for Justice
by Stuart M. Speiser (2010)



David v. Goliath: ATLA and the Fight for Everyday Justice
by Richard S. Jacobson & Jeffrey R. White (2004)

(Free viewing and downloading
at www.poundinstitute.org.)



The Jury In America
by John Guinther (1988)

Reports of the Chief Justice Earl Warren Conferences on Advocacy

- 1989 • Medical Quality and the Law
- 1986 • The American Civil Jury
- 1985 • Dispute Resolution Devices in a Democratic Society
- 1984 • Product Safety in America
- 1983 • The Courts: Separation of Powers
- 1982 • Ethics and Government
- 1981 • Church, State, and Politics
- 1980 • The Penalty of Death
- 1979 • The Courts: The Pendulum of Federalism
- 1978 • Ethics and Advocacy
- 1977 • The American Jury System
- 1976 • Trial Advocacy as a Specialty
- 1975 • The Powers of the Presidency
- 1974 • Privacy in a Free Society
- 1973 • The First Amendment and the News Media
- 1972 • A Program for Prison Reform

Reports of Roundtable Discussions

1993 • Justice Denied: Underfunding of the Courts.

Report on the 1993 Roundtable, examining the issues surrounding the current funding crisis in American courts, including the role of the government and public perception of the justice system, and the effects of increased crime and drug reform efforts. Moderated by Chief Justice Rosemary Barkett of the Florida Supreme Court.

1991 • Safety of the Blood Supply.

Report on the Spring 1991 Roundtable, written by Robert E. Stein, a Washington, D.C., attorney and an adjunct professor at Georgetown University Law Center. The report covers topics such as testing for the presence of HIV and litigation involving blood products and blood banks.

1990 • Injury Prevention in America.

Report on the 1990 Roundtables, written by Anne Grant, lawyer and former editor of Everyday Law and TRIAL magazines. Topics include “Farm Safety in America,” “Industrial Safety: Preventing Injuries in the Workplace,” and “Industrial Diseases in America.”

1988-89 • Health Care and the Law III.

Report on the 1988–1989 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Drugs, Medical Devices and Risk: Recommendations for an Ongoing Dialogue,” “Health Care Providers and the New Questions of Life and Death,” and “Medical Providers and the New Era of Assessment and Accountability.”

1988 • Health Care and the Law.

Report on the 1988 Roundtables, written by health policy specialist Michael E. Carbine. Topics include “Hospitals and AIDS: The Legal Issues,” “Medicine, Liability and the Law: Expanding the Dialogue,” and “Developing Flexible Dispute Resolution Mechanisms for the Health Care Field.”

1988 • Health Care and the Law II—Pound Fellows Forum.

Report on the 1988 Pound Fellows Forum, “Patients, Doctors, Lawyers and Juries,” written by John Guinther, award-winning author of *The Jury in America*. The Forum was held at the Association of Trial Lawyers Annual Convention in Kansas City and was moderated by Professor Arthur Miller of Harvard Law School.

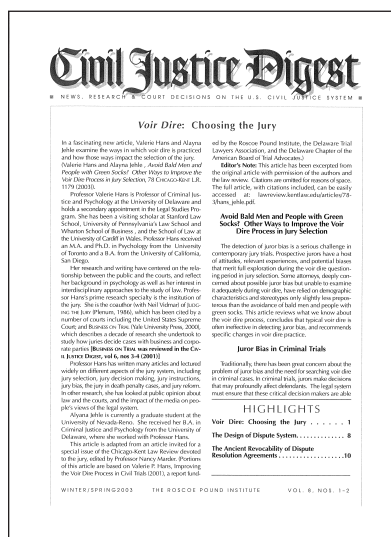
Research Monographs

Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts. This landmark study, written by Professor Michael Rustad of Suffolk University Law School with a grant from the Pound Foundation, traces the pattern of punitive damages awards in U.S. products cases. It tracks all traceable punitive damages verdicts in products liability litigation for a quarter century and provides empirical data on the relationship between amounts awarded and those actually received.

The Pound Connective Tissue Injury Research Project: Final Report, by Valerie P. Hans, Ph.D. Each year, automobile accidents account for a substantial number of deaths and other personal injuries nationwide. Lawsuits over injuries suffered in auto accidents constitute the most frequent type of tort case in the state courts. The Pound Institute supported a series of research studies on the public’s views of whiplash and other types of soft tissue and connective tissue injuries within the context of civil lawsuits. The 2007 final report presents and integrates key research findings and identifies some of their implications for trial practice.

The American Lawyer’s Code of Conduct, Revised Draft. Available at www.poundinstitute.org.

Pound’s Civil Justice Digest



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