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Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights

ABSTRACT. Two developments frame this discussion: the demise of negotiated contracts as the predicate to enforcing arbitration obligations under the Federal Arbitration Act and the reorientation of court-based procedures to assimilate judges' activities to those of other dispute resolution providers. From 1925 until the mid-1980s, obligations to arbitrate rested on consent. Thereafter, the U.S. Supreme Court shifted course and enforced court and class action waivers mandated when consumers purchased goods and employees applied for jobs. To explain the legitimacy of precluding court access for federal and state claims, the Court developed new rationales—that arbitration had procedural advantages over adjudication, and that arbitration was an effective enforcement mechanism to "vindicate" public rights.

The result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so—rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights. The diffusion of disputes to a range of private, unknowable alternative adjudicators also violates the constitutional protections accorded to the public—endowed with the right to observe state-empowered decision makers as they impose binding outcomes on disputants. Closed processes preclude the public from assessing the qualities of what gains the force of law and debating what law ought to require. The cumulative effect of the Supreme Court's jurisprudence on arbitration has been to produce an unconstitutional system that undermines both the legitimacy of arbitration and the functions of courts.

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FEATURE CONTENTS

INTRODUCTION: DISPUTE DIFFUSION 2806

I. THE PUBLIC IN COURTS 2818

II. THE CREATION AND ERASURE OF RIGHTS 2836

III. LOCATING THE PRIVATE AND THE PUBLIC IN ARBITRATION 2855

A. The Paradigm of Merchants, Contracts, and Consent 2860

B. From Waffles to Cheerios: Employees, Consumers, and Obligations To Arbitrate 2863

IV. METRICS OF EFFECTIVE VINDICATION, ADEQUACY, AND UNCONSCIONABILITY 2874

A. Gateways to Judging Arbitration's Legitimacy 2874

B. Effective Vindication's Genesis in an "International Commercial Transaction" and Under the Supervision of the Securities and Exchange Commission 2883

C. Judicial Cost-Benefit Analyses and the Question of Collective Actions 2885

D. "Mass" Arbitration Clauses Without a Mass of Claims 2893

1. Public Access to, and Confidentiality in, Arbitration 2894

2. Accounting for Individual Consumer and Employee Arbitrations 2900

a. Finding the Filings 2901

b. Locating the Rules and Fee Structures 2910

c. Concerns about Compliance 2914

E. Contracting for Judges in a Market for Courts 2915

F. Regulated Arbitrations: Court-Annexed Arbitration in Federal Courts, Agency Supervision, and European Directives 2920

CONCLUSION: "NIGHTMARISH" SCENARIOS AND THE CONSTITUTION OF COURTS 2932

INTRODUCTION: DISPUTE DIFFUSION

> *"To avoid the expense and delay of having a trial, judges encourage the litigants to try to reach an agreement resolving their dispute."*
>
> —"Understanding the Federal Courts/How Courts Work," website of the U.S. Courts, 2015[1]

> *"We may change any terms, conditions, rates, fees, expenses, or charges regarding your Services at any time."*
>
> —Wireless Provider "Customer Agreement," 2015[2]

Courts are equated with public processes, and arbitration with private consensual agreements. Yet that convention misses the degree to which public law has come to regulate the contours of arbitration, and the ways in which courts have incorporated privatizing practices. While public and private—in various senses of those words—have long co-mingled in courts and in arbitration, the balance has shifted, reconfiguring the field of dispute resolution and diminishing distinctions between the work of courts and of other dispute resolution providers.

One reason to care about the changing mix of the public and the private in both venues is that the political authority and the moral legitimacy of courts and arbitration have depended on distinctions between public and private spheres. In theory, judges are agents of the state, charged with implementing its law through public decision making; arbitrators are creatures of contracts, obliged to effectuate the intent of the parties. The distinction is presumed to be constitutionally respectful and welfare-maximizing, enabling the enforcement of public rights and protecting the autonomy of contractual relationships.

Yet the two practices—adjudication and arbitration—are coming to be styled as fungible options on a "dispute resolution" (DR) spectrum. An increasingly common parlance (crisscrossing the globe) replaces the phrase "alternative dispute resolution" (ADR) with DR, so as to put courts—now deemed "Judicial Dispute Resolution" (JDR) or "Judicial Conflict Resolution"

1. *Civil Cases*, U.S. CTS., http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/HowCourtsWork/CivilCases.aspx [http://perma.cc/BR9L-4WGC].

2. The quotation comes from *Wireless Customer Agreement*, AT&T § 1.3 (2015), http://www.att.com/legal/terms.wirelessCustomerAgreement-list.html [http://perma.cc/9XA6-E956] [hereinafter AT&T Wireless Customer Agreement] (emphasis omitted). Similar provisions are proffered by other wireless service providers. *See, e.g.*, *General Terms and Conditions of Service*, SPRINT, http://shop2.sprint.com/en/legal/legal_terms_privacy_popup.shtml?id16=terms_and_conditions ("We may change any part of the Agreement at any time, including, but not limited to, rates, charges, how we calculate charges, discount, coverages, technologies used to provide services, or your terms of Service.").

(JCR)[3]—on a continuum of mechanisms responding to conflicts. This formulation aligns courts with a range of options that clouds courts' identity as a unique constitutionally obliged mode of decision making.

The reasons for and the goals of this homogenization vary, as the field of DR is capacious. Among its proponents are those seeking to respond to the high demand for adjudicatory services by augmenting "paths to justice" so as to enhance access,[4] reformers aspiring to shape more collegial problem-solving processes,[5] entrepreneurs looking for business,[6] and potential defendants hoping to avoid the publicity and regulation that courts entail.[7] The methods include expanding the forms of process, increasing the power of private providers to issue binding judgments, and broadening the repertoire of providers. The shared aim is to produce resolutions enforceable by law.

"Dispute Diffusion" is the term I offer to capture these new commitments to the eclipse of court-based adjudication as the primary paradigm for government-authorized dispute resolution. Implementation in the United States comes through a mix of policymaking through statutes, rules, regulations, and court-made doctrines, which press trial-level judges to become conciliators, to deploy other individuals as "neutrals" to mediate or to arbitrate in courts, and to outsource decision making to the private market. Much of the work seeks to quiet conflict by relying on confidential interactions among disputants and decision makers. The claims filed, the methods used by decision makers, and the results are often outside the public's purview. An array of provisions—forming what I term "Alternative Civil Procedural Rules" (ACPR)—reflect the

3. Such shorthands appear in a variety of materials. *See, e.g.*, THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION (Tania Sourdin & Archie Zariski eds., 2013) [hereinafter THE MULTI-TASKING JUDGE].

4. *See, e.g.*, HAZEL GENN, PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 148-66 (1999); Mauro Cappelletti, *Alternative Dispute Resolution Processes Within the Framework of the World-Wide Access-to-Justice Movement*, 56 MOD. L. REV. 282 (1993).

5. *See, e.g.*, Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (in Some Cases)*, 83 GEO. L. J. 2663 (1995).

6. *See* Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Values*, 59 BROOK. L. REV. 931, 950-53 (1993).

7. For example, advertising campaigns have characterized litigation as abusive, while defenders of court-based processes argue that critics have exaggerated the harms of lawsuits and undervalued the legitimacy of the injuries sought to be redressed. *See, e.g.,* Marc Galanter, *An Oil Strike in Hell: Contemporary Legends About the Civil Justice System*, 40 ARIZ. L. REV. 717, 731-33 (1998) (discussing how a lawsuit against a fast food restaurant, which had served scalding coffee that caused serious injuries, became a poster case for the misuse of courts); Elizabeth G. Thornburg, *Judicial Hellholes, Lawsuit Climates and Bad Social Science: Lessons from West Virginia*, 110 W. VA. L. REV. 1097 (2008) (detailing anti-litigation organizations targeting jurisdictions for being insufficiently protective of business interests).

developing deregulatory norms. While conferring adjudicatory license on a variety of private processes, the ACPR rarely address the needs of indigent users, the independence of the decision makers, and the rights of the public to participate.

Some aspects of Dispute Diffusion can be attributed to private ordering,[8] but the focus in my discussion is not on international sovereign debt or trade arbitrations. Rather, my concerns are about mandates applied to hundreds of millions of consumers and employees, obliged to arbitrate not because of choice but because public laws have constructed requirements to use private decision making in lieu of adjudication. The United States Supreme Court opened the floodgates during the last three decades, as it reinterpreted 1925 congressional legislation, now known as the Federal Arbitration Act (FAA), to require courts to enforce a myriad of arbitration provisions, promulgated by issuers of consumer credit, manufacturers of products, and employers.

The result has been the mass production of arbitration clauses requiring that claimants, alleging violations of federal and state statutory and common law wrongs, proceed single-file to decision makers designated by the clauses' providers. To assume the result is "mass arbitration" is to misunderstand how the provisions function; few who are cut off from using the courts and required (rather than choosing) to arbitrate do so, thereby erasing as well as diffusing disputes.

Procedural change is synonymous with the history of courts, as transnational exchanges shape and reshape both adjudication and arbitration. The development of new modes for responding to disputes and the proliferation of sites for resolution are not problems, per se. An important example is the growth of administrative adjudication, through which many (but not all) powers of courts are delegated to other kinds of judges who work under rules crafted through public exchanges and subjected to constitutional limitations.[9] In doctrinal terms, as long as the Court determines that the "process due" suffices, delegation to an alternative forum is permissible.[10]

8. *See*, *e.g.*, EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010); A. Michael Froomkin, *ICANN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605 (2002); Markus Wagner, *Regulatory Space in International Trade Law and International Investment Law*, 36 U. PA. J. INT'L L. 1 (2015).

9. *Goldberg v. Kelly*, 397 U.S. 254 (1970), is the iconic statement of the obligations that follow such adjudicators. A recent review of the interactions among federal administrative adjudicators comes from Bijal Shah, *Uncovering Coordinated Interagency Adjudication*, 128 HARV. L. REV. 805 (2015). In the federal system, Article III imposes some constraints on the permissible scope of delegation to non-Article III judges. *See, e.g.*, Stern v. Marshall, 131 S. Ct. 2594, 2608-09 (2013).

10. *Mathews v. Eldridge*, 424 U.S. 319 (1976), provides the oft-stated test evaluating the private and public interests at stake and the risks of error of not providing certain forms of process.

But in the context of mandated arbitration, the Court has not exercised its obligation to analyze the alternatives and assess their quality. Rather, the Court has spun off decision making without imposing structured safeguards. The result is a system that ought to be seen as unconstitutional, in which state-enforced dispute resolution is outsourced to hundreds of unregulated providers whose rules are hard to find, processes generally closed, and outcomes difficult to know.

The burden of my discussion is to understand why and how new dispute resolution institutions are being constructed, to map their contours and values, and to analyze their constitutional and normative implications. The recent Supreme Court FAA case law has garnered a good deal of criticism for cutting off the production of law,[11] for undermining the role of Article III courts,[12] for limiting associational rights,[13] and for constricting access to law by enforcing bans on the collective pursuit of claims.[14] The reallocation of disputes through the FAA to non-public service providers should also be understood as a shadow conflict over public subsidies for litigants. Justices who object to reading the federal Constitution as imposing positive obligations to support civil litigants and who are leery of court-based class actions can avoid debates about the scope of such rights by obliging disputants to use single-file arbitration.[15] The

11. J. Maria Glover, Feature, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052 (2015).

12. *See* PETER B. RUTLEDGE, ARBITRATION AND THE CONSTITUTION 15-53 (2012); Roger J. Perlstadt, *Article III Judicial Power and the Federal Arbitration Act*, 62 AM. U. L. REV. 201 (2012).

13. *See* Burt Neuborne, *Ending* Lochner *Lite*, 50 HARV. C.R.-C.L. L. REV. 183 (2015).

14. *See* Judith Resnik, *Fairness in Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 118-133 (2011); Myriam E. Gilles, *The End of Doctrine: Private Arbitration, Public Law and the Anti-Lawsuit Movement* (Benjamin N. Cardozo Sch. of Law, Jacob Burns Inst. for Advanced Legal Studies Research Paper No. 436, 2014), http://ssrn.com/abstract=2488575 [http://perma.cc/REK9-6NZQ].

15. For example, Justice Scalia has authored two opinions requiring single-file arbitrations despite evidence that absent the capacity to use collective action, claims will not be brought. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011), discussed *infra* notes 370-373, 422-437, 441-445 and accompanying text. Justice Scalia has also questioned the extent to which the Constitution requires governments to assist individuals seeking to use the courts. *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 349-350 (1996). Justice Thomas concurred in both of the arbitration rulings upholding class bans. *Italian Colors*, 133 S. Ct. at 2312-13 (Thomas, J., concurring); *AT&T v. Concepcion*, 131 S. Ct. at 1753-56 (Thomas, J., concurring). He has also objected to constitutional obligations to subsidize litigants. *See* Turner v. Rogers, 131 S.Ct. 2507, 2521 (2011) (Thomas, J., dissenting); M.L.B. v. S.L.J. *ex rel.* M.L.J., 519 U.S. 102, 130 (1996) (Thomas, J., dissenting). Both Justices Scalia and Thomas also joined in imposing limits on class actions. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011).

consequence, as one researcher of arbitration provisions for employees has concluded, is a system that exacerbates inequalities.[16]

The FAA case law has also troubled contract and arbitration scholars,[17] because obligations to arbitrate arise not from negotiation but by signing (or clicking on) documents, some of which stipulate that the drafter of the provisions "may change any terms" unilaterally.[18] Deeming an obligation to proceed (almost always on an "individual basis"[19]) through a designated dispute resolution system to be an enforceable "contract" undervalues private law,[20] rightly admired for facilitating cooperative agreements, reflecting the will of the participants able to tailor obligations to their particular needs.

My argument is that the cumulative impact of recent Supreme Court decisions on arbitration also produces an unconstitutional system, providing insufficient oversight of the processes it has mandated as a substitute for adjudication and shifting control over third-party access away from courts and to the organizations conducting arbitrations and the commercial enterprises drafting arbitration clauses. Legal claims are a species of property, and open courts are the venues designated under constitutions to respond to claimed deprivations of those property rights. Limitations on rights—and new procedures for their

16. Alexander J.S. Colvin, *Mandatory Arbitration and Inequality of Justice in Employment*, 35 BERKELEY J. EMP. & LAB. L. 71 (2014). Colvin argues that mandated arbitration gives control over process to employers, lowers the bargaining capacity of employees, and limits access to counsel.

17. *See* THOMAS E. CARBONNEAU, TOWARD A NEW FEDERAL LAW OF ARBITRATION (2014); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2013); OREN BAR-GILL, SEDUCTION BY CONTRACT 185, 196-97 (2012); Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MED. 56, 71-72 (2014). Some studies also raise the concerns that consumers signing such provisions are generally unaware of the clauses, which often have poor "readability scores"; moreover, if read, most consumers "wrongly believe" that the clauses do not preclude them from using courts through class actions. *See Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street and Consumer Protection Act § 1028(a)*, CONSUMER FIN. PROTECTION BUREAU § 1, at 11; § 2, at 27-28 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [http://perma.cc/P5B9-JPSZ] [hereinafter *CFPB 2015 Arbitration Study*]; Jeff Sovern, Elayne E. Greenberg, Paul F. Kirgis & Yuxiang Liu, *"Whimsy Little Contracts" with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements* 8-11 (St. John's Legal Studies Research Paper Series, Paper No. 14-0009, Feb. 19, 2015), http://ssrn.com/abstract=2516432 [http://perma.ccs/LPM3-8KPG].

18. *AT&T Wireless Customer Agreement*, *supra* note 2, at § 1.3.

19. *Id.* at §§ 2.1-2.2; *see also CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 52 n.120.

20. Radin terms the decision to count such obligations as contracts to be a normative "degradation" of contract that erodes the moral foundations of contracts. RADIN, *supra* note 17, at 19-28; *see also* Michelle E. Boardman, *Consent and Sensibility*, 127 HARV. L. REV. 1967 (2014) (reviewing RADIN, *supra* note 17).

vindication—are readily permissible but cannot, constitutionally, be imposed arbitrarily or be insulated from tests of fairness and lawfulness.

The Court's own explanations of its decisions licensing arbitration reflect the concern that procedural innovations should protect the rights at stake. The Court has repeatedly described its rulings as resting on the requirement that arbitration provide opportunities for the "effective vindication" of statutory rights,[21] and the Court has regularly drawn the analogy between arbitration mandates and forum selection clauses in which disputants designate one jurisdiction's court system or another.[22]

Thus, the Court's reallocation of adjudicatory authority to arbitration could be constitutional, were several conditions met. First, the Court would have to police the alternatives to assess the adequacy and fairness of the procedures ex ante, to understand how they are used in practice, and to impose oversight on both process and outcomes ex post. When doing so, the Court would need to ensure that the alternatives provide egalitarian dispute resolution mechanisms, responsive to the asymmetries among disputants through fee waivers to the indigent, collective actions, or other means to protect opportunities for voice and participation. Second, the Court would have to require public access to the processes and outcomes, making the alternatives transparent and accountable so as to facilitate debates about both procedures and governing norms.

But the Court has not done so. Rather, the Court's expansion of the FAA—diffusing disputes through outsourcing to deregulated and variable processes—strips individuals of access to courts to enforce state and federal rights, strips the public of its rights of audience to observe state-empowered decision makers imposing legally binding decisions, and strips the courts of their obligation to respond to alleged injuries.

21. *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 28 (1991); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 240-42 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637 (1985). The doctrine's breadth is discussed *infra* Part IV.

22. "An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." Scherck v. Alberto-Culver Co., 417 U.S. 506, 519 (1974); *see also Mitsubishi Motors*, 473 U.S. at 628, 630-31. This "forum selection" analogy has been repeatedly invoked by the Court. *See, e.g.*, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 698 (2010); EEOC v. Waffle House, Inc., 534 U.S. 279, 295-96 (2002); Cortez Byrd Chips, Inc. v. Bill Harbert Constr. Co., 529 U.S. 193, 199-201 (2000); Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer, 515 U.S. 528, 533-34 (1995); Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 289 (1995) (Thomas, J., dissenting); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 482-83 (1989); Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 36-37 (1988) (Scalia, J., dissenting); *Shearson/Am. Express*, 482 U.S. at 255.

Evidence of these failures comes from data about the use of arbitration by consumers. Despite the heralding of arbitration as a speedy and effective alternative to courts, the mass production of arbitration clauses has not resulted in "mass arbitrations."[23] Instead, the number of documented consumer arbitrations is startlingly small. Arbitrations involving wireless service providers provide one example, which I have chosen because the Supreme Court addressed the ban on class arbitrations in that context in its 2011 decision involving AT&T Mobility.[24] According to information from the American Arbitration Association (AAA), designated by AT&T to administer its arbitrations and complying with state reporting mandates, 134 individual claims (about 27 a year) were filed against AT&T between 2009 and 2014.[25] During that time period, the estimated number of AT&T wireless customers rose from 85 million a

23. The phrase is becoming part of debates on the FAA case law. *See generally* David Horton, *Mass Arbitrations and Democratic Legitimacy*, 85 U. COLO. L. REV. 459 (2014).

24. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011).

25. The American Arbitration Association provides quarterly reports on consumer arbitration pursuant to the laws of various jurisdictions in which it operates. *Consumer Arbitration Statistics*, AM. ARB. ASS'N (2015), https://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat [https://perma.cc/8ZBZ-FX5T] (select the document "Provider Organization Report"). With the indefatigable, thoughtful, and innovative research assistance of a group of Yale Law School students whom I thanked at the outset, and with the guidance of Bonnie Posick's tracking of massive amounts of materials, we reviewed five years of data by downloading the file documenting arbitrations from July of 2009 through June (the second quarter) of 2014 and by filtering claims against AT&T. Because the AAA takes data from the website each quarter, the materials on the web as of the spring of 2015 no longer included some of what had been posted for 2009, and new materials had been added to provide information through the end of 2014. The data we analyzed ran from July 2009 through June of 2014; we downloaded the data to retain them. These data are hereinafter referenced as *AAA Data, July 2009-June 2014, Provider Organization Report*, and are on file with the author.

A preliminary word on methodology is in order. After downloading the five-year period detailed above, we then removed all claims filed by one firm after learning that it had filed the 1,149 claims in an effort to create de facto class actions, *see infra* notes 480-482 and accompanying text. Thus, we identified 134 individual claims. Thereafter, we sent summaries and drafts of our analyses to AAA's Vice President for Statistics and In-House Research, Ryan Boyle, who responded generously to our many inquiries and who provided materials and explanations of AAA's data and policies. That series of e-mails and telephone exchanges, from February through April of 2015 are hereinafter referenced as Boyle AAA 2015 Materials.

The record in the AT&T litigation included AAA data from five years between 2003-2007, and the numbers are parallel to those we identified for 2009-2014 in that fewer than two hundred consumer arbitration filings were recorded. *See* Brief of Civil Procedure and Complex Litigation Professors as Amici Curiae in Support of Respondents at 12, 20, *AT&T v. Concepcion*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 3934621 (citing Declaration of Bruce L. Simon in Support of Plaintiffs' Opposition to Defendants' Amended Motion To Compel Arbitration, ¶¶ 8-9, Coneff v. AT&T Corp., 620 F. Supp. 2d 1248 (W.D. Wash. 2009) (No. 06-944), *rev'd*, 673 F.3d 1155 (9th Cir. 2012)). *See infra* note 485 and accompanying discussion.

year to 120 million people, and lawsuits filed by the federal government charged the company with a range of legal breaches, including systematic overcharging for extra services and insufficient payments of refunds when customers complained.[26]

More generally, the AAA, which is the largest non-profit provider of arbitration services in the United States, averages under 1,500 consumer arbitrations annually;[27] its full docket includes 150,000 to 200,000 filings a year.[28] Thus, were arbitration providers to be in high demand, their capacity to respond would be limited. An estimated 290 million people have cell phones,[29] and "99.9% of subscribers" to the eight major wireless services are subject to arbitration clauses.[30] For those with credit card debt, about 50% face arbitration,[31] as do more than 30 million employees.[32] Virtually all of these arbitration

26. AT&T, *Number of AT&T Wireless Subscribers from 2007 to 2014 (in 1,000s)*, STATISTA, http://www.statista.com/statistics/220692/number-of-atundt-wireless-subscribers-since-2007 [http://perma.cc/PU6N-FTP4]; *4Q 2014 AT&T By the Numbers*, AT&T (2014), http://www.att.com/Common/about_us/pdf/att_btn.pdf [http://perma.cc/3CEP-YPER]. *See, e.g.*, Complaint for Permanent Injunction and Other Equitable Relief at 3-4, FTC v. AT&T Mobility, LLC, No. 1:14-cv-3227 (N.D. Ga. Oct. 8, 2014), http://www.ftc.gov/es/system/files/documents/cases/141008attcmpt1.pdf [http://perma.cc/FK95-6AEX]; Stipulated Order for Permanent Injunction and Monetary Relief at 16, FTC v. AT&T Mobility, LLC, No. 1:14-cv-3227 (N.D. Ga. Oct. 8, 2014), http://www.ftc.gov/es/system/files/documents/cases/141008attstip2.pdf [http://perma.cc/Z4D3-JQTB]; *infra* notes 509-511 and accompanying text.

27. *AAA Data, July 2009-June 2014, Provider Organization Report*, *supra* note 25 (recording 7,303 claims labeled consumer arbitrations, excluding construction, real estate, and employment categories); *Analysis of the American Arbitration Association's Consumer Arbitration Caseload: Based on Consumer Cases Awarded Between January and August 2007*, AM. ARB. ASS'N, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325 [https://perma.cc/LPG6-S6F9] ("Each year, the AAA administers approximately 1,500 consumer cases . . . ."). The AAA data from 2015 listed 1,063 filings in 2010; 1,425 arbitrations in 2011; 2,811 arbitrations in 2012; and 1,741 in 2013. Boyle AAA 2015 Materials, *supra* note 25.

28. *Statement of Ethical Principles for the American Arbitration Association, An ADR Provider Organization*, AM. ARB. ASS'N, http://www.adr.org/aaa/faces/s/about/mission/ethicalprinciples [http://perma.cc/Z4QY-9TNX] (describing the AAA as administering "approximately 150,000 cases" each year) [hereinafter *AAA Ethical Principles*]. The AAA provided us more recent data, indicating that annual filings (not limited to arbitration) were "203,084 in 2013 and 223,751 in 2014." Boyle AAA 2015 Materials, *supra* note 25.

29. The number of subscribers comes from BAR-GILL, *supra* note 17, at 187, 196-97.

30. *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 26, 28 tbl.1. Most include a small claims court option, *id.* at § 1, at 15, and discussed *infra* notes 486-492 and accompanying text.

31. *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 10; *see also Arbitration Study Preliminary Results: Section 1028(a) Study Results to Date*, CONSUMER FIN. PROTECTION BUREAU 22 (2013), http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf [http://perma.cc/LS7Q-HTFZ] [hereinafter *CFPB 2013 Preliminary Results*]. The CFPB noted that a class action antitrust settlement limited the use of arbitration clauses for certain is-

clauses bar class actions in courts or in arbitration, and to the extent that use of the court system is permitted, individuals are routed to small claims courts that also do not provide collective procedures.[33]

By way of contrast, thousands of courts operate in the state and federal systems, where civil filings are estimated to run between 25 and 47 million cases annually, excluding about 50-60 million juvenile and traffic cases.[34] Moreover, when a federally chartered agency, the Consumer Financial Protection Bureau (CFPB), looked at federal court filings between 2010 and 2012 in five consumer product markets, the CFPB identified 3,462 individual cases, or on average about 1,100 per year, in addition to 470 federal consumer class action filings.[35]

As the volume of filings suggests, the market *for courts* remains robust, including among those who have the capacity to draft their own contracts. Reviews of the contracts of companies with the resources to customize indicate that they do not regularly bind themselves to arbitrate, or that they sometimes seek to obtain the benefits of both arbitration and courts by bargaining for judicial review of arbitrators' rulings.[36] Yet the Supreme Court has also rejected parties' efforts to permit judicial oversight of arbitrators' decisions.[37]

Debate is underway about whether arbitration is cheaper or quicker than courts and whether consumers or employees do better or worse in either venue.[38] My goal is to turn attention to the underlying fact that almost no consum-

suers for under four years, beginning in 2010. "If those issues still included such clauses, some 94% of credit card loans outstanding would now be subject to arbitration." *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 9-11.

32. Alexander J.S. Colvin & Mark Gough, *Individual Employment Rights in the U.S.: Actors and Outcomes*, 68 ILR REV. (forthcoming 2015) (manuscript at 2) (on file with author).

33. *CFPB 2015 Arbitration Study*, *supra* note 17, § 1, at 10. The small claims court option is encouraged by the AAA. *See Consumer Arbitration*, AM. ARB. ASS'N (2015), https://www.adr.org/aaa/faces/aoe/gc/consumer [https://perma.cc/QW23-RKGA] ("Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction.").

34. *See infra* figs.2 & 3; notes 131-132 and accompanying text.

35. *CFPB 2015 Arbitration Study*, *supra* note 17, § 6, at 27-28. Filings ought not to be equated with decisions, as in some of the cases identified, defendants sought to stay litigation and filed motions to require arbitration. *Id.* § 6, at 8. Although CFPB researchers also sought to identify filings in a subset of states, they found that data challenges made that plan unworkable. *Id.* § 6, at 15. In terms of the class action research, the research included six consumer markets and also was able to locate 92 state court class action filings.

36. *See* Hall St. Assocs., v. Mattel, Inc., 552 U.S. 576, 579-80 (2008); Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 512-13 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014); *infra* notes 564-571, 654-668 and accompanying text (discussing *Strine*).

37. *See Hall St.*, 552 U.S. at 587-88.

38. *See, e.g.*, Andrea Cann Chandrasekher & David Horton, *After the Revolution: An Empirical Study of Consumer Arbitration*, 103 GEO. L.J. (forthcoming 2015) (manuscript at 1) (on file

ers or employees "do" arbitration at all. The lack of use reflects the minimal oversight of arbitration's fairness and lawfulness, the failure to require a comprehensive system of fee waivers, the bans on collective actions requisite to augmenting complainants' resources, and the limited access accorded third parties to the claims filed, the proceedings, and the results.

My purpose is not to idealize courts as the sole path to or the embodiment of justice.[39] Barriers to entry are significant, with lawyer fees ranking high on the list of obstacles.[40] Moreover, examples of "junk justice," in which the judicial process works its own unfairness, are plentiful. Illustrative is one study of 4,400 lawsuits filed by debt buyers in Maryland courts; unrepresented debtors regularly defaulted on amounts owed (averaging about $3,000)—all without trials, lawyers, or much judicial oversight.[41] The imposition of court-user fees and fines for those with limited resources imposes yet other harms, including endless debt cycles and the imprisonment of some for the failure to pay.[42] The

with author); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 OHIO ST. J. ON DISP. RESOL. 843, 843-44 (2010); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J. L. REFORM 813, 813-16 (2008); Report from Alexander J.S. Colvin & Mark D. Gough to the Am. Ass'n for Justice, Comparing Mandatory Arbitration and Litigation: Access, Process, and Outcomes (Apr. 2, 2014) (on file with author) [hereinafter Colvin & Gough Report]; *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, MAYER BROWN LLP 1-2 (Dec. 2013), http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf [http://perma.cc/DT6J-T2YE]; *Consumer Arbitration Before the American Arbitration Association, Preliminary Report*, SEARLE CIV. JUST. INST. (2009), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_010205 [https://perma.cc/9RAJ-HDF8].

In 2015, the Consumer Financial Protection Bureau added its analysis, based on studying 422 federal consumer financial class settlements approved between 2008 and 2012, and identifying the sizes of classes in about three-quarters of those cases and the amounts received. The CFPB study concluded that consumer class action settlements during those years had benefitted at least 160 million consumers by providing $2.7 billion in damages or in-kind relief. Further, the CFPB reported that settlements averaged $540 million, and lawyers' fees ranged from 16-24 percent. *See CFPB 2015 Arbitration Study*, *supra* note 17, § 1, at 16-17.

39. *See* GENN, *supra* note 4, at 148-66.

40. "The vast majority of ordinary Americans lack any real access to the legal system for resolving their claims and the claims made against them." Gillian K. Hadfield, *Innovating To Improve Access: Changing the Way Courts Regulate Legal Markets*, DAEDALUS, Summer 2014, at 83.

41. Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179 (2014). Ninety-eight percent of the defaulting debtors lacked counsel. *Id.* at 208-09.

42. *See* Alicia Bannon, Mitali Nagrecha & Rebekah Diller, *Criminal Justice Debt: A Barrier to Reentry*, BRENNAN CENTER FOR JUST. 13-26 (2010), http://www.brennancenter.org/sites/default/files/legacy/Fees%20and%20Fines%20FINAL.pdf [http://perma.cc/J3AR-KRU2].

Department of Justice's 2015 account of the failures of the municipal court in Ferguson, Missouri is another example, making vivid the disjuncture between government-empowered judges and just systems.[43] Rather than "administering justice or protecting the rights of the accused," the local court's goal was "maximizing revenue," and it did so through "constitutionally deficient" procedures that had a racially biased impact.[44]

Yet the ability to uncover the intricacies of how these systems fail comes from legal obligations of courts, which are required to maintain records and to permit public observation – opening paths to correct injustices, if popular will to do so exists.[45] Courts offer the potential for egalitarian redistribution of authority, and the possibility of public oversight of legal authority. Without public access, one cannot know whether fair treatment is accorded regardless of status. Without publicity, judges have no means of demonstrating their independence. Without oversight, one cannot ensure that judges, tasked with vindicating public rights, are loyal to those norms. Without independent judges acting in public and treating the disputants in an equal and dignified manner, outcomes lose their claim to legitimacy. And without public accountings of how legal norms are being applied, one cannot debate the need for revisions.

Below, in Part I, I identify the legal and historical frameworks that make courts obligatorily open, constitutionally regulated entitlements. This section offers glimpses of a large body of law, predicated on state and federal constitutions, requiring assessments of the fairness of procedures, imposing obligations to assist subsets of indigent litigants, and mandating that proceedings and documents be publicly accessible. In Part II, I put the Supreme Court's transformation of the FAA into the context of changing attitudes towards the role of courts. Through doctrinal shifts and revisions of federal procedural rules, adjudication lost its position of superiority, and arbitration gained its valence as a preferred method of dispute resolution. Trials came to be positioned as problematic, outlier failures of court-based procedures that had been redesigned to produce settlements.

Part III provides a genealogy of arbitration by tracing its movement from the private domain to public obligation. This analysis begins with nineteenth-century, trans-Atlantic models of consensual arbitration and moves through waves of U.S. Supreme Court interpretations, enlarging the scope of the 1925

43. Civ. Rights Div., *Investigation of the Ferguson Police Department*, U.S. DEP'T JUST. 42-62 (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf [http://perma.cc/9EKY-NS43].

44. *Id*. at 42, 68-69.

45. The breaches in Ferguson included the municipal court's failure to comply with obligations to make public its rules and processes. *Id.* at 97-98.

statute and crafting explanations for the propriety of broadening the FAA's deployment. In the 1980s and thereafter, when mandating arbitration for consumers and employees who could not plausibly negotiate terms, the Court developed new rationales for the legitimacy of arbitration—lauding its informality, speed, and accessibility and attributing to it the capacity to provide "effective vindication" of statutory rights.

Part IV details the genesis of this doctrine of effective vindication and the Court's reluctance to give it meaning. The Court has neither required administrative, judicial, and public oversight nor ensured egalitarianism through policing fees and facilitating collective arbitrations. By excavating data reported between 2009 and 2014 by arbitration providers, I detail how little evidence exists that arbitration offers a gateway to pursuit of individual claims. To illustrate that such limitations are not intrinsic to arbitration, I explore other models of arbitration, drawn from negotiated contracts relying on judges to review arbitrators' decisions; from state statutes dispatching judges as arbitrators; from Congress, which, since 1988, has authorized federal courts to offer "court-annexed arbitration" but permitted it only for certain claims and generally if freely chosen;[46] from federal regulation of securities arbitrations; and from European oversight of consumer arbitrations.

I close by returning to the constitutional law of courts and specifically to First Amendment rulings on rights of public access to adjudication. Under current doctrine, when third parties challenge closing proceedings, courts use the tradition of open trials as the benchmark by which to measure the utilities of openness and the impact of closure in particular processes. But as trials become a rarity in, rather than the centerpiece of, court-based procedures, reliance on that history provides no sure footing. Constitutional law needs instead to develop norms that state-empowered and state-enforced dispute resolution cannot be legitimate in democracies without open access to enable regular interactions among disputants, adjudicators, and the public. Thus, by way of conclusion, I explore the contingency of courts as public institutions, the risks of losing the political capital garnered by providing services to diverse disputants, and the political will that would be required to re-center courts and their alternatives on egalitarian and public law norms.

46. *See* Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, sec. 901, 102 Stat. 4642, 4660 (1988) (codified as amended in 1998 at 28 U.S.C. §§ 651-58); *infra* notes 573-583 and accompanying text.

I. THE PUBLIC IN COURTS

Public courts seem so much like fixtures, supporting and supported by the ideology of a "day in court,"[47] that scant attention is paid to the legal sources and the contingencies producing the current understanding that courts welcome all comers. Given my claim that Dispute Diffusion renders courts vulnerable, a brief review is in order of the thicket of texts specifying roles for judges, witnesses, litigants, jurors, victims, and the public.

State and federal constitutions regulate judicial selection and tenure in office, impose mechanisms for protecting judicial independence, and define the parameters of courts' jurisdiction. Detailed instructions can also be found in some constitutions, such as directions to Supreme Court Justices to write or publish opinions, to make rulings freely available, to let others publish them, or to explain reasons for dissent.[48]

The public gains two kinds of access rights to courts. Constitutional text, doctrine, and common law traditions establish the authority of individuals to bring claims to courts and the obligation of courts to welcome third parties to observe their proceedings. State constitutions regularly linked the two forms of access by mandating rights-to-remedies in open courts. The 1776 Delaware Declaration of Rights (echoing the Magna Carta as filtered through natural and common law traditions) provided:

> That every Freeman for every Injury done him in his Goods, Lands or Person, by any other Person, ought to have Remedy by the Course of the Law of the Land, and ought to have Justice and Right for the Injury

47. *See generally* SUSAN S. SILBEY & PATRICIA EWICK, THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE (1998); Susan S. Silbey, *The Courts in American Public Culture*, DAEDALUS, Summer 2014, at 140.

48. The constitutions of Arizona, California, and Michigan provide that opinions "shall be free for publication by any person." ARIZ. CONST. of 1910, art. VI, § 8 (1960); CAL. CONST. of 1849, art. VI, § 12; MICH. CONST. of 1963, art. IV, § 35. The California Constitution of 1849 was superseded by the California Constitution of 1879, which added the provision that Supreme Court opinions "shall be available for publication by any person," CAL. CONST. of 1879, art. VI, § 16 (1966). The Michigan Constitution also directs that "[d]ecisions of the supreme court, including all decisions on prerogative writs, shall be in writing and shall contain a concise statement of the facts and reasons for each decision and reasons for each denial of leave to appeal. When a judge dissents in whole or in part he shall give in writing the reasons for his dissent." MICH. CONST. of 1963, art. VI, § 6; *see also* KY. CONST. of 1792, art. V, § 4 (imposing the "duty of each judge of the Supreme Court, present at the hearing of such cause, and differing from a majority of the court, to deliver his opinion in writing. . . .").

> done to him freely without Sale, fully without any Denial, and speedily without Delay, according to the Law of the Land.[49]

The 1792 Constitution added that "[a]ll courts shall be open."[50] The first constitutions of Maryland (1776) and Massachusetts (1780), and the second of New Hampshire (1784) had similar directions,[51] while Pennsylvania's 1776 version instructed that all "courts shall be open, and justice shall be impartially administered without corruption or unnecessary delay."[52] Early nineteenth-century formulations, such as the 1818 Connecticut Constitution and the 1819 Alabama Constitution, used the locution that such rights were to be accorded to "every person."[53] Those terms are echoed in many state constitutions that describe public rights to observe proceedings and to use courts.[54]

Criminal defendants garnered special protections with rights to disclosure of charges, representation, confrontation, speedy trials, and to jurors from the

49. DEL. DECLARATION OF RIGHTS of 1776, art. 12.

50. DEL. CONST. of 1792, art. I, § 9; *see also* KY. CONST. of 1792, art. XII, § 13; VT. CONST. of 1777, ch. II, § XXIII.

51. *See* MD. CONST. of 1776, Declaration of Rights, art. XVII ("That every freeman, for any injury done him in his person or property, ought to have remedy, by the course of the law of the land, and ought to have justice and right freely without sale, fully without any denial, and speedily without delay, according to the law of the land."); MASS. CONST. of 1780, pt. 1, art. XI ("Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character. He ought to obtain right and justice freely, and without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws."); N.H. CONST. of 1784, art. I, § 14 ("Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property or character, to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay, conformably to the laws.").

52. PA. CONST. of 1776, § 26. Pennsylvania's current constitutional provision is similar: "All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay." PA. CONST. art. 1, § 11.

53. ALA. CONST. of 1819, art. I, § 14 ("All courts shall be open, and every person, for an injury done him in his lands, goods, person, or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial or delay"); CONN. CONST. of 1818, art. I, § 12 ("All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."). The right to bring claims is linked to the right to represent oneself in civil as well as criminal cases. *See* Iannaccone v. Law, 142 F.3d 553, 556-58 (2d Cir. 1998). The scope of the protection of "every person" is discussed *infra* notes 90-94 and accompanying text.

54. *See* JENNIFER FRIESEN, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES 6-91 to 6-92 (4th ed. 2006).

vicinage in which the crime took place.[55] Jury trial rights in criminal and civil cases put members of the public into courts as decision makers, thereby further anchoring the practice of open proceedings.[56] Victims of crimes gained constitutional recognition in the latter part of the twentieth century, when more than thirty state constitutions added provisions recognizing a role for victims in court proceedings.[57]

The federal Constitution does not specify remedial rights in the terms used frequently in state constitutions.[58] The phrase "open Court" appears only in the little-read Treason Clause of Article III,[59] and the reference to "public trials" comes in relationship to the Sixth Amendment rights of criminal defendants. Yet the idea of federal courts as responding to claims of injury has a long history. In 1803, Chief Justice Marshall famously insisted on two precepts: that the "very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury," and that one "of the first duties of government is to afford that protection."[60] Repeatedly, and relatively unselfconsciously until the current wave of objections to

55. A summary is provided in Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 1038-58 (2012).

56. *See* Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2179-84 (2014). State constitutions protected civil juries, and the Seventh Amendment ensured preservation of civil jury trial rights in the federal system. *See* U.S. CONST. amend. VII.

57. *See, e.g.*, LA. CONST. § 25 (1974) (providing victims the right to be "present and heard at all critical stages of preconviction and postconviction proceedings" or to decline to participate). A listing of states with such provisions is provided by *Issues: Constitutional Amendments*, NAT'L CENTER FOR VICTIMS CRIME (2012), http://www.victimsofcrime.org/our-programs/public-policy/amendments [http://perma.cc/D84C-8SAP].

58. During ratification, Virginia, North Carolina, and Rhode Island suggested the addition of a right-to-remedy clause and proffered language reminiscent of the provisions quoted above. North Carolina and Virginia proposed that the amendment read: "That every freeman ought to find a certain remedy, by recourse to the laws for all injuries and wrongs he may receive in his person, property, or character. He ought to obtain right and justice freely without sale, completely and without denial, promptly and without delay, and that all establishments, or regulations contravening these rights, are oppressive and unjust." 2 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA: 1787-1870, at 268, 379 (Fred B. Rothman & Co. 1998) (1894). That and other proposals were not adopted, nor did such terms (again under consideration after ratification) become a part of the 1791 Bill of Rights. William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 372-75 (1997).

59. U.S. CONST. art. III, § 3, cl. 1 (limiting treason convictions to those based either on the "Testimony of two Witnesses" or a "Confession in open Court").

60. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

implied causes of action,[61] the Supreme Court responded by ruling on the merits of a variety of claims of right, often predicated on statutes that did not specify the availability of private enforcement,[62] as well as on common law rights.[63]

The case law expressly addressing constitutionally obliged access to federal courts (for claims falling within the courts' jurisdiction) is relatively thin—prompted by instances when Congress limited access for a set of claimants (such as those in detention at Guantánamo Bay),[64] specified that particular executive decisions (such as those relating to the deportation of immigrants) were not subject to judicial review,[65] or allocated final decision making to non-

61. *See*, *e.g.*, Armstrong v. Exceptional Child Ctr., Inc., 135 S. Ct. 1378 (2015); Douglas v. Indep. Living Ctr. of S. Cal., Inc., 132 S. Ct. 1204, 1213 (2012) (Roberts, C.J., dissenting); Gonzaga Univ. v. Doe, 536 U.S. 273 (2002); Alexander v. Sandoval, 532 U.S. 275 (2001).

62. A list of examples comes from the appendix to the brief in *Douglas v. Independent Living Center of Southern California*, detailing sixty-one cases in which preemption of state provisions was not based on claims filed under 42 U.S.C. § 1983. Brief for Respondents at app. 1a-11a, *Douglas*, 132 S. Ct. 1204 (Nos. 09–958, 09–1158, 10–283), 2011 WL 3319552.

63. One famous example is *Ex parte Young*, 209 U.S. 123 (1908), recognizing the ability of railroad stockholders to contest state rate regulation as confiscatory, in violation of the Fourteenth Amendment and of the Commerce Clause. Despite arguments that the suit was barred by sovereign immunity, the Court shaped a functional exception, permitting the lawsuit to proceed against a state official rather than the state itself, and explained that federal courts, like state courts, "should, at all times, be opened" to claimants "for the purpose of protecting their property and their legal rights." *Id.* at 165. *See generally* Barry Friedman, *The Story of* Ex Parte Young*: Once Controversial, Now Canon*, *in* FEDERAL COURTS STORIES 247-99 (Vicki C. Jackson & Judith Resnik eds., 2010). In *Armstrong v. Exceptional Child Ctr., Inc.*, the majority decision by Justice Scalia positioned suits to "enjoin unconstitutional actions by state and federal officers [as] . . . the creation of courts of equity," rather than resting "upon an implied right of action contained in the Supremacy Clause." *Armstrong*, 135 S. Ct. at 1384. The dissent countered that *Ex Parte Young* has been characterized as "giving 'life to the Supremacy Clause.'" *Armstrong*, 135 S. Ct. at 1391 (Sotomayor, J., dissenting (quoting Green v. Mansour, 474 U.S. 64, 68 (1985))).

When federal courts enforced common law rights, questions have emerged about whether such rights were part of a general common law and could thus be interpreted and shaped by federal judges, or whether such rights derived from remedial structures provided by states. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Original Source of the Cause of Action in Federal Courts: The Example of the Alien Tort Statute*, 101 VA. L. REV. 609 (2015), Bellia and Clark interpret the history to demonstrate that "the local law of a particular sovereign . . . determined the causes of action that its courts could adjudicate," *id.* at 638, and that variation existed in "the forms and modes of proceeding" in England and various of the American states, *id.* at 637. The compromise, in their view, in the First Judiciary Act was that causes of action "were matters of local law," to which Section 34 required federal courts to apply state law, just as the federal courts had to borrow forms of proceeding from the states in which they sat. *Id.* at 639.

64. Boumediene v. Bush, 553 U.S. 723, 792 (2008).

65. INS v. St. Cyr, 533 U.S. 289, 292-93, 325-26 (2001).

Article III courts (such as administrative adjudication of longshoremen's injuries).[66]

When facing efforts to limit litigants from bringing cases, the Supreme Court has responded at times by avoiding the issue because alternative routes to the federal judiciary existed or by reading provisions as not imposing barriers that their language suggested.[67] On rare occasions, the Court has overturned bans on judicial review.[68] A variety of constitutional bases undergird assumptions of court access. One source is Article III's vesting of "the judicial power" in a federal court system comprised of one Supreme Court and such lower courts that Congress chooses to create. Individuals in detention who seek to file claims have the additional resource of Article I's protections of habeas corpus;[69] when coupled with the doctrine that state courts have no power over individuals held by federal officials,[70] the argument for access to federal courts becomes robust. Further, constitutional specification of the writ of habeas corpus, of due process, and of petitioning rights supports access to challenge convictions and conditions of confinement.[71] The Court has concluded that custodians must not only facilitate communication by delivering prisoners' legal mail but must also permit inmates to communicate with lawyers and obtain legal materials.[72]

The First Amendment right "of the people . . . to petition the Government for redress of grievances" also provides a basis for more general access to the federal courts.[73] The choice of the word "government" (instead of the term "legislature"),[74] coupled with the history of legislative responses to public and

66. Crowell v. Benson, 285 U.S. 22, 65 (1932).

67. *See, e.g.*, *St. Cyr*, 533 U.S. 289; Felker v. Turpin, 518 U.S. 651 (1996); Reich v. Collins, 513 U.S. 106 (1994); *Ex parte* McCardle, 74 U.S. 506 (1869); *Ex parte* Yerger, 75 U.S. 85 (1869).

68. *See, e.g.*, *Boumediene*, 553 U.S. 723; United States v. Klein, 80 U.S. 128 (1871).

69. U.S. CONST. art. I, § 9.

70. *Tarble's Case*, 80 U.S. 397 (1871).

71. *See, e.g.*, *Boumediene*, 553 U.S. 723; Bounds v. Smith, 430 U.S. 817 (1977); *Ex parte* Hull, 312 U.S. 546, 549 (1941).

72. *See Bounds*, 430 U.S. 817; Lewis v. Casey, 518 U.S. 343 (1996). The *Lewis* majority read *Bounds* narrowly to reduce its scope. In the post 9/11 Guantánamo detainee litigation, the Government argued unsuccessfully that access rights derived solely from habeas rights and that, once habeas petitions were denied, no constitutional access right remained. *See* Hope Metcalf & Judith Resnik, Gideon *at Guantánamo: Democratic and Despotic Detention*, 122 YALE L.J. 2504, 2507, 2543-45 (2013).

73. U.S. CONST. amend. I.

74. James Madison proposed specifying access to the "legislature." *See* 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

private parties' petitions,[75] supports reading the Clause to reference access to courts. The law thickened over the twentieth century[76] and, by 2011, Justice Kennedy described litigation as necessary for "informed public participation" which was, in turn, "a cornerstone of democratic society."[77] That decision—*Borough of Duryea v. Guarnieri*—illustrates the related point that constraints on litigation are permissible, if grounded in rationality.[78]

Fifth Amendment guarantees against deprivations of life, liberty, and property without due process, as well as against confiscation without just compensation, can also provide routes to court for determinations of whether the processes provided are those "due"[79] and the compensation "just."[80] The doctrine that legal claims themselves are a species of property[81] further supports access to courts, state or federal. Even the Court's interpretation of the Eleventh Amendment to divest federal courts of authority over claims brought against

75. For example, in 1770, the Connecticut General Assembly acted akin to a court in responding to "150 causes, in law and equity, brought by petitioners." Stephen A. Higginson, Note, *A Short History of the Right To Petition Government for the Redress of Grievances*, 96 YALE L.J. 142, 144-146 (1986); *see also* Julie M. Spanbauer, *The First Amendment Right To Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 HASTINGS CONST. L.Q. 15 (1993).

76. *See* NAACP v. Button, 371 U.S. 415, 429-30, 452 (1963) (discussing the NAACP's right to litigate as a "form of political expression"); *see also* Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508 (1972) (noting the right of access to courts, protected by the underlying right to petition, meant that groups could coordinate to file suits or argue to agencies without violating antitrust laws).

77. Borough of Duryea v. Guarnieri, 131 S. Ct. 2488, 2499-2500 (2011).

78. The ruling narrowed the grounds on which Petition Clause claims by public employees arguing retaliation can be made. *Id.* at 2498-99.

79. U.S. CONST. amend. V. *See generally* Charles A. Miller, *The Forest of Due Process of Law: The American Constitutional Tradition*, *in* 18 NOMOS: DUE PROCESS 3 (J. Roland Pennock & John W. Chapman eds., 1977).

80. The questions of when a taking occurs and what constitutes just compensation are for the courts. *See*, *e.g.*, Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893); Fla. Power Corp. v. FCC, 772 F.2d. 1537 (11th Cir. 1985), *rev'd*, 107 S. Ct. 1107 (1987). More recently, the Court and scholars have addressed when judicial decisions constitute takings and whether analysis of their lawfulness should be based on the Takings or the Due Process Clause. *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702 (2010); Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process*, 97 CORNELL L. REV. 305, 324-28, 356-68 (2012).

81. *See* Sprint Commc'ns Co. v. APCC Servs., Inc., 554 U.S. 269 (2008); Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950).

states could be read as an implicit endorsement of judicial power otherwise extending to civil litigants properly before the federal courts.[82]

Third-party rights to observe court proceedings likewise have various federal constitutional bases. Public rights of attendance (beyond the Treason Clause) start with the Sixth Amendment, which guarantees criminal defendants a "speedy and public trial" before a jury drawn from the vicinage.[83] When the press and the public seek access, they rely on First Amendment speech and petition rights, inflected by common law English and American practices.[84]

Although the U.S. Supreme Court has yet to rule directly on access to civil trials and related proceedings, its holdings on public access to criminal trials, pre-trial suppression hearings,[85] and voir dire[86] have prompted lower court judges to conclude that parallel rights attach to civil trials, related proceedings, and most of the documents filed in court.[87] The formulation for determining whether a particular closure is lawful is often described as a mix of "experience" and "logic"[88]: that the First Amendment right of public access attaches when "the place and process have historically been open to the press and general public" and when "access plays a significant positive role in the functioning of the particular process in question."[89]

82. For discussion of the parameters of the Court's Eleventh Amendment jurisprudence, see Vicki C. Jackson & Judith Resnik, *Sovereignties—Federal, State, and Tribal: The Story of* Seminole Tribe of Florida v. Florida, *in* FEDERAL COURTS STORIES, *supra* note 63, at 329, 329-358.

83. U.S. CONST. amend. VI.

84. *See* Press-Enter. Co. v. Superior Court (*Press-Enterprise I*), 464 U.S. 501, 505-10 (1984); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564-73, 575-76 (1980) (plurality opinion); Judith Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987); *infra* notes 654-665 and accompanying text. Defendants' Sixth Amendment public trial rights may also produce a right or the "freedom" of the public to "listen." *See Richmond Newspapers*, 448 U.S. at 576-77.

85. Waller v. Georgia, 467 U.S. 39 (1984).

86. Presley v. Georgia, 558 U.S. 209 (2010).

87. A list of the circuits concluding that rights to civil trials were protected is provided in Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 514 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014); *see also* Courthouse News Serv. v. Planet, 750 F.3d 776, 786, 793 (9th Cir. 2014) (remanding for consideration of the scope of access to civil proceedings); N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 305 (2d Cir. 2011) (holding that the quasi-criminal administrative hearings held by the Transit Authority, which imposed sanctions, were unconstitutionally closed). Access to documents—at least those deemed "judicial" documents filed in civil cases as part of lawsuits—has likewise received protection. *See* United States v. Erie County, 763 F.3d 235 (2d Cir. 2014); Hartford Courant Co. v. Pellegrino, 380 F.3d 83 (2d Cir. 2004).

88. *See, e.g.*, *Strine*, 733 F.3d at 515, discussed *infra* notes 564-571, 654-668 and accompanying text.

89. Press-Enter. Co. v. Superior Court (*Press-Enterprise II*), 478 U.S. 1, 8 (1986).

Two other facets of the public persona of courts—hospitality towards all persons regardless of color, gender, or age, and concerns for inter-litigant inequalities and asymmetries—are artifacts of social movements of the last two centuries. Although many states promised "every person" rights-to-remedies, that reference did not include vast swaths of the population. Married women, African-Americans, members of Indian tribes, and various other persons faced legal barriers to their direct pursuit of claims. Conflicts—in courts and on battlefields—turned judiciaries into venues obliged to recognize the juridical personhood of all persons and to accord them equal dignity.

The question of subsidies for poor litigants emerged in the mid-twentieth century as part of the domestic struggle over race relations, framed by efforts to distinguish America from "totalitarian regimes."[90] In a series of decisions, the Court concluded that unfairness resulted if some criminal defendants had resources to pay fees for filing, transcripts for appeal, and lawyers, while others did not. The 1963 ruling in *Gideon v. Wainwright,*[91] guaranteeing the right to counsel for indigent felony defendants, was foreshadowed by the 1956 decision of *Griffin v. Illinois,* requiring that states fund transcripts for indigent defendants who would otherwise be unable to appeal.[92] Related precepts come from *Douglas v. California,* insisting that states providing appeals of criminal convictions appoint counsel for indigent defendants,[93] and *Miranda v. Arizona*, mandating that impoverished detainees, held for questioning by the police, be given *Gideon*-based rights to counsel.[94]

Constitutional entitlements for civil litigants emerged when a class of "welfare recipients residing in . . . Connecticut" argued that state-imposed fees of sixty dollars for filing and service precluded them from filing for divorce.[95] Writing for the Court in 1971, Justice Harlan held that the combination of "the basic position of the marriage relationship in this society's hierarchy of values and the . . . state monopolization" of lawful dissolution required the state, as a matter of due process, to provide fee waivers for those too poor to pay.[96]

The potential capaciousness of that precept was made plain by concurring Justices, each of whom would have proceeded under different legal theories.

90. *See* Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 634-38 (2010).

91. 372 U.S. 335 (1963).

92. 351 U.S. 12 (1956).

93. 372 U.S. 353 (1963).

94. 384 U.S. 436, 472-74 (1966).

95. Boddie v. Connecticut, 401 U.S. 371, 372 (1971).

96. *Id.* at 374. *See generally* Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right To Protect One's Rights—Part I*, 1973 DUKE L.J. 1153.

Justice Douglas objected that a Due Process approach was too "subjective" and instead rested the access right on the Equal Protection Clause, which he read to protect against "invidious discrimination . . . based on . . . *poverty*."[97] (Two years later, the Court rejected poverty as a suspect classification for purposes of equal protection.[98]) Justice Brennan agreed that the case presented a "classic problem of equal protection" as well as a due process violation; in his view, the state's legal monopoly meant that support was required for indigent litigants attempting to "vindicate any . . . right arising under federal or state law."[99]

The Court retreated in the face of high demand, limited resources, and a slippery slope of claimants.[100] The Court carved out the family as a special place in which Due Process doctrine generated substantive procedural entitlements, such as subsidized tests to establish paternity,[101] transcripts on appeal for indigents losing their status as parents,[102] and an exceedingly narrow right to counsel if facing termination of parental rights.[103] In 2011, a five-person majority Court concluded that procedural fairness—but not necessarily the appointment of lawyers—was also required before incarcerating civil contemnors, sued by co-parents for failure to pay child support.[104]

Struggles about access for "everyone" have also prompted inquiries into whether courts themselves were treating claimants fairly. In the early 1980s, the National Association of Women Judges (NAWJ), working in conjunction with

97. *Boddie*, 401 U.S. at 385-86 (Douglas, J., concurring in the result).

98. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 18-29 (1973).

99. *Boddie*, 401 U.S. at 386-88 (Brennan, J., concurring in part). The sole dissenter, Justice Black (who had authored the opinion in *Griffin v. Illinois*, 351 U.S. 12 (1956), requiring states to subsidize transcripts for appeals for criminal defendants), argued that the Court had invaded state prerogatives by imposing rules for civil litigants. *Boddie*, 401 U.S. at 389, 393-94 (Black, J., dissenting).

100. *See, e.g.*, United States v. Kras, 409 U.S. 434 (1973); Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2133 (2000).

101. Little v. Streater, 452 U.S. 1 (1981).

102. M.L.B. v. S.L.J., 519 U.S. 102 (1996).

103. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31-32 (1981) ("[N]either can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. . . . [T]he decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings [is] to be answered in the first instance by the trial court, subject to appellate review.").

104. Turner v. Rogers, 131 S. Ct. 2507 (2011). The Court concluded that courts had to ensure "a fundamentally fair determination," which did not necessarily require appointment of counsel. *Id.* at 2512. The Court specifically reserved the question of whether lawyers would have to be appointed when the state, rather than a private party also lacking counsel, was the opponent. *Id.* at 2520.

the National Judicial Education Program (NJEP) of the NOW Legal Defense and Education Fund, pressed for inquiries into law's biases. Building on a history of judicial efforts to improve the administration of justice by studying problems ranging from case management to juvenile offenders,[105] the NAWJ and the NJEP sought to bring into focus the treatment of women in courts.

Chief judges in state and federal judiciaries responded by commissioning "task forces," looking at "gender bias," "racial and ethnic bias" and, occasionally, the intersection of the two.[106] More than sixty reports resulted; topics included interactions in courtrooms, judicial appointments of lawyers to committees and staff assignments, and the structures of various legal regimes governing violence, sentencing, incarceration, immigration, bankruptcy, household dissolution, child support, economic marginality, and discrimination. Thousands of pages documented how experiences varied by gender and race, and these reports prompted new rules and practices aiming to improve the inclusiveness of courts.[107]

The mix of public adjudication, rulemaking, litigant filings, task forces, accounting for funds, and the need to obtain more resources has turned courts into "a huge information system—an entity that receives, processes, stores, creates, monitors, and disseminates large quantities of documents and information."[108] In the federal system, the Attorney General of the United States began providing statistical tables on filings in 1871.[109] That task shifted in 1939 to the Administrative Office of the United States, which works with federal district and appellate courts to describe the demands placed on courts.[110]

105. *See* Judith Resnik, *Asking About Gender in Courts*, 21 SIGNS 952, 952 (1996); Lynn Hecht Schafran, *Documenting Gender Bias in the Courts: The Task Force Approach*, 70 JUDICATURE 280 (1987). The NOW Legal Defense and Education Fund changed its name to Legal Momentum. LEGAL MOMENTUM (2014), https://www.legalmomentum.org [https://perma.cc/5FHA-V5P9].

106. Resnik, *supra* note 105, at 953.

107. *See id.* at 980-85. Issues of inclusiveness and diversity are under discussion in the field of arbitration. *See, e.g.*, Thomas J. Stipanowich & Zachary P. Ulrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators* 8 (Pepperdine Univ. Legal Studies Research Paper Series, Paper No. 2014/30, 2014), http://ssrn.com/abstract=2519196 [http://perma.cc/9CJA-LGY7] (finding that of the 123 arbitrators responding to a survey, about eighty-five percent were men).

108. RICHARD SUSSKIND, THE END OF LAWYERS? RETHINKING THE NATURE OF LEGAL SERVICES 201 (2008).

109. *See* PETER G. FISH, THE POLITICS OF FEDERAL JUDICIAL ADMINISTRATION 91-95 (1973); David S. Clark, *Adjudication to Administration: A Statistical Analysis of Federal District Courts in the Twentieth Century*, 55 S. CAL. L. REV. 65, 97 (1981).

110. *See* 28 U.S.C. §§ 601-20 (2012). The Director of the Administrative Office files reports annually. *See, e.g.*, *Judicial Business 2013*, U.S. CTS. (2013), http://www.uscourts.gov/Statistics

With the advent of PACER (Public Access to Court Electronic Records), computer docketing puts federal court filings—except those sheltered based on concerns for national security and litigant safety—into a public database permitting readers to view pleadings and to track the submissions and dispositions in particular cases.[111] Aggregate statistics are compiled by the Administrative Office of the U.S. Courts, which reports yearly on the "business" of the federal courts.[112] More efforts are underway; the Chief Justice's 2014 "state of the judiciary" announced that his Court was "developing its own electronic filing system" to facilitate public access.[113]

Parallel data entry systems exist in all the states,[114] albeit often supported by fewer resources and with all the variations that federalism enables.[115] Illinois's Court Statistics Act, for example, calls for court officials to provide "information, statistical data, and reports bearing on the state of the dockets and business transacted by the courts and other matters pertinent to the efficient operation of the judicial system."[116] That state is the exemplar chosen here

/JudicialBusiness/2013.aspx [http://perma.cc/8J9U-8AWZ]. The history of the Administrative Office and its reports, and their use by the Judicial Conference of the United States, are examined in Judith Resnik, *Trial As Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924, 937-38 (2000).

111. *See PACER: Public Access to Court Electronic Records*, U.S. CTS., https://www.pacer.gov [http://perma.cc/94AA-3GCV]. Certain forms of personal information (such as social security numbers) are protected, and current federal appellate rules limit remote electronic access to documents in immigration cases. *See* FED. R. CIV. P. 5.2(a)-(c); FED. R. APP. P. 25(a)(5).

112. *See, e.g.*, *Judicial Business 2014*, U.S. CTS. (2014), http://www.uscourts.gov/Statistics/JudicialBusiness/2014.aspx [http://perma.cc/2Y9B-GG95].

113. *See* John G. Roberts, *2014 Year-End Report on the Federal Judiciary*, SUP. CT. U.S. 7-9 (2014), http://www.supremecourt.gov/publicinfo/year-end/2014year-endreport.pdf [http://perma.cc/HFS5-5AZ7].

114. Robert C. LaFountain, Richard Y. Schauffler, Shauna M. Strickland & Kathryn A. Holt, *Examining the Work of State Courts: An Analysis of 2010 State Court Caseloads*, NAT'L CTR. FOR STATE CTS. 1 (2012), http://www.courtstatistics.org/OtherPages/~/media/Microsites/Files/CSP/DATA%20PDF/CSP_DEC.ashx [http://perma.cc/NXV9-BYSX]; *State Court Guide to Statistical Reporting, Version 2.0*, NAT'L CTR. FOR STATE CTS. (2014) http://www.courtstatistics.org/~/media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting%20v%202.ashx [http://perma.cc/ZRM8-YJAZ]; *Reporting Excellence Awards, 2014*, NAT'L CTR. FOR STATE CTS. (2014), http://www.courtstatistics.org/Other-Pages/Awards.aspx [http://perma.cc/5VB9-48UH].

115. *See generally* Stephen C. Yeazell, *Courting Ignorance: Why We Know So Little About Our Most Important Courts*, DAEDALUS, Summer 2014, at 129.

116. 70 ILL. COMP. STAT. ANN. 125/1 (West 2014). The Administrative Office of Illinois Courts (AOIC)—like its counterparts across the country—issues annual reports containing caseload statistics, disposition information, and more. *See, e.g.*, *Annual Report of the Illinois Courts: Statistical Summary—2013*, ADMIN. OFF. ILL. CTS. (2013), http://www.state

because it has an unusually large public arbitration program. In 2011, more than 41,000 cases were sent to "mandatory, non-binding, non–court procedure designed to resolve civil disputes by utilizing a neutral third party."[117] That program, created in 1987, was required to evaluate its "effectiveness" and "report the results" to the General Assembly annually[118] until 2012, when its separate data-collection obligations were repealed.[119]

These glimpses into the volume of filings and the infrastructures reflect the investments made in courts, even as judiciaries report themselves to be underresourced.[120] Given diverse streams of income and the mix of public and private funds, estimating the actual dollars flowing into courts is difficult. A few figures from the federal system offer windows into the sums committed. In 1971, the federal judiciary received $145 million; by 2005, that allocation represented an increase from under one-tenth of a percent of the federal budget to two-tenths – for a total of $5.7 billion.[121] During the same period, staff positions more than doubled to 32,000,[122] providing a workforce responding to annual filings of about 350,000 to 400,000 civil and criminal cases and more than a million bankruptcy petitions.[123] And, despite budgetary constraints producing pressures to downsize facilities and staff, the 2015 budget for the federal judiciary was $6.7 billion, a $182 million (2.8%) increase over the 2014 allocation.[124]

.il.us/court/SupremeCourt/AnnualReport/2013/StatsSumm/2013_Statistical_Summary.pdf [http://perma.cc/FL95-3VGJ].

117. *Court-Annexed Mandatory Arbitration: Annual Report of the Supreme Court of Illinois to the Illinois General Assembly for State Fiscal Year 2011*, ADMIN. OFF. ILL. CTS. 1 (2011), http://www.state.il.us/court/Administrative/ManArb/2011/ManArbRpt11.pdf [http://perma.cc/9FDM-BK9H] [hereinafter *Illinois Court-Annexed Arbitration–2011 Report*]; *see* 735 ILL. COMP. STAT. ANN. 5/2-1001A (West 2014).

118. Posted reports from 2004 to 2011 can be found on the Illinois courts' websites. *See Court-Annexed Mandatory Arbitration Annual Reports*, ILL. CTS., http://www.state.il.us/court/Administrative/ManArb/default.asp [http://perma.cc/L984-J7VJ].

119. 735 ILL. COMP. STAT. ANN. 5/2-1008A (West 2011), *repealed by* Act of May 30, 2012, Pub. Act No. 97-1099, § 10, 2012 Ill. Laws 5652; *see also Illinois Court-Annexed Arbitration–2011 Report*, ADMIN. OFF. ILL. CTS., *supra* note 117, at 5; Telephone Interview by Chris Milione with staff of the Admin. Office of Ill. Courts (Nov. 24, 2014). The staff reconfirmed this information for the author on May 12, 2015 (e-mail on file with author).

120. *See* Michael J. Graetz, *Trusting the Courts: Redressing the State Court Funding Crisis*, DAEDALUS, Summer 2014, at 96.

121. Russell R. Wheeler, *Chief Justice Rehnquist as Third Branch Leader*, 89 JUDICATURE, Nov.-Dec. 2005, at 116, 120.

122. *Id.*

123. The Chief Justice provided the data in his year-end report. *See* Roberts, *supra* note 113, appendix.

124. The sum of $6.7 billion was appropriated in discretionary funds to the judiciary for the Fiscal Year 2015, *Judiciary's FY 2015 Meets Needs*, U.S. CTS. (Dec. 15, 2014), http://news

Further, under the leadership of Chief Justice William Rehnquist, the federal judiciary obtained in the 1990s what one newspaper called the "largest public-building construction campaign since the New Deal: a 10-year, $10 billion effort to build more than 50 new Federal courthouses and significantly to alter or add to more than 60 others."[125] The courts tripled their dedicated space and, between 1996 and 2006, doubled it once more.[126] One way to summarize the monumentality of the federal court system is by a photograph of the Thomas F. Eagleton Federal Courthouse (Figure 1), which opened in 2000 in St. Louis, Missouri.[127]

.uscourts.gov/judiciarys-fy-2015-funding-meets-needs [http://perma.cc/28QQ-K6L8], an increase of $182 million (+2.8%) over the $6.5 billion appropriated for 2014. *Fiscal Year 2014: No Budget and a Government Shutdown – Annual Report 2013*, U.S. CTS., http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/AdministrativeOffice/DirectorAnnualReport/annual-report-2013/judiciary-funding/fy2014-no-budget-and-a-government-shutdown.aspx [http://perma.cc/4PT2-QZ8D].

125. Randy Gragg, *Monuments to a Crime-Fearing Age*, N.Y. TIMES MAG., May 28, 1995, at 36. The Chief Justice chaired the judiciary when it expanded its building footprint, while his leadership of the Court helped to produce substantial constriction of the remedial authority of the federal courts. *See* Judith Resnik, *Building the Federal Judiciary Literally and Legally: The Monuments of Chief Justices Taft, Warren, and Rehnquist*, 87 IND. L.J. 823 (2012); *see also* Jason Mazzone & Carl Emery Woock, *Federalism as Docket Control* (Univ. of Ill. Coll. of Law Legal Studies Research Paper No. 15-18, 2015), http://ssrn.com/abstract=2573107 [http://perma.cc/Y26V-WEVN].

126. *The Future of the Federal Courthouse Construction Program: Results of a Government Accountability Office Study on the Judiciary's Rental Obligations: Hearing Before the Subcomm. on Economic Dev., Public Bldgs. and Emergency Mgmt. of the H. Comm. on Transp. and Infrastructure*, 109th Cong. 269 (2006) (statement of David L. Winstead, Comm'r, Pub. Bldgs. Serv., Gen. Servs. Admin.).

127. *See Thomas F. Eagleton United States Courthouse, St. Louis, Missouri*, U.S. GEN. SERVS. ADMIN. 18 (2001) [hereinafter *GSA Eagleton Courthouse booklet*]; *Thomas F. Eagleton U.S. Courthouse*, U.S. GEN. SERVS. ADMIN. (2015), http://www.gsa.gov/portal/content/101471 [http://perma.cc/8XHH-QJ62]. Thanks to Magistrate Judge Noce for providing me with the image and information about the courthouse.

Figure 1.
THOMAS F. EAGLETON FEDERAL COURTHOUSE, ST. LOUIS, MISSOURI, 2000



Architects: Hellmuth, Obata + Kassabaum, Inc. Photographer: The Honorable David D. Noce, U.S. Magistrate Judge for the Eastern District of Missouri. Photograph courtesy of and reproduced with the permission of the photographer.

Standing 557 feet, this building became the "largest Federal courthouse in the United States,"[128] at a cost of almost $200 million dollars to construct the more than one million square-foot structure.[129]

While courthouses have become iconic representations of government, twenty-first-century graphics require data.[130] Figure 2—comparing the volume of filings in federal and state courts in 2010—provides another set of proportions. This figure details the 360,000 civil and criminal federal trial court filings, joined by more than a million bankruptcy claimants. Those numbers are small when contrasted with the volume of state court annual filings, which number more than 47 million, when juvenile and traffic filings are excluded,[131] and some 100 million when, as in Figure 3, they are included.[132]

128. *GSA Eagleton Courthouse Booklet*, U.S. GEN. SERVS. ADMIN., *supra* note 127, at 12. This building is not the largest courthouse in the country. For example, the 2001 structure built for the Brooklyn Supreme and Family Courts houses more than eighty courtrooms in more than 1.1 million square feet. With thirty-two stories, it is 473 feet high. *See Brooklyn Supreme and Family Courthouse, New York, USA*, DESIGN BUILD NETWORK (2015), http://www.designbuild-network.com/projects/brooklyn-supreme [http://perma.cc/GK54-CXH6].

129. *See* Gragg, *supra* note 125, at 36; *Eagleton Federal Courthouse*, CITY ST. LOUIS, http://web.archive.org/web/20070818174938/http://stlcin.missouri.org/devprojects/projinfo.cfm?DevProjectID=47 [http://perma.cc/4FC9-DD5V] (putting the building's height at 567 feet).

130. *See* William H. Simon, *Courthouse Iconography and Chayesian Judicial Practice*, 24 YALE J.L. & HUMAN. 419 (2012).

131. The sources for Figure 2 (Comparing the Volume of Filings: State and Federal Trial Courts, 2010) come from, on the federal side, *Federal Judicial Caseload Statistics: March 31, 2010*, U.S. CTS., tbls.C-1, D-1 & F (2010), http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics2010.aspx [http://perma.cc/X7DU-XPKD]. Thus, the 2010 data ran from 2009 through 2010. Data on state filings come from the Court Statistics Project, *State Court Caseload Statistics: 2010*, NAT'L CTR. FOR STATE CTS. (2013), http://www.courtstatistics.org/Other-Pages/StateCourtCaseloadStatistics.aspx [http://perma.cc/Q35C-7K59]. The number of state filings is an estimate, as states do not uniformly report data on all categories.

132. Data for Figure 3 (Disaggregating State Trial Court Filings) were collected by Ruth Anne French-Hodson, Yale Law School, Class of 2012, and Jason Glick, Yale Law School, Class of 2012, with assistance from David Rottman of the National Center for State Courts. The data were revisited in 2015 by Jason Bertoldi, Yale Law School, Class of 2015. This information is derived from annual reports of caseload statistics published by the National Center for State Courts. *See State Court Caseload Statistics: An Analysis of 2008 State Court Caseloads*, NAT'L CTR. FOR STATE CTS. 45 tbl.1, 64-68 tbl.5 (2010); *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads*, NAT'L CTR. FOR STATE CTS. 38, 51, 56 (2010), http://www.courtstatistics.org/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx [http://perma.cc/DUU6-5QQY]; *State Court Caseload Statistics: Annual Report 1992*, NAT'L CTR. FOR STATE CTS., 28, 43 fig. 1.60, 100 tbl.8 (1994); *State Court Caseload Statistics: Annual Report 1976*, NAT'L CTR. FOR STATE CTS. 60 tbl.16 (1980). These statistics are estimates, as not all states report data in the same manner and in all categories.

Figure 2.
COMPARING THE VOLUME OF FILINGS: STATE AND FEDERAL TRIAL COURTS, 2010

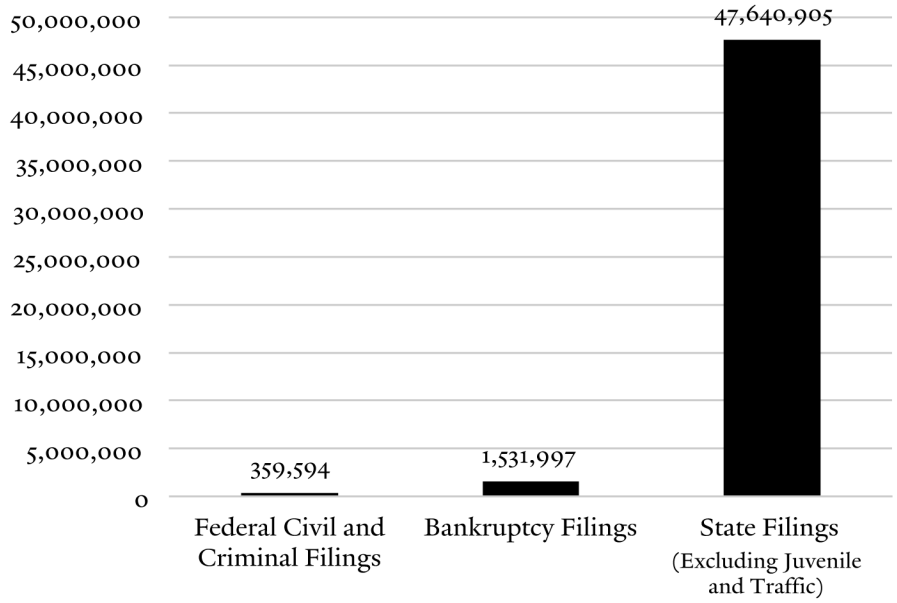
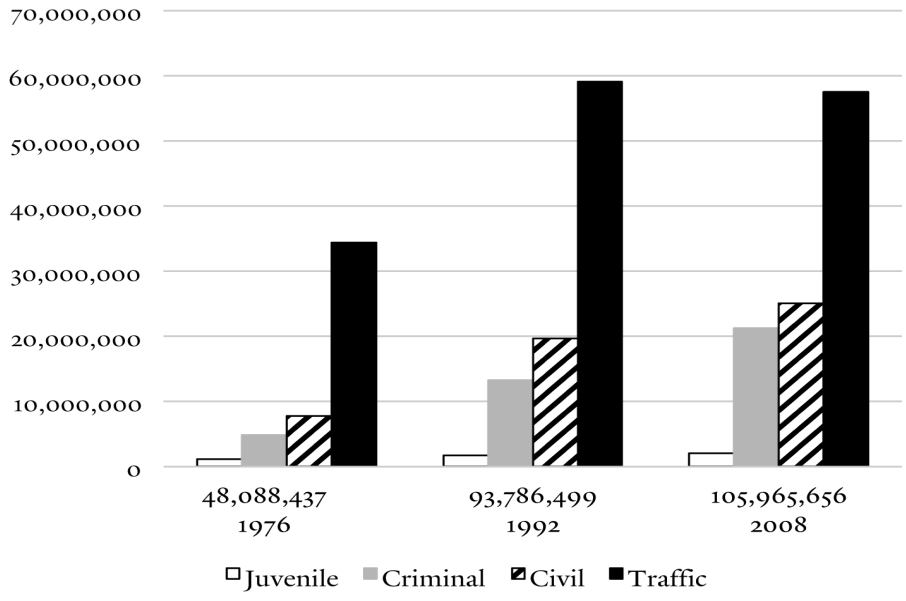


Figure 3.
DISAGGREGATING STATE TRIAL COURT FILINGS, 1976-2008



The filings are one measure of judiciaries' success. Courts are seen as hospitable to a variety of claimants, proceeding under a system not of their users' personal design but fashioned by bodies of rule-makers committed to procedural neutrality and subjected to public scrutiny. Courts are the rare venue aspiring to treat all comers equally and to respond to litigants' needs—with new forms to guide the millions of self-represented litigants, specialized clerks, information booths and kiosks, and targeted fee waivers for certain kinds of litigants.[133] The doors are open to outsiders, authorized to watch the democratic practices of government officials (judges, lawyers, and staff), as they are obliged to interact with each other and the disputants in a respectful manner.

And of course, these formal obligations are unevenly achieved in practice and at times dishonored. Painful contemporary examples come from some local courts that create streams of revenue by imposing fees and fines on indigent defendants.[134] In 2015, additional evidence of such practices surfaced in the wake of the police shooting of Michael Brown, an African-American man—prompting an investigation by the U.S. Justice Department into the police and municipal court in Ferguson, Missouri. The Justice Department's report detailed the court's absence of written rules (without "*any* information about [the court's] operations on its website"[135]), its failure to provide notice, the misinformation given, the imposition of needless court appearances, unjust license suspensions, unduly high fines, harsh penalties for missed appearances, retaliation, and biased waivers—all of which disproportionately harmed African Americans.[136]

Such problems are neither unique to Ferguson nor limited to the criminal justice and civil sanction system. The systemic questions of how to be fair in practice are ever-present. The many task forces commissioned by dozens of

133. In 2011, New York reported 2.3 million people in civil litigation without lawyers; in 2009, California counted 4.3 million litigants without lawyers. *See* Jonathan Lippman, *Equal Justice at Risk: Confronting the Crisis in Civil Legal Services*, 15 N.Y.U. J. LEGIS. & PUB. POL'Y 247, 248 (2012); Jonathan Lippman, *State Courts: Enabling Access*, DAEDALUS, Summer 2014, at 30. California data are provided in the report related to a statute creating a pilot program—named after Sargent Shriver—for civil legal assistance. *See* A.B. No. 590, 2009 Cal. Stat. 2498, 2499.

134. One report on criminal justice debt looked at California, Texas, Florida, New York, Georgia, Ohio, Pennsylvania, Michigan, Illinois, Arizona, North Carolina, Louisiana, Virginia, Alabama, and Missouri. The study found repeated incidents in which the failure to pay a "user fee" or a "fine" resulted in the imposition of additional fees, the incarceration of some—(resulting in a new form of "debtors' prison") as a result, and the dysfunction of the fee-fine system in terms of the costs to individuals and families and to the judiciaries imposing the charges. *See* Bannon, Nagrecha & Diller, *supra* note 42, at 1-5.

135. *Investigation of the Ferguson Police Department*, *supra* note 43, at 45.

136. *Id.* at 42-60; 68-69.

judiciaries in the 1980s and 1990s were one response, as courts sought to explore how racial, ethnic, and gender biases affected their practices.[137] State-commissioned Access-to-Justice task forces in more recent decades are another.[138]

Those interventions and attempts are not, however, possible in closed systems. Public practices and recordkeeping are predicates to making plain how much needs to be fixed and to providing platforms for demands to do so. In 2015, the Justice Department's findings of violation of federal civil rights laws[139] prompted the resignations of several of Ferguson's officials and the decision of the Missouri Supreme Court to appoint an appellate judge to take charge of the municipality's court system.[140] Publicity was at the core of the Justice Department's remedies—calling for increased "transparency regarding court operations to allow the public to assess whether the court is operating in a fair manner."[141]

In sum, nothing is casual about the public's relationship with courts. Courts are funded by the public fisc and staffed by government employees working in buildings owned or rented by the government and subject to a thicket of government-crafted regulation. Courts are also public in the sense that the members of the public are entitled to file cases, to watch proceedings involving others in courts, and to know the identity of judges and staff, their salaries (set by law), their budgets, and the rationales for their rulings. Controversies about those investments and the quality of processes and outcomes regularly result.

Governments are also the beneficiaries of these exchanges. These multiple meanings of the "public" *in* courts are in service of the authority *of* courts. From criminal penalties to the reallocation of rights in commerce and in households, law's remedies entail coercion. Despite the conventional view that the federal Constitution has no positive entitlements, the judiciary is a counterexample, as a public service largely supported by public funds. The private

137. More than sixty reports were published by court systems as of the mid-1990s. *See* Resnik, *supra* note 105.

138. These access to justice efforts are summarized at *Resource Center for Access to Justice Initiatives*, AM. BAR ASS'N (2015), http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/resource_center_for_access_to_justice/state_atj_commissions.html [http://perma.cc/95J9-HBV3] [hereinafter *Access to Justice Initiatives*].

139. *Investigation of the Ferguson Police Department*, *supra* note 43, at 69-78.

140. Order Transferring The Honorable Roy L. Richter, Eastern District, Missouri Court of Appeals, to the 21st Judicial Circuit (St. Louis County) (Mo. Mar. 9, 2015) (en banc) (citing the court's authority under the Missouri Constitution to order temporary transfers "as the administration of justice requires").

141. *Investigation of the Ferguson Police Department*, *supra* note 43, at 97.

sector relies on courts to protect economic growth and interpersonal obligations. Yet the dominant user is the government itself,[142] enforcing its norms through criminal prosecutions and civil litigation and guarding its contracts and proprietary interests. Moreover, governments benefit from their judges, who gain their legitimacy and protect their independence through the discipline of obligations to make known their procedures and to do much of their work before the public.

II. THE CREATION AND ERASURE OF RIGHTS

This structure is under siege through Dispute Diffusion, propelled by revised mandates to judges about how to handle cases and by the U.S. Supreme Court's new approach to arbitration clauses. Looking only at court-based procedural reform or only at the doctrine of the FAA is to miss the interaction between the two as they have been reconceptualized during the past four decades. Both processes are being reconfigured as variations on the dispute resolution theme, and that shift reflects new normative commitments – to diffusion, deregulation, and to the privatization of dispute resolutions that gain the force of law.

Start with arbitration. In 2002, Justice Thomas commented on the degree to which the Court had "expanded the reach and scope"[143] of the Federal Arbitration Act.[144] Designed in 1925 by merchants and lawyers,[145] the Act authorized federal courts to enforce contract clauses that committed the signatories to forgo decision making in courts and to be bound, instead by the decisions of arbitrators they choose. What that statute (reenacted "without any material

142. For example, in 2013, the U.S. was a party as a plaintiff in 7,694 civil cases and a defendant in 40,545 civil cases, resulting in the U.S. being a party in 16.95% of the 284,604 civil cases filed in federal court. *See U.S. District Courts – Judicial Business 2013*, U.S. CTS. tbl.4, http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-district-courts.aspx [http://perma.cc/2EN4-VH8L].

143. EEOC v. Waffle House, 534 U.S. 279, 314 (2002) (Thomas, J., dissenting); *see also infra* notes 297-320 and accompanying text. Other Justices have offered similar analyses. In 1987, and again in 1991, Justice Stevens charged that the Court had "effectively rewritten the statute" by applying the FAA to statutory claims and to employees. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 43 (1991) (Stevens, J., dissenting) (quoting his discussion in *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (Stevens, J., dissenting)). In 1995, Justice O'Connor described the Court's decisions as "building . . . , case by case, an edifice of its own creation." Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 283 (1995) (O'Connor, J., concurring).

144. Federal Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 2-14 (2013)).

145. *See* Amalia D. Kessler, Feature, *Arbitration and Americanization: The Paternalism of Progressive Procedural Reform*, 124 YALE L.J. 2940 (2015).

change" and named the FAA in 1947[146]) provided were remedies—staying or dismissing pending lawsuits in favor of arbitration and enforcing awards when appropriate.

The scope of that remedy was once understood to be limited. During much of the FAA's first six decades, congressional power to enact the statute was linked to its authority under Article III to regulate the lower federal courts.[147] Because the Arbitration Act was "purely procedural in nature," it conferred "no new substantive right" and thus did not apply in state courts. The Act provided one site for the development of arbitration; other federal laws on labor-management agreements shaped another. The statutory endorsement of labor arbitration reflected unions' capacity to garner majoritarian approval of measures enhancing workers' authority. Thus, commercial and labor arbitrations were celebrated for their responsiveness to specially situated participants, many of whom were enmeshed in long-term commercial relationships.

The distinctions between the contractual rights created by agreement and public rights mandated by statute, between federal and state courts, and between judges and arbitrators were robust some fifty years after the FAA's enactment. As a consequence, a unanimous Court ruled in *Alexander v. Gardner-Denver Company* in 1974 that a labor-management agreement requiring arbitration of disputes did not preclude individual employees from pursuing statutory civil rights claims in court.[148] A decade later, in 1984, a unanimous Court likewise concluded that because arbitration "could not provide an adequate substitute" for adjudication, an unsuccessful arbitration under a collective bargaining

146. *See* H. REP. NO. 255, at 1 (1947) (discussing the enactment of title 9 of the U.S. Code into positive law).

147. This point was stressed to the Supreme Court by both the Chamber of Commerce and the AAA. *See, e.g.*, Brief for the Chamber of Commerce of the State of N.Y. & Am. Arb. Ass'n, Inc., as Amici Curiae Supporting Respondent, Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1932) (No. 172), 1931 WL 32404, at *14-15 [hereinafter AAA Marine Transit Brief].

Several Justices have likewise focused on Article III as the source of congressional power to enact the FAA. *See* Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 418 (1967) (Black, J., dissenting) ("[I]t is clear that Congress in passing the Act relied primarily on its power to create general federal rules to govern federal courts."); *see also* Southland Corp. v. Keating, 465 U.S. 1, 22, 25, 35 (1984) (O'Connor, J., dissenting) (calling the Court's application of the FAA a "newly discovered federal right" in conflict with the "unambiguous" legislative history, which made plain that Congress had relied on its power "to control the jurisdiction of the federal courts"). Thus, arbitration obligations would be enforced in cases filed under Article III courts' jurisdiction over admiralty, diversity, federal question and the like.

148. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36, 44-60 (1974).

agreement did not prevent an employee from filing a subsequent civil rights case.[149]

Undergirding these decisions were views about the integrity of adjudication, the functions of federal statutory rights, and the rationales for arbitration. Judges were loyal to the public (embodied by their commitment to "the law of the land"[150]) and arbitrators to the contract (in the context of labor, "the law of the shop"[151]). Thus, Justices read statutes protecting consumers and employees to limit the FAA's scope.[152] As Chief Justice Burger explained in 1981, "[l]eaving resolution of discrimination claims to persons unfamiliar with the congressional policies . . . could have undermined enforcement of fundamental rights Congress intended to protect."[153]

Further, until the mid-1980s, the FAA case law described litigation as entailing what arbitration lacked. Courts endowed disputants with a disciplined procedural structure, predicated on evidentiary standards, discovery, fact-finding, law application, and appellate review.[154] These attributes redistributed power to protect those without the clout to negotiate dispute resolution clauses (or much else) in contracts. Litigation's procedural neutrality was hence another reason not to enforce arbitration provisions when one side had "unequal bargaining power"[155] or "excessive" and "overwhelming economic power"[156] in a way that suggested "no genuine bargaining over the terms."[157]

Those were the views jettisoned thereafter, as new majorities on the Court concluded that the FAA could require individuals, signing form job applica-

149. McDonald v. City of W. Branch, 466 U.S. 284, 289, 292 (1984).

150. *See, e.g.*, *Gardner-Denver*, 415 U.S. at 57.

151. *Id.* at 53; *McDonald*, 466 U.S. at 290.

152. *See, e.g.*, Wilko v. Swan, 346 U.S. 427, 437 (1953).

153. Barrentine v. Ark.-Best Freight Sys., 450 U.S. 728, 747 (1981) (Burger, C.J, dissenting).

154. *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 203 (1956); *Wilko*, 346 U.S. at 435-36.

155. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 414 (1967) (Black, J., dissenting) (noting that members of Congress "expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power."). The Court later rejected the dissenters' arguments that such inequality ought to constrain enforcement of arbitration clauses. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 132-33 (Stevens, J., dissenting) (explaining that the "potential disparity in bargaining power" between "large employers" and their employees ought to be one reason to exempt all "contracts of employment from mandatory arbitration").

156. Even when requiring arbitration, the Court noted that "overwhelming" or "excessive economic power" would be grounds for pause. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985).

157. *Soler Chrysler-Plymouth*, 473 U.S. at 666 (Stevens, J., dissenting).

tions or purchasing consumer products, to pursue statutory claims exclusively in arbitration. Further, the Court abandoned its reliance on Article III and insisted instead that the FAA was the product of Congress's Commerce Clause powers.[158] Rather than a procedural right applicable only in federal courts, the FAA became a federal substantive right, preempting state laws found by the Court to undermine its own broadening of the "liberal federal policy favoring arbitration."[159]

As a consequence, during the last three decades, the Court has ruled that the FAA can be used to bar access to courts when individuals claim breaches of federal securities laws;[160] when employees allege discrimination on the basis of age;[161] when employees file sex discrimination suits under state law;[162] when consumers assert rights under state consumer protection laws;[163] when merchants allege violations of the antitrust laws;[164] and when family members claim that negligent management of nursing homes resulted in the wrongful deaths of their relatives.[165] The bases for such obligations to arbitrate are not bargained-for, and, in many contexts, consumers and employees cannot shop to avoid arbitration mandates. Deeming these obligations "contract" ignores what the opening epigraph from the wireless service provider exemplifies:

158. *See* Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

159. *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1745 (2011) (citations omitted); *see also Shearson*, 482 U.S. at 226; *Soler Chrysler-Plymouth*, 473 U.S. at 625.

160. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220.

161. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

162. *Adams*, 532 U.S. at 105.

163. *AT&T v. Concepcion*, 131 S. Ct. 1740.

164. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); *Soler Chrysler-Plymouth*, 473 U.S. 614.

165. Marmet Health Care Ctr., Inc. v. Brown, 132 S. Ct. 1201 (2012) (per curiam). On remand, the West Virginia Supreme Court sent the consolidated cases to the trial court for discovery and to "develop the evidence" on whether, aside from the reversed state "public policy" grounds, waivers of court access for those entering nursing homes were unenforceable under "state common law principles." Brown v. Genesis Healthcare Corp., 729 S.E.2d 217, 230 (W. Va. 2012). Congress had specifically considered the requirement to arbitrate claims against nursing homes but has not enacted legislation on the practice. *See* Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Cong. (2012); Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009); *Mandatory Binding Arbitration: Is it Fair and Voluntary?: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 1 (2009) (statement of Alison E. Hirschel, Nat'l Consumer Voice for Quality Long-Term Care).

producers of rights-waivers can unilaterally "change any terms, conditions, rates, fees, expenses or charges regarding your Services at any time . . . ."[166]

This novel approach to arbitration required new theories of its legitimacy. As consent and volition receded as the bases for enforcing rights-waivers, Justices developed different rationales—that arbitration was a better process than adjudication and did just as well as an enforcement mechanism for public rights. In many decisions, Justices complained that litigation was "costly and time consuming,"[167] or praised arbitration's capacity to produce "streamlined proceedings"[168] providing prospective litigants with opportunities adequate to "effectively vindicate" their federal rights.[169] Yet while regularly articulating that standard, the Court has not—to date—declined to enforce an arbitration mandate for its failure to provide adequate remedies.[170]

But to focus only on the Supreme Court readings of the FAA is to ignore the social and political movements revising attitudes towards litigation in the federal courts and beyond. Beginning in the 1970s, the flexibility and informality of various forms of ADR (not only arbitration) came to be praised as virtues—juxtaposed against the formal and public obligations of adjudication which were, in turn, gaining the negative valence of imposing undue costs on both disputants and the courts. Congress enacted statutes and agencies promulgated regulations commending arbitration, mediation, and other ADR methods for use by administrative agencies and in the federal courts.[171]

166. *AT&T Wireless Customer Agreement*, *supra* note 2, § 1.3; *see generally* Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 8-17 (2010) (discussing and documenting the "unilateral modification reality").

167. Barrentine v. Ark.-Best Freight Sys., 450 U.S. at 748 (Burger, C.J., dissenting).

168. *AT&T v. Concepcion*, 131 S. Ct. at 1748.

169. *See Soler Chrysler-Plymouth*, 473 U.S. at 614, and discussion *infra* Part IV.

170. See *infra* notes 397-409 and accompanying text. Lower courts have, as discussed *infra* notes 392-395 and accompanying text, upon occasion found arbitration provisions unenforceable and used a variety of explanations, some tied to effective vindication or burdensomeness or unconscionability.

171. *See infra* notes 198-207 and accompanying text. The debate in the lower courts about whether an agency's decision not to seek conciliation is judicially reviewable was resolved by the Supreme Court in 2015. In *EEOC v. Mach Mining, LLC*, 135 S. Ct. 1645 (2015), a unanimous Court authorized a narrow scope of review. At issue was whether statutory mandates that the EEOC "endeavor to eliminate" unlawful employment practices "by informal methods of conference, conciliation, and persuasion," 42 U.S.C. § 2000e-5(b) (2012), and that the EEOC may sue only if "unable to secure . . . a conciliation agreement acceptable to the commission," 42 U.S.C. § 2000e-(5)(f)(1), could be the basis for defendants asserting the EEOC's decision not to settle as an affirmative defense. The Court held that "[a] sworn affidavit from the EEOC stating that it has performed" its statutory conciliation obligations "but that its efforts have failed will usually suffice." *Mach Mining*, 135 S. Ct. at 1656.

Moreover, to look only at the United States is to miss the transnational crosscurrents of Dispute Diffusion.[172] The modern history of arbitration is marked by the establishment in 1899 of the Permanent Court of Arbitration[173] and by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which came into force in 1959[174] and which the United States joined in 1970.[175] The Convention, an international counterpart to the FAA, requires contracting states to recognize awards made pursuant to private agreements to arbitrate.[176]

A measure of the transnational arbitration market comes from the American Arbitration Association, which was founded in 1926 to nurture the FAA. This nonprofit corporation calls itself "the world's leading provider of conflict management and dispute resolution services"[177] and describes its roster of thousands of "trained and qualified"[178] neutrals who, as noted, deal with more than 150,000 cases yearly, mostly from contracts – public and private – naming

172. *See* Judith Resnik, *Globalization(s), Privatization(s), Constitutionalization, and Statization: Icons and Experiences of Sovereignty in the 21st Century*, 11 INT'L J. CONST. L. 162 (2013); Neil Walker, *Beyond Boundary Disputes and Basic Grids: Mapping the Global Disorder of Normative Orders*, 6 INT'L J. CONST. L. 373 (2008).

173. *Permanent Court of Arbitration: About Us,* PERMANENT CT. ARB. (2009), http://www.pca-cpa.org/showpage.asp?pag_id=1027 [http://perma.cc/9X6D-HNQR].

174. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. XII, *opened for signature* June 10, 1958, 330 U.N.T.S. 38 (entered into force June 7, 1959). As of the beginning of 2015 the "New York Convention" had 154 State Parties. *See Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNCITRAL, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html [http://perma.cc/PWH5-E5YN].

175. 21 U.S.T. 2517, T.I.A.S. 6997.

176. Under the Convention, state parties can decline enforcement of awards on public policy grounds and may also condition enforcement on certain forms of reciprocity. For discussion of the scope of these exceptions, see Pierre Mayer & Audley Sheppard, *Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19 ARB. INT'L 249 (2003); and Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT'L ARB. 213 (1996). The interaction between entrepreneurship and sovereignty is mapped by several commentators. *See, e.g.*, Yves M. Dezalay & Bryant Garth, *Constructing a Transatlantic Marketplace of Disputes on the Symbolic Foundations of International Justice*, *in* CONTRACTING BEYOND BOUNDARIES: PRIVATE REGULATION OF INTERNATIONAL TRADE AND FINANCE IN THE TWENTIETH CENTURY (Gregoire Mallard & Jerome Sgard eds.) (forthcoming), http://ssrn.com/abstract=2549866 [http://perma.cc/5W6W-DFU3].

177. *American Arbitration Association Elects New Directors*, AM. ARB. ASS'N (2014), https://www.adr.org/aaa/ShowPDF;jsessionid=MYLjT7WG9hqmWcRnkdpyvQ2x3JGmG2yTQ8fwSGnzgC4L66htj90V!-5119463?doc=ADRSTAGE2020833 [https://perma.cc/6L5C-SRNW].

178. *Mass Claims ADR Programs and Federal ADR Programs*, AM. ARB. ASS'N 1, http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004209 [https://perma.cc/H949-ADUR].

the AAA to administer arbitration.[179] By 2013, the AAA had seventy cooperative agreements in forty-eight countries and its own international division, the International Centre for Dispute Resolution (ICDR).[180] These developments are part of larger patterns of globalization and privatization, celebrated by some as expanding the rule of law[181] and criticized by others as a neo-liberal privatization of power.[182]

Just as cross-continental exchanges shaped arbitration in the nineteenth and early twentieth centuries, contemporary interactions across networks of judges, lawyers, and repeat player litigants are transforming court-based procedures as well. During the last four decades, in several countries, programs to

179. The figure of 150,000 cases administered annually by the AAA comes from various sources. *See* Statement of Ethical Principles, *supra* note 28; MARTIN F. GUSY, JAMES M. HOSKING & FRANZ T. SCHWARZ, A GUIDE TO THE ICDR INTERNATIONAL ARBITRATION RULES 13 (2011) (reporting that the AAA "provides dispute resolution services in more than 150,000 cases annually . . . including arbitrations (of any sort), mediations, and other ADR processes"); *see also* Sebastian Perry, *Inside the ICDR: An Interview with Luis Martinez*, AM. ARB. ASS'N 4 (Oct. 19, 2011), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_022207 [http://perma.cc/D66U-UFNZ] (describing that the AAA "handles over 150,000 cases a year"). More recent information from the AAA indicated that, in 2013 and 2014, it received more than 200,000 filings. *See* Boyle AAA 2015 Materials, supra note 25.

Several federal agencies and many state programs, such as those for uninsured drivers and no-fault automobile insurance claims, rely on the AAA. *See* Brief for the Am. Arbitration Ass'n as Amicus Curiae at 2, Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000) (No. 99-1235), 2000 WL 744161 [hereinafter AAA Green Tree Brief]; Brief for the Am. Arbitration Ass'n as Amicus Curiae in Support of Respondent at 15 n.9, Prima Paint Corp. v. Flood & Conklin Mfg. Co., 1967 WL 113919 [hereinafter AAA Prima Paint Brief]; *see also infra* notes 198-201 and accompanying text (describing regulations naming the AAA as the required arbitration provider).

The AAA is also the largest provider of arbitration services for employment. Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?*, 29 OHIO ST. J. ON DISP. RESOL. 59, 62 (2014). The for-profit provider JAMS, founded in 1979 by a former state-court judge, calls itself the "largest private alternative dispute resolution (ADR) provider in the world," dealing with about 12,000 cases a year and employing nearly 300 full-time neutrals in "mediating and arbitrating complex, multi-party business/commercial cases." *JAMS Fact Sheet*, JAMS, http://www.jamsadr.com/files/Uploads/Documents/Corporate-Fact-Sheet.pdf [http://perma.cc/PQ76-VFBW].

180. *See* Brief for the Am. Arbitration Ass'n as Amicus Curiae in Support of Petitioner at 1, BG Grp. PLC v. Republic of Arg., 134 S. Ct. 1198 (2014) (No. 12-138), 2013 WL 4781545, at *2 [hereinafter AAA BG Group Brief]. As of 2015, the ICDR, which was established in 1996, provided "services in more than 80 countries." *See About the American Arbitration Association (AAA) and the International Centre for Dispute Resolution (ICDR)*, AM. ARB. ASS'N (20145), https://www.adr.org/aaa/faces/s/about [https://perma.cc/XMQ4-BGWT].

181. *See, e.g.*, SABINO CASSESE, THE GLOBAL POLITY: GLOBAL DIMENSIONS OF DEMOCRACY AND THE RULE OF LAW (2012).

182. *See, e.g.*, SASKIA SASSEN, TERRITORY, AUTHORITY, RIGHTS: FROM MEDIEVAL TO GLOBAL ASSEMBLAGES (2006).

revisit the practices of civil litigation have aimed to refocus the work of trial-level judges, encouraging them to become case managers pressing for resolutions without adjudication. In the 1990s, England and Wales embraced pre-filing protocols to promote settlements through adoption of the "Woolf Reforms."[183] Australia and Canada have similar initiatives "remaking" or "privatizing" their courts.[184]

Returning to the United States, recall that Chief Justice Burger insisted in 1981 that, because courts had a distinctive role to play in enforcing race discrimination law, arbitration was inappropriate for such claims. In contrast, he argued that Fair Labor Standards Act claims could be sent to arbitration, and he criticized his colleagues for being "oblivious to desperately needed changes to keep the federal courts from being inundated with disputes of a kind that can be handled more swiftly and more cheaply by other methods."[185] As the Chief Justice explained, all branches of the federal government were studying how "to remove . . . routine and relatively modest-sized claims . . . from the courts."[186] The Chief Justice was referencing—and championing—the "policy of favoring extrajudicial methods of resolving disputes."[187] The goal was to avoid having the "federal courts flooded by litigation increasing in volume, in length, and in a variety of novel forms."[188]

Increasing caseloads were problems to be solved, and interest in protecting the courts from too many or the wrong kind of cases prompted judicial action on and off the bench. In 1995, a special committee of the U.S. Judicial Conference (the federal judiciary's policymaking arm) provided a "long range plan" that forecast a "nightmarish" scenario of overwhelming demand for courts.[189]

183. *See* RT. HON. LORD WOOLF, ACCESS TO JUSTICE: FINAL REPORT TO THE LORD CHANCELLOR ON THE CIVIL JUSTICE SYSTEM OF ENGLAND AND WALES (1996). Criticism of this approach comes from HAZEL GENN, WHAT IS CIVIL JUSTICE FOR? (2011).

184. *See generally* TREVOR C.W. FARROW, CIVIL JUSTICE, PRIVATIZATION, AND DEMOCRACY (2014); SARAH MURRAY, THE REMAKING OF THE COURTS: LESS-ADVERSARIAL PRACTICES AND THE CONSTITUTIONAL RULE OF THE JUDICIARY IN AUSTRALIA (2014); THE MULTI-TASKING JUDGE, *supra* note 4.

185. Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728, 753 (1981) (Burger, C.J., dissenting). At issue there was a Fair Labor Standards Act claim, which, the Chief Justice argued, stemmed from an "entirely different historical and legal context," making arbitration appropriate. *Id.* at 750.

186. *Id.* at 746.

187. *Id.* at 748; *see also* Warren Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274 (1982).

188. *Barrentine*, 450 U.S. at 748 (Burger, C.J., dissenting).

189. *See Long Range Plan for the Federal Courts*, JUD. CONF. U.S. 18 (Dec. 1995), http://www.uscourts.gov/uscourts/FederalCourts/Publications/FederalCourtsLongRangePlan.pdf [http://perma.cc/WEY3-9UQ9] [hereinafter *1995 Long Range Plan*]. Some aspects of this report have been superseded by the *Strategic Plan for the Federal Judiciary*, JUD. CONF. U.S.

Extrapolating from the second half of the twentieth century, the report projected that, by 2010, 610,800 cases (more than double the number in 1995) would be filed.[190] To buffer against this possibility, the Judicial Conference urged Congress to send cases from federal courts to state courts and to administrative agencies, to avoid creating new federal rights whenever possible and, if cases proceeded in federal courts, to rely more on ADR.[191]

The judiciary's enthusiasm for stemming court filings resonated with leading members of industry, other members of government, and the legal academy. Through a series of statutes and rule reforms, mediation and arbitration — methods characterized in the 1980s by both Chief Justice Burger and the Federal Rules of Civil Procedure as extrajudicial procedures[192] — turned in the 1990s into everyday practices *inside* courts.[193] By 1993, judges gained the power to insist that litigants attend settlement conferences or use "neutrals" in efforts to end cases without adjudication.[194]

Thus, inside the federal courts, procedural revisions pushed significant aspects of court-based dispute resolution out of sight. The Federal Rules were amended to provide that discovery materials were no longer routinely filed in courts unless appended to motions; pre-discovery confidentiality agreements became routine,[195] and settlements conditioned on non-disclosure of terms

(Sept. 2010), http://www.uscourts.gov/uscourts/FederalCourts/Publications/StrategicPlan2010.pdf [http://perma.cc/5NBF-SG9C].

190. *1995 Long Range Plan*, *supra* note 189, at 15.

191. *Id.* at 23-39 (Recommendations 1-15); 70-71 (Recommendations 38-39).

192. *See* FED. R. CIV. P. 16(c) (1983) (amended 1993); *Barrentine*, 450 U.S. at 748 (Burger, C.J., dissenting).

193. *See* Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651-58 (2012)); Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471-82 (2012)).

194. *See* FED. R. CIV. P. 16(c)(1)-(2), (f) (requiring the attendance or availability of parties at pretrial conferences; authorizing the court to take action on matters including "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule"; and authorizing sanctions for those failing to participate in good faith); *see also* Judith Resnik, *The Privatization of Process: Celebration and Requiem for the Federal Rules of Civil Procedure at 75*, 162 U. PA. L. REV. 1793, 1802-1806 (2014). *See generally* Resnik, *supra* note 110.

195. *See generally* Dustin B. Benham, *Proportionality, Pretrial Confidentiality, and Discovery Sharing*, 71 WASH. & LEE L. REV. 2181 (2014). This article surveys cases on the sharing of information obtained in discovery, the use of "return-or-destroy" provisions required as a predicate either to discovery or to settlement, and a relaxed standard for granting protective orders of disclosures made. Benham calls for rules building in the sharing of discovery as part of the goal of increasing the efficiency of litigation. He argues that his proposals fit the paradigm of Federal Rule amendments addressing proportionality as a test of the permissible scope of

became commonplace.[196] By 2014, proponents (including those on the Court) interested in constraining the perceived burdens imposed by federal litigation had put into place new restrictions on pleading and discovery, as well as new limits on the availability of implied causes of action, class actions, damages, and attorneys' fees.[197]

The Court is not the only public promoter or potential regulator of ADR. Since the 1970s, Congress has offered arbitration as a forum in which to pursue remedies under various federal statutes. For example, in 1978, Congress amended the Federal Insecticide, Fungicide, and Rodenticide Act of 1947 (FIFRA) to require sharing research costs by those seeking applications authorizing their use of chemicals covered by the act; if disputes arise, resolution is exclusively by arbitration.[198] The Amateur Sports Act of 1978 identifies arbitration as the forum for resolving disputes between organizations, members, and a national governing body.[199] Two years later, in 1980, Congress amended the Employee Retirement Income Security Act to mandate arbitration for disputes between employers and multi-employer plan sponsors when employers withdraw from a plan.[200] In 1988, Congress altered its 1976 Federal Land Policy and

discovery. Congress has proposed, but not enacted, obligations to make more materials available. *See*, *e.g.*, Sunshine in Litigation Act of 2014, S. 2364, 113th Cong. (2014).

196. Symposium, *Secrecy in Litigation*, 81 CHI.-KENT L. REV. 301-590 (2006).

197. *See generally* Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543 (2014).

198. Act of Sept. 30, 1978, Pub. L. No. 95-396, 92 Stat. 819 (codified as amended at 7 U.S.C. § 136a (2012)) ("If . . . the original data submitter and the applicant have neither agreed on the amount and terms of compensation nor on a procedure for reaching an agreement on the amount and terms of compensation, either person may initiate binding arbitration proceedings by requesting the Federal Mediation and Conciliation Service to appoint an arbitrator from the roster of arbitrators maintained by such Service."). This provision was upheld against challenges that it violated Article III by bypassing life-tenured judges. *See* Thomas v. Union Carbide Agric. Prods Co., 473 U.S. 568 (1985).

The procedures for FIFRA arbitrations are codified in 29 C.F.R. § 1440.1 (2014); those regulations authorize the AAA to run the proceedings. The rules detail the location of the arbitration, discovery and evidentiary procedures, and arbitrator compensation. 29 C.F.R. § 1440.1 (2014); 29 C.F.R. Pt. 1440, App. (2014). The rules provide that "[a]ny person having a direct interest in the arbitration is entitled to attend hearings," but that "[i]t shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person." 29 C.F.R. Pt. 1440, App. Sec. 18(c) (2014). The AAA reported to us that it administered twenty-one FIFRA arbitrations in 2010 and between five and eight arbitrations per year from 2011-2013. *See* Boyle AAA 2015 Materials, *supra* note 25.

199. Amateur Sports Act of 1978, Pub. L. No. 95-606, § 205(c)(1), 92 Stat. 3045 (codified as amended at 36 U.S.C. § 220529 (2012)) ("The right to review by any party aggrieved by a determination . . . shall be to any regional office of the American Arbitration Association.").

200. Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96–364, § 4221(a)(1), 94 Stat. 1208 (codified as amended at 29 U.S.C. § 1401 (2012)) ("Any dispute between an

Management Act to establish arbitration as the default for disputes over land appraisals.[201]

More generally, in 1996, Congress enacted the Administrative Dispute Resolution Act (ADRA), exhorting federal agencies to diffuse disputes by using providers other than judges and methods other than adjudication.[202] Both before the ADRA and after, administrative regulations commended the use of arbitration in a wide array of contexts, such as housing,[203] national parks,[204] patents,[205] disaster relief,[206] and telecommunications.[207] In addition,

employer and the plan sponsor of a multiemployer plan concerning a determination . . . shall be resolved through arbitration.").

201. Federal Land Exchange Facilitation Act of 1988, Pub. L. No. 100–409, § 3(a), 102 Stat. 1086, 1087 (codified as amended at 43 U.S.C. § 1716(d)(2) (2012)) ("If . . . the Secretary concerned and the other party or parties involved cannot agree to accept the findings of an appraisal or appraisals, the appraisal or appraisals shall be submitted to an arbitrator appointed by the Secretary from a list of arbitrators submitted to him by the American Arbitration Association for arbitration to be conducted in accordance with the real estate valuation arbitration rules of the American Arbitration Association."); *see also* 43 C.F.R. § 2201.4 (2014); 36 C.F.R. § 254.10 (2014) (detailing the arbitration procedure).

202. Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (1990) (codified at 5 U.S.C. § 571 et seq. (2012)).

203. In 1990, the Department of Housing and Urban Development enacted regulations demanding that specified insurance plans "provide for binding arbitration proceedings arranged through a nationally recognized dispute settlement organization." 55 Fed. Reg. 41021 (Oct. 5, 1990) (codified at 24 C.F.R. § 203.204(g) (2014)).

204. In 2001, acting pursuant to the National Parks Omnibus Management Act of 1998, the National Park Service authorized concessioners to use arbitration in conflicts about the value of leasehold surrender interests, if contracts are terminated. *See* 66 Fed. Reg. 35082 (July 3, 2001). The method for selecting arbitrators is detailed in 36 C.F.R. § 51.51 (2014).

205. In 2004, the Patent and Trademark Office permitted binding arbitration "to determine any issue in a contested case" before the Patent Trial and Appeal Board. 69 Fed. Reg. 50003, 50016 (Aug. 12, 2004); 37 C.F.R. § 41.126(a) (2014). Both parties must agree in writing and specify which issues are to be arbitrated. *See* 37 C.F.R. § 41.126(b), (e) (2014). In 2012, in response to the Leahy-Smith America Invents Act, the Patent and Trademark Office expanded the availability of binding arbitration to patent derivation proceedings. *See* 37 C.F.R. § 42.410 (2014).

206. The Federal Emergency Management Agency (FEMA) provides for arbitrations in certain contexts under the aegis of FEMA's Alternative Dispute Resolution Office. 44 C.F.R. § 295.42 (2012). In 2009, under the American Recovery and Reinvestment Act, 74 Fed. Reg. 44767, 44767 (Aug. 31, 2009), FEMA made final and binding arbitration available to resolve disputed Public Assistance applications related to hurricanes Katrina and Rita in projects worth more than $500,000. 44 C.F.R. § 206.209 (2014).

207. The Federal Communications Commission (FCC) makes arbitration available related to home run wiring ownership in multiple dwelling unit buildings. 47 C.F.R. § 76.804(a)(2) (2014), (b)(2); 62 Fed. Reg. 61016, 61017-20 (Nov. 14, 1997). In 1996, the FCC issued regulations related to Personal Communication Services licensees; "parties are encouraged to use expedited ADR procedures, such as binding arbitration, mediation, or other ADR tech-

as discussed below, Congress has also shaped a special arbitration process in the federal courts.

On one account, the proliferation of sites *of* dispute resolution is an ode *to* adjudication, for which demand outstrips supply. The problem to be solved is insufficient capacity, as judges cannot respond to all in need of their attention. The goal is to equip those seeking redress with more "access to justice" (the term common in the United States for dozens of state-based task forces[208]) or with "paths to justice" (the phrase used in many other countries).[209] In practice, such alternatives need not be either court-exclusive or court-preclusive: non-court options can be pursued in addition to or on the way to filing in court.

Examples of such regulated innovations come from both sides of the Atlantic. In the United States, Congress created a system of "court-annexed arbitration," to which parties generally may give consent and for which trials de novo are permissible.[210] Many state systems have parallels.[211] In Europe, the preamble to a 2013 Directive on consumer alternative dispute resolution (CADR)[212] explained that "the right to an effective remedy and the right to a

niques" for disputes. 47 C.F.R. § 24.251 (2014); 47 C.F.R. § 27.1188 (2014); *see also* 47 C.F.R. § 90.677(d) (2014) (permitting arbitration in the context of band reconfiguration separating cellular and non-cellular systems); 71 Fed. Reg. 52751 (Sept. 7, 2006) (same); 47 C.F.R. § 301.200 (2014) ("To the extent that the parties cannot resolve such dispute . . . they are strongly encouraged to use expedited alternative dispute resolution procedures, such as mediation or non-binding arbitration."); 78 Fed. Reg. 5310, 5314 (Jan. 25, 2013) ("[T]he final rule provides that any formal dispute resolution request must include a summary of the parties' prior efforts and attempts to resolve the dispute through negotiation, mediation, or non-binding arbitration.").

208. These access to justice efforts are summarized at *Access to Justice Initiatives*, *supra* note 138.

209. *See, e.g.*, GENN, *supra* note 4.

210. *See* 28 U.S.C. §§ 651-658 (2012), discussed *infra* notes 573-597 and accompanying text.

211. Illinois is the example discussed here. *See infra* note 591 and accompanying text.

212. *See* Directive 2013/11, of the European Parliament and of the Council on Alternative Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165/63) [hereinafter CADR 2013 Directive]. As of 2008, researchers reported that systems in place for consumer ADR in Europe responded to about half a million claims annually, and many of the processes were free of charge. *See* CHRISTOPHER HODGES, IRIS BENÖHR & NAOMI CRUETZFELDT-BANDA, CONSUMER ADR IN EUROPE 368, 380 (2012).

In addition, regulations address online dispute resolution (ODR) and aim to create an EU-wide online platform for disputes arise out of online transactions and to link this platform to national ADR systems. *See* Regulation 524/2013, of the European Parliament and of the Council on Online Dispute Resolution for Consumer Disputes, 2013 O.J. (L 165/1) [hereinafter European ODR Regulation]. In February of 2015, the United Kingdom's Civil Justice Council issued a report recommending the adoption of Her Majesty's Online Court ("HMOC") for online dispute resolution. *Online Dispute Resolution for Low Value Civil Claims*, CIV. JUST. COUNCIL 3 (Feb. 2015), http://www.judiciary.gov.uk

fair trial are fundamental rights . . . . Therefore, ADR procedures shall not be designed to replace court procedures and shall not deprive consumers or traders of their rights to seek redress before the courts."[213] When coupled with new mechanisms for collective relief,[214] the European Directives aim to rectify what could be termed a market failure in adjudicatory structures by expanding the number of forums in and the modes of process through which consumers can pursue redress for alleged legal harms.[215] These mechanisms can function not only to resolve disputes but also as gateways to further pursuit in court.

An alternative account is that litigation is itself the problem to be solved—not only because it is costly and adversarial but also because its public, regulatory effects do harm to entrepreneurship, impose costs on consumers and

/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf [http://perma.cc/WT4P-HGML]. The Council anticipated that HMOC would not "fully replace any existing court," but would have "full jurisdiction over some types of disputes," and would be used to administer some processes within complex disputes. *Id.* at 21.

213. CADR 2013 Directive, *supra* note 212, at para. 45.

214. Commission Recommendation (EU) No. 2013/396 of 11 June 2013, on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States, 2013 O.J. (L 201/60) [hereinafter Commission Recommendation on Collective Redress]; *UK Consumer Rights Bill and Private Enforcement of Competition Law*, OLSWANG (Dec. 5, 2014), http://www.olswang.com/articles/2014/12/the-uk-consumer-rights-bill-and-private-enforcement-of-competition-law [http://perma.cc/QLN3-ELHN] [hereinafter *UK Consumer Rights Private Enforcement*]; *see also* Susanne Augenhofer, *Some Questions on Enforcement and Individual Redress—The Example of Regulation (EC) No 261/2004*, EUROPÄISCHE UND INTERNATIONALE DIMENSION DES RECHTS [EUROPEAN AND INTERNATIONAL DIMENSIONS OF LAW]: FESTSCHIRFT FOR DAPHNE ARIANE SIMOTTA 39 (Thomas Garber, Reinhold Geimer & Rolf A. Schütze eds., 2012). Discussion from a U.S. perspective is offered by S.I. Strong, *Regulatory Litigation in the European Union: Does the U.S. Class Action Have a New Analogue?*, 88 NOTRE DAME L. REV. 899 (2012).

215. The concerns prompting the CADR Directive included the view that "most consumers don't take action" to pursue their claims. *See EU Debates Out-of-Court Scheme for Consumer Disputes*, EURACTIV.COM (Apr. 15, 2013), http//www.euractive.com/food/policymakersmull-court-consumer-dispute-system-news-503274 [http://perma.cc/BUP7-P9VS] (quoting the EU Consumer Affairs Commissioner's concern). The Commission Recommendation on Collective Redress explains its goal as enabling more private enforcement of rights, to supplement public and individual methods. Commission Recommendation on Collective Redress, *supra* note 214, at para. 6.

In November of 2014, another Directive sought to expand enforcement of violations of EU competition law by authorizing both direct and indirect purchasers from an infringer to purse "full compensation" and the tolling of limitation periods when a "consensual dispute resolution process" is pursued. *See* Directive 2014/104, of the European Parliament and of the Council on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, 2014 O.J. (L 349/1). A UK Consumer Rights bill to create opt-out collective actions for damages aims to facilitate private enforcement of that body of law. *See UK Consumer Rights Private Enforcement*, *supra* note 214.

employees, and fetter government officials' decision making.[216] These views have gained prominence in the United States, as what was once described as the "old judicial hostility" to arbitration[217] has been replaced by hesitancy about, if not hostility towards, adjudication. The gestalt is captured by the other opening epigraph, coming from a 2015 page of the federal judiciary's website, helping visitors to understand how the "Federal Courts work."[218] There, the judiciary set off one text box to advise disputants "to avoid the expense and delay of having a trial" whenever possible.[219]

In addition to encouraging parties to exit the court system, judges superintend court-based settlement efforts.[220] As their procedures incorporate ADR, the practices of judges come to resemble those of neutrals and arbitrators. Together, that cohort and their work constitute a field (in the sociological sense proposed by Pierre Bourdieu),[221] in which reflexive exchanges normalize the avoidance of the public regulation entailed in adjudication in favor of diffusing disputes to diverse private sites. Control over access by third parties becomes a matter of largesse, rather than right.[222] At the high end of international arbitrations, the overlapping sets of lawyers and arbitrators are developing a

216. As Benjamin Kaplan, the Reporter for the 1960s revisions to the Federal Rules of Civil Procedure, commented in 1989 at a symposium dedicated to the fiftieth Anniversary of the Federal Rules of Civil Procedure, the Rules "have worked to considerable (if not universal) satisfaction to support revolutions of the substantive law. The much-criticized discovery function and class action remain together the scourge of corporate and governmental malefactors." Benjamin Kaplan, *A Toast*, 137 U. PA. L. REV. 1879, 1881 (1989).

217. *See, e.g.*, Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 480 (1989).

218. *Civil Cases*, *supra* note 1.

219. *Id.*

220. *See* FED. R. CIV. P. 16 (1983); FED. R. CIV. P. 16; *supra* notes 192-194 and accompanying text.

221. Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 814, 816 (1987).

222. A parallel, coming from the quasi-criminal context, was the limited access accorded to proceedings conducted by the New York City Transit Authority (NYCTA), which had come to function as a low-level, criminal court. When individuals failed to pay fares, jumped turnstiles, or were otherwise misbehaving in the subway system of New York, the NYCTA issued notices of violations, totaling in one year about 125,000. *See* N.Y. Civil Liberties Union v. N.Y. City Transit Auth., 684 F.3d 286, 290-91 (2d Cir. 2011). Of that number, some 20,000 citations were contested at in-person hearings in which Transit Authority officers (lawyers appointed by the Authority's President and paid per-diem) presided. To attend, a prospective observer had, under Transit Authority rules, to obtain permission from respondent-defendants; each respondent had to agree, twice. *Id.* at 292. The Second Circuit, relying on the "experience and logic" test, see *supra* notes 88-89, concluded that the rule violated the First Amendment's protection of third-party access rights. While bracketing the reach of its ruling to other administrative proceedings, the Second Circuit held that the NYCTA's "'quasi-judicial' administrative hearing" was so like a "criminal trial" that openness was obligatory. *Id.* at 298-303.

community of norms. And for the small-dollar claims of consumers and employees, the repeat player purveyors of arbitration clauses overlap with ADR providers to designate certain organizations as authoritative decision makers. As adjudication becomes repositioned as the product of "unnecessary litigation," the rationales for public funding of courts weaken. Decisions to cut public investments in courts or to close courthouses become more difficult to contest.[223]

Earlier, I offered the phrase Dispute Diffusion to capture this developing normative orientation, aligning and conflating adjudication with its alternatives. Implementation comes through a host of statutes and regulations constituting what I termed Alternative Civil Procedure Rules (ACPR). Unlike the tidiness of the 1938 Federal Rules of Civil Procedure (numbered from 1 to 84) and their counterparts in each state (all of which are produced and disseminated by the governments of the issuing jurisdictions), locating ACPR requires much more effort. One needs to piece together sub-constitutional doctrine, statutes, and government-promulgated rules authorizing outsourcing, link such provisions to often hard-to-find manuals and protocols of hundreds of ADR providers, and learn whether specific arbitration clauses proffered when purchasing goods and services or applying for jobs impose modifications.[224]

The reason to group this array of sources together is to show their common function. Unsurprisingly, the many mini-codes of procedure incorporate some

223. *See* Hazel Genn, *What is Civil Justice For? Reform, ADR, and Access to Justice*, 24 YALE J.L. & HUMAN. 397 (2012). Genn detailed how the UK, once a leader in providing legal aid and administrative tribunal redress, adopted a policy aiming for civil litigants to internalize the costs of litigation (aside from courthouse infrastructure expenses) under a fee-for-service model. In the United States, the Judicial Conference has authorized the closing of several federal courthouses, and its Facilities and Space Committee announced in 2013 that it had reduced the square footage of the courts by three percent. *31 Court Facilities To Be Downsized in First Year of Cost-Cutting Project*, THIRD BRANCH NEWS (Oct. 15, 2013), http://news.uscourts.gov/31-court-facilities-be-downsized-first-year-cost-cutting-project [http://perma.cc/RN4G-95BN].

224. In 2011, the Federal Judicial Center published an overview to provide an "initial report" on ADR practices in the federal district courts. Thanks are due to Donna Stienstra for a series of e-mails, clarifying the rules and resources on alternative dispute resolution in the federal courts. *See* Donna Stienstra, *ADR in the Federal District Courts: An Initial Report*, FED. JUDICIAL CTR. (Nov. 16, 2011), http://www.fjc.gov/public/pdf.nsf/lookup/adr2011.pdf/$file/adr2011.pdf [http://perma.cc/W7F3-XPA9]. In addition, an entity called the Resolution Systems Institute (RSI), supported in part by the private ADR provider JAMS (derived from the acronym for its former name – Judicial, Arbitration, and Mediation Services), has created a database to provide a "state-by-state guide" with search tools to court-based ADR; the guide also includes references to explore federal local rules. *Court ADR Across the U.S.*, RESOLUTION SYS. INST. (2015), http://courtadr.org/court-adr-across-the-us/search.php [http://perma.cc/MA84-ZYYM].

of the methods and values of the Federal Rules. And just as the substantive effects of the 1938 Federal Rules have come to be widely acknowledged,[225] so too must the substantive norms imported into the ACPR be brought into view.

At their inception, the 1938 Federal Rules aimed to ease barriers to the federal courts by shaping trans-substantive, uniform, national provisions that expanded opportunities for obligatory information exchange among the parties and that vested discretion in trial judges, who were empowered to render public decisions based on the claim's merits.[226] In the mid-1960s, rule revisions facilitated the filing of class actions – thereby enabling the entry of schoolchildren, prisoners, consumers, employees, and many others into court.[227] The way was paved by dozens of new federal statutory rights, the creation in 1974 of the Legal Services Corporation, and fee-shifting provisions for civil rights and employment discrimination plaintiffs.[228]

The influx of diverse claimants helped to clarify the political and social consequences of adjudication – the inevitable "substance" of rules of "practice and procedure" – that made plain the stakes of different procedural opportunities.[229] After heated debates about the processes for drafting rules, federal legislation in 1988 imposed new requirements: proposed changes had to go through a period of public notice and comment prior to their approval or modification by layers of committees, reviewing the rules before sending them to the Supreme Court. Further, the time for congressional override after promulgation by the Court was expanded, to run for 180 days.[230] Rule-making hearings became contested exchanges in which self-identified groups affiliated with "plaintiffs" or "defendants" sought to influence decisions on pleadings, discovery, aggregation, and trials.

225. *See generally* ROBERT M. COVER & OWEN M. FISS, THE STRUCTURE OF PROCEDURE (1979).

226. *See, e.g.*, Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1131-63 (1982); Arthur R. Miller, *Simplified Pleading, Meaningful Days in Court, and Trials on the Merits: Reflections on the Deformation of Federal Procedure*, 88 N.Y.U. L. REV. 286 (2013); Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 494-98, 502-15 (1986); David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U. PA. L. REV. 1969, 1972-77 (1989).

227. *See* Theodore Eisenberg & Stephen Yeazell, *The Ordinary and the Extraordinary in Public Law Litigation*, 93 HARV. L. REV. 465 (1980).

228. *See*, *e.g.*, Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (2012); Legal Services Corporations Act of 1974, 42 U.S.C. § 2996 (2012).

229. The Rules Enabling Act instructs that the rules of "practice and procedure" promulgated pursuant to its processes shall not "abridge, enlarge, or modify any substantive right." 28 U.S.C. §§ 2071(a), 2072(b) (2012).

230. *See* 28 U.S.C. §§ 2073-2074. An overview of the debate and the changes is provided in Owen M. Fiss & Judith Resnik, *Making and Reading Rules*, *in* ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE 1162-94 (2003).

The Alternative Civil Procedure Rules now emerging come in part from the public sector; new federal rules incorporating ADR go through the processes outlined above, just as rules for state-based arbitration or other forms of ADR go through those jurisdictions' requirements. Further, state regulations affect some of the rules; for example, California requires arbitration providers to waive fees for indigent claimants using arbitration within that state.[231]

But alternative rules are also produced by private providers, free to specify procedures without public input. The variability in ACPR renders it normatively deregulatory. To the extent that some providers—such as the AAA—solicit input from outsiders and are concerned about limiting expenses of parties, they do so by choice. Thus, the AAA's decisions to convene a task force to produce its 1998 "Consumer Due Process Protocol" imposing fee schedules with caps, to create ethical standards,[232] and to revise its rules and fee schedules are matters of "internal policy."[233] Likewise, the AAA's standards of "Ethical Principles," such as "commitments to diversity" and "information disclosure and dissemination," are choices,[234] and many other ADR providers do not follow these AAA efforts at self-regulation. Further, the manufacturers and services that impose arbitration clauses make a host of choices; according to one review of 188 U.S.-based "social media providers," about forty percent mandated arbitration, and many did not meet the "due process fairness tests" of the

231. *See* CAL. CIV. PROC. CODE § 1284.3 (West 2015).

232. The AAA convened a National Consumer Disputes Advisory Committee in 1997, and the result was a protocol first issued in 1998. *See Consumer Due Process Protocol: Statement of Principles of the National Consumer Disputes Advisory Committee*, AM. ARB. ASS'N (2007), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_005014 [https://perma.cc/T2AQ-NYNE] [hereinafter *AAA Consumer Due Process Protocol*]. A first protocol grew out of a 1995 task force focused on labor and employment law. *See* Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 369, 373-74, 390-401 (2003). JAMS is another provider stating it imposes fairness standards. *See JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Fairness*, JAMS 2 (2009), http://www.jamsadr.com/files/Uploads/Documents/Jams-Rules/Jams_Consumer_Min-Std-2009.pdf [http://perma.cc/5W8F-X9JN].

233. The background of the AAA Advisory Committee on Consumer Disputes, explained *supra* note 232, is also discussed in an amicus brief submitted by the AAA, *see* AAA Green Tree Brief, *supra* note 179, at 3. The AAA commented that it had decided, "as a matter of internal policy," that consumer disputes with an amount in controversy under $10,000 would be processed under the rules of this Protocol "regardless of the rules, terms and conditions reflected in a pre-dispute clause." *Id.* at 4. *See infra* notes 509-514 and accompanying text, discussing changes in 2013 and 2014 to the AAA rules and fees.

234. *AAA Ethical Principles*, *supra* note 28.

AAA.[235] Indeed, identifying terms in arbitration clauses, ADR providers, and learning about their rules and caseloads are research projects in themselves.[236]

In addition to variability, ACPR do not insulate decision makers' independence from parties; rather, ACPR shape an insider system with its own political economy, reliant on a web of confidential interactions inhibiting connections to the body politic. One could—if energetic—search the fifty state websites to make a list of the name of every person appointed or elected to be a judge in state and federal courts. Further, one could review thousands of pages of data on court filings and outcomes and look at individual dockets, many of which are now on electronic filing systems.[237] And one could walk into the thousands of courthouses around the country to read files and to watch judges, when they are on the bench.

But no central registries account for the hundreds of ADR decision makers, the claims filed before them, their rules, fees, or outcomes. The AAA, for example, does not have a list of all the institutions identifying it as the administrator of their arbitrations,[238] and the AAA does not offer a public directory of

235. Michael L. Rustad & Thomas H. Koenig, *Fundamentally Unfair: An Empirical Analysis of Social Media Arbitration Clauses*, 65 CASE W. RES. L. REV. 341 (2014).

236. For example, JAMS, "a leading for-profit provider in the U.S., does not publish data on its arbitration caseload." Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals* 6 (Pepperdine U. Sch. of Law Legal Studies Research Paper Series, Paper No. 2014/29), http://ssrn.com/abstract=2519084 [http://perma.cc/X6TX-H683]. Stipanowich has noted the proliferation of "soft guidelines" through initiatives from providers including the International Bar Association and the International Institute for Conflict Prevention & Resolution. *Id.* at 10-11. Other researchers have offered specific accounts. *See, e.g.*, Erin O'Hara O'Connor & Peter B. Rutledge, *Arbitration, the Law Market, and the Law of Lawyering*, 38 INT'L REV. L. & ECON. 87 (2014). The task is daunting; in 2010, more than 750 ADR systems were available across EU. *See* HODGES, BENÖHR & CRUETZFELDT-BANDA, *supra* note 212, at 389.

237. The information gathered is, nonetheless, far from complete. *See* Yeazell, *supra* note 115. Moreover, procedural reforms, discussed here and by others, are making access to court-based information more difficult. *See generally* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM (Joseph W. Doherty, Robert T. Reville, & Laura Zakaras eds., 2012). Further, when arbitration providers are required to give data, their records may have more information than what is filed in courts, as the CFPB noted when analyzing the outcomes of class actions. *CFPB 2015 Arbitration Study*, *supra* note 17, § 6, at 3.

238. Having a complete account would be difficult in that the AAA may not be aware that it is named in particular contracts as an arbitration administrator; apparently the AAA does not keep an internal list of all the government regulations or major manufacturers and employers that name it to be the administrator of arbitrations. Boyle AAA 2015 Materials 2015, *supra* note 25. Other analyses have identified some of the institutions and businesses empowering the AAA. For example, the *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 34-35, concluded that the AAA was listed in 83 percent of the credit card arbitration clauses reviewed and in 86 percent of the mobile wireless arbitration clauses reviewed.

its own arbitrators.[239] Instead, confidentiality is one of the AAA's Ethical Principles, committing the organization to keeping information about proceedings private.[240] Watching the work is also not an option. The major providers advertise confidentiality as a signature of their processes; the hearings are generally closed, and the rules permit arbitrators to bar third parties from attending hearings.[241] While many arbitration clauses are "silent on confidentiality,"[242] some oblige participants to keep information and outcomes private.[243]

239. *See* Boyle AAA 2015 Materials, *supra* note 25. Public access to information about AAA arbitrators is available when seeking to select arbitrators. *See Arbitrator and Mediator Selection*, AM. ARB. ASS'N (2015), https://www.adr.org/aaa/faces/arbitratorsmediators/arbitratormediatorselection [https://perma.cc/6EBT-3JVJ]; *Introducing AAA Arbitrator Select*, AM. ARB. ASS'N (2015), https://www.adr.org/aaa/ShowPDF%3Fdoc%3DADRSTG_016003 [https://perma.cc/WFS8-6YBK] (click on "Arbitrator Select" link to download the pdf, *Introducing AAA Arbitrator Select*). A party choosing the "list only" service fills out a two-page form in which the party can indicate the dollar amounts of the claim and counterclaim if any; the nature of the dispute; the "reason for choosing AAA arbitrator select"; and the "desired qualifications for arbitrator(s)." *Introducing AAA Arbitrator Select*, AM. ARB. ASS'N, *supra*, at 4-5. The AAA then provides lists of sets of arbitrators and their fees (ranging from $750, $1,500, or $2,000). *Id.* at 3. Searching and selection comes with a service charge of $500 for each arbitrator appointed. *Id.* In addition, state laws seeking information on arbitration providers offer another route to information. Those entities in compliance provide spreadsheets on which the names of arbitrators can be found. *See*, *e.g.*, *AAA Data, July 2009-June 2014, Provider Organization Report*, *supra* note 25.

240. *AAA Ethical Principles*, *supra* note 28.

241. *See, e.g.*, *Consumer Due Process Protocol*, *supra* note 232, Principle 12(2); *JAMS Comprehensive Arbitration Rules & Procedures*, JAMS (July 1, 2014), http://www.jamsadr.com/rules-comprehensive-arbitration/#Rule%2026 [http://perma.cc/45KY-C2PZ] (limiting public access to proceedings before the Judicial Arbitration and Management Services); *Rules of Conditionally Binding Arbitration*, BETTER BUS. BUREAU, http://www.bbb.org/council/programs-services/dispute-handling-and-resolution/dispute-resolution-rules-and-brochures/rules-of-conditionally-binding-arbitration#ConfidentialityofRecords [http://perma.cc/S386-Z69L] ("It is our policy that records of the dispute resolution process are private and confidential."). *But see* Pokorny v. Quixtar, Inc., 601 F.3d 987, 996-1002 (9th Cir. 2010) (finding unenforceable ADR provisions, including those requiring confidentiality, where they created one-sided advantages).

Arbitrators working under the AAA also adhere to its code of ethics, which states that the "arbitrator should keep confidential all matters relating to the arbitration proceedings and decision." *The Code of Ethics for Arbitrators in Commercial Disputes*, AM. ARB. ASS'N 7 (Mar. 1, 2004), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_003867 [https://perma.cc/24B4-LVNX].

242. *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 51-52. In six product markets, the study reported that in checking accounts, about twenty-eight percent of the market had confidentiality clauses while none existed in wireless providers' clauses. *Id.* tbl.10, 52-53.

243. Challenges to the legality of such clauses is discussed *infra* notes 453-454 and accompanying text. The AAA takes "no position on whether parties should or should not agree to keep the

Aggregate data and individual filings are also not made publicly accessible, except as required under federal or state law. For example, the AAA complies with state mandates requiring posting of data, but takes down that information when the obligation to post (generally for five-year periods) expires.[244] Some redacted employment awards are also made available.[245] Researchers seeking to capture trends need to obtain special access to ADR providers' files or archive data before those materials disappear from the Internet.

Complainants and their lawyers have parallel challenges. One consumer cannot know from arbitration dockets whether another won or lost based on identical allegations of overcharges or product defects, just as one employee cannot generally know if another succeeded on discrimination or on other claims of rights. Individual decisions come into the public purview through limited routes, such as when awards are contested; the rulings of arbitrators are generally enforceable in, albeit not directly reviewable by, courts.[246] As the AAA explained to the United States Supreme Court, which agreed with the argument against the appellate review called for in an arbitration clause, "finality"—translated as limited court oversight—is intended to produce economy.[247] Thus, the Court chose to close off judicial reconsideration even when the parties had sought court review of the lawfulness of the outcome of arbitration.[248]

III. LOCATING THE PRIVATE AND THE PUBLIC IN ARBITRATION

Contract, not coercion, was the centerpiece of arbitration in much of the nineteenth and twentieth centuries. The obligations to participate and to

proceeding and award confidential between themselves." *AAA Ethical Principles*, *supra* note 28.

244. Boyle AAA 2015 Materials, *supra* note 25; *infra* notes 464-466 and accompanying text. LexisNexis, as well as Westlaw, also offers some capacity for searching arbitral awards. *See, e.g.*, Lexis Advance (typing "AAA Employment Arbitration Awards and AAA Labor Arbitration Awards" to access those collections). *See also Consumer Arbitration Rules*, AM. ARB. ASS'N, Rule 4-43(c) (Sept. 1, 2014), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTAGE2021425& [https://perma.cc/3LZB-UGDP] [hereinafter *AAA 2014 Consumer Arbitration Rules*] ("The AAA may choose to publish an award rendered under these Rules; however, the names of the parties and witnesses will be removed from awards that are published, unless a party agrees in writing to have its name included in the award.").

245. *CFPB 2015 Arbitration Study*, *supra* note 17, § 4, at 22.

246. *See* Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 582-84 (2008). The limited grounds for review under the FAA are discussed *infra* Part IV.E.

247. *See* Brief for the Am. Arbitration Ass'n as Amicus Curiae in Support of Affirmance at 3, *Hall St.*, 552 U.S. 576 (No. 06-989), 2007 WL 2707884 [hereinafter AAA Hall Street Brief].

248. *See Hall St.*, 552 U.S. at 580-81; *see also infra* notes 545-556 (discussing *Hall Street*).

comply flowed from shared decisions to eschew the public arena. Negotiating parties could design their own idiosyncratic procedures, select their decision makers, and stipulate remedies to suit their preferences. Arbitrators in turn derived their power from and owed their loyalties to the parties' intent, rather than governing law. The "ability to tailor processes to fit particular circumstances and needs"[249] invited autonomous self-fashioning. Arbitration was seen to promote economic growth[250] and, as Michael Helfand discusses in this volume, the welfare and well-being of sub-communities.[251]

Arbitrations were also private in two other senses of that word. First, during the nineteenth century, parties who decided to arbitrate could not turn to the public system to enforce that obligation.[252] Rather, as a matter of "public" (the word chosen) policy, courts jealously guarded their monopoly on enforcing obligations[253] and declined to enforce agreements to arbitrate.[254] Second, the parties controlled the places in which arbitrations took place and could choose private venues, to which strangers had no right of entry.[255]

249. Stipanowich, *supra* note 236, at 9.

250. One history of contract links its development in the West to the rise of humanism and individualism. *See* URIEL PROCACCIA, RUSSIAN CULTURE, PROPERTY RIGHTS, AND THE MARKET ECONOMY 32-49, 61-80 (2007).

251. Michael A. Helfand, Feature, *Arbitration's Counter-Narrative: The Religious Arbitration Paradigm*, 124 YALE L.J. 2994 (2015).

252. Recent research on English and colonial practice requires reassessing the view of the role played by the judiciary in enforcing arbitration agreements in earlier centuries. Under a 1698 statute, the British Parliament created a mechanism for parties to obtain referrals to arbitration and for the court to enforce awards through contempt powers. This approach was adopted in more than twenty American jurisdictions, including both before and after colonies became states. James Oldham & Su Jin Kim, *Arbitration in America: The Early History*, 31 LAW & HIST. REV. 241, 246-51 (2013).

253. H.R. REP. NO. 68-96, at 1-2 (1924); *see also* Amalia Kessler, *Deciding Against Conciliation: The Nineteenth Century Rejection of a European Transplant and the Rise of a Distinctively American Ideal of Adversarial Adjudication*, 10 THEORETICAL INQUIRIES L. 423 (2009).

254. *See* IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 15-22 (1992).

255. Knowing the frequency with which arbitrations were open to third parties is difficult. Historians have identified examples of eighteenth and nineteenth century arbitrations that were conducted like trials, albeit without juries, and many such proceedings included spectators. *See* AMALIA D. KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877 (forthcoming) (on file with author); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 N.Y.U. L. REV. 443, 468 (1984). Moreover, a rich history of English arbitrations from pre-Roman Britannia through the Elizabethan Age documents the mélange of public and private that endowed third-party arbitrators with authority to resolve disputes and that included public access to many of the proceedings. *See* DEREK ROEBUCK, EARLY ENGLISH ARBITRA-

These facets of the private in arbitration have kept arbitration off-screen. While the public function of courts has produced many iconic images denoting the authority of the state, visual representations of accords to arbitrate are hard to come by. An exception is an engraving (Figure 4) by Bernard Picart.[256] As the French text explains at the bottom, two kings are depicted "swearing an alliance" confirmed by their handshake. The Renaissance Virtues of Justice and Peace embrace in the background; the eye of Providence looks down from above, and War, Ambition, Discord, Fraud, and Impiety are enchained below.

TION (2008); DEREK ROEBUCK, THE GOLDEN AGE OF ARBITRATION: DISPUTE RESOLUTION UNDER ELIZBETH I (2015). My thanks to John Langbein for suggesting this resource.

By the time of the enactment of the federal legislation on arbitration in 1925, arbitrations were styled as closed processes, and since its founding in 1926, the AAA has described privacy as a central feature of arbitrations. *See* FRANCES KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS AND ACHIEVEMENTS (1948). Thus, in contemporary discussions, arbitration is often celebrated for offering the confidentiality that courts do not. *See, e.g.*, Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 525 (3d Cir. 2013) (Roth, J., dissenting); *infra* notes 564-571, 654-668 and accompanying text.

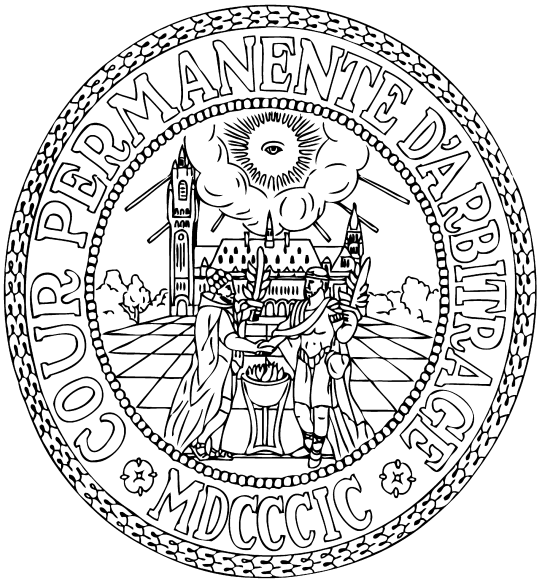
256. Thanks to Michael Widener and Arthur Eyffinger for information on Picart and related imagery. Picart, who lived from 1673 to 1733, was known for his depictions of religious ceremonies and customs of diverse peoples. *See* Ilja M. Veldman, *Familiar Customs and Exotic Rituals: Picart's Illustrations for* Cérémonies et coutumes religieuses de tous les peuples, 33 SIMIOLUS: NETH. Q. HIST. ART 94 (2008).

Figure 4.
TRAITEZ DE PAIX, BERNARD PICART, 1826



Frontispiece, Jean Dumont, Corps universel diplomatique du droit des gens. *Courtesy of Lillian Goldman Law Library, Yale Law School.*

Figure 5.
ORIGINAL LOGO OF THE PERMANENT COURT OF ARBITRATION



© *Courtesy of the Permanent Court of Arbitration.*

The Picart depiction was the frontispiece to a 1726 compilation of political treaties and commercial alliances (*Corps universel diplomatique du droit des gens* by Jean Dumont).[257] Its special resonance for arbitration comes from its use as the template for the first logo (see Figure 5) of the Permanent Court of Arbitration (PCA),[258] whose founding conferences provided "invaluable lessons" for those designing arbitrations in the United States.[259] The PCA has been housed since 1913 in the Peace Palace, which itself is an icon of volition because it has sheltered a series of international dispute resolution organizations to which no

257. *See* JEAN DUMONT, BARON DE CARLSCROON, CORPS UNIVERSEL DIPLOMATIQUE DU DROIT DES GENS: CONTENANT UN RECUEIL DES TRAITES D'ALLIANCE, DE PAIX, DE TREVE, DE NEUTRALITE, DE COMMERCE, D'ECHANGE (1726).

258. All rights to the former logo of the Permanent Court of Arbitration, shown in Figure 5, are held by the PCA; the image is reproduced with permission of the PCA and the assistance of its staff. In 2007, the logo was updated. The design remained but with fewer lines and without the "eye of providence" as a backdrop. *See* JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN STATES AND DEMOCRATIC COURTROOMS 284 fig.184 (2011).

259. KELLOR, *supra* note 255, at 9.

one can be "bidden."[260] Both the PCA and the International Court of Justice (ICJ), also housed at the Peace Palace and opening its courtroom in 1946 as the successor institution to the Permanent Court of International Justice, depend on parties' consent to their jurisdiction and lack direct coercive mechanisms to enforce their decisions.[261] Voluntarism thus sits at the center of arbitration.

A. The Paradigm of Merchants, Contracts, and Consent

The merchants and lawyers who forged the public law of arbitration in the United States sought federal legislation to enforce consensual agreements. A committee of the American Bar Association (ABA) drafted language for what became the 1925 United States Arbitration Act (USAA).[262] Joined by more than 120 organizations under the leadership of the Chamber of Commerce, the ABA pressed for enactment.[263]

260. RESNIK & CURTIS, *supra* note 258, at 255 (quoting Edward W. Bok, *Introduction* to ANTONIO SANCHEZ DE BUSTAMANTE, THE WORLD COURT, at xii (Elizabeth F. Read, trans., 1998) (1925)).

261. The PCA publicly reported fifty-four "cases conducted" under its auspices during its first one hundred years. *Annual Reports: 108th Annual Report—2008: Annex 2*, PERMANENT CT. ARB. 43-48 (2008), http://www.pca-cpa.org/showpage.asp?pag_id=1069 [http://perma.cc/ZZA6-7SJZ]. The ICJ has received some 160 cases over the decades of its operation. *See List of All Cases*, INT'L CT. JUST., http://www.icj-cij.org/docket/index.php?p1=3&p2=2 [http://perma.cc/P4UD-HBAT]. Analyses of the history of the international tribunals houses at the Peace Palace, as well as of the filings and decisions, can be found in RESNIK & CURTIS, *supra* note 258, at 247-64.

Under PCA rules, public information is generally provided only if parties consent; legal obligations may also require some disclosures. *See Rules of Procedure: PCA Arbitration Rules 2012*, PERM. CT. ARB. 18 (Dec. 17, 2012), http://www.pca-cpa.org/showpage.asp?pag_id=1188 [http://perma.cc/8D5U-DEQL]. That practice may change as the UNCITRAL Rules and Convention on Transparency begin to have broader influence. *See UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, UNCITRAL (Jan. 2014), http://www.uncitral.org/pdf/english/texts/arbitration/rules-on-transparency/Rules-on-Transparency-E.pdf [http://perma.cc/ZK2A-UXNU] [hereinafter UNCITRAL Transparency Rules]. The U.N. General Assembly recommended the use of these rules in all investment disputes. *See* G.A. Res. 68/109, ¶ 3, U.N. Doc. A/RES/68/109 (Dec. 16, 2013). Enforcement of rulings may come through national judiciaries. *See* Deyan Draguiev, *State Responsibility for Non-Enforcement of Arbitral Awards*, 8 WORLD ARB. & MEDIATION REV. 577 (2014).

262. United States Arbitration Act, Pub. L. No. 68-401, 43 Stat. 883 (1925). The act was repealed in 1947, when it was reenacted with minor editorial revisions and codified at 9 U.S.C. §§ 1-14 (2012). Federal Arbitration Act, ch. 392, Pub. L. No. 80-282, 61 Stat. 669 (1947). Details of those lobbying, drafting, and promoting the legislation can be found in IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013).

263. Focused efforts by New York State's Chamber of Commerce and its Bar Association's Committee on the Prevention of Unnecessary Litigation helped to move reforms in that state to the national stage. *Id.* at 56-70. *See also* AAA Prima Paint Brief, *supra* note 179, at *10

The 1925 statute mandated that a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce" was "valid, irrevocable, and enforceable," subject to "such grounds as exist at law or in equity for the revocation of any contract."[264] The statute expressly exempted "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[265] Those workers were among the few employees whom Congress could clearly regulate under its Commerce Clause authority, as understood in the 1920s.[266] Furthermore, at the time, the federal courts did not have their own civil procedural rules. While the federal judiciary then had the power, under the doctrine of *Swift v. Tyson*, to shape general federal common law,[267] federal judges conformed most of their procedures to the rules of the states in which they sat.

The question of the constitutionality of the Arbitration Act reached the Supreme Court in 1932; the Court upheld the statute on the grounds that Congress had the authority to create such a remedy pursuant to its power under Article III to regulate admiralty jurisdiction.[268] Two years later, Congress enacted the Rules Enabling Act, authorizing the federal courts to create national procedural rules, which were promulgated by the Supreme Court in 1938.

n.5 & app'x (describing the "partial list of 122 organizations which sponsored the Federal Arbitration Law," and including those organizations in an appendix); AAA Marine Transit Brief, *supra* note 147, at *5 ("Since the adoption of the first of the modern statutes in New York, in 1920, the use of arbitration has enjoyed a tremendous growth, and it has been adopted as a system for the settlement of disputes by a great number of trade associations and chambers of commerce, many of which have been assisted and advised in the installation of such systems by your petitioners. The construction and application of the United States Act is of special importance, both for the effect which it may have upon the construction and application of state acts with similar principles and provisions, and because it is the statute to which reference will usually be made when the arbitrations involve controversies between citizens of different states.").

264. United States Arbitration Act, ch. 213, § 2, 43 Stat. 883 (1925) (current version at 9 U.S.C. § 2 (2012)).

265. *Id.* § 1. Despite protests by some judges (invoking the federal Jones Act and other protections specifically for seamen), lower courts have relied on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the expansion of FAA law to apply mandated arbitration clauses to foreign nationals who are seamen. *See, e.g.*, Lindo v. NCL (Bahamas), Ltd., 652 F.3d 1257 (11th Cir. 2011); Rogers v. Royal Caribbean Cruise Line, 547 F.3d 1148 (9th Cir. 2008).

266. This point, in the context of that era's Commerce Clause jurisprudence, is discussed in the dissents in *Circuit City, Inc. v. St. Clair Adams*, 532 U.S. 105 (2001). *See id.* at 124-25 (Stevens, J., dissenting); *id.* at 133-34 (Souter, J., dissenting).

267. 41 U.S. 1 (1842).

268. *See* Marine Transit Corp. v. Dreyfus, 284 U.S. 263 (1932).

As Amalia Kessler details in this volume, once in place, the U.S. Arbitration Act (reenacted and renamed the Federal Arbitration Act (FAA) in 1947) was promoted and nurtured by the American Arbitration Association, itself incorporated in 1926 to support this system of "self-regulation."[269] The mandate of the FAA made the promise to arbitrate a matter of public law, but many other aspects of arbitration remained in the private realm. The system was privately financed by contracting parties[270] and, because arbitrators were not to provide "information or publicity" about what transpired (unless parties directed otherwise),[271] participants controlled access to knowledge about arbitration's use and could screen it from public view.

Yet Congress also authorized parties to come to federal courts to enforce or vacate arbitration awards.[272] When conflicts about either obligations to arbitrate or the outcomes are filed in court, the public gains access to information. As a consequence, litigated conflicts over the scope of the FAA are a treasure trove of insights (albeit not a random sample) into the changing terms and conditions under which arbitrations take place.

Until the 1980s, the Supreme Court put consent at the fore and read the statute as neither preclusive of other federal regulatory goals nor operative when parties had significantly different bargaining powers. The oft-cited exemplar is the unanimous 1953 decision of *Wilko v. Swan*, which involved a customer's allegations that a brokerage firm violated 1933 federal securities laws by making misrepresentations about the valuation of a stock.[273] The question was whether terms in an agreement calling for the settlement of controversies by arbitration were enforceable.[274]

Justice Reed, writing for the Court, did not rule out the FAA's application to statutes,[275] but his opinion raised two problems: the asymmetry in parties' bargaining capacity and the limits of the arbitration process. Even if some buyers and sellers "deal[t] at arm's length on equal terms," Justice Reed wrote, the federal securities laws were "drafted with an eye to the disadvantages under

269. *See* Kessler, *supra* note 145, at 2986 (quoting KELLOR, *supra* note 255, at 27). In 1947, Congress repealed the United States Arbitration Act and enacted a revised version, entitled the Federal Arbitration Act. See Federal Arbitration Act, Pub. L. No. 80-282, 61 Stat. 669 (1947).

270. KELLOR, *supra* note 255, at 40-41.

271. *Id.* at 242.

272. 9 U.S.C. § 16(a)(1) (2012).

273. 346 U.S. 427, 428-29 (1953).

274. *Id.* at 429-31.

275. *Id.* at 433-34.

which buyers labor."[276] Moreover, the process of arbitration departed significantly from the rights provided in courts.[277] Arbitrators' awards "may be made without explanation of their reasons and without a complete record of their proceedings"—leaving one unable to examine "arbitrators' conception of the legal meaning of such statutory requirements as 'burden of proof,' 'reasonable care' or 'material fact.'"[278] In contrast, public decision making by judges, subject to appellate review, ensured compliance with congressional regulations protecting purchasers of stock.[279] Thus, if one party objected, the arbitration clause was not to be enforced.[280]

B. From Waffles to Cheerios: Employees, Consumers, and Obligations To Arbitrate

In the 1980s, the Supreme Court revisited its prior readings of the FAA. Rejecting the *Wilko* Court's concern that arbitration was a "method of weakening the protections afforded in the substantive law to would-be complainants,"[281] the Court reread congressional statutes to require that persons having signed an "agreement to arbitrate" be required to do so.[282] In a series of decisions, the Court concluded that enforcement was required unless objectors could meet their burden of demonstrating that a "contrary congressional command" altered the obligation to arbitrate,[283] that an "inherent conflict" existed between the relevant statutory right and arbitration,[284] or that

276. *Id.* at 435.

277. *Id.* at 433-38.

278. *Id.* at 436.

279. Justice Jackson concurred, and Justice Frankfurter, joined by Justice Minton, dissented. They argued that no evidence had been presented that "the arbitral system as practiced in the City of New York" would not afford the rights to which the purchaser was entitled, as contrasted with the "tortuous course of litigation, especially in the City of New York." *Id.* at 439-40 (Frankfurter, J., dissenting).

280. *Id.* at 438 (majority opinion).

281. Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 481 (1989).

282. *Id.* at 479; *see also* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 238, 242 (1987) (holding that § 10(b)(5) claims under the 1934 Securities Exchange Act and claims under RICO were arbitrable); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 640 (1985) (enforcing obligations to arbitrate antitrust claims); Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 223-24 (1985) (enforcing obligations to arbitrate claims brought under the 1934 Securities Exchange Act and related state law claims).

283. *See Shearson/Am. Express v. McMahon*, 482 U.S. at 226-27 ("The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue.").

284. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S 20, 26 (1991).

the alternative dispute program was inadequate to "vindicate" statutory rights.[285]

Further, in 1984, in a key decision opening new arenas for the relocation of claims from courts to arbitration, the Supreme Court held—over several objections—that the FAA applied to state courts. The decision in *Southland Corp. v. Keating*[286] was written by Chief Justice Burger, who was, as noted, an ardent proponent of ADR but who was also known for supporting state autonomy from federal constitutional mandates.[287] Breaking ranks with fellow federalists Justices O'Connor and Rehnquist, Chief Justice Burger held that the FAA preempted California's Franchise Investment Law, which called for "judicial consideration of claims" brought under its aegis.[288] Justice Stevens (who dissented in all the cases expanding the FAA's reach from contract to statutory rights[289]) disagreed about the displacement of state authority.[290] Justices O'Connor and Rehnquist argued that the FAA was based on Congress's Article III powers, that the FAA's text mentioned federal district courts specifically, and that it created a federal procedural remedy that had no application to state courts.[291] "Today's decision is unfaithful to congressional intent, unnecessary, and . . . inexplicable."[292]

285. *Id.* at 28 ("[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." (quoting *Mitsubishi Motors*, 473 U.S. at 637)).

286. 465 U.S. 1 (1984).

287. For example, Chief Justice Burger pressed the National Center for State Courts to create programs to help state attorneys general improve their arguments before the United States Supreme Court. *See* Judith Resnik & Lane Dilg, *Responding to a Democratic Deficit: Limiting the Powers and the Term of the Chief Justice of the United States*, 154 U. PA. L. REV. 1575, 1601-04 (2006).

288. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

289. *See, e.g.*, *Gilmer*, 500 U.S. at 36 (Stevens, J., dissenting); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part and dissenting in part); *Mitsubishi Motors*, 473 U.S. at 640 (Stevens, J., dissenting).

290. *Southland Corp.*, 465 U.S. at 18, 21 (Stevens, J., concurring in part and dissenting in part).

291. *Id.* at 22-36 (O'Connor, J., dissenting) (calling the Court's application, *id.* at 35, of the FAA a "newly discovered federal right"). This dissent also noted that Sections 3 and 4, implementing the FAA, expressly and only referenced the "United States district court[s]." *Id.* at 29. The FAA continues to be construed not to provide an independent source of federal jurisdiction but as governing cases otherwise properly before the federal courts. The test of when federal jurisdiction exists in cases seeking to enforce arbitration agreements under the FAA is not, however, straightforward. *See, e.g.*, Vaden v. Discover Bank, 556 U.S. 49 (2009).

A decade thereafter, Justice Scalia agreed, stating he stood "ready to join four other Justices in overruling" *Southland*. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265, 285 (1995) (Scalia, J., dissenting). Justice Thomas, joined by Justice Scalia, also dissented to argue that *Southland* ought to be overturned. *Id.* at 288, 291 (Thomas, J., dissenting) ("The

The expansion of the FAA to consumers and to state courts was followed by the Court's rulings on employment contracts—confirming the "demise of the non-arbitrability doctrine."[293] In 1991, over the objections of a financial services manager bringing a claim under the Age Discrimination in Employment Act,[294] the Court explained that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context."[295] In 2001, the Court dealt squarely with the question of the FAA's application to employees. *Circuit City Stores, Inc. v. Adams* held that, aside from seamen and railroad workers (expressly exempted by the statute), employees could—through job application forms or other documents—waive rights to bring state and federal anti-discrimination as well as common law claims in courts.[296]

The impact of the changing interpretation of the FAA can be seen in Figure 6, the "Application for Employment" that Waffle House ("America's Place to Work, America's Place to Eat") required prospective employees to sign. The document comes from the record in *EEOC v. Waffle House, Inc.*, decided by the U.S. Supreme Court in 2002.[297] From the hand-marked portion of the document, we learn that the applicant, Eric Scott Baker, told the company that he could start work in two weeks, that he had a high school diploma, and that he drove a 1985 Buick Skyhawk.

FAA treats arbitration simply as one means of resolving disputes that lie within the jurisdiction of the federal courts.").

292. *Southland Corp.*, 465 U.S. at 36 (O'Connor, J., dissenting) (joined by Rehnquist, J.).

293. Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103, 1113 (2011). As Drahozal and Rutledge map, the Court's expansion of the FAA overlapped with expanded enforcement of forum selection clauses. *See, e.g.*, Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991); *see also* Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum Selection and Arbitration Clauses*, 66 HASTINGS L.J. 719 (2015).

294. *Gilmer*, 500 U.S. 20.

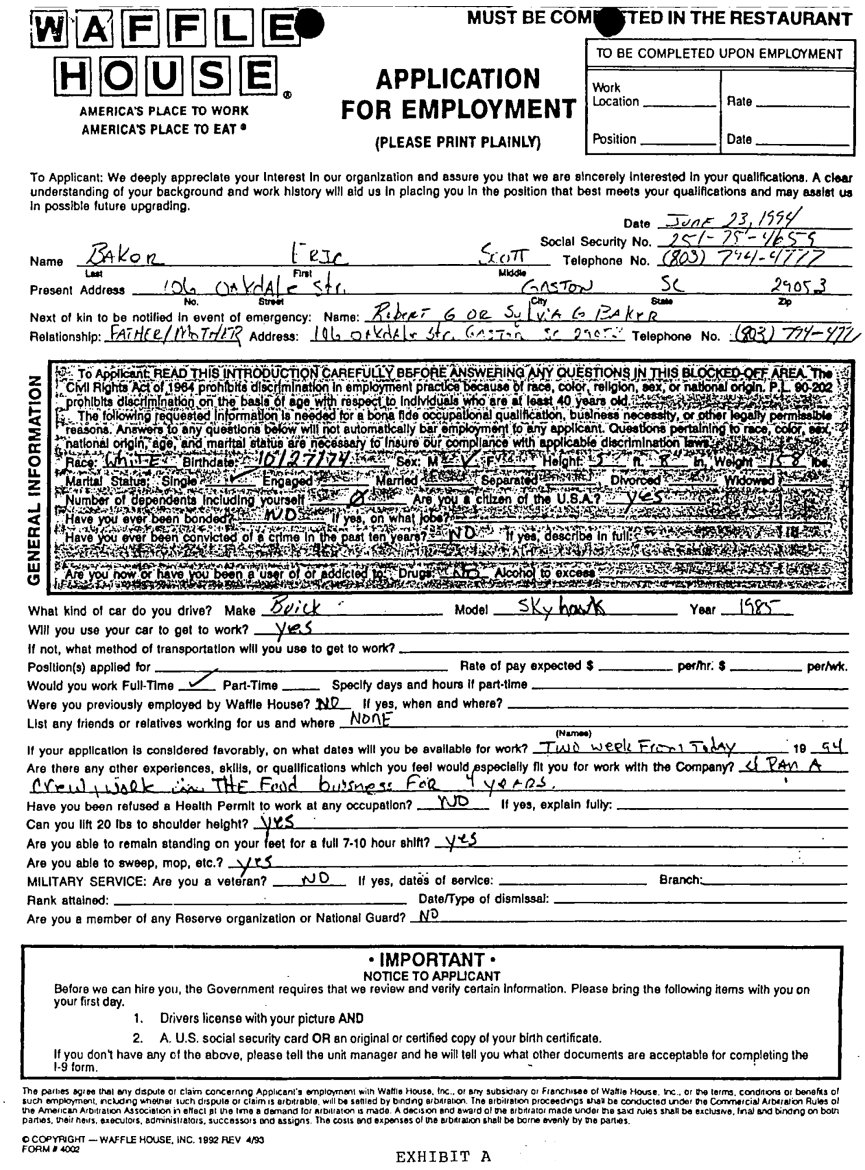
295. *Id.* at 33.

296. 532 U.S. 105 (2001). On remand, the Ninth Circuit concluded that, under California law, the contract was not enforceable because it was a contract of adhesion. Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 893 (9th Cir. 2002).

297. Joint Appendix, EEOC v. Waffle House, 534 U.S. 279 (2002) (No. 99-1823), 2001 WL 34093975, at *59, *61.

Figure 6.[298]

WAFFLE HOUSE EMPLOYMENT APPLICATION



WAFFLE HOUSE®
AMERICA'S PLACE TO WORK
AMERICA'S PLACE TO EAT®

MUST BE COMPLETED IN THE RESTAURANT

APPLICATION FOR EMPLOYMENT
(PLEASE PRINT PLAINLY)

TO BE COMPLETED UPON EMPLOYMENT
Work Location _____ Rate _____
Position _____ Date _____

To Applicant: We deeply appreciate your interest in our organization and assure you that we are sincerely interested in your qualifications. A clear understanding of your background and work history will aid us in placing you in the position that best meets your qualifications and may assist us in possible future upgrading.

Date JUNE 23, 1994
Name BAKER (Last) ERIC (First) SCOTT (Middle) Social Security No. 251-75-4659 Telephone No. (803) 794-4777
Present Address 106 OAKDALE (No.) STR. (Street) GASTON (City) SC (State) 29053 (Zip)
Next of kin to be notified in event of emergency: Name: ROBERT G OR SYLVIA G BAKER
Relationship: FATHER/MOTHER Address: 106 OAKDALE STR. GASTON SC 29053 Telephone No. (803) 794-4772

GENERAL INFORMATION

To Applicant: READ THIS INTRODUCTION CAREFULLY BEFORE ANSWERING ANY QUESTIONS IN THIS BLOCKED-OFF AREA. The Civil Rights Act of 1964 prohibits discrimination in employment practice because of race, color, religion, sex, or national origin. P.L. 90-202 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years old. The following requested information is needed for a bona fide occupational qualification, business necessity, or other legally permissible reasons. Answers to any questions below will not automatically bar employment to any applicant. Questions pertaining to race, color, sex, national origin, age, and marital status are necessary to insure our compliance with applicable discrimination laws.

Race: WHITE Birthdate: 10/27/74 Sex: M ✓ F Height: 5 ft. 8 in. Weight 158 lbs.
Marital Status: Single ✓ Engaged Married Separated Divorced Widowed
Number of dependents including yourself 0 Are you a citizen of the U.S.A.? YES
Have you ever been bonded? NO If yes, on what jobs?
Have you ever been convicted of a crime in the past ten years? NO If yes, describe in full:
Are you now or have you been a user of or addicted to: Drugs: NO Alcohol to excess

What kind of car do you drive? Make Buick Model SKYHAWK Year 1985
Will you use your car to get to work? YES
If not, what method of transportation will you use to get to work?
Position(s) applied for Rate of pay expected $ per/hr. $ per/wk.
Would you work Full-Time ✓ Part-Time Specify days and hours if part-time
Were you previously employed by Waffle House? NO If yes, when and where?
List any friends or relatives working for us and where NONE
If your application is considered favorably, on what dates will you be available for work? (Names) TWO WEEK FROM TODAY 19 94
Are there any other experiences, skills, or qualifications which you feel would especially fit you for work with the Company? I PAN A CREW I WORK IN THE FOOD BUSINESS FOR 4 YEARS.
Have you been refused a Health Permit to work at any occupation? NO If yes, explain fully:
Can you lift 20 lbs to shoulder height? YES
Are you able to remain standing on your feet for a full 7-10 hour shift? YES
Are you able to sweep, mop, etc.? YES
MILITARY SERVICE: Are you a veteran? NO If yes, dates of service: Branch:
Rank attained: Date/Type of dismissal:
Are you a member of any Reserve organization or National Guard? NO

• IMPORTANT •
NOTICE TO APPLICANT
Before we can hire you, the Government requires that we review and verify certain information. Please bring the following items with you on your first day.
1. Drivers license with your picture AND
2. A. U.S. social security card OR an original or certified copy of your birth certificate.
If you don't have any of the above, please tell the unit manager and he will tell you what other documents are acceptable for completing the I-9 form.

The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.

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FORM # 4002

EXHIBIT A

298. *Id.*

Name and Occupation	Address	Phone Number
Keith Gunter	P.O. Box 201 Gastonia SC 29053	791-1601
Dennis Adams	104 Oakdale Str Gastonia SC 29053	936-0777
NETA Bridges	PO Box 1416 Gastonia SC 29053	796-1960

RECORD OF EDUCATION

School	Name and Address of School	Dates Attendance Mo./Year	Course of Study	Circle Last Year Completed	Did You Graduate?	GPA	List Diploma or Degree
High	Suncrest High School	90 - 94	Business	1 2 3 (4)	☒ Yes ☐ No		Diploma
College				1 2 3 4	☐ Yes ☐ No		
Other (Specify)				1 2 3 4	☐ Yes ☐ No		

WORK EXPERIENCE (List below last three employers, starting with last one first)

	NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
I	Little Caesars	2	94	-	-	P.I.C. Run crew; handle money (cash in & out) mop, trash, etc.	4.25	5.50	Still employed.	Patti
	Restaurant	REFERENCE CHECKED BY:								PHONE# 791-1701
II	NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
	Winn-Dixie	6	93	7	94	Deli. Assistant Run OPEN, mop floor, etc.	4.35	4.35	School.	Everette
		REFERENCE CHECKED BY:								PHONE# -
III	NAME AND ADDRESS OF COMPANY AND TYPE OF BUSINESS	FROM MO.	FROM YR.	TO MO.	TO YR.	DESCRIBE IN DETAIL THE WORK YOU DID	STARTING HOURLY RATE	LAST HOURLY RATE	REASON FOR LEAVING	NAME OF SUPERVISOR
	Bi-Lo	12	92	5	93	Bagger. Stocker	4.25	4.35	Manager. Medical condition.	Ed Whidbee
	[illegible]	REFERENCE CHECKED BY:								PHONE#

NOTICE TO EMPLOYEES

Failure to be truthful on the application may affect the applicant's subsequent ability to receive workers' compensation benefits.

The facts set forth above in my application for employment are true and complete. I understand that if employed, false statements or omission of facts called for on this application shall be considered sufficient cause for dismissal. You are hereby authorized to make any investigation of my personal history and financial credit record through any investigative or credit agencies or bureaus of your choice. I further understand that I am an "Employee at Will" and that Waffle House, Inc. does not guarantee my employment for any specific period of time.

In making this application for employment I also understand that an investigative consumer report may be made whereby information is obtained through personal interviews with my neighbors, friends, or others with whom I am acquainted. This inquiry includes information as to my character, general reputation, personal characteristics, and mode of living. I understand that I have the right to make a written request within a reasonable period of time to receive additional, detailed information about the nature and scope of this investigative consumer report.

I FULLY UNDERSTAND THAT IF ASSIGNED TO ANY POSITION WHEREBY MONIES, EQUIPMENT, OR OTHER SUPPLIES OF WAFFLE HOUSE, INC. ARE ASSIGNED TO ME, I SHALL BE ACCOUNTABLE FOR THE AFORESAID ITEMS AND LIABLE FOR ANY SHORTAGES IN SAME. I AGREE THAT WAFFLE HOUSE, INC. MAY DEDUCT FROM ANY MONIES DUE ME, AN AMOUNT TO COVER ANY SHORTAGES WHICH MAY OCCUR AND WILL INDEMNIFY WAFFLE HOUSE, INC. AGAINST ANY LEGAL LIABILITY FOR WITHHOLDING SAID SHORTAGES FROM MONIES DUE ME AS A RESULT OF MY EMPLOYMENT WITH WAFFLE HOUSE. IF THERE ARE ANY SHORTAGES OR LOSSES IN MONEY, FOOD, OR EQUIPMENT WHICH IS ASSIGNED TO ME OR TO WHICH I HAVE ACCESS, I AGREE TO SUBMIT TO A POLYGRAPH OR OTHER SCIENTIFIC EVALUATION TEST CONDUCTED IN COMPLIANCE WITH APPLICABLE LAW DURING ANY INVESTIGATION OF SUCH SHORTAGE OR LOSS, AS PART OF THIS APPLICATION PROCESS AND AS A CONDITION OF MY CONTINUED EMPLOYMENT, AT THE REQUEST OF WAFFLE HOUSE, INC. I AGREE TO SUBMIT TO TESTING TO DETERMINE MY USE OF DRUGS OR ALCOHOL. I UNDERSTAND THAT REFUSING TO SUBMIT TO A TEST OR A POSITIVE RESULT IN ANY TEST INDICATING DRUG OR ALCOHOL USE MAY RESULT IN MY IMMEDIATE TERMINATION FROM EMPLOYMENT.

IF THE POSITION TO WHICH I AM ASSIGNED SHALL BE A POSITION WHERE I NORMALLY RECEIVE TIPS, I UNDERSTAND THAT IT IS MY OBLIGATION TO REPORT ALL TIPS TO THE INTERNAL REVENUE SERVICE FOR INCOME TAX PURPOSES. THIS MAY BE DONE EITHER BY REPORTING THEM ON THE PRELIST OR ON MY TAX RETURN AT THE END OF THE YEAR. DELIBERATELY NOT REPORTING ALL INCOME COULD RESULT IN SEVERE PENALTIES.

I UNDERSTAND AND ACKNOWLEDGE THAT WAFFLE HOUSE IS TAKING A CREDIT AGAINST MY WAGES FOR TIPS RECEIVED, IN THE EVENT I DO NOT RECEIVE TIPS EQUAL TO THAT CREDIT. I SHALL NOTIFY MY UNIT MANAGER SO THAT MY TIPS CAN BE COUNTED AND AUDITED TO ESTABLISH WHAT LEVEL OF TIPS I AM MAKING. I UNDERSTAND WAFFLE HOUSE, INC. IS ALSO BOUND TO REPORT TO THE IRS THE AMOUNT OF THOSE TIPS THAT THEY COUNT. THE TIPS COUNTED WILL BE POSTED BY THE UNIT MANAGER ON THE PRELIST.

MEAL POLICY: As a part of your compensation, Waffle House allows its employees to eat during their shift at a reduced rate. This includes 1 full meal if your workday is 4 hours or less and 2 full meals if your workday is over 4 hours. In addition, beverages and snacks as desired are allowed. The only limitation is that dinner steaks, chicken and pork chops are not offered under this meal policy. Please try to eat the meal at some time during the shift. However, this should be during a slow time and must not interfere with customer service. To cover the cost of the meal, drinks, snacks and the time to eat these items, Waffle House will deduct from your paycheck an amount based on the number of hours worked that day. Please see your Unit Manager for the schedule of meal charges.

I have read and understand the above notice and agree to comply with the provisions above.

Signed this 23 day of June, 19 94

Signature of Applicant

The printed terms imposed by Waffle House offered no equivalent personalization. Rather, the form instructed all applicants that Waffle House could "deduct from any monies due [them], an amount to cover any shortages which may occur" and that they had to "indemnify" the company "against any legal liability" for withholding wages.[299] Moreover, if "money, food, or equipment" to which he had access was alleged to be lost, applicants had "to submit to a polygraph" or other testing.[300] As to the resolution of disputes:

> The parties agree that any dispute or claim concerning Applicant's employment with Waffle House, Inc., or any subsidiary or Franchisee of Waffle House, Inc., or the terms, conditions or benefits of such employment, including whether such dispute or claim is arbitrable, will be settled by binding arbitration. The arbitration proceedings shall be conducted under the Commercial Arbitration Rules of the American Arbitration Association in effect at the time a demand for arbitration is made. A decision and award of the arbitrator made under the said rules shall be exclusive, final and binding on both parties, their heirs, executors, administrators, successors and assigns. The costs and expenses of the arbitration shall be borne evenly by the parties.[301]

Eric Baker signed the form on June 23, 1994 at a Waffle House in Columbia, South Carolina; he was offered and declined a job there. Some weeks later, and without filling out another application, Baker was hired at another Waffle House, miles away. Within a few weeks, Baker had a seizure (lasting "approximately thirty seconds") at work.[302] On September 5, 1994, Waffle House terminated Baker's employment.[303] Baker complained to the Equal Employment Opportunity Commission (EEOC) that Waffle House had violated his rights under the Americans with Disabilities Act of 1990 (ADA). After investigating, the EEOC filed an enforcement action against Waffle House in federal district court. Waffle House moved to dismiss and to compel the EEOC to go to arbitration.[304]

One issue, raised in defense, was the form's effect on the EEOC. An antecedent question was the form's relevance to Baker. In 1998, the district court judge held that, because Baker filed the form at one location but was hired at

299. *Id.* at *61.

300. *Id.*

301. *Id.* at *59.

302. EEOC v. Waffle House, Inc., No. Civ. A. 3:96-2739-O, 1998 WL 35168489, at *1 (D.S.C. Mar. 23, 1998).

303. *Id.*

304. *Id.*

another, "it does not appear that Baker's acceptance of employment . . . was made pursuant to the written application."[305] Likewise, a member of the Fourth Circuit concluded that under "fundamental principles of contract law," Mr. Baker had not entered into a written employment agreement.[306] But a majority of the Fourth Circuit determined that the "generic, corporation-wide employment application . . . followed Baker to whichever facility of Waffle House hired him."[307] While the EEOC was not a signatory, the "binding arbitration agreement between Baker and Waffle House" precluded the EEOC from seeking remedies for Mr. Baker, though not from requesting injunctive relief against Waffle House for discriminating on the basis of disability.[308]

In 2002, the Supreme Court disagreed. Writing for the majority, Justice Stevens concluded that the form did not limit the filing by the EEOC, which was authorized by Congress to "vindicate the public interest" as well as to seek victim-specific remedies.[309] The "proarbitration policy goals of the FAA do not require the agency to relinquish its statutory authority if it has not agreed to do so."[310] In dissent, Justice Thomas (joined by Chief Justice Rehnquist and Jus-

305. *Id.* at *2.

306. EEOC v. Waffle House, Inc., 193 F.3d 805, 817 (4th Cir. 2002) (King, J., dissenting). "Common sense tells us that a person who physically goes to the Wal-Mart in Lewisburg, West Virginia, is applying for a job at *that* Wal-Mart, not one in Richmond, Virginia, or Charlotte, North Carolina." *Id.* at 818.

307. *Id.* at 809 (majority opinion).

308. *Id.* at 809-13.

309. EEOC v. Waffle House, Inc., 534 U.S. 279, 290, 296-98 (2002). Given that Baker and Waffle House had not arbitrated, the issue of whether any mitigation would have been in order was not reached. *Id.* at 296-98. The view that employment forms ought not preclude public enforcement was championed by twenty-eight states (with Missouri in the lead) filing an amicus brief in support of the EEOC, seeking reversal of the appellate court's rule and raising concerns about its application to attorney general enforcement of consumer protection statutes. *See* Brief of the States of Missouri, Alaska, Arizona, Arkansas, California, Colorado, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Rhode Island, South Dakota, Utah, Vermont, West Virginia and the Commonwealth of the Northern Mariana Islands in Support of Petitioner, *Waffle House*, 534 U.S. 279 (No. 99-1823), 2001 WL 34131148. In the ruling's wake, state enforcement agencies have rebuffed efforts to find themselves precluded. *See, e.g.*, Rent-A-Center, Inc. v. Iowa Civil Rights Comm'n, 843 N.W.2d 727 (Iowa 2014); Joulé, Inc. v. Simmons, 944 N.E.2d 143 (Mass. 2011); People v. Coventry First LLC, 915 N.E.2d 616 (N.Y. 2009).

310. *Waffle House*, 534 U.S. at 294. The Court had suggested this approach in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991), in which Justice White discussed the point that requiring a registered securities representative to arbitrate his ADEA claim did not preclude the EEOC from enforcing the act.

tice Scalia) read the form to preclude the EEOC from pursuing relief that the employee "has agreed not to do for himself."[311]

The Waffle House documents illustrate the distance between "fundamental principles of contract law" and the application Eric Baker signed. The oddity of characterizing such "pieces of paper" as contracts was explained in the 1970s by Arthur Leff, who wrote that contracts required "not only a deal but dealing."[312] Negotiations—even with form provisions—reduced "the possibility of monolithic one-sidedness."[313] Leff appreciated that contract theorists had, in the 1940s, shaped concepts such as duress, fraud, and unconscionability as part of the development of the doctrine of "contracts of adhesion;" Leff thought these arguments innovative but the wrong approach ("totally irrelevant"[314]) to materials that were not themselves contracts.[315] Rather, as "products of non-bargaining," such documents were "unilaterally manufactured commodities."[316] As a "thing," the law ought to regulate its quality, as it did other products.

But instead of limiting arbitration to negotiated contracts, the Court has licensed expansive use of that product, now described by opponents as "forced arbitration,"[317] while others offer terms such as "employer-promulgated plan"[318]

311. *Waffle House*, 534 U.S. at 298 (Thomas, J., dissenting).

312. Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 132, 138 (1970).

313. *Id.* at 138, 140. Scholars of arbitration likewise stress its basis in informed consent, coupled with its "procedural integrity"—and identify these two components as proper subjects of judicial monitoring. *See* William W. Park, *Explaining Arbitration Law, in* SELECTED TOPICS IN INTERNATIONAL ARBITRATION: CENTENNIAL LIBER AMICORUM (forthcoming 2015), http://www.williamwpark.com/documents/WWPExplainingArb29July.pdf [http://perma.cc/M46W-5NGP].

314. Leff, *supra* note 312, at 148.

315. *Id.* at 142-43.

316. *Id.* at 147. For instance, in 1962, the Supreme Court of California held that a "mass-made contract" (a life insurance policy sold in an airport vending machine) could not be "equate[d] [with a] bargaining table, where each clause is the subject of debate . . . ." Steven v. Fid. & Cas. Co., 377 P.2d 284, 293, 298 (Cal. 1962). I should add that my concern is not about boilerplate per se, which can enable egalitarian treatment across a set of contracting parties and lower the costs of contracting. See Alan Schwartz & Joel Watson, *Conceptualizing Contractual Interpretation*, 42 J. LEGAL STUD. 1 (2013). My focus instead is on mandates in non-negotiated documents to forgo the pursuit of public rights.

317. Alliance for Justice, *Lost in the Fine Print*, YOUTUBE (Oct. 6, 2014), https://www.youtube.com/watch?v=tgC3N802Sjk [https://perma.cc/KG9D-3QVY].

318. The AAA provides distinct rules governing arbitration where the "dispute arises from an employer-promulgated plan." *Employment Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N 10 (Nov. 2009), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362 [https://perma.cc/27RR-HRM2] [hereinafter *AAA Employment Arbitration Rules*]; *see also* Colvin & Gough, *supra* note 32, at 13. In 2014, the AAA changed its 2009

or "pre-dispute arbitration."[319] Under the Court's approach, the range of statutes coming under the FAA's aegis has continued to expand. In 2012, the Court applied the FAA to litigants claiming violations of the Credit Repair Organization Act,[320] and in 2013, to a family restaurant, Italian Colors, which argued that the American Express Company had violated the Sherman Antitrust Act.[321] Signatures lost some of their relevance in 2009, when the Court required employees who had not signed a collective bargaining agreement to use arbitration instead of pursuing their age discrimination claims in court.[322]

Employment Rules by revising its fee schedule. *See AAA Employment Arbitration Rules*, *supra*, at 35-40.

319. *CFPB 2015 Arbitration Study*, *supra* note 17, § 1, at 3.

320. CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012).

321. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013); *see also* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985).

322. *See* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 269-72 (2009). The impact of this approach is on display in a 2012 opinion by a trial court judge who held that, by purchasing a car that included a ninety-day trial use of a Sirius XM Radio, and a month later receiving in the mail a "Welcome Kit" from Sirius that mandated arbitration upon accessing the service, a consumer was prohibited from bringing a class action alleging violations of the Telephone Consumer Protection Act. Knutson v. Sirius XM Radio, Inc., Civil No. 12cv418 AJB, 2012 WL 1965337 (S.D. Cal. 2012). The Ninth Circuit reversed, pointing out that the customer had purchased nothing from the provider and that no evidence of consent existed. *See* Knutson v. Sirius XM Radio, Inc., 771 F.3d 559 (9th Cir. 2014).

A few statutory questions remain. Litigation has focused, for example, on the Fair Labor Standards Act (FLSA) and the National Labor Relations Act (NLRA). The FLSA, enacted in 1938, authorizes "one or more employees" to bring wage-and-hour claims "for and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b) (2012). Co-employees must opt-in. *See id.* Given the statute's provision for a collective action decades before the 1966 class action rule, a few lower courts have held that litigation outcomes under the FLSA, including through settlements, cannot be sealed. *See, e.g.*, Nutting v. Unilever Mfg., Inc., 2014 WL 2959481, at *5 (W.D. Tenn. June 13, 2014); Stalnaker v. Novar Corp., 293 F. Supp. 2d 1260, 1264 (M.D. Ala. 2003). *See generally* Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. EMP. & LAB. L. 109 (2013).

Judges might likewise have decided that arbitration requirements—especially if precluding class arbitrations and resulting in confidential outcomes—would conflict with the FLSA. Instead, several circuits have sent individual FLSA claimants to arbitration. *See* Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2886 (2014); Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013); Owen v. Bristol Care, Inc., 702 F.3d 1050 (8th Cir. 2013); Carter v. Countrywide Credit Indus., 362 F.3d 294 (5th Cir. 2004); Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002). In these cases, employees were sent to different providers—1) the American Arbitration Association, *see* Giordano v. Pep Boys—Manny, Moe & Jack, Inc., No. CIV. A. 99-1281, 2001 WL 484360, at *2 (E.D. Pa. March 29, 2001); Brief for Appellees at 5, Walthour v. Chipio Windshield Repair, LLC, 745 F.3d 1326 (11th Cir. 2014) (No. 13-11309); Brief for Appellee at 11-16, Sutherland v. Ernst & Young LLP, 726 F.3d 290 (2d Cir. 2013) (No. 12-304) (specifying the AAA or

Judicial and legislative encouragement of arbitration has not been lost on the business community or on ADR providers. One measure of growth is production, and the numbers of clauses mandating arbitration are soaring across many sectors. A 1991 survey found fewer than four percent of firms requiring arbitration in employment; by 2007, another study found that more than forty-five percent of the firms did so.[323] In 2008, the estimate was that "a quarter or more of all non-union employees in the US"—thirty million employees—were covered.[324]

Many more consumers are obliged to use arbitration. The market for cell phones grew between 1990 and 2009 to include an estimated 291 million users in the United States and to produce revenues for the four major providers (AT&T, Verizon, Sprint, and T-Mobile) totaling $180 billion.[325] Virtually all providers of wireless services insist on mandatory arbitration, along with the option (discussed in more detail below) of using small claims court for individual actions.[326]

Financial services are another sector producing arbitration clauses. According to a 2015 study by the Consumer Financial Protection Bureau (CFPB), which was chartered in 2010 by the Dodd-Frank Wall Street Reform and Consumer Protection Act and authorized to regulate arbitration in that segment of the market,[327] approximately fifty percent of credit card loans are subject to arbitration,[328]

JAMS at the employee's choice); Brief for Appellants at 8-9, Adkins v. Labor Ready, Inc., 303 F.3d 496 (4th Cir. 2002) (No. 01-2304); 2) JAMS, *see* Brief for Appellee at 11-16, *Sutherland*, 726 F.3d 290 (No. 12-304) (specifying the AAA or JAMS at the employee's choice); 3) the National Arbitration Forum, *see* Brief for Appellants at 7, 28-34, *Carter*, 362 F.3d at 298 (No. 03-10484).

In contrast, the National Labor Relations Board had concluded that the NLRA prohibits waivers of class arbitrations and, in the fall of 2014, declined to follow a Fifth Circuit ruling that held otherwise. *See* D.R. Horton, Inc., v. NLRB, 737 F.3d 344 (5th Cir. 2013); Murphy Oil USA, Inc., 361 N.L.R.B. slip op. 27 (Oct. 28, 2014); D.R. Horton, Inc., 357 N.L.R.B. slip op. 184 (Jan. 3, 2012).

323. Mark D. Gough, *The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation*, 35 BERKELEY J. EMP. & LAB. L. 91, 95-96 (2014). The 1991 data came from a review of about 100 contracts; the 2007 data came from a review of 757 U.S.-based companies.

324. Colvin & Gough, *supra* note 32, at 2.

325. BAR-GILL, *supra* note 17, at 185, 196-97 (relying on an estimate from the FCC).

326. The CFPB review concluded that 87.5% of the major wireless providers (servicing over 99.9% of subscribers to these providers) have arbitration obligations, and 85% (servicing over 99.7% of arbitration-subject subscribers) also permit use of small claims court. *See CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 26, 33-34.

327. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. §§ 5481-5603 (2012).

328. *CFPB 2015 Arbitration Study*, *supra* note 17, § 1, at 9; § 2, at 10 fig.1, 31. See also *CFPB 2013 Preliminary Results*, *supra* note 31, at 21, 31.

and nearly all that were studied "expressly did not allow arbitration to proceed on a class basis."[329] Mandated arbitration is also common in web-based sales. As of the fall of 2014, Amazon imposed mandatory arbitration (with the small claims court alternative),[330] and Dropbox offered a 30-day window to opt out of arbitration.[331] And, as the case law at the Supreme Court reflects, some nursing homes require mandatory arbitration, including for claims of negligence resulting in wrongful death.[332]

The appetite to do more was evident in the spring of 2014, when General Mills—the manufacturer of the popular Cheerios cereal—put a notice on its website that through "interacting" by "joining our online community," "entering a sweepstakes," downloading coupons, or purchasing products "online or [in] physical stores," customers agreed that "any dispute . . . based in contract, tort, statute, fraud, misrepresentation, or any other legal theory," was to be resolved "by informal negotiations or through binding arbitration."[333] A barrage

329. *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 44-45; *see also CFPB 2013 Preliminary Results*, *supra* note 31, at 62 n.146; *id.* at 13, 37. The 2015 study concluded that no issuers of credit cards had dropped arbitration clauses over the period studied, while a few added such provisions. *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 11-12. The report also noted that in that segment of the market, the increase in such clauses was not as "dramatic" as some had predicted after the Supreme Court's 2011 decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 (2011). *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 12.

330. *Conditions of Use*, AMAZON.COM (2012), http://www.amazon.com/gp/help/customer/display.html/ref=footer_cou?ie=UTF8&nodeId=508088 [http://perma.cc/6SL2-V99Z].

331. *Terms of Service*, DROPBOX (2015), https://www.dropbox.com/privacy#terms [https://perma.cc/D6TJ-EFP7].

332. *See supra* note 165 and accompanying text.

333. *See* Sarah Cole, *General Mills' Arbitration Clause*, INDISPUTABLY (Apr. 17, 2014), http://www.indisputably.org/?p=5564 [http://perma.cc/9YFH-LQQS] (quoting General Mills' legal terms as of April 17, 2014); Stephanie Strom, *When 'Liking' a Brand Online Voids the Right To Sue*, N.Y. TIMES, Apr. 16, 2014, http://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html [http://perma.cc/9494-AQAA]. According to the reports, General Mills instituted this approach after a federal district judge denied General Mills' motion to dismiss proposed class actions. The class actions alleged that the company had violated California's consumer laws by marketing "Nature Valley" bars as all-natural despite the use of genetically-modified ingredients. See Order on Motion to Dismiss, Rojas v. Gen. Mills, Inc., No. 12-cv-05099-WHO (N.D. Cal. Mar. 26, 2014); Class Action Complaint, Janney v. General Mills, 12-cv-03919-PJH (N.D. Cal. July 26, 2012), 2012 WL 3309433. Thereafter, the parties settled, and the cases were dismissed with prejudice. *See* Stipulation of Voluntary Dismissals with Prejudice, Janney v. Gen. Mills, Inc., No. 12-cv-05099-WHO (N.D. Cal. Nov. 19, 2014), 2014 WL 6771223; Settlement Agreement, *Janney*, No. 12-cv-05099-WHO (N.D. Cal. Nov. 7, 2014), http://cspinet.org/new/pdf/general-mills-settlement-agreement.pdf [http://perma.cc/EKP2-NR47]. General Mills agreed to stop using the phrase "100% Natural" in advertising and labeling products containing certain artificial ingredients and to pay an undisclosed monetary settlement to the plaintiffs. *Id.*

of negative publicity prompted some retraction; General Mills reminded its customers that they had the "opportunity to opt out" by e-mail.[334] Thereafter, General Mills retreated further, and by the end of 2014, its website made no mention of arbitration.[335]

IV. METRICS OF EFFECTIVE VINDICATION, ADEQUACY, AND UNCONSCIONABILITY

A. Gateways to Judging Arbitration's Legitimacy

Once the Supreme Court authorized arbitration for federal statutory and common law rights in the absence of bargaining, the Court needed an alternative account of the legitimacy of its actions. As discussed below, the Court first mentioned the idea of "effective vindication" in 1985 in the context of an antitrust claim arising out of a trilateral contract among transnational commercial parties. When expanding its imposition of arbitration to the mass production of arbitration clauses and applying its rule to consumers and employees, the Court reiterated that the legitimacy of doing so rested on arbitration's adequacy as a choice of forum in which to vindicate statutory rights.

Before detailing the development and application of this approach, a word is in order about lines of doctrine which, in theory, differentiate between federal statutory rights and state statutory or common law rights and which distribute authority to review arbitration clauses between judges and arbitrators. In the context of federal statutes, the Court reads the FAA as putting arbitration clauses on an "equal footing" with any other contract provision[336] and then asks whether another federal statute specifically precludes the use of arbitration or, if not expressly precluded, whether an "inherent conflict" exists between arbitration and that statute. In these analyses, the Court often speaks

334. Kirstie Foster, *Explaining Our Website Privacy Policy and Legal Terms*, TASTE GEN. MILLS (Apr. 17, 2014), http://www.blog.generalmills.com/2014/04/explaining-our-website-privacy-policy-and-legal-terms [http://perma.cc/3B27-RHPU] ("Downloading coupons, entering sweepstakes or subscribing to publications is entirely up to you. . . . And no. Nothing about this would impact current or pending lawsuits.").

335. *See* Kirstie Foster, *We've Listened—And We're Changing Our Legal Terms Back*, TASTE GEN. MILLS (Apr. 19, 2014), http://www.blog.generalmills.com/2014/04/weve-listened-and-were-changing-our-legal-terms-back-to-what-they-were [http://perma.cc/KZ76-RBUD]; *Legal Terms*, GEN. MILLS, http://www.generalmills.com/en/Company/legal-terms [http://perma.cc/P5H8-RYPL]; Stephanie Strom, *General Mills Reverses Itself on Consumers' Right To Sue*, N.Y. TIMES, Apr. 20, 2014, http://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html [http://perma.cc/SR6P-5VF3].

336. *See, e.g.*, Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

about arbitration as effectively vindicating the specific statutory right pursued.[337] In contrast, when arbitration clauses relate to rights based on state law, the legal question is whether the mode of pursuing those rights must be arbitration as a matter of federal law.[338] Although this federal preemption issue might not invite inquiries other than whether the state law conflicts with the federal mandate, the Court sometimes also discusses the "adequacy" or "accessibility" of arbitration in preemption cases.

Thus the doctrinal lines are not crisp. The Court has linked "effective vindication" to discussions of arbitration's "adequacy"[339] and to the potential that arbitration imposes "prohibitively expensive" costs.[340] Indeed, the Court relied on its state preemption case (*AT&T Mobility LLC v. Concepcion*, licensing a ban on class arbitrations) to inform its ruling in a federal statutory rights case (*American Express v. Italian Colors*)—despite objections by the dissent, seeking to buffer federal statutory claims from the ruling in the AT&T litigation.[341]

Lower court decisions reflect the overlap in analyses. Some judges apply the test of "effective vindication" only to federal—and not state—statutory rights,[342] while others use the terms "effective vindication" and "adequacy" or "accessibility" in their decisions addressing contested arbitration clauses applying to court-based pursuit of federal and/or state rights.[343] Other phrases come into play, such as whether the obligation to arbitrate renders "illusory" federal or state statutes and common claims and whether using arbitration is unduly

337. *E.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26-28 (1991); Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 226-27, 240-42 (1987).

338. This distinction is explained in *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 936 (9th Cir. 2013).

339. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2311 (2013).

340. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 92 (2000).

341. *See Italian Colors*, 133 S. Ct. at 2320 (Kagan, J., dissenting); *infra* notes 406-410 and accompanying text.

342. This argument in part stems from Justice Kagan's dissent in *Italian Colors*, in which she sought to insulate the federal antitrust claims from the approach the Court had taken in the *AT&T Mobility LLC v. Concepcion* decision. *See Italian Colors*, 133 S. Ct., at 2320. Lower courts have followed suit. *See, e.g.*, *Ferguson*, 733 F.3d at 936; Lombardi v. DirecTV, Inc., 546 F. App'x 715 (9th Cir. 2013); Torres v. CleanNet, U.S.A., Inc., No. 14-2818, 2015 WL 500163, at *6-7 (E.D. Pa. Feb. 5, 2015). Some pre-*Italian Colors* rulings also took this position. *See, e.g.*, Orman v. Citigroup, Inc., No. 11 Civ. 7086, 2012 WL 4039850, at *4 (S.D.N.Y. Sept. 12, 2012).

343. *See, e.g.*, Kristian v. Comcast Corp., 446 F.3d 25, 37, 51 (1st Cir. 2006); Booker v. Robert Half Int'l, Inc., 413 F.3d 77, 80 (D.C. Cir. 2005); Damato v. Time Warner Cable, Inc., No. 13-CV-994 ARR RML, 2013 WL 3968765, at *10 (E.D.N.Y. July 31, 2013). Some courts view the *Italian Colors* decision as precluding this approach. *See, e.g.*, *Torres*, 2015 WL 500163, at *7 n.6.

"burdensome."[344] The state-law doctrine of unconscionability also appears in the mix, at times linked to an analysis of effective vindication.[345]

The other facet of the case law requiring an introductory explanation is what is known as the "gateway" question: whether claims of ineffective or unconscionable provisions are to be decided by courts before parties can be sent to arbitration or decided by arbitrators as part of their interpretation of contracts and of arbitration procedures.[346] This arena was once understood to fall within state courts' domain but is now firmly under federal control. The current approach, shaped in 2010 by the Supreme Court, gives broad authority to arbitrators and "substantially" reduces the "role of courts in applying unconscionability doctrine to assess the enforceability of arbitration clauses."[347]

A painful illustration comes from a 2013 Second Circuit decision brought by a New Yorker, Bernardita Duran, challenging a provision requiring her to go to Arizona to contest the obligation to arbitrate.[348] Duran argued that it was unconscionable to require her to travel to Maricopa County, Arizona to press claims that a firm had violated federal statutes and New York's consumer laws by, she alleged, taking "$3,190.64 in fees" from her and causing her "overall debt to increase by over $4,500 in eight months."[349]

344. *See, e.g.*, Hall v. Treasure Bay V.I. Corp., 371 F. App'x 311, 313 (3d Cir. 2010); Awuah v. Coverall N. Am., Inc., 554 F.3d 7, 13 (1st Cir. 2009).

345. *See, e.g.*, *Hall*, 371 F. App'x at 313.

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

347. *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 41; *See* Rent-A-Center, West, Inc., v. Jackson, 561 U.S. 63 (2010). As the CFPB put it, this ruling delegated to arbitrators "at least some of the issues that a court otherwise could decide." *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 41; *see also* Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006). The *CFPB 2015 Arbitration Study* provided several examples of provisions delegating authority to arbitrators. See *CFPB 2015 Arbitration Study supra* note 17, § 2, at 43-44. The authority of arbitrators, if given by contract, has also been underscored in *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064 (2013), which held that arbitrators can interpret a contract to permit class arbitrations as a "form" of a civil action. In *BG Group, PLC v. Republic of Argentina*, 134 S. Ct. 1198 (2014), despite questions of interpretation of an international investment treaty that might be read to divest the arbitrators of jurisdiction, the Court likewise held that arbitrators, and not judges, can interpret contracts to assess their jurisdiction to arbitrate.

348. Duran v. J. Hass Grp., LLC, 531 F. App'x 146 (2d Cir. 2013). Other examples of the challenges of "gateway" questions include *UBS Financial Services v. West Virginia University Hospitals, Inc.*, 660 F.3d 643 (2d Cir. 2011); *Van Buren v. Pro Se Planning, Inc.*, 2014 WL 6485653 (E.D. La. 2014); and *Damato v. Time Warner Cable, Inc.*, 2013 WL 3968765 (E.D.N.Y. 2013).

349. *See* Complaint ¶ 6, Duran v. J. Hass Grp., LLC, No. 10-cv-4538 (E.D.N.Y. Oct. 5, 2010), 2010 WL 4236649. Duran also alleged that the lawyer who initially ran the firm was put on probation by Arizona's state bar. *Id.* ¶ 96. The district court had stayed the motion to compel arbitration until the Supreme Court held that Credit Repair Organizations Act claims could be subject to arbitration, *see* CompuCredit Corp. v. Greenwood, 132 S. Ct. 665 (2012),

The Second Circuit's summary order explained that, had Duran argued that the arbitration agreement was itself "unconscionable due to the forum selection clause," a judge would have had to decide that issue. But, because Duran's claim was only that the designation of Arizona (the "forum selection clause") was unconscionable, the issue was one for the arbitrator.[350] What the court called the "logical flaw" in the result was, it believed, dictated by the Supreme Court's precedent.[351] Nonetheless, the court recognized the impact: that by

> requiring arbitration over the validity of the forum selection clause to proceed pursuant to the terms of that forum selection clause, we may well be enforcing an invalid—and indeed unconscionable—contract. Even if the arbitrator ultimately decides that the merits of the dispute should not be arbitrated in Arizona, a round of arbitration will already have occurred in Arizona . . . .[352]

According to the 2015 Consumer Financial Protection Bureau study, Ms. Duran's travel challenges were not typical of the provisions it researched. Most credit card arbitration clauses (ninety-three percent) and all mobile wireless clauses addressed the place of arbitration; the vast majority located arbitrations convenient to the consumer. Yet Ms. Duran was also not the only consumer subjected to travel obligations. About eight percent of credit card clauses and about fourteen percent of wireless clauses did not require locating arbitrations proximate to the consumer.[353] Moreover, an analysis of obligatory arbitration provisions proffered by social media companies found that more than two dozen required that arbitrations be held in the "social media's home jurisdiction," rather than that of the consumer.[354]

In short, the public law of private arbitration is anything but simple, and three points emerge from the density of the doctrine. First, anyone interested

and thereafter held that because the "contract contains nothing to suggest that the parties intended the courts to decide venue," dismissal of the action was proper, *see Duran*, No. 10-cv-4538, 2012 WL 3233818, at *4 (E.D.N.Y. June 8, 2012).

350. *Duran*, 531 F. App'x at 147.

351. *Id.* at 147 n.1.

352. *Id.* (citing Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000)).

353. *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 53-55. These clauses instead required the arbitration be at some specific location, without regard to the consumer's residence. *Id.* The AAA's Consumer Due Process Protocol also calls for doing so. *See Consumer Due Process Protocol*, *supra* note 232, at Principle 7 ("In the case of face-to-face proceedings, the proceedings should be conducted at a location which is reasonably convenient to both parties with due consideration of their ability to travel and other pertinent circumstances.").

354. Rustad & Koenig, *supra* note 235, at 392-93.

in challenging obligations to arbitrate needs lawyers skilled in navigating a large body of doctrinal complexities, and hence, the Court's jurisprudence has imposed a substantial financial burden on individuals seeking to use courts instead of arbitration. Second, however muddy the legal approaches, federal judges are in control of decisions about when arbitration can be substituted for litigation and about which procedural features are "fundamental" to arbitration.[355] The focus of the case law is not on market theories about whether consumers would be willing to sell their process rights in exchange for lower prices.[356] Nor do federal judges read the text of the FAA—referencing defenses to arbitrability based on contract law[357]—to mandate deference to state contract law.

Third, this body of federal law lacks directions on how courts do—and ought to—measure effective vindication, adequacy, accessibility, and burdensomeness. From whose vantage point—claimants, respondents, third parties, decision makers—is the evaluation made? Is the question comparative, with courts as the baseline? Is the analysis predicated on implicit assumptions about what constitutes optimal levels of enforcement of the law? Such questions are part of debates about the roles of private and public enforcement in producing compliance and about how to maximize the utility of interventions in light of the costs of compliance and of the pursuit of violators. And, of course, views on the desirability of individual and collective pursuit of rights—in public—ought to be informed by knowledge about the frequency of legal violations and the degree to which voluntary compliance remedies the breaches that occur.

355. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1748 (2011), discussed *infra* notes 370-373, 422-437, 441-445 and accompanying text; *see also* DIRECTV, Inc. v. Imburgia, 170 Cal. Rptr. 3d, 190 (Ct. App. 2014), *cert. granted*, 83 U.S.L.W. 3267 (U.S. Mar. 23, 3015) (No. 14-462), discussed *infra* note 555.

356. The question of what is termed a "price effect" in boilerplate provisions of various kinds is explored by Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 895-97 (2014) (reviewing RADIN, *supra* note 17). Whether prices are affected by arbitration waivers is an empirical question. The 2015 CFPB study did not find any "statistically significant evidence of an increase in prices among those companies that dropped their arbitration clauses and thus increased their exposure to class action litigation risk." *CFPB 2015 Arbitration Study*, *supra* note 17, § 1, at 18. Nor did the CFPB identify reductions in the provision of credit. *Id.*

A different question is whether law ought to permit shopping for rights; Radin argued that law ought not license one party to "take" another's rights, as a kind of "private eminent domain." RADIN, *supra* note 17, at 15.

357. 9 U.S.C. § 1 (2012) ("[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."); *id.* § 2 (stating that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

Getting the requisite information is difficult. Data on court-based filings do not provide a full picture of the injuries that have occurred,[358] because individuals often lack the capacity to "name, blame, and claim."[359] Even if one is aware of legal injuries, the costs of pursuit may well make "lumping it" appropriate, absent collective action.[360] Court filings are also an imperfect measure because of over-claiming as well as under-claiming.[361] Other variables include whether informal remedies provide relief, whether options exist to use different venues (small claims court, arbitration, class actions), whether the various venues have the capacity to deal with the number of claimants seeking their services, and the role played by the government, pursuing relief on its own or on others' behalf.

The quality of the procedures offered is also relevant in terms of user-friendliness and of the availability of assistance. For example, some courts have clerks specially trained in helping self-represented litigants, and courts routinely adjust or waive fees for litigants with limited or no resources. Further, when claimants can join together in collective actions, costs can be spread. The kind and nature of process also matter in an assessment of whether a system's procedural entailments are "proportionate" to the claims at stake—a concern increasingly present in federal civil rulemaking[362] and a standard-bearer in Europe.[363]

How might these assessments be made in practice? One might expect that if arbitration were a "better" process than adjudication and levels of legal claims were constant, the availability of arbitration would produce a rise in filings. Satisfaction rates via user surveys could also be illuminating; a proxy could be whether negotiating parties bargain to stay out of court altogether or seek judicial review. Analyzing outcomes and comparing providers, as the Government

358. For example, one analysis from the 1980s concluded that of one hundred injuries where the stakes exceed $1,000, about ten result in pursuit of court remedies. David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer & Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 72, 86 (1983).

359. *See* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .* , 15 LAW & SOC'Y REV. 631 (1980).

360. For example, a survey of more than 1,000 credit card holders reported that most believing they were wronged would cancel cards, approximately 10% would report a problem to a government agency, and 1.4% thought they would contact a lawyer or bring suits. *See CFPB 2015 Arbitration Study*, *supra* note 17, § 3, at 16-18.

361. PAUL C. WEILER, HOWARD HIATT, JOSEPH P. NEWHOUSE, WILLIAM G. JOHNSON, TROYEN BRENNAN, AND LUCIAN LEAPE, A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION (1993).

362. Jonah B. Gelbach & Bruce H. Kobayashi, *The Law and Economics of Proportionality in Discovery*, DUKE L. CENTER FOR JUD. STUD. (2014), http://law.duke.edu/sites/default/files/centers/judicialstudies/v_gelbach_kobayashi_duke_idps_2014.pdf [http://perma.cc/N3NU-PH25].

363. *See* Vicki C. Jackson, Feature, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094 (2015).

Accountability Office (GAO) has done for financial services arbitrations[364] and as a variety of researchers seek to do for employees and consumers,[365] could offer additional insights, especially if independent measures of the validity of claims are available.

In addition to empirical information, however incomplete, value judgments are required. For example, when describing arbitration as "cheaper," "more informal," and "speedier" than adjudication, is the implicit claim that arbitration permits more claimants to bring complaints, that it imposes fewer burdens on potential respondents, or both? What metric should be used to assess the impact of adjudication's expressive values? Returning to the question of the vantage point for such assessments, is the cost-benefit assessment internal to the disputants or ought third-party access to information about the proceedings be factored into the equation? Choosing goals depends in part on underlying narratives about the degree to which compliance with legal rules exists, the importance of compliance, the role of public exchange, and whether private efforts to enforce rights make a difference.

An example of efforts to increase private enforcement comes from the European Union, committed to protecting the right to an "effective judicial remedy."[366] A recent Directive on Consumer ADR consciously aims to expand the number of private claims pursued through alternative dispute resolution without precluding the use of courts thereafter.[367] In contrast to what might be termed this claim-expressive approach, the United States Supreme Court's use

364. *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-92-74, SECURITIES ARBITRATION: HOW INVESTORS FARE 35-40 (1992) [hereinafter GAO, 1992, HOW INVESTORS FARE].

365. *See, e.g.*, Chandrasekher & Horton, *supra* note 38; Drahozal & Zyontz, *supra* note 38; Drahozal, *supra* note 38; Colvin & Gough Report, *supra* note 38; *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, MAYER BROWN LLP 1-2 (Dec. 2013), http://www.mayerbrown.com/files/uploads/Documents/PDFs/2013/December/DoClassActionsBenefitClassMembers.pdf [http://perma.cc/DT6J-T2YE].

366. Originally framed in terms of protection of fundamental human rights, the right to an effective remedy gained confirmation in Article 47 of the European Charter. *See Rights to Effective Remedies*, *in* THE EU CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY 1211-28 (Steve Peers, Tamara Hervery, Jeff Kenner & Angela Ward eds., 2014).

367. CADR 2013 Directive, *supra* note 212. Interest in developing consumer ADR came from concerns that judicial redress was "not always practical or cost-efficient for consumers or businesses." *See Commission Staff Working Paper Impact Assessment Accompanying the Directive on Consumer ADR and the Regulation on Consumer ODR*, EUR. COMM'N 13 (Nov. 29, 2011), http://www.europarl.europa.eu/document/activities/cont/201204/20120425ATT43950/20120425ATT43950EN.pdf [http://perma.cc/FF6L-W4RR]. Further, some industries viewed CADR as a means of defusing problems. HODGES, BENÖHR, & CRUETZFELDT-BANDA, *supra* note 212, at 396-97. Another factor was the sector of government involved; these consumer directives fell within the portfolios of ministers of business and finance rather than of justice.

of the FAA to preclude court filings and to permit bans on collective actions is seen as "claim suppressive."[368] That shift, discouraging private enforcement, could be predicated on the view that compliance with legal rules is better achieved through other means[369] and thus that court-based procedures are inefficient or unnecessary, or on the view that too many pursue unwarranted claims.

Evaluating the tradeoffs in many arenas can be difficult, but some of the utilities and harms of collective action are obvious. As Justice Breyer in the *AT&T* case commented, given a "maximum gain to a customer for the hassle of arbitrating a $30.22 dispute is still just $30.22,"[370] individuals at risk of paying $125 in administrative fees were unlikely to pursue their claims ("only a lunatic or a fanatic sues for $30").[371] A concern from the prospective defendants' vantage point was voiced by Justice Scalia, writing for the *AT&T* majority and asserting that class arbitrations created "in terrorem" effects, pressing companies into inappropriate settlements.[372] Thus, all members of the Court agreed that collectivity mattered; they disagreed about what weight to accord competing arguments about whether class actions usefully police misbehavior and provide individual benefits, disserve customers because companies increase the costs of products, or result in trivial remedies for individuals and unduly large fees for their attorneys.

The institutional question is which bodies—courts, legislatures, agencies, individuals and their lawyers—are to make such assessments about the tradeoffs between litigation and arbitration and the utilities of collective action. One can read the many federal statutes giving rise to private causes of action as congressional judgments attributing some value to private enforcement of the law, just as state constitutions, legislation, and common law endow individuals with rights to pursue injuries. Yet the Supreme Court has not given much weight to this court-based rights framework. As the majority in the *AT&T* liti-

368. *See* Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging "Anti-Reform" Provisions in Arbitration Clauses*, 69 U. MIAMI L. REV. 469 (2015).

369. Regulatory options, for example, provide other routes. *See, e.g.*, Geoffrey P. Miller, *An Economic Analysis of Effective Compliance Programs* (NYU Law & Econ. Research Paper No. 14-39, 2014), http://ssrn.com/abstract=2533661 [http://perma.cc/JAP4-9YA6].

370. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1760 (2011) (Breyer, J., dissenting) (quoting Laster v. AT&T Mobility LLC, 584 F.3d 849, 855, 856 (9th Cir. 2009)).

371. *Id*. at 1761 (Breyer, J., dissenting) (quoting Judge Posner's comment in *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004)).

372. *Id*. at 1752. The lack of review stemmed from the Court's holding in *Hall Street*, discussed *infra* notes 545-556 and accompanying text. A review of the empirical information available on the trade-offs between class and individual actions is provided by Joanna C. Schwartz, *The Cost of Suing Business*, 65 DEPAUL L. REV. (forthcoming 2016), http://ssrn.com/abstract=2589208 [http://perma.cc/Z9QN-BNZM].

gation explained, it was relying on "our cases"[373] to read the FAA (which predated class actions and which makes no mention of arbitration's form in terms of the numbers of parties or other features) to require enforcement of arbitration obligations that include collective action bans. Further, rather than remand to require fact-finding, the Court has repeatedly stipulated the adequacy of arbitrations and rejected judicial monitoring of the outcomes.

Congress has thus far responded in a piecemeal fashion, episodically insulating a few businesses (such as car dealerships and chicken farms[374]) from mandatory pre-dispute arbitration. Further, Congress has relied on the Securities and Exchange Commission (SEC) to oversee securities arbitrations and the GAO to report on their use; chartered the Consumer Financial Protection Bureau to consider regulation of mandatory arbitration of disputes about consumer financial products and services;[375] and specified the structure and reach of court-annexed arbitration in federal courts. But Congress has yet to impose general requirements addressing the kind of consent required to waive

373. *AT&T v. Concepcion*, 131 S. Ct. at 1749.

374. *See* Motor Vehicle Franchise Contract Arbitration Fairness Act, S. REP. No. 107-266, at 1-2 (2002) (describing dealers as "virtual economic captives of automobile manufacturers" who proffer contracts on a "take it or leave it" basis) (codified at 15 U.S.C. § 1226 (2006)); Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-246, § 11005, 122 Stat. 1651, 1653 (codified as amended at 7 U.S.C. § 197c (2006 & Supp. IV 2010)).

Military personnel also have some protection. The 2007 Talent-Nelson Amendment exempts "covered" members of the armed forces and their dependents from mandatory arbitration in consumer credit disputes, which the Department of Defense has defined to include payday loans, vehicle title loans, and tax refund anticipation loans. *See* Talent-Nelson Amendment to the John Warner National Defense Authorization Act of 2007, Pub. L. No. 109-364, § 670(f)(4), 120 Stat. 2083, 2267 (2006) (codified at 10 U.S.C. § 987(f)(4) (2006)); 32 C.F.R. § 232.3(b)(1) (2014); 32 C.F.R. § 232.3(b)(1) (2007); *see also* Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, § 8116(a)(1), 123 Stat. 3409, 3454 (2009) (exempting Title VII claims related to military contractors from mandatory arbitration).

375. The CFPB has the authority to issue regulations prospectively banning binding pre-dispute mandated arbitration agreements in the markets over which it has regulatory authority. *See* 12 U.S.C. § 5518(b) (providing that the Bureau, "by regulation, may prohibit or impose conditions or limitations" on arbitration agreements between consumers and financial product and service providers relating to "any future disputes between the parties" upon a finding that such regulations are "in the public interest and for the protection of consumers"). In May of 2015, 58 members of Congress called on the CFPB to issue rules "to prohibit the use of forced arbitration clauses in financial contracts and give consumers a meaningful choice after disputes arise." Press Release, Sen. Al Franken, Members of Congress Call on the Consumer Financial Protection Bureau To Issue a Strong Rule To Prohibit Use of Forced Arbitration (May 21, 2015), http://www.franken.senate.gov/?p=press_release&id=3152 [http://perma.cc/4XG5-SK3Q].

court access rights in light of the absence of bargaining, the quality of the procedural opportunities needed for arbitration, or the information that ought to be disclosed.[376] Below, I trace the emergence and application of the Court's legitimacy tests, and I explore the roles that Congress and federal agencies could play in structuring the proliferating Alternative Civil Procedure Rules and in regulating the diffuse sites in which they operate.

B. Effective Vindication's Genesis in an "International Commercial Transaction" and Under the Supervision of the Securities and Exchange Commission

The "judge-made" test of adequacy[377] was announced in 1985 in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, when the Court first applied the FAA to preclude litigation of a federal statutory right.[378] The context, as Justice Blackmun explained for the Court, was a trilateral contract involving an "international commercial transaction" that included an arbitration agreement.[379] As the dissent described the claim, the Puerto Rican dealer, Soler Chrysler-Plymouth, alleged that the two other parties ("major automobile companies") were part of an "international cartel that has restrained competition in the American market . . . [and] allegedly prevented the dealer from transshipping some 966 surplus vehicles from Puerto Rico" to other U.S. dealers.[380]

Relying on a mix of the FAA and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (which the United States had joined fifteen years earlier), the majority sent the disputants—a Japanese automobile manufacturer, the Chrysler Corporation, and a Puerto Rican dealership—to

376. Proposals to do more have been made, both in draft legislation and in commentary. *See, e.g.*, Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (2015); Arbitration Fairness Act of 2013, H.R. 1844, 113th Cong. (2013); Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013); Fairness in Nursing Home Arbitration Act of 2012, H.R. 6351, 112th Cong. (2012); Fairness in Nursing Home Arbitration Act of 2009, H.R. 1237, 111th Cong. (2009); Fairness in Nursing Home Arbitration Act, S. 512, 111th Cong. (2009); Sarah Rudolph Cole, *The Federalization of Consumer Arbitrations: Possible Solutions*, 2013 U. CHI. L. F. 271 (2013); Ramona L. Lampley, *"Underdog" Arbitration: A Plan for Transparency*, 90 WASH. L. REV. (forthcoming 2015), http://ssrn.com/abstract=2574064 [http://perma.cc/CLS7-N6YY]. Thomas Carbonneau has also called for the revision of the FAA. *See* CARBONNEAU, *supra* note 17, at 95-134.

377. This is Justice Scalia's description. *See* Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310 (2013).

378. 473 U.S. 614 (1985).

379. *Id.* at 616.

380. *Id.* at 640 (Stevens, J., dissenting). Justice Stevens argued that the arbitration clause was part of the agreement between Soler and Mitsubishi and therefore did not bar the antitrust counter-claim that entailed a trilateral dispute, nor did the clause apply to claims outside the contract provisions relating to failure to perform. *Id.* at 643-45.

arbitration.[381] The ruling could easily have been cabined: the three parties were businesses (albeit with different resources), and consent to the contract was not in question[382]—even if, as the dissent argued, there had been "no genuine bargaining over the terms of the submission" to arbitration.[383]

Further, one reading of the opinion was that it applied only to international cases. The Court cited the Convention that the United States had joined, committing itself to enforcement of international awards. "[E]ven assuming that a contrary result would be forthcoming in a domestic context,"[384] the Court emphasized the importance of "international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes."[385] Much of the opinion expressed confidence in arbitrators' willingness to enforce U.S. antitrust law and their ability to deal with its complexity. Given that the parties' "intentions" were for the international arbitral body to decide claims "arising from the application of American antitrust law," the Court expressed its confidence that the arbitrators were "bound to decide [the] dispute in accord with the national law giving rise to the claim."[386] The Court added what might have been an aside but, in retrospect, came to be read as its essential caveat: "so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function."[387]

The Court's next steps in the relocation of statutory claims to arbitration could also have been limited ones, dependent on supervision of arbitrations by federal agencies such as the SEC. In 1987, in *Shearson/American Express v. McMahon*, Justice O'Connor wrote for the Court to enforce a pre-dispute arbitration clause "between brokerage firms and their customers."[388] She explained that unlike the 1950s era of *Wilko v. Swan*, "the SEC has sufficient statutory authority to ensure that arbitration is adequate to vindicate Exchange Act rights, [such that] enforcement does not effect a waiver of 'compliance with any

381. *Id.* at 616-18 (majority opinion).

382. The Court used "freely negotiated contractual choice of forum provisions" as the relevant benchmarks. *See id.* at 631.

383. *Id.* at 666 (Stevens, J., dissenting).

384. *Id.* at 629 (majority opinion).

385. *Id.*

386. *Id.* at 636-37.

387. *Id.* at 637.

388. 482 U.S. 220, 222 (1987).

provision' of the Exchange Act."[389] The role played by the SEC in ensuring the quality of arbitral processes also counted in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, which overruled *Wilko* expressly in 1989,[390] and in *Gilmer v. Interstate/Johnson Lane Corp.*, which enforced the FAA in a case alleging that a brokerage firm had engaged in age discrimination.[391]

Thus, these initial cases involved either international commercial transactions or domestic securities litigation that was subject to some administrative oversight. Disputes were diffused but in a limited category of cases and with the prospect of administrative oversight.

C. Judicial Cost-Benefit Analyses and the Question of Collective Actions

"Effective vindication" became the mantra thereafter, but the Court deemed that test to be satisfied without individually negotiated contracts, international transactions, or federal administrative oversight. Its approach has thus failed to develop a federal analogue of the unconscionability doctrines used by state courts to evaluate the structure of proposed arbitrations.[392]

Illustrative is a 2013 decision by the Supreme Court of Washington, which concluded that a four-sentence arbitration clause proffered by a debt adjustor, LDL Freedom Enterprises, Inc., was unconscionable in three ways.[393] First, that state's consumer law provided a four-year period in which to bring a

389. *Id.* at 238. The partial dissenters—Justice Blackmun joined by Justices Brennan and Marshall—disagreed, arguing that SEC oversight of arbitration under the Exchange Act did not solve the problems identified in *Wilko*, in that arbitration provided neither a record nor judicial review and put the complainant in a forum "controlled by the securities industry." *Id.* at 242, 260 (Blackmun, J., concurring in part and dissenting in part). Justice Stevens wrote separately to record his dissent that *Wilko* applied. *Id.* at 268 (Stevens, J., concurring in part and dissenting in part).

390. 490 U.S. 477, 485 (1989).

391. 500 U.S. 20, 29 (1991). The SEC continues to exercise oversight over Financial Industry Regulatory Authority (FINRA) arbitrations, as discussed *infra* notes 599-619 and accompanying text.

392. Some lower courts have distinguished the inquiry into effective vindication on the one hand, and unconscionability doctrine on the other, while others have connected them. For example, the First Circuit concluded that the federal concern focused "more narrowly" on "illusoriness"—that "the arbitration regime . . . is structured so as to *prevent* a litigant from having access to the arbitrator to resolve claims, including unconscionability defenses." Awuah v. Coverall N. Am., 554 F.3d 7, 13 (1st Cir. 2009).

393. *See* Gandee v. LDL Freedom Enters., Inc., 293 P.3d 1197, 1201 (Wash. 2013). *See generally* James Dawson, Comment, *Contract After* Concepcion*: Some Lessons from the State Courts*, 124 YALE L.J. 233 (2014).

claim, but the arbitration clause imposed a thirty-day statute of limitations.[394] Second, the amount at stake was $3,500 in actual damages, yet by requiring travel to California, the arbitration clause imposed prohibitive costs.[395] Third, the "loser pays" provision was one-sided, benefiting only the company.[396]

In contrast, the U.S. Supreme Court has not produced a single decision finding arbitration inadequate, inaccessible, or ineffective to vindicate rights.[397] For example, in 2000, Chief Justice Rehnquist, writing for the Court, rebuffed Larketta Randolph, who had alleged that Green-Tree Financial Corporation-Alabama had violated the Truth in Lending Act and the Equal Credit Opportunity Act.[398] Randolph argued that the arbitration clause had failed to address the question of costs, rendering the clause unenforceable.[399] Over Justice Ginsburg's objections for the four dissenters that the burden of detailing costs ought to lie with the "repeat player" and that the question of arbitration's accessibility required a remand,[400] the Court held that the opponent of arbitration had to demonstrate that costs would be "prohibitive."[401]

The difficulty of meeting that burden became vivid in the 2013 decision of *American Express v. Italian Colors*,[402] which like *Mitsubishi*, involved antitrust claims but this time in the "domestic context."[403] Justice Scalia, writing for the five-person majority, offered hypotheticals about what would constitute

394. *Gandee*, 293 P.3d at 1201.

395. *Id.* at 1200 ("Gandee struggles financially (as presumably do all Freedom's customers) and the costs of arbitrating in California would exceed [Gandee's] claim.").

396. *Id.* at 1200-01.

397. Lower courts have found some obligations to arbitrate invalid, invoking a mix of unconscionability and effective vindication failings. *See, e.g.*, Chavarria v. Ralphs Grocery Co., 733 F.3d 916 (9th Cir. 2013); Boaz v. FedEx Customer Info. Servs., Inc., 725 F.3d 603 (6th Cir. 2013); Hall v. Treasure Bay V.I. Corp., 371 F. App'x 311, 313 (3d Cir. 2010) (finding the requirement that the employee pay the "entire costs" and that arbitrators not modify the employer's disciplinary measure to be substantively unconscionable in the context of a mix of state and federal claims); Morrison v. Circuit City Stores, Inc., 317 F.3d 646 (6th Cir. 2003). Yet in the wake of the 2011 and 2013 decisions in *AT&T* and *Italian Colors*, lower courts have retreated. *See, e.g.*, Duran v. J. Hass Grp., LLC, 531 F. App'x 146, 147-48 (2d Cir. 2013), discussed *supra* notes 348-352.

398. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000).

399. *Id.* at 90.

400. *Id.* at 96-97 (Ginsburg, J., dissenting).

401. *Id.* at 92 (majority opinion). In the lower courts, this ruling has permitted claims that costs can be prohibitive. *See, e.g.*, Valle v. ATM Nat'l, LLC, No. 14-CV-7993 KBF, 2015 WL 413449, at *6-7 (S.D.N.Y. Jan. 30, 2015), *appeal docketed*, No. 15-535 (2d Cir. Feb. 23, 2015) (severing a "loser pays" provision in part based on financial resources of the plaintiffs).

402. 133 S. Ct. 2304 (2013).

403. *Cf.* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 629 (1985).

inadequacy. He reiterated the phrasing from *Randolph* about a "prohibitively expensive" process and added another example—that "a provision in an arbitration agreement forbidding the assertion of certain statutory rights"[404] could render arbitration "impracticable."[405]

But as Justice Kagan's dissent pointed out, those examples rang hollow because the case appeared to fit them. Italian Colors, a small business, had argued that American Express had "used its monopoly power to force merchants" to accept what was alleged to be a tying arrangement, unlawful under antitrust law.[406] The same contract included an arbitration provision barring class actions; the "variety of procedural bars that would make pursuit of an antitrust claim a fool's errand" immunized the company from liability.[407] The majority did not disagree that the costs of establishing an antitrust violation would be greater than any damages awarded to individual claimants but nonetheless enforced the single-file arbitration requirement.

Justice Scalia's majority ruling in *Italian Colors* explained that its outcome was forecast by his 2011 opinion in *AT&T Mobility LLC v. Concepcion*[408] (which "all but resolves this case"[409])—thereby anchoring the relationship of the adequacy inquiry that the Court undertook in that preemption case and its doctrine on effective vindication. At issue in *AT&T v. Concepcion* was, as noted, a bar on class actions in courts or in arbitration that was imposed in the documents accompanying the purchase of a wireless service.

The idea of "class arbitration" had gained currency after 2003, when the Supreme Court ruled in *Green-Tree Financial Corp. v. Bazzle*[410] that the question of whether a contract precluded class arbitration was to be determined ini-

404. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2310, 2315 (2013).

405. *Id.* at 2310-11 (citing Green Tree Fin. Corp.–Ala. v. Randolph, 531 U.S. 79, 90 (2000)); *see also Green Tree*, 531 U.S. at 92.

406. *Italian Colors*, 133 S. Ct. at 2313 (Kagan, J., dissenting).

407. *Id.*; *see* Einer Elhauge, *How* Italian Colors *Guts Private Antitrust Enforcement by Replacing It with Ineffective Forms of Arbitration*, 38 FORDHAM INT'L L.J. 771 (2015).

Whether the doctrine on arbitration would reach mandates prohibiting injunctive relief is not settled. *See* Gilles, *supra* note 368. One example comes from the proposed merger of AT&T. Customers sought to enjoin the merger by demanding arbitration; a judge held that the demand was not cognizable in arbitration but left open the possibility that the claims could be pursued in court. AT&T Mobility LLC v. Fisher, Civ. No. DKC 11-2245, 2011 U.S. Dist. LEXIS 124839, at *15-16 (D. Md. Oct. 28, 2011).

408. 131 S. Ct 1740 (2011).

409. *Italian Colors*, 133 S. Ct. at 2312.

410. 539 U.S. 444, 452-53 (2003).

tially by an arbitrator rather than a judge.[411] The marketplace of providers responded by fashioning a procedure for class arbitrations that incorporated aspects of the federal class action rule, and the AAA database reflected the use of that provision, with more than 280 such actions listed by 2009.[412]

But another sector of the market—potential defendants drafting arbitration clauses—had a different response. Many businesses wrote clauses prohibiting class arbitrations;[413] some offered the symmetry that "YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU."[414] Such clauses were usually accompanied by an "anti-severability

411. *Id.* Justice Stevens concurred and argued that class-wide arbitrations were permissible under the FAA. *Id.* at 456 (Stevens, J., concurring in the judgment). Chief Justice Rehnquist, joined by Justices O'Connor and Kennedy dissented; they read the contract as precluding class-wide arbitration. *Id.* at 458-59 (Rehnquist, C.J., dissenting). Justice Thomas dissented, arguing that the FAA did not apply to proceedings in state courts. *Id.* at 460 (Thomas, J., dissenting).

412. *Supplementary Rules for Class Arbitrations*, AM. ARB. ASS'N (2011), https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf [https://perma.cc/U2MN-3BDR]; *see also* Carole J. Buckner, *Toward a Pure Arbitral Paradigm of Classwide Arbitration: Arbitral Power and Federal Preemption*, 82 DENV. U. L. REV. 301, 303 n.20 (2004); Judith Resnik, *Fairness in Numbers*, 125 HARV. L. REV. 78, 122-23 (2011). Class arbitrations continue to be filed. *See Class Arbitration Case Docket*, AM. ARB. ASS'N (2015), http://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket [http://perma.cc/Y9E8-GV8K]; Boyle AAA 2015 Materials, *supra* note 25.

As the decision in *AT&T* reported, the AAA's searchable class action docket included, as of 2009, 283 class actions of which 121 were active and 162 "settled, withdrawn, or dismissed" without merits rulings. *AT&T v. Concepcion*, 131 S. Ct. at 1751 (citing Brief of Am. Arbitration Ass'n as Amicus Curiae in Support of Neither Party at 22-24, Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S. Ct. 1758 (2010) (No. 08-1198), 2009 WL 2896309 [hereinafter AAA Stolt-Nielsen Brief]).

413. Brief of CTIA—The Wireless Ass'n as Amicus Curiae Supporting Petitioner at 18, *AT&T v. Concepcion*, 131 S. Ct. 1740 (No. 09-893), 2010 WL 709799; *see* Edward Wood Dunham, *The Arbitration Clause as Class Action Shield*, 16 FRANCHISE L.J. 141 (1997). In addition, several arbitration contracts prohibit seeking relief "on behalf of the general public or other parties." *See* Gilles, *supra* note 368, at n.22.

414. Wireless Cellular Phone Document from AT&T (2002) (on file with author), and reproduced in Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1134-35. That provision was not sui generis. *See, e.g., Prepay Wireless Service Agreement*, VERIZON WIRELESS (2000), http://www.verizonwireless.com/privacy_disclosures/prepay_wireless_svc.html [http://perma.cc/X3L6-8PPC] ("EVEN IF APPLICABLE LAW PERMITS CLASS ACTIONS OR CLASS ARBITRATIONS, YOU WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST US . . . AND WE WAIVE ANY RIGHT TO PURSUE ON A CLASS BASIS ANY SUCH CONTROVERSY OR CLAIM AGAINST YOU.").

provision," stipulating that if a court found the clause unenforceable, the obligation to arbitrate would become unavailable and all claims had to be brought to court.[415]

The *AT&T* litigation thus became the first in which the Court addressed the lawfulness of preventing individuals from joining together in arbitration. The case had been filed by Vincent and Lisa Concepcion "on behalf of all consumers who entered into a transaction in California wherein they received a cell phone for free or at a discount . . . but were charged sales tax" in excess of that "payable [as] calculated on the actual discounted price."[416] The overcharge was $30.22, and the Concepcions alleged that the providers had violated California's consumer protection laws against deceptive and false advertising.[417] The Concepcions' theories were that the provider should either have absorbed the costs of the sales tax or not have advertised that the phones were free.[418]

The AT&T 2014 service documents state that "you and AT&T are each waiving the right to a trial by jury or to participate in a class action." Further, the form states that it "evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs." *AT&T Wireless Customer Agreement*, AT&T, *supra* note 2, § 2.2.

The self-obliged symmetrical limitation aims to avoid questions about the enforceability of the provisions. *See* Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004) (holding that state law may find unconscionable an agreement requiring consumers to arbitrate their claims but which permits the provider to choose between arbitration and litigation). A more recent decision questioned but did not decide whether symmetrical constraints were required. *See* THI of New Mexico at Hobbs Ctr., LLC, v. Patton, 741 F.3d 1162, 1170 (10th Cir. 2014); *see also* Alltel Corp v. Rosenow, 2014 Ark. 375, at 8-9 (holding unenforceable an arbitration agreement lacking mutuality and explaining "there is no mutuality of obligation where one party uses an arbitration agreement to shield itself from litigation, while reserving to itself the ability to pursue relief through the court system" (quoting Independence Cnty. v. City of Clarksville, 386 S.W.3d 395, 399 (Ark. 2012))).

415. *See CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 45-46.

416. Complaint at ¶ 14, Concepcion v. Cingular Wireless LLC, No. 06 CV 0675 DMS (NLS) (S.D. Cal. Mar. 27, 2006), 2006 WL 1194855 [hereinafter Concepcion Complaint]; First Amended Complaint at ¶ 14, *Concepcion v. Cingular*, No. 06 CV 0675 DMS (NLS) (S.D. Cal. May 2, 2006), 2006 WL 1866797 [hereinafter Concepcion First Amended Complaint].

417. The Concepcions relied on the 1970 Consumer Legal Remedies Act. *See* CAL. CIV. CODE § 1760 (West 2015). Further, invoking FTC regulations, the Concepcions argued that footnote or asterisk references to special conditions were inadequate to prevent misunderstanding. *See* Concepcion Complaint, *supra* note 416, at ¶¶ 23, 32-33, 46 (citing 16 C.F.R. § 251.1, which requires "extreme care" when offers advertise "free" goods or services, and which specifies that any obligations incurred must be explained "clearly and conspicuously at the outset"); Concepcion First Amended Complaint, *supra* note 416 at ¶¶ 23, 32-33, 46 (same).

418. If sales tax were required, the Concepcions argued, then the provider should have absorbed it rather than "illicitly shift[] the tax burden to [its] customers." Concepcion Complaint, *supra* note 416, at ¶ 17(b); Concepcion First Amended Complaint, *supra* note 416, at ¶ 17(b).

California had both a statute and a decision (*Discover Bank v. Superior Court*)[419] addressing the procedural hurdles that the Concepcions faced. Under California law, when class waivers were in a "consumer contract of adhesion," predictably small damage disputes could arise between the parties,[420] and the "party with the superior bargaining power" was alleged to have "carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money," a waiver would be unenforceable because it functioned to exempt the party from responsibility for the allegedly willful injury inflicted.[421]

The 2011 *AT&T* decision held California's rule preempted by the FAA because the rule stood as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[422] The *AT&T* Court rested its holding on "our cases,"[423] which ascribed two rationales to the FAA: "judicial enforcement of privately made agreements to arbitrate"[424] and elimination of the "costliness and delays of litigation."[425] Given that consumers could not negotiate arbitration provisions in cell phone documents (I have tried), the majority understandably focused less on consent and more on what it believed to be the procedural advantages of "bilateral" arbitration.[426]

The FAA's text, shaped in the 1920s, provided no descriptions of the form that arbitrations were to have. The Court imputed one through a purposive interpretation, inflected with assessments of the costs and benefits of class actions. The majority extolled the virtues of "bilateral arbitration"—a term introduced into FAA case law in 2010 by Justice Alito when ruling that silence in a contract about the availability of class arbitration could not be taken by

419. CAL. CIV. CODE § 1668 (West 2015); Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005).

420. *Discover Bank*, 113 P.3d at 1110.

421. *Id.*; *see also* CAL. CIV. CODE § 1668 (West 2015).

422. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1753 (2011) (citation omitted).

423. *Id.* at 1749.

424. *Id.* (citing Dean Witter Reynolds Inc. v. Byrd, 470 U.S. 213, 219 (1985)).

425. *Id.* (citing *Dean Witter Reynolds Inc.*, 470 U.S. at 220). The Court's focus on arbitration's "fundamental attributes," *id.* at 1748, as an affordable and accessible dispute resolution forum prompted the California Supreme Court to conclude that a state prohibition on waiving access to state labor hearings (a so-called "Berman hearing") was not preempted because such proceedings conferred the benefits of arbitration and therefore could be a step on the way to arbitration. *See* Sonic-Calabasas A, Inc. v. Moreno, 311 P.3d 184 (Cal. 2013), *cert. denied*, 134 S. Ct. 2724 (2014).

426. *AT&T v. Concepcion*, 131 S. Ct. at 1751.

arbitrators as the basis for authorizing a class process.[427] In the *AT&T* decision, bilateral arbitration came to embody "the principal advantage of arbitration—its informality."[428] Further, the *AT&T* majority praised the speed and relatively low cost of bilateral arbitration in contrast with the slow pace of class arbitration.[429]

As evidence, the Court drew (ironically, given its preemption of California's law) on another of that state's statutes, which mandated reporting by arbitration services.[430] Based on information provided by the AAA, the majority concluded that "the average consumer arbitration between January and August 2007 resulted in a disposition on the merits in six months, four months if the arbitration was conducted by documents only."[431] In contrast, of the 283 class arbitrations "opened" by the AAA, the "median time from filing to settlement, withdrawal, or dismissal—not judgment on the merits—was 583 days, and the mean was 630 days."[432]

The majority decided that class arbitrations were "more likely to generate procedural morass than final judgment."[433] In addition, confidentiality and protection of absentees became "more difficult."[434] Data aside, the majority opined that class arbitrations gave plaintiffs too much power, creating the risk of "in terrorem" settlements; defendants had to "bet the company" because class arbitration provided "no effective means of review."[435] (In 2007, as discussed below, it was the Court that read the FAA narrowly and refused to permit "effective means of review."[436])

427. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686-87 (2010) (discussing the "fundamental changes brought about by the shift from bilateral arbitration to class-action arbitration"). The word "bilateral" appeared earlier in conjunction with arbitration to describe a form of arbitration without discussing it as preferred by the FAA. *See, e.g.*, Transp.-Commc'n Emps. Union v. Union Pac. R.R. Co., 385 U.S. 157, 177 (1966) (Fortas, J., dissenting) ("The Board is essentially a permanent bilateral arbitration institution created by statute for settling disputes arising in the context of an established contractual relationship.").

428. 131 S. Ct. at 1751 (noting that "class arbitration *requires* procedural formality").

429. *Id.*

430. *See* CAL. CIV. PROC. CODE § 1281.96 (West 2015).

431. *AT&T v. Concepcion*, 131 S. Ct. at 1751 (citing *Analysis of the AAA's Consumer Arbitration Caseload*, AM. ARB. ASS'N (2007), https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004325 [https://perma.cc/MC87-483H]; AAA Stolt-Nielsen Brief, *supra* note 412, at 22-24).

432. *AT&T v. Concepcion*, 131 S. Ct. at 1751.

433. *Id.*

434. *Id.* at 1750.

435. *Id.* at 1752. The lack of review stemmed from the Court's narrow reading of the FAA in *Hall Street Associates v. Mattel, Inc.*, 552 U.S. 576 (2008). *See infra* Part IV.E.

436. *See infra* Part IV.E.

The distance between the statute's text and the Court's analysis can be seen from its holding that providers can prohibit aggregation but that the FAA itself does not preclude parties from agreeing to use class arbitrations.[437] Nor have courts concluded that the importation of various other procedures from the litigation system is impermissible. Summary judgment motions have become a feature of some employment arbitrations,[438] as has discovery. Parties can also shape appellate tiers within arbitration and choose time frames for decision making – rendering arbitration neither "speedy" nor "inexpensive."[439] Indeed, as illustrated by an AAA handbook, the category "arbitration" entails a host of procedural variations, depending on the submarket in which it is used.[440]

The 1925 statute's silence as to form reflects its historical context, authorizing enforcement when the practice was nascent and leaving ample room for arbitration's evolution, in use today for a range of disputes from high stakes, heavily lawyered, expensive commercial conflicts to family dissolutions. Not only was there a lack of evidence that the Act commanded or preferred bilateralism[441] but, as Justice Breyer argued in dissent, the FAA was shaped for commercial arbitration between disputants of "roughly equivalent bargaining power."[442] For the dissent, aggregate arbitrations were therefore consistent with what Congress had in mind for its statute's users.[443] Thus, rather than contrasting class and individual arbitrations, the dissent compared class arbitrations to class actions in court. Based on another California study, Justice Breyer noted that "class arbitrations can take considerably less time than in-court proceedings in which class certification is sought."[444] Moreover, a single

437. *AT&T v. Concepcion*, 131 S. Ct at 1751. Further, in 2013, the Court concluded that when parties authorize arbitrators to interpret contracts and arbitrators conclude that class arbitration is permissible, that interpretation stands even if it is mistaken. *See* Oxford Health Plans, LLC v. Sutter, 133 S. Ct. 2064 (2013).

438. Colvin, *supra* note 16, at 81.

439. The CFPB found that almost thirty percent of the wireless providers and more than forty percent of the credit card clauses provided for appeal, usually to three arbitrators. Some required a monetary threshold, which the study thought would benefit businesses more than consumers. *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 75-79.

440. *See* HANDBOOK ON ARBITRATION PRACTICE, AM. ARB. ASS'N 207-74, 385-94 (2010). The chapters are entitled "Discovery and Evidence in Arbitration," *id.* at 207-74, and "A Practical Approach to Affording Review of Commercial Arbitration Awards: Using an Appellate Arbitrator," *id.* at 385-94.

441. *AT&T v. Concepcion*, 131 S. Ct. at 1756 (Breyer, J., dissenting).

442. *Id.* at 1759.

443. *Id.*

444. *Id.* (citing Admin. Office of the Courts, *Class Certification in California: Second Interim Report from the Study of California Class Action Litigation*, JUD. COUNCIL CAL. 18

class action was "surely more efficient than thousands of separate proceedings for identical claims."[445]

D. "Mass" Arbitration Clauses Without a Mass of Claims

The image of "thousands of separate proceedings" seems like the logical consequence of the massive production of arbitration clauses. To know definitely the numbers of filings would require a database of providers required to make public their systems and usage rates. The federal system imposes no such general requirements,[446] but a few states have mandated disclosures from their resident ADR providers of consumer arbitrations, and researchers (including those deployed by the federally created Consumer Financial Protection Bureau) have made forays into submarkets to try to find filings.

I offer details about how to research arbitration filings and the results of those inquiries in service of three points. First, Dispute Diffusion uncoupled from obligations of public access closes off systematic information about the volume and nature of the complaints. But for state regulation requiring data or the largesse of providers, we would know even less about arbitration in practice than we do. Second, the information available demonstrates the non-use of arbitration. Because so few individuals, as contrasted with those eligible to bring claims, do so in the newly mandated system, arbitration works to erase rather than to enhance the capacity to pursue rights. Third, exploration of the individualized system demonstrates the importance of collectivity to the pursuit of small-value claims. The Court's enforcement of class action bans has been the key to losing the remedial role played by private enforcement of law.

(2010), http://www.courts.ca.gov/documents/classaction-certification.pdf [http://perma.cc/LV62-UQCK]).

445. *Id.* at 1756.

446. As discussed *infra* note 463, the Financial Industry Regulatory Authority (FINRA) requires that data on arbitration awards be publicly available. FINRA RULES § 12904(h), FIN. INDUSTRY REG. AUTHORITY (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4192 [http://perma.cc/WZ7T-CW3V] (noting that for customer disputes, "[a]ll awards shall be made publicly available"); *Id.* §§ 12904(h), 13904(h), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4292 [http://perma.cc/3UF7-PRBY] (providing the same rule for industry disputes); *see also Dispute Resolution Statistics*, FIN. INDUSTRY REG. AUTHORITY (2015), http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics [http://perma.cc/D2EA-A6PQ] (summarizing arbitration statistics) [hereinafter *FINRA Dispute Resolution Statistics*]; *FINRA Arbitration Awards Online*, FIN. INDUSTRY REG. AUTHORITY (2015), http://finraawardsonline.finra.org [http://perma.cc/KF5Z-JRFD] (providing a searchable database of arbitration awards).

In researching the use of arbitration, I chose filings involving AT&T because of its place in the case law and because its designated arbitration service, AAA, complies with mandates to disclose information. Two sets of data about consumer AT&T arbitrations exist. The *AT&T* litigation record included information on arbitration for five years between 2003 and 2007; during that interval, 170 individuals—averaging 34 a year—were in arbitration with the company.[447] More recent statistics come through research on five years from 2009 to 2014. By culling the AAA's web-based information, we identified 134 individual consumers—or about 27 per year—who filed claims through the AAA against AT&T.[448] Given the estimate that the number of AT&T subscribers rose over the course of this ten-year period from 46 to 120 million customers each year, the available data reveal that virtually none use arbitrations.

1. Public Access to, and Confidentiality in, Arbitration

An account of the route to the data is in order because, as Frances Kellor recounted in her 1948 book on the AAA, arbitration is a private process. The businesses that shaped it preferred to have their disputes off screen, and they obliged arbitrators to keep confidential what they learned and did.[449]

Decades later, that aura of privacy persists, even as the rule structure about confidentiality has become more complex. By authorizing disputants to go to court to confirm or vacate awards,[450] the FAA itself "appears to presume that arbitration materials could become public."[451] Lawsuits filed about arbitration are, however, a small fraction of the claims arbitrated. Thus, public access relies

447. Brief of Civil Procedure and Complex Litigation Professors, *supra* note 25, at 20 (citing Declaration of Bruce L. Simon, *supra* note 25, at ¶¶ 8-9). These statistics include a period of time prior to AT&T's 2004 merger with Cingular. Cingular had been the second-largest provider of wireless services, and AT&T had been the third-largest. The new entity, under the AT&T name, provided services to 46 million. Coneff v. AT&T Corp., 620 F. Supp. 2d 1248, 1252 (W.D. Wash. 2009), *rev'd*, 673 F.3d 1155 (9th Cir. 2012).

448. *See AAA Data, July 2009-June 2014, Provider Organization Report*, *supra* note 25.

449. *See, e.g.*, KELLOR, *supra* note 255, at 72, 88. Kellor's role in shaping the AAA is discussed in Kessler, *supra* note 145. Whether a preference for confidentiality ought to be honored for companies with public investors is a question not explored here.

450. *See* 9 U.S.C. § 13 (2012); *see also* PDV Sweeny, Inc. v. ConocoPhillips Co., No. 14-cv-5183 (AJN), 2014 WL 4979316 (S.D.N.Y. Oct. 6, 2014) (concluding that arbitral award actions are "judicial documents" that are presumptively open); Martis v. Dish Network, No. 1:13-cv-1106, 2013 WL 6002208 (W.D. Mich. Nov. 12, 2013).

451. Richard Frankel, *State Court Authority Regarding Forced Arbitration After* Concepcion, *in* POUND CIV. JUST. INST , FORCED ARBITRATIONS AND THE FATE OF THE 7TH AMENDMENT: THE CORE OF AMERICA'S LEGAL SYSTEM AT STAKE?,. 55, 70 (2014), http://www.poundinstitute.org/sites/default/files/docs/2014PoundReport2.24.15.pdf [http://perma.cc/MFQ9-VQKW].

primarily on the rules of ADR providers, the text of arbitration clauses, custom, and some federal and state regulations.

As noted, the major providers describe arbitration as a private process and authorize arbitrators to limit third-party access to hearings.[452] In addition, specific arbitration clauses may require confidentiality. Illustrative is one imposed in 2002 and since withdrawn by AT&T, instructing that: "Neither you nor [the company] may disclose the existence, content or results of any arbitration or award, except as may be required by law [or] to confirm and enforce an award."[453]

The legality of such rules is a subject of debate. In 2003, the Ninth Circuit held this provision unconscionable under California law,[454] but other circuits (the Second, Third, and Fifth) have not objected to such provisions.[455] Instead, those courts approached "confidentiality clauses [as] so common in the arbitration context"[456] that limited confidentiality would undermine the "character of arbitration itself."[457] Moreover, although the Supreme Court's case law does not much discuss confidentiality, the few references assume its existence and importance. For example, in 2010, Justice Alito quoted the AAA class arbitration rule, that "the presumption of privacy and confidentiality" did not apply to class actions as an example of the "fundamental changes" distinguishing bilateral and class-action arbitrations.[458] Likewise, Justice Scalia commented in *AT&T v. Concepcion* that confidentiality "becomes more difficult" with class action arbitrations.[459]

452. As the AAA explains in its Ethical Principles, an "arbitration proceeding is a private process." *AAA Ethical Principles*, *supra* note 28.

453. Ting v. AT&T, 319 F.3d 1126, 1151 n.16 (9th Cir. 2003).

454. *Id.* at 1126; *see also* Pokorny v. Quixtar, Inc. 601 F.3d 987 (9th Cir. 2010). The Ninth Circuit, joined by some state courts, concluded that confidentiality either gives rise to or contributes to a contract's unconscionability. *See, e.g.*, Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 578-79 (Ky. 2012).

455. *See* Guyden v. Aetna Inc., 544 F.3d 376, 384-85 (2d Cir. 2008); Iberia Credit Bureau Inc. v. Cingular Wireless LLC, 379 F.3d 159, 175-76 (5th Cir. 2004); Parilla v. IAP Worldwide Serv., VI, Inc., 368 F.3d 269, 279-81 (3d Cir. 2004). Further, one court concluded that a for-profit educational service could seek an injunction against former students to prevent them from disclosing the outcomes of arbitration. *See* ITT Educ. Serv., Inc. v. Arce, 533 F.3d 342 (5th Cir. 2008).

456. *Guyden*, 544 F.3d at 385.

457. *Id.* (quoting *Iberia Credit Bureau*, 379 F.3d at 175).

458. Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 686 (2010) (quoting from the class action arbitration rules provided as an Addendum to AAA Stolt-Nielsen Brief, *supra* note 412, at 10a).

459. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1750 (2011).

In practice, however, mandates to keep consumer information confidential are infrequent. The 2015 study by the CFPB concluded that in consumer debt, confidentiality was required in seven percent of the credit card clauses reviewed and in none of the arbitration obligations imposed by the wireless service providers.[460]

Yet, unlike courts, obliged by statutes and constitutions to account for their work, ADR providers are subject to fewer regulations, and First Amendment and Due Process rights of access have not thus far been read to apply directly to them. ADR providers do not routinely create public venues for observation of their proceedings, and many providers decline to make public the number and kinds of claims with which they deal, or do so only by way of a special arrangement with selected researchers.[461] Arbitrators continue to be bound by obligations of non-disclosure; companies do not routinely post decisions and disposition data, and individuals can only learn about filings and outcomes through networks linking similarly situated individuals and lawyers.

Important exceptions — from transnational conventions, federal regulations, and state law — permit windows into a few segments of the arbitration market. In 2013, UNCITRAL issued rules to govern transparency in treaty-based investor-state arbitration.[462] Domestically, federal regulation of public companies

460. *See CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 52-53.

461. The 2015 AAA Materials cited here are one example, and thus I join several empirical analyses thanking the AAA for making available data that were not otherwise in the public domain. *See also* Colvin & Pike, *supra* note 179, at 59 n.1, 62 (noting that the AAA enabled full file reviews of 217 cases, thereby permitting access beyond what was available under state mandates); O'Connor & Rutledge, *supra* note 236, at 105. Further, Colvin and Gough note that the AAA uses a "broad interpretation" of California's disclosure requirements, thereby augmenting the public disclosure of information. Colvin & Gough, *supra* note 32, at 12.

462. UNCITRAL Transparency Rules, *supra* note 261. As the press release explained, while "confidentiality is often a valued feature of commercial arbitration," the public interest in arbitrations involving the state prompted the need to make such arbitrations more transparent and accessible. *See* Press Release, Comm. on Int'l Trade Law, General Assembly Adopts the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration, U.N. Press Release UNIS/L/210 (Dec. 11, 2014), http://www.unis.unvienna.org/unis/en/pressrels/2014/unisl210.html [http://perma.cc/9YPE-M68C].

The Transparency Rules require the arbitral tribunal, when exercising its discretion, to "take into account" the "public interest in transparency" along with the "parties' interest in a fair and efficient resolution of their dispute." UNCITRAL Transparency Rules, *supra* note 261, at art. 1, ¶ 4. The Rules also specify that when conflicts arise between arbitration rules and the Rules on Transparency, the latter "shall prevail." *Id.* art. 1, ¶ 7. Once arbitration is noticed, the Transparency Rules require that "the repository [] make all documents available in a timely manner, in the form and in the language in which it receives them"; that various documents, including a list of exhibits and expert reports, be made available to the public; that the tribunal permit third parties to submit information to it; and that hearings "shall be public" and the tribunal shall "facilitate public access," subject to the need to protect "confi-

and rules of the Financial Industry Regulatory Authority (FINRA)[463] require some disclosures. Further, as noted, a few states call for ADR providers to publish data on consumer arbitrations in "a computer-searchable format" (to use the terms of California's 2002 statute) on the web.[464]

dential information" of some parts of the hearing. *Id.* art. 2-4, 6; *see also* Lise Johnson, *The Mauritius Convention on Transparency: Comments on the Treaty and Its Role in Increasing Transparency of Investor-State Arbitration* (Columbia Ctr. on Sustainable Inv. Policy Paper, 2014), http://ccsi.columbia.edu/files/2013/12/10.-Johnson-Mauritius-Convention-on-Transparency-Convention.pdf [http://perma.cc/WTF3-B5RK]; Julia Salasky, *The New UNCITRAL Rules and Convention on Transparency*, LONDON SCH. ECON. & POL. SCI.: INVESTMENT & HUM. RTS. PROJECT (Aug. 6, 2014), http://blogs.lse.ac.uk/investment-and-human-rights/portfolio-items/transparency-in-investment-treaty-arbitration-and-the-un-guiding-principles-on-business-and-human-rights-the-new-uncitral-rules-and-convention-on-transparency [http://perma.cc/5DJB-R42X].

463. *See* FINRA RULES §§ 12904(h), FIN. INDUSTRY REG. AUTHORITY (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4192 [http://perma.cc/WZ7T-CW3V]; 13904(h), FIN. INDUSTRY REG. AUTHORITY (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4292 [http://perma.cc/3UF7-PRBY] ("All awards shall be made publicly available."); *see also FINRA Arbitration Awards Online*, FIN. INDUSTRY REG. AUTHORITY (2015), http://finraawardsonline.finra.org [http://perma.cc/DT7M-NRWC]; *Dispute Resolution Statistics*, FIN. INDUSTRY REG. AUTHORITY (2015), http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics [http://perma.cc/H3FA-U5RP].

464. CAL. CIV. PROC. CODE § 1281.96(a), (b) (West 2015) (originally enacted in 2002, effective 2003, and amended in 2014). The information gathered for my discussion on AAA filings was governed by the mandates of California's 2003 statute and hence subsequent references to the statute use that version.

In the 2014 revisions, California required that "[t]he information required by this section shall be made available in a format that allows the public to search and sort the information using readily available software." CAL. CIV. PROC. CODE § 1281.96(b) (West 2015). Furthermore, the 2014 statute mandated that data are to be "directly accessible from a conspicuously displayed link." *Id.* § 1281.96(b). The statute—in 2003 and in 2014—also requires that paper copies be provided upon request, exempts companies doing fewer than fifty yearly consumer arbitrations from web-based quarterly reporting, and protects companies from liability for providing the information. *See id.* § 1281.96(a), (c)(2), (e). The 2014 amendment added additional disclosure requirements, including whether "arbitration was demanded pursuant to a pre-dispute arbitration clause and, if so, whether the pre-dispute arbitration clause designated the administering arbitration company." *Id.* § 1281.96(a)(1).

Maryland, Maine, and the District of Columbia enacted similar provisions after California's 2002 enactments. *See* D.C. CODE § 16-4430 (2012); ME. REV. STAT. tit. 10, § 1394 (2010); MD. CODE ANN., COM. LAW § 14-3903 (West 2011). The statutes vary slightly. Maryland, for example, also requires information on where arbitrations were conducted. MD. CODE ANN., COM. LAW § 14-3903(a)(11). Maine mandates that the information remain available for at least five years. ME. REV. STAT. tit. 10, § 1394. The District of Columbia authorizes private parties and the Attorney General of the District of Columbia to seek injunctive relief and recover the costs of doing so; as of 2014, no reported case law has resulted. D.C. CODE § 16-4430(i) (providing that "any affected person or entity, including the Attorney General of the District of Columbia, can request a court to enjoin the arbitration organiza-

California's 2002 mandate has become a key source of data. Arbitration providers are asked to furnish, for "each consumer arbitration," the name of the "nonconsumer party" (if "a corporation or other business entity"); the "type of dispute" (and for employees, details about their wage brackets); whether an attorney represented the consumer; the time from the demand made to disposition; the mode of disposition ("withdrawal, abandonment, settlement, award after hearing, award without hearing, default, or dismissal without hearing"); the prevailing party; the amount sought; the amount awarded and other relief provided; and the arbitrator's name, fee, and the fee's allocation among the parties.[465]

Yet information remains spotty. A 2013 study, *Reporting Consumer Arbitration Data in California*, concluded that most providers were not in compliance with the state law;[466] only eleven of the twenty-six entities identified as arbitration providers filed any of the required information.[467] Not surprisingly, the

tion from violating the section and order such restitution as appropriate" and providing for recoupment of attorneys' fees and costs if those seeking to enjoin the arbitration organization prevail by settlement or court order). California's statute calls for compliance but specifies no particular method. CAL. CIV. PROC. CODE § 1281.96(f) ("It is the intent of the Legislature that private arbitration companies comply with all legal obligations of this section.").

465. CAL. CIV. PROC. CODE § 1281.96(a). California's Judicial Council defined "consumer arbitration" in its *Ethics Standards for Neutral Arbitrators in Contractual Arbitration*. *See Ethics Standards for Neutral Arbitrators in Contractual Arbitration*, CAL. JUD. COUNCIL (2002), http://www.courts.ca.gov/documents/ethics_standards_neutral_arbitrators.pdf [http://perma.cc/8RLM-BV5H]. A "consumer arbitration" is "an arbitration conducted under a predispute arbitration provision contained in a contract . . . with a consumer party . . . drafted by or on behalf of the nonconsumer party; and . . . [t]he consumer party was required to accept the arbitration provision in the contract." *Id.* at 3. A "consumer party" includes:

> (1) [a]n individual who seeks or acquires, including by lease, any goods or services primarily for personal, family, or household purposes including, but not limited to, financial services, insurance, and other goods and services as defined in section 1761 of the Civil Code; (2) An individual who is an enrollee, a subscriber, or insured in a health-care service plan within the meaning of section 1345 of the Health and Safety Code or health-care insurance plan within the meaning of section 106 of the Insurance Code; (3) An individual with a medical malpractice claim that is subject to the arbitration agreement; or (4) An employee or an applicant for employment in a dispute arising out of or relating to the employee's employment or the applicant's prospective employment that is subject to the arbitration agreement.

Id. at 4.

466. David J. Jung, Jamie Horowitz, Jose Herrera & Lee Rosenberg, *Reporting Consumer Arbitration Data in California: An Analysis of Compliance with California Code of Civil Procedure §1281.96*, PUB. L. RES. INST. 9, 51 (2013), http://gov.uchastings.edu/docs/arbitration-report/2014-arbitration-update [http://perma.cc/9M5X-8LH2] [hereinafter *Reporting Consumer Arbitration Data*].

467. *Id.* at 1.

AAA is a leader in compliance. As it describes on its webpage, *Consumer Arbitration Statistics*, the information is "made available pursuant to state statutes" and "updated on a quarterly basis, as required by law."[468]

The web-based materials are a revolving set; when a new quarter is posted, the older quarter is taken down, such that only five years of data are online. To understand the use of arbitration, we evaluated a lengthy chronicle of claims from across the country that were filed and closed from July 2009 to June 2014.[469] That list totaled 17,368 individual claims (sometimes related to the same case[470]), of which 7,303 (or forty-two percent) fell in the consumer category, excluding real estate and construction.[471] The spreadsheets delineate seven categories: three kinds of consumer arbitrations (consumer, consumer construction, and consumer real estate), "employer promulgated employment," "other industry," residential construction, and residential real estate.[472]

Reading the entries, one generally learns the names of the business entity[473] and of arbitrators and lawyers (if appearing),[474] as well as whether the

468. *Consumer Arbitration Statistics*, AM. ARB. ASS'N (2015), http://www.adr.org/aaa/faces/aoe/gc/consumer/consumerarbstat [http://perma.cc/R2R7-MQRA].

469. *See AAA Data, July 2009-June 2014, Provider Organization Report*, *supra* note 25. The data described were obtained by "filtering" the Excel sheet columns through the "Data" tab and then electronically searching the document. We downloaded and stored the data to preserve that time-span of information. As noted, Lexis and Westlaw allow subscribers to search the texts of arbitral awards provided by the AAA with some redactions. See *supra* note 244.

470. The AAA provides an entry for each individual filing (whether singly or as part of a joint claim) and an entry for each respondent. For example, if a complaint is made against a car dealer and that car's manufacturer, the AAA would create two separate listings for each of the complaints. The AAA spreadsheet therefore contains 17,368 rows corresponding to each such individual filing. *See AAA Data, July 2009-June 2014, Provider Organization Report*, *supra* note 25. The AAA website stated that these 17,368 rows represented 16,436 cases filed after June 2009 and closed before July 2014. Because the AAA posts changes quarterly to its web materials, this information no longer appears but is on file with the author. *Consumer Arbitration Statistics*, AM. ARB. ASS'N (2014) (on file with author).

471. *Id.*

472. *Id.* A few real estate claims, involving brokers, may be categorized by the AAA as falling under the general category of consumer complaints. Boyle AAA 2015 Materials, *supra* note 25

473. *See AAA Data, July 2009-June 2014, Provider Organization Report*, *supra* note 25. Individual consumers are not named; claims are listed by file numbers.

474. Enough information is included to calculate the number of arbitrations per year conducted by a particular arbitrator. *See AAA Data, July 2009-June 2014, Provider Organization Report*, *supra* note 25 (filtering the "Arbitrator_Name" column). For example, in claims against AT&T that were listed in the database, 598 individuals served as arbitrators of at least one claim. *See id.* (filtering arbitrator data in claims involving AT&T for "unique records only"); Memorandum from Adam Margulies to author, *Identifying Arbitrators* (Feb. 26, 2015) (on file with author).

claim closed by settlement or award, the amounts sought, the fees,[475] and fee allocations between the disputants.[476] Of the 5,224 claims "terminated by an award," about half included a dollar figure.[477] The information on prevailing parties comes with the caveat that arbitrators are the source; the AAA has not "reviewed, investigated, or evaluated the accuracy or completeness" of such information.[478]

2. *Accounting for Individual Consumer and Employee Arbitrations*

Below, I detail some of the results of parsing these data as well as materials gathered by other researchers. My focus is on the use of arbitration, the rules and fee structures of the AAA, the provisions made for indigent claimants, and compliance with awards. The density of this account aims both to provide information not otherwise available and to make plain the challenges entailed in doing so.

By way of a preview, seven conclusions emerge from this brief survey of available data. First, obtaining the information is labor-intensive, and the results are partial at best. Second, public records indicate that almost no individual consumers use arbitration. Third, navigating the sea of arbitration clauses and governing rules requires sophistication. Assistance—such as easily accessible forms on fee waivers and consumer-friendly user guides—is hard to find. Fourth, no comprehensive provisions enable indigent consumers to obtain waivers of filing fees. Fifth, the major ADR providers have little current capacity to administer a large number of arbitrations. Sixth, deciding on the optimal numbers of arbitrations requested or completed is difficult. But, and seventh, if

475. The AAA changed its fee system in March 2013, as noted above. Boyle AAA 2015 Materials, *supra* note 25.

476. Information on the prevailing party appeared in 34% of the claims when awards are made, and the salary range of employees appeared in 37% of the 6,795 employment claims. *See AAA Data, July 2009-June 2014, Provider Organization Report*, *supra* note 25. These data were obtained by filtering the Provider Organization Report by category and subcategory. *See id.* For prevailing party data, we first filtered the "Type_of_Disposition" column for "Awarded" claims (5,224 claims), and then filtered the "Prevailing_Party" column so that it included only cells with information rather than "--," resulting in 1,760 claims, or 34% of 5,224 claims. Similarly, for salary range data, we first filtered the "TypeDispute" column for "Employer Promulgated Employment" claims (6,795 claims), and then filtered the "Salary_Range" column to include only cells with information rather than blank cells or cells indicating "Not Provided by Parties." The result was 2,546 claims, or 37% of 6,795 claims.

477. The zero appearing in the other half may reflect that no monetary relief was provided. *See id.* The "other relief" columns for both the business and the consumer are blank for all awarded claims.

478. *Id.*

the justification for applying the FAA to consumers is that it opens doors to dispute resolution that were otherwise closed, little evidence comes from the number of claimants using arbitration individually in the years since the Supreme Court expanded the aegis of the FAA and closed off collective action.

a. Finding the Filings

To create a manageable, focused inquiry, we reviewed the five-year span of AAA data to identify consumer arbitrations involving AT&T. Within the set of 7,303 consumer claims unrelated to commercial real estate or residential construction, the AAA 2009-2014 spreadsheet listed 1,283 brought against AT&T in any of its corporate forms.[479] Because one law firm confirmed that it filed 1,149 individual claims against AT&T Mobility,[480] a question emerged about whether those claims represented individual use of the system.[481] After learning from the firm that it had filed hundreds of arbitration claims (some related to "phantom" data charging and others to oppose a proposed AT&T merger with T-Mobile) in an effort to create two de facto class actions, we excluded that firm's filings from our count.[482]

479. We identified 1,100 claims, of which 169 were filed against "AT&T Corporation"; 12 against "AT&T*"; and 2 against "AT&T Services, Inc." *Id.* In addition, one law firm filed two other claims against "Cingular Wireless" in 2013. *Id.* One claimant sought $1,477,099 from Cingular was awarded $485,152.22. The disposition of the other claim, which sought $723,549 from Cingular, was marked "administrative." *Id.* AT&T merged with Cingular Wireless in 2004. See *Cingular Timeline*, AT&T, https://www.att.com/Common/merger/files/pdf/Cingular_timeline7.pdf [https://perma.cc/2LUU-FG2D].

480. *See id.* (first, filtering "Nonconsumer" column for text containing "AT&T" or any similar title; second, filtering "Consumer Attorney Firm" for "Bursor & Fisher, PA"). The filings were made between July 2011 and November 2012. The AAA data listed 1,148. An interview confirmed that the firm had filed the additional claim on the AAA list, as well as a set of other claims related to a different legal argument. *See* Telephone Interview with L. Timothy Fisher, Bursor & Fisher (Feb. 11, 2015).

481. In January 2011, before the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, that law firm had sought class action certification in a case alleging that "AT&T's billing system for iPhone and iPad data transactions" systematically overcharged consumers for data not provided or used. Hendricks v. AT&T Mobility LLC, 823 F. Supp. 2d 1015, 1017-18 (N.D. Cal. 2011). In October 2011, a federal district court held that the Supreme Court's ruling in *AT&T* precluded class certification, notwithstanding the argument about costs of pursuit, and that "large expenses interfer[ed] with the vindication of statutory rights." *Id.* at 1021.

482. Interview with L. Timothy Fisher, *supra* note 480. As Fisher recalled, the firm filed about 1,000 claims on phantom charges and a similar number related to the merger. Not all of those filings are listed on the AAA website. We learned that arbitration hearings were held in twenty-four of the over-charging claims. *Id.* The firm gave me a copy of one of the decisions, in which the complainant's expert and AT&T's witnesses testified and the arbitrator

Holding those filings aside, consumers brought 134 claims against AT&T, or an average of 27 per year.[483] (AT&T did not initiate any claims against consumers during the five-year period studied but did file a counterclaim in one of the consumer-initiated claims.[484]) That rate of consumer filings fits the picture provided in the record in Concepcions' litigation. Then, AT&T had almost seventy million customers by 2007 and, in the five years between 2003 and 2007, some 170 consumers—or about 34 a year—arbitrated under the AAA procedures with AT&T Mobility, AT&T Wireless, or Cingular Wireless.[485] (How many used the available pre-arbitration processes was not clear.)

found against the complainant; the Award stated that the arbitrator's compensation of $750 was to be paid by AT&T under "the parties' arbitration agreement." Patrick Hendricks v. AT&T Mobility, LLC, Case No. 74-434-E-000041-12 (Award, Commercial Arb. Tribunal, Am. Arb. Ass'n May 21, 2012) (on file with author).

As for the effort to stop the merger, a district court granted an injunction against Sandra Smith, one of the "1,109 AT&T customers" represented by that firm, from trying to use arbitration to do so. Order at 2, AT&T Mobility LLC v. Smith, No. 11-cv-5157 (E.D. Pa. Oct. 7, 2011). The court relied on the AT&T clause stating that arbitrators were to decide all issues except those "*relating to the scope and enforceability of the arbitration provision.*" *Id.* at 4. Further, AT&T had provided that arbitrators could not "preside over any form of a representative or class proceeding." *Id.* at 6. The court therefore concluded that AT&T would likely prevail on the argument that, functionally, Smith was barred by that clause because she was proceeding as a representative. *Id.* at 12-16.

Further, the court found that AT&T would suffer irreparable harm by having "its resources, attention, and witnesses" diverted from responding to the Department of Justice's lawsuit against the merger. *Id.* at 16, 2011 WL 5924460, at *9. In addition, the "compressed schedule" required by the AAA for arbitration imposed burdens that would "stretch" the company "too thin." *Id.* Finding that the balance of hardships and public interest tipped towards AT&T, the court enjoined the arbitration. *Id.* at 16-20. For a review of other decisions on the arbitrability of the merger, see *Schatz v. Cellco Partnership*, 842 F. Supp. 2d 594, 601-603 (S.D.N.Y. 2012).

483. One other law firm, Edelson McGuire, LLC, was listed as filing twenty claims. *See AAA Data, July 2009-June 2014, Provider Organization Report*, *supra* note 25 (first, filtering "Nonconsumer" column for text containing "AT&T"; second, filtering "Consumer Attorney Firm" for "Edelson McGuire, LLC"). That group of claims is included among the 134 claims because the number of individual filings by the firm was small and the amounts sought varied, as did the filing dates and the dispositions.

484. *See id.* (listing "Consumer" for each claim involving AT&T in the "Initiating_Party" column). Evidence for the potential counterclaim comes in the form of one non-blank entry—approximately $1287—within a column listing amounts claimed by the business.

485. *See* Brief of Civil Procedure and Complex Litigation Professors, *supra* note 25, at 20 (citing Declaration of Bruce L. Simon, *supra* note 25, at ¶¶ 8-9) (reporting on data collected from American Arbitration Association website statistics). The district court noted that AT&T has reported a higher figure (570) of customers who had pursued arbitration but had "failed to identify the nature or amount of these claims" or whether any involved deceptive advertising. Laster v. T-Mobile USA, Inc., No. 05-cv-1167, 2008 WL 5216255, at *13 (S.D. Cal. Aug. 11, 2008).

During much of the period between 2003 and 2014, AT&T and its predecessor companies also noted that customers could use small claims court.[486] We sought to learn about those filings for a five-year period running from 2010 to 2014 in two jurisdictions, California and Illinois. Those states were chosen because of California's role in regulating arbitration, Illinois's large court-annexed arbitration program, the size of each state, and the capacity to access online some of the small claims court filings in counties in each state. In California, where accessible databases came from twenty-five of its fifty-eight counties (this set includes less than thirty percent of the state's population), we identified 66 cases in fifteen counties in the five years between 2010 and 2014 in which AT&T was a defendant and three in which it was a plaintiff.[487] Counties in Illinois had more web-accessible data, and during the same five-year period, we located 140 cases in fourteen counties that involved breach of contract or fraud.[488]

Given uneven access to data on small claims, these very preliminary numbers raise the possibility that more consumers (as well as AT&T itself) may be choosing the option of pursuing claims in court rather than in arbitration. The Consumer Financial Protection Bureau also sought to understand the role played by small claims courts. The CFPB found that, in 2012, fewer than 870 consumers filed against credit issuers in small claims court in a set of jurisdictions totaling about 85 million people; the CFPB identified credit card issuers turning to courts repeatedly—eighty percent of 41,000 claims—for debt

AT&T amended the terms of its arbitration provisions as the litigation was ongoing, and made the terms more consumer-friendly. As of 2015, for "any non-frivolous claim that does not exceed $75,000, AT&T will pay all costs of the arbitration." *AT&T Wireless Customer Agreement*, *supra* note 2, at § 2.1. In addition, AT&T offers to pay at least $10,000 as well as double attorneys' fees to any consumer who wins more in arbitration than was offered in settlement. *Id.* at § 2.2(4). AT&T has not made public the numbers of such claims paid.

486. *See AT&T Wireless Customer Agreement*, *supra* note 2, § 2.2(1). According to Andrew Pincus, who has represented AT&T, a small claims option was available in the AT&T provisions, as well as in those from its predecessor Cingular, since "at least mid-2003," and perhaps earlier. E-mail from Andrew Pincus, Partner, Mayer Brown LLP, to author (Feb. 18, 2015) (on file with author). Provisions from the 2003 and 2006 versions are also on file with author.

487. Memorandum from Diana Li, Jonas Wang, John Giammatteo, Marianna Mao, Ben Woodring & Chris Milione to author, *Small Claims Court Filings: A Preliminary Analysis* (March 16, 2015) (on file with author) [hereinafter *Small Claims Court Filings* memo]. These counties were: Santa Clara, Ventura, Santa Cruz, Fresno, Stanislaus, Placer, Kern, El Dorado, Contra Costa, San Joaquin, San Francisco, San Mateo, Monterey, Marin, and Mendocino.

488. *Id*. Those counties were Cook, Lake, St. Clair, Vermilion, Clinton, LaSalle, DuPage, Madison, Bard, Champaign, Winnebago, Macon, McHenry, and Jackson.

collection.[489] Further, when looking at federal court filings, during three years from 2010 to 2012, in five consumer product markets, the CFPB identified 3,462 individual cases or more than 1,100 per year, in addition to 470 consumer class action filings.[490]

The variables that could make courts more accessible than arbitration include fees that are sometimes lower (for example, counties in California charge from $30 to $75 per small claims court filing; in Illinois, the fees ranged from $35-$50 to $119-$337 per filing[491]), knowledge about how to use the system, and the ease of sharing information among claimants—in that all of these courts are open to the public.[492] Yet overall, relatively few individuals pursue claims anywhere. The CFPB's survey offered the explanation that the people surveyed rarely thought they would themselves bring cases.[493] What its data coupled with my research make plain is that the private enforcement of small-value claims depends on collective, rather than individual, action.

More information about the volume of filings in arbitration comes from the AAA 2009-2014 data, which reported that it conducts about 1,500 consumer

489. *CFPB 2015 Arbitration Study*, *supra* note 17, § 1, at 15-16; § 7, at 11-12. The CFPB encountered the challenges we had in that a central database for small claims courts does not exist, and access to data varies by jurisdictions. The CFPB data sampled case filings by selecting state databases that aimed to provide statewide data and that permitted party-name searches, by years; the CFPB supplemented its analysis through review of some county-level data from the "30 most populous counties in the United States." *Id.* § 7, at 5-6.

490. *Id.* § 6, at 27-28, 16. The CFPB chose to exclude auto loans in its individual case analysis because a preliminary review identified 27,000 filings and that large number made manual inquiries too challenging. *Id.* § 6, at 11 & n.22. Hence it has likely undercounted the number of consumers seeking to use courts. Auto loans were part of its class action analysis. *Id.* In some of the individual cases within the CFPB count, motions to arbitrate were filed. *Id.* § 6, at 8. Although the CFPB also sought to identify individual filings in a subset of states, data challenges made that plan unworkable. *Id.* § 6, at 15. The CFPB did identify 92 state class actions in the counties it studied, of which 19 were removed to federal court. *Id.* § 6, at 16.

491. Memorandum from Diana Li, Jonas Wang, John Giammatteo, Marianna Mao, Ben Woodring & Chris Milione, *supra* note 487. That review relied on the California small claims fee schedule, *see Statewide Civil Fee Schedule*, SUPERIOR CT. CAL. 5-6 (Jan. 1, 2015), http://www.cc-courts.org/_data/n_0003/resources/live/2015CivilFeeSchedule.pdf [http://perma.cc/79LC-JEXJ], and on county websites that provided Illinois fee data. In California, those who have filed more than 12 small claims in California within the previous 12 months pay $100 to file the next claim. *Statewide Civil Fee Schedule*, *supra*; *see also Small Claims Court Filings* memo, *supra* note 487.

492. All courts permit individuals to look at files, if stored on site. Online access to filings is often available, in some courts without charges and in others behind a paywall. Search tools and the capacity to search in depth varied by county and state. *See* Memorandum from Diana Li, Marianna Mao, Jonas Wang, Benjamin Woodring, John Giammatteo, & Chris Milione, to author, *Public Access to Small Claims Court* (Feb. 28, 2015) (on file with author).

493. *CFPB 2015 Arbitration Study*, *supra* note 17, § 3, at 16-18.

arbitrations (as defined by the AAA) a year.[494] Paralleling those figures is research identifying 4,857 AAA consumer-filed arbitrations between 2009 and 2013.[495] The definition used by the AAA is somewhat narrower than what California counts as a consumer arbitration,[496] putting the figure at about 3,500 per year.[497] Another way to assess available information is to include the AAA data with those of other providers reporting consumer arbitrations under state mandates. On that count, filings averaged about 5,000 to 6,000 a year during the period from 2009 to 2014.[498]

494. From the data the AAA posted for 2009-2014, we tallied 1,054 consumer filings in 2010; 1,047 in 2011; 2,821 in 2012; and 1,535 in 2013. *See AAA Data, July 2009-June 2014, Provider Organization Report*, *supra* note 25 (excluding consumer construction and consumer real estate filings). This analysis parallels but is not identical to the numbers provided to us by the AAA, which listed 1,063 consumer filings in 2010; 1,425 in 2011; 2,811 in 2012; and 1,741 in 2013. Boyle AAA 2015 Materials, *supra* note 25.

495. Chandrasekher & Horton, *supra* note 38, at 33.

496. Section 1281.96 of the California mandate on reporting consumer arbitrations requires disclosure of the "nature of the dispute involved as one of the following: goods; credit; other banking or finance; insurance; health care; construction; real estate; telecommunications, including software and Internet usage; debt collection; personal injury; employment; or other." CAL. CIV. PROC. CODE § 1281.96(a)(3) (West 2015). The earlier version of that section, enacted in 2002, required disclosure of the "type of dispute involved, including goods, banking, insurance, health care, employment." *Id.* § 1281.96(a)(2) (West 2014); *see also* David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1285 n.90 (2009).

497. *See AAA Data, July 2009-June 2014, Provider Organization Report*, *supra* note 25.

498. Specifically, in addition to the 17,368 entries over five years from the AAA, the data include filings from the Office of the Independent Administrator designated by Kaiser Foundation Health Plan, Inc. for its California health plan members. *Welcome*, OFF. INDEP. ADMINISTRATOR (2015), http://www.oia-kaiserarb.com [perma.cc/US6M-YSD3]. That office provides a non-searchable database listing 9,123 cases over a period of twelve years from January 2003 to December 2014. A searchable five-year database listed 3,294 arbitrations from January 2010 to December 2014. *Sortable Disclosure Table*, OFF. INDEP. ADMINISTRATOR (2015), http://www.oia-kaiserarb.com/51/consumer-case-information/disclosure-table-about-arbitrations-received-in-past-five-years-sortable/sortable-dislosure-table [http://perma.cc/R6A7-KX6U]. JAMS recorded 2,921 entries filed from 2009-2014. *JAMS Consumer Case Information*, JAMS (2015), http://www.jamsadr.com/consumercases [http://perma.cc/3F47-5YKW] (click to download "Consumer Case Information" Excel sheet).

Judicate West disclosed 2,250 arbitrations from 2006 to 2014, with 2,221 filed since 2009. *Quarterly Consumer Arbitration Disclosure*, JUDICATE W. (Dec. 31, 2014), http://www.judicatewest.com/files/forms/arb_forms/Quarterly_Cons_Arb_Disc.pdf [http://perma.cc/R2Z6-2KJR] (counting cases by determining the number of times "Case Number" appears and determining date range by searching by year for "Filing Date"). A manual search identified that twenty-nine of the arbitrations reported were filed before 2009. ADR Services, Inc. listed 2,181 arbitrations from January 2006 to October 2014, with 2,137 filed since 2009. *Consumer Arbitration Record*, ADR SERVS. INC. (Oct. 1, 2014), http://www.adrservices

Above, I discussed the Consumer Financial Protection Bureau's inquiries into court filings. CFPB data on arbitrations go beyond my focus on claims involving AT&T; the CFPB looked at six credit-related markets for which, again, the AAA is the predominant provider of arbitration services.[499] The CFPB's

.org/pdf/Consumer%20Arbitration%20Record%202014.10.01.pdf [http://perma.cc/YTZ2-R7EJ] (counting cases by determining the number of times "Case Number" appears; determining date range by searching by year for "Date Demand Received"). A manual search identified that forty-four of the arbitrations reported were filed before 2009.

Resolution Remedies reported 240 arbitrations from 2009 to 2014. *Consumer Arbitration Disclosure Report—Standard 8 Report*, RESOL. REMEDIES (Oct. 2014), http://www.resolutionremedies.com/documents/Standard8Report-Oct2014.pdf [http://perma.cc/SWP3-HAMY] (determining date range by searching by year for "Date"). Many of the entries, however, are labeled as mediations. In order to count the number of arbitrations, a case-sensitive search for "Arb" was conducted—after saving the document and opening outside the Google Chrome web browser, which did not allow a case-sensitive search—because a non-case-sensitive search for "arb" provides many erroneous hits. A cursory review of the 240 hits found via a case-sensitive search indicated no errors in the count. Alternative Resolutions Centers reported 170 arbitrations from January 2009 to September 2013. *ARC Consumer Arbitrations*, ALTERNATIVE RESOL. CENTERS (Apr. 1, 2014) (on file with author) (counting cases by determining the number of times "Case Name" appears; determining date range by searching by year for "Case Date"). Alternative Resolution Centers removed its old database and switched to a spreadsheet format. *See Disclosures*, ALTERNATIVE RESOL. CENTERS (2014), http://www.arc4adr.com/consumerreporting.html [http://perma.cc/FG72-DWTW] (select "download spreadsheet"). National Arbitration and Mediation (NAM) reported eighteen arbitrations from September 2007 to July 2014, with all but one filed after July 2009. *NAM Consumer Arbitrations*, NAT'L ARB. & MED. (2014), http://www.namadr.com/Consumer_cases.cfm [http://perma.cc/Z2VK-TAA5].

Excluded from the count of the some 28,000 total consumer filings under the California mandate from 2009 to 2014 were 20,000, listed from 2009 to 2011, by the National Arbitration Forum (NAF). *See California CCP 1281.96 Reports*, NAT'L ARB. F., http://www.adrforum.com/main.aspx?itemID=563&hideBar=False&navID=188&news=3 [http://perma.cc/UW63-M5GS]. Unlike the other providers, these filings are categorized by the arbitration's end date, and almost all were filed before 2009. NAF stopped administering new consumer arbitrations on July 24, 2009, pursuant to a consent judgment, after the State of Minnesota brought suit alleging that NAF had undisclosed ties to the credit collection industry. *See* Minn. v. Nat'l Arbitration Forum., No. 27-CV-09-18550, 2009 WL 5424036 (Minn. Dist. Ct. July 17, 2009) (consent judgment); Press Release, Minn. Office of the Att'y Gen., National Arbitration Forum Barred from Credit Card and Consumer Arbitrations Under Agreement with Attorney General Swanson (July 19, 2009), http://pubcit.typepad.com/files/nafconsentdecree.pdf [http://perma.cc/VTH9-ECAY] (containing also Letter from Lori Swanson, Att'y Gen. of the State of Minn., to President, Am. Arbitration Ass'n (July 19, 2009)); *see also National Arbitration Forum To Cease Administering All Consumer Arbitrations in Response to Mounting Legal and Legislative Challenges*, NAT'L ARB. F., (July 19, 2009), http://www.adrforum.com/newsroom.aspx?itemID=1528 [http://perma.cc/QZA3-JG5M].

499. *See CFPB 2015 Arbitration Study*, *supra* note 17, § 1, at 10; § 2, at 34-35 (identifying the AAA as a provider in eighty-three percent of credit card arbitration clauses and in eighty-six percent of the surveyed mobile wireless arbitration clauses); Tables 4-5, § 2, at 36-39 (summarizing providers in contracts in the six sectors studied); *see also CFPB 2013 Prelimi-*

2013 Preliminary Results reported millions of consumers subject to arbitration and found an average of 415 individual AAA filings per year from 2010 to 2012 in four consumer product markets—credit card, checking account, payday loans, and prepaid cards.[500] In its 2015 report, the CFPB added two products, private student loans and auto loans,[501] to its analysis—bringing the three years' annual average up to 616.[502] About two-thirds were filed by consumers, while the remaining included disputes brought by both parties as well as those filed by companies.[503] A summary of the information we excavated and of that detailed by the CFPB is provided in Figure 7.[504]

Turning to employment, a 2008 study suggested that, across the country, at least thirty million employees were obliged to use arbitration.[505] The AAA was (again) the "largest provider" of employment-related arbitration; researchers estimated that about 1 in 10,000 employees used its system.[506] Between 2010 and 2013, the AAA reported 1,349 to 1,599 filings nationwide under employer-promulgated arbitration obligations.[507]

nary Results, *supra* note 31, at 13. ("The AAA is the predominant administrator for consumer arbitration about credit cards, checking accounts, and GPR prepaid cards.").

500. *CFPB 2013 Preliminary Results*, *supra* note 31, at 13.

501. *2015 CFPB Arbitration Study*, CONSUMER FIN. PROTECTION BUREAU, *supra* note 17, § 5, at 3. The median amount of consumers' "affirmative claim[s]" was $11,500. *Id.* § 1, at 12.

502. *Id.* § 1, at 11.

503. *Id.*

504. Another effort at identifying a subset of cases, those involving social media, comes from Rustad and Koenig, who located four social media arbitration dispositions over the course of a decade in AAA data. See Rustad & Koenig, supra note 235, at 369-72.

505. Colvin & Gough, *supra* note 32, at 2.

506. Colvin & Pike, *supra* note 179, at 82.

507. Boyle AAA 2015 Materials, *supra* note 25.

Figure 7.
CONSUMER FILINGS WITH THE AAA

Sources	*Types*	*Estimates of Numbers of Consumers*	*Average Per Year*	*Total Over Years Analyzed*
AAA Data, *Provider Organization Report* (June 2009–July 2014)	AAA-defined consumer claims		1,460	7,303
	including: AAA claims involving AT&T	85-120 million consumers	27	134*
Consumer Financial Protection Bureau, *2015 Arbitration Study* (January 2010–December 2012)	AAA claims in credit card, prepaid card, checking account, payday, private student, and auto loan markets	including: 80 million credit-card consumers	616**	1,847

* Consumers filed all 134 of the consumer claims involving AT&T.
** Consumers filed approximately two thirds, and companies about one third, of the 616 claims per year.

The question is what to make of the small numbers of claims filed. The low filing rates for consumer arbitrations could reflect a lack of need to do so. Public enforcement may suffice, or manufacturers and service providers could generally be in compliance with legal obligations and voluntarily remedy the breaches that do occur. For example, in terms of informal resolutions, AT&T reported that it paid $1.3 billion in 2007 in "manual credits to resolve customer concerns and complaints."[508] Further, AT&T's current promise to provide extra payments to consumers who succeed in arbitration creates an incentive for the company to settle claims. Yet AT&T does not publish data on its settlements or on when it pays premium awards after arbitration. Thus, one is left to speculate on whether AT&T's responsiveness explains the few claims filed or whether the accommodations made are but a small fraction of consumer complaints that could have been brought.

508. Laster v. T-Mobile USA, Inc., No. 05-CV-1167-DMS (AJB), 2008 WL 5216255, at *3 (S.D. Cal. Aug. 11, 2008).

Support for a thesis of under-claiming comes from a series of federal agencies' complaints asserting that the major wireless service providers imposed illegal overcharges through a practice known as "cramming." In October of 2014, the Federal Trade Commission (FTC) filed a federal lawsuit alleging that AT&T had billed consumers $9.99 per month for unauthorized third-party subscriptions that were not clearly identified in its billing.[509] According to the complaint, when customers noticed the charges and did complain, they received either inadequate refunds or none at all.[510] The FTC alleged that AT&T kept between 35-40% of the unauthorized charges and that, as a result, in 2013 AT&T gained more than $160 million in revenue.[511]

Four days after the filing, the FTC and AT&T announced a settlement, joined by the Federal Communications Commission (FCC) and several states, to return $80 million to consumers, to provide $20 million to the participating states, and to give $5 million to the U.S. Treasury.[512] In December of 2014, the CFPB filed a similar lawsuit against Sprint and alleged "millions of dollars" of unauthorized third-party charges; that complaint estimated $2 billion were, annually, overcharged to consumers.[513] Later that month, T-Mobile settled an FTC complaint lodged against it for cramming and agreed to refund $90 million in unwanted charges, to pay an $18 million fine to state attorneys general, and to pay $4.5 million to the FTC.[514]

These government filings could be interpreted as providing all the legal remedies needed. Such efforts surely provide a buffer against the dearth of individual claims. Yet research by the Consumer Financial Protection Bureau describes how much the government itself relies on private enforcement as one

509. Complaint at 3, FTC v. AT&T Mobility, LLC, No. 1:14-cv-3227 (N.D. Ga. Oct. 8, 2014), http://www.ftc.gov/es/system/files/documents/cases/141008attcmpt1.pdf [http://perma.cc/7AXP-67UX].

510. *Id.* at 3-4.

511. *Id.*

512. Stipulated Order for Permanent Injunction and Monetary Judgment at 16, FTC v. AT&T Mobility, LLC, No. 1:14-cv-3227 (N.D. Ga. Oct. 8, 2014) http://www.ftc.gov/es/system/files/documents/cases/141008attstip2.pdf [http://perma.cc/RKZ8-XDPL]. The settlement stipulated that AT&T would have to report to the FTC on its compliance with the settlement order for at least six years. *Id.* at 31.

513. Complaint at 3, CFPB v. Sprint Corp, No. 14 CV 9931 (S.D.N.Y. Dec. 17, 2014) http://files.consumerfinance.gov/f/201412_cfpb_cfpb-v-sprint-complaint.pdf [http://perma.cc/WF4F-PSWN].

514. Stipulated Order for Permanent Injunction and Monetary Judgment at 10, FTC v. T-Mobile USA, Inc., No. 2:14-ev-00967 (W.D. Wash. Dec. 19, 2014); Diane Bartz, *U.S. Settles Lawsuit over T-Mobile US's Unauthorized Charges*, REUTERS (Dec. 19, 2014), http://www.reuters.com/article/2014/12/19/t-mobile-us-usa-settlement-idUSL1N0U31F120141219 [http://perma.cc/9C6S-BB2J].

way to ferret out illegal action. The CFPB concluded that when government entities pursued particular claims that were also the subject of class actions, the government filed its complaints in about two-thirds of the cases *after* those filed by private parties.[515] That pattern highlights the inter-dependencies between public and private enforcement, as well as the importance of the capacity to pursue claims collectively.

If one argument for private enforcement comes from a policy analysis of the role it plays in enforcing obligations, another comes from law. State and federal legislation has authorized private rights of action, empowering individuals to bring claims. Such provisions reflect both majoritarian distrust of centralizing too much power in government and commitments to the entrepreneurialism of private enforcement.[516] This mix of law and policy makes the absence of claims a source of concern.

b. Locating the Rules and Fee Structures

Two other factors—ease of knowing how to file claims and the costs of doing so—affect the likelihood of pursuing claims. In addition to the challenges of learning about other claimants, Dispute Diffusion makes it difficult to locate the governing rules and the fees involved in arbitration. Atop the rules of specific providers (like the AAA), arbitration clauses may be a source of procedures, as can be individual arbitrators, imposing their own specifications. Thus, just as the case law contesting arbitration clauses requires lawyer expertise if one is considering contesting any of the obligations imposed, using the arbitration system itself entails sophistication to learn which rules and fees apply.[517]

A few details on the layers of rules that have governed arbitration within the AAA system illustrate the subtleties of deciding—from reading documents—which rules govern. For decades, the AAA has had Commercial Arbitration Rules; the AAA added what it now calls its *Consumer-Related Disputes: Supplementary Procedures*[518] in 1999 to response to the concerns prompting the

515. *CFPB 2015 Arbitration Study*, *supra* note 17, § 1, at 17-18.

516. *See* SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE UNITED STATES 19-59 (2010).

517. The CFPB determined that many clauses were challenging for consumers to decipher on its "readability" scores. *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 27-29. In terms of complexity, the study looked at the number and length of rules, and reported that the AAA's 2014 Consumer Arbitration Rules were 10,560 words, shaping 55 rules; the Philadelphia Municipal Court Rules ran 9,649 words, detailing 38 rules. *Id.* § 4, at 7.

518. The original 1999 rules were, as amended in April 1, 2000, named the AAA's *Arbitration Rules of Resolution of Consumer-Related Disputes*. *See* AAA Green Tree Brief, *supra* note 179, at

1998 AAA-sponsored *Consumer Due Process Protocol*.[519] The Consumer Supplement imposed no administrative fees on consumers seeking $75,000 or less and permitted consumers to pay no more than 50 percent of arbitrators' fees, which were capped at $125 for claims not exceeding $10,000.[520] In 2013, the AAA revised its fee rules for consumer claims.[521] The AAA instituted its own $200 administrative filing fee, to be paid by consumers (unless arbitration clauses specify that businesses absorb that fee).[522] In addition, the AAA required businesses to pay all the arbitrators' fees[523] and applied parallel provisions for its employer-promulgated rules.[524]

In 2014, the Consumer Supplemental Protocol was replaced by a freestanding set of Consumer Arbitration Rules,[525] not tied to an amount in controversy and to be used even when a consumer agreement specifies other rules.[526] Although conversations with AAA staff clarified that the 2014 Consumer Rules

*4 & Appendix B. The current set of procedures can be found at *Consumer-Related Disputes: Supplementary Procedures*, AM. ARB. ASS'N 8 (2014), https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009997&RevisionSelectionMethod=LatestReleased [https://perma.cc/6JQ4-G3M9] [hereinafter *AAA Consumer Supplementary Procedures*] (providing under C-1.(a) that "[t]he Commercial Dispute Resolution Procedures and these Supplementary Procedures for Consumer-Related Disputes shall apply" for consumer arbitrations and that "[t]he AAA's most current rules will be used when the arbitration is started").

519. *AAA Consumer Due Process Protocol*, *supra* note 232.

520. Boyle AAA 2015 Materials, *supra* note 25. For claims between $10,000 and $75,000, the maximum consumer payment for arbitration fees permitted was $375. Providers could absorb all fees if they volunteered to do so. *Id.*

521. *Id.*

522. *Id.*; AAA *Consumer Supplementary Procedures*, *supra* note 518, at 14.

523. *AAA Consumer Supplementary Procedures*, *supra* note 518, at 14.

524. *AAA Employment Arbitration Rules*, *supra* note 318; Boyle AAA 2015 Materials, *supra* note 25.

525. *AAA 2014 Consumer Arbitration Rules*, *supra* note 244. For parallel employment arbitration protocols that likewise impose a non-refundable $200 "when a claim is filed," see *AAA Employment Arbitration Rules*, *supra* note 318, at 32.

526. Boyle AAA 2015 Materials, *supra* note 25. The rules are not quite so clear; they state that they apply whenever an arbitration clause is part of a "consumer agreement," unless the arbitration agreement specifies "a particular set of rules other than the *Consumer Arbitration Rules*." *See AAA 2014 Consumer Arbitration Rules*, *supra* note 244, at 9.

Thus, if consumers read arbitration clauses, it is possible to be confused about which set governs. For example, on its arbitration information webpage, AT&T explains that "[b]ecause the AAA may update [the commercial and supplementary consumer] rules from time to time, and because the applicable rules for any particular arbitration will be the ones in force at the time, please check the Government & Consumer section on AAA's website to see the latest version." AT&T also provides a hyperlink to the section. *Resolve a Dispute with AT&T via Arbitration*, AT&T (2015), http://www.att.com/esupport/article.jsp?sid=KB72565&cv=820 [http://perma.cc/33NH-8NEN].

displace others, AAA documents make reference to the possibility of substituting other rules, "such as the Real Estate or Wireless Industry Arbitration Rules, for the Commercial Dispute Resolution Procedures in some cases,"[527] as well as the Wireless Rules, which are now superseded by the Consumer Rules.[528] In short, the various procedures and specific arbitration clauses offer more of a maze than a roadmap to which rules apply and how much discretion individual arbitrators have in a system that is unbounded by precedent.

The question of costs is one that the AAA describes as a matter left largely to its own judgment, exercised in reference to what courts and other dispute providers do and to the Consumer Due Process Protocol's commitment to costs being "reasonable."[529] As noted, in 2013, the AAA instituted a filing fee for consumers, pegged it at $200, and continued applying that fee in the 2014 revisions.[530]

527. *AAA Consumer Supplementary Procedures*, *supra* note 518, at 8.

528. Boyle AAA 2015 Materials, *supra* note 25. The Wireless Rules were aiming to provide "flexibility to handle small claims; large, complex cases; and everything in between." Michael F. Altschul & Elizabeth S. Stong, *Cellular Industry Moves to ADR: AAA Develops New Arbitration Rules To Resolve Wireless Disputes*, ADR CURRENTS, Fall 1997, at 6, 6-7.

The overlap of rule sets and references make the question of application less than straightforward. For example, Rule R-1 of the Wireless Industry Arbitration Rules states that "[t]he parties shall be deemed to have made these Rules a part of their arbitration agreement whenever they provide for arbitration by the American Arbitration Association (AAA) or under its Wireless Industry Arbitration Rules." *Wireless Industry Arbitration Rules*, AM. ARB. ASS'N 7 (2014), https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mdao/~edisp/adrstg_004134.pdf [https://perma.cc/S6QN-NH73] [hereinafter *Wireless Industry Arbitration Rules*]. Thus, for the unguided, it was unclear whether "provid[ing] for arbitration by the American Arbitration Association," *Wireless Industry Arbitration Rules*, *supra*, at 7, alone triggered the wireless industry arbitration rules when they were not otherwise specified in an arbitration clause. For instance, AT&T's consumer agreement identifies the AAA as the arbitration provider and states that the arbitration will be "governed by the Commercial Arbitration Rules and the Supplementary Procedures." *AT&T Wireless Customer Agreement*, *supra* note 2, § 2.2(3).

529. Boyle AAA 2015 Materials, *supra* note 25; *AAA Consumer Due Process Protocol*, *supra* note 232, at Principle 6 ("Reasonable Cost").

The CFPB found variation in whether institutions paid or reimbursed the consumers' initial filing fees, as well as in the requirements for doing so, in whether arbitrators could impose post-arbitration costs on consumers, and in whether consumers obtained attorney fee awards. *See CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 57-64 (summarizing cost provisions in arbitration clauses in the six markets studied). Moreover, "[s]ignificant shares of arbitration clauses across almost all markets . . . did not address attorneys' fees." *Id.* § 2, at 66. Some clauses provided that attorneys' fees were to be awarded to prevailing consumers. *Id.* § 2, at 67-68.

530. *AAA Consumer Supplementary Procedures*, *supra* note 518, at 14; *Consumer Arbitration Rules*, *supra* note 525.

But not all consumers have to pay that fee because, in 2002, as part of its packet of arbitration regulations, California required fee waivers for "indigent consumers," defined as those with incomes of less than "300 percent of the federal poverty guidelines."[531] California instructed providers to give consumers notice of this option and to create forms for sworn declarations that a particular consumer qualified; providers were not to ask for additional information.[532]

In compliance, the AAA has a form labeled "Waiver of Fees Notice for Use by California Consumers Only"[533] and another document (not available on the web) for the rest of the country, entitled an "Affidavit in support of Reduction or Deferral of Filing and Administrative Fees."[534] That affidavit form requires consumers outside of California to make detailed disclosures of assets, income, and liabilities and does not indicate the availability of full waivers. The AAA reports that it has given waivers when requests are made[535] but that it does not track the numbers or kinds of waivers, deductions, or deferrals given.[536] Thus,

531. CAL. CIV. PROC. CODE § 1284.3(b)(1) (West 2015).

532. *Id.* § 1284.3(b)(2).

533. *See American Arbitration Association Affidavit for Waiver of Fees Notice for Use by California Consumers Only*, https://www.adr.org/aaa/ShowPDF;jsessionid=kbxxPbvFTQmmP8cycYdvlLjfxmgYV4dLDBNsfjx1gH347bx1GqLL!1786312740?doc=ADRSTG_004304 [http://perma.cc/63NM-A4E3]; *American Arbitration Association Affidavit for Waiver of Fees Notice for Use by California Consumers Only*, AM. ARB. ASS'N (Oct 21, 2011), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_004304 [http://perma.cc/3GB4-PFUX]; *see also Forms*, AM. ARB. ASS'N (2015), http://www.adr.org/aaa/faces/services/fileacase/forms [http://perma.cc/6RR6-YSRZ] (including fifty-eight other forms as well as the fee waiver hardship form for California consumers).

534. Affidavit in Support of Reduction or Deferral of Filing and Administrative Fees, Am. Arb. Ass'n (on file with author). Unlike the fee waiver form for California consumers available through the AAA website, the AAA website does not include ready access to this Affidavit form; the web discussion under the heading "Administrative Fee Waivers and Pro Bono Arbitrators" states that "parties are eligible for a waiver or deferral of the administration fee if their annual gross income falls below 200% of the federal poverty guidelines." *Administrative Fee Waivers and Pro Bono Arbitrators*, AM. ARB. ASS'N, https://www.adr.org/aaa/ShowPDF%3Bjsessionid%3DR295PCqYD5MkNKhQqm9H7jhSMwYh2NnsYFSbG6yrMhgmGVB299lc!1082660915%3Fdoc%3DADRSTG_004098 [http://perma.cc/X8BM-YP9H]. There, the AAA explains that, for its "hardship affidavit," "additional information . . . may be considered," including "past income, assets . . . and income prospects," and that the decision is discretionary. *Id.*; *see also CFPB 2015 Arbitration Study*, *supra* note 17, § 4, at 11 n.51 and accompanying text (reporting that the "consumer can apply for a hardship waiver of otherwise applicable administrative fees," but not citing to the form itself).

535. Boyle AAA 2015 Materials, *supra* note 15.

536. *Id*. The CFPB found twenty-two consumer requests for fee waivers, and twenty-three "California" fee waiver requests amidst the 1,847 disputes that the AAA administered and the CFPB studied; the results of the requests were not recorded based on the "limited data." *CFPB 2015 Arbitration Study*, *supra* note 17, at § 5, at 77. Research on arbitration mandates in

aside from California, robust and publicly accessible analogues to court-based "in forma pauperis" proceedings are not available in arbitration.[537]

c. Concerns about Compliance

If the problems of rules and costs ex ante impose barriers to filing, uneven implementation of the awards made ex post may also discourage filing. Compliance analyses are hard to come by, and here I turn to information resulting from SEC regulation of the financial securities arbitrations, including under FINRA, and by way of reports from the Government Accountability Office (GAO). In the wake of the Supreme Court's rulings in the 1980s permitting enforcement of arbitration clauses related to securities transactions, concerns emerged about industry-based arbitrations administered by the National Association of Securities Dealers, the New York Stock Exchange, the American Stock Exchange, the Chicago Board Options Exchange, and the Municipal Securities Rulemaking Board.[538]

Responding to requests by members of Congress to study securities arbitrations,[539] the Government Accountability Office (GAO) issued six reports between 1992 and 2003.[540] A 2000 GAO study, sampling 247 claims out of 11,290

social media identified that the majority of provisions reviewed did not explain costs and that some were misleading on costs. Rustad & Koenig, supra note 235, at 387-92.

537. *See, e.g.*, 28 U.S.C. § 1915 (2012). The federal court filing fee, as of 2015, was $350. *See* 28 U.S.C. § 1914(a) (2012).

538. *See, e.g.*, J. Kirkland Grant, *Securities Arbitration: Is Required Arbitration Fair to Investors?*, 24 NEW ENG. L. REV. 389, 480 (1989).

539. *See* GAO, 1992, HOW INVESTORS FARE, *supra* note 364, at 4, 21.

540. *See id.*; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-162R, FOLLOW-UP REPORT ON MATTERS RELATING TO SECURITIES ARBITRATION (2003) [hereinafter GAO, 2003, FOLLOW-UP REPORT]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-03-790, EMPLOYMENT DISPUTES: RECOMMENDATIONS TO BETTER ENSURE THAT SECURITIES ARBITRATORS ARE QUALIFIED (2003); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/GGD-00-115, SECURITIES ARBITRATION: ACTIONS NEEDED TO ADDRESS PROBLEM OF UNPAID AWARDS (2000) [hereinafter GAO, 2000, PROBLEM OF UNPAID AWARDS]; U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-01-162R, PROCEDURES FOR UPDATING ARBITRATOR DISCLOSURE INFORMATION (2000); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-94-17, EMPLOYMENT DISCRIMINATION: HOW REGISTERED REPRESENTATIVES FARE IN DISCRIMINATION DISPUTES (1994).

The 1992 study of about 2,000 outcomes during a six-month period concluded that investors did no better or worse in industry-based arbitrations than in those conducted by the AAA. GAO, 1992, HOW INVESTORS FARE, *supra* note 364, at 6-7, 35. The GAO found that investors received an award in 59% of cases at an industry-sponsored forum and 60% of cases before American Arbitration Association arbitration. *Id.* at 38. The GAO found that if a hearing was held and a lawyer present, awards were more likely. *Id.* at 40. The GAO also raised questions about qualifications and training of the industry-based arbitrators. *See id.* at 55-61.

arbitrated by industry providers, found that an estimated $129 million of the $161 million (or about eighty percent) of awards to investors went "unpaid."[541] A 2003 follow-up review concluded that in 2001, about $55 million of the $100.2 million in arbitration awards had gone unpaid—an improvement over the 1998 results, even as about half the successful investors did not receive funds.[542]

E. Contracting for Judges in a Market for Courts

Another window into arbitration's relationship to legal rights comes from those with the capacity to shop for services. Some negotiated contracts build courts *into* their customized agreements. A 2008 study of high-value companies concluded that the firms left open the option of using courts when negotiating contracts with each other; fewer than one in ten contracts bound themselves to use arbitration exclusively.[543] Yet three-quarters mandated arbitration for their consumers.[544] Other customized agreements call for judicial oversight of arbitrations to ensure compliance with the contracts' directions. The legality of doing so reached the Supreme Court in 2008 in *Hall Street Associates v. Mattel, Inc.*[545]—providing another illustration of the role of public law in structuring the parameters of "private" arbitration.

The case was atypical in that the particular contract was forged as a settlement of a federal lawsuit relating to the termination and indemnification obligations of a tenant (Mattel) to its landlord (Hall Street). After Mattel won a bench trial on the termination question, the parties agreed that arbitrators would decide indemnification—with the caveat that a court "shall vacate, modify or correct any award: (i) where the arbitrator's findings of fact are not supported by the substantial evidence, or (ii) where the arbitrator's conclusions of law are erroneous."[546] Hall Street, which lost the arbitration, argued that the

The 2000 GAO follow-up reported that its proposals had generally been put into place. GAO, 2000, PROBLEM OF UNPAID AWARDS, *supra*, at 4.

541. *See* GAO, 2000, PROBLEM OF UNPAID AWARDS, *supra* note 540, at 5.

542. *See* GAO, 2003, FOLLOW-UP REPORT, *supra* note 540, at 9.

543. *See* Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 876, 883 (2008). Criticism of the analysis comes from Christopher R. Drahozal & Stephen J. Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?*, 25 OHIO ST. J. ON DISP. RESOL. 433 (2010).

544. *See* Eisenberg, Miller & Sherwin, *supra* note 543, at 876.

545. 552 U.S. 576 (2008).

546. *Id.* at 579. Thereafter, the district court vacated the award based on the view it was legally erroneous. *Id.* at 580. The Court noted the peculiarity of the arbitration agreement's rela-

arbitrator erred as a matter of law by not including an Oregon Water Quality Act provision as a measure of environmental contamination.[547]

The question of the enforceability of that provision was litigated under the FAA, which authorizes judges to void arbitration awards "procured by corruption, fraud, or undue means"; when evidence exists of "partiality or corruption in the arbitrators"; when arbitrators are "guilty of misconduct" in conducting the hearing or otherwise prejudicing a party; or "where the arbitrators exceeded their powers, or so imperfectly executed [their powers] . . . ."[548] Not mentioned directly are errors of law, perhaps because in the 1920s, arbitrators were "supposed to apply the contract" and not necessarily "apply the law."[549]

Given that the contract at issue in *Hall Street* stipulated review for errors of law, the Court could have upheld judicial review under the FAA's excess-of-powers provision. Doing so could have had a wider impact, permitting judicial oversight of arbitrations predicated on the effective vindication/adequacy rationale. Alternatively, the Court could have read the FAA as celebrating the authority of parties to negotiate provisions, including contracting for courts' jurisdiction.[550] Or the Court could—as the New Zealand Supreme Court has

tionship to the district court's Rule 16 powers—leaving open alternative grounds for the lower court to review the outcome of arbitration. *Id.* at 592.

547. *Id.* at 580.

548. 9 U.S.C. § 10(a) (2012). Modification and correction are available under § 11 for an "evident material miscalculation of figures or an evident material mistake" to the persons or property referenced, or where "arbitrators have awarded upon a matter not submitted to them," or the "award is imperfect in matter of form." 9 U.S.C. § 11 (2012).

The case law has also referenced vacatur based on "manifest disregard of law." *See* Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 670-73 (2010). Whether this doctrine retains its vitality in light of *Hall Street* has divided the federal appellate courts. *See, e.g.*, Sarah Rudolph Cole, *The Federalization of Consumer Arbitration: Possible Solutions*, 2013 U. CHI. LEGAL. F. 271; Ann C. Gronlund, *The Future of Manifest Disregard as a Valid Ground for Vacating Arbitration Awards in Light of the Supreme Court's Ruling in* Hall Street Associates, L.L.C. v. Mattel, Inc., 96 IOWA L. REV. 1351 (2011); Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. REV. 137 (2011).

In 2014, the Florida Supreme Court relied on *Hall Street* to conclude that "courts cannot review the claim that an arbitrator's construction of a contract renders it illegal." Visiting Nurse Ass'n of Fla., Inc. v. Jupiter Med. Ctr., Inc., 154 So. 3d 1115, 1132 (Fla. 2014), *cert. denied*, 83 U.S.L.W. 3657 (U.S. May 4, 2015) (No. 14-944). Jupiter Medical Center had sought to vacate a $1.25 million award on the grounds that the arbitrators' interpretation of a "purchase and lease" agreement had turned it "into a patient-steering and kickback scheme that violates both the federal Medicare law and state anti-kickback statutes." Petition for a Writ of Certiorari at 2, *Visiting Nurse Ass'n*, No. 14-944 (U.S. Feb. 5, 2015).

549. Ware, *supra* note 17, at 74.

550. *See* Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 629 n.142 (2005).

since concluded—have held that the agreement for judicial review was integral to the contract and that its invalidation undid the decision to arbitrate.[551]

Instead, Justice Souter, writing for the Court, read the FAA's direction that courts "must grant" confirmation of arbitration orders as preventing the Court from interpreting the FAA's excess-of-powers provision to authorize judicial oversight; further, the Court read the FAA grounds as exclusive, precluding parties from adding additional bases on which to review awards.[552] That narrowness made "sense" because it maintained "arbitration's essential virtue of resolving disputes straightaway."[553] The Court fashioned the procedural rule by substituting its preferences—for speed in this instance—over the parties' preferences for oversight by judges.

Yet the majority added the caveat that parties could provide for "enforcement under state statutory or common law, . . . where judicial review of different scope is arguable."[554] As a consequence, a few state courts have read *Hall Street* to permit them to accord review more expansive than under the FAA—as a matter of state "procedure" rather than arbitration's "substance"—and therefore as not preempted by the FAA.[555] The result is a dialogue among judges in

551. *Carr & Brookside Farm Trust Ltd. v Gallaway Cook Allan* [2014] NZSC 75 (SC) para. 70. The court noted that the parties' attention to the scope of review evidenced that the "appeal right did go to the heart of their agreement to submit their dispute to arbitration," and hence that the agreement to arbitrate failed. *Id.* at para. 72.

That approach assumed the authority of the Court, rather than the arbitrators, to decide the relationship of arbitration clauses to contracts, and the U.S. Supreme Court has ceded a great deal of that decision making to arbitrators. *See* Rent-A-Center, W., Inc. v. Jackson, 561 U.S. 63 (2010); Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440 (2006); *supra* text accompanying notes 346-347.

552. Hall St. Assocs. v. Mattel, Inc., 552 U.S. 576, 584-87 (2008). Justice Souter's distress about the potential for litigation to be cumbersome can also be found in his opinion in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), expanding the requirements for pleading antitrust claims. Justice Stevens disagreed there, as he did in *Hall Street*, where he argued that the FAA ought not to be read as precluding enforcement of "perfectly reasonable judicial review provisions in arbitration agreements fairly negotiated by the parties and approved by the district court." *Hall St.*, 552 U.S. at 593 (Stevens, J., dissenting). Justice Breyer filed a separate dissent.

553. *Hall St.*, 552 U.S. at 588. The remand was to address whether the Federal Rules under which the agreement was negotiated provided additional authority for courts to review the outcomes. *Id.* at 592.

554. *Id.* at 590. As a matter of federal law, if a contract designates a state such as California as providing the governing law, then broader review of arbitration may be available in federal courts as well. *See* Biller v. Toyota Motor Corp., 668 F.3d 655 (9th Cir. 2012).

555. In response, several current arbitration agreements of large-scale providers specified that their agreements were governed by federal law. *See, e.g.*, *Cardmember Agreement*, AM. EXPRESS 6 (2014), http://web.aexp-static.com/us/content/pdf/cardmember-agreements/green/AmericanExpressGreenCard.pdf [http://perma.cc/DMX7-5P8D] (providing that the arbi-

different jurisdictions about the values and priorities of the public law of private arbitration. Some state courts have endorsed judicial review and explained their rulings as respecting freedom of contract and as enhancing arbitration's appeal (pun intended).[556]

Illustrative is a decision by the Texas Supreme Court, which reviewed a contract specifying that an arbitrator did "not have authority (i) to render a decision which contains a reversible error of state or federal law, or (ii) to apply a cause of action or remedy not expressly provided for under existing state or federal law."[557] Given that arbitration's "essential virtue" was agreement and that parties could choose arbitration for a variety of reasons ("speed and cost, . . . flexibility, privacy, and in some instances, expertise"), the Texas Court permitted judicial review.[558] Moreover, the court rejected what it called "haste" as either a primary or a good goal for arbitration.[559] Rather, parties ought to be

tration agreement is governed by the FAA); *Sample Cardmember Agreement*, DISCOVER 4 (2014), https://www.discovercard.com/assets/Prime_Combined_it.pdf [http://perma.cc/3UVX-YCE9] (same); *Comcast Agreement for Residential Services*, COMCAST 16 (2014), http://cdn.comcast.com/~/Media/Files/Legal/Subscriber%20Agreement/ResServices_HomeNetworkingUniLegal_STD_ENG.pdf [http://perma.cc/SEE5-XCUP] ("[T]he Federal Arbitration Act ('FAA'), not state arbitration law, shall govern the arbitrability of all Disputes. . . . No state statute pertaining to arbitration shall be applicable under this Arbitration Provision.").

The scope of the non-preemption of parties' stipulation of state law governance is before the Court again. *See also* DIRECTV, Inc. v. Imburgia, 170 Cal. Rptr. 3d, 190 (Ct. App. 2014), *cert. granted*, 83 U.S.L.W. 3267 (U.S. Mar. 23, 3015) (No. 14-462). Imbrugia had filed a class action in 2008 against DIRECTV and alleged violations of state consumer and other laws. In the arbitration clause, DIRECTV had provided that "[i]f, however, the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire Section . . . is unenforceable." *Id.* at 192. The state court concluded that the contract made the provision nonseverable and therefore that the requirement to arbitrate was not enforceable; further, to the extent it was ambiguous, it was to be construed against the drafter. *Id.* at 196.

556. *See, e.g.*, Cable Connection, Inc. v. DIRECTV, Inc., 190 P.3d 586, 594, 604-05 (Cal. 2008) (noting that the decision to permit review encourages parties to use of courts instead of risking a "capricious arbitration award" and that parties, who are "best situated" to make the tradeoffs, can choose to "accept the risk of legal error in exchange for the benefits of a quick, inexpensive, and conclusive resolution" or additional litigation in court). Parties could not, however, contract for "unfamiliar standards of review." *Id.* at 605. State rulings rejecting contracts to expand courts' oversight of arbitration awards under state law include *HL 1, LLC v. Riverwalk, LLC*, 15 A.3d 725 (Me. 2011); and *Brookfield Country Club, Inc. v. St. James-Brookfield, LLC*, 696 S.E.2d 663 (Ga. 2010).

557. NAFTA Traders, Inc. v. Quinn, 339 S.W.3d 84, 91 (Tex. 2011).

558. *Id.* at 94.

559. *Id.* In a concurrence, Chief Justice Jefferson commented that "our system is failing if parties are compelled to arbitrate because they believe our courts do not adequately serve their needs" and called for efforts to fix the system rather than creating incentives for people to

allowed "an alternative to litigation" without needing to be "willing to risk an unreviewable decision."[560] Under this approach, the parties' arbitrators become – if an appeal is filed – de facto lower court judges, working under higher courts' supervision.

The desirability of decisions by judges is also evident in a 2009 enactment by the Delaware legislature, seeking to maintain the state's "preeminence" in corporate dispute resolution by redesigning procedures to make its courts competitive with private sector dispute resolution providers.[561] The legislature offered an arbitration program run by the Chancery Court's judges and held in their courthouses.[562] To be eligible, at least one of the disputants had to be incorporated in Delaware, at least a million dollars had to be at stake, and disputants had to pay $12,000 in filing fees and $6,000 daily to the state thereafter.[563] Filings were not to be on the public docketing system, and the public was not permitted to attend hearings.[564] The decisions were to be enforceable as judgments, subject to review by the Delaware Supreme Court, which had not, as of 2013, provided rules about whether appeals would also be confidential.[565]

As a federal district judge would later describe it, litigants could purchase what was "essentially a civil trial" conducted by Delaware's Chancery judges.[566] That decision finding the procedure unconstitutional came in response to a challenge by the "Delaware Coalition for Open Government," arguing that

"circumvent the courts and opt for private adjudication." *Id.* at 103-04 (Jefferson, C.J., concurring).

560. *Id.* at 95 (majority opinion). Similarly, Alabama's Supreme Court opened the door to judicial review in order to honor "the contractual rights and expectations of the parties," including their authorization of "de novo review of the award entered." Raymond James Fin. Servs. Inc. v. Honea, 55 So. 3d 1161, 1168-69 (Ala. 2010) (reading a provision in an agreement between a broker and a client that, if damages were awarded in excess of $100,000, a court could conduct de novo review based on the transcript of the arbitration). One of the justifications for permitting class action bans, relied on by the majority in *AT&T Mobility LLC v. Concepcion*, was that unreviewability put defendants at too great a risk. 131 S. Ct. 1740, 1752 (2011) ("We find it hard to believe that defendants would bet the company with no effective means of review . . . ."). *See supra* notes 417-445 and accompanying text.

561. H.B. 49, 145th Gen. Assemb. (Del. 2009); *see also* DEL. CODE ANN. tit X, § 349 (2009); DEL. CT. CH. R. 96-98.

562. Standing Order of Del. Ch. at 1 (Jan. 4, 2010), DEL. STATE CTS., http://courts.delaware.gov/forms/download.aspx?id=42348 [http://perma.cc/WW4D-8SGE].

563. *Id.*

564. *See* Del. Coal. for Open Gov't, Inc. v. Strine, 894 F. Supp. 2d 493, 496 (D. Del. 2012) (citing DEL. CH. CT. R. 97(a)(4), 98(b)).

565. *See id.* at 496 & n.4.

566. *Id.* at 502.

Delaware's legislation violated the public's First Amendment's right to observe court proceedings.[567] Delaware's Chancery Court judges appealed and lost again in a split decision in which the Third Circuit concluded that "Delaware's government-sponsored arbitration" could not constitutionally be held in a courthouse yet be closed to the public.[568]

The relevance of the Delaware legislation to the meaning of "effective vindication" comes from its provision that litigants with resources could be provided state-employed judges, authorized to resolve their conflicts—in private. As one amicus supporting a petition for certiorari to overturn the Third Circuit explained, businesses were "weary of private arbitration" and sought "predictability" by turning to the Chancery judges.[569] These individuals were "first-rate adjudicator[s]," schooled in its law, well-known for their "efficient case management" and for their rules requiring hearings within three months of filing.[570] Moreover, when going to court, parties had "to comport themselves civilly, to assess their positions soberly, and to present their cases in a way that respects the other demands on the judge's time."[571]

F. Regulated Arbitrations: Court-Annexed Arbitration in Federal Courts, Agency Supervision, and European Directives

Outsourcing dispute resolution depends on law, which currently imposes a form of regulation—licensing variability, permitting privacy, prohibiting much by way of court oversight, and according a great deal of authority to private providers to preclude collective redress.[572] The "public" is thus pervasive in the "private" of arbitration. But other forms of regulation are possible, and such

567. Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 512 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 1551 (2014).

568. *Id.* at 521; *see infra* 654-668 and accompanying text.

569. Motion for Leave To File Brief as Amicus Curiae and Brief for TechNet as Amicus Curiae Supporting Petitioners at 10, *Strine*, 733 F.3d 510 (No. 13-869) (quoting Jessica Tyndall, *The Delaware Arbitration Experiment: Not Just a "Secret Court,"* 6 J. BUS. ENTREPRENEURSHIP & L. 395, 408 (2013)).

570. Thomas J. Stipanowich, *In Quest of the Arbitration Trifecta, or Closed Door Litigation?: The Delaware Arbitration Program*, 6 J. BUS. ENTREPRENEURSHIP & L. 349, 350-52 (2013).

571. Motion for Leave To File Brief as Amicus Curiae and Brief for TechNet as Amicus Curiae Supporting Petitioners, *supra* note 569, at 8 (citing to and extrapolating from Leo E. Strine, Jr., *"Mediation-Only" Filings in the Delaware Court of Chancery: Can New Value Be Added by One of America's Business Courts?*, 53 DUKE L.J. 585, 592-93 (2003)).

572. Outsourcing to arbitration is not the only method of limiting opportunities to pursue claims collectively. The Supreme Court has also imposed constraints on class actions, and more are contemplated. *See* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011); Resnik, *supra* note 14; Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161 (2015).

rules could impose obligations of egalitarian access and public accountability on arbitration.

To make plain that the current norms of the Alternative Civil Procedural Rules are not inevitable and that its deregulatory diffusion could be replaced with transparent systems, I provide a few examples of yet other "alternatives" that do create mechanisms for oversight of decision makers, that aim to protect disputants' volition, and that authorize public access and court review. Each of the processes has its critics, yet each illustrates methods for organizing publicly endorsed arbitration. Thus, were the Supreme Court seeking ways to implement its tests of effective vindication and adequacy, it has models upon which to draw. Federalism is one font of innovation, and above I discussed state-based innovations such as California's fee waiver rules and reporting mandates and Illinois's court-arbitration program. A second resource is Congress, which has created a different form of arbitration for cases filed in the federal courts. Agency oversight is a third model, and a fourth comes from regulatory efforts in Europe.

In the 1980s, Congress encouraged federal courts to offer an array of court-based ADR and created special procedures for "court-annexed arbitration." Congress authorized federal judges to appoint lawyers to conduct trial-like hearings and to enjoy judge-like powers to issue subpoenas, convene hearings, and enter awards.[573] But the provisions imposed constraints very different from those the Court has licensed through its reading of the FAA.

Specifically, in the 1988 "Judicial Improvements and Access to Justice Act,"[574] Congress selected ten district courts that could mandate court-annexed arbitration, but not in all cases. Instead, this option was available only when cases involved monetary damages under $100,000; for cases involving civil rights and constitutional claims, the statute permitted judges to refer cases to arbitration only if the parties consented and if the issues were not "novel."[575]

A decade later, Congress revisited the parameters in the "Alternative Dispute Resolution Act of 1998,"[576] which required all federal district courts to "authorize, by local rule . . . , the use of alternative dispute resolution processes

573. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, sec. 901, § 653, 102 Stat. 4642, 4660 (1988) (codified as amended at 28 U.S.C. §§ 651-658 (2012)).

574. *Id.*

575. Pub. L. No. 100-702, 102 Stat. 4659 (1988). Note that the 1998 revision, discussed *infra* notes 576-580, does not include the limitation precluding cases that include novel issues.

576. Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, 112 Stat. 2993 (codified at 28 U.S.C. §§ 651-658 (2012)).

in all civil actions," including the "use of arbitration."[577] The criteria for eligible cases shifted a bit. Congress prohibited arbitrations when actions were "based on an alleged violation of a right secured" by the Federal Constitution and when the relief sought exceeded $150,000.[578] Congress also directed district courts to establish standards for those appointed as arbitrators, who were subject to rules of disqualification applicable to federal judges and protected for their "quasi-judicial functions" with "the immunities and protections that the law accords to persons serving in such capacity."[579]

In addition, under the heading "Safeguards in Consent Cases," Congress required federal courts to ensure that consent to arbitration was given "freely and knowingly" and that "no party or attorney" was to be "prejudiced for refusing to participate in arbitration"; the ten districts originally authorized in 1988 to provide arbitration continued, however, to have the option of mandating its use for eligible cases.[580] Congress also provided for trial de novo in which the action was to be "treated . . . as if it had not been referred to arbitration."[581] Thus, unlike other forms of ADR for which federal judges have the power to require attendance,[582] the general mandate from Congress was to make arbitration voluntary. Moreover, unlike the obligations enforced by the Supreme Court under the FAA,[583] federal court-annexed arbitrations do not preclude parties who want to proceed to trial from doing so.

577. 28 U.S.C. § 651(b) (2012). The statute explained that its provisions were not to affect existing programs under the 1988 statute. *See* 28 U.S.C. § 654(d) (2012).

578. 28 U.S.C. § 654(a) (2012). In the 1998 Amendment, as well as the original 1988 statute, if the court's jurisdiction rested on 28 U.S.C. § 1343, which is available for cases filed under 42 U.S.C. § 1983, arbitration is not permitted. *Id*.

579. 28 U.S.C. § 655(c) (2012). Authority was also provided for courts, under regulations approved by the Judicial Conference, to establish rates of compensation. 28 U.S.C. § 658 (2012).

580. 28 U.S.C. §§ 654(b), 654 (d) (2012). As of 2014, three of those ten districts—the District of New Jersey, the Eastern District of New York, and the Eastern District of Pennsylvania—had active, mandatory programs. Telephone Interview with Donna Stienstra, Senior Researcher, Fed. Judicial Ctr. (June 1, 2015).

581. 28 U.S.C. § 657(c)(2) (2012). In the 1988 statute, Congress had provided that if a party did less well in the de novo trial, fee-shifting was permissible. *See* Pub. L. No. 100-702, tit. IX, § 901(a), 102 Stat. 4661 (1988) (codified at 28 U.S.C. § 655(e) (1988)). That provision is not replicated in the 1998 statute.

582. See, for example, FED. R. CIV. P. 16(f), which authorizes judges to impose sanctions on parties who refuse to participate in pretrial conferences. "Good-faith" participation is required, *see* FED. R. CIV. P. 16(f)(1)(B); agreement is not.

583. Some arbitration clauses permit opt-outs; those studied by the CFPB required consumers to mail a "signed written document to the issuer" within a stated time. *CFPB 2015 Arbitration Study*, *supra* note 17, § 2, at 31. Given that the clauses were often hard to read and that most

Another distinction between FAA and court-annexed arbitration is the potential for the public to attend proceedings. The 1988 provisions did not discuss confidentiality but did require that awards could not be "made known" to judges assigned to the cases.[584] Further, neither information adduced during arbitration nor awards made, if any, were admissible evidence in any trials subsequent to the arbitration.[585] In the 1998 amendments, Congress required district courts to protect the "confidentiality of the alternative dispute resolution processes" through prohibitions on "disclosure of confidential dispute resolution communications."[586]

The statute could be read to suggest that arbitration proceedings fell within the parameters of "confidential dispute resolution communications." But the statute does not speak directly to this issue, and little reported case law addresses it.[587] Through review of some local rules and discussions with court staff, we learned that, as of 2014, court-annexed arbitrations were open to the public in the two federal court districts reporting hundreds of court-annexed arbitrations yearly,[588] that litigants were encouraged to use open courtrooms in

consumers were not aware of them, the default under the FAA contrasts sharply with what the federal statute governing court-annexed arbitration provides.

584. Pub. L. No. 100-702, tit. IX, § 901(a), 102 Stat. 4660 (1988) (codified at 28 U.S.C. § 654(b) (1988)) ("Sealing of Arbitration Award").

585. Pub. L. No. 100-702, tit. IX, § 901(a), 102 Stat. 4660 (1988) (codified at 28 U.S.C. § 655(c) (1988)) ("Limitation on Admission of Evidence"). This provision adds arbitration proceedings to the limits imposed by federal evidentiary rules which have, since 1975, precluded the admission of information obtained in a mediation or settlement conference. *See* FED. R. EVID. 408.

586. 28 U.S.C. § 652(d) (2012). Congress called on districts to adopt local rules implementing confidentiality and provided this provision as an interim measure.

587. One 2007 lower court decision invoked the statute as a congressional mandate that court-annexed arbitrations be confidential. *Stepp v. NCR Corp.*, 494 F. Supp. 2d 826, 836-37 (S.D. Ohio 2007) concerned an employee who had lost a job and alleged age discrimination; the employer sought confidential compulsory arbitration. The district court rejected many challenges to the arbitration, including the claim that closure failed to vindicate the employee's statutory rights. In passing, the court commented: "Given that Congress provided for confidentiality in court mandated arbitration, 28 U.S.C. § 652(d) . . . , the inclusion of a confidentiality provision" in the proposed private arbitration was "not sufficient to overcome the 'current strong endorsement,' of arbitration." 494 F. Supp. 2d at 837 (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 30 (1991)).

588. Local rules generally do not discuss public access to arbitration, or reference the location of arbitration hearings but do not clarify who can attend. Thus information on actual practices requires direct exchanges with courthouse judges and staff, who have been generous in providing help. Examples of rules noting that arbitration headings may be held in courthouses include: N.D. CAL. ADR R. 4-4(b) (2012) ("The hearing may be held at any location within the Northern District of California selected by the arbitrator(s), including a room at a federal courthouse, if available.); and M.D. GA. R. 16.2.4(B) (2014) (stating that the arbitra-

a third,[589] and that arbitrations were private (if held) in six federal court districts.[590] An example of open arbitrations in the states comes from Illinois,

tion hearing "shall be held in space to be provided in a United States Courthouse"). The Eastern District of Pennsylvania requires what it terms "arbitration trials" to be held in courtrooms. E.D. PA. LOCAL R. CIV. P. 53.2(5)(A) (2013) ("The trial shall take place in the United States Courthouse in a room assigned by the arbitration clerk."). The District of Connecticut had a local rule, promulgated in 1978 and discontinued in 1982, providing that arbitration hearings were "normally [to] be held at the appropriate United States Courthouse" and persons "having a direct interest" were authorized to attend; the arbitrator had discretion about whether to permit attendance of "any other person." D. CONN LOCAL R. 28 § 7 (e) (not in use) (on file with author). Similarly, while the local rule for the Eastern District of New York states that arbitrations are held in courtrooms, the hearings are not open to the public. *See* E.D.N.Y. LOCAL R.87.3(f)(1)); Telephone Interview with Donna Stienstra, *supra* note 580.

Staff from the Eastern District of Pennsylvania noted that requiring arbitration proceedings to take place in a courtroom was meant in part to lend dignity to the proceedings. Telephone Interview by Chris Milione with Michael E. Kunz, Clerk of the Court, E. Dist. of Pa. (Apr. 11, 2014). Information on the numbers of arbitrations comes from Stienstra, *supra* note 224, at 15 tbl.7, who reported that 2,799 cases had been referred to arbitration in her review of forty-nine federal district courts in a year period ending June 30, 2011; the District of New Jersey recorded 1,668 court-annexed arbitrations and the Eastern District of Pennsylvania listed 826 court-annexed arbitrations, *id.* at app. 5.

589. Telephone Interview by Chris Milione with Jim Quinlan, Arbitration Clerk, Dist. of N.J. (Apr. 9, 2014). Quinlan reconfirmed this information for the author on May 11, 2015 (e-mail on file with author).

590. Two districts' local rules—those of the Western District of Missouri and the Western District of Pennsylvania—had general privacy rules for ADR that appear to include arbitration. *See* General Order, Mediation and Assessment Program, W.D. Mo., VIII(A)(1) ("This Court shall treat as confidential all written and oral communications, not under oath, made in connection with or during any Program session except as otherwise noted in this Section."); ADR Policies and Procedures, W.D. Pa. 6(A) ("Except as provided in subsection D of this Section 6, this Court, the ADR Coordinator, all neutrals, all counsel, all parties and any other person who participates (in person or by telephone) in (i) any ADR process described in Sections 1 through 5 of these Policies and Procedures, or (ii) any private ADR process pursuant to Court order, shall treat as 'confidential information' (i) the contents of all documents created for or by the neutral, (ii) all communications and conduct during the ADR process, and (iii) all 'communications in connection with' the ADR process.").

In four other districts—the Northern District of California, the Middle District of Georgia, the District of Idaho, and the Eastern District of New York—clerks informed students working on this project that if arbitration hearings were held, they would be private. *See* Telephone Interview by Chris Milione with Tim Smagacz, ADR Program Administrator, N. Dist. of Cal. (Apr. 23, 2014); Telephone Interview by Mark Kelley with Holly McCarra, Arbitration Clerk, Middle Dist. of Ga. (Apr. 2014); Telephone Interview by Devon Porter with Susie Headlee, ADR/Pro Bono Coordinator, Dist. of Idaho (Apr. 14, 2014); Telephone Interview by Devon Porter with Rita Credle, Arbitration Clerk, E. Dist. of N.Y. (Apr. 24, 2014). Further, the District of Delaware's experience with arbitration is limited; most of its ADR is mediation. Telephone Interview by Chris Milione with Mary Pat Thynge, Chief Magistrate Judge, Dist. of Del. (Apr. 17, 2014).

which is both a high-volume jurisdiction and one that provides public access to arbitration.[591]

Two other parallels between court-annexed arbitration and FAA-based arbitration merit discussion: costs and use. In 1999, the Judicial Conference of the United States concluded that federal courts' local rules should address the compensation of "neutrals" and clarify whether they would serve "pro bono or for a fee."[592] The related commentary called for participants "unable to afford the cost of ADR . . . [to be] excused from paying."[593] Pursuant to this mandate, for example, the Eastern District of Pennsylvania specified in 2014 that the hourly fees were to be paid by funds from the federal judiciary.[594]

As for the frequency of use, four of the ten districts originally licensed in 1988 to create court-annexed arbitration programs continued, as of 2014, to

591. *See Arbitrator's Bench Book*, DUPAGE CNTY., ILL., EIGHTEENTH JUD. CIR. 14 (2011), http://www.dupageco.org/Courts/Docs/34143 [http://perma.cc/Q4ZM-9KNU]. Arbitration hearings are public in all counties in Illinois. *See* Interview by Chris Milione with Loretta Glenny, Arbitration Administrator, Ill. 18th Judicial Dist. (Sept. 29, 2014). The proceedings take place either in courthouses, which sometimes have "arbitration centers," or in other buildings. *See Illinois Uniform Arbitrator Reference Manual*, ADMIN. OFF. ILL. CTS. 8 (SEPT. 2010), www.dupageco.org/courts/33051 [http://perma.cc/4BRF-UAAJ]; *Locations and Contact Information*, CIR. CT. COOK COUNTY. (2015), http://www.cookcountycourt.org/ABOUTTHECOURT/OfficeoftheChiefJudge/CourtRelatedServices/MandatoryArbitration/LocationsandContactInformation.aspx [http://perma.cc/GL6M-2PXN]; *see also* ILL. SUP. CT. R. 88 cmt. (noting that the "use of courthouse facilities provides a desirable quasi-judicial atmosphere," and centralization advances efficiency while providing opportunities to monitor the progress of cases).

592. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 53 (1999). As noted, the statute authorized the conference to regulation compensation provisions. *See* 28 U.S.C. § 658 (2012). The "non-mandatory principles" included making known rates and limits of compensation and requiring fee disclosures. Thanks to Donna Stienstra for pointing us to these sources. *See also* Jason Bertoldi, Compensating ADR Neutrals in the Federal Courts (Feb. 10, 2015) (unpublished manuscript) (on file with author).

593. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, *supra* note 592, at 53-54.

594. E.D. PA. LOCAL R. CIV. P. 53.2(2) (2013) (calling for compensation of $150 per hour for single arbitrators). In the Eastern District of New York, local rules provide compensation, to "be paid by or pursuant to the order of the Court" subject to the limits set by the Judicial Conference" of "$250 for services in each case," unless protracted, and if three arbitrators are used, the compensation is "$100 for service" for each. E.D.N.Y. LOCAL R. 83.7(b) *see also* D.N.J. LOCAL CIV.R. 201.1(c) (2014) (calling for compensation of "$250 for service in each case" unless the proceeding is protracted); M.D. GA. R. 16.2.2(C) (2014) (providing that "arbitrators shall be compensated for their services in such amounts and in such manner as the Chief Judge shall specify from time to time by standing order"); N.D. CAL. ADR R. 4-3(b) (2012) (calling for compensation of $250 per day for single arbitrators and $150 per day for each member of a panel of three).

provide court-annexed arbitration.[595] After the 1998 amendments, six additional districts established programs, and the volume of cases varied widely, from districts in which hundreds of cases went through its program yearly to those in which no court-annexed arbitrations had been held in a year or more.[596] These numbers indicate that some sets of disputants volunteer to arbitrate when the option is provided; to understand which groups select to do so requires more than courts records can provide.[597]

595. As the rules illustrate, these are the districts retaining authority to mandate use of court-annexed arbitration. *See* D.N.J. LOCAL CIV. R. 201.1(d)(1) (2014) ("Subject to the exceptions set forth in [the local rules], the Clerk shall designate and process for compulsory arbitration any civil action pending before the Court where the relief sought consists only of money damages not in excess of $150,000 exclusive of interest and costs and any claim for punitive damages."); E.D.N.Y. LOCAL R. 83.7(d)(1)(2013) (requiring that the Clerk of the Court "designate and process for compulsory arbitration all civil cases . . . wherein money damages only are being sought in an amount not in excess of $150,000.00 exclusive of interest and costs."); E.D. PA. LOCAL R. CIV. P. 53.2(3)(a) (2013) (explaining that the Clerk must "designate and process for compulsory arbitration all civil cases (including adversary proceedings in bankruptcy, excluding, however, (1) social security cases, (2) cases in which a prisoner is a party, (3) cases alleging a violation of a right secured by the U.S. Constitution, and (4) actions in which jurisdiction is based in whole or in part on 28 U.S.C. §1343) wherein money damages only are being sought in an amount not in excess of $150,000.00 exclusive of interest and costs."); N.D. CAL. ADR R. 3-2 (2012) ("Litigants in certain cases designated when the complaint or notice of removal is filed are presumptively required to participate in one non-binding ADR process offered by the Court (Arbitration, Early Neutral Evaluation, or Mediation) or, with the assigned Judge's permission, may substitute an ADR process offered by a private provider."). The Northern District of California, however, no longer had an active program. *See infra* note 596.

596. Interviews conducted in the spring of 2014 provide some insight into the frequency of court-annexed arbitrations. The three districts having programs and authorized to mandate use were the most active. The District of New Jersey, the Eastern District of New York, and the Eastern District of Pennsylvania reported robust court-annexed arbitration programs: staff described such arbitrations as "very common" in the District of New Jersey, and said that they took place about 180 times a year in the Eastern District of New York, and 784 times in 2013 in the Eastern District of Pennsylvania. In contrast, staff in two districts—the Northern District of California and the Western District of Missouri—described such proceedings as "rare" or "very rare," or that none had taken place in the past year. In the District of Delaware, staff estimated similarly low frequency—seven or eight times in the past twenty years; staff in the District of Idaho reported about five court-annexed arbitrations in the past ten years. In the District of Connecticut, the program had operated from 1978 until about 1982, D. CONN LOCAL R. 28 (not in use) (on file with author), and no court-annexed arbitrations had taken place for more than twenty years. The Middle District of Georgia reported about twelve court-annexed arbitrations per year, and the Western District of Pennsylvania estimated that about two percent of its civil caseload used court-annexed arbitration yearly. *See* Memorandum from Mark Kelley, Devon Porter & Chris Milione to author, *Court-Annexed Arbitration in the Federal Courts* (May 1, 2014) (on file with author).

597. Commentators suggest that, rather than arbitrate, some disputants prefer mediation, seen as a less expensive and more confidential processes. *See, e.g.*, Stienstra, *supra* note 224, at 15;

As noted above, administrative agencies can also be a source of rules—illustrated here by the public-private system put into place for securities-regulation arbitrations in the wake of the Court's rulings enforcing arbitration mandates. In the late 1990s, the American Stock Exchange and the Municipal Securities Rulemaking Board closed their arbitration systems,[598] leaving the National Association of Securities Dealers and the New York Stock Exchange to administer arbitrations. In 2007, they formed FINRA,[599] overseen by the SEC,[600] which became "the sole U.S. private-sector provider of member firm regulation for securities firms that do business with the public."[601] FINRA's work includes "rule writing, firm examination, enforcement, and arbitration and mediation functions."[602]

The Government Accountability Office has issued a series of reports critical of the industry's arbitrations.[603] FINRA's rules respond to some of those concerns, even as the rules continue to prompt critical commentary and litigation about FINRA's procedures for controlling the selection of arbitrators and its failure to require open hearings.[604] FINRA has methods for entities to

Thomas J. Stipanowich & Zachary P. Ulrich, *Commercial Arbitration and Settlement: Empirical Insights into the Roles Arbitrators Play*, 6 Y.B. ON ARB. & MED. 1, 2 n.10, 6, 20 (2014).

598. *See, e.g.*, Grant, *supra* note 538, at 480.

599. *See News Release: NASD and NYSE Member Regulation Combine To Form the Financial Industry Regulatory Authority—FINRA*, FIN. INDUSTRY REG. AUTHORITY (July 30, 2007), http://www.finra.org/Newsroom/NewsReleases/2007/p036329 [http://perma.cc/LR4Y-3Z68] [hereinafter *FINRA News Release*].

600. 15 U.S.C. § 78s (2012). The Court referred to the SEC's oversight function when it held securities claims arbitrable. *See* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 233 (1987) (explaining that the SEC since 1975 "has had expansive power to ensure the adequacy of the arbitration procedures employed by the [self-regulatory organizations]").

601. Order Approving NASD Proposed Rule Change To Consolidate NASD and NYSE Regulatory Functions, SEC Release No. 56146, 2007 WL 5185331 (July 26, 2007); NASD Proposed Rule Change To Consolidate NASD and NYSE Regulatory Functions, 72 Fed. Reg. 14149 (proposed Mar. 26, 2007).

602. *See FINRA News Release*, *supra* note 599.

603. *See supra* note 540.

604. *See* Christine Hines, *Groups Urge Transparency from FINRA on Forced Investor Arbitration*, FAIR ARB. NOW (Jan. 22, 2015) http://www.fairarbitrationnow.org/groups-urge-transparency-from-finra-on-forced-investor-arbitration [http://perma.cc/JA76-KGMA] (discussing a letter from Americans for Financial Reform, Alliance for Justice, Center for Justice and Democracy, Consumers Union, National Association of Consumer Advocates, National Consumers League, Public Investors Arbitration Bar Association, Public Citizen, and U.S. PIRG to the FINRA Dispute Resolution Task Force). That letter argued that mandatory arbitration deprives individual investors of open and fair hearings and "stunts development of critical legal policy." *Id.* (quoting the letter). Moreover, it argued, "important information about arbitrator selection and other elements of FINRA's arbitration system remain unavailable to the public." *Id.* (quoting the letter). Whether

register[605] and for individuals, required to have five years of professional experience and training, to do so as well.[606] FINRA delineates between "public" and "non-public" arbitrators based on whether they have affiliations with the security industry.[607] In light of complaints about the arbitral forum's control over arbitrator panel selection,[608] a computer generates randomized lists from which parties choose arbitrators.[609]

FINRA rules leave open the possibility of collective action in courts by precluding enforcement of provisions requiring waivers of class actions, while requiring that arbitrations under its aegis are individual and not collective

FINRA's disclosure requirements for arbitrators suffice was the subject of a later court challenge, arguing that FINRA had failed to specify the nature of an arbitrator's relationship to financial consultants. *See* Stone v. Bear, Stearns & Co., 538 F. App'x 169 (3d Cir. 2013), *cert. denied*, 134 S. Ct. 2292 (2014) (No. 13-959).

605. For firm registration under FINRA, see *Firm Registration*, FIN. INDUSTRY REG. AUTHORITY (2015), http://www.finra.org/industry/firm-registration [http://perma.cc/X5FX-RQXP].

606. *See FINRA's Arbitrators*, FIN. INDUSTRY REG. AUTHORITY (2015), http://www.finra.org/ArbitrationAndMediation/Arbitrators/BecomeanArbitrator/FINRAArbitrators [http://perma.cc/ZUJ6-GVNY]; *see also Required Basic Arbitrator Training*, FIN. INDUSTRY REG. AUTHORITY (2014), http://www.finra.org/arbitrationandmediation/arbitrators/training/requiredbasicarbitratortraining [http://perma.cc/V767-W8WF]. FINRA requires specialized training to chair an arbitral panel. FINRA RULES § 12400(c), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4138 [http://perma.cc/PLW8-XTYJ]. Optional training is also available. *Advanced Arbitrator Training*, FIN. INDUSTRY REG. AUTHORITY (2015), http://www.finra.org/ArbitrationAndMediation/Arbitrators/Training/AdvancedTraining/index.htm [http://perma.cc/93AN-4ZRM].

607. *Code of Arbitration Procedures for Customer Disputes*, FIN. INDUSTRY REG. AUTHORITY § 12100(u) (June 2013), http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=4099 [http://perma.cc/8JFK-AH2T]; *see Regulatory Notice 13-21*, FIN. INDUSTRY REG. AUTHORITY (June 2013) (effective July 1, 2013), http://www.finra.org/web/groups/industry/@ip@reg/@notice/documents/notices/p272613.pdf [http://perma.cc/R8TT-GQ78]. Under California's Private Attorneys General Act (PAGA) of 2004, CAL. LAB. CODE §§ 2698-99 (West 2015), private parties can become "public" to obtain damages akin to qui tam, as a way for the state to police labor law violations. *See* Iskanian v. CLS Transp. LA LLC, 327 P.3d 129 (Cal. 2014), *cert. denied*, 135 S. Ct. 1155 (2015). In 2015, the U.S. Supreme Court declined to hear a challenge to a decision by the California Supreme Court relying on *Iskanian*. *See* Brown v. S.C. (Morgan Tire & Auto), 331 P.3d 1274 (2014), *cert. denied sub nom.* Bridgestone Retail Operations, LLC v. Brown, 83 U.S.L.W. 3627 (U.S. June 1, 2015) (No. 14-790).

608. *See* GAO, 2000, PROBLEM OF UNPAID AWARDS, *supra* note 540, at 6.

609. FINRA RULES § 12400(a), FIN. INDUSTRY REG. AUTHORITY (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4138 [http://perma.cc/65XS-SKHF] (describing this procedure for customer-broker disputes); FINRA RULES § 13400(a) FIN. INDUSTRY REG. AUTHORITY (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4235 [http://perma.cc/65XS-SKHF] (describing this procedure for industry disputes).

actions.[610] FINRA's Rules and its Codes of Arbitration Procedure for Consumer and Industry Disputes had, before the Court's class action arbitration decisions, barred enforcement of a pre-dispute arbitration agreement in a putative class action unless class certification was denied, a class was decertified, or a court found that a consumer was not part of the class.[611] Responding to a challenge to these provisions in light of *AT&T v. Concepcion* and *Italian Colors*, FINRA's Board of Governors held in the spring of 2014 that these rules remained "valid and enforceable"[612] and accorded with the Exchange Act's "core" purpose of the "protection of investors."[613]

610. FINRA RULES § 2268(f), FIN. INDUSTRY REG. AUTHORITY (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9955 [http://perma.cc/C3LY-MQQR] (requiring all arbitration agreements to include a statement that the clause may not be enforced against a member of a putative class action); FINRA RULES § 2268(d), FIN. INDUSTRY REG. AUTHORITY (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9955 [http://perma.cc/C3LY-MQQR] (barring any predispute arbitration agreement from including a condition that "limits or contradicts" the FINRA rules); *see also* Rhonda Wasserman, *Legal Process in a Box, or What Class Action Waivers Teach Us About Law-Making*, 44 LOY. U. CHI. L.J. 391, 416-419 (2012) (discussing FINRA provisions that bar securities firms from enforcing class action waivers). The rule in *Italian Colors* may apply to FINRA inter-industry and employment arbitration. *See* Jill I. Gross & Olivia Darius, *Arbitration Case Law Update 2014*, at 5, *in* SEC. ARB. COURSEBOOK (Practising Law Inst.) (2014), http://ssrn.com/abstract=2427401 [http://perma.cc/6MW2-KESP].

611. FINRA RULES § 2268(f), FIN. INDUSTRY REG. AUTHORITY (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=9955 [http://perma.cc/C3LY-MQQR]. The rule predates FINRA; its predecessor, the National Association of Securities Dealers (NASD) adopted the precursor to these rules in 1992, in response to SEC pressure to "give investors access to the courts in . . . class actions." Proposed Rule Change by Nat'l Ass'n of Securities Dealers, Inc., Relating to Improvements in the NASD Code of Arbitration Procedure, 57 Fed. Reg. 30519, 30520 (proposed July 9, 1992).

612. Charles Schwab & Co., Inc., 2014 WL 1665738, at *18 (FINRA Apr. 24, 2014). In October 2011, Charles Schwab & Co., Inc. (Schwab) added a "Waiver of Class Action or Representative Action" to the arbitration section of its Account Agreement with customers, affecting "almost seven million." Complaint and Request for Expedited Hearing at 1, Charles Schwab & Co., Inc., 2014 WL 1665738 (FINRA 2014), http://amlawdaily.typepad.com/02022012finra_finra.pdf [http://perma.cc/26VR-9GT8]. FINRA brought an enforcement action against Schwab in February 2012. *Id.* at 1. FINRA's enforcement complaint alleged that Schwab's new provision violated FINRA Rules 2268(d)(1) and (3), which prohibit the enforcement of predispute arbitration agreements otherwise against FINRA rules; FINRA Code of Arbitration Procedure 12204(d), which bars the enforcement of class action waivers; and FINRA Rule 2010, which requires FINRA members to meet "high standards of commercial honor" and engage in "just and equitable principles of trade." *Id.* at 5. The FINRA Board of Governors' April 2014 decision overturned a Hearing Panel decision in favor of Schwab. *Id.* at 2; *see Hearing Panel Decision Granting in Part and Denying in Part the Parties' Cross-Motions for Summary Judgment*, Dep't of Enforcement v. Charles Schwab & Co., Inc., (FINRA Feb. 21, 2013), http://www.finra.org/sites/default/files/OHODecision/p258285_0.pdf [http://perma.cc/7C8H-RNW9]. Concomitant with the April 2014 decision, Schwab agreed to a settle-

Aggregate data about FINRA arbitration filings are also made available: between 2007 and 2013, the numbers ranged from about 3,200 to 7,100 a year.[614] Prior to the issuance of an award, all information is private.[615] Once an award is made, it can be found on FINRA's website, which includes the names of the parties and their counsel, as well as the relief requested and awarded, if any.[616] The caveat is that, as in courts and other arbitration systems, many cases do not end in an award.[617] Moreover, FINRA does not provide data on unpaid awards, although it can suspend members who fail to pay.[618]

A brief consideration of Europe—once serving as the arbitration model for the U.S.—is in order. Under the directive on consumer ADR (CADR) that I mentioned in Part I, European rules require providers to register[619] and to create means to ensure "independence," "transparency," the "adversarial

ment requiring it to pay a $500,000 fine and to notify all customers that the class action waiver was invalid. *FINRA Letter of Acceptance, Waiver, and Consent*, No. 2011029760202 (Apr. 24, 2014), http://disciplinaryactions.finra.org/Search/ViewDocument/35735; *see also* Press Release, FINRA, *Board Decision Finds Charles Schwab & Co. Violated FINRA Rules by Adding Waiver Provisions in Customer Agreements Prohibiting Customers from Participating in Class Actions; Reverses FINRA Hearing Panel Decision* (Apr. 24, 2014), http://www.finra.org/newsroom/newsreleases/2014/p493587 [http://perma.cc/N4J7-ESTT].

613. Charles Schwab & Co., Inc., 2014 WL 1665738, at *17-18 (FINRA Apr. 24, 2014).

614. *See Dispute Resolution Statistics*, FIN. INDUSTRY REG. AUTHORITY (2015), http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics [http://perma.cc/8R92-JZ6K].

615. *Administrative Frequently Asked Questions (FAQ)*, FIN. INDUSTRY REG. AUTHORITY (2015), http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/FAQ/P123919 [http://perma.cc/ZZY4-YH8P].

616. FINRA RULES § 12904(H), FIN. INDUSTRY REG. AUTHORITY (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4192 [http://perma.cc/XWP6-UUGV] (for customer disputes "[a]ll awards shall be made publicly available"); FINRA RULES § 13904(H), FIN. INDUSTRY REG. AUTHORITY (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4292 [http://perma.cc/JER2-D76B] (same for industry disputes); *FINRA Arbitration Awards Online*, FIN. INDUS. REG. AUTHORITY (2015), http://www.finraawardsonline.finra.org [http://perma.cc/PP2R-YMSV]; FINRA *Dispute Resolution Statistics*, *supra* note 446.

617. For example, through August 2014, twenty-three percent of cases were decided by arbitrators, either after a hearing or after review of documents. *See FINRA Dispute Resolution Statistics*, *supra* note 446. "All [o]ther reasons . . . includes cases closed by: Stipulated Award, Bankruptcy of Critical Party; Uncured Deficient Claim; Forum Denied; Stayed by Court Action, etc. Note cases counted as closed in this report do not include those cases that closed and were then reopened." *Id.*

618. FINRA RULES § 9554, FIN. INDUSTRY REG. AUTHORITY (2015), http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4005 [http://perma.cc/CT3Q-AXYE] (permitting FINRA staff to suspend members that fail to pay arbitration awards or related settlements).

619. European ODR Regulation, *supra* note 212.

principle," "effectiveness," and "fairness."[620] The Consumer ADR Directive regulates fees, ADR providers' independence and impartiality, the transparency of procedures and obligations to create web-based data about complaints, the time to disposition, and compliance with awards.[621]

In addition to specifying that pre-dispute agreements against consumers are not enforceable,[622] the regulations call for information about how CADR affects compliance with legal obligations and whether the procedures enhance consumer access to remedies.[623] ADR entities are to comply "with the requirements" on "confidentiality and privacy," and Member States are to "ensure that ADR entities make publicly available any systematic or significant problems."[624] Researchers on CADR have suggested that it could be "constitutionally dangerous for a CADR system to decide the rights and wrongs of a dispute other than on the basis of the law," and that assessments ("key performance indicators") had to rely on lawfulness as a metric.[625]

An EU Regulation details how providers are to establish a platform for Online Dispute Resolution (ODR), how to submit complaints, and how to create a database of complaints so that the "Commission shall have access . . . for . . . monitoring the use and functioning" while protecting personal data and

620. HODGES, BENÖHR, & CRUETZFELDT-BANDA, *supra* note 212, at 13-18; *see* CADR 2013 Directive, *supra* note 212, at Article 55, on the need to "closely monitor" ADR entities.

621. *See* CADR 2013 Directive, *supra* note 212. Article 8 aims for ninety days to resolution, and article 9, on fairness, authorizes parties to withdraw. *See id*.

622. *See id*. Article 10 ("Member States shall ensure that an agreement between a consumer and a trader to submit complaints to an ADR entity is not binding on the consumer if it was concluded before the dispute materialized and if it has the effect of depriving the consumer of his right to bring an action before the courts for the settlement of the dispute."). Further, under subsection 2, an ADR decision can be binding only if parties are "informed of its binding nature in advance and specifically accept that provision." *Id.* In general, the law of the European Court of Justice regards as unfair "standard form" contracts that require consumers to go to arbitration and remands the issue to national level courts to decide case by case whether terms are in fact standard (that is, not negotiable) and not to enforce unfair terms. Whether European countries do enough to protect consumers, and whether they ought to distinguish among consumers, is the subject of Lisa Waddington, *Reflections on the Protection of 'Vulnerable' Consumers Under EU Law* (Maastricht Faculty of Law Working Paper No. 2013-2, 2014), http://ssrn.com/abstract=2532904 [http://perma.cc/W8DB-5YLY]. Such sensitivity to context is lauded in Ronald J. Gilson, Charles F. Sabel, & Robert E. Scott, *Text* and *Context: Contract Interpretation as Contract Design*, 100 CORNELL L. REV. 23, 75-81 (2014).

623. *See* European ODR Regulation, *supra* note 212 (concerning online dispute resolution for consumer disputes).

624. CADR 2013 Directive, *supra* note 212, at para. 24, 29, 30.

625. HODGES, BENÖHR, & CRUETZFELDT-BANDA, *supra* note 212, at 426-48.

confidentiality.[626] In addition, EU countries permit monitoring through a public "Union-wide data base of consumer complaints" and a "Consumer Markets Scoreboard" evaluating access to and use of ADR.[627] A European Commission Recommendation to expand methods of collective redress describes ADR as an "efficient way of obtaining redress in mass harm situations," and states that such procedures should "always be available alongside, or as a voluntary element of, judicial collective redress."[628]

Policing can also come from courts, such as a 2010 ruling, *Alassini v. Italian Telecom*, in which the European Court of Justice concluded that the company's online ADR program was not an impermissible and disproportionate burden on rights to a fair hearing, but with several caveats that created a framework for national courts to assess ADR programs. Thus, ADR efforts could not impose a "substantial delay" in bringing legal proceedings and, when needed, time-bars were to be tolled; forms of judicial "interim measures" were to remain available, and for those unable to use electronic ADR procedures, accommodations had to be made.[629]

CONCLUSION: "NIGHTMARISH" SCENARIOS AND THE CONSTITUTION OF COURTS

A return to the United States and to the federal courts—the font of contemporary arbitration law—provides my conclusion. Recall that in 1995, the U.S. Judicial Conference's long-range planners projected that federal court filings would soar to 610,000 by 2010,[630] producing the "nightmarish" scenario of overwhelming numbers.[631] The Long Range Plan raised the specter that "civil litigants who can afford it will opt out of the court system entirely for private dispute resolution providers."[632] Further, "the future may make the jury

626. *See* European ODR Regulation, *supra* note 212, art. 12, para. 2. Yearly reports were also required. Various efforts ("EEJ-Net," "ECC-Net," "Fin-Net," "SOLVIT") aimed to assist consumers in filing cross-border complaints. HODGES, BENÖHR, & CRUETZFELDT-BANDA, *supra* note 212, at 13-18.

627. *Id.* at 18-20.

628. European Commission Recommendation on Collective Redress, *supra* note 214, at para. 16.

629. Case C-317/08, *Alassini v. Italian Telecom*, 2010 E.C.R. I-02213, at para. 47-67.

630. *1995 Long Range Plan*, *supra* note 189, at 15.

631. Under the heading "A Possible Scenario for the Future," the Long Range Plan stated: "If the federal courts' civil and criminal jurisdiction continues to grow at the same rate it did over the past 53 years, the picture in 2020 can only be described as nightmarish."*Id.* at 18.

632. *Id.* at 19.

trial—and perhaps the civil bench trial as well—a creature of the past."[633] The projected denouement was that the "federal district courts, rather than being forums where the weak and the few have recognized rights that the strong and the many must regard, could become an arena for second-class justice."[634]

With these assumptions, the federal courts would largely "become criminal courts and forums for those who cannot afford private justice."[635] Therefore, as Chief Justice William Rehnquist explained in his foreword to the 1995 *Long Range Plan*, a "conservation" effort was needed to preserve the "core values of the rule of law," "equal justice, judicial independence, national courts of limited jurisdiction, excellence, and accountability"—values that were challenged by the "limited financial resources of the federal government."[636]

With the advantage of hindsight, we can know that rather than the 610,000 filings anticipated in 1995 for 2010, some 360,000 cases were begun that year.[637] As of 2014, filing data were reported as holding "steady"; in 2014, total "filings for civil cases and criminal defendants" numbered about 376,000.[638] Moreover, a review of filings during the past 110 years—graphed in Figure 8—suggests that if the current trend line remains stable, both the rate of filings and the number of civil and criminal cases may decline.

633. *Id.* at 19-20.

634. *Id.* at 20

635. *Id.* at 20

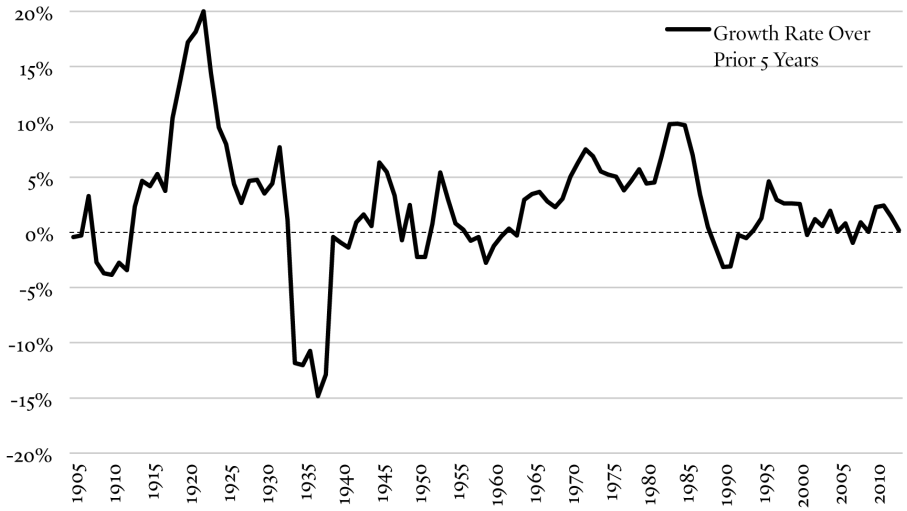
636. *Id.* at vii.

637. *See* Federal Judicial Caseload Statistics: March 31, 2010, *supra* note 131, at T. C-1 and D-1. Recorded were 77,287 filings for criminal cases and 282,307 civil filings. *Id.*

638. Chief Justice Roberts noted that the "total filings for civil cases and criminal defendants in the district courts grew less than one percent to 376,536." *See* Roberts, *supra* note 113, at 13.

Figure 8.

GROWTH RATE AND FLUCTUATION OF TOTAL DISTRICT COURT FILINGS, 1905-2013[639]



But the aspirations of the federal judiciary's *Long Range Plan*—that civil trials not be "a creature of the past" and that the federal courts be preserved as "forums where the weak and the few have recognized rights that the strong and the many must regard"[640]—are dimming. The moniker of the "vanishing trial" makes that point.[641] In the 1960s, trials took place in about ten percent of the

639. Information for 1905-1998 comes from William F. Shughart II & Gökhan R. Karahan, *Determinants of Case Growth in Federal District Courts in the United States, 1904–2002 (ICPSR 03987-v1)*, INTER-U. CONSORTIUM FOR POL. & SOC. RES. (2003), http://www.icpsr.umich.edu/icpsrweb/ICPSR/studies/3987 [http://perma.cc/AN8H-GJ53]. For data for years 1999-2012, see *History of the Federal Judiciary*, FED. JUD. CENTER, http://www.fjc.gov/history/caseload.nsf/page/caseloads_main_page [http://perma.cc/4X7G-KXJG]. Data for 2013 are taken from *Caseload Statistics 2013*, U.S. CTS., tbls. C & D, http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/caseload-statistics-2013.aspx [http://perma.cc/D5G9-GBFK]. The effective annual growth rate described in Figure 8 reflects the annual rate of growth that would have occurred if filings had increased at a constant rate during the prior five years. This growth rate, based on actual growth in each of the five years, has been smoothed out to avoid the distraction of the volatility in year-to-year growth rates. Five-year growth rates for 1905-1908 are based in part upon estimated filings during 1900-1903, projected backwards using years with reported numbers of filings and cases pending. This graph does not include bankruptcy filings.

640. *1995 Long Range Plan*, *supra* note 189, at 20.

641. *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004).

civil cases brought to federal courts.[642] By 2010, trials began in about one case out of 100 civil cases filed.[643]

Of course, judges do adjudicatory work other than trials, and hence another metric is relevant: "bench presence." After reviewing statistics gathered by the Administrative Office of the U.S. Courts, researchers reported a "steady year-over-year decline in total courtroom hours" from 2008 to 2012 that continued into 2013.[644] Federal judges spent less than two hours a day on average in the courtroom, or about "423 hours of open court proceedings per active district judge."[645]

In contrast, the market for alternative judges is booming. The AAA's significant expansion during the last decades can be tracked through its Supreme Court amici filings that, when pieced together, detail the growth. The AAA's docket grew from 1,750 arbitrations in 1950[646] to 13,000 in 1966, of which sixty-four percent were proceedings against uninsured motorists.[647] Within fifteen years, the number of annual proceedings had increased to more than 40,000, of which, the AAA noted, "a number of them were international."[648] By 2000, the

642. *Id.* at 465 (noting that between 1962 and 1969, no more than twelve percent of annual civil terminations occurring during or after trial); *see also* Marc Galanter & Angela M. Frozena, *A Grin Without a Cat: The Continuing Decline & Displacement of Trials in American Courts*, DAEDALUS, Summer 2014, at 115; Judith Resnik, *Failing Faith: Adjudicatory Procedures in Decline*, 53 U. CHI. L. REV. 494, 558 (1986) (reporting that trials were completed in 10.5% to 12% of federal civil cases annually from 1960 to 1969).

643. *Table C-4: U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending December 31, 2010*, ADMIN. OFF. U.S. CTS. (2010), http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2010/dec10/C04Dec10.pdf [http://perma.cc/6632-GGDA] (indicating that one percent of the 314,233 civil cases terminated "reach[ed] trial"). The 2013 numbers were about the same. *Table C-4: U.S. District Courts—Civil Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending December 31, 2013*, ADMIN. OFF. U.S. CTS. (2013), http://www.uscourts.gov/uscourts/Statistics/StatisticalTablesForTheFederalJudiciary/2013/December/C04Dec13.pdf [http://perma.cc/DKE8-2MJ5] (indicating that 1.2% of the 259,284 civil cases terminated "reach[ed] trial").

The logic of the decline is argued by John Langbein in *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522 (2012). *See also* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631.

644. *See* Jordan M. Singer & Hon. William G. Young, *Bench Presence 2014: An Updated Look at Federal District Court Productivity*, 48 NEW ENG. L. REV. 565, 565 (2014).

645. *Id.* at 566-67.

646. *See* Brief of the Am. Arbitration Ass'n as Amicus Curiae in Support of Petitioners, Shearson/Am. Express Inc. v. McMahon, 482 U.S. 220 (1987) (No. 86-44), 1986 WL 727884, at *16 [hereinafter AAA Shearson/American Express Brief].

647. *See* AAA Prima Paint Brief, *supra* note 179, at *15 n.9.

648. Motion for Leave To File Brief of Amicus Curiae at 1, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), 1985 U.S. S. Ct. Briefs LEXIS 1614. Two years

AAA was offering long-term tallies. Between 1926 (when it began) and 1999, the AAA had dealt with about 1.7 million cases, "most of [which were] arbitrations."[649] In 2007, the total was over two million cases,[650] and in 2012, the figure was close to 3.7 million.[651] By then, the AAA had entered into cooperative agreements with sixty-six organizations in forty-six countries.[652] In terms of its annual docket, filings are up from 150,000 a year in 2007 to about 200,000 per year.[653]

As public judges move to the periphery of dispute resolution and shift their own procedures to privatize much of their interaction with disputants, another effect of Dispute Diffusion and its Alternative Civil Procedure Rules emerges: the impact on the public's right to observe court processes. Above I argued that, insofar as can be known in light of a host of closed proceedings and limited quantitative data, this diffusion of disputes has resulted in a good deal of erasure of private enforcement of federal and state litigation rights. Thus, the cumulative effect of the Court's FAA expansion works an unconstitutional deprivation of litigants' property and court access rights. I close by expanding the analysis of how this outsourcing, coupled with the privatization of judicial processes in courts, puts at risk the other kind of access-to-court right, that of the public's authority to observe and, with it, the rationales for robust public support of court services.

To do so, I return to the constitutional challenge to Delaware's "arbitration" program, which I used as an example of resourced parties seeking to rely on publicly appointed judges to resolve their disputes, albeit in private. When ruling that Delaware could not constitutionally hold closed arbitrations in its courthouses, the Third Circuit drew on Supreme Court decisions in criminal cases, described as applying a test of "experience" and "logic."[654] The Court has held that the First Amendment protects public access to criminal proceedings, if they were traditionally accessible (the "experience" prong), as long as access "plays a significant positive role in the functioning of the particular process in

later, in 1985, the AAA arbitrated approximately 45,000 cases. *See* AAA Shearson/American Express Brief, *supra* note 646, at *2.

649. AAA Green Tree Brief, *supra* note 179, at *2.

650. AAA Hall Street Brief, *supra* note 247, at *1.

651. *See* AAA BG Group Brief, *supra* note 180, at * 2.

652. *The American Arbitration Association: A Long History of Working with Government*, AM. ARB. ASS'N 1 (2011), http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_017603 [https://perma.cc/P6PZ-DL7B].

653. The AAA website continues to cite the study finding 150,000 arbitrations annually, but the growth rate of arbitrations reported in the amici filings suggests higher numbers, now above 200,000 yearly. *See* Boyle AAA 2015 Materials, *supra* note 25.

654. Del. Coal. for Open Gov't, Inc. v. Strine, 733 F.3d 510, 514-515 (3d Cir. 2013).

question" (the "logic" in the test).[655] The Third Circuit's majority explained that "Delaware proceedings are conducted by Chancery Court judges in Chancery Court during ordinary court hours, and yield judgments that are enforceable in the same way as judgments resulting from ordinary Chancery Court proceedings. Delaware's proceedings derive a great deal of legitimacy and authority from the state."[656] As the concurring opinion by Judge Fuentes put it, "the air of [an] official State-run proceeding" made the limit on public access unconstitutional.[657]

But as I have detailed, experiences in courts are changing and, with them, the logic supporting open processes. Dispute Diffusion values speed, finality, deregulated variability, and confidentiality. As these values come to dominate in and out of courts, the "positive significance" of openness diminishes, reflexively (again in Bourdieu's sociological terms). As judges turn themselves into just another set of actors in the dispute resolution market providing conciliation services, rationales for constitutionally obligatory openness erode, as do arguments for substantial public support and structural independence.

The debate between the majority and dissent in the Delaware litigation illustrates this conflict of values. The majority underscored the benefits to the public of knowing how "Delaware resolves major business disputes"[658] and discounted arguments about the harms that public access would cause.[659] In the end, public "faith in the Delaware judicial system" was the more weighty consideration when finding a "First Amendment right of access to Delaware's government-sponsored arbitrations."[660]

In contrast, the dissent in *Strine* focused on the centrality of privacy, the importance of insulating both the process and the outcomes of arbitrations from public scrutiny, the needs of the state to stay competitive, and the role of parties' consent.[661] In this account, offering confidentiality ("one of the

655. *Id.* at 518 (quoting Press-Enter. Co. v. Superior Court (*Press-Enterprise II*), 478 U.S. 1, 8 (1986)).

656. *Id.* at 520.

657. *Id.* at 522 (Fuentes, J., concurring).

658. *Id.* at 519 (majority opinion).

659. *Id.* at 519-21.

660. *Id.* at 521.

661. *Id.* at 523-26 (Roth, J., dissenting). Judge Roth's views were reiterated forcefully in a petition for certiorari that, despite the support from a host of amici law firms and institutions, was denied in the winter of 2014. Petition for Writ of Certiorari, Strine v. Del. Coal. for Open Gov't, Inc., 134 S. Ct. 1551 (2014) (No. 13-869), 2012 WL 262086, *cert. denied*, 134 S. Ct. 1551.

Amici included the Chamber of Commerce and the Business Roundtable, TechNet, a large group of law firms, and NASDAQ OMX Group, Inc. and NYSE Euronext. *See* Brief of

primary reasons why litigants choose arbitration"[662]) facilitated resolution by assuring parties that sensitive information would not be made public.[663] Further, Delaware sponsored this form of arbitration "as a part of its efforts to preserve its position as the leading state for incorporations in the U.S."[664] Given that parties volunteered for the program, the dissent argued that the exercise of judicial power derived from their authority, rather than that of the state.[665] Thus, a mix of empirical claims about what prospective users would do ("go elsewhere" if Delaware's proceedings were not closed) and normative views about the importance of state-based procedures successfully competing in the marketplace of dispute resolution rendered openness the lesser value.[666]

This disagreement among the appellate judges illuminates the doctrinal weakness of the current First Amendment test of access rights. The logic prong lacks a normative compass, putting it at risk of collapsing into the "judgment of experience" as new procedures come to the fore. Alternatively, the experience prong is irrelevant because openness may have value regardless of past practices. Indeed, in searching for footings, judges engage with what Jeremy Bentham termed "publicity," and they proffer, albeit often without citation, variations on his themes[667]—that openness forwards informed discussions of government, fosters perceptions of fairness, checks corruption, enhances performance, discourages fraud, and permits communities to vent emotions in cases involving crimes.[668]

As the Delaware litigation also illustrates, the case law on public access focuses on whether proceedings in court are trial-like or predicates to trials. What the doctrine has yet to take into account is that being "trial-like"—in the absence of trials and "bench presence"—ought not to be the only measure of

the Chamber of Commerce of the United States of America and Business Roundtable as Amici Curiae in Support of Petitioners, *Strine*, 134 S. Ct. 1551, 2014 WL 709719; Brief for TechNet as Amicus Curiae Supporting Petitioners, *Strine*, 134 S. Ct. 1551, 2014 WL 709721; Motion of Law Firms for Leave To File Brief as Amici Curiae for [24] Law Firms from throughout the Nation and Brief for Amici Curiae Supporting Petitioners, *Strine*, 134 S. Ct. 1551, 2014 WL 768323; Brief of NASDAQ OMX Group, Inc. and NYSE Euronext as Amici Curiae in Support of Granting the Petition, *Strine*, 134 S. Ct. 1551, 2014 WL 787212.

662. *Strine*, 733 F.3d at 525 (Roth, J., dissenting).

663. *Id.*

664. *Id.* at 524.

665. *Id.* at 526.

666. *Id.*

667. JEREMY BENTHAM, *An Introductory View of the Rationale of Evidence* (1827), *in* 6 THE WORKS OF JEREMY BENTHAM 356 (John Bowring ed., Edinburgh, Tait 1843).

668. *See* United States v. Simone, 14 F.3d 833, 839 (3d Cir. 1994) (citing United States v. Smith, 787 F.2d 111, 114 (3d Cir. 1986)).

constitutional obligations of openness for dispute resolution. When judges take on the role of "neutrals" or authorize others to do so with "quasi-judicial" status, and when judges outsource their authority to the private sector, these "quasi-judicial" acts need to be subjected to public scrutiny. Information is needed because the difficulties of producing fair and binding outcomes for the millions of individuals who are now rights-holders are enormous. Public debates need to explore what kinds of injuries ought to be redressable and, if so, how.

In a 1976 article analyzing an earlier wave of Supreme Court constitutional analyses of the parameters of legitimate adjudication, Jerry Mashaw insisted that the "search" for "value" in due process law did not necessarily end in trial-like proceedings akin to those then associated with courts.[669] What was required were public mechanisms to evaluate the quality of decision making to ensure accuracy, to respect the dignity of disputants, and to accord them equal treatment.[670] The measures he proposed – administrative oversight, transparency, accounting, and judicial review[671] – could all come into play to implement what the Supreme Court has come to call the "effective vindication" of rights. The complement to all of his methods is the concept of publicity, making exchanges between disputants and the state accessible in various ways so as to enable outsiders to evaluate the shape of the procedures developed and their outcomes

In sum, the Supreme Court was right to invoke the idea of "effective vindication of rights," but wrong not to require oversight to accomplish that aim. The constitutional predicates of legitimate coercion are at stake, as are the property and political rights of citizens. Whether conducted by state-paid or by privately financed entities, dispute resolution charged by the state with vindicating legal obligations has to be regulated to ensure equality of access through mandating fee waivers for indigence and overseeing the quality of decision makers. The alternatives must be publicly available and accountable so as to permit analyses of whether their processes and results constitute law, justice, or both. In courts and their alternatives, constitutional democracies require public engagement with the substantive and procedural rules that are the predicates for the power to render enforceable judgments.

669. Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge*: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

670. *Id.* at 30-54.

671. *Id.* at 54-59.