

# The Federalization of Consumer Arbitration: Possible Solutions

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## INTRODUCTION

The Supreme Court's arbitration jurisprudence is, perhaps, the surest example of the "federalization" of an area of law that federalism principles dictate traditionally belongs to the states.<sup>1</sup> Over the last thirty years, the Supreme Court developed a preemption doctrine that effectively precludes states from regulating arbitration because the Court nullifies state laws or judicial decisions that are inconsistent with either the policy underlying or the language of the Federal Arbitration Act (FAA).<sup>2</sup> As a result, enforcement of state laws regulating

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<sup>1</sup> The federalization of arbitration law seems especially surprising because the Court is reputed to be leading a federalism revival. See generally Erwin Chemerinsky, *Reconceptualizing Federalism*, 50 NYU L Rev 729 (2005) (examining the inconsistency of the Supreme Court's federalism revival in the context of numerous pro-preemption decisions); David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the FAA's Encroachment on State Law*, in *The Privatization of Justice? Mandatory Arbitration and the State Courts*, Report of the 2003 Forum for State Appellate Court Judges 47, 48 (Pound Civil Justice Institute 2003) (same). See also Norman W. Spaulding, *Constitution as Countermonument: Federalism, Reconstruction, and the Problem of Collective Memory*, 103 Colum L Rev 1992, 2006-14 (2003) (tracing the federalism revival's roots in the Rehnquist Court).

<sup>2</sup> Federal Arbitration Act, Pub L No 68-401, 43 Stat 883 (1925), codified at 9 USC § 1 et seq. See, for example, *Doctor's Associates v Casarotto*, 517 US 681 (1996); *Allied-Bruce Terminix Cos, Inc v Dobson*, 513 US 265 (1995); *Perry v Thomas*, 482 US 483 (1987); *Southland Corp v Keating*, 465 US 1 (1984); *Moses H. Cone Memorial Hospital v Mercury Construction Corp*, 460 US 1 (1983); *Prima Paint Corp v Flood & Conklin Manufacturing Co*, 388 US 395 (1967). In the preface to the Revised Uniform Arbitration Act (RUAA), drafters explained the Supreme Court's approach to preemption in the following way: "That body of case law establishes that state law of any ilk, including adaptations of the RUAA, mooting or limiting contractual agreements to arbitrate must yield to the pro-arbitration public policy voiced in Sections 2, 3, and 4 of the FAA." See National Conference of Commissioners on Uniform State Laws, *Uniform Arbitration Act* \*2 (2000), online at [http://www.uniformlaws.org/shared/docs/arbitration/arbitration\\_](http://www.uniformlaws.org/shared/docs/arbitration/arbitration_)

arbitration became the exception rather than the rule. In the 2009–2011 terms, the Court took arbitral preemption a step further, extending its preemption doctrine to “second generation” arbitration cases.<sup>3</sup> These second generation cases involve state court or legislative attempts to regulate in areas that the FAA does not specifically address, such as enforceability or review issues.<sup>4</sup> Perhaps surprisingly, the Court did not hesitate to extend preemption to one of these second generation cases in *AT&T Mobility LLC v Concepcion*.<sup>5</sup> In that case, the Court held that federal arbitration law preempted a California state court decision holding an arbitration agreement unconscionable because it precluded consumers from pursuing a class action in court or arbitration.<sup>6</sup> *Concepcion*, together with the Court’s holding during the previous term in *Stolt-Nielsen SA v AnimalFeeds International Corp.*,<sup>7</sup> which held that arbitrators could not order class arbitration unless the parties agreed to it,<sup>8</sup> expanded the federal domination of arbitration law into areas the FAA does not address. In doing so, the Court created an expanded preemption doctrine that appears to preclude any state regulation or judicial decision that conflicts with the Court’s vaguely articulated notion of what arbitration is. Consequently, the Court’s decisions have effectively eliminated the states’ ability to regulate the arbitration process to improve

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<sup>3</sup> Professor Christopher Drahozal first coined the term “second generation” cases to describe this type of arbitration case. See generally Christopher R. Drahozal, *Federal Arbitration Act Preemption*, 79 Ind L J 393 (2004).

<sup>4</sup> Additional examples of issues the FAA does not address include arbitration discovery, arbitrator disclosure requirements, class action arbitration, and arbitrators’ power to order punitive damages.

<sup>5</sup> 131 S Ct 1740 (2011).

<sup>6</sup> Id at 1748–53.

<sup>7</sup> 130 S Ct 1758 (2010).

<sup>8</sup> See id at 1775–76. Note that *Stolt-Nielsen* involved two repeat players with relatively equal bargaining power, not a consumer and a business. Although Justice Ginsburg in dissent expressed hope that the *Stolt-Nielsen* decision would not apply in a consumer dispute, the dominant interpretation suggests that her hopes are not well-founded. See id at 1783. For discussion of Justice Ginsburg’s dissent in *Stolt-Nielsen*, see, for example, Jean Sternlight, *Sternlight on AT&T Mobility v. Concepcion* (ADR Prof Blog Nov 9, 2010), online at <http://www.indisputably.org/?p=1842> (visited Sept 15, 2013). Courts are likely to require arbitrators in a consumer dispute, like arbitrators in a business dispute, to point either to the parties’ contract or to some law justifying the arbitrators’ decision to order a class arbitration before the court will uphold an arbitrator’s decision to send the dispute to class arbitration.

the fairness to the one-shot player, such as the consumer.<sup>9</sup> The *Concepcion* and *Stolt-Nielsen* decisions would seem to complete the process of federalizing arbitration law.

During this same time frame and perhaps in response to the Supreme Court's wholesale endorsement of arbitration, businesses expanded their arbitration agreements to include the consumers to whom they sell products.<sup>10</sup> In response, consumer

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<sup>9</sup> And, as a practical matter, the *Concepcion* and *Stolt-Nielsen* decisions also sounded a death knell for consumers attempting to pursue low-value claims against businesses because Congress refuses to address the issue and states can no longer effectively address it.

<sup>10</sup> See *Concepcion*, 131 S Ct at 1744 (describing AT&T Mobility's arbitration agreement); Jean R. Sternlight, *Tsunami: AT&T Mobility LLC v. Concepcion Impedes Access to Justice*, 90 Or L Rev 703, 717 (2012) (comparing studies showing the large increase in the adoption of arbitration clauses in consumer contracts since 2001). Following *Concepcion*, Playstation, eBay, Xbox, Netflix, and Paypal amended their arbitration agreements to preclude class processes. See Chris Morran, *Sony Changes PS3 Terms of Service to Avoid Class Action Lawsuits*, Consumerist (Sept 16, 2011), online at <http://consumerist.com/2011/09/16/sony-changes-ps3-terms-of-service-to-avoid-class-action-lawsuits/> (visited Sept 15, 2013); Chris Morran, *Paypal Slips Forced Arbitration Clause Into User Agreement; Gives Users Until Dec. 1 to Opt Out*, Consumerist (Oct. 9, 2012), online at <http://consumerist.com/2012/10/09/paypal-slips-forced-arbitration-clause-into-user-agreement-gives-you-until-dec-1-to-opt-out/> (visited Sept 15, 2013) (reporting that both Paypal and Ebay adopted class action waivers in their arbitration clauses following *Concepcion*); Matt Brownell, *Netflix is Now Banning Class-Action Suits Too*, [www.mainstreet.com](http://www.mainstreet.com) (Mar 20, 2012), online at <http://www.mainstreet.com/article/smart-spending/technology/netflix-now-banning-class-action-suits-too> (visited Sept 15, 2013) (reporting that Xbox and Netflix adopted class action and class arbitration waivers following *Concepcion*). Wireless phone companies, banks, computer sellers, and cable companies routinely integrate arbitration agreements with class arbitration waivers in their boilerplate language in contracts with consumers. Verizon, Sprint, AT&T, and T-Mobile use class action waivers in their customer arbitration agreements. For the T-Mobile wireless contract, see [http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr\\_Ftr\\_TermsAndConditions&print=true](http://www.t-mobile.com/Templates/Popup.aspx?PAsset=Ftr_Ftr_TermsAndConditions&print=true) (visited Sept 15, 2013). For the Sprint terms, see [https://manage.sprintpcs.com/output/en\\_US/manage/MyPhoneandPlan/ChangePlans/popLegalTermsPrivacy.htm](https://manage.sprintpcs.com/output/en_US/manage/MyPhoneandPlan/ChangePlans/popLegalTermsPrivacy.htm) (visited Sept 15, 2013). For the Verizon Wireless Customer Agreement, see [http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER\\_AGREEMENT&jspName=footer/customerAgreement.jsp](http://www.verizonwireless.com/b2c/globalText?textName=CUSTOMER_AGREEMENT&jspName=footer/customerAgreement.jsp) (visited Sept 15, 2013). For the AT&T Wireless Customer Agreement, see <http://www.wireless.att.com/learn/articles-resources/wireless-terms.jsp> (visited Sept 15, 2013). See also Zachary Gima, Taylor Lincoln, and David Arkush, *Forced Arbitration: Unfair and Everywhere*, Public Citizen 10, 14, 16 (Sept 2009) (showing that five out of seven banks, four out of ten computer manufacturers, and six out of thirteen cable providers use arbitration clauses in their contracts). Professors Chris Drahozal and Peter Rutledge are undertaking a comprehensive study of the impact of the *Concepcion* decision on businesses' use of class action waivers in franchise arbitration clauses. Until that study is complete, the best evidence seems to be anecdotal. One of the best-known companies to adopt a class action waiver in their consumer arbitration clauses is Microsoft. In June 2012, Microsoft announced that it was revising its consumer contracts to add class action waivers. According to Microsoft, consumers may pursue low-value disputes individually in either small claims court or arbitration, but will not be able to aggregate them with other similarly-situated consumers. See David Lazarus, *Microsoft Pulls Plug on Class Actions*, LA Times B1 (June 8, 2012). The article describes Microsoft

advocacy groups and others<sup>11</sup> increased the attack on arbitration as a process for achieving justice.<sup>12</sup> This attack is based primarily on the view that arbitration does not provide a fair process or results to one-shot players,<sup>13</sup> like consumers, who play little or no role in negotiating the underlying arbitration agreement and whose lack of knowledge hampers their ability to

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as part of a post-*Concepcion* business trend to eliminate consumer class actions: “That trend kicked into high gear after the high court ruled in a 5-4 decision last year that businesses can require arbitration—and prohibit class-action lawsuits—in their service contracts. The decision specifically involved AT&T but applies to all companies in all industries.” *Id.* See Theodore Eisenberg, Geoffrey P. Miller, and Emily Sherwin, *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U Mich J L Ref 871, 886 (2008) (finding clauses providing for mandatory arbitration in 92.9 percent of employment contracts and 76.9 percent of consumer contracts); Linda J. Demaine and Deborah R. Hensler, “Volunteering” to Arbitrate Through Predispute Arbitration Clauses: *The Average Consumer’s Experience*, 67 L & Contemp Probs 55, 62–64 (2004) (examining a mix of industries and finding that 35.4 percent of consumer contracts contained an arbitration clause, compared to 69.2 percent of financial services contracts containing such a clause); Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion under the Federal Arbitration Act*, 77 NC L Rev 931, 933–36 (1999) (discussing the expansion of arbitration into consumer agreements in relation to Supreme Court arbitration jurisprudence); Edward Brunet, et al, *Arbitration Law in America: A Critical Assessment* 129 (Cambridge 2006) (discussing the expansion of arbitration agreements into every day consumer transactions with financial institutions, service providers, and sellers of goods); Lauren Gaffney, *The Circle of Assent: How “Agreement” Can Save Mandatory Arbitration in Long-Term Care Contracts*, 62 Vand L Rev 1017, 1019 (2009) (noting that mandatory arbitration of disputes has become the norm in long-term care contracts); Mark Furletti, *Mandatory Arbitration Clauses in the Credit Card Industry* \*3–4 (Federal Reserve Bank of Philadelphia 2003), online at [http://www.philadelphiafed.org/payment-cards-center/events/workshops/2003/MandatoryArbitrationClauses\\_012003.pdf](http://www.philadelphiafed.org/payment-cards-center/events/workshops/2003/MandatoryArbitrationClauses_012003.pdf) (visited Sept 15, 2013) (noting the adoption of arbitration clauses by the credit card industry); Consumer Action, *Arbitration Clauses Prevalent* \*5 (Consumer Action News Spring 2007), online at [http://www.consumer-action.org/downloads/english/CA\\_News\\_CC\\_07.pdf](http://www.consumer-action.org/downloads/english/CA_News_CC_07.pdf) (visited Sept 15, 2013) (finding that 75 percent of surveyed cards required consumers to settle disputes in arbitration).

<sup>11</sup> See, for example, *Gutting Class Action*, NY Times A26 (May 12, 2011).

<sup>12</sup> For the Public Citizen discussion of Arbitration, see <http://www.citizen.org/Page.aspx?pid=397> (visited Sept 15, 2013). For the National Association of Consumer Advocates (NACA) discussion of Forced Arbitration, see <http://www.naca.net/issues/forced-arbitration> (visited Sept 15, 2013). Both sites contain links to various reports and stories that illustrate this point. More recently, a new advocacy group formed the Consumers Count Litigation Group. This group, currently soliciting consumers to join prospective class actions, exists to challenge the use of arbitration to resolve consumer disputes. See Consumers Count website, online at <http://www.consumerscount.org> (visited Sept 15, 2013) (“Browse. Submit. Act. Are You Outraged? Did It Happen To You? You Build The Crowd, We’ll Make The Case.”).

<sup>13</sup> A “one-shot” player is at a systematic disadvantage in an arbitration against a “repeat” player. Repeat players have advantages in drafting arbitration agreements, selecting arbitrators, and the arbitration itself. See Sarah R. Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L Rev 449, 472–79 (1996).

participate in any aspect of the arbitral process from arbitrator selection to the hearing. Most damning may be the attacks of public interest groups against the cadre of arbitrators who hear these types of cases.<sup>14</sup> Criticized as partial to the groups paying them, arbitrators and their defenders can only argue, but not prove, that they act impartially when deciding a case. In the absence of evidence supporting their claims, arbitrators and the organizations for whom they work have difficulty debunking critical views of their work.<sup>15</sup>

States' inability to regulate arbitration agreements or awards, together with Congress's reluctance to amend the FAA,<sup>16</sup> led in part, to the creation of a federal agency, the

<sup>14</sup> See, for example, Consumer Action, *Dodd-Frank Act Calls for Study of Binding Mandatory Arbitration Provisions*, Consumer Action Insider (Consumer Action Aug 2012), online at [http://www.consumer-action.org/news/articles/consumer\\_action\\_insider\\_august\\_2012/](http://www.consumer-action.org/news/articles/consumer_action_insider_august_2012/) (visited Sept 15, 2013) (suggesting arbitrators do not always follow the law and give preferential treatment to corporations that hire them repeatedly).

<sup>15</sup> Additional empirical research on consumer arbitration's effectiveness may be forthcoming. The Consumer Financial Protection Bureau (CFPB), as part of its study of pre-dispute arbitration agreements involving consumer financial products or services, put out a call for information on how arbitration is used in this context. See Consumer Financial Protection Bureau, *Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements* 77 Fed Reg 25148, 25148 (2012).

<sup>16</sup> See, for example, congressional attempts to amend the FAA to make pre-dispute arbitration agreements unenforceable in employment, consumer, and civil rights contexts: A Bill to Amend title 9, United States Code, to allow employees the right to accept or reject the use of arbitration to resolve an employment controversy, HR 815, 107th Cong, 1st Sess, in 147 Cong Rec H 621 (daily ed Mar 01, 2001); Preservation of Civil Rights Protections Act of 2001, HR 2282, 107th Cong, 1st Sess, in 147 Cong Rec H 3464 (daily ed June 21, 2001); Preservation of Civil Rights Protections Act of 2002, S 2435, 107th Cong, 2d Sess, in 148 Cong Rec S 3625 (daily ed May 1, 2002); Fairness and Individual Rights Necessary to Ensure a Stronger Society: Civil Rights Act of 2004, HR 3809, 108th Cong, 2d Sess, in 150 Cong Rec H 514 (daily ed Feb 11, 2004); Preservation of Civil Rights Protections Act of 2005, HR 2969, 109th Cong, 1st Sess, in 151 Cong Rec H 4721 (daily ed June 17, 2005); Arbitration Fairness Act of 2007, HR 3010, 110th Cong, 1st Sess, in 153 Cong Rec H 7774 (daily ed July 12, 2007); Civil Rights Act of 2008, HR 5129, 110th Cong, 2d Sess, in 154 Cong Rec H 454 (daily ed Jan 23, 2008); Arbitration Fairness Act of 2009, S 931, 111th Cong, 1st Sess, in 155 Cong Rec S 4891 (daily ed Apr 29, 2009); Arbitration Fairness Act of 2011, HR 1873, 112th Cong, 1st Sess, in 157 Cong Rec H 3278 (daily ed May 12, 2011). Although some of the early bills were responses to the use of arbitration to resolve statutory employment discrimination claims, drafters offered protection from arbitration to consumers as well. See, for example, Arbitration Fairness Act of 2011, HR 1873, 112th Cong, 1st Sess, 156 Cong Rec H 3278 (daily ed May 12, 2011). In addition, legislators proposed amendments to various statutes, such as the Consumer Credit Protection Act, that would have had the same effect. See, for example, Consumer Fairness Act of 2003, HR 1887, 108th Cong, 1st Sess, in 149 Cong Rec H 3570 (daily ed Apr 30, 2003). Almost none of these bills were reported out of committee, and those that survived the committee step of the legislative process were not voted on by the House or Senate.

Consumer Financial Protection Bureau (CFPB).<sup>17</sup> The agency has broad authority to enforce consumer protection laws and protect the general welfare of consumers in their interactions with different financial institutions.<sup>18</sup> One of the CFPB's initiatives is to study the use of arbitration in disputes between consumers and financial services providers to determine whether arbitration is an appropriate mechanism for resolution of these disputes.<sup>19</sup> While the CFPB's study is in the very early stages and may ultimately have little impact on arbitration,<sup>20</sup> the irony is that a federal agency, rather than a state legislature, is now the only entity capable of reforming arbitration.<sup>21</sup>

The Supreme Court's anti-federalism approach to arbitration precludes states from engaging in the kind of democratic experimentation<sup>22</sup> with different regulatory

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<sup>17</sup> See Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), Pub L No 111-203, 124 Stat 1376, 2003-04 (2010), codified at 12 USC § 5301 et seq (authorizing the newly formed Consumer Credit Protection Agency to prohibit or impose conditions or limitations on the use of arbitrations between a consumer and a financial services provider). The Dodd-Frank Act allows limitations on arbitration if the Director of the Consumer Credit Protection Agency determines, after conducting a formal study of the use of binding arbitration agreements in the financial services industry, that such limitations are in the public interest and for the protection of consumers. *Id.*

<sup>18</sup> See Myriam Gilles and Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v Concepcion*, 79 U Chi L Rev 623, 654 (2012).

<sup>19</sup> *Id.* at 656 (detailing how § 1028 of the Dodd-Frank Act directs the CFPB to conduct a study of arbitration in consumer transactions and submit its findings to Congress).

<sup>20</sup> *Id.* at 658 (noting that any contracts entered into before 180 days after the agency's determination would not be affected by the new regulations).

<sup>21</sup> *Id.* at 656 (noting that after its study is completed, the CFPB could partially overturn *Concepcion* by banning class action waivers in the specific context of consumer financial products).

<sup>22</sup> A key attribute of federalism is that it enables states to serve as "laboratories for experimentation" in social policy. See *Grutter v Bollinger*, 539 US 306, 342 (2003), interpreting *United States v Lopez*, 514 US 549, 581 (1995) (Kennedy concurring) (stating that states should be able to "draw on the most promising aspects" of other states' experimental approaches to affirmative action); *Gregory v Ashcroft*, 501 US 452, 458 (1991) (noting that the federalism system provides for "innovation and experimentation" in government); David S. Schwartz, *State Judges as Guardians of Federalism: Resisting the Federal Arbitration Act's Encroachment on State Law*, 16 Wash U J L & Pol 129, 130-31 (2004). Professor Schwartz notes that FAA preemption "stifles state law 'experimentation' not only by nullifying state laws on the books, but also by discouraging proposals to change the law." *Id.* at 134. See also Jack Wilson, "No-Class-Action Arbitration Clauses," *State-Law Unconscionability, and the Federal Arbitration Act: A Case for Federal Judicial Restraint and Congressional Action*, 23 Quinipiac L Rev 737, 814-15 (2004) (arguing that forcing state courts to defer to the FAA's vague federal policy on class action arbitration is inferior to allowing state legislatures to address the issue); Edward Brunet, *The Minimal Role of Federalism and State Law in*

approaches that federalism typically encourages and that, generally, results in well-considered solutions to existing problems.<sup>23</sup> This approach may be especially problematic for consumer arbitration because there is relatively little empirical evidence to support arguments for or against the use of arbitration in this context. If state legislatures were permitted to experiment with different methods for regulating arbitration, focusing on several areas might prove fruitful—reexamination of class action arbitration as a process for adjudicating consumers’ low-value claims, expansion of transcript and opinion-writing requirements, and reexamination of arbitrator selection processes, among others.<sup>24</sup> Though they might prefer eliminating pre-dispute consumer arbitration agreements entirely, scholarly commentators tend to agree that if businesses continue to use arbitration, additional due process protections are necessary so that parties will be more likely to accept arbitration as a primary means for resolving disputes.<sup>25</sup> In light

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*Arbitration*, 8 Nev L J 326, 329–31 (2007) (noting that arbitration law is a species of contract and consumer law and, therefore, states are better suited to addressing its issues than is the federal government).

<sup>23</sup> As the Court stated in *Gregory v Ashcroft*,

[F]ederalist structure . . . assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.

501 US at 458.

<sup>24</sup> Professors Stephen Hayford and Alan Palmiter recommend a similar approach. Rather than rejoin “at the state level the battles lost before the Supreme Court,” the authors recommended that state legislatures try to fill in the gaps on the many arbitral matters the FAA did not address. Stephen L. Hayford and Alan R. Palmiter, *Arbitration Federalism: A State Role in Commercial Arbitration*, 54 Fla L Rev 175, 226–27 (2002). The authors would probably be surprised that the Court has since taken the view that even the effort to fill in the gaps the FAA appeared to leave wide open can be preempted. See *Concepcion*, 131 S Ct at 1753. At this point, the Court seems to reject Hayford and Palmiter’s view that the RUAA and other state legislative acts could serve an important role in assuring the fundamental fairness of arbitration.

<sup>25</sup> See, for example, Amy Schmitz, *Regulation Rash? Questioning the AFA’s Approach for Protecting Arbitration Fairness*, 28 Bank & Fin Serv Pol Rep 16, 19 (2009) (asserting that the need for some reform of arbitration, particularly in the consumer context, must be balanced against the importance of avoiding “needless protectionism”). Professor Schmitz also proposes arbitration reforms like notice of the arbitration clause, balanced arbitrator selection, contained costs, adequate discovery, convenient hearing location, timeliness and compliance with awards, preservation of statutory remedies, public disclosure of awards, access to small claims court, and allowance of class relief. *Id.* at 23–29. See also Richard D. Fincher, et al, *An Examination of the Arbitration Fairness Act of 2009* \*7, 85–87 (Association of Conflict Resolution Dec 1, 2009), online at

of the Court's current approach to arbitral preemption and Congress's lack of interest in amending the FAA, it may well be that private dispute resolution providers, rather than state legislatures,<sup>26</sup> will ultimately provide the laboratory for experimentation.

This Article recognizes the reality that arbitration is not going anywhere.<sup>27</sup> Those who contend that it provides second

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<http://www.acrnet.org/uploadedFiles/Publications/FinalReport%2012-1-09.pdf> (visited Sept 15, 2013) (recommending improving the process and procedures provided in pre-dispute arbitration agreements instead of "disenfranchis[ing]" one-shot players from utilizing an "affordable, viable, fair dispute resolution process to resolve their disputes in a timely manner"). Lew Maltby drafted the Model Arbitration Act, which he proposes as an alternative to the AFA and which codifies many of Schmitz's recommendations. Maltby's Act includes a mandate that consumers pay limited fees, and have a right to a neutral provider and a written opinion, if requested. See Lew Maltby, *Model Arbitration Act* \*1-2 (unpublished proposed Act) (on file with author). See also Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 *Am Rev Intl Arb* 323, 427-29 (2011) (recommending a statutory amendment of the FAA that provides "due process standards" to circumvent unconscionability, specifically the limitation of class-action waivers and a mechanism for independent administration of the arbitration processes); Richard A. Bales and Sue Irion, *How Congress Can Make a More Equitable Federal Arbitration Act*, 113 *Pa St L Rev* 1081, 1100-01 (2009) (proposing that consumer arbitration be invalid unless, among other requirements, there is a jointly selected arbitrator, adequate discovery, cost splitting, a right to representation, a right to a class action, a right to a written opinion, and a right to limited judicial review).

<sup>26</sup> The RUAA drafters, without the benefit of cases like *Hall Street Associates LLC v Mattel Inc.*, 552 US 576 (2008), *Concepcion*, and *Stolt-Nielsen*, read the preemption tea leaves as follows:

It is likely that matters not addressed in the FAA are also open to regulation by the States. State law provisions regulating purely procedural dimensions of the arbitration process (e.g., discovery [RUAA Section 17], consolidation of claims [RUAA Section 10], and arbitrator immunity [RUAA Section 14]) likely will not be subject to preemption. Less certain is the effect of FAA preemption with regard to substantive issues like the authority of arbitrators to award punitive damages (RUAA Section 21) and the standards for arbitrator disclosure of potential conflicts of interest (RUAA Section 12) that have a significant impact on the integrity and/or the adequacy of the arbitration process. These "borderline" issues are not purely procedural in nature but unlike the "front end" and "back end" issues they do not go to the essence of the agreement to arbitrate or effectuation of the arbitral result. Although there is no concrete guidance in the case law, preemption of state law dealing with such matters seems unlikely as long as it cannot be characterized as anti-arbitration or as intended to limit the enforceability or viability of agreements to arbitrate.

See *Uniform Arbitration Act* at \*5 (cited in note 2).

<sup>27</sup> In November 2012, Professor Jill Gross asked Supreme Court Justice Sonia Sotomayor whether she believed that the Court would change its approach to arbitration cases in the near future. See Jill Gross, *Justice Sotomayor on Arbitration*, (ADR Prof Blog Nov 12, 2012), online at <http://www.indisputably.org/?p=4116> (visited Sept 15, 2013). Justice Sotomayor responded that she did not believe the Court would alter its approach to arbitration cases and that those interested in reform should look to the



class justice,<sup>28</sup> will result in the complete takeover of vast areas of the law,<sup>29</sup> or will result in law ossification, need to realize that the Supreme Court's approach to arbitral preemption requires those interested in the issue to do what can be done to make the process more effective for all parties, rather than continue to attack it as an inadequate forum for resolution of consumer disputes. Improvements in the arbitration process will make a process that is already fair to consumers more acceptable to them.<sup>30</sup> Recent studies demonstrate that arbitrators take their jobs very seriously.<sup>31</sup> They cite law, follow precedent, think like judges and, in short, do everything necessary to provide justice to those who select them.<sup>32</sup> Rather than turn to the anecdote of

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private sector or the legislature for change. See *id.* Justice Sotomayor's comments were prescient as the Supreme Court continued along its path of arbitration federalization in *American Express Co v Italian Colors Restaurant*, 133 S Ct 2304 (2013). In that case, the Court decided that merchants could not join together in a class arbitration to pursue their antitrust claims based on the claim that bilateral arbitration would not permit them to vindicate their statutory rights. Rejecting the merchants' claim that the expert analysis necessary to support an antitrust claim would make bilateral arbitration too expensive for an individual merchant to pursue, the Court held that the individual merchant's right to pursue a remedy is not eliminated simply because it must be pursued in the arbitration forum, even if the individual ultimately decides not to pursue the claim because it is too expensive to do so. The *American Express* decision eliminates the claim that a class arbitration waiver contained in an arbitration agreement precludes the individual, whether consumer or other one-shot player, from effectively vindicating his or her statutory rights.

<sup>28</sup> See, for example, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash U L Q 637, 677-97 (1996) (debunking the argument that binding arbitration serves all parties' best interests); Stephan Landsman, *Nothing for Something? Denying Legal Assistance to Those Compelled to Participate in ADR Proceedings*, 37 Fordham Urban L J 273, 279 (2010) (suggesting that Congress's 1988 authorization of mandatory federal court ADR programs implicitly confirmed the "second-class justice" of compulsory arbitration).

<sup>29</sup> See Sternlight, 74 Wash U L Q at 677-97 (cited in note 28); Landsman, 37 Fordham Urban L J at 279 (cited in note 28).

<sup>30</sup> For example, a recent survey indicated that nine out of ten consumers disapprove of mandatory arbitration, albeit in the consumer finance sector. The Pew Charitable Trusts, *Banking on Arbitration: Big Banks, Consumers and Checking Account Dispute Resolution* \*6 (The Pew Charitable Trusts Nov 27, 2012), online at [http://www.pewstates.org/uploadedFiles/PCS\\_Assets/2012/Pew\\_arbitration\\_report.pdf](http://www.pewstates.org/uploadedFiles/PCS_Assets/2012/Pew_arbitration_report.pdf) (visited on Sept 15, 2013). See also Reynolds Holding, *Private Justice: Can public count on fair arbitration?*, San Francisco Chronicle A15 (Oct 8, 2001).

<sup>31</sup> See W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 NC L Rev 1091, 1093 (2012); Ariana R. Levinson, *What the Awards Tell Us about Labor Arbitration of Employment Discrimination Claims*, 46 U Mich J L Ref \*48 (forthcoming 2013), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2020740##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2020740##) (visited Sept 15, 2013).

<sup>32</sup> See Michael H. LeRoy and Peter Feuille, *Reinventing the Enterprise Wheel: Court Review of Punitive Awards in Labor and Employment Arbitrations*, 11 Harv Neg L Rev 199, 247 (2006) (noting that in a study of over 1500 court decisions reviewing labor

the “bad arbitrator” to prove that arbitration harms consumers, a critical evaluation of arbitration reveals that justice is being done in the arbitration process. Now that arbitration is a process that is here to stay, the focus should be on improving the process, not continuing down the futile path of attempting to eliminate it as a dispute resolution mechanism.

This Article will focus briefly on the Supreme Court jurisprudence that led to the current situation in which state law plays a minimal role in arbitration doctrine.<sup>33</sup> While state legislatures traditionally regulate contract law issues,<sup>34</sup> the Supreme Court’s interpretation of the FAA has resulted in an anomalous situation in which federal law routinely trumps state laws that attempt to reform arbitration.<sup>35</sup> The Article will also explain how the Court’s *Concepcion* and *Stolt-Nielsen* decisions took the anti-federalism approach a step further—by permitting preemption in areas the FAA does not address. This expansion of the preemption doctrine further undermines the states’ ability to substantively regulate arbitration by defining arbitration in a very specific way and then declaring preempted any laws or decisions that are not consistent with the definition. Moreover, this expansion, together with Congress’s lack of interest in regulating arbitration, makes it quite likely that private dispute resolution providers will be the only entities able to reform the arbitration process. Recognizing that arbitration law is largely federalized, this Article will then identify a number of possible reforms private dispute resolution providers could implement and review one of the more promising avenues of reform—arbitrator opinion writing—in greater depth. This reform would have a number of beneficial effects. It would provide transparency in the arbitration process, address problems perceived in the arbitrator selection process, make clear whether

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arbitration results, arbitrators are beginning to mirror the role of judges and juries in their decisions); Weidemaier, 90 NC L Rev at 1093 (cited in note 31) (revealing a study of arbitrator opinions showing that arbitrators writing reasoned awards act like judges).

<sup>33</sup> See generally Edward Brunet, *The Minimal Role of Federalism and State Law in Arbitration*, 8 Nev L J 326, 332–36 (2007).

<sup>34</sup> The Court itself has declared that states are traditionally responsible for regulating contracts and that federal courts should be “reluctant to federalize” that area of law. *Patterson v McLean Credit Union*, 491 US 164, 183 (1989), quoting *Santa Fe Industries, Inc v Green*, 430 US 462, 479 (1977).

<sup>35</sup> As Professors Stephen L. Hayford and Alan R. Palmiter point out, “[t]he Court’s revisionism, effectively creating a national policy favoring arbitration, has shown itself to have legs.” Hayford and Palmiter, 54 Fla L Rev at 178 (cited in note 24).

the parties received due process during the arbitration, and ensure that awards are carefully considered and evidence properly balanced.

## I. THE FEDERALIZATION OF CONSUMER ARBITRATION

Arbitration scholars routinely cite traditional contract law and federalism principles when critiquing the Supreme Court's arbitration preemption jurisprudence.<sup>36</sup> The Supreme Court acknowledges that arbitration agreements, distilled to their essence, are simply contracts.<sup>37</sup> Following federalism theory, then, one would expect the Court to respect a state's interest in regulating in an area traditionally delegated to state regulation—contract law.<sup>38</sup> Nevertheless, the Court, without

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<sup>36</sup> See generally Brunet, 8 Nev L J 326 (cited in note 22) (tracing the evolution of state arbitration law and its relation to federalism); Schwartz, *State Judges as Guardians of Federalism: Resisting the FAA's Encroachment on State Law* at 47 (cited in note 1) (urging state court judges to construe the FAA and Supreme Court preemption precedent narrowly); Drahozal, 79 Ind L J 393 (cited in note 3) (analyzing theories of FAA preemption and applying those theories to unresolved cases); Margaret Moses, *Can Parties Tell Courts What to Do? Expanded Judicial Review of Arbitral Awards*, 52 U Kan L Rev 429 (2004) (discussing the scope of judicial review and enforcement of arbitration agreements as private contracts).

<sup>37</sup> In numerous opinions, the Court states that arbitration is a creature of contract law. See, for example, *Hall Street Associates LLC v Mattel Inc*, 552 US 576, 585 (2008), citing *Dean Witter Reynolds, Inc v Byrd*, 470 US 213, 220 (1985); *Litton Financial Printing Division, A Division of Litton Business Systems, Inc v NLRB*, 501 US 190, 204 (1991); *Nolde Brothers, Inc v Bakery & Confectionery Workers Union*, 430 US 243, 250–51 (1977) (collecting Supreme Court cases that suggest arbitration is a creature of contract); *United Steelworkers of America v Warrior and Gulf Navigation Co*, 363 US 574, 582 (1960); *Gateway Coal Co v Mine Workers of America*, 414 US 368, 374 (1974); *John Wiley & Sons, Inc v Livingston*, 376 US 543, 547 (1964); *Atkinson v Sinclair Refining Co*, 370 US 238, 241 (1962).

<sup>38</sup> Initially, the Court appeared likely to permit state regulation of arbitration agreements. As noted above, Congress enacted the FAA in 1925 as a direct response to merchants seeking legislative help to overcome judicial hostility to the enforcement of arbitration agreements. Recognizing its limited power under the Commerce Clause, Congress chose to rely on its power to control federal court jurisdiction; it enacted the FAA as procedural law, applicable only to federal courts. Thirteen years later, in *Erie Railroad Co v Tompkins*, 304 US 64 (1938), the Court held that in diversity cases, a federal court should apply federal procedural law, but must apply state substantive law in determining the nature of the parties' rights. See *id* at 79. As long as courts considered the FAA to be federal procedural law, then *Erie* presented no bar to its enforceability. In a subsequent case, however, *Bernhardt v Polygraphic Co of America*, 350 US 198 (1956), the Court held that the duty to arbitrate did involve substantive law. As a result, it held that, with regard to diversity cases, state laws (rather than federal) regarding arbitration provided the rules of decision, and it thus applied Vermont law to deny a request for arbitration. See *id* at 202–05. In the Court's next examination of this issue, *Prima Paint Corp v Flood & Conklin Manufacturing Co*, 388 US 395 (1967), the Court qualified its holding in *Bernhardt* by noting that, even in diversity cases, Congress

referring to federalism in any of its decisions, typically preempts any state efforts to regulate the enforceability of arbitration agreements or review of arbitration awards.<sup>39</sup> More recently, the Court extended that preemption to an area that the FAA does not specifically address—class action arbitration.<sup>40</sup> Concluding that class action arbitration is not arbitration (though the FAA does not define arbitration), the Court held that the FAA precludes class arbitration and thus trumps state efforts to condition enforceability of an arbitration agreement on the existence of a class remedy.<sup>41</sup> While the Supreme Court's holdings that specific provisions of the FAA, which address enforceability of arbitration agreements as well as review of arbitration awards, preempt arguably inconsistent state law, it is perhaps more surprising, and really an abandonment of federalism principles, to hold that states may not regulate in an area that the FAA does not address *at all*.<sup>42</sup>

Previous commentators criticized the Supreme Court arbitration decisions for ignoring federalism principles.<sup>43</sup> The

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can “prescribe how federal courts are to conduct themselves with respect to subject matter over which Congress plainly has power to legislate.” *Id.* at 405. In other words, for disputes involving interstate commerce (such as the one at issue in *Prima Paint*), an area where Congress clearly had the power to regulate, Congress could issue rules governing federal court procedures for resolving the dispute, including rules mandating the enforceability of arbitration clauses, regardless of whether such rules were procedural or substantive. The Court in *Prima Paint*, though, left open the question of the extent to which Congress, in enacting the FAA, had imposed or constitutionally could impose such rules on state courts. The Court finally confronted that issue and determined that Congress could impose rules on state courts in *Southland Corp v Keating*, 465 US 1, 10–12 (1984). Subsequent decisions extended that principle in a variety of ways.

<sup>39</sup> See, for example, *Southland Corp v Keating*, 465 US 1 (1984) (FAA preempts California franchise law); *Allied-Bruce Terminix Companies v Dobson*, 513 US 265 (1995) (FAA preempts Alabama law rendering predispute arbitration agreements unenforceable); *Doctor's Associates, Inc v Casarotto*, 517 US 681 (1996) (FAA preempts Montana law requiring arbitration clause to be typed in underlined capital letters on the first page of the contract).

<sup>40</sup> See generally *Concepcion*, 131 S Ct 1740.

<sup>41</sup> *Id.* at 1747–51.

<sup>42</sup> The FAA provides an incomplete regulatory scheme. While it speaks clearly on the question of enforceability, it contains relatively little guidance on procedural issues in arbitration. For example, the FAA provides no direction on the arbitrator's responsibilities or the arbitrator selection process. See Hayford and Palmiter, 54 Fla L Rev at 177, 209–10 (cited in note 24) (discussing the FAA's “murky sphere” from which little direction can be gleaned).

<sup>43</sup> See generally David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 L & Contemp Probs 5 (2004); Brunet, 8 Nev L J 326 (cited in note 22).

Court's arbitration preemption decisions, beginning in 1984 with *Southland Corp v Keating*<sup>44</sup> and continuing through the 2010–11 term in *Concepcion*, fail to adhere to understood federalism values such as deference to state law, comity, and dignity.<sup>45</sup> Justice O'Connor, in her *Southland* dissent, explained that the FAA provided a rule of procedure only applicable in federal courts.<sup>46</sup> O'Connor's interpretation, which arbitration scholars widely regard as correct,<sup>47</sup> acknowledges federalism concerns, is consistent with the drafters' goals in writing the FAA, and also makes sense in light of other FAA provisions, particularly §§ 3 and 4, which clearly apply only in a federal court.<sup>48</sup> Yet, in

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<sup>44</sup> 465 US 1 (1984).

<sup>45</sup> See Brunet, 8 Nev L J at 330–32 (cited in note 22) (describing various values of federalism, including deference to state law, dignity of shared government, and comity—"respect for the laws of another sovereign power").

<sup>46</sup> See *Southland Corp*, 465 US at 22 (O'Connor dissenting).

<sup>47</sup> See, for example, David L. Franklin, "An Edifice of Its Own Creation": *The Supreme Court's Recent Arbitration Cases*, 10 DePaul Bus & Comm L J 495, 498 (2012) (noting that Justice Thomas is the only justice who still correctly rules that the FAA does not apply to the states). For examples of scholars who take issue with the majority opinion in *Southland*, see Ian R. Macneil, *American Arbitration Law: Reformation, Nationalization, Internationalization* 121 (Oxford 1992); Paul D. Carrington and Paul H. Haagen, *Contract and Jurisdiction*, 1996 S Ct Rev 331, 339, 380 (1996) (noting that O'Connor demonstrated that the majority opinion in *Southland* manipulated the history of the FAA); Schwartz, 67 L & Contemp Probs at 51 (cited in note 43) (arguing that O'Connor's dissent is "true to the original intent of the FAA"); Edward Brunet, *Toward Changing Models of Securities Arbitration*, 62 Brooklyn L Rev 1459, 1469 n 33 (1996); Robert A. Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U Ill L Rev 635, 677 n 133 (1995); Stephen J. Ware, *Alternative Dispute Resolution* § 2.7 at 30 (West Group 2001). But see Christopher R. Drahozal, *In Defense of Southland: Reexamining the Legislative History of the Federal Arbitration Act*, 78 Notre Dame L Rev 101, 103–05 (2002) (noting that, although the majority opinion is incomplete, "the conclusion it reaches is [not] wrong"). See also *Allied-Bruce Terminix Cos, Inc v Dobson*, 513 US 265, 285 (1995) (Thomas dissenting) (agreeing with O'Connor's dissent that the FAA does not apply outside of the federal courts).

<sup>48</sup> Justice O'Connor stated,

The majority opinion decides three issues. First, it holds that § 2 creates federal substantive rights that must be enforced by the state courts. Second, though the issue is not raised in this case, the Court states . . . that § 2 substantive rights may not be the basis for invoking federal-court jurisdiction under 28 U.S.C. § 1331. Third, the Court reads § 2 to require state courts to enforce § 2 rights using procedures that mimic those specified for federal courts by FAA §§ 3 and 4. The first of these conclusions is unquestionably wrong as a matter of statutory construction; the second appears to be an attempt to limit the damage done by the first; the third is unnecessary and unwise.

*Southland*, 465 US at 24. As Justice O'Connor emphasized, and most commentators agree, the majority's contention that the FAA was always intended as substantive law is inconsistent with the FAA's legislative history and plain text. See *id.* at 24–28. Moreover, the majority's FAA analysis creates an interpretive problem that Justice O'Connor

decision after decision following *Southland*, the Court repeatedly ignored the interest of state courts and legislatures in regulating contracts. Although Justice Thomas continues to dissent in each case where the FAA is applied in state courts because he believes the FAA is a procedural statute inapplicable in state courts,<sup>49</sup> Justice O'Connor gave up the argument in *Allied-Bruce Terminix Cos, Inc v Dobson*,<sup>50</sup> stating that she "acquiesce[d] in today's judgment" on stare decisis grounds.<sup>51</sup>

In spite of *Southland* and its progeny, many scholars believed that matters the FAA did not address, particularly those that are procedural in nature, would remain open to state regulation.<sup>52</sup> As Professor Brunet observed following the *Green Tree Financial Corp v Bazzle*<sup>53</sup> decision, when the Court rejected the South Carolina Supreme Court's decision permitting an arbitrator to decide whether class arbitration was permissible under an arbitration agreement that was silent on the matter,<sup>54</sup> "a high quality argument [could be made] that the states should be able to regulate arbitration procedures, particularly where there appears no contrary intent in the text of the FAA."<sup>55</sup>

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mentions but cannot resolve. If the FAA is substantive law, as the majority suggests, it must be the case that state courts should apply not only § 2 of the FAA, at issue in *Southland*, but also §§ 3 and 4. Yet these provisions specify that they apply in federal courts; section 3 addresses the issue of court stays in "any suit or proceeding . . . brought in any of the courts of the United States." 9 USC § 3. Section 4 allows a party to move to compel arbitration in "any United States district court." 9 USC § 4. It seems impossible to reconcile the majority opinion in *Southland* with the plain language of FAA §§ 3 and 4.

<sup>49</sup> See, for example, *Green Tree Financial Corp v Bazzle*, 539 US 444, 460 (2003) (Thomas dissenting). In his dissent, Justice Thomas stated:

I continue to believe that the Federal Arbitration Act . . . does not apply to proceedings in state courts. . . . For that reason, the FAA cannot be a ground for pre-empting a state court's interpretation of a private arbitration agreement. Accordingly, I would leave undisturbed the judgment of the Supreme Court of South Carolina.

<sup>50</sup> 513 US 265 (1995).

<sup>51</sup> *Id* at 282–84 (O'Connor concurring).

<sup>52</sup> See, for example, Drahozal, 79 Ind L J at 417–18 (cited in note 3) (describing a "preemption continuum" ranging from front-end issues most likely to be preempted to procedural issues less likely to be preempted); Brunet, 8 Nev L J at 333 (cited in note 22) (noting the state procedural rules could survive the "obstacle test"); Hayford and Palmiter, 54 Fla L Rev at 226 (cited in note 24) (suggesting that states fill in the gaps in the FAA where Congress has failed to act).

<sup>53</sup> 539 US 444 (2003).

<sup>54</sup> See *id* at 454 (vacating the South Carolina Supreme Court's decision).

<sup>55</sup> Brunet, 8 Nev L J at 338 (cited in note 22).

In 2000, the Revised Uniform Arbitration Act (RUAA) drafters concluded that FAA preemption would be unlikely to impact state law provisions regarding discovery, consolidation of claims, and arbitrator immunity, all second generation issues the FAA did not address.<sup>56</sup> The drafters were less sanguine about the possibility of avoiding regulation on substantive issues such as the arbitrators' authority to award punitive damages or the standards governing arbitrator disclosure of conflicts of interest.<sup>57</sup> According to the drafters, the FAA did not address any of these issues because it focuses primarily on front-end (enforceability) and back-end (judicial review of arbitral awards) issues.<sup>58</sup> But regulation of these issues might nevertheless be preempted, the drafters reasoned, because, unlike discovery and immunity, punitive damages and conflicts questions are not entirely procedural in nature. Ultimately, the drafters concluded that, "[a]lthough there is no concrete guidance in the case law, preemption of state law dealing with such matters seems unlikely as long as it cannot be characterized as anti-arbitration or as intended to limit the enforceability or viability of agreements to arbitrate."<sup>59</sup>

Professor Stephen Hayford, writing in 2002, described the areas the FAA did not address as a "murky sphere" extending beyond the FAA's core "but without the same clarity and force as in the legislation's provisions on enforceability and arbitrability."<sup>60</sup> When evaluating state arbitration rules, Hayford stated that a court should determine whether the "rule is consistent with the twin purposes of the FAA: namely, to overcome hostility to arbitration and to effectuate the parties' arbitration agreement."<sup>61</sup> In other words, when considering rules

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<sup>56</sup> *Revised Uniform Arbitration Act* (National Conference of Commissioners on Uniform State Laws 2000), *Prefatory Note*, in Stephen B. Goldberg, et al, *Dispute Resolution: Negotiation, Mediation, Arbitration, and Other Processes* Appendix D at 603 (Wolters Kluwer Law & Business 6th ed 2012). Hayford and Palmiter agree with this position: "Nowhere does the FAA mention pre-hearing discovery, summary disposition, consolidation of claims, or provisional remedies." Hayford and Palmiter, 54 Fla L Rev at 178 (cited in note 24).

<sup>57</sup> Goldberg, et al, *Dispute Resolution* at 603 (cited in note 56).

<sup>58</sup> Id at 600-01.

<sup>59</sup> Id at 603.

<sup>60</sup> Hayford and Palmiter, 54 Fla L Rev at 177 (cited in note 24).

<sup>61</sup> Id at 201. Professor Jean Sternlight agrees: "[w]hile the FAA does not occupy the entire field of arbitration, it does preempt those state laws that would undermine the goals of the FAA." Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as*

addressing areas that the FAA does not mention, the question should be only whether the rule furthers the FAA's pro-arbitration policy. So long as it does, the FAA should not preempt it.<sup>62</sup>

Professor Chris Drahozal outlined the possible preemption approaches the Court might adopt to address what he described as the "second generation" arbitration cases—those cases where the state's regulation or judicial decision addressed areas that the FAA does not specifically address.<sup>63</sup> According to Professor Drahozal, the Court could choose from one of the following four methods to determine whether preemption should apply: [1] *Keystone* theory, stating that "[a] state law is not preempted . . . so long as the law does not invalidate the parties' arbitration agreement";<sup>64</sup> [2] RUAA theory (the RUAA drafters' view of preemption), stating that a state law may be preempted if it invalidates the parties' agreement or "if the state law conflicts with terms in the arbitration agreement addressing 'the most essential dimensions of the commercial arbitration process,'" terms that go to the arbitration agreement's essence;<sup>65</sup> [3] anti-FAA theory, stating that preemption is appropriate if the state law is anti-FAA in that it conflicts with or limits "explicit FAA provisions or general federal arbitration law";<sup>66</sup> or [4] pro-contract theory, stating that state laws that do not invalidate the parties' arbitration agreement but conflict with one of the agreement's provisions should be preempted.<sup>67</sup> If the Court

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*a Substitute for the Jury Trial*, in *The Privatization of Justice? Mandatory Arbitration and the State Courts*, Report of the 2003 Forum for State Appellate Court Judges 5, 14 (Pound Civil Justice Institute 2003).

<sup>62</sup> Following this logic, though, Hayford sounded a note of caution, concluding that mandatory state arbitration rules might be problematic under the Supreme Court's approach to arbitration federalism because such rules suggest that the parties' agreement to the contrary would not be enforceable. See Hayford and Palmiter, 54 Fla L Rev at 201 (cited in note 24). If the rule can provide content to the parties' promise, it would pass muster; if it mandated a certain path, by contrast, it would not. See *id* at 204. Under this conception, a rule mandating a certain amount of discovery or a reasoned award would be unlikely to avoid preemption, at least if it did not permit the parties to contract around the rule. But if the parties could contract around the rule, in consumer arbitration at least, it is unlikely that a requirement of reasoned written opinions would appear since the business drafting the arbitration agreement would be unlikely to include such a provision.

<sup>63</sup> Drahozal, 79 Ind L J at 395 (cited in note 3).

<sup>64</sup> *Id* at 417.

<sup>65</sup> *Id* (such as enforceability and judicial review of arbitration awards).

<sup>66</sup> *Id* at 418 (citation omitted).

<sup>67</sup> Drahozal, 79 Ind L J at 419 (cited in note 3).



adopted the Keystone, anti-FAA, or pro-contract theories, preemption of second generation arbitration issues would be unlikely because none of the state regulations or decisional law addressing these issues invalidates the arbitration agreement or contradicts general arbitration law, nor do the parties typically include these issues in their agreements. The result would be less clear if the Court adopted the RUAA theory because divining the essential dimensions of the arbitration process can lead to unpredictable results. After all, what are the essential dimensions of the arbitration process?

Some guidance regarding these issues seemed possible when the Court decided *Hall Street Associates v Mattel*,<sup>68</sup> a case that considered whether parties could agree to expand judicial review of an arbitration award in ways the FAA did not identify.<sup>69</sup> Although the FAA addresses judicial review of arbitration awards, all the federal circuit courts had permitted lower courts to review arbitration awards on the basis of manifest disregard of the law, a standard that does not appear in the Federal Arbitration Act.<sup>70</sup> The *Hall Street* Court followed the traditional arbitration preemption approach, holding that because the FAA specifically identifies the bases upon which individuals may challenge arbitration awards, parties do not have the ability to expand the bases upon which a court may rely when reviewing an award.<sup>71</sup> *Hall Street* did not provide much guidance on the question of whether state legislatures could regulate in areas that the FAA does not address because *Hall Street* considered a factual scenario that the FAA does address: judicial review of arbitration awards.

Ultimately, though, it appears that the Court adopted a version of the RUAA theory and, in addition, declared the essential terms of the arbitration process. The *Concepcion* Court applied a version of the RUAA theory when it considered whether the FAA preempted a judicial decision conditioning

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<sup>68</sup> 552 US 576 (2008).

<sup>69</sup> See *id.* at 586.

<sup>70</sup> See *id.* at 583 & n 5 (noting that the Ninth and Tenth Circuits expressly held that parties could not contract for increased judicial review with the Eighth Circuit agreeing in dicta and that the First, Third, Fifth, and Six Circuits have held the opposite with the Fourth Circuit agreeing in an unpublished opinion). See also *id.* at 584–85 (listing cases that recognize “manifest disregard for the law” as a reason for judicial vacatur of an arbitration award).

<sup>71</sup> *Id.* at 584, 586–87.

enforcement of an arbitration agreement on the availability of class action arbitration (an issue the FAA does not address).<sup>72</sup> The Court held that courts cannot condition enforceability of an arbitration agreement on the availability of class action arbitration.<sup>73</sup> In the decision, the Court identified a platonic arbitration ideal likely to hinder future state efforts to regulate areas the FAA does not address:

Classwide arbitration includes absent parties, necessitating additional and different procedures and involving higher stakes. Confidentiality becomes more difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent it is manufactured by *Discover Bank* rather than consensual, is inconsistent with the FAA.<sup>74</sup>

This decision followed closely on the heels of the Court's *Stolt-Nielsen* decision in which the Court explained that class action and bilateral (traditional) arbitration are wholly different: "[i]n bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes."<sup>75</sup>

Interpreting these two decisions, the Court seems to be homing in on an essential nature of arbitration that state courts and legislatures alter at their peril. That essential nature includes confidentiality of the proceedings, all parties present, knowledgeable arbitrators, lower costs, speed, efficiency, limited

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<sup>72</sup> See *Concepcion*, 131 S Ct at 1744.

<sup>73</sup> *Id* at 1750–51.

<sup>74</sup> *Id*, citing *Discover Bank v Superior Court*, 113 P3d 1110 (Cal 2005).

<sup>75</sup> *Stolt-Nielsen*, 130 S Ct at 1775. Professor S.I. Strong observed with surprise the Court's reaction to class arbitration because it has existed for over 30 years and has been the subject of Supreme Court review. See S.I. Strong, *Does Class Arbitration "Change the Nature" of Arbitration? Stolt-Nielsen, AT&T, and a Return to First Principles*, 17 *Harv Neg L Rev* 201, 214–15, 263–64 (2012). For Professor Strong's views on procedural rigor and class arbitration, see *id* at 228.

judicial review, and limited “procedural rigor.”<sup>76</sup> In addition, the Court identified the “different procedures” and “higher stakes” of class arbitration as distinguishing it from bilateral arbitration.<sup>77</sup> While the Court provided some guidance regarding the different procedures of and higher stakes involved in class arbitration, it failed to articulate a standard for judging how many attributes of traditional arbitration can change before those changes would be considered problematic and therefore preempted. Nevertheless, the Court’s description of arbitration as a process with limited procedural rigor, which is also inexpensive, speedy, and lacks review, suggests that most attempted state reforms of the arbitration process (likely even increased discovery) would be preempted.<sup>78</sup>

By defining arbitration, the Court may be sending a signal that FAA preemption, even in areas that the FAA does not address, is likely to occur.<sup>79</sup> Rather than limit rejection of state legislative and decisional arbitration law to areas presenting potential inconsistency with the FAA, *Concepcion* and *Stolt-Nielson* reject states’ ability to regulate in areas the FAA does not address.

<sup>76</sup> See *Concepcion*, 131 S Ct at 1751, citing *Stolt-Nielsen*, 130 S Ct at 1776.

<sup>77</sup> *Concepcion*, 131 S Ct at 1750–51. But see Strong, 17 Harv Neg L Rev at 262–66 (cited in note 75) (“[C]oncerns about arbitrator competence . . . appear insufficient to call the legitimacy of class arbitration into question.”).

<sup>78</sup> Not surprisingly, the dissent in *Concepcion* takes a different position. According to the dissent, class arbitration is not inconsistent with the FAA’s purpose unless it discouraged the enforcement of the arbitration agreement. See *Concepcion*, 131 S Ct at 1757–58 (Breyer dissenting). Treating the primary goal of the FAA as clause enforcement rather than as a means for ensuring that a certain kind of arbitration takes place enabled the dissent to enforce California’s rule requiring class arbitration availability. See *id.* at 1758. The primary objective of the FAA, according to the dissent, was not to guarantee certain procedural rules—it was to “secure the ‘enforcement’ of agreements to arbitrate.” See *id.* The dissent emphasized the Court’s early approach to arbitration as a dynamic process to show the inconsistency with its new, rigid conception of arbitration in the majority opinion. See *id.* at 1761.

<sup>79</sup> This approach seems inconsistent with traditional preemption jurisprudence that would permit state regulation unless the regulation “stands as an obstacle” to carrying out the FAA’s purpose. See Schwartz, *State Judges as Guardians of Federalism: Resisting the FAA’s Encroachment on State Law* at 61 (cited in note 1), quoting *Geier v American Honda Motor Co*, 52 US 861, 873 (2000). Professor Schwartz suggested an example of the type of state regulation that would not traditionally be preempted—California’s ethics rules governing arbitrators and dispute resolution services providers. See Schwartz, *State Judges as Guardians of Federalism: Resisting the FAA’s Encroachment on State Law* at 61 (cited in note 1). While the case law on California’s rules has yet to develop, regulating arbitrators, like ensuring arbitration meets certain criteria, might be preempted by the current Supreme Court.

Despite repeated critiques of the Supreme Court's arbitration jurisprudence,<sup>80</sup> the Supreme Court unquestionably endorses the use of arbitration and does not tolerate state regulation of arbitration that it perceives to be inconsistent with or hostile to the FAA's express language or the Court's interpretation of what arbitration is.<sup>81</sup> While Congress could enact legislation to counteract the Supreme Court decisions, at least in those subject areas the FAA does not address, such regulation is simply not forthcoming. In light of the dearth of regulation, a more practical answer may be to look to the private sector dispute resolution services providers to see if some attempt to improve due process in arbitration might accomplish some of the goals that state legislatures have been forced to abandon.

Federalism principles suggest that state experimentation with possible solutions to existing problems is preferable to a single decision maker, such as the federal government, dictating a particular approach.<sup>82</sup> In the consumer arbitration area, where empirical work to determine arbitration's utility is in its infancy, this type of experimentation could be especially beneficial. Yet, time after time, the Supreme Court has stricken state efforts to regulate arbitration. Some critics of the Court's anti-federalism approach hoped that, at least in areas that the FAA did not specifically address, such as class action arbitration, the Court would permit states to regulate. Those hopes were dashed, however, when the Court made clear that class arbitration is not arbitration and that conditioning enforceability of an arbitration agreement on the existence of a class process was preempted.<sup>83</sup>

The Court's decisions striking down the states' efforts to regulate do not preclude private dispute resolution organizations from experimenting with the services they provide to consumers

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<sup>80</sup> See generally Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 Kan L Rev 767 (2012).

<sup>81</sup> *Concepcion*, 131 S Ct at 1749, citing *Moses H. Cone Memorial Hospital v Mercury Construction Corp*, 460 US 1, 24 (describing § 2 of the FAA as enacting a "liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary").

<sup>82</sup> See, for example, *New State Ice Co v Liebmann*, 285 US 262, 311 (1932) (Brandeis dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

<sup>83</sup> See *Concepcion*, 131 S Ct at 1753.

and businesses.<sup>84</sup> Possible areas for regulation include improving the arbitrator selection processes to ensure the selection of impartial and independent arbitrators, mandating arbitrator opinion writing, transcript maintenance, increased discovery, access to representation, access to full statutory remedies, and development of mechanisms for ensuring that the process is not costly or inconvenient to the consumer.<sup>85</sup>

At the risk of discouraging the kind of experimentation that might be particularly beneficial in consumer arbitration, the remainder of the Article will explore in depth one possible reform to the arbitration process: requiring arbitrators to issue reasoned, written awards. More research and analysis of other possible reforms would also be helpful but must be left for another Article.

## II. ARBITRATION OPINION WRITING

State legislatures or arbitral provider organizations, such as the American Arbitration Association (AAA) and Judicial Arbitration and Mediation Services (JAMS), should reconsider their approach to arbitrator opinion writing. Recent articles by Professors Mark Weidemaier and Arianna Levinson indicate that the arbitration process, contrary to what seems to be popular belief, provides access to justice for one-shot players with statutory claims.<sup>86</sup> Moreover, arbitrators engage in a

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<sup>84</sup> Some might describe this approach as the fox guarding the hen house. See David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 Ind L J 239, 247 (2012) (noting that AAA and other dispute resolution providers have no incentive to make pre-dispute arbitration agreements attractive to consumers because consumers do not purchase the service—buyers of neutral provider organization’s services are all entities desiring to suppress claims).

<sup>85</sup> See Fincher, et al, *An Examination of the Arbitration Fairness Act of 2009* at \*80–82 (cited in note 25) (finding the AFA’s remedy of eliminating all pre-dispute arbitration agreements unnecessary and noting that there have been efforts to improve the fairness and transparency of the arbitration process). See also Schmitz, 28 Bank & Fin Serv Pol Rep at 23–29 (cited in note 25).

<sup>86</sup> See Weidemaier, 90 NC L Rev at 1093 (cited in note 31) (concluding that arbitrators behave much like judges); Levinson, 46 U Mich J L Reform at \*48 (cited in note 31). After examining 160 labor arbitration opinions in employment discrimination cases, Levinson concludes that labor arbitration provides access to justice in “many instances” and “often provides a procedure with due process protections, a decision-maker who interprets the law and the contract as applied to the facts, and a union which advocates for the grievant’s rights.” Id. See also Christopher R. Drahozal and Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitrations*, 25 Ohio St J on Disp Resol 843, 845–46 (2010) (noting that in a study of over 300 AAA arbitrations in the consumer setting, no statistically significant “repeat player” advantage was detected); Amy J.

decision-making and opinion-writing process (when they write opinions) that is quite similar to the process in which judges engage. Weidemaier's and Levinson's studies confirm long-held beliefs in the arbitral community (although less so outside that community) that arbitrators are capable of understanding and applying precedent and can interpret legal rulings in a manner similar to judges. If these studies and beliefs are accurate, greater transparency in all types of arbitration through the implementation of mandatory arbitrator opinion writing, could substantially improve the process itself as well as the public's and parties' perceptions of the process.

Accepting Weidemaier's and Levinson's studies as accurate, this Article does not suggest that businesses abandon arbitration or even dramatically transform the arbitration process. Instead, it advocates one significant change, which will cost some, but not a great deal of, money and resources. The writing of an arbitration opinion will address most arbitration opponents' concerns about using this process to resolve consumer disputes.<sup>87</sup> In addition to improving the quality of arbitral decision making, opinion writing will bring greater transparency to the arbitrator selection process, enabling even the one-shot player to make better-educated selection decisions; improve the hearing process (because the arbitrator will need to make sure he or she understands all of the issues presented); and provide a greater sense of resolution to the parties, who will now have a deeper understanding of the reasons they won or

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Schmitz, *Curing Consumer Warranty Woes Through Regulated Arbitration*, 23 Ohio St J on Disp Resol 627, 629–30 (2008), citing Kirk D. Jensen, *Summaries of Empirical Studies and Surveys of How Individuals Fare in Arbitration*, 60 Consumer Fin L Q Rep 631, 631–25 (2006) (statistical evidence may suggest arbitration provides higher recovery rates for consumers than using the courts). But see David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 Notre Dame L Rev 1247, 1340 (2009) (“[W]hatever else mandatory arbitration may be, there is no evidence that it is fair.”); Jean R. Sternlight, *Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to a Jury Trial*, 16 Ohio St J on Disp Resol 669, 669–71 (2001) (arguing that mandatory binding arbitration is in conflict with the Seventh Amendment right to a jury trial).

<sup>87</sup> Consumer advocates would prefer a world in which consumer agreements were not covered by the FAA, that is, where consumers were not bound by arbitration agreements. At this point, however, case law states that consumer arbitration agreements are enforceable if they are not unconscionable and that, in most cases, individual consumers may not proceed as a class action in arbitration or court. Moreover, proposed legislation designed to exempt consumers from FAA coverage has failed repeatedly. Taking as true a world in which consumers are bound by arbitration agreements, this Article focuses on improvements to the arbitration process rather than continuing to press for its abandonment as a dispute resolution process.

lost. Moreover, this relatively inexpensive process change would have a significant impact on parties' and the public's perception of arbitration as a fair and legitimate forum for the resolution of disputes and would also likely improve the quality of arbitral decision making.

As articulated more fully below, private groups could add these requirements without creating or incurring significant additional costs. In some respects, it may be surprising that this requirement does not already exist. The history and development of commercial and labor arbitration, which this article will now examine, may help explain the absence of this requirement.

#### A. History of Opinion Writing in Arbitration

Arbitration has been an alternative to litigation for hundreds of years. During the early medieval period, merchants in France, England, and Germany conducted the majority of their business at trade fairs.<sup>88</sup> Disputes between buyers and sellers at these temporary fairs had to be resolved quickly and finally so that the parties could depart for home. In addition, standards for resolution were necessary so that all disputants would accept the outcome. As a result, trades and industry began maintaining arbitration tribunals with elected arbitrators to resolve these disputes.<sup>89</sup> Arbitration or merchant judges were to decide cases by applying custom and usage norms of the parties rather than the law of the land. This procedural law, known as "the law merchant," developed independently of the common law.<sup>90</sup> By the early seventeenth century, arbitration was the preferred mechanism for resolving disputes under the law merchant.<sup>91</sup>

Merchants brought the arbitration process to the pre-Revolution American colonies.<sup>92</sup> Merchants served as arbitrators

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<sup>88</sup> See Leon E. Trakman, *The Law Merchant: The Evolution of Commercial Law* 7–21 (Rothman 1980). Trading often went on for several weeks. It is not surprising, therefore, that disputes would arise as well as the need for a means to adjudicate these disputes.

<sup>89</sup> Martin Domke, *Domke on Commercial Arbitration* § 2:4 (Gabriel Wilner ed 1990).

<sup>90</sup> See *id.*

<sup>91</sup> See *id.*

<sup>92</sup> See Ian R. MacNeil, Richard E. Speidel, and Thomas J. Stipanowich, *Federal Arbitration Law, Agreements, Awards, and Remedies under the Federal Arbitration Act* § 4.3.1 (Little, Brown and Company 1994) (noting that, while colonial America practiced

and chambers of commerce developed in part to ensure the institutionalization of the arbitration process.<sup>93</sup> As communities grew larger and reputation within a particular industry became less important, however, merchants turned to state legislatures and to Congress to protect enforcement of their arbitration agreements and awards.<sup>94</sup> Once Congress enacted the Federal Arbitration Act—which ensured enforcement of arbitration agreements and awards—in 1925, the use of commercial arbitration increased dramatically. A short time later, in the 1940s, labor arbitration became popular and remains popular today. Modern collective bargaining agreements virtually always contain a provision for final and binding arbitration.

Yet, commercial and labor arbitration differ in a fundamental way.<sup>95</sup> While written opinions are common in labor arbitration, it is rare for a commercial arbitrator to draft a written opinion. While labor arbitrators typically make extensive findings of fact, articulate the parties' positions, and offer reasoning based on custom or law, commercial arbitrators are not required to explain their reasoning and rarely do.<sup>96</sup> In

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arbitration, it did not have the support of similar statutes and jurisdiction as English arbitration); Bruce H. Mann, *The Formalization of Informal Law: Arbitration Before the American Revolution*, 59 NYU L Rev 443, 469–71 (1984) (describing colonial merchant arbitration).

<sup>93</sup> See Soia Mentschikoff, *Commercial Arbitration*, 61 Colum L Rev 846, 855 (1961).

<sup>94</sup> Professor Amy J. Cohen explained that merchants preferred informal procedures because they could bring “a range of social experience and social expertise to bear on legal disputes.” Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J of Disp Resol 91, 104 (2011). Merchants preferred arbitration because it permitted them to “adjust their own economic relations in the marketplace.” *Id.* at 105. The FAA was necessary, though, in order to ensure that agreements to arbitrate and arbitration awards would be honored. *Id.* at 104.

<sup>95</sup> Labor arbitration developed as a means to ensure “extended negotiation between highly interdependent parties.” G. Richard Shell, *ERISA and Other Federal Employment Statutes: When is Commercial Arbitration an “Adequate Substitute” for the Courts?*, 68 Tex L Rev 509, 512 (1990). Under this model, the arbitrator is the parties’ agent for contract interpretation and is supposed to issue an award that is a close approximation of what the parties themselves would have negotiated. *Id.* Application of this model protects and may strengthen the parties’ underlying relationship. By contrast, commercial arbitrators should act like judges and should provide resolution cheaply and efficiently. *Id.* This may be particularly surprising because parties often want commercial arbitrators to interpret external law, not just apply customs. See *id.* at 532. Unlike labor arbitration, arbitrators are not limited in their capacity to render awards even when the subject matter is a federal statute. In other words, they may impose liability and award damages generally without restriction. See *id.* at 533.

<sup>96</sup> However, Edward Brunet noted, “Arbitrators are often said to be experts in the subject matter of the disputes they adjudicate. Certainly this was true of the historic commercial arbitrations between textile merchants.” Edward Brunet, *Arbitration and Constitutional Rights*, 71 NCL Rev 81, 88 (1992).



addition, while parties often agree to publish labor arbitrators' awards, it is rare that parties agree to publish a commercial arbitrator's award.<sup>97</sup>

History may be the best resource to explain why labor arbitrators write opinions and commercial arbitrators do not. During World War II, the War Labor Board introduced arbitration as a nonviolent mechanism to resolve disputes between businesses and their workers so that the war effort would not be disrupted.<sup>98</sup> The War Labor Board championed the use of arbitration as a peaceful method for resolving grievances and compelled the inclusion of arbitration agreements in collective bargaining agreements.<sup>99</sup> The success of War Labor Board arbitration created the impetus for greater use of arbitration. Although the War Labor Board success in part explains the use of arbitration among unions and employers, these entities embraced grievance arbitration for other reasons as well.<sup>100</sup> Unions preferred arbitration because courts were

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<sup>97</sup> See Christopher B. Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should Be Required to Issue Written, Publishable Opinions*, 4 *Emp Rts & Emp Policy J* 285, 299 (2000); Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 *Geo Wash L Rev* 443, 444–45 (1998) (noting that commercial arbitrators rarely explain their reasoning).

<sup>98</sup> See Robert V. Massey Jr, *History of Arbitration and Grievance Arbitration in the United States* \*3 (Institute for Labor Studies and Research), online at <http://www.laborstudiesandresearch.ext.wvu.edu/r/download/32003> (visited Sept 15, 2013). Massey notes that

[b]ecause of the great World War, President Franklin Roosevelt and his War Labor Board were cognizant of the fact that during this war the interruption of steel production and other war materials could not be tolerated by work stoppages taking place prior to interest arbitration hearings. Therefore, Roosevelt's War Labor Board insisted that labor and management place grievance-arbitration clauses into collective bargaining agreements as a final and binding last step of the grievance procedure to meet the wartime production needs of the country.

Id. See generally Benjamin Aaron, *Catalyst: The National War Labor Board of World War II*, 39 *Case W Res L Rev* 519 (1989).

<sup>99</sup> See, for example, *In re Walker Turner Co, Inc*, 1 *War Labor Reps* 101, 107 (1942) (holding that in a dispute between a union and a company which have never had a mutually acceptable procedure for the settlement of grievances, the collective bargaining agreement should provide that grievances be submitted to a committee); *In re Champlin Refining Co*, 3 *War Labor Reps* 155, 155 (1942) (ordering an arbitration clause written into the collective bargaining agreement). See generally Jack G. Day, *Symposium: An Oral History of the National War Labor Board and Critical Issues in the Development of Modern Grievance Arbitration: Prologue*, 39 *Case W Res L Rev* 515 (1988–1989).

<sup>100</sup> Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 *Hofstra Labor L J* 381, 398–99 (1996), citing Calvert

frequently hostile toward unions' efforts to organize and participate in workplace governance.<sup>101</sup> Employers, perhaps more reluctantly than the unions, accepted arbitration because the provision was offered in exchange for a no-strike clause.<sup>102</sup> In addition, the limited scope of labor arbitrator awards helped to institutionalize arbitration as the method for dispute resolution in private sector labor relations. Parties' agreements to award only reinstatement, restoration of seniority, and back pay to a winning grievant limited the arbitrator's authority. Well-known labor arbitrator and Professor Reginald Alleyne explained that a grievant could typically obtain only back pay, with interim earnings deducted and no punitive damages.<sup>103</sup> Thus, the risks of an unfair result were limited for both sides and, consequently, both sides embraced the process.

Although the tradition of labor arbitrators writing opinions may seem at odds with the efficiency rationale underlying grievance arbitration, over time parties have come to expect the written opinions and, when given the opportunity in the late 1960s to avoid opinion writing and its attendant costs, failed to do so. Not only do labor arbitrators routinely write awards, but they also treat arbitration opinions and awards as a form of non-binding precedent.<sup>104</sup> It is common for advocates to cite arbitrators' opinions in their post-hearing briefs and to rely on treatises whose main purpose is to identify trends and customs in labor arbitration.<sup>105</sup> Arbitrators in the labor field look to these treatises and opinions to help them analyze particular cases and to justify decisions that they reach.

Commercial arbitration, by contrast, never embraced the written arbitration award. The lack of opinion writing may stem from commercial arbitration's earlier origin in the pie powder fairs of the twelfth century. When New York merchants lobbied for the passage of a federal arbitration act, they focused on enforcement of arbitration agreements and awards, not on requiring arbitrators to offer reasons to support their

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McGruder, *A Half Century of Legal Influence Upon the Development of Collective Bargaining*, 50 Harv L Rev 1071, 1112-13 (1937).

<sup>101</sup> Id.

<sup>102</sup> See id; Aaron, 39 Case W Res L Rev at 521-22 (cited in note 98).

<sup>103</sup> Alleyne, 13 Hofstra Labor L J at 399 (cited in note 100).

<sup>104</sup> Frank Elkouri and Edna Asper Elkouri, *How Arbitration Works*, 365-88 (BNA 3d ed 1973).

<sup>105</sup> See id at 369.

conclusions. As had been the case for centuries, nothing in the 1925 Federal Arbitration Act required an arbitrator to make findings of fact or draw conclusions of law.<sup>106</sup> The Supreme Court confirmed that arbitrators need not write opinions in *Bernhardt v Polygraphic Co of America, Inc.*,<sup>107</sup> when it stated that “[a]rbitrators . . . need not give reasons for their results.”<sup>108</sup> Numerous courts have followed this principle in subsequent decisions. The Uniform Arbitration Act, modeled after the FAA, does not require written opinions either.<sup>109</sup>

## B. Approaches to the Arbitrator Opinion

Other industries, perhaps acknowledging the success of arbitration in resolving commercial and labor disputes, adopted arbitration as a primary dispute resolution mechanism but followed commercial arbitration’s practice of not writing reasoned opinions. The securities industry, for example, wholly embraced the process, adopting mandatory arbitration for all disputes arising in the industry, including customer disputes against brokers. Because the Securities and Exchange Commission (SEC) closely regulates the arbitration process and because it is the only process used to resolve disputes in the securities industry, procedures governing securities arbitration have evolved more quickly and in a more calculated way than labor and commercial arbitration procedures. At the outset, arbitration awards had to be in writing and include “a summary of the issues . . . a description of the award . . . [and] decisions made available to the public.”<sup>110</sup> This requirement did not, however, result in “reasoned” written opinions. Few securities arbitration awards contained anything other than a statement

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<sup>106</sup> See *Raytheon Co v Automated Business Systems, Inc.*, 882 F2d 6, 8 (1st Cir 1989).

<sup>107</sup> 350 US 198 (1956).

<sup>108</sup> *Id.* at 203. See, for example, *Rai v Ernst & Young, LLP*, 2010 WL 3518056 (ED Mich 2010) (arbitrators do not have an obligation to write an opinion); *United Steelworkers of America v Enterprise Wheel & Car Corp.*, 363 US 593, 598 (1960) (arbitrators have no obligation to explain their reasons or write an opinion); *Butler Manufacturing Co v USW*, 336 F3d 629, 636 (7th Cir 2003) (citing *Enterprise Wheel*, the court stated that arbitrators are normally not required to write an opinion).

<sup>109</sup> See Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L Rev 949, 1082–83 (2000) (indicating that the FAA and UAA are anomalies in the arbitration field because neither Act requires a reasoned written opinion).

<sup>110</sup> *Gilmer v Interstate/Johnson Lane Corp.*, 500 US 20, 31–32 (1991).

of the issues and an indication of whether or not relief was granted.<sup>111</sup>

A primary critique of securities arbitration has been that the arbitrators do not provide written opinions with facts or reasoning to support their awards.<sup>112</sup> In response to this critique, the Financial Industry Regulatory Authority (FINRA) initially proposed an amendment to its rules that would require arbitrators to provide written awards at the request of consumers' counsel.<sup>113</sup> Ultimately, however, FINRA adopted a

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<sup>111</sup> For examples of this trend, see generally, *Podber v Interstate Johnson Lane/Wachovia, Inc*, 2003 WL 271323 (NASD); *Bell v Morgan Stanley*, 2002 WL 535953 (NASD); *Walborn v Aetna Life Insurance and Annuity Co*, 2001 WL 1004226 (NASD). Professor Jennifer J. Johnson reviewed NASD opinions from 2003–2004 resolving customer-broker disputes. She found that in 2003, fewer than 5 percent of the 2,077 customer cases closed through arbitration offered even a brief explanation of the panel's decision. In 2004, her review of arbitration awards revealed that fewer than 5 percent of the 2,423 NASD customer cases closed through the arbitration process included an opinion that explained the award. See Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 NC L Rev 123, 144–45 (2005).

<sup>112</sup> Professor Peter B. Rutledge proposes a different solution to the problem. Rather than creating a written opinion requirement, Rutledge proposes stripping arbitrators of their immunity. Peter B. Rutledge, *Market Solutions to Market Problems: Re-Examining Arbitral Immunity as a Solution to Unfairness in Securities Arbitration*, 26 Pace L Rev 113, 121–24 (2005). Without immunity, Rutledge reasons that arbitrators will have a greater incentive to write awards. *Id.* at 125–26. Although this approach may encourage greater opinion writing, particularly for the risk-averse arbitrator, a more direct method for accomplishing this goal, which is less likely to increase litigation and its attendant costs, would be to require either a transcript of the arbitral hearing or a reasoned written opinion. See also Seth E. Lipner, *Explained Awards* (Arbitration Securities and Investment Fraud Lawyers 2013), online at <http://www.securitiesarbitrations.com/Finra-Securities-Arbitration-Awards/Explained-Awards> (visited Sept 15, 2013) (explaining that FINRA adopted the current rule requiring agreement of parties before mandating an explained award rather than the amendment that would have granted investors the unilateral ability to request an explained award because of the brokerage firms' vehement protests). Professors Barbara Black and Jill Gross performed a study to evaluate whether customers find securities arbitration fair. See Barbara Black and Jill Gross, *Perceptions of Fairness of Securities Arbitration: An Empirical Study* \*1 (University of Cincinnati College of Law Public Law and Legal Theory Research Paper Series No 08-01 Feb 2008), online at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1090969](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1090969) (visited Sept 15, 2013). This empirical study revealed that “overall, participants were not satisfied with the outcome of their most recent dispute and would be more satisfied if they had an explanation of the award.” *Id.* at \*3.

<sup>113</sup> The NASD's initial proposal would have permitted either customers or associated persons to request an explained decision. NASD, SR-NASD-2005-032 Proposed Rule Change and Amendment Nos. 1 and 2 Thereto, to Provide Written Explanations in Arbitration Awards Upon the Request of Customers, or of Associated Persons in Industry Controversies, 70 Fed Reg 41065 (2005) (amending NASD, Rule § 10330(j)(2)). An explained decision is a “fact-based award stating the reason(s) each alleged cause of action was granted or denied. Inclusion of legal authorities and damage calculations is not required.” 70 Fed Reg at 41065. The rule filing was later withdrawn and replaced with a rule requiring an explanation of the decision only “upon the joint request of the

rule less likely to result in reasoned opinions. Rather than permit the consumer to request a written opinion, FINRA changed the amendment to permit “explained decisions” only if both sides request it.<sup>114</sup> Since it is unlikely that the repeat player in the arbitration will request the reasoned opinion, the new rule, while an improvement, is unlikely to result in better-reasoned opinions.

Interestingly, while commercial arbitration and securities arbitration awards remain relatively reason-free, some of the arbitrator provider organizations responded to arbitration critiques by creating a reasoned opinion requirement, at least in the context of consumer arbitration. National Arbitration Forum (NAF), an arbitrator provider organization,<sup>115</sup> permits a consumer, on her own initiative, to request a written decision.<sup>116</sup> While the default rule results in a summary award, if the consumer files a written request “seeking reasons, findings of fact or conclusions of law” within ten days of the Notice of

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parties.” FINRA, SR-FINRA-2008-051 Proposed Rule Change to Amend Rules 12214, 12514 and 12904 of the Code of Arbitration Procedure for Customer Disputes and Rules 13214, 13514 and 13904 of the Code of Arbitration Procedure for Industry Disputes to Require Arbitrators to Provide an Explained Decision upon the Joint Request of the Parties, 73 Fed Reg 64995, 64996 (2008).

<sup>114</sup> 73 Fed Reg at 64995 (cited in note 113).

<sup>115</sup> NAF is not currently accepting consumer arbitrations and has not accepted consumer arbitrations since July 19, 2009. The rules discussed in this section were applied to consumer arbitrations filed in 2008 and 2009. In 2009, the Minnesota Attorney General sued NAF for consumer fraud. See *In re National Arbitration Forum Trade Litigation*, 704 F Supp 2d 832, 835 (D Minn 2010) (delivering the court’s perspective on and summarizing the NAF’s credit arbitration cessation). Although a hedge fund with financial interests in debt collection businesses owned NAF, NAF nevertheless continued to administer consumer debt collection arbitrations. See *id.* To settle Minnesota’s claim against NAF, NAF agreed to stop administering consumer and credit card arbitrations in Minnesota. See *id.*; Carrick Mollenkamp, Dionne Searcey, and Nathan Koppel, *Turmoil in Arbitration Empire Upends Credit-Card Disputes*, Wall Street Journal A1 (Oct 15, 2009) (describing the debt collection agency Accretive’s connection to the NAF fraud and the shift away from consumer debt collection arbitration).

<sup>116</sup> Either party may request the written opinion. Thus, unlike FINRA arbitration, which requires both parties to agree to the written opinion, in consumer arbitration, it is more likely that an arbitrator will issue an opinion. See National Arbitration Forum, *Code of Procedure* Rule 37.H (2008), online at <http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf> (visited Sept 15, 2013). AAA Commercial Arbitration Rules, like FINRA, only require an arbitrator to write an opinion if both parties request it. American Arbitration Association, *Commercial Arbitration Rules & Mediation Procedures* R-42 (2009), online at [http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004103&revision=latestreleased](http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103&revision=latestreleased) (visited Sept 15, 2013).

Selection of an Arbitrator, she will be entitled to a written opinion.<sup>117</sup>

AAA's Consumer Supplementary Rules do not go as far as NAF's but still require the arbitrator to "apply any identified pertinent contract terms, statutes, and legal precedents."<sup>118</sup> Moreover, the arbitrator is permitted to issue any remedy that the parties could have obtained in court.<sup>119</sup> JAMS's Consumer Arbitration Rules are somewhat less clear. While the rules seem to require some type of written award, the rule's language does not describe how in-depth an arbitrator must go in analyzing facts, customs, and laws. The rule states, "An [a]rbitrator's [a]ward will consist of a written statement stating the disposition of each claim. The award will also provide a concise written statement of the essential findings and conclusions on which the award is based."<sup>120</sup>

AAA's rules for employment disputes, which were drafted in response to the development of a Due Process Protocol for Resolution of Employment Disputes through Arbitration and Mediation, also require that the arbitrator provide written reasons supporting his or her award.<sup>121</sup> Rule 39 provides that "[t]he award shall be in writing . . . and shall provide the written reasons for the award unless the parties agree otherwise."<sup>122</sup>

Class arbitration is also a more recent phenomenon. In response to the Supreme Court's decision in *Bazze*, a decision in which a plurality of the Supreme Court appeared to confer authority on arbitrators to order class arbitration from an arbitration agreement silent on the issue,<sup>123</sup> both AAA and JAMS quickly developed rules to govern class arbitration. These

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<sup>117</sup> See National Arbitration Forum, *Code of Procedure* at Rule 37.H (cited in note 116). The fee for the written opinion is quite reasonable.

<sup>118</sup> American Arbitration Association, *Consumer-Related Disputes Supplementary Procedures C-7(c)* (2005), online at [http://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTAGE2009997&RevisionSelectionMethod=LatestReleased](http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTAGE2009997&RevisionSelectionMethod=LatestReleased) (visited Sept 15, 2013).

<sup>119</sup> *Id.*

<sup>120</sup> JAMS, *JAMS Policy on Consumer Arbitrations Pursuant to Pre-dispute Clauses Minimum Standards of Procedural Fairness* \*3 (July 2009), online at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Consumer\\_Min\\_Stds-2009.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Consumer_Min_Stds-2009.pdf) (visited Sept 15, 2013).

<sup>121</sup> American Arbitration Association, *Employment Arbitration Rules and Mediation Procedures* Rule 39.c, (June 2010), online at [http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004362&revision=latestreleased](http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004362&revision=latestreleased) (visited Sept 15, 2013).

<sup>122</sup> *Id.*

<sup>123</sup> See *Bazze*, 539 US at 444.

rules, modeled on Rule 23 of the Federal Rules of Civil Procedure, required, among other things,<sup>124</sup> that the arbitrators write reasoned opinions and that those opinions be accessible on the providers' websites. AAA's rule, for example, states that "[t]he final award on the merits in a class arbitration, whether or not favorable to the class, shall be reasoned . . ."<sup>125</sup> A review of AAA's class arbitration awards reveals that the class arbitrators comply with this rule.<sup>126</sup> While the future of class arbitration following *Stolt-Nielsen* and *Concepcion* is very much in doubt,<sup>127</sup> a trend toward reasoned opinions in arbitration

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<sup>124</sup> See FRCP 23. Other requirements from the AAA Supplementary Rules for Class Arbitration include: (1) At least one arbitrator shall be appointed from AAA's national roster of class arbitration arbitrators; (2) If the parties cannot agree on the number of arbitrators, one arbitrator shall hear the case unless the AAA exercises its discretionary power to provide three arbitrators; (3) The arbitrator must resolve, as a threshold matter, whether the case may proceed on behalf or against a class; (4) A list of conditions that allow a class action; (5) A reasoned determination of whether a class action is allowable; (6) An effort to provide reasonable notice to all affected parties of the class determination; (7) A final award on the merits of the class arbitration; (8) A list of procedures in the event of settlement; (9) A presumption of confidentiality; (10) A reasoned opinion on the award, available publically for a cost; (11) A list of provisions regarding administrative fees and penalties for nonpayment; (12) A list of stipulations providing that judicial proceedings do not constitute a waiver of arbitration. See American Arbitration Association, *Supplementary Rules for Class Arbitrations* Rules 1–12 (Oct 2003), online at [http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/mdaw/mdax/~edisp/adrstg\\_004129.pdf](http://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/mdaw/mdax/~edisp/adrstg_004129.pdf) (visited Sept 15, 2013).

<sup>125</sup> American Arbitration Association, *Supplementary Rules for Class Arbitrations*, Rule 7 (cited in note 124). JAMS final class arbitration award rule states that

[t]he final award on the merits in a class arbitration, whether or not favorable to the class, shall be reasoned and shall define the class with specificity, and shall set forth the reasons the class was or was not certified and the legal and factual findings underlying the award on the merits. The final award shall also specify or describe those to whom the notice provided in Rule 4 was directed; those whom the Arbitrator finds to be members of the class, and those who have elected to opt out of the class.

JAMS, *JAMS Class Action Procedures* Rule 5 (May 2009), online at [http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS\\_Class\\_Action\\_Procedures-2009.pdf](http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Class_Action_Procedures-2009.pdf) (visited Sept 15, 2013).

<sup>126</sup> See, for example, American Arbitration Association, *Searchable Class Arbitration Docket*, (2013), online at <http://www.adr.org/aaa/faces/services/disputeresolutionservices/casedocket> (visited Sept 15, 2013). Alan Scott Rau, *Arbitral Power and the Limits of Contract: The New Trilogy*, 22 Am Rev Intl Arb 435, 447 (2011). Strong, 17 Harv Neg L Rev at 208 & n 27 (cited in note 75) ("The AAA Supplementary Rules are particularly influential" because the AAA has administered over 300 class arbitrations, many of them high profile cases like *Stolt-Nielsen*).

<sup>127</sup> *Concepcion* raised the question "whether the FAA prohibit[ed] States from conditioning the enforceability of certain [consumer] arbitration agreements on the availability of classwide arbitration procedures." *Concepcion*, 131 S Ct at 1744. The Supreme Court held that California's rule applied the unconscionability analysis differently in arbitration agreements than when analyzing other contracts and was

seems evident from a review of the various class arbitration rules available.

Different institutions and different fields developed inconsistent approaches to opinion writing. While regulators and administrators deliberately selected approaches to opinion writing in the securities and class arbitration areas, the development of different approaches in other fields may be the result of happenstance rather than a calculated effort. Many of the reasons offered to justify the lack of reasoned opinions seem outdated and unreasonable, particularly as legal issues have become more prominent in all types of arbitration and as more one-shot players are compelled to arbitrate.<sup>128</sup> The question whether opinions are necessary, at least in arbitrations involving one-shot players, is a timely one. Over the past twenty years, some of the more prominent dispute resolution organizations—like AAA—have moved from *discouraging* arbitrators from writing opinions because that might “open avenues for attack . . . by the losing party”<sup>129</sup> to mandating some form of reasoned opinion.<sup>130</sup> This movement suggests that the

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therefore preempted. See *id.* at 1746–47. In reaching this conclusion, the Court detailed the myriad ways in which class-wide arbitration differed from traditional bilateral arbitration—the process was slower, more expensive, more procedurally formal, and more likely to create risks to defendants—to bolster its conclusion that its implementation would be an obstacle to achieving Congress’s goals in enacting the FAA. See *id.* at 1751–52. Following *Concepcion*, it is likely that courts will enforce class action waivers, at least in circumstances where an adequate alternative to litigation is present (as there was in *Concepcion*). In *Stolt-Nielsen*, the Court held arbitrators could not rely on public policy when interpreting a silent arbitration agreement to permit class arbitration. See *Stolt-Nielsen*, 130 S Ct at 1767–68. To order class arbitration, the Court stated, the arbitrators, when interpreting an agreement silent on the issue of class arbitration, must find legal rules to support their decision, rather than rely on public policy. *Id.* Because legal rules (such as the FAA or state statutes) do not mandate class arbitration, the *Stolt-Nielsen* decision effectively precludes arbitrators from interpreting a silent arbitration agreement to permit class arbitration. Thus, these two decisions, considered together, may well sound a death knell for class arbitration.

<sup>128</sup> At one time, commercial arbitration routinely involved repeat players who negotiated at arm’s length and selected arbitration over litigation as the means to resolve disputes. No longer are commercial disputes presided over by a panel of three arbitrators who may have volunteered for the job and who understand the applicable industry customs that should govern a dispute. Thus, providers should depart from the traditional commercial arbitration procedural approach.

<sup>129</sup> American Arbitration Association, *A Guide for Commercial Arbitrators* \*14 (2001), online at <https://apps.adr.org/center/neutralResources/A%20Guide%20for%20Commercial%20Arbitrators.pdf> (visited Sept 15, 2013). See also Stephen A. Hochman, *Judicial Review to Correct Arbitral Error—An Option to Consider*, 13 Ohio St J on Disp Resol 103, 104–05 (1997) (noting that the AAA has removed certain arbitrators who insist on explaining their arbitral awards).

<sup>130</sup> Note that the AAA Commercial Arbitration Rules no longer discourage arbitrator



tradition or custom of arbitrators not writing opinions may be on the wane, at least in disputes involving one-shot players like employees and consumers.

### III. BENEFITS AND DRAWBACKS OF A REASONED WRITTEN OPINION

Judicial decision-making scholarship suggests that opinion writing serves three purposes: (1) to assist judges in the decision-making process by forcing them to carefully consider the facts and law at issue in a particular decision; (2) to further the existing system of precedent so that future readers can understand what the rules of law are; and (3) to legitimize the decisions in the eyes of the parties and the public. As one professor puts it, "Roughly stated, opinions provide the parties and the public with assurance that a given decision is not arbitrary, but rather is the product of the reasoned application of appropriate legal standards."<sup>131</sup> The primary purposes for arbitrator opinion writing are similar, although not identical. While encouraging the arbitrator to carefully consider her decision and legitimizing the decision in the eyes of the parties and the public are both essential goals of an arbitrator opinion-writing requirement,<sup>132</sup> the value of promoting the development

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opinion writing but also do not encourage it. The prominent arbitration provider organizations maintain rules mandating fact-finding and reasoning in consumer disputes. For example, AAA's Consumer-Related Disputes Supplementary Procedures Rule C-7(c) states that

[i]n the award, the arbitrator should apply any identified pertinent contract terms, statutes, and legal precedents. The arbitrator may grant any remedy, relief or outcome that the parties could have received in court. The award shall be final and binding. The award is subject to review in accordance with applicable statutes governing arbitration awards.

American Arbitration Association, *Consumer-Related Disputes Supplementary Procedures* at C-7(c) (cited in note 118).

<sup>131</sup> Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 Georgetown L J 1283, 1317 (2008).

<sup>132</sup> "A well-reasoned opinion can contribute greatly to the acceptance of the award by the parties by persuading them that the arbitrator understands the case and that his award is basically sound." Elkouri and Elkouri, *How Arbitration Works* at 237 (cited in note 104). The Supreme Court offered support for this view: "Arbitrators have no obligation to the court to give their reasons for an award . . . a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement." *United Steelworkers of America v Enterprise Wheel & Car Corp.*, 363 US 593, 598 (1960). See also Hayford, 66 Geo Wash L Rev at 444-47 (cited in note 97) (maintaining that in the long run, commercial arbitration cannot continue without reasoned opinions that provide transparency and the ability to assess the competency of

of precedent to guide future behavior is considerably less certain. At the same time, promoting an arbitral opinion-writing requirement serves a different goal, that of assisting parties in arbitrator selection. Written arbitral opinions assist parties in the selection process because it provides them with better information about a particular arbitrator's decision-making process and potential biases.<sup>133</sup> The following sections will attempt to define what is meant by a "reasoned written opinion" as well as the potential benefits and drawbacks of arbitrator opinion writing.<sup>134</sup>

#### A. What is a Reasoned Written Opinion?

Before implementation of a reasoned written opinion requirement, consensus regarding what constitutes a reasoned written opinion should be developed. To be "reasoned," an arbitrator's opinion must, at minimum, contain four elements. First, the arbitrator should identify the issues in dispute. In doing so, the arbitrator should include relevant facts as well as the principles the arbitrator intends to apply to the facts.<sup>135</sup> The goal underlying this requirement is that the parties reviewing the opinion will know that the arbitrator understood the evidence presented at the hearing and was aware of the customs the industry uses to resolve this type of dispute. Second, the arbitrator should use the parties' post-hearing briefs, together with the evidence presented at the hearing, to identify the parties' contentions. This section of the opinion demonstrates that the arbitrator listened to the parties and understood their

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arbitrators); Llewellyn Joseph Gibbons, *Private Law, Public "Justice": Another Look at Privacy, Arbitration, and Global E-Commerce*, 15 Ohio St J Disp Resol 769, 772-73 (2000) (stating well-reasoned opinions help to combat the ability of institutional repeat players to "arbitrator-shop" at the expense of a one-time consumer grievant); Roger I. Abrams, Frances E. Abrams, and Dennis R. Nolan, *Arbitral Therapy*, 46 Rutgers L Rev 1751, 1779-80 (1994) (stating while losing parties may not agree with the decision, a reasoned opinion makes sure they understand the arbitrator considered their argument).

<sup>133</sup> Elkouri emphasized that opinions may also serve an educational function because the arbitrator's opinion helps guide their future actions. See Elkouri, *How Arbitration Works* at 365-66 (cited in note 104).

<sup>134</sup> While more could be done to segregate the different types of decisions arbitrators make into categories and mandate opinion writing only when absolutely necessary, this article focuses more generally on benefits and drawbacks of mandating opinion writing. See Oldfather, 96 Georgetown L J at 1317-20 (cited in note 131). Other issues, such as how often and when an arbitrator should write an opinion might be left for another day.

<sup>135</sup> See Roger I. Abrams, *The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitration*, 14 UC Davis L Rev 551, 586 (1991).

arguments.<sup>136</sup> Next, the arbitrator must include a decision. In this part of the opinion, the arbitrator clarifies the scope of the decision, interprets the evidence, resolves questions of fact, applies principles of law and custom, and explains why he or she accepted or rejected the parties' theories.<sup>137</sup> A final section should describe the award and its consequences for each party.<sup>138</sup>

## B. Objections to the Written Opinion

The primary objections to the adoption of a written opinion requirement are cost,<sup>139</sup> risk to finality, risk to privacy, and arbitrator incompetence.<sup>140</sup> The increased use of arbitration in the consumer and employment context reinforces some of these concerns because arbitrators, who are paid by the hour, will take some amount of time to write opinions. In addition, written opinions may invite more challenges, and, if they do, can increase costs in defending or prosecuting such challenges. How can a consumer, whose claim is often small, afford arbitration at all, much less arbitration where the arbitrator must write a reasoned written opinion? To the extent that the finality of arbitration has also played a significant role in limiting costs, efforts to increase the existence, breadth, and depth of opinion writing may be more likely to increase costs because, with greater transparency may come an increasing number of challenges to the correctness of the award. Finally, to the extent that arbitrator opinions are published, the confidentiality of the arbitration process will be undermined. In the consumer context,

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<sup>136</sup> See *id.*

<sup>137</sup> See *id.* at 586–87.

<sup>138</sup> See *id.* at 587.

<sup>139</sup> See Kaczmarek, 4 *Emp Rts & Emp Policy J* at 327 (cited in note 97) (noting that labor arbitrators sometimes take longer to write an opinion than to hear evidence in a dispute, jeopardizing the speed and low cost that make arbitration an attractive ADR mechanism).

<sup>140</sup> See Calvin William Sharpe, *Integrity Review of Statutory Arbitration Awards*, 54 *Hastings L J* 311, 357 (2003) (indicating that publishing reasoned written opinions will compromise the confidentiality of the proceedings); Lynn Katzler, Comment, *Should Mandatory Written Opinions be Required in All Securities Arbitrations? The Practical and Legal Implications to the Securities Industry*, 45 *Am U L Rev* 151, 157, 189 (1995) (similar). Some commentators also worry about arbitrators' ability to make reasoned decisions, arguing that arbitrators do not understand law particularly well. But see Weidemaier, 90 *NC L Rev* at 1097–1101 (cited in note 31) (rejecting this claim in light of empirical evidence); Levinson, 46 *U Mich J L Ref* at \*33–37 (cited in note 31).

however, this Article will explain why these purported drawbacks should not create an obstacle to implementation of a written reasoned opinion requirement.

1. Increased costs?

With respect to cost, post-*Concepcion*, it may well be that to ensure enforceability of an arbitration agreement against a consumer, the business will have to pay all or most of the consumer's costs and fees. In *Concepcion*, the Court implied that its willingness to enforce AT&T's class action arbitration and court waiver turned, in part, on the generosity of AT&T's arbitration clause.<sup>141</sup> That clause applied AAA procedural rules, stated that AT&T would pay all costs for nonfrivolous claims, gave the consumer the option to bring his claim in small claims court in lieu of arbitration, permitted the arbitrator to award the full remedies that would have been available to the consumer in court, and offered the consumer a \$7,500 minimum recovery if the arbitral award exceeded AT&T's last settlement offer.<sup>142</sup>

Even before the Court decided *Concepcion*, though, most lower courts had held that arbitration clauses could only bind consumers if the costs of pursuing arbitration were no more than the costs of going to court.<sup>143</sup> In response to these rulings, the major arbitrator providers, AAA, JAMS, and NAF, created consumer arbitration guidelines that limit consumers to paying the equivalent of a court filing fee in order to file for arbitration and refuse to provide arbitration services if arbitration costs exceeded court costs.<sup>144</sup> If opinions were mandated, arbitration

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<sup>141</sup> See *Concepcion*, 131 S Ct at 1753.

<sup>142</sup> See id at 1744.

<sup>143</sup> See *Circuit City Stores Inc v Adams*, 279 F3d 889, 894 (9th Cir 2002) (holding requirement that an employee pay half the arbitrator's fee rendered the arbitration agreement unenforceable); *Ball v SFX Broadcasting Inc*, 165 F Supp 2d 230, 240 (NDNY 2001) (holding that the likelihood of significant arbitration costs, which would not be incurred in a judicial forum, rendered the arbitration agreement unenforceable); *Shankle v B-G Maintenance Management of Colorado Inc*, 163 F3d 1230, 1234–35 (10th Cir 1999) (noting that employee should not have to pay one-half of arbitrator's \$250 per hour fee); *Paladino v Avnet Computer Technologies Inc*, 134 F3d 1054, 1062 (11th Cir 1998) (noting that employee should not have to pay \$2,000 filing fee and one-half the arbitrator's fee); *Cole v Burns International Security Services*, 105 F3d 1465, 1484 (DC Cir 1997) (noting that excessive costs of arbitration would prohibit employee's access to justice).

<sup>144</sup> AAA's Consumer Due Process Protocol, Principle 6, states that consumers should pay only "reasonable costs." The full principle states:

costs would then include the time for the arbitrator to write the opinion. Thus, the business, not the consumer, would bear the cost of the written opinion. One suspects that a consumer who loses the arbitration, but receives a reasoned written opinion, would be on her own if she wished to challenge the results of the opinion.

Even if courts did not limit the consumer's obligation to what he or she might pay in court, the costs of a written opinion are not as high as one might initially expect. Useful empirical evidence exists regarding the costs of adding the reasoned written opinion procedure. In 2005, NASD, now FINRA, proposed an amendment to its rules that would require arbitrators to provide written awards at the request of consumers' counsel.<sup>145</sup> According to the NASD, the additional cost of the written explanation was \$200.<sup>146</sup> NASD offered in its amendment to pay for half of the costs.<sup>147</sup> Eventually, NASD chose not to adopt this amendment because those who commented on the proposal objected to the consumer having the sole power to request an explained decision.<sup>148</sup> Moreover,

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Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay. In some cases, this may require the Provider to subsidize the process.

American Arbitration Association, *Consumer Due Process Protocol*, Principle 6 (AAA 2007), online at [http://www.adr.org/cs/idcplg?IdcService=GET\\_FILE&dDocName=ADRSTG\\_005014&RevisionSelectionMethod=LatestReleased](http://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_005014&RevisionSelectionMethod=LatestReleased) (visited Sept 15, 2013). Although declining to set absolute guidelines, AAA, in its commentary to principle 6, states:

In some cases, the need to ensure reasonable costs for the Consumer will require the Provider of goods or services to subsidize the costs of ADR which is mandated by the agreement. Indeed, many companies today deem it appropriate to pay most or all of the costs of ADR procedures for claims and disputes involving individual employees. . . . The Committee considered, and ultimately rejected, the alternative of establishing specific requirements for Provider subsidization of the cost of arbitration procedures, other than to conclude that the Provider of goods and services should ensure the consumer a basic minimum arbitration procedure appropriate to the circumstances.

Id at Comments to Principle 6 (citations omitted).

<sup>145</sup> See generally 70 Fed Reg 41065 (cited in note 113).

<sup>146</sup> See id at 41066.

<sup>147</sup> Id.

<sup>148</sup> See, for example, Margo A. Hasson, *Letter to SEC Secretary Florence Harmon regarding Proposed Rule Change, \*2* (FINRA Dec 15, 2008), online at <http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p117545.pdf>

commenters expressed concern that the proposal would result in an increased number of motions to vacate awards based on the arbitrators' explanations. NASD subsequently withdrew the rule filing, implementing instead a process called an "explained decision." The explained decision, which would cost the parties \$400 (although arbitrators could allocate the cost as they see fit), is only a possibility if *both* parties request it.<sup>149</sup> The quantification of opinion costs provides consumers with a strong argument that the additional costs of the written opinion are relatively small compared to the accrued benefits of the new practice—greater accountability of arbitrators, claimants' increased belief in the fairness of the arbitral process, ability of claimants to change their future behavior to avoid additional legal difficulty, and ability of either party to present an effective appeal.

NAF, an arbitrator provider organization,<sup>150</sup> adopted a rule that limits the consumers' responsibility for the cost of a written opinion, which the consumer can request at his own initiative, to

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(visited Sept 15, 2013). FINRA, *News Release: New Arbitration Rule Requires Award Explanations Upon Investor Request* (Jan 27, 2005), online at <http://www.finra.org/Newsroom/NewsReleases/2005/P013145> (visited Sept 15, 2013).

<sup>149</sup> FINRA Rule 12904(g), applying to decisions after April 16, 2007, states:

(g) Explained Decisions

(1) This paragraph (g) applies only when all parties jointly request an explained decision.

(2) An explained decision is a fact-based award stating the general reason(s) for the arbitrators' decision. Inclusion of legal authorities and damage calculations is not required.

(3) Parties must make any request for an explained decision no later than the time for the prehearing exchange of documents and witness lists under Rule 12514(d).

(4) The chairperson of the panel will be responsible for writing the explained decision.

(5) The chairperson will receive an additional honorarium of \$400 for writing the explained decision, as required by this paragraph (g). The panel will allocate the cost of the chairperson's honorarium to the parties as part of the final award.

(6) This paragraph (g) will not apply to simplified cases decided without a hearing under Rule 12800 or to default cases conducted under Rule 12801.

<sup>150</sup> NAF is not currently accepting consumer arbitrations and has not accepted consumer arbitrations since July 19, 2009 (see text accompanying note 115). The rules discussed in this section were applied to consumer arbitrations filed in 2008 and 2009.

\$100.<sup>151</sup> This \$100 fee is only allocated to the consumer if the consumer requests a written decision and the arbitration agreement that binds the consumer does not address the issue of a written opinion. Limiting the consumer's payment to \$100 is quite generous—although the fees for a written opinion do not appear excessive, under the NAF rules, a consumer will know in advance of his or her request what the extent of his financial liability will be.

Some Better Business Bureau offices pay their arbitrators only a \$100 honorarium for conducting a hearing and writing a reasoned opinion.<sup>152</sup> Despite the low honorarium, arbitrators are

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<sup>151</sup> See National Arbitration Forum, *Fee Schedule to Code of Procedure* \*6 (Aug 2008), online at <http://www.adrforum.com/users/nafr/resources/2008FeeSchedule-FinalPrint1.pdf> (visited Sept 15, 2013). NAF rules provide standard fees for Common Claim cases:

The fees for written findings of fact, conclusions of law or reasons for the Award in a Common Claim case are:

\$3,500 or less	\$200
\$3,501 – 13,000	\$300
\$13,001 – 35,000	\$400
\$35,001 – 55,000	\$500
\$55,001 – 74,999	\$750

The above fees are paid as follows:

A Party obligated to pay fees for a Consumer pays the entire fee where an Arbitration Agreement with a Consumer Party requires written findings of fact, conclusions of law or reasons for an Award.

A Consumer Party pays \$100 (one hundred dollars) and the Party obligated to pay fees for a Consumer pays the remaining portion where an Arbitration Agreement does not provide for written findings, conclusions or reasons and a Consumer Party requests such an Award.

Id.

<sup>152</sup> Consider Better Business Bureau, *Arbitrator Selection List* (Feb 24, 2013) (on file with author). BBB offices make individual decisions about whether to pay honoraria to their arbitrators. In Columbus, Ohio, the BBB pays arbitrators a \$100 honorarium for the hearing and opinion writing. Most opinions offer the parties findings of facts and conclusions of law that are similar to labor arbitration decisions. The low honorarium does not appear to discourage qualified arbitrators from serving. Of the thirty-one arbitrators on the roster (including me), sixteen have JD degrees, one has a master's degree, and the remainder include dispute resolution professionals as well as local business owners (including owners of construction companies, an auto and truck parts remanufacturing company owner, and licensed contractors). When a party has a dispute, the BBB gives the party the arbitrator selection lists, with names and very brief biographies, and asks them to cross out the name of any person with whom the party might have a financial, competitive, professional, family, or social relationship and to rank the remaining in order of preference. See *id.* at \*1.

expected to and do write reasoned awards for the consumers who bring claims against businesses. Thus, the costs of obtaining a reasoned written opinion are relatively low and likely to be borne by the business. In light of the potential benefits of an opinion, the risk of increased costs seems a minor concern.

## 2. Risk to finality?

Another purported benefit of arbitration is that the arbitrator's decision is final and binding, subject only to very limited judicial review. Theoretically, limited judicial review serves to deter appeals of arbitration awards. Even in the few cases where the award is challenged, courts typically defer to the arbitrator's award.<sup>153</sup> Opponents of arbitrator opinion writing claim that if arbitrators write opinions, parties will be more likely to challenge the arbitral outcome whether it is well or poorly reasoned. A written opinion that offers reasons to support the award, the argument goes, provides parties the evidence that might permit them to challenge that award on appeal.

If, as expected, the courts continue to limit the bases upon which review may be obtained, it seems relatively unlikely that parties will be able to mount successful arbitration award challenges.<sup>154</sup> Although limited review always deterred arbitration award challenges, the Court's decision in *Hall Street*, limited the bases for challenging arbitration awards to those

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<sup>153</sup> See *Hall Street*, 552 US at 586 (holding that vacatur of an arbitral award is limited to "egregious departures" by the arbitrator from the arbitration agreement and does not encompass mistakes of law); Michael H. LeRoy and Peter Feuille, *Happily Never After: When Final and Binding Arbitration Has No Fairy Tale Ending*, 13 Harv Neg L Rev 167, 209–10 (2008) (finding that, in the employment context, arbitration awards were vacated 6.6 percent of the time at the district court level and 12 percent of the time at the appellate level).

<sup>154</sup> Professor Calvin Sharpe reviewed the rate of appeals from labor arbitration decisions, which provide reasons for the decisions. See Sharpe, 54 Hastings L J at 356 n 236 (cited in note 140), citing Michael H. LeRoy and Peter Feuille, *Private Justice in the Shadow of Public Courts: The Autonomy of Workplace Arbitration Systems*, 17 Ohio St J on Disp Resol 19, 49–50 (2001). According to Sharpe, from 1960–1991, federal district and appellate courts confirmed approximately three-fourths of the awards. See *id.* Similar, although slightly lower numbers of confirmations in the same courts, occurred between 1991 and 2001 (70 percent for district courts; 66 percent for appellate courts). *Id.*



contained in FAA § 10.<sup>155</sup> Following *Hall Street*, parties may no longer be able to challenge an arbitration award on the extra-statutory ground that the arbitrator manifestly disregarded the law. As a result, a party is less likely to be successful in overturning an arbitration award.<sup>156</sup>

If the arbitration decision reveals poor reasoning, challenging the result, to the extent that is possible, would seem to benefit both the party who suffered the adverse result as well as the public, who would then be more confident that the outcome was correct and that the arbitration process provided justice. If the arbitrator's underlying reasoning is unsupportable, the integrity of the arbitration process would only be enhanced if the decision were overturned, even if additional costs were incurred. In addition, it is unclear whether the advent of written opinions will actually increase challenges. It may be that a well-reasoned opinion would discourage a subsequent challenge because the losing party would now understand the decision-making process and would have a principled basis by which it might accept the award.<sup>157</sup>

The relatively low rate of appeals in labor arbitration offers some support for the argument that reasoned written opinions reduce appeals.<sup>158</sup> While little is known about the reasons why parties rarely appeal labor arbitration awards, scholars offer

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<sup>155</sup> See *Hall Street*, 552 US at 584. See also 9 USC § 10 (enumerating reasons for vacatur and rehearing).

<sup>156</sup> See Michael H. LeRoy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard* \*ii (Selected Works Aug 2010), online at [http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=michael\\_leroy](http://works.bepress.com/cgi/viewcontent.cgi?article=1007&context=michael_leroy) (visited Sept 15, 2013) (finding that state courts are more likely to confirm arbitration awards since the Court decided *Hall Street*). Some of Professor LeRoy's findings are that

state appellate courts confirmed more employment awards after *Hall Street* was decided on March 3, 2008—88.9 percent (16/18), compared to 70.9 percent (73/103 awards) from 1975 until *Hall Street*. Federal district courts confirmed 93.7 percent of awards (164/175) before *Hall Street*, and 90.9 percent (30/33) after. Federal appeals courts confirmed awards at a high rate before and after *Hall Street* (87.8 percent and 85.7 percent).

Id.

<sup>157</sup> Kaczmarek, 4 Emp Rts & Emp Policy J at 297–98 (cited in note 97).

<sup>158</sup> Of course, in the labor context, other factors, including the relatively equal bargaining power of the parties, fewer bases for challenging awards, and parties' desire to maintain their ongoing relationship impact the award appeal rate. See Michael H. LeRoy and Peter Feuille, 13 Harv Neg L Rev at 209–10 (cited in note 153) (stating the belief that unions and employers restrict their appeal of arbitration awards to maintain good relationships).

three potential justifications for the lack of appeals: (1) likelihood of appeal success is low;<sup>159</sup> (2) parties want to preserve their relationship;<sup>160</sup> and (3) availability of arbitrator's reasoning helps parties to accept the result.<sup>161</sup> While consumers are likely less interested in preserving their relationship with a business than a union would be with respect to an employer, the other two reasons suggest that, should reasoned written opinions be required, the likelihood of increased appeals is relatively low.

### 3. Risk to confidentiality?

Arbitration's proponents frequently identify the privacy of the proceedings as one of the theoretical advantages of arbitration over court adjudication.<sup>162</sup> If the parties wish their proceedings to be shielded from public scrutiny, arbitration—a private forum—is preferable to the courts, which rarely deny public access. Yet this theoretical advantage is not always fully realized. Unlike mediation, the confidentiality of which receives protection as an evidentiary privilege, arbitration proceedings are understood to be private. However no statute prevents courts from compelling disclosure or admitting evidence from the arbitration. Despite this lack of statutory protection, it is rare for parties to sign a confidentiality agreement before arbitration to ensure that the proceedings are kept confidential. The understood notion of privacy might seem beneficial for

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<sup>159</sup> LeRoy and Feuille found that federal courts are also quite deferential to employment discrimination arbitration awards. *Id.* at 185. Federal circuit courts affirmed arbitration awards in these cases 88 percent of the time while federal district courts affirmed arbitration awards a whopping 93.4 percent of the time. *Id.* The study reviewed post-award disputes between an individual employee and employer, who were not covered by a collective bargaining agreement. *Id.* at 182. The authors reviewed 240 individual employment arbitration awards appealed either to federal circuit or district courts between 1970 and 2006. See *id.* at 186.

<sup>160</sup> See Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 *Hastings L J* 1199, 1235–36 (2000).

<sup>161</sup> See *United Steelworkers*, 363 US at 598 (“[A] well-reasoned opinion tends to engender confidence in the integrity of the process.”).

<sup>162</sup> Courts often point to privacy and confidentiality as unique features of arbitration. See *Stolt-Nielsen*, 130 S Ct at 1776. Professor Amy Schmitz identifies the privacy, but not confidentiality, of arbitration as creating some potential advantages and disadvantages for parties to arbitration. See Amy J. Schmitz, *Assuming Silence in Arbitration*, *New Jersey Lawyer* 13, 13–15 (Apr 2011) (noting that while arbitration is private, it is not necessarily confidential). For further discussion of the benefits and drawbacks of privacy in arbitration, see generally Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 *U Kan L Rev* 1211 (2006); Richard C. Reuben, *Confidentiality in Arbitration: Beyond the Myth*, 54 *U Kan L Rev* 1255 (2006).

parties who wish to avoid the airing of their dirty laundry in public. Yet the notion of privacy in arbitration may mislead parties, particularly one-shot players, into believing that what they say in arbitration will be kept quiet when, in the absence of a confidentiality agreement, parties' testimony may be revealed either in court or in the media.

For the one-shot player, the benefits of confidentiality or privacy may not be especially important. In fact, it may be the case that the lack of privacy protection in arbitration is actually a benefit for the one-shot player. If the one-shot player believes that the arbitration process or the result is unfair (for whatever reason), the absence of a confidentiality agreement may facilitate the individual's interest in sharing information with the press, other litigants, or whomever else might be interested.

#### 4. Arbitrators incapable of writing reasoned opinions?

One of the major objections to the use of arbitration to resolve noncontractual claims, particularly claims requiring the interpretation of a statute or other external law, has been that the existing pool of arbitrators is not competent to resolve such claims.<sup>163</sup> If arbitrators are not capable of analyzing and deciding statutory claims, the argument goes, it would seem improper to expand the arbitrator's role to include external law interpretation. And if arbitrators cannot properly interpret the law, they are also unlikely to write well-reasoned opinions.

Despite considerable historical support for this position,<sup>164</sup> the Court has, rather rapidly, changed its view about

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<sup>163</sup> See *Barrentine v Arkansas-Best Freight System Inc.*, 450 US 728, 743-45 (1981) (extending the rule that unions cannot waive statutory rights under Title VII to the Fair Labor Standards Act (FLSA) and stating that in labor arbitration, arbitrator's role is to interpret and apply the law of the shop). See also David E. Feller, *Compulsory Arbitration of Statutory Discrimination Claims under a Collective Bargaining Agreement: The Odd Case of Caesar Wright*, 16 Hofstra Labor & Emp L J 53, 73 (1998) (discussing individual public law claims and noting that arbitrability presumption should not exist when a collective bargaining agreement exists); Martin H. Malin, *Arbitrating Statutory Employment Claims in the Aftermath of Gilmer*, 40 SLU L J 77, 83-88 (1996) (discussing statutory employment claims and the difference between grievance and general arbitration).

<sup>164</sup> See, for example, Brunet, 62 Brooklyn L Rev at 1484 (cited in note 47) (opining that securities arbitration is lawless); Barbara Black and Jill I. Gross, *Making It Up as They Go Along: The Role of Law in Securities Arbitration*, 23 Cardozo L Rev 991, 1040 (2002) (observing that arbitrators impose liability on brokers even when the law clearly does not support the result); Kenneth S. Abraham and JW Montgomery, III, *The Lawlessness of Arbitration*, 9 Conn Ins L J 355, 357 (2003) (arguing that insurance

arbitrators' capabilities.<sup>165</sup> In *Gilmer v Interstate/Johnson Lane Corp*,<sup>166</sup> and again in *14 Penn Plaza LLC v Pyett*,<sup>167</sup> the Court approved arbitrators deciding statutory claims (*Gilmer*)<sup>168</sup> and applying external law (*Pyett*).<sup>169</sup> Yet the Court's embrace of arbitrator competence is not reflected in most of the academic commentary. Some academic commentators emphasize that arbitrators, particularly those who decide labor disputes, are experts in the "law of the shop" rather than the "law of the land."<sup>170</sup> For whatever reason and without citing any empirical evidence, academic commentators seem unwilling to adapt their views about arbitrators' roles and expertise to those of the courts even though the Court has made it abundantly clear that it has faith in arbitrators' ability to interpret the law.<sup>171</sup>

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arbitration is contractual "lawlessness"); Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J Am Arb 1, 11 (2003) (noting that arbitrators cannot make new law or establish precedent); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 Minn L Rev 703, 725 (1999) (concluding that arbitrators do not follow the law).

<sup>165</sup> See generally *Wilko v Swan*, 364 US 427 (1953) (arguing that arbitrators were neither legal experts nor capable of adjudicating legal claims).

<sup>166</sup> 500 US 20 (1991). In *Gilmer*, the Court explicitly rejected the "judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals." Id at 34 n 5, quoting *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614, 626–27 (1985).

<sup>167</sup> 556 US 247 (2009).

<sup>168</sup> See *Gilmer*, 500 US at 34 n 5.

<sup>169</sup> See *Pyett*, 556 US at 247. The Supreme Court's view about arbitrator authority has evolved rather quickly—from *Gardner-Denver* to *Wright* to *Pyett*, the Court has moved from thinking that an arbitrator who applies external law is exceeding his authority to a view that a labor arbitrator asked to arbitrate a public law must do so. See *Alexander v Gardner-Denver Co*, 415 US 36, 53–54 (1974); *Wright v Universal Maritime Service Corp*, 525 US 70, 79 (1998); *Pyett*, 556 US at 255. Some academic commentators, notably Marion Crain, are advocating for an expanded role for the union in statutory rights cases. Professor Crain emphasizes, though, the importance of enhancing the statutory controls on unions if additional power were conferred on them. See Marion Crain and Ken Matheny, *Labor's Identity Crisis*, 89 Cal L Rev 1767, 1839–41 (2001) (discussing discrimination in the workplace).

<sup>170</sup> Martin H. Malin and Jeanne M. Vonhof, *The Evolving Role of the Labor Arbitrator*, 21 Ohio St J Disp Resol 199, 205 (2005). The EEOC takes this position, too. See Brief for the Equal Employment Opportunity Commission as Amicus Curiae Supporting Plaintiff-Appellee, *Rogers v New York University*, No 99-9172, \*11–12 (filed Feb 22, 2000) (available on Westlaw at 2000 WL 34002290). The National Employment Lawyers Association's Amicus Brief takes the same position. See Brief for the National Employment Lawyers Association as Amicus Curiae Supporting Plaintiff-Appellee, *Rogers v New York University*, No 99-9172 (filed Feb 15, 2000) (available on Westlaw at 2000 WL 34002295).

<sup>171</sup> Some unions are warming to the idea that an arbitrator may resolve statutory discrimination claims if the parties have empowered him to do so. See Amicus Brief of

More recently, however, three legal scholars conducted empirical analyses of arbitrator's decision making and use of precedent. In his article analyzing arbitrator use of precedent,<sup>172</sup> Professor Weidemaier found inaccurate the common wisdom that arbitrators neither follow nor make precedent. Examining arbitrators' citation practices in securities, labor, employment, and class action arbitration, Weidemaier found that arbitrators, particularly in employment and class action arbitration cases, "routinely" wrote lengthy, reasoned awards, spending considerable time analyzing the extant legal issues and extensively using precedent.<sup>173</sup> While some of the cited precedent came from other arbitrators' opinions, the majority of cited precedent came from published judicial opinions. Professor Weidemaier concluded that the available evidence supported the theory that arbitrators and judges engage in similar types of decision making and opinion writing.

Professor Drahozal reviewed the existing empirical studies in 2006 and found that arbitrators, when surveyed, reveal the same philosophy about following the law when rendering a decision as judges.<sup>174</sup> Drahozal reported that judicial reversal rates of arbitration awards, even when reviewed de novo, are remarkably similar to appellate court reversal rates for lower court decisions.<sup>175</sup> Thus, it would seem inappropriate to conclude

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AFL-CIO, *14 Penn Plaza LLC v Pyett*, No 07-581, \*9 (filed July 18, 2008) (available on Westlaw at 2008 WL 2817677). The AFL-CIO argued:

[W]here an individual employee-grievant has requested that the union arbitrate his statutory discrimination claim through the collectively bargained grievance procedure, we can see no reason why the arbitrator's decision of that statutory claim should not be given the same binding effect on the individual employee who requested arbitration as an arbitration award issued pursuant to the sort of individual arbitration agreement sanctioned by *Gilmer*.

Id.

<sup>172</sup> Professor Weidemaier reviewed over 800 arbitration opinions, evenly divided among securities, labor, class action, and employment cases. Weidemaier, 90 NC L Rev at 1105 (cited in note 31).

<sup>173</sup> Id at 1095, 1139 (noting that outside of securities disputes, arbitrators "wrote reasonably lengthy decisions that were substantially devoted to legal analysis and made ample use of precedent"). In addition, Weidemaier found that, outside of labor arbitration, the "overwhelming majority" of awards cite judicial precedent. Id at 1140. He found the similarity between arbitrators' opinions and judicial opinions "striking." Id.

<sup>174</sup> See Christopher R. Drahozal, *Is Arbitration Lawless?*, 40 Loyola LA L Rev 187, 214 (2006).

<sup>175</sup> See id.

that arbitrators understand the law any less than other potential decision makers.<sup>176</sup>

Professor Levinson's work also rejects the common wisdom that arbitrators, particularly in the unionized sector, are incapable of analyzing external or statutory law and explaining their application of law to facts in a well-reasoned opinion. In her study of 160 labor arbitration awards involving employment discrimination claims, Professor Levinson found that "[t]he majority of cases reach outcomes that appear defensible under the governing law, even if the reader does not agree with the outcome."<sup>177</sup> Professor Levinson concluded that a mandatory system in which labor arbitrators decide employment discrimination disputes, like the one at issue in *Pyett*, is just.<sup>178</sup> Despite this conclusion, Professor Levinson nevertheless recommends increased procedural protections in arbitration, including access to greater discovery and recourse for arbitrators' clearly erroneous statements of law.<sup>179</sup>

Arbitrator quality is also quite high. My recent analysis of the Better Business Bureau (BBB) roster in Columbus, Ohio, is revealing. These thirty-some arbitrators, who hear disputes and write reasoned opinions for a \$100 honorarium, share credentials that are quite impressive. As it turns out, many lawyers, law professors, and other professionals enjoy arbitrating, even if the pay is low, so long as they are not asked to arbitrate too frequently.<sup>180</sup> FINRA operates on a similar

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<sup>176</sup> Drahozal also reported on a study, conducted by Patricia Greenfield, which reviewed 106 cases decided between 1983 and 1985 where at least one party had filed an unfair labor practice charge with the NLRB. *Id.* at 195–96, citing Patricia A. Greenfield, *How Do Arbitrators Treat External Law?*, 45 *Indus & Labor Rel Rev* 683, 687 (1992). Greenfield found in her study that although half of the arbitrators cited external law in their opinions, most of the arbitrators' analysis of external law was cursory or conclusory. See *id.* Greenfield's study would seem to be of limited value given its age and focus on unfair labor practice charges. Further empirical studies, particularly of labor arbitration awards, would be helpful in assessing whether or not arbitrators follow the law, particularly when statutory discrimination claims are at issue.

<sup>177</sup> Levinson, 46 *U Mich J L Reform* at 33 (cited in note 31). Of the 111 cases involving statutes, seventy-one (64 percent) cited legal authority other than a statute, thirteen cited EEOC regulations or guidelines, and twenty-six cited other arbitration decisions. *Id.* at 32–33. Forty decisions cited the relevant statute but no legal authority. *Id.* at 33.

<sup>178</sup> See *id.* at 49.

<sup>179</sup> See *id.* at 52.

<sup>180</sup> Consider Better Business Bureau, *Arbitrator Selection List* (cited in note 152).

model, although they offer higher pay to arbitrators.<sup>181</sup> Many arbitrators do not rely on their arbitrator stipends for their full salary. As a result, the lower pay FINRA and BBB offer does not appear to detract from arbitrator quality. As more and more law schools provide training for future mediators and arbitrators, it is likely that the quality of arbitrators will continue to improve without a requirement that arbitrators become highly paid.

Longstanding views that arbitrators are incapable of interpreting and applying external and statutory law to resolve disputes in arbitration are outmoded. Arbitrators are frequently legally trained and are almost always very experienced in law and/or dispute resolution. The Court is right to have faith in arbitrators' ability to analyze difficult legal issues, apply precedent to help resolve a dispute and write an opinion that reflects these efforts. Arbitrators are capable decision makers who can competently resolve issues, whether straightforward or complex.<sup>182</sup>

### C. Benefits of Reasoned Written Opinions—All this for \$100?

Numerous benefits attach when arbitrators write opinions, particularly when the dispute involves a business and a consumer.<sup>183</sup> From the consumer's perspective, a written opinion provides valuable information about how an arbitrator reached her decision. This information may aid the consumer in future

<sup>181</sup> FINRA's pay scale provides only modest compensation to arbitrators. Pursuant to FINRA Code of Arbitration Procedure Rule 12902 for Customer Disputes and Rule 13902 for Industry Disputes, a hearing session, which is any meeting between the parties and the arbitrator(s) of four hours or less, costs the parties, for a claim greater than \$500,000, \$1,200 for a session with three arbitrators (\$400 per arbitrator per session—if the parties opt for one arbitrator, they must pay \$450 per hour for any claim over \$10,000.01). See FINRA Rule 12902. The arbitrator(s) have discretion to determine the amount of each hearing session fee that each party must pay.

<sup>182</sup> Continued use of arbitration may result in a transfer of some types of disputes from litigation to arbitration. This transfer could create problems since courts provide a deferential review process to arbitration awards, shielding arbitrator mistakes from reversal. Elsewhere I have advocated for increasing judicial review of arbitration awards involving statutory or external law. If businesses continue to use arbitration to resolve consumer disputes, it may be that Congress should consider altering the existing standards of review in § 10 of the FAA.

<sup>183</sup> This is not to say that written opinions benefit parties, decision makers, or the public in every case. Consider Oldfather, 96 Georgetown L J 1283 (cited in note 131). Yet, on balance, the research supports the belief that writing increases deliberation, which, in most cases, provides better decision making. See *id.* at 1317–39; Chris Guthrie, Jeffrey J. Rachlinski, and Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 Cornell L Rev 1, 36–37 (2007).

arbitrator selection.<sup>184</sup> In addition, the reasoned written opinion legitimizes the process by providing greater decision-making transparency to the consumer.<sup>185</sup> From the business's perspective, the opinion aids in arbitrator selection and legitimization of the use of the process and provides the business with greater information about trends in decision making that might be beneficial when planning for the future. A written opinion benefits the arbitrator (as well as the parties) because writing the opinion increases deliberation and, thus, improves the quality of the decision.<sup>186</sup> Writing the decision helps the arbitrator think through issues, avoid arbitrary decisions and offer more fulsome explanations than an oral or limited written decision would.

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<sup>184</sup> Professors Barbara Black and Jill Gross cited this reason, among others, as an appropriate justification for the introduction of explained decisions in securities arbitration. See Barbara Black and Jill I. Gross, *Letter to SEC Secretary Florence Harmon* \*3 (Nov 20, 2008), online at <http://www.sec.gov/comments/sr-finra-2008-051/finra2008051-1.pdf> (visited Sept 15, 2013). The professors stated "because explained awards will provide parties with some insight into how arbitrators resolve controversies, they may provide valuable information for parties to use when ranking and striking arbitrators during arbitrator selection in future cases." *Id.*

<sup>185</sup> Professors Black and Gross also identified the need for transparency in decision making as a justification for the institution of an explained decision requirement. Interestingly, the arbitration parties themselves, the customers, also stated that they would be more satisfied with securities arbitration outcomes if they had an explanation of the award. See Black and Gross, *Perceptions of Fairness of Securities Arbitration* at \*39 (cited in note 112) (55.48 percent of customers stated that they would be more satisfied with the outcome of their arbitration had they received an explanation of the award).

<sup>186</sup> Most scholars focus on judges, rather than arbitrators, when discussing the benefits of deliberation. The principles underlying decision making, though, would be unlikely to change whether the decision maker were an arbitrator or a judge. One author explained that in the process of writing an opinion, a judge must "clarify his thoughts as he reduces them to paper." It is the "process of reducing one's ideas to writing" that enables a decision maker to assess whether or not his reasoning is sound. Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 *Widener L J* 597, 599 (2003). A judge advising law clerks stated that:

Judges write opinions for many reasons: to help think through the issues; to explain to the parties, their counsel, and the appellate courts how and why the case was decided; to advance the law's development; to provide consistency by setting precedent; . . . and to convince a possibly unfavorable audience that the judge wrote a correct decision.

Gerald Lebovits and Lucero Ramirez Hidalgo, *Advice to Law Clerks: How to Draft Your First Judicial Opinion*, 36 *Westchester Bar J* 29, 29 (2009).



1. Arbitrator selection process enhanced.

Reasoned decisions provide insight into the arbitrator's deliberative process. By reviewing the reasoned decision, a party is likely to develop a deeper understanding of the arbitrator's thinking process. This greater understanding will aid the party when selecting arbitrators in the future.<sup>187</sup> Moreover, arbitrators who decide a particular case one way on one occasion are likely to decide a similar case the same way on another day. Most arbitrators want to be consistent in the way they adjudicate disputes<sup>188</sup>—not only does the writing of opinions reveal the way arbitrators make decisions but also aids them in future decisions to remind them of the way they approached a particular problem in the past. This knowledge also helps parties in the selection process.

In addition, reasoned written opinions provide useful information to parties about an arbitrator's abilities. As Professor Hayford stated, "in most cases [ ] the only indicia of . . . arbitrator competencies are the manner in which the neutral conducts the hearing and the perceived correctness of the result reached."<sup>189</sup> This meager information provides parties little basis for making sound arbitrator selection decisions. Parties are in a much better position to evaluate the arbitrator's abilities if he or she is required to write a reasoned opinion.<sup>190</sup>

2. Transparency in the decision-making process.

Parties want to understand why they have won or lost in arbitration.<sup>191</sup> Reasoned opinions provide parties this understanding and, in many cases, help the losing party accept

<sup>187</sup> This conclusion is likely to be true even if the consumer is a one-shot player. Consumer counsel share information about arbitrators—this ability to share information is enhanced by easy access to the internet.

<sup>188</sup> Weidemaier, 90 NC L Rev at 1110 (cited in note 31).

<sup>189</sup> Stephen Hayford and Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 Ohio St J Disp Res 343, 403 (1995).

<sup>190</sup> See Gibbons, 15 Ohio St J on Disp Resol at 772–73 (cited in note 132) (noting that well-reasoned opinions help to combat the ability of institutional repeat players to "arbitrator-shop[ ]" at the expense of a one-time consumer grievant).

<sup>191</sup> Even AAA concedes that parties sometimes want these decisions. Raymond G. Bender Jr, *Critical First Steps in Complex Commercial Arbitration* \*7 (American Arbitration Association 2009), online at [http://www.adr.org/aaa/ShowPDF?doc=ADRSTG\\_011424](http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_011424) (visited Sept 15, 2013).

an adverse award.<sup>192</sup> Availability of a reasoned opinion may also serve to strengthen the parties' faith in the integrity of the arbitral process because the parties are able to see for themselves that the arbitrator considered the relevant facts and, if applicable, legal rules. In addition, when arbitrators draft reasoned awards, the parties may review the award to ensure that their facts and theories were heard and, hopefully, understood.<sup>193</sup>

The theory that parties want explained decisions and greater transparency in decision making is borne out by the available empirical evidence. Professors Barbara Black and Jill Gross, who initially contended that written opinions, at least in the securities industry, would not be beneficial, changed their minds in light of their empirical study, revealing that that customers *wanted* explanations of the arbitration awards and believed they would be more satisfied if they received such explanations.<sup>194</sup>

One proponent of written arbitration awards, Stephen Hayford, theorizes that parties are interested in and would benefit from greater transparency in arbitrator decision making. Without reasoned decisions, parties have no "reliable indicia of whether the arbitrator's decision was founded on a full understanding of the material facts and a proper interpretation and application of the relevant . . . law."<sup>195</sup> In the absence of a reasoned decision, losing parties will likely be dissatisfied with the arbitration process, and, more problematically, attempt to vacate the arbitration award.<sup>196</sup> In addition, as Professor Reuben notes, reasoned opinions "help explain and legitimize the work of the court in the eyes of the parties and the public, thus

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<sup>192</sup> Kaczmarek stated that "[a]ll sides generally agree that a sound opinion contributes to the acceptance of the award by persuading the parties that the arbitrator thoughtfully considered the claim and came to a well-reasoned decision." Kaczmarek, 4 *Emp Rts & Emp Pol J* at 297 (cited in note 97).

<sup>193</sup> Consider Martha I. Morgan, *The Constitutional Right to Know Why*, 17 *Harv CR-CL L Rev* 297, 299 (1982).

<sup>194</sup> Compare Barbara Black, *The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?*, 72 *U Cin L Rev* 415, 450–51 (2003) (arguing that explained decisions are not useful), with Black and Gross, *Perceptions of Fairness of Securities Arbitration* at \*39 (cited in note 112) (55.48 percent of customers stated that they would be more satisfied with the outcome of their arbitration had they received an explanation of the award).

<sup>195</sup> See Hayford, 66 *Geo Wash L Rev* at 446 (cited in note 97).

<sup>196</sup> See *id.*

supporting the rule of law that is essential to the exercise of democratic governance.”<sup>197</sup>

### 3. Enhancing the decision-making process—lessons from cognitive psychology.

Those who study decision making often emphasize that when a decision maker must write a reasoned decision, he or she will analyze the facts and applicable rules more critically and take more care in drafting his or her decision.<sup>198</sup> In addition, if a decision maker is aware that she will be expected to write a reasoned opinion, she will pay better attention to the evidence as it is presented at the hearing. Knowing that others will read the opinion will also provide the decision maker an incentive to take greater care in reaching her decision.

While these beliefs are widely held, and have been so for a long time, only recently have scholars turned to the field of cognitive psychology to better understand the decision-making process and find support for these intuitions. Cognitive psychologists analyze the methods individuals use to make decisions and offer suggestions about how to improve decision quality.<sup>199</sup> Cognitive psychologists believe that individuals utilize heuristics to assist them when evaluating available choices. These heuristics are shortcuts that individuals use to make the decision-making process less cognitively demanding.<sup>200</sup> An individual’s use of various heuristics to make certain kinds of decisions will, most of the time, result in sufficiently accurate decisions. Yet, cognitive psychologists have discovered that individuals use these shortcuts even when their use results in inaccurate decision making. For example, the availability heuristic describes the situation where an individual correlates his ability to recall a type of event with the likelihood that the event will occur. In other words, if one can recall an event easily, one is likely to believe that the event will reoccur more often

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<sup>197</sup> Richard C. Reuben, *Process Purity and Innovation: A Response to Professors Stempel, Cole, and Drahozal*, 8 Nev L J 271, 281 (2007). Although Reuben refers to courts, logically, his reasoning would extend to the arbitral forum.

<sup>198</sup> Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 U Kan L Rev 985, 1056 (2012).

<sup>199</sup> Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 Cornell L Rev 486, 491–92 (2002).

<sup>200</sup> See id at 494–95.

than is statistically supportable. Thus, the availability heuristic leads a decision maker to overpredict the likelihood of events that are easy for him to recall.<sup>201</sup>

Together with availability, numerous other heuristics help individuals make quick and relatively accurate decisions every day about where to eat dinner and what route to take to work. Yet, the use of these heuristics to make more complex decisions may lead to poor results. Fortunately, recent research in the field has identified additional heuristics that individuals use to reduce the decisional error resulting from interaction among the various biases. These might be called “modifying heuristics.” They are heuristics that operate on top of other heuristics to correct the bias that results from use of those initial heuristics. Research on one of these modifying heuristics—known as accountability—suggests that the more likely an individual is to be held accountable for his decisions, the more likely he will be to make efforts to improve the quality of his decision making.<sup>202</sup> In other words, the greater a decision maker’s responsibility for a judgment, the more careful and complete will be his use of the relevant evidence.<sup>203</sup> Accountability also reduces the extent to which decision makers are subject to some of the various other types of psychological biases described above.<sup>204</sup> In addition, accountability causes a decision maker to be more careful with his decision if he may suffer negative consequences because he failed to justify the decision by providing a satisfactory

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<sup>201</sup> Mark Seidenfeld offers an example of the impact of the availability heuristic in the context of EPA rulemaking. According to Seidenfeld, legal scholars believe that “virtually every rule promulgated by the Environmental Protection Agency (EPA) is challenged in court.” *Id.* at 501. The statistics reveal that only 3 to 26 percent of EPA rules are challenged. See *id.* “Th[is] difference between [ ] folklore and reality,” states Seidenfeld, “may well reflect that rules subject to challenge are much more salient in the minds of members of the agency and hence easier for them to recall, leading agency members to believe that 80 percent or more of all rules were challenged.” *Id.*

<sup>202</sup> See David M. Sanbonmatsu, Sharon A. Akimoto, and Earlene Biggs, *Overestimating Causality: Attributional Effects of Confirmatory Processing*, 65 *J Pers & Soc Psych* 892, 896–97 (1993). See generally Philip E. Tetlock, Linda Skitka, and Richard Boettger, *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 *J Pers & Soc Psych* 632 (1989).

<sup>203</sup> Sanbonmatsu, 65 *J Pers & Soc Psych* at 896–97 (cited in note 202).

<sup>204</sup> These other biases often lead a decision maker to inferior decisions. The bias heuristics include attribution (the tendency to attribute one’s beliefs and opinions to others), overconfidence (experts tend to be overconfident), and availability (the ability to recall similar events to assist in the current decision). Decision makers can be affected by other biases as well. See Mark Seidenfeld, *The Psychology of Accountability and Political Review of Agency Rules*, 51 *Duke L J* 1059, 1062–64 (2001).

explanation for it.<sup>205</sup> Although accountability may have other effects on a decision maker, cognitive psychologists agree that one effect of accountability is to increase the likelihood that a decision maker will consider all relevant evidence and “modify initial impressions in response to contradictory evidence.”<sup>206</sup>

In the arbitration context, the accountability heuristic suggests that an arbitrator who is obligated to provide parties with a reasoned written opinion will be more careful in evaluating the evidence and less likely to be influenced by inherent decision-making biases. This consideration will have two effects. First, the arbitrator will be aware that the parties will be likely to view him negatively (that is, hold him accountable) if the reasons the arbitrator provides for his decision are unsatisfactory. Thus, accountability will lead arbitrators to be more careful when providing justifications for their decisions. Second, a written opinion may make judicial review more likely, but also make it more likely that judicial review will be meaningful. Thus, the possibility of judicial review is a further accountability check that will limit an arbitrator’s tendency to rely inappropriately on biases rather than analysis.<sup>207</sup>

Another lesson from cognitive psychology is that decision makers tend to use intuition, another heuristic, to develop quick answers to judgment problems that deliberation can potentially “endorse, correct, or override.”<sup>208</sup> Professors Chris Guthrie, Jeffrey J. Rachlinski, and Judge Andrew Wistrich conducted an empirical study of trial judges’ decision-making processes to test

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<sup>205</sup> Id at 1064.

<sup>206</sup> Tetlock, 57 J Pers & Soc Psych at 632 (cited in note 202).

<sup>207</sup> Professor Mark Seidenfeld examined the accountability heuristic in the context of arbitrary and capricious judicial review of administrative agency rulemaking. According to Seidenfeld, judicial review creates agency accountability. This accountability reduces the decision maker’s reliance on shortcuts, which often represent use of inappropriate biases. Arbitrary and capricious review reduces the impact of individual biases in agency decision making and creates the proper “incentives for agency staff to take appropriate care and to avoid many systematic biases when formulating rules and ushering them through the rulemaking process.” Seidenfeld, 87 Cornell L Rev at 547–48 (cited in note 199).

<sup>208</sup> Daniel Kahneman and Shane Frederick, *Representativeness Revisited: Attribute Substitution in Intuitive Judgment*, in Thomas Gilovich, Dale Griffin, and Daniel Kahneman, eds, *Heuristics and Biases: The Psychology of Intuitive Judgment* 49, 51 (Cambridge 2002). Intuitive thinking can “lead to severe and systematic errors.” Amos Tversky and Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 Science 1124, 1124 (1974).

this theory. Their research, which involved administering the Cognitive Reflection Test (CRT)<sup>209</sup> to a group of 295 Florida circuit court judges, revealed that judges use intuition when making decisions but that, in some instances, intuition led to inaccurate choices.<sup>210</sup> In those cases, the authors concluded, judges needed to override their erroneous intuitions with deliberation.<sup>211</sup> Using Daniel Kahneman and Shane Frederick's work in psychology, together with the evidence gathered from their empirical study of judges' decision making, the authors concluded that one way the justice system could encourage this necessary deliberation would be to require judges to write opinions more frequently.<sup>212</sup> According to the authors, "writing opinions could induce deliberation that otherwise would not occur. . . . [T]he discipline of opinion writing might enable well-meaning judges to overcome their intuitive, impressionistic reactions. The process of writing might challenge the judge to assess a decision more carefully, logically, and deductively."<sup>213</sup>

Applying these findings to arbitrators would likely yield similar results.<sup>214</sup> Arbitrators, like trial judges, tend to develop

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<sup>209</sup> The CRT is a three-item test that is designed to separate intuitive and deliberative decision making. In other words, the test is designed to assess an individual's ability to resist answering a question with the first response that comes to one's mind (which, in the case of the test, will be the wrong answer). Guthrie, Rachlinski, and Wistrich, 93 Cornell L Rev at 35 (cited in note 183).

<sup>210</sup> See id at 13, 31.

<sup>211</sup> See id at 32–33.

<sup>212</sup> Id at 36–37. The authors offer additional means for encouraging deliberation—providing judges with more time to make decisions, more training and feedback to encourage deliberative decision making, and scripts and checklists that they could use at each step in the process so that they will be less likely to use intuition when the result of intuition would be erroneous decisions. See id at 35–42.

<sup>213</sup> Guthrie, Rachlinski, and Wistrich, 93 Cornell L Rev at 36–37 (cited in note 183).

<sup>214</sup> In a subsequent study, Guthrie, Rachlinski, and Wistrich attempted to determine whether specialization improved decision making quality. See Jeffrey J. Rachlinski, Chris Guthrie, and Andrew Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 BU L Rev 1227, 1257 (2006). Their study of federal bankruptcy judges was inconclusive. As they stated,

[W]hether specialization improves judicial decision making remains an open question. . . . [T]he decision-making performance of specialized judges, at least those that we studied here, appears, at a minimum, to be on par with the decision-making performance of generalist judges. Specialization, in other words, does not appear to decrease the quality of judicial decision making, even if it does not lead inexorably to improved decision making.

Id at 1257. Arbitrators, with their (typically) greater specialized knowledge, might seem more like bankruptcy judges than trial judges. It would appear, however, that their

intuitive reactions to evidence presented. Like the process trial judges use, the process of drafting an opinion might encourage the arbitrator to reach her decision more carefully and deliberately. Thus, the arbitrator would be more likely to avoid erroneous outcomes when writing an opinion than when not writing an opinion. Like the justice system, dispute resolution providers, who administer the modern arbitration system, should, to the extent possible, make efforts to increase the use of deliberation, rather than intuition, in decision making.<sup>215</sup> One way to accomplish this goal would be to require arbitrators to write reasoned written opinions.

While cognitive psychology cannot quantify the benefit of making a decision maker accountable, it does suggest that more accurate decisions and meaningful judicial review in appropriate cases are a likely outcome of increasing decision-maker accountability and deliberation. The next question, then, is to what extent the benefits of accountability are outweighed, if at all, by the increased cost of written opinions as well as the loss of confidentiality and potential increased risk of judicial review. Good empirical evidence exists regarding the costs of adding the reasoned written opinion procedure. FINRA considered adopting a rule that would require arbitrators to provide written awards at the request of consumers' counsel at a cost of \$200.<sup>216</sup> National Arbitration Forum (NAF) and AAA adopted similar rules for consumer disputes—requiring reasoned opinions while limiting the consumers' responsibility for the cost of such opinions to \$100.<sup>217</sup> Thus, it appears that the increased cost of a written opinion is minimal.

Concerns about confidentiality and risk of increased judicial review also seem overblown. In consumer arbitration, it is rarely the consumer who is interested in confidentiality. In fact, often the consumer is interested in publicizing information about the

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arguably greater similarity to bankruptcy judges would make little difference in the quality of their decision-making process. Thus, the analogy to trial judges makes sense.

<sup>215</sup> This conclusion mirrors Guthrie, Rachlinski, and Wistrich's conclusions with respect to the justice system. Acknowledging that intuition might be a benefit in some cases, the authors nevertheless conclude that "[t]he justice system should take what steps it can to increase the likelihood that judges will decide cases in a predominantly deliberative, rather than a predominately intuitive, way." Guthrie, Rachlinski, and Wistrich, 93 *Cornell L Rev* at 43 (cited in note 183).

<sup>216</sup> See 70 *Fed Reg* at 41066 (cited in note 113). See also text accompanying notes 113 and 149.

<sup>217</sup> See text accompanying note 151.

arbitration process and outcome. At any rate, the interest in maintaining the confidentiality of consumer arbitrations is very low on the consumer side. Additional publicity, obtained through reasoned written opinions, will undoubtedly make the entire arbitral process more transparent and, as a result, potentially more acceptable to the consumers required to use it and to the public at large who seem skeptical about it. It is unclear whether requiring arbitrators to issue reasoned written opinions will increase judicial review of arbitration awards. Following *Hall Street*, the ability to challenge arbitration awards decreased to the point where it may well be that parties can only challenge arbitration awards for procedural irregularity. Even if parties are ultimately able to claim that an arbitrator exceeded the scope of her powers in issuing an award (a potentially substantive basis for review), parties who lose in arbitration but understand why they lost because they received a reasoned opinion may be less likely to appeal. Given the lack of empirical evidence on this issue, dispute resolution providers should engage in the experiment in reasoned opinion writing because it may prove to be a useful and beneficial idea.

Finally, evidence supports the longstanding belief that arbitrators are capable of adjudicating both facts and law. Requiring a reasoned opinion of arbitrators in consumer arbitrations will likely enhance arbitrators' abilities and weed out those arbitrators who cannot rise to the task.

#### IV. CONCLUSION

The federalization of arbitration law is virtually complete. Few unanswered questions remain. If the Supreme Court remains true to its new definition of arbitration articulated in *Concepcion* and *Stolt-Nielsen*, states will have little ability to regulate the arbitration process. The CFPB may limit or ban pre-dispute arbitration agreements in consumer financial services transactions, but such future regulations depend on politics and represent only a possibility. Congress has shown little interest in regulating arbitration in the consumer area. Thus, any change to the arbitral process will come, if at all, from the private sector. The most likely candidates for achieving reform are the arbitration providers themselves. Unlikely to eliminate the use of arbitration, the providers instead should attempt to engage in experimentation with different due process



protections in arbitration—they have already begun this effort through the adoption of consumer due process protocols and through limitations on costs and fees that consumers must pay in order to arbitrate their claims. Although other protections might also be beneficial, providers should consider requiring arbitrators to draft reasoned written opinions. At relatively low cost, this change to current arbitral procedures, already in place to some degree with some providers, will increase the transparency and legitimacy of the arbitration process for consumers, providing them with clearer justifications for adverse decisions and the basis, if needed, for challenging the decisions. Given that arbitrators are fully capable of resolving the kinds of issues that may arise in consumer arbitration, this relatively simple change will provide benefits to consumers, businesses, and arbitrators, as well as to the public at large. It is a change whose time has come.

