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## **The Day Doctrine Died: Private Arbitration and the End of Law**

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# THE DAY DOCTRINE DIED: PRIVATE ARBITRATION AND THE END OF LAW

Myriam Gilles\*

*This story begins in 1980, when a budding anti-lawsuit movement found an energetic champion in a new conservative President. Over time, the movement became a dominant feature of political life, as its narrative of activist judges, jackpot justice, and a thriving lawsuit industry stirred partisan passions. And yet, some thirty years on, it is clear that the primary legacy of the anti-lawsuit movement is the movement itself—not legislative achievements, which have been few and far between, but committed adherents, including future Supreme Court Justices, lower court judges, and business leaders.*

*Meanwhile, and also in the early 1980s, federal courts began a long, slow, and initially apolitical process of invigorating the staid legal backwater of arbitration. Over the next thirty years, arbitration came fully of age. By 2013, the Supreme Court had held that companies may freely and openly use provisions mandating one-on-one, confidential arbitration in standard form agreements with employees, consumers, and others to escape the judicial system—and avoid potential exposure to class actions.*

*Finally, over these same thirty years, class actions became a dominant force in litigation, having managed to dodge the most serious reform initiatives of the anti-lawsuit movement. Class actions—for better or for worse—have proven to be extremely powerful weapons in a wide variety of subject matter areas, accounting for billions of dollars in damages settlements. Companies of all stripes dearly want to avoid class exposure.*

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*And so, as these three developments have unfolded over the past thirty years—separately and together—we are now at a unique point in our legal history: one that portends, quite literally, the end of doctrinal development in entire areas of the law. Companies, anxious to avoid any and all exposure to class actions are highly motivated to insert confidential, one-on-one arbitration mandates into the standard form agreements that, over these same thirty years, have come to govern their relationships with employees, consumers, direct purchasers, and all manner of counterparties. As a result, all disputes under these agreements—whether they would have otherwise been brought as class or individual claims—will now be shunted into the hermetically-sealed vault of private arbitration, where there is no public, transparent decision-making process, much less stare decisis, or common law development. For entire categories of cases that are ushered into this vault—from consumer law, to employment law, to much of antitrust law—common law doctrinal development will cease. This, quite literally, represents the end of law.*

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*The courtroom was adjourned.*

*No verdict was returned.*

*—Don McLean, American Pie*

#### I. INTRODUCTION

In 1980, the United States was just coming out of a decade that had witnessed an unprecedented expansion of private rights of action. The increase in the size of the civil docket was like nothing the country has seen before or since. The incidence of private litigation more than quadrupled

between 1968 and 1977.<sup>1</sup> And while much of that increase was in the state courts, the 1970 federal civil caseload had doubled by 1980 and tripled by 1986.<sup>2</sup> Likewise, the number of practicing lawyers doubled between 1970 and the early 1980s,<sup>3</sup> and the *scope* of litigation—i.e., the range of areas of human interaction that became the subject of litigation activity—broadened beyond recognition. Ordinary consumer transactions, everyday workplace interactions, the air we breathe, and the water we drink all had become litigation disciplines unto themselves.

In 1980, Ronald Reagan came into office determined to reverse the “litigation explosion.” As governor of California, Reagan had been a vocal champion of tort reform, having signed the pioneering Medical Injury Compensation Reform Act, which placed hard caps on noneconomic damages, along with other measures.<sup>4</sup> It was an article of faith for reformers that a “jackpot justice” state-law tort system imposed a multi-hundred billion dollar annual “tort tax” on citizens.<sup>5</sup>

Now, on the bigger stage to which he ascended in 1980, the new President and his advisors took up a broadened agenda of “lawsuit reform,” training their sights on private actions under federal statutes. In the preceding decade, “issue-oriented citizens groups with pro-regulatory agendas, such as environmental, civil rights, and consumer protection organizations,” had burst onto the litigation scene,<sup>6</sup> winning significant courthouse victories in areas of public law—victories that could not have been easily achieved through legislative or administrative avenues.<sup>7</sup> Capitalizing on the precedents of the Warren Court and with financial backing from the Ford Foundation and other progressive organizations, public interest groups in the 1970s used “impact litigation” to bring about social

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1. SEAN FARHANG, *THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S.* 15, fig. 1.2 (2010).

2. JÜRGEN O. SKOPPEK, *THE GROWTH OF LITIGATION* (1989), available at <http://www.mackinac.org/6263> (citing *The Federal Civil Justice System Bureau of Justice Statistics Bulletin*, July 1987).

3. *Id.* (citing American Bar Association Information Services, WASH. POST (Mar. 5, 1986)).

4. Medical Injury Compensation Reform Act of 1975 (MICRA) (codified at CAL. CIV. CODE § 3333.2 (West 2012)). MICRA imposed a \$250,000 cap on pain and suffering damages. In the decades that followed, many states would enact similar non-economic damage limits, among other tort reform measures.

5. LAWRENCE J. MCQUILLAN ET AL., *PACIFIC RESEARCH INST., JACKPOT JUSTICE: THE TRUE COST OF AMERICA'S TORT SYSTEM* 35 (2007), available at [https://www.heartland.org/sites/all/modules/custom/heartland\\_migration/files/pdfs/25923.pdf](https://www.heartland.org/sites/all/modules/custom/heartland_migration/files/pdfs/25923.pdf); PETER HUBER, *LIABILITY* 4 (1988) (claiming the tort system costs Americans \$300 billion each year in a “tort tax”). See also Stephen P. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329, 337, n.47 (1987) (quoting President Reagan’s speech to the American Tort Reform Association on May 30, 1986 that “[t]wisted and abused, tort law has become a pretext for outrageous legal outcomes—outcomes that impede our economic life, not promote it” (internal citations omitted)).

6. FARHANG, *supra* note 1, at 69.

7. ANN SOUTHWORTH, *LAWYERS OF THE RIGHT: PROFESSIONALIZING THE CONSERVATIVE COALITION* 37 (2008). See also John H. Adams, *Responsible Militancy—The Anatomy of a Public Interest Law Firm*, 29 *The Record of the Association of the Bar of the City of New York* 621, 631 (Nov. 1974).

justice through the law.<sup>8</sup> In this venture, they found a receptive federal judiciary, which by this time had “shown a strong proclivity toward expansive, proplaintiff interpretations” of federal statutes.<sup>9</sup> The ascendancy of “law in the public interest” changed the very nature of litigation—expanding conceptions of standing, class actions, and the award of attorneys’ fees to prevailing plaintiffs in ways that welcomed more types of claims and claimants into the courtroom.<sup>10</sup>

The new breed of lawsuits struck a nerve with conservatives, who grew alarmed that “public interest lawyers were able to maximize the impact of congressional enactments, despite the substantial costs these imposed on business and local governments.”<sup>11</sup> To these critics, the sole beneficiaries of the litigation “explosion” were plaintiffs’ lawyers, who extracted “exorbitant windfall” fees which they then plowed back into new and increasingly harmful litigations.<sup>12</sup> Social conservatives and business interests linked arms against these disparate foes, seeking measures at the state and federal levels to reduce the incidence and impact of litigation.<sup>13</sup>

The culture of the Reagan administration provided aid and comfort for the anti-lawsuit reformers. Soon, there emerged a new “infrastructure

8. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 23, 30 (2008).

9. FARHANG, *supra* note 1, at 143–44 (observing that “[w]ith a judiciary clearly to the left of Congress,” it was clear to public interest groups that the federal courts were a more effective conduit for achieving their goals, and that “the Republican vision of courts as bastions of restrained adjudication in which defendants would find shelter . . . looked off the mark”).

10. TELES, *supra* note 8, at 52.

11. *Id.* at 54. See also THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY* 26 (2002) (“The notoriety of tort litigation, combined with the powers of persuasion of corporate and professional interests, has put personal injury lawsuit reform at the top of the antilittigation agenda. Yet the range of antilittigation politics sweeps much more broadly than tort suits.”); Stephen C. Yeazell, *Unspoken Truths and Misaligned Interests: Political Parties and the Two Cultures of Civil Litigation*, 60 U.C.L.A. L. REV. 1752, 1771 (2013) (“Lawsuits became a threat to the stability and even the continued existence of a number of potential defendants. Unsurprisingly, defendants fought back, not only by vigorously defending lawsuits but also by launching broad political and public relations efforts. One result of those efforts was the new salience of civil litigation as a political issue.”).

12. Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1567 (2014) (quoting Orrin Hatch in 1984 Senate hearings on The Legal Fee Equity Act, a fee cap bill that ultimately failed to pass); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 5 (1986) (“A phalanx of mournful and indignant commentators concur that America is in the throes of a litigation crisis requiring urgent attention from policymakers.”); Deborah L. Rhode, *Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution*, 54 DUKE L. J. 447, 450 (2004) (observing that the public has long “fulminated against the bar as . . . plagues of locusts tormenting the nation with epidemics of unwarranted litigation and sapping the vitality from the free enterprise system” (internal quotations omitted)).

13. See, e.g., Stephanie Mencimer, *The Myth of America’s ‘Lawsuit Crisis’*, WASH. MONTHLY (Oct. 5, 2004), [http://www.alternet.org/story/20082/the\\_myth\\_of\\_america's\\_'lawsuit\\_crisis](http://www.alternet.org/story/20082/the_myth_of_america's_'lawsuit_crisis) (reporting that in the 1980s, various industries “began to heavily lobby legislators to restrict citizens’ ability to sue,” proposing legislative enactments such as “strict caps on damage awards, tougher standards for proving liability, and caps on plaintiffs’ attorney fees”); this “crusade was taken up by small government conservatives, who believed that tort reform paralleled their own efforts to fill the federal bench with pro-business jurists and roll back government regulations”).

of think tanks and journals,” foundations and advocacy groups, all devoted to promoting core conservative ideals of judicial restraint, social order, and deregulation.<sup>14</sup> Under the new President, the Republican Party “began to recognize the value of assaulting legal liberalism as a strategy” for whipping up their base, and it capitalized on the convenient narrative that lawyers were destroying America.<sup>15</sup>

Meanwhile, as the anti-lawsuit movement captured the imagination of conservatives and became a core value of the Reagan White House, the institution of arbitration was emerging from a somnolent adolescence.<sup>16</sup> Until the mid-1980s, arbitration had primarily served as a forum for international contract disputes and other sedate niches of the dispute resolution world. Insulated by the doctrine of *Wilko v. Swan*<sup>17</sup>—a 1953 decision holding arbitration unavailable in many classes of cases—arbitration never crossed paths with the federal statutory claims that provided the stuff of the litigation explosion. And arbitration played virtually no role in the Reagan reformers’ movement.<sup>18</sup>

Even as *Wilko* was dismembered, piece-by-piece, throughout the 1980s and 90s, arbitration remained sheltered from the hurly burly of the litigation explosion, if only because no one would have conceived that companies might someday permissibly use mandatory arbitration clauses in standard form contracts to avoid liability to consumers, employees, and others.<sup>19</sup> But over time, business interests began to embrace “alternative dispute resolution” as a cost effective substitute to litigation.<sup>20</sup> And, gradually, as judges steeped in the anti-lawsuit movement came to dominate the judiciary and comprise a majority of the Supreme Court, the inconceivable became fully conceived. By 2013, there was no longer any ques-

14. ANDREW E. BUSCH, *REAGAN’S VICTORY: THE PRESIDENTIAL ELECTION OF 1980 AND THE RISE OF THE RIGHT* 181 (2005). As Busch notes, this nascent network later evolved into a “new media—based in the Internet, talk radio, and the ‘blogosphere’ and much friendlier to Republicans and conservatives than the old mainstream media.” *Id.*

15. TELES, *supra* note 8, at 56. See also WILLIAM HALTOM & MICHAEL MCCANN, *DISTORTING THE LAW: POLITICS, MEDIA, AND THE LITIGATION CRISIS* 39 (2004) (stating that conservatives used the media “to condition public attitudes and to supply to the public information that would advance” the anti-lawsuit agenda); Galanter, *supra* note 12, at 4 (citing an account of the litigation explosion by Robert F. Dee, the Chairman of the National Association of Manufacturers: “Like a plague of locusts, U.S. lawyers with their clients have descended upon America and are suing the country out of business. Literally.” (internal citations omitted)).

16. See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 393–94 (2005) (charting the evolution of mandatory arbitration).

17. 346 U.S. 427 (1953).

18. *But see* 35 U.S.C.A. § 294 (2012). In 1982, Reagan signed a bill permitting resolution of patent claims by private arbitration, observing that an alternative forum might help reduce the “inordinately high cost of patent litigation.” Presidential Statement on Signing the Patent and Trademark Office Appropriations Bill, 18 WEEKLY COMP. PRES. DOC. 1089 (Aug. 28, 1982).

19. See Gilles, *supra* note 16, at 394–95 (observing that arbitration clauses were rarely imposed in standard form contracts until the 1990s, after a series of Supreme Court decisions evinced “an incredibly expansive view of the FAA”).

20. See *id.* at 396.

tion that mandatory, one-on-one arbitration provisions in standard form-agreements were enforceable.<sup>21</sup>

Further, over the same period, class action liability avoidance moved to the top of the priority list for corporate counsel. Beginning in the 1980s, class actions racked up many billions of dollars in settlements, spread across an ever-expanding range of subject areas and industries, leading corporate defenders to complain loudly of *in terrorem* effects.<sup>22</sup> By the 2000s, as multimillion dollar range settlements became almost commonplace,<sup>23</sup> the power of class cases to coerce lucrative settlements was not much in dispute. This was certainly not lost on companies, who provided a receptive audience for law firms marketing innovative new techniques to avoid exposure to aggregate litigation—in particular, arbitration clauses with embedded class action bans.<sup>24</sup>

These class action bans ensured that any claim against a corporate defendant could be asserted only in a one-on-one, nonaggregated arbitral proceeding, promising virtual immunity from liability, given the certainty that consumers and employees would almost never be able to arbitrate small dollar claims individually. Buoyed by the Supreme Court's enthusiasm for arbitration, companies in the late 1990s and 2000s began to insert these provisions in all sorts of standard form contracts—especially credit card, telecom, and e-commerce agreements—and so, as these movements have unfolded over the past thirty years, separately and together, we have come to a unique point in our legal history. Companies, highly motivated to avoid class action exposure, have been widely adopting arbitration provisions containing class action bans, and this trend is only accelerating.<sup>25</sup> Meanwhile, a conservative judiciary forged in the fires of the Reagan anti-lawsuit movement has broadly upheld the imposition of these arbitration agreements in all manner of standard form contracts with employees, consumers, and others. Disputes arising under these contracts—all disputes, whether they would otherwise have been brought as class or individual cases—may now only be filed in arbitration.

And those arbitrations are, by contract, one-on-one, confidential affairs shielded from public view and decided by arbitrators who do not write precedential decisions. The stuff of the common law—*stare decisis*,

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21. See *infra* notes 178–85 and accompanying text (reviewing the Supreme Court's pro-arbitration decisions).

22. See, e.g., *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (describing the situation faced by defendants in the wake of class certification: “All of a sudden they will face thousands of plaintiffs. . . . They might, therefore, easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy.”).

23. See, e.g., Sherri Raiken Savett, *Plaintiffs' Vision of Securities Litigation: Current Trends and Strategies*, 84 ALI 375, 386–88 (May 2008) (ranking top class action settlements, ranging from \$50 million to \$7 billion).

24. Gilles, *supra* note 16, at 396–97 (describing efforts by law firms and arbitral bodies—in particular, the now-defunct National Arbitration Forum—to promote liability-reducing arbitration clauses, and reporting that “companies were responsive to this pitch”).

25. *Id.* at 397–98.

publicity, and preclusion principles—is absent in this hermetically sealed vault.<sup>26</sup> For the entire categories of cases that are ushered into this vault—from consumer law, to employment law, to much of antitrust law—common law doctrinal development will cease. That is what I mean by the end of law.

Part II provides a historical sketch of anti-lawsuit efforts at the federal level from President Reagan through President George W. Bush. Part III examines how the goals of the anti-lawsuit movement came to be accomplished, not by direct legislative reforms proposed during those Republican presidencies, but by an indirect route through judicial expansion of longstanding statutory provisions of the Federal Arbitration Act. In particular, I describe important transformations in the Supreme Court's arbitration jurisprudence beginning in the mid-1980s, culminating in the enforceability of arbitration clauses with embedded class bans in standard form agreements in *AT&T Mobility v. Concepcion* and *American Express v. Italian Colors*.<sup>27</sup> Part IV considers the implications of companies' full deployment of arbitration clauses in settings where they have an incentive to avoid class exposure, concluding that whole categories of claims will be evicted from the public court system. And in that connection, I consider some counterfactual scenarios: What doctrinal developments in antitrust and consumer law (to take two examples) would not have occurred over the past decade if arbitration clauses had been deployed to the full extent now authorized by the Supreme Court? Finally, by way of a conclusion in Part V, I observe that the effects of removing entire classes of litigation from the stream of the common law creates a game of high stakes musical chairs: as legal development is frozen, at an arbitrary point in time, much depends upon where you are when the music stops.

## II. THE ANTI-LAWSUIT WARS

The modern anti-lawsuit movement took shape, in part, as a legislative reform effort under Ronald Reagan. Now, from the remove of 35 years—which has seen five Republican presidential terms producing nearly 900 federal judicial appointments, including five conservative Justices on the current Supreme Court—we can see that this movement achieved something very different, and surely more potent: a radical transformation of the composition and ideology of the federal judiciary,

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26. Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 704 (1998). See also Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> (quoting Gilles that "Americans are actively being deprived of their rights").

27. *AT&T Mobility v. Concepcion*, 563 U.S. 307 (2011); *American Express v. Italian Colors*, 133 S.Ct. 2304 (2013).



which (far more than the grinding, piecemeal efforts of legislative reform efforts) has, in turn, accomplished many of the goals of limiting litigation.

### A. *Reagan-Era Litigation Reform, 1980–1988*

Ronald Reagan himself was deeply suspicious of litigation “in the public interest,” and surrounded himself early on with advisors (many of whom had served under Richard Nixon)<sup>28</sup> who were equally hostile to lawsuits.<sup>29</sup> The decade preceding Reagan’s election had seen a sharp increase in litigation brought by employees, consumers, environmentalists, and public interest lawyers.<sup>30</sup> This increase was the direct result of new civil rights statutes creating federal rights and private rights of action by which to enforce those rights.<sup>31</sup> But the uptick in litigation was also due, in significant part, to statutory attorneys’ fee provisions designed to stimulate this private enforcement, which transformed the litigation landscape “by contributing resources to civil rights groups and stimulating the growth of a for-profit civil rights bar.”<sup>32</sup>

Many Reagan-era conservatives thus came to office with the shared belief that the major causes of the “litigation explosion” were left-leaning public interest groups and entrepreneurial lawyers who were using “litigation and courts to shape the substantive meaning of the new social regulatory statutes,” creating regulatory policies that hurt business interests.<sup>33</sup> Reagan encouraged members of his administration in their positive

28. The Nixon administration had shown “a strong interest in preventing the growth of . . . public interest law firms,” engaging in the first direct “effort at ‘defunding the Left’” by seeking to strip these groups of non-profit status under Section 501(c)(3) of the tax code. TELES, *supra* note 8, at 50.

29. See, e.g., FARHANG, *supra* note 1, at 176 (“From the start of the Reagan administration, high-ranking lawyers appointed to positions of leadership in the bureaucracy complained of the growth in recent years of civil rights litigation instigated by the private bar, which they regarded as frequently being of questionable merit, as producing excessively large fee awards, and as imposing undue monetary burdens on both business and governmental defendants.”); SOUTHWORTH, *supra* note 7, at 38 (observing that “[m]any of the lawyer founders” of prominent conservative public interest law organizations “served in high levels in the Reagan and Bush I administrations—some of them while they were very young”); TELES, *supra* note 8, at 64–80 (discussing the members of the Reagan administration who, before and after their government service, created conservative law firms, foundations, and institutes which were, in significant respect, dedicated to reducing the incidence and impact of litigation).

30. FARHANG, *supra* note 1, at 172–73.

31. See, e.g., Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).

32. FARHANG, *supra* note 1, at 147–51 (discussing one-way fee-shifting provisions in Titles II and VII of the Civil Rights Act of 1964, the School Aid Act, the Voting Rights Act of 1965, and the Civil Rights Fees Act of 1976); *id.* at 150 (quoting Mary Derfner, director of the Lawyers’ Committee’s Attorney’s Fees Project that “during the first half of the 1970s the fee-shifting provisions in recent civil rights laws helped ‘public interest law firms burgeon,’ and that ‘[p]rivate practitioners and individual members of smaller commercial law firms began to undertake civil rights cases in addition to their other work’” (internal citations omitted)).

33. Burbank & Farhang, *supra* note 12, at 1551. See also Edwin Meese, *Foreword to BRINGING JUSTICE TO THE PEOPLE*, at ii (Heritage Found. 2004) (“[T]he term ‘public interest law’ . . . describe[s] groups of attorneys around the country—mostly liberal in their political views—that had turned from representing individual poor people with their ordinary legal problems to maintaining novel legal actions on behalf of political activists and special-interest social causes.”); Paul D. Carrington, *Politics and Civil Procedure Rulemaking: Reflections on Experience*, 60 DUKE L. J. 598, 601–02 (describing the uptick in litigation caused by “the substantial increase in the number of civil actions filed by citizens

antipathy for lawyers and thoroughly concurred in the strategy for starving the beast by reducing or capping attorneys' fee awards as part of a broader program to "defund the Left."<sup>34</sup>

A favorite target was the Legal Services Corporation ("LSC"),<sup>35</sup> which battled against Reagan while he was Governor of California, and which was viewed by the President and his close advisors as a "hotbed of liberal lawyers dedicated to funding politically-oriented public impact cases."<sup>36</sup> As Reagan officials found their agenda obstructed by public interest litigation brought by LSC, they began to portray the organization as home to all sorts of individuals who were "radical, socialist" "ideological ambulance chasers" keen on litigating every issue.<sup>37</sup> The administration united conservatives around the idea that the legal services projects funded by the LSC constituted a "radical social and political agenda" of "avowed Marxists," whose "nationwide network of liberal activists" used taxpayer money to enact "new laws and administrative rulings" that

seeking enforcement of civil rights or civil liberties," in "new categories of civil filings [such as] employment discrimination cases and cases brought to enforce federal environmental laws" (internal citations omitted)); Yeazell, *supra* note 11, at 1757 (quoting Ronald Reagan speech: "American society is mired in excessive litigation. . . . [O]ur system of justice has become weighed down with lawsuits of every nature and description. . . ." (internal citations omitted)).

34. See generally Michael S. Greve, *Why "Defunding the Left" Failed*, 89 PUB. INT. 91, 92 (1987). See also Burbank & Farhang, *supra* note 12, at 1553.

35. In 1965, as part of Lyndon B. Johnson's "war on poverty," Congress authorized the Office of Economic Opportunity ("OEO") to award legal services grants for "providing poor people with legal assistance in civil matters." DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 298 (1988). As the OEO reauthorization approached, many in Congress sought make the institution more independent; and in 1974, President Richard Nixon signed a bill creating the Legal Services Corporation ("LSC"), with an independent, non-partisan board. Pub. L. NO. 93-355, §§ 1003(a)-1004(a), 88 Stat. 378 (1974). Despite the independent board, conservative distrust of LSC remained strong. See, e.g., Vice President Spiro T. Agnew, *What's Wrong With the Legal Services Program*, 58 A.B.A. J. 930, 930-32 (1972) (arguing that the legal services program had become a politicized effort to redistribute "rewards, rights and resources" and referring to legal aid lawyers as "ideological vigilantes").

36. Abner J. Mikva, *Deregulating Through the Back Door: The Hard Way to Fight a Revolution*, 57 U. CHI. L. REV. 521, 532 (1990). See LUBAN, *supra* note 35, at 298 (describing "victories by California Rural Legal Assistance ("CRLA") lawyers, such as the restoration of \$210 million in illegal cut-backs in the Medi-Cal Program, that infuriated then-Governor Ronald Reagan, who responded by vetoing CRLA funds" (internal citations omitted)); Robert Hornstein et al., *The Politics of Equal Justice*, 11 AM. U. J. OF GENDER, SOC. POL'Y & THE LAW 1089, 1093 ("The stunning changes brought about by the poor's federally funded lawyers generated intense and fierce political opposition in the early 1970s. For politicians like . . . California Governor Ronald Reagan . . . federally funded legal services represented something other than equal access to justice—something sinister, anti-American, and anti-democratic.") (internal citations omitted); Kimberly McKelvey, *Public Interest Lawyering in the United States and Montana: Past, Present and Future*, 67 MONT. L. REV. 337, 343-44 (2006) ("The restoration of the funds hampered then-Governor Ronald Reagan from balancing the budget as he had promised. In response, Governor Reagan spent most of the 1970s restricting or attempting to eliminate" public interest lawyering programs in California.).

37. McKelvey, *supra* note 36, at 344; Mikva, *supra* note 36, at 532. Ultimately, the Reagan administration was unsuccessful in its highly visible attempts to dismantle the LSC when "[d]eans of 141 law schools, over 100 judges from New York State (in addition to hundreds from other states), and fourteen past ABA presidents, among others, rose up to thwart the effort." McKelvey, *supra* note 36, at 344 (citing LUBAN, *supra* note 35, at 299-300); see also LUBAN, *supra* note 35, at 300 ("In the face of this powerful support [for LSC], a compromise emerged in which the LSC would continue to exist, but at a considerably reduced budget.").

would further “socialize America.”<sup>38</sup> Special ire was reserved for class actions seeking to “restructure[e] social institutions, or extravagant damage awards,” all of which enabled a small group of liberals to subvert “the democratic will as expressed through legislatures or executive action.”<sup>39</sup> With this message blaring, Reaganites took several runs at shutting down LSC altogether, eventually succeeding in cutting its budget so deeply as to hobble (but not destroy) the organization.<sup>40</sup>

More importantly, conservative policymakers sought legislative reforms to reduce lawyers’ incentives to commence litigation. In particular, Reagan administration officials sought to eliminate “sources of funding” via statutory fee caps.<sup>41</sup> A signature plank of the Reagan administration’s anti-lawsuit agenda was “an ambitious litigation reform proposal that would have restricted attorneys’ fees available to private parties seeking to enforce over one hundred federal statutes.”<sup>42</sup> The bill, introduced in both the 99th and 100th Congresses,<sup>43</sup> “signaled the emergence of a movement”<sup>44</sup> aimed at closing the courthouse doors to private enforcers. In addition, anti-lawsuit adherents in Congress—led by Senator Orrin Hatch—proposed the “Legal Fee Equity Act,” which sought to cap hourly rates awarded under attorney fee-shifting statutes at \$75 per hour—a tactic overtly intended to reduce the willingness of private lawyers to provide contingent representation in environmental, civil rights, and other cases involving governmental defendants.<sup>45</sup>

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38. LUBAN, *supra* note 35, at 299 (quoting from a fundraising letter by Howard Phillips, chairman of the National Defeat Legal Services Committee, to conservatives seeking support for eliminating LSC entirely).

39. *Id.* at 301.

40. While the Reagan administration was ultimately “[s]tymied by Congress in its attempts to defund the LSC,” it nonetheless used budget cuts and “ideological appointments to its board of directors” to undermine its influence. *Id.* at 300.

41. FARHANG, *supra* note 1, at 177 (“Reagan administration leadership saw civil rights fee-shifting legislation since the CRA of 1964 as a critical part of the incentive structure generating excessive civil rights litigation, and the goal of their fee-capping proposals, at bottom, was to ‘drive a stake through that incentive structure.’”); Burbank & Farhang, *supra* note 12, at 1553–54 (observing that conservative leaders “were deeply concerned that private rights of action, coupled with fee shifting . . . were producing a ‘state-sponsored, private governing apparatus’ that was beyond the control of the elected branches”; accordingly they sought to enact fee-caps “to bar fee awards to entrepreneurial attorneys who now engage in contingency litigation”) (internal quotations omitted).

42. Burbank & Farhang, *supra* note 12, at 1545. See also Robert V. Percival & Geoffrey P. Miller, *The Role of Attorney Fee Shifting in Public Interest Litigation*, 47 LAW & CONTEMP. PROBS. 233, 234 (1984). The authors report that the Reagan administration early on floated a draft proposal, entitled “The Limitation on Legal Fee Awards Act of 1981,” which “died without a sponsor.” *Id.* at 234, n.8; *id.* at 242 (describing the proposal as “designed to bar recovery of fee awards against the federal government in most public interest litigation”). Undeterred, the administration and their allies in Congress continued to press anti-lawsuit measures. *Id.* at 234, n.8 (citing *Attorneys’ Fees Awards: Hearings on S. 585 before the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 97<sup>th</sup> Cong., 2d Sess. 12–13 (1982) (hearing on Senator Hatch’s proposal to limit attorneys’ fees and to prohibit the use of multipliers)).

43. See S. 2162, 99th Cong. (1986); S. 539, 100th Cong. (1987).

44. Burbank & Farhang, *supra* note 12, at 1545 (describing “the emergence of litigation reform as a Republican issue in Congress”); Yeazell, *supra* note 11, at 1771–81.

45. Hearings on near identical versions of bill were held in 1984 and 1985. See *The Legal Fee Equity Act: Hearings Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary on S.*

As the anti-lawsuit movement progressed, administration officials openly “called for the law’s curtailment,” joining voices with groups “from within the medical profession, insurance industry, business community and other groups who saw themselves increasingly victimized by the law.”<sup>46</sup> Reagan administration true believers grew openly “confrontational, calling for immediate and massive judicial, regulatory, and legislative reform” of litigation.<sup>47</sup> For example, the administration established a “Tort Policy Working Group” to fix the “malfunctioning tort system.”<sup>48</sup> The Group issued a breathtakingly broad, unabashedly business-friendly proposal to nationalize product liability law and severely limit consumer rights.<sup>49</sup> As Neal Devins describes, movement conservatives at DOJ and the Reagan White House saw themselves as fighting “a holy war,” with a mantra of: “Let the chaos come. . . . This is part of the revolution! Pragmatism is cowardice and weakness!”<sup>50</sup>

Notwithstanding the dramatic discourse, insofar as legislative reform goes, the Reagan administration’s anti-lawsuit movement was strikingly unsuccessful. Despite multiple attempts to use “rhetoric, legislation, [and] administrative action” to reduce access to courts, the President’s agenda “met stiff opposition from both nonprofit and for-profit” lawyers and Congress.<sup>51</sup> The “defund the Left” strategy was particularly unsuccessful, as efforts to completely eliminate LSC and directly regulate attorneys’ fees in the Legal Fees Equity Act crashed on the rocks of interest-group politics.<sup>52</sup>

Despite these legislative failures, the Reagan administration did set off a transformation in the composition of the federal bench—a “conservative revolution” that would, in time, pay meaningful dividends to the

1580, S. 1794, and S. 1795, 99th Cong. (1985); *The Legal Fees Equity Act: Hearings Before the Subcomm. on the Constitution of the Comm. on the Judiciary on S. 2802*, 98th Cong. (1984).

46. Samuel Jan Brakel, *Using What We Know About Our Civil Litigation System: A Critique of “Base-Rate” Analysis and Other Apologist Diversions*, 31 GA. L. REV. 77, 86 (1996) (observing that “it was during the early Reagan years that the public first began to hear a well-versed chorus complaining of the exorbitant social and economic costs imposed on society by excessive law and lawyering”).

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

48. Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823, 1897 (2008) (citing TORT POLICY WORKING GROUP, REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 2, 35 (1986) (blaming many of the nation’s problems on “a veritable explosion of tort liability in the United States,” and attributing the rise to the “undermining of causation through a variety of questionable practices and doctrines” and a reliance on “junk science”)).

49. TORT POLICY WORKING GROUP, *supra* note 48.

50. Devins, *supra* note 47, at 961 (quoting Terrel H. Bell, *Education Policy Development in the Reagan Administration*, PHI DELTA KAPPAN (Mar. 1986), at 487, 491) (internal quotations omitted).

51. BUSCH, *supra* note 14, at 174; FARHANG, *supra* note 1, at 177.

52. FARHANG, *supra* note 1, at 177 (“The private enforcement status quo was sticky and Reagan could not move it.”); Greve, *supra* note 34, at 93 (“Not a single one of the [Reagan] Administration’s proposals for defunding its sworn enemies has been fully implemented.”).

anti-lawsuit campaign.<sup>53</sup> From the start, Reagan and his acolytes regarded the post-Warren Court federal judiciary as enabling increased litigation in service of the liberal agenda.<sup>54</sup> Accordingly, the administration sought to remake the bench by nominating only those in harmony with the president's judicial philosophy, which called for strict constructionism and judicial restraint.<sup>55</sup> To maximize control over the nomination process, Reagan downgraded the ABA's traditional role in vetting candidates and, instead, centralized control of judicial screening procedures with a few trusted insiders.<sup>56</sup> The President personally met every judicial nominee to ensure their conservative bona fides and fidelity to his vision.<sup>57</sup>

These hands on tactics resulted in a series of profoundly conservative nominations at all levels of the federal judiciary, including the Supreme Court.<sup>58</sup> By the late 1980s, the newly-ascendant conservative majority on the Court had issued a series of anti-lawsuit decisions,<sup>59</sup> expressing deep distrust of private enforcement litigation and fee shifting in particular.<sup>60</sup> The Justices in the majority actively sought to turn back

53. See DAVID M. ROULETTE, *JUDICIAL ROULETTE* 21–24 (1988) (Attorney General Meese explained that changing the federal bench would “institutionalize the Reagan revolution so it can’t be set aside no matter what happens in future presidential elections.” (internal quotations omitted)).

54. BUSCH, *supra* note 14, at 18 (describing how conservatives believed that federal judges had been “central to the advancement of the liberal agenda[,]” accomplishing “for liberals what they could not accomplish at the ballot box”).

55. TELES, *supra* note 8, at 2. See also Sheldon Goldman, *Reagan's Judicial Legacy: Completing the Puzzle and Summing Up*, 72 *JUDICATURE* 318, 319–20 (1989) (“Arguably, the Reagan administration was engaged in the most systematic judicial philosophical screening of judicial candidates ever seen in the nation’s history . . .”).

56. Goldman, *supra* note 55, at 320.

57. See also Terry Eastland, *Reagan's Other Legacy*, *THE WEEKLY STANDARD* (June 15, 2004, 12:00 AM), [http://www.weeklystandard.com/Content/Public/Articles/000/000/004/230\\_rpuwm.asp](http://www.weeklystandard.com/Content/Public/Articles/000/000/004/230_rpuwm.asp) (recalling the President instituted the practice of flying appointees to Washington, D.C. for in-person meetings prior to their confirmation hearings, revealing “how much Reagan cared about judicial selection”).

58. President Reagan appointed Sandra Day O'Connor (1981), Antonin Scalia (1986), and Anthony Kennedy (1987) as Associate Justices to the Supreme Court, and elevated William Rehnquist to Chief Justice (1981). See Timothy B. Tomasi & Jess A. Velona, *All the President's Men?: A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 *COLUM. L. REV.* 766, 768 (1987) (citing *Biden Says Meese is Trying to Reshape the U.S. Constitution*, *N.Y. TIMES*, Nov. 7, 1985, <http://www.nytimes.com/1985/11/07/us/biden-says-meese-is-trying-to-reshape-us-constitution.html> (critiquing Reagan administration for choosing nominees who would serve the concrete social and political agenda of the “Radical Right”).

59. Most glaringly, the conservative Justices decided five Title VII cases in the summer of 1989 which observers feared would severely undercut statutory enforcement. See, e.g., *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (rejecting discriminatory harassment claim); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989) (holding that the limitations period for challenging a seniority system begins to run when the practice is adopted and not when workers are adversely impacted); *Martin v. Wilks*, 490 U.S. 755 (1989) (allowing third parties to bring collateral actions challenging consent decrees); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (overruling *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), by shifting the burden of proof to employees in disparate impact cases to show that an employer's practice was not a business necessity); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (absolving employer of liability where it established a “mixed motive,” i.e., that even if discrimination played a role, the same employment action would have resulted in the absence of any discrimination).

60. See, e.g., *City of Riverside v. Rivera*, 477 U.S. 561 (1986) (holding that statutory fee award need not be proportional to low damage award); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (allowing plain-

the “rising tide” of litigation, using technical rules “governing burdens of proof, standards of evidence, standing, statutes of limitations, attorneys’ fees, and expert witness costs” as their preferred tools for cutting back on lawsuits.<sup>61</sup>

The administration’s efforts to appoint judges who shared Reagan’s views on litigation as well as substantive law met with few of the headwinds that beset the legislative anti-lawsuit agenda<sup>62</sup> or that limited the president’s ability to install socially conservative jurists like Robert Bork. The Bork affair,<sup>63</sup> as well as the rejection of other values-driven nominees,<sup>64</sup> may have marked an outer bound on the social conservatism that a Democratic-controlled Senate would tolerate in judicial nominees.<sup>65</sup> But no such markers were in evidence so far as the anti-lawsuit agenda was concerned, as the Senate unblinkingly confirmed a record number of lower court judges who shared the President’s commitment to rolling back the “litigation explosion.” In all, the Reagan nomination apparatus

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tiff to waive § 1988 fee claim in settlement negotiations); *Marek v. Chesny*, 473 U.S. 1 (1985) (holding that attorney’s fees are included in Rule 68 costs that shift to plaintiff when eventual judgment does not exceed settlement offer); *Blum v. Stenson*, 465 U.S. 886 (1984); *Hensley v. Eckerhart*, 461 U.S. 424, 442 (1983) (fee award should be adjusted downward because plaintiff only ‘partially’ succeeded, and describing fee litigation as “one of the least socially productive types of litigation imaginable”). See generally Andrew M. Siegel, *The Court Against the Courts: Hostility to Litigation as an Organizing Theme in the Rehnquist Court’s Jurisprudence*, 84 TEXAS L. REV. 1097 (2006).

61. FARHANG, *supra* note 1, at 180–81; see also Charles Rothfeld, *Rulings on Job Bias: Chilling Effect on Lawsuits*, N.Y. TIMES, Oct. 27, 1989, <http://www.nytimes.com/1989/10/27/us/the-law-rulings-on-job-bias-chilling-effect-on-lawsuits.html>.

62. Confirmations did decline somewhat in Reagan’s second term, when Democrats regained control of the Senate, the outspoken Joe Biden became chair of the Senate Judiciary Committee, and the administration was beset by scandal (Iran-Contra, Wedtech). See Eastland, *supra* note 57 (“Reagan managed to get most of his nominees confirmed when Republicans held the Senate, as was the case through 1986. But when Democrats regained control in 1987, his batting average declined.”).

63. Robert H. Bork’s 1987 nomination “seemed to embody so much of what liberals disliked in the Reagan agenda”—and his staunchly conservative views on abortion, civil rights, and the death penalty mobilized the Left. ETHAN BRONNER, *BATTLE FOR JUSTICE: HOW THE BORK NOMINATION SHOOK AMERICA* 152 (2007). On the day the Bork nomination was announced, Senator Ted Kennedy held a televised press conference in which he warned that “Bork’s America is a land in which women would be forced into back-alley abortions, blacks would sit at segregated lunch counters, rogue police could break down citizens’ doors in midnight raids, . . . and the doors of the federal courts would be shut on millions of citizens.” See Joe Klein, *The Old Frontier: Teddy’s Bork Crusade*, N.Y. MAG., Oct. 19, 1987, at 26.

64. For example, the nomination of Jefferson Sessions in 1986 drew the ire of liberal groups for his racially insensitive comments, forcing his withdrawal. See Howard Kurtz, *Votes on Judge Nominees Become Politically Risky*, WASH. POST, June 28, 1986, <http://www.washingtonpost.com/archive/politics/1986/06/28/votes-on-judge-nominees-become-politically-risky/5a3c298c-9b48-4478-8b68-8f8768d4650c/>; HERMAN SCHWARTZ, *PACKING THE COURTS: THE CONSERVATIVE CAMPAIGN TO REWRITE THE CONSTITUTION* 95–96 (1988) (describing the failed Committee vote on Sessions). Daniel Manion, widely criticized as unqualified and ultra right wing, won a “bitter, squeak-through victory” by just one vote. Thomas E. Shakow, Book Note, *Picking Moderate Judges*, 107 YALE L. J. 2333, 2335–36 (1998) (reviewing SHELDON GOLDMAN, *PICKING FEDERAL JUDGES: LOWER COURT SELECTION FROM ROOSEVELT TO REAGAN* (1997)); see also *id.* at 104–09 (describing the close confirmation vote on Manion’s nomination, who was the son of a famed conservative and a close friend of the Reagan administration).

65. SCHWARTZ, *supra* note 64, at 176.

minted some 346 judges—almost half the sitting judges in the federal judiciary.<sup>66</sup>

### B. *Litigation Reform Under George H.W. Bush, 1988–1992*

Though the Reagan administration largely failed to shepherd serious litigation reform through Congress, George H. W. Bush took up the cause during his presidency.<sup>67</sup> Bush's point man for the anti-lawsuit agenda was Vice President Dan Quayle, whose shot across the bow came in a controversial speech to the ABA on August 13, 1991, in which he lambasted lawyers and lawsuits, claiming that litigation inflicted \$300 billion in deadweight costs on the American economy each year.<sup>68</sup> Quayle followed up with speeches all across the nation criticizing a "legal system . . . spinning out of control" and the "explosion of frivolous lawsuits."<sup>69</sup>

Taking a page from the Reagan reformers, Quayle proposed fifty anti-lawsuit reforms through the President's Council on Competitiveness.<sup>70</sup> Having watched the Reaganites fail in their successive efforts to restrict attorneys' fees, the Bush I/Quayle proposals focused instead on other types of reform, e.g., implementing a loser-pays regime, imposing caps on punitive damages, and enforcing strict discovery limits.<sup>71</sup> These anti-lawsuit proposals were at the heart of the "Access to Justice Act" introduced by the Bush I administration via Senators Grassley, McConnell, and Garn.<sup>72</sup>

But here again, as under President Reagan, the legislative drive for lawsuit reform was a general failure.<sup>73</sup> On this issue—as on others—

66. FARHANG, *supra* note 1, at 176.

67. Yeazell, *supra* note 11, at 1758 (quoting George H.W. Bush in a stump speech: "[W]e've got Little League coaches that are afraid to coach; we've got doctors that are afraid to bring babies into the world because of a lawsuit; we've got people that are afraid to help people along the highway because they're afraid to be sued. We've got to put an end to these crazy lawsuits.").

68. BURKE, *supra* note 11, at 24 (quoting Quayle: "Does America really need 70 percent of the world's lawyers? Is it healthy for our economy to have 18 million new lawsuits coursing through the system annually?"); David Margolick, *Address by Quayle on Justice Proposals Irks Bar Association*, N.Y. TIMES, Aug. 14, 1991, <http://www.nytimes.com/1991/08/14/us/address-by-quayle-on-justice-proposals-irks-bar-association.html> (reporting on Quayle's speech to the ABA).

69. Vice President Dan Quayle, Acceptance Speech at the 1992 Republican National Convention (Aug. 20, 1992), in WASH. POST, available at <http://www.washingtonpost.com/archive/politics/1992/08/21/quayle-we-will-go-on-fighting-for-the-values-of-our-people/c0d11a6a-575f-488e-a606-a9d8f7387d4a/>. See also Vice President Dan Quayle, Remarks to the American Business Conference, C-SPAN (Oct. 1, 1991), <http://www.c-span.org/video/?21732-1/litigation-regulatory-reform> (criticizing lawyers who ignore the "social and economic costs when litigation is overused or abused").

70. PRESIDENT'S COUNCIL ON COMPETITIVENESS, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA (1991). See also Carrington, *supra* note 33, at 627 ("Vice President Dan Quayle was appointed to lead a Council on Competitiveness staffed largely—if not entirely—by loyal Republicans committed to protecting the ability of American business to compete profitably in global markets.").

71. Notably, these proposals specifically rejected widespread use of mandatory, pre-dispute arbitration. Dan Quayle, *Civil Justice Reform*, 41 AM. U. L. REV. 559 (1992).

72. S. 2180, 102nd Cong. (1992).

73. See, e.g., Barry Meier, *Bill to Curb Consumer Lawsuits Falls Short*, N.Y. TIMES, Sept. 13, 1992, <http://www.nytimes.com/1992/09/13/weekinreview/the-nation-bill-to-curb-consumer-lawsuits-falls-short.html>. President George H.W. Bush did come close to achieving one Reagan-era, anti-lawsuit

reformers viewed the Bush I presidency as lacking the focus of the Reagan Revolution; the Bush team was “not a group of like-minded individuals seeking to advance” a shared anti-lawsuit vision, as Reagan’s core group of advisors had been.<sup>74</sup> Moreover, a powerful and coordinated opposition to Bush and Quayle surfaced, and it proved difficult to surmount.

For example, after the Reagan-appointee led Supreme Court pushed the anti-lawsuit agenda forward as intended,<sup>75</sup> Congress responded with the Civil Rights Act of 1990, which would have broadly overruled the Court’s decisions restricting Title VII liability and attorneys’ fees. While President Bush initially vetoed the Act,<sup>76</sup> legal activists lobbied so intensely that Congress overwhelmingly passed a compromise version of the bill; the President—chastened by the unfolding Anita Hill-Clarence Thomas drama—signed the Act in a Rose Garden ceremony.<sup>77</sup>

Despite these legislative letdowns, the Bush I presidency continued the Reagan strategy of appointing conservative judges to the federal bench, which placed an even greater emphasis on those who were hostile to litigation.<sup>78</sup> Most memorable were the contentious Supreme Court confirmation hearings for Clarence Thomas, but the President made a series of important appointments to the lower federal courts as well.<sup>79</sup> In his final year in office, Bush placed litigation reform squarely in the spotlight, trumpeting the issue often in the 1992 televised presidential debates.<sup>80</sup> Likewise, on the campaign trail, Bush and Quayle in their unsuccessful

goal: in 1991 and 1992, Congress placed significant restrictions on LSC funding, and “[i]n 1992, the House debated over a bipartisan proposal to eliminate LSC” that came close to passing. McKelvey, *supra* note 36, at 345–46.

74. Devins, *supra* note 47, at 982.

75. See FARHANG, *supra* note 1, at 180–82 (describing a series of Supreme Court decisions decided in the 1980s which threatened to undercut Title VII enforcement and other forms of private litigation).

76. Andrew M. Dansicker, *A Sheep in Wolf’s Clothing: Affirmative Action, Disparate Impact, Quotas and the Civil Rights Act*, 25 *COLUM. J. L. & SOC. PROBS.* 1, 2–3 (1991) (discussing failed attempt to enact 1990 bill and to override Bush’s veto—which lost by 1 vote); see also FARHANG, *supra* note 1, at 180–90 (same).

77. Civil Rights Act of 1991, 105 Stat. 1071 (1991) (codified as amended in §§ 2, 16, 29, and 42 U.S.C.).

78. Glen Elsasser, *Thanks to Bush and Old Age, Conservatives Will Win the Supreme Court*, *CHI. TRIB.* (Jan. 22, 1989), [http://articles.chicagotribune.com/1989-01-22/news/8902270585\\_1\\_justices-supreme-court-exclusionary-rule](http://articles.chicagotribune.com/1989-01-22/news/8902270585_1_justices-supreme-court-exclusionary-rule) (noting Bush’s opposition to “judicial activism” and his promise to “appoint people to the federal bench that will not legislate from the bench”).

79. Prominent confirmations included Samuel Alito to the Third Circuit, J. Michael Luttig to the Fourth Circuit, and Dennis Jacobs to the Second Circuit—three conservative jurists who would later help advance the anti-lawsuit agenda. See, e.g., *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2072 (2013) (Alito, J., concurring) (noting the narrow and fact-specific circumstances wherein the defendant conceded to the arbitrator’s authority, but noting that in other situations, courts should “pause before concluding that the availability of class arbitration is a question the arbitrator should decide”); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (Alito, J.) (holding that imposing class arbitration on parties who have not agreed to class arbitration is inconsistent with the FAA); see also *infra* text accompanying notes 182–85 (describing Jacobs’ dissent from denial of en banc review in *American Express v. Italian Colors*, 133 S.Ct. 2304 (2013)).

80. BURKE, *supra* note 11, at 25.



1992 reelection bid ramped up their focus on lawsuit reform, arguing repeatedly on the stump that Americans are “suing each other too much and caring for each other too little.”<sup>81</sup>

Following the 1992 election, some commentators speculated that the Bill Clinton presidency would bring an end to the anti-lawsuit crusade.<sup>82</sup> But, if anything, the issue picked up steam as Newt Gingrich’s “Contract with America” promised “to stem the endless tide of litigation” with proposals to impose stringent caps on punitive damages, to reform securities fraud litigation, and to enact federal product liability reform.<sup>83</sup> The Speaker’s troops repeatedly placed lawsuit reform measures on the legislative docket—such as the ill-fated but pithily named “Loser Pays Act of 1993”—and they eventually won some significant, if narrow, victories reforming securities and prison litigation.<sup>84</sup> Media coverage of the continuing “litigation crisis” also continued during this period,<sup>85</sup> and litigation reform issues were front and center as the President encountered unprecedented difficulty getting his judicial nominees confirmed.<sup>86</sup> There was even talk amongst anti-lawsuit enthusiasts—led by House Majority Whip Tom DeLay—of impeaching “activist” judges.<sup>87</sup> So, as the Clinton

81. Rhode, *supra* note 12, at 451 (quoting President George H. W. Bush) (internal citations omitted).

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

83. The ninth plank of the “Republican Contract With America” was the “Common Sense Legal Reforms Act” (“CSLRA”), upon which the Speaker and the entire Republican contingent in Congress promised a vote within the first hundred days of the 104th Congress. See NEWT GINGRICH & RICHARD ARMEY, REPUBLICAN CONTRACT WITH AMERICA (Sept. 27, 1994), available at <http://media.mcclatchydc.com/static/pdf/1994-contract-with-america.pdf>. See also H.R. 10, 104th Cong. (Jan. 4, 1995); BURKE, *supra* note 11, at 25.

84. The Republican Congress enacted the Private Securities Litigation Reform Act of 1995 (“PSLRA”) over President Clinton’s veto. PUB. L. NO. 104-67, 109 Stat. 737 (1995). Three years later, Congress passed the Securities Litigation Uniform Standards Act of 1998 (“SLUSA”), requiring removal of state securities fraud class actions to federal court. PUB. L. NO. 105-353, 112 Stat. 3227 (1998). Further, Congress limited the ability of prisoners to bring civil rights suits in the Prison Litigation Reform Act of 1995. PUB. L. NO. 104-134, 110 Stat. 1321 (1996). *But see* Purcell, *supra* note 48, at 1900 (“In a near success, [Congress] passed the Common Sense Product Liability Legal Reform Act . . . which limited claims in product liability cases . . . [but] President Clinton vetoed the bill, and the Republic majority failed to marshal the two-thirds necessary to override it.” (internal citations omitted)).

85. See, e.g., John Leo, *The World’s Most Litigious Nation*, U.S. NEWS & WORLD REP., May 22, 1995, at 24; Stephen Badiansky & Ted Gest, *How Lawyers Abuse the Law*, U.S. NEWS & WORLD REP., Jan. 30, 1995, at 50.

86. See, e.g., Anthony Lewis, *Abroad at Home; Caving to the Ultras*, N.Y. TIMES, Nov. 10, 1997, <http://www.nytimes.com/1997/11/10/opinion/abroad-at-home-caving-to-the-ultras.html> (describing the “extremist course” of “ultra-right” Senators who “blocked many of President Clinton’s judicial nominations for months and years”); Henry Weinstein, *Drive Seeks to Block Clinton Judicial Nominees*, L.A. TIMES (Oct. 26, 1997), <http://articles.latimes.com/1997/oct/26/news/mn-46909> (describing the success of a fundraising letter for the Judicial Selection Monitoring Project signed by Robert Bork which sought contributions to the effort to block Clinton’s judicial appointments, which “have been drawn almost exclusively from the ranks of the liberal elite. These judges blazed an activist trail, creating an out-of-control judiciary”).

87. Shakow, *supra* note 64, at 2338 (citing David Kairys, *Clinton’s Judicial Retreat*, WASH. POST, Sept. 7, 1997, at C1).

years drew to a close, the Republican base remained as interested as ever in curtailing litigation.

### C. *Litigation Reform Under George W. Bush, 2000–2008*

When George W. Bush campaigned for the presidency in 2000, he ran on a platform that was explicitly anti-lawsuit,<sup>88</sup> trumpeting the tort reform victories he had achieved while Governor of Texas. He “used his support for federal tort reform measures to distinguish himself from Al Gore during the campaign,” and once elected, he outlined plans for massive medical malpractice, asbestos, and class action litigation reform.<sup>89</sup> In every State of the Union address, President Bush prodded Congress to act on litigation reform efforts,<sup>90</sup> and he gave rousing speeches across the nation on fixing the “broken medical liability system.”<sup>91</sup>

But, legislative successes continued to prove elusive. The Administration’s signature tort reform effort was the “Help Efficient, Accessible, Low-Cost Timely Healthcare” (HEALTH) Act of 2002, which incorporated the greatest hits from state medical malpractice reform legislation, e.g., capping noneconomic damages to \$250,000, abolishing joint and several liability, capping attorneys’ fees and punitive damages, and shortening the statute of limitations for most medical injuries.<sup>92</sup> The

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88. See Rhode, *supra* note 12, at 451 (“Without apparent irony, a president who owed his election to a lawsuit has lamented, ‘We’re a litigious society; everybody is suing, it seems like.’”) (quoting President George W. Bush, Address at the University of Scranton, Penn. (Jan. 16, 2003), available at 2003 WL 125455).

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

90. See, e.g., President George W. Bush, 2004 State of the Union Address (Jan. 23, 2004), available at <https://www.theatlantic.com/past/docs/issues/2004/01/sotu-address.htm> (calling for the elimination of “wasteful and frivolous medical lawsuits”); President George W. Bush, 2005 State of the Union Address (Feb. 2, 2005), available at <http://www.presidentialrhetoric.com/speeches/02.02.05.html> (“[W]e must free small businesses from needless regulation and protect honest job-creators from junk lawsuits.”); *id.* (“Justice is distorted, and our economy is held back by irresponsible class-actions and frivolous asbestos claims . . .”); President George W. Bush, 2007 State of the Union Address (Jan. 23, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/01/23/AR200701231075.html> (calling for legislation to curb “junk lawsuits”).

91. See, e.g., Julie Davies, *Reforming the Tort Reform Agenda*, 25 WASH. U. J. L. & POL’Y 119, 121 n.7 (2007) (describing a 2005 speech by President Bush in Collinsville, Illinois advocating for medical reform legislation “in front of an audience of cheering doctors in white coats”); Yeazell, *supra* note 11, at 1759 (“[W]e’ve got to protect our small-business owners and workers from the junk lawsuits that threaten jobs across America. I don’t think you can be pro-homebuilder, pro-small-business, pro-entrepreneur, and pro-trial-lawyer at the same time. I think you have to choose. My opponent made a choice. He put a trial lawyer on the ticket. I made my choice. I’m for legal reform to make sure this economy continues forward.”) (quoting George W. Bush, Remarks to the Nat’l Ass’n of Homebuilders in Columbus, Ohio (Oct. 2, 2004) available at <http://www.gpo.gov/fdsys/pkg/PPP-2004-book3/pdf/PPP-2004-book3-doc-pg2323.pdf>).

92. Help Efficient, Accessible, Low Cost, Timely Health Care (HEALTH) Act of 2002, S. 2793; HR 4600 (2002). Versions of this bill have been re-introduced in recent years by Republican leaders seeking to repeal the Affordable Health Care Act. See, e.g., Walter Pincus, *Beyond the Soothing Titles, Some Legislative Debacles*, WASH. POST, Dec. 24, 2012, <https://www.washingtonpost.com/world/national-security/beyond-the-soothing-titles-some-legislative-debacles/2012/12/24/f64ea16e-4>

bill squeaked through the Republican-controlled House, only to fail in the Senate.<sup>93</sup> Asbestos litigation reform efforts met a similar fate.<sup>94</sup>

In the end, the Bush II Administration's anti-lawsuit rhetoric may have helped with electoral politics and motivating the base<sup>95</sup>—and it surely helped with reelection as Republican fire was trained on trial lawyer John Edwards<sup>96</sup>—but it did little to advance the anti-lawsuit legislative agenda itself. Ultimately, the Class Action Fairness Act of 2005,<sup>97</sup> enacted after a “grinding eight-year effort,” was the only arguably significant lawsuit reform legislation achieved by the Bush II administration.<sup>98</sup>

But, George W. Bush did continue the conservative strategy to reshape the federal judiciary, and he was vocal in his commitment to putting forth only those nominees who “agree with my philosophy that judges should interpret the law, not try to make law from the bench.”<sup>99</sup> The White House took especially seriously the opportunities presented by the retirement of Justice O'Connor and the death of Chief Justice Rehnquist to nominate solidly conservative jurists to the high court.<sup>100</sup> A team of

bad-11e2-9a42-d1ce6d0ed278\_story.html (reporting on efforts to enact a new version of the HEALTH bill as part of the Spending Reduction Act).

93. Eid, *supra* note 89, at 10 (reporting the HEALTH Act passed by a 217–203 vote in the House, but failed by more than 30 votes in the Senate).

94. See, e.g., Matthew J. Chase, Note, *Fairness in Asbestos Injury Resolution Act of 2003: Saving the “Elephantine Mass”*, 79 ST. JOHN'S L. REV. 195, 208–10 (2012) (discussing FAIR Act's legislative history); S. Rep. No. 108-118, at 5–15 (2003) (detailing the vote of the committee); *A Bill to Provide for the Fair and Efficient Judicial Consideration of Personal Injury and Wrongful Death Claims Arising Out of Asbestos Exposure*, S. 413, 108th Cong. (2003).

95. See Rhode, *supra* note 12, at 451–52 (reporting that between 2001–2005, the U.S. Chamber of Commerce alone had spent over \$100 million “on television commercials and related strategies,” that ATRA coordinated PR and lobbying efforts for “over three hundred well-financed corporate and trade groups, along with thirty state reform organizations. . . ,” and that advertising by “business and insurance interests” was at an all-time high); F. Patrick Hubbard, *The Nature and Impact of the “Tort Reform” Movement*, 35 HOFSTRA L. REV. 437, 536 (2006) (reporting that conservative anti-lawsuit groups spent over \$100 million into the 2003-2004 campaigns in seven states).

96. See, e.g., David G. Savage, *A Trial Lawyer on Ticket Has Corporate U.S. Seeing Red*, L.A. TIMES (Sept. 13, 2004), <http://articles.latimes.com/2004/sep/13/nation/na-lawyers13> (reporting on the negative views of vice presidential-hopeful John Edwards by both the business community and conservative leaders).

97. Class Action Fairness Act of 2005, Pub. L. No. 109–2, 119 Stat. 4 (2005). CAFA removes class cases valued over \$5 million to federal court and directs those courts to scrutinize class settlements more thoroughly.

98. Purcell, *supra* note 48, at 1823. Overall, modern Republican presidents proposed and failed to pass a significant number of anti-lawsuit legislative measures. See Burbank & Farhang, *supra* note 12, at 1555–63 (describing legislative failures of the Limitation of Legal Fees Awards Act of 1981, the Frivolous Suit Reduction Act of 1994 and 1995, the Loser Pays Legal Fee Fairness Act, the Small Business Lawsuit Abuse Protection Act of 1998, the Civil Rights Attorney's Fees Awards Act of 1976, the Trade, Employment, and Productivity Act of 1987, the Community Bank Regulatory Relief Act of 1992, the Civil Justice Fairness Act of 1995, and the Small Business Growth Act of 2007).

99. See, e.g., President Bush Holds Press Conference, THE WHITE HOUSE (Mar. 13, 2002, 4:00 PM), <http://georgewbush-whitehouse.archives.gov/news/releases/2002/03/20020313-8.html>; see also Elisabeth Bumiller, *Bush Vows to Seek Conservative Judges*, N.Y. TIMES, Mar. 29, 2002, <http://www.nytimes.com/2002/03/29/us/bush-vows-to-see-conservative-judges.html> (quoting President Bush: “We've got to get good, conservative judges appointed to the bench and approved by the United States Senate.”).

100. Thomas B. Edsall & Dana Milbank, *The Right's Moment, Years in the Making*, WASH. POST, July 3, 2005, [http://www.washingtonpost.com/wp-dyn/content/article/2005/07/02/AR\\_20050702013](http://www.washingtonpost.com/wp-dyn/content/article/2005/07/02/AR_20050702013)

White House insiders dubbed “The Four Horsemen” was formed in 2002—a full two years before O’Connor announced her retirement—in order to plan, organize, and shepherd the nominations.<sup>101</sup> The campaign to seat President Bush’s Supreme Court nominees brought together the entire conservative coalition, from “business groups and big-name evangelicals” to “passion-driven activists and pragmatic Washington insiders[;]”<sup>102</sup> bringing to bear the “financial clout of [economic] conservatives . . . paired with the grass-roots power of the social conservatives.”<sup>103</sup> And it was hugely successful: both John Roberts and Samuel Alito sailed through their confirmation hearings.<sup>104</sup> And over his two terms, Bush appointed 323 largely like minded judges to the federal bench.

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For all the ‘*sturm und drang*’<sup>105</sup> that attended the anti-lawsuit movement from the Reagan through Bush II presidencies, little substantive reform was enacted. But the efforts were hardly for naught. The greatest achievements of all three Republican administrations, insofar as the anti-lawsuit agenda is concerned, were the successful nominations of Antonin Scalia, Anthony Kennedy, Clarence Thomas, John Roberts, and Samuel Alito to the Supreme Court.<sup>106</sup> All of these sons of the Reagan Revolution had experienced the substantial frustration of the litigation reform movement before ascending to the bench. And while their positions as Supreme Court Justices would not quite give them the latitude to enact

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12\_pf.html (observing that when the time came to fill the vacancy left by Justice O’Connor, “the conservative movement ha[d] something it lacked during its losing battle for the confirmation of Robert H. Bork to the court 18 years ago: a highly coordinated movement that has fused the big dollars of economic conservatives with the grass-roots clout of millions of religious conservatives”).

101. *Id.* The group was made up of C. Boyden Gray, chair of the Committee for Justice; Jay Alan Sekulow, chief counsel for the American Center for Law and Justice; Leonard A. Leo, executive vice president of the Federalist Society; and Edwin A. Meese III, attorney general during Reagan’s second term.

102. Jeanne Cummings, *In Judge Battle, Mr. Sekulow Plays a Delicate Role*, WALL ST. J. (May 17, 2005), <http://www.wsj.com/articles/SB111629602487135425>.

103. Edsall & Milbank, *supra* note 100.

104. See generally Adam Liptak, *Court Under Roberts Is Most Conservative in Decades*, N.Y. TIMES, July 25, 2010, at <http://www.nytimes.com/2010/07/25/us/25roberts.html> (arguing that the Supreme Court under Chief Justice Roberts has become “the most conservative [Court] in living memory”).

105. *Sturm und Drang Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/sturm%20und%20drang> (last visited Oct. 9, 2015).

106. Altogether, the three Republican presidents together appointed 891 judges to the federal bench, achieving a complete overhaul of the judiciary. See Douglas T. Kendall & Charles P. Lord, *The Takings Project: A Critical Analysis and Assessment of the Progress So Far*, 25 B.C. ENVTL. AFF. L. REV. 509, 528 (1998) (observing that beginning in the mid-1980’s, the nation has witnessed “a fundamental shift in the composition and ideology of the federal judiciary,” as conservatives implemented their “blueprint for a new era of using the court system to further the conservative agenda”); see also SOUTHWORTH, *supra* note 7, at 34 (“The more conservative composition of the federal judiciary resulting from appointments by presidents Reagan and Bush I and II . . . have encouraged the retreat of many progressive lawyers from a bold vision of their role in social change through law reform . . . .”); see also *id.* at 37–38 (“If disadvantaged groups once found allies in judges who believed it was their role to intervene in economic and social affairs, conservatives have benefited similarly from the appointment of judges who share their political sympathies.”).

the bold measures of the Reagan and Bush II litigation reform agendas, they would encounter on the bench one reform opportunity that exceeded the impact of even the most radical legislative proposals put forth by their political patrons: the opportunity to use the Federal Arbitration Act to allow companies to insulate themselves against liability.

### III. THE ARBITRATION WARS

While the direct, political assault on litigation fell short, many of the same goals came to be accomplished by an indirect route through judicial expansion of longstanding statutory provisions of the Federal Arbitration Act (“FAA”). Enacted in 1925 to promote arbitration among equally sophisticated parties in commercial and maritime contracts,<sup>107</sup> the FAA provides that an arbitration agreement “written provision in any maritime transaction or a contract evidencing a transaction involving commerce” was enforceable, subject only to “such grounds as exist at law or in equity for the revocation of any contract.”<sup>108</sup> For over fifty years after the FAA was enacted, arbitration remained a niche practice, deployed primarily by business interests seeking to channel disputes out of the traditional litigation system and into less expensive and more private forms of alternative dispute resolution.<sup>109</sup> By waiving the right to a formal judicial hearing, these parties voluntarily submitted their disagreements to experts in the field, with limited rights of appeal and the promise of complete confidentiality. Over the years, arbitration became the norm for resolving complex commercial disputes arising under collective bargaining agreements, international trade contracts, and certain other large-scale commercial arrangements.<sup>110</sup>

#### A. Arbitration in the Supreme Court

From the 1950s through the 1980s, the Supreme Court repeatedly affirmed its view that the FAA encouraged the arbitration of claims between equally sophisticated parties, rejecting efforts to impose arbitration upon guileless consumers or employees via standard form contract.<sup>111</sup> In

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107. The legislative history reveals that the Act’s drafters were focused exclusively on opponents of “roughly equivalent bargaining power,” and the primary purpose of the statute was to encourage arbitration for purposes of preserving business relationships. See Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99, 111–12 (explaining that the legislative history clearly reveals that supporters of the FAA believed it was a “bill of limited scope, intended to apply in disputes between merchants of approximately equal economic strength to questions arising out of their daily relations”).

108. FEDERAL ARBITRATION ACT, 9 U.S.C. § 2 (2012).

109. Moses, *supra* note 107, at 123.

110. See Steven A. Meyerowitz, *The Arbitration Alternative*, A.B.A. J., Feb. 1985, at 78, 79 (reporting on the increase of commercial, labor and construction cases arbitrated before the AAA from 1975 to 1985).

111. See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 414 (1967) (Black, J., dissenting) (“On several occasions [1925 legislators] expressed opposition to a law which would enforce

the 1953 case *Wilko v. Swan*, the Court concluded that claims brought by an investor under the federal securities laws could not be forced into arbitration.<sup>112</sup> Writing for the Court, Justice Reed observed that arbitration was particularly ill-suited for resolution of such weighty federal statutory claims because arbitral decisions were announced “without explanation of their reasons and without a complete record of their proceedings, [concealing] the arbitrators’ conception of the legal meaning of such statutory requirements as ‘burden of proof,’ ‘reasonable care’ or ‘material fact.’”<sup>113</sup> For the next thirty years, the Court maintained this policy of disallowing the arbitration of federal statutory claims, consistently holding that “Congress did not intend to funnel public law causes of action into a forum that lacked full-bore discovery, rigorous evidentiary rules, and appellate rights, and therefore did not ‘provide an adequate substitute for a judicial proceeding.’”<sup>114</sup>

But by the early 1980s, the Court’s position on arbitration had fundamentally shifted.<sup>115</sup> Chief Justice Burger had long been an unapologetic opponent of the “litigation explosion,”<sup>116</sup> and he saw in arbitration significant potential to address the issue.<sup>117</sup> While Burger did not have a Court that fully shared his deep seated hostility to litigation—such a Court would only come to fruition under his successors<sup>118</sup>—the Chief Justice’s

even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees.” (internal citations omitted).

112. 346 U.S. 427, 435 (1953).

113. *Id.* at 436. Very influential in the *Wilko* decision was an amicus brief filed by the SEC, in which the nascent agency argued that public policy prohibited the enforcement of pre-dispute arbitration clauses which prevented access to the courts, particularly “where the statutory rights involved, although conferred on a private party, are affected by the public interest.” Brief for the Sec. and Exch. Comm’n, Amicus Curiae at 23, *Wilko v. Swan*, 346 U.S. 427 (1953), 1953 WL 78482, at \*23.

114. David Horton, *Mass Arbitration and Democratic Legitimacy*, 85 U. COLO. L. REV. 460, 491 (2014) (citing *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 222–23 (1985)).

115. See, e.g., Jeffrey W. Stempel, *Tainted Love: An Increasingly Odd Arbitral Infatuation in Derogation of Sound and Consistent Jurisprudence*, 60 U. KAN. L. REV. 795, 829 (2012) (“Despite early-1980s cases . . . that reflected continued wariness about arbitration, by the mid-1980s the Court had embarked on a new path.”).

116. See, e.g., Jeffrey W. Stempel, *New Paradigm, Normal Science, or Crumbling Construct? Trends in Adjudicatory Procedure and Litigation Reform*, 59 BROOK. L. REV. 659, 690 n.119, 715 n.205, 717 n.206 (1993) (noting the anti-litigation turn taken by legal elites in part as a response to Chief Justice Burger’s efforts, including the 1976 Pound Conference, which criticized litigation as wasteful and inefficient, and extolled the virtues of arbitration).

117. See, e.g., Chief Justice Warren E. Burger, Keynote Address at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (Apr. 7, 1976). See also Burbank & Farhang, *supra* note 12, at 1588 (noting that Chief Justice Burger “made no secret of his antipathy toward the ‘litigation explosion’ of the 1970s,” and describing the 1976 Pound Conference as “the most important event in the counteroffensive” against litigation (internal citations omitted)); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676 (1986) (noting that Chief Justice Burger believed “that ADR must be used to curb the ‘flood’ of ‘new kinds of conflicts’ (such as ‘welfare . . . claims under the Equal Protection Clause’) that have purportedly overwhelmed the judicial system” (internal citations omitted)).

118. See generally THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN’T (Vincent Blasi ed., 1983).

enthusiasm for “alternative dispute resolution” found early adherents among even his liberal brethren.<sup>119</sup> Thus, Justice Brennan’s majority opinion in the 1983 *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation* decision described the FAA as “a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.”<sup>120</sup> A year later, Justice Brennan (along with Justice Marshall) again joined the Chief Justice and an anti-litigation majority in *Southland Corp. v. Keating*, applying the FAA to state courts.<sup>121</sup>

To be fair, at the time *Moses H. Cone* and *Southland* were decided, the latent capacity of arbitration to achieve anti-litigation goals may not yet have been entirely clear. While a number of conservative Justices seemed to have had an inkling that “expanding the [FAA] and embracing arbitration” would further their “personal preference” for less litigation,<sup>122</sup> the centrist and liberal Justices took longer to catch on.<sup>123</sup> At least in part, this belated response was based on a widely held perception that arbitration—done right—could provide cost effective, speedy dispute resolution to consumers and employees with small value claims who would otherwise face great difficulty accessing the court system.<sup>124</sup> But once the liberal Justices fully grasped the claim suppressing effects of arbitration, it was too late to stop its jurisprudential advance.<sup>125</sup> As the decade progressed, the “liberal federal policy” favoring arbitration fully rolled back the rule of *Wilko*,<sup>126</sup> with the Court holding that claims arising

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119. See, e.g., Warren E. Burger, *Using Arbitration to Achieve Justice*, ARB. J., Dec. 1985, at 3, 6 (“[I]n terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases.”); see also *Chief Justice Urges Greater Use of Arbitration*, N.Y. TIMES, Aug. 22, 1985, <http://www.nytimes.com/1985/08/22/us/chief-justice-urges-greater-use-of-arbitration.html>.

120. 460 U.S. 1, 24 (1983).

121. 465 U.S. 1, 10 (1984).

122. Stempel, *supra* note 115, at 834.

123. See, e.g., *Perry v. Thomas*, 482 U.S. 483, 484, 489 (1987) (Marshall, J.) (showing Justice Marshall—in a decision joined by Justice Brennan among others—compelled arbitration of a wage claim, preempting a state law exempting such claims from arbitration).

124. See, e.g., *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995) (discussing how Justice Breyer—in a decision joined by Justices Stevens, Souter, and Ginsburg—upheld arbitration where “the typical consumer who has only a small damages claim (who seeks, say, the value of only a defective refrigerator or television set)” would otherwise be left “without any remedy but a court remedy, the costs and delays of which could eat up the value of an eventual small recovery”).

125. See, e.g., *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 247 (1987) (Brennan, Marshall, & Blackmun, JJ., concurring in part and dissenting in part); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985) (Brennan, Marshall, & Stevens, JJ., dissenting); see also Stempel, *supra* note 115, at 842 (describing the doctrinal difficulties faced by Justice Brennan, “the author of *Moses H. Cone* and part of the *Southland* majority,” as he “suddenly positioned himself against arbitration” in a series of dissenting decisions beginning with *Mitsubishi*).

126. See, e.g., *Shearson/Am. Express, Inc.*, 482 U.S. at 225 (refusing to extend *Wilko* to claims under the 1934 Act); *Mitsubishi Motors Corp.*, 473 U.S. at 625 (“[W]e find no warrant in the Arbitration Act for implying in every contract within its ken a presumption against arbitration of statutory claims.”); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 216, n.1, 219 (1985) (criticizing the rule of *Wilko*).

under the federal securities,<sup>127</sup> antitrust,<sup>128</sup> RICO,<sup>129</sup> and employment statutes<sup>130</sup> were fully arbitrable.

By the 1990s, the utility of arbitration as a vehicle for achieving long sought anti-lawsuit objectives was unmistakable. In *Gilmer v. Interstate/Johnson Lane Corp.*,<sup>131</sup> and then again in *Circuit City Stores, Inc. v. Adams*,<sup>132</sup> the Court enforced arbitration clauses imposed in standard form employment contracts to preclude the litigation of discrimination claims in federal court.<sup>133</sup> During this period, the Court also upheld arbitration clauses over challenges of unconscionability and unfairness.<sup>134</sup> Now fully grasping the import of such a broad expansion of the FAA on legal claims, the liberal wing began to deliver more powerful and pointed dissenting opinions; notably, Justices Stevens, Marshall, and Souter in *Gilmer* accused the majority of ignoring clear statutory language in order to impose their “personal preferences for private ordering and reduced litigation,”<sup>135</sup> and all four liberal Justices dissented in *Circuit City*, sharply criticizing the majority’s “misuse[ of] its authority” in “ignor[ing] the interest of the unrepresented employee” by interpreting the FAA according to “its own policy preferences.”<sup>136</sup>

During this period, the conservative wing of the Court also limited the traditional role of judges in policing the fairness of arbitration clauses by granting greater authority to arbitrators.<sup>137</sup> In a series of cases, the Justices determined that parties could delegate to the arbitrator many issues that had previously been decided by courts—including whether the arbi-

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

128. *Mitsubishi Motors Corp.*, 473 U.S. at 626 (“[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited” the enforcement of the Act in controversies based on statutes).

129. *Shearson/Am. Express, Inc.*, 482 U.S. at 242 (holding that claims under the Securities Exchange Act and Racketeer Influenced and Corrupt Organizations Act were arbitrable).

130. See *infra* notes 131–33 and accompanying text (discussing *Gilmer* and *Adams*).

131. 500 U.S. 20, 33 (1991) (“Mere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”).

132. 532 U.S. 105, 109 (2001) (finding the FAA applies to all employment contracts, except those of transportation workers).

133. See, e.g., Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 408 (2000) (“Before 1991, most parties believed that courts would not enforce mandatory arbitration of statutory employment discrimination claims.”).

134. See, e.g., *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 82 (2000) (rejecting unconscionability challenge to an arbitration clause which was silent on fees and costs); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995) (rejecting unconscionability challenge to an arbitration clause which dictated a distant and inconvenient forum).

135. Stempel, *supra* note 115, at 859.

136. *Circuit City Stores, Inc.*, 532 U.S. at 132–33 (Stevens, J., dissenting).

137. See, e.g., *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444 (2003); *PacifiCare Health Sys., Inc. v. Book*, 538 U.S. 401 (2003); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002).



tration clause itself was unconscionable.<sup>138</sup> By granting contract drafters the authority to arrogate to arbitrators questions traditionally decided by judges, right-leaning Justices substantially reduced the role of courts and approved a form of private ordering with significant substantive law effects.<sup>139</sup>

The sheer number of pro-arbitration decisions in the late-1990s revealed a Court determined to redefine the reach of the FAA.<sup>140</sup> And, as the potential for widespread use of arbitration clauses to avoid liability to workers and consumers came into focus, the U.S. Chamber of Commerce and other conservative groups began submitting amicus briefs to the Supreme Court in support of arbitration—a practice that continues to the present.<sup>141</sup>

When the Roberts Court took up a string of arbitration cases in the 2000s, a sort of permanent 5–4 split emerged, with the Court’s liberals routinely dissenting from decisions enforcing arbitration clauses.<sup>142</sup> Clearly, somewhere between Chief Justice Burger’s mid-1970s embrace of “alternative dispute resolution” and Chief Justice Roberts’ investiture, the Court’s liberal wing woke up to the potential of arbitration to simply preclude the prosecution of claims by consumers and workers.<sup>143</sup>

138. See, e.g., *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 70–72 (2010).

139. See, e.g., Elizabeth M. Avery, *Green Tree Financial Corp. v. Bazzle: Class Actions and the Future of Arbitrating Antitrust Disputes*, 19 ANTITRUST 24, 24 (2005) (“[T]he Court’s growing body of jurisprudence suggest[s] a limited role for the courts in disputes governed by arbitration agreements.”); David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F. L. REV. 49, 80 (2003) (“[T]hese cases show a trend toward moving . . . enforceability questions into the arbitrator’s purview, consistent with the sweeping pro-arbitration policy that will result in more cases . . . going to arbitration.”).

140. See, e.g., *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681 (1996); *Vimar Seguros Y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 541 (1995); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58–64 (1995); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 270–82 (1995).

141. *Gilmer* is also the first arbitration related case in which the U.S. Chamber of Commerce filed an amicus brief urging the Court to enforce an arbitration clause under the FAA. See Brief Amicus Curiae of the Chamber of Commerce of the U.S. in Support of the Respondent, *Gilmer v. Interstate/Johnson Lane Co.*, 500 U.S. 20 (1991) (No. 90-18), 1990 WL 10009002. See also SOUTHWORTH, *supra* note 7, at 35–36, Table 2.2 (observing that from 2000–2006, fifty-three conservative legal advocacy groups, which now “rival their liberal counterparts in size and resources,” filed 204 briefs in Supreme Court cases).

142. See, e.g., *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. at 76 (Stevens, J., dissenting, joined by Justices Ginsburg, Breyer, and Sotomayor); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662 (2010) (Ginsburg, J., dissenting, joined by Justices Stevens and Breyer); *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 592 (2008) (Stevens, J., dissenting, joined by Kennedy; Breyer, J., dissenting); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001) (Stevens, J., dissenting, joined by Justices Ginsburg and Breyer, and in which Justice Souter joined in part); *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000) (Ginsburg, J., concurring in part and dissenting in part, joined by Justices Stevens, Souter, and Breyer).

143. Justice Stevens may have become aware of the liability-limiting possibilities of arbitration as early as his dissenting opinion in *Southland Corp. v. Keating*, 465 U.S. 1, 17–21 (1984), where he expressed concern that the majority’s ruling would prohibit states from invalidating “as contrary to public policy” arbitration clauses which “exclud[e] wage claims from arbitration . . . or provid[e] special protection for franchisees.” See also *Gilmer*, 500 U.S. at 42–43 (“When the FAA was passed in 1925, I doubt that any legislator who voted for it expected it to apply to statutory claims, to form contracts between parties of unequal bargaining power, or to the arbitration of disputes arising out of the employment

At the same time, the ability of arbitration to advance the Reagan–Bush II agenda of decimating the “lawsuit industry” appears to have tempted the conservative Justices—most prominently Justices O’Connor, Scalia, and (more slowly) Thomas—into abandoning long-held views that the FAA does not apply to state law cases.<sup>144</sup> Justices Scalia and Thomas, for example, dissented on precisely these federalism grounds when the Court held state law preempted in *Allied-Bruce Terminix Companies Inc. v. Dobson*.<sup>145</sup> Subsequently, Justice Thomas kept up the states’ rights fight alone in a series of cases—including *Doctor’s Associates, Inc. v. Casarotto*,<sup>146</sup> *Green Tree Financial Corporation v. Bazzle*,<sup>147</sup> and *Buckeye Check Cashing, Inc. v. Cardegna*.<sup>148</sup> But by the time the Court turned its attention to the effects of arbitration clauses upon state law consumer class actions in *AT&T Mobility v. Concepcion*, these federalist principles had been fully laid aside—collateral damage in the service of the Reaganite cause.<sup>149</sup>

### B. Class Actions, *Concepcion*, and Italian Colors

Meanwhile, over roughly the same period in which the Court profoundly shifted its views on arbitration, Rule 23(b)(3) class actions were becoming an increasingly dominant and controversial force in litigation.

relationship. In recent years, however, the Court ‘has effectively rewritten the statute’ and abandoned its earlier view that statutory claims were not appropriate subjects for arbitration.” (internal citations omitted)).

144. Justice O’Connor was an early and consistent opponent of applying the FAA to state court proceedings. See *Perry v. Thomas*, 482 U.S. 483, 493 (1987) (O’Connor, J., dissenting, analyzing legislative history of FAA to argue that Congress intended it to apply only to federal court proceedings); *Southland*, 465 U.S. at 25–29 (O’Connor, J., dissenting) (same); *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 30 (1983) (O’Connor, J., joining dissent on procedural grounds). By the time *Allied-Bruce Terminix* was decided, however, “Justice O’Connor appeared to have thrown in the towel . . . [s]he still thought *Southland* was wrongly decided, but acknowledged its precedential authority and concurred.” Stempel, *supra* note 115, at 852 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 282 (1995) (O’Connor, J., concurring)).

145. 513 U.S. 265, 284–85 (1995) (Scalia, J., dissenting) (asserting that *Southland* was wrongly decided, and that adhering to its ruling that the FAA applies to state court proceedings “entails a permanent, unauthorized eviction of state-court power to adjudicate a potentially large class of disputes”); *id.* at 285 (“I . . . stand ready to join four other Justices in overruling . . . *Southland*.”); *id.* at 295 (Thomas, J., dissenting) (“In my view, [stare decisis] is insufficient to save *Southland*.”).

146. 517 U.S. 681, 689 (1996) (Thomas, J., dissenting) (asserting the FAA does not apply to state court proceedings); see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60 (1995) (Thomas, J., dissenting) (arguing that the choice-of-law provision in an arbitration agreement should make it an issue of state law, thus not governed by the FAA).

147. 539 U.S. 444, 460 (2003) (Thomas, J., dissenting) (“[T]he FAA cannot be a ground for preempting a state court’s interpretation of a private arbitration agreement.”).

148. 546 U.S. 440, 449 (2006) (“I remain of the view that the [FAA] does not apply to proceedings in state courts.”); see also *Preston v. Ferrer*, 552 U.S. 346, 363 (2008) (“As I have stated on many previous occasions, I believe that the [FAA] does not apply to proceedings in state courts.”).

149. See Stempel, *supra* note 115, at 802 n.32 (observing that “[i]n nearly all of the Court’s reasonably ‘close’ arbitration decisions . . . the Justices supporting enforced arbitration, but resisting class-wide arbitration, have been those appointed by Republican presidents,” and that while Justice Thomas briefly ran “counter to this typology” with his strong federalism-based dissents, “since the dawn of the Roberts Court in 2004, Justice Thomas has almost always aligned with the pro-arbitration interests or the pro-powerful business forces”).

Bearing little resemblance to their 1960s predecessors—those public spirited injunctive class actions aimed at civil rights enforcement or institutional reform—the 1980s damages class actions focused on aggregating tens of thousands of claimants injured by toxic exposures,<sup>150</sup> anticompetitive conduct, or fraudulent acts.<sup>151</sup> The size and sophistication of these modern class actions fundamentally altered the procedural playing field, as defendants were suddenly confronted with many more claimants than would ordinarily sue on an individual basis, with potentially catastrophic financial consequences.<sup>152</sup> The result was a series of jaw-dropping settlements,<sup>153</sup> along with the public emergence of a formidable plaintiffs' class action bar—"a group of lawyers willing and able to take on complex and risky cases" by "pool[ing] resources and aggressively shap[ing] litigation across many enterprises and industries, in fields including antitrust, consumer welfare, environmental, and, of course, securities law."<sup>154</sup>

Employed in the service of forcing substantial settlement funds and attorneys' fees, class action litigation quickly became a high profile and unwelcome threat to business interests. Not surprisingly, these powerful opponents actively lobbied for legislative reform to curtail the burgeoning "class action industry."<sup>155</sup> And they certainly succeeded in generating some dramatic proposals, such as a 2003 Republican-sponsored bill to prohibit plaintiffs' lawyers from receiving fees based on a percentage of recovery in large class actions.<sup>156</sup> But, for the most part, legislative efforts to eliminate class actions met with substantial resistance from those who credited the device with providing claimants with small dollar damages access to courts as "private attorneys general," helping to enforce public law. Ultimately, for many of same reasons the anti-lawsuit movement failed to reform ordinary civil litigation, direct legislative efforts to wipe

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150. See, e.g., *In re A.H. Robins Co.*, 880 F.2d 709, 752 (4th Cir. 1989) (approving class certification of Dalkon Shield claims); *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 174 (2d Cir. 1987) (approving class certification in case involving toxic defoliant used in Vietnam war).

151. See, e.g., John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 726 (1986) (describing the emergence of a highly effective plaintiffs' class action bar in securities fraud litigation).

152. Charles Silver, "We're Scared to Death": *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003).

153. See Savett, *supra* note 23, at 386–88 (documenting class action settlements ranging from \$50 million to \$7 billion).

154. Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 111–12 (2006) (internal citations omitted).

155. See, e.g., *id.* at 104–06 (documenting reformist literature); see also Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiff's Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991); Elliot J. Weiss & John S. Beckerman, *Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995).

156. See Marcia Coyle, *Times Five: Bolstered by High Fees in Tobacco Suits, Senate Bill Caps Hourly Pay in Class Actions*, BROWARD DAILY BUS. REV. (Palm Beach), May 20, 2003 (reporting on proposal by Senators Kyl and Cornyn to limit contingency fees earned by lawyers in suits resulting in settlements or judgments of \$100 million or more).

out class actions and aggregate litigation proved unsuccessful or limited in scope.<sup>157</sup>

By the early 2000s, as it gradually became apparent that serious class action reform was unlikely to emerge from the political branches, corporate interests began looking to courts to achieve their goals. By this time, the composition and disposition of the federal judiciary had changed dramatically as a result of the sustained efforts of three Republican Presidents, and corporate defendants found their arguments about the coercive nature of class litigation gradually met with greater success.<sup>158</sup> So, rather than quickly settle class cases, business defendants instead contested every element of Rule 23; courts—populated with Republican-appointed judges generally disposed against consumer, employment, and other mass-harm cases—proved receptive to these challenges. During this period, standards for certifying class actions became increasingly more demanding,<sup>159</sup> small-claims consumer class actions were fundamentally circumscribed,<sup>160</sup> and sprawling employment class actions were reined in by restrictive interpretations of the commonality requirement of Rule 23(a).<sup>161</sup>

But by far the most effective strategy implemented by class action opponents was drafting standard form consumer contracts to include arbitration provisions expressly waiving the right to any collective adjudication of claims.<sup>162</sup> These class action bans ensured that any claim against a corporate defendant could be asserted only in a one-on-one, non-aggregated arbitral proceeding. For the early adopters, class action bans promised virtual immunity from liability, given the certainty that consumers and employees would almost never seek to arbitrate small dollar

157. See, e.g., Class Action Fairness Act, Pub. L. No. 109-2, 119 Stat. 4 (2005); Securities Litigation Uniform Standards Act of 1998, Pub. L. No. 105-353, 112 Stat. 3227 (1998); Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (1995).

158. See *supra* note 106 and accompanying text.

159. See, e.g., *In re* Initial Pub. Offerings Sec. Litig., 471 F.3d 24, 40–41 (2d Cir. 2006) (rejecting the “some showing” standard and adopting a requirement that plaintiffs provide “definitive” proof, through “affidavits, documents, or testimony to . . . [establish] that each Rule 23 requirement has been met”); *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 316 (3d Cir. 2008) (“An overlap between a class certification requirement and the merits of a claim is no reason to decline to resolve relevant disputes when necessary to determine whether a class certification requirement is met.”).

160. For example, the “ascertainability” requirement, which courts have grafted onto the Rule 23(b)(3) manageability prong, has allowed judges in consumer cases to deny class certification absent reliable proof of purchase or a knowable list of injured plaintiffs. This requirement has rendered many (if not most) cases arising from small retail purchases uncertifiable. See, e.g., *In re* Conagra Peanut Butter Prods. Liab. Litig., 251 F.R.D 689 (N.D. Ga. 2008) (denying class certification where purchasers of peanut butter were insufficiently ascertainable); *In re* Fresh Del Monte Pineapples Antitrust Litig., 2008 WL 5661873 (S.D.N.Y. Feb. 20, 2008) (pineapples); *In re* Phenylpropanolamine (PPA) Prods. Liab. Litig., 214 F.R.D 614 (W.D. Wash. 2003) (cough syrup).

161. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011).

162. See, e.g., Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 11 (2000) [hereinafter Sternlight, *As Mandatory Binding*] (“One might call this the ‘do it yourself’ approach to law reform: the company need not convince any legislature to pass revised laws, nor persuade any judicial body to change court rules, but rather merely choose to eliminate the pesky class action on its own.”).

claims individually or to attract counsel on a contingent fee basis. Within a few years, these “get out of jail free” provisions were standard fare in credit card, telecom, and e-commerce agreements, among many others.<sup>163</sup>

As plaintiffs’ lawyers and access-to-justice advocates began to challenge these class bans, shortly after the turn of this century, corporate defendants found themselves cosseted by the same players that had led the legislative efforts for litigation reform. Groups including the Chamber of Commerce, the American Tort Reform Association, the Pacific Research Institute, and the Manhattan Institute brought to the pro-arbitration campaign their stables of reliable researchers, faux-grass-roots organizations, sympathetic journalists, off-shoot institutes, lobbyists, and an army of amicus writers.<sup>164</sup> The talking points were clear: mandatory arbitration is a faster, cheaper, and more efficient means of resolving claims,<sup>165</sup> and companies would prefer to look their customers and employees in the eye, in an informal arbitral setting, rather than stare down the fully-loaded barrels of weapons wielded by rapacious class action lawyers. Mandatory arbitration was the ideal inheritor of the anti-lawsuit movement.<sup>166</sup>

The initial battlegrounds were state and lower federal courts faced with motions to compel arbitration of putative class actions, which plaintiffs opposed on grounds that the underlying arbitration clauses were un-

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163. See, e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 627 (asserting that arbitration clauses are increasingly used by companies that “touch consumers’ day-to-day lives,” including “telephone companies, internet service providers, credit card issuers, payday lenders, mortgage lenders, health clubs, nursing homes, retail banks, investment banks, mutual funds, and the sellers of all manner of goods and services”).

164. Mencimer, *supra* note 13 (describing the growth and development of the anti-lawsuit coalition). See also SEARLE CIVIL JUSTICE INSTITUTE, SEARLE CENTER ON LAW, REGULATION AND ECONOMIC GROWTH (2009), available at [https://www.adr.org/aaa/ShowPDF?doc=ADR\\_STG\\_010205](https://www.adr.org/aaa/ShowPDF?doc=ADR_STG_010205) (providing study funded by conservative think tank purporting to find arbitration more efficient than litigation).

165. See, e.g., *The Federal Arbitration Act and Access to Justice: Will Recent Supreme Court Decisions Undermine the Rights of Consumers, Workers, and Small Businesses?: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 1 (2013), available at <http://www.judiciary.senate.gov/imo/media/doc/12-17-13ParasharamiTestimony.pdf> (statement of Archis A. Parasharami, Partner, Mayer Brown LLP) (“Arbitration before a fair, neutral decisionmaker leads to outcomes for consumers and individuals that are comparable or superior to the alternative—litigation in court—and that are achieved faster and at lower expense.”); Donald L. Kreindler, *Arbitration Practice Under Federal Law*, 18 FORUM 348, 348 (1983) (describing arbitration as a “speedier, less costly and far more satisfactory alternative to resolv[ing] business disputes”); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 91–93 (asserting that adhesion agreements to arbitrate are fair in that they allow companies to pass on savings in costs from standard forms to their customers and employees); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements—with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 255 (2006) (“[W]hatever lowers costs to businesses tends over time to lower prices to consumers.”).

166. See, e.g., *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (asserting that the 1925 Congress was not “blind to the potential benefit of the [FAA] for expedited resolution of disputes,” and quoting a House Report saying that “the costliness and delays of litigation . . . can be largely eliminated by agreements for arbitration.” (internal citations omitted)).

conscionable as a matter of state contract law.<sup>167</sup> Corporate defendants enjoyed early success beating back these challenges, as many state and federal courts routinely upheld arbitration clauses containing class action bans in the early 2000s.<sup>168</sup> But by the end of the decade, access-to-justice forces appeared to have turned the tide, as some fourteen state supreme courts had held that class action bans embedded in arbitration clauses were unconscionable under state contract law.<sup>169</sup> Most prominently, the California Supreme Court in *Discover Bank v. Superior Court* held that class action bans embedded in arbitration clauses were unconscionable because they “may operate effectively as exculpatory contract clauses that are contrary to public policy.”<sup>170</sup>

And then, in 2011, the Supreme Court decided *AT&T Mobility v. Concepcion*.<sup>171</sup> In a 5–4 plurality decision, authored with evident relish by Justice Scalia, the Court struck down under the Supremacy Clause the *Discover Bank* ruling, under which arbitration clauses in consumer agreements were generally regarded as unconscionable and unenforceable unless they allowed for class proceedings inside the arbitral forum.<sup>172</sup> Finding that class proceedings are antithetical to the idea of arbitration as enshrined in the FAA, the Court held the California unconscionability rule was preempted because it posed an obstacle to the very object of the FAA, which is to ensure enforcement of the agreement as written.<sup>173</sup> Justice Scalia was openly dismissive of the argument made by the dissent “that class proceedings are necessary to prosecute small-dollar claims that might otherwise slip through the legal system.”<sup>174</sup> Brushing the dissent away, Justice Scalia flatly stated that “States cannot require a procedure that is inconsistent with the FAA, even if it is desirable for unrelated rea-

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167. Under the FAA’s saving clause, a party may oppose arbitration on such “grounds as exist at law or in equity for the revocation of any contract,” including state-law unconscionability. *See, e.g., Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (holding that “generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2” of the FAA).

168. *See, e.g., Snowden v. CheckPoint Check Cashing*, 290 F.3d 631, 638 (4th Cir. 2002) (“We also reject Snowden’s argument that the Arbitration Agreement is unenforceable as unconscionable because without the class action vehicle, she will be unable to maintain her legal representation given the small amount of her individual damages.”); *Rains v. Found. Health Sys. Life & Health*, 23 P.3d 1249, 1253 (Colo. Ct. App. 2001) (“[A]rbitration clauses are not unenforceable simply because they might render a class action unavailable.”); *Pick v. Discover Fin. Servs., Inc.*, 2001 WL 1180278, at \*5 (D. Del. Sept. 28, 2001) (“[I]t is generally accepted that arbitration clauses are not unconscionable because they preclude class actions.”); *Gras v. Assocs. First Capital Corp.*, 786 A.2d 886, 893 (N.J. Super. Ct. App. Div. 2001) (enforcing class action provision against unconscionability challenge and concluding that there is no “overriding public policy in favor of class actions”).

169. *See, e.g., Gilles & Friedman, supra* note 163, at 633 (describing “flood of state court decisions invalidating class action waivers” announced between 2005 to 2011, with “at least fourteen states . . . rul[ing] class action waivers unenforceable” on broad public policy grounds).

170. 113 P.3d 1100, 1108 (Cal. 2005).

171. 131 S.Ct. 1740 (2011).

172. *Id.* at 1750.

173. *Id.* at 1753 (finding California’s *Discover Bank* rule “stands as an obstacle” to the purposes of the FAA).

174. *Id.*

sons.”<sup>175</sup> Justice Thomas—who had previously dissented in six cases on the grounds that the FAA does not apply to state court proceedings—wrote a concurring opinion in *Concepcion* which laid bare his utter abandonment of federalism principles in service of anti-litigation outcomes.<sup>176</sup>

Undaunted, plaintiffs continued to challenge arbitration clauses containing class action waivers on the grounds that these waivers disable litigants from vindicating their federal statutory rights. Specifically, a class ban represents an implicit prohibition against spreading the costs of litigation across multiple claimants in collective litigation, precluding the individual plaintiff from being able to bring an antitrust, employment discrimination, or other complex, expensive statutory claim.<sup>177</sup> Based on a series of Supreme Court decisions recognizing the importance of ensuring a fair and accessible arbitral forum,<sup>178</sup> this legal strategy was initially successful, as a series of circuit courts invalidated class action waivers on “vindication of rights” grounds.<sup>179</sup>

And then, in 2013, came *American Express Company v. Italian Colors Restaurant* (“*Italian Colors*”)—featuring the same five Justice majority as *Concepcion* and an opinion authored with even more relish by Justice Scalia.<sup>180</sup> In *Italian Colors*, the small merchant plaintiffs had proven that, as a factual matter, the imposition of American Express’s clause mandating one-on-one arbitration stripped them of their ability to pursue an antitrust claim because it forced each plaintiff to shoulder non-recoupable expert and other costs that vastly exceeded any amount the individual plaintiff could hope to win.<sup>181</sup> The Supreme Court rejected the challenge, holding that the FAA demands enforcement of the clause as

175. *Id.*

176. *Id.* at 1753–56 (Thomas, J., concurring) (observing that the only viable defenses under FAA § 2 are defenses to the formation of a contract—for example, duress or fraudulent inducement—and that other public-policy-based challenges may well provide legal grounds to challenge the validity of any contract, but they do not count as “grounds . . . for the revocation” of contracts within the meaning of FAA § 2).

177. Gilles & Friedman, *supra* note 163, at 633.

178. See, e.g., *Green Tree Financial Corp. Alabama*, 531 U.S. 79, 92 (2000) (“[W]here . . . a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs.”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637–38 (1985) (concluding that federal claims are fully arbitral, but only “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum”).

179. See, e.g., *Kristian v. Comcast Corp.*, 446 F.3d 25, 57 (1st Cir. 2006) (invalidating class action ban in arbitration clause because the “sheer complexity” of an antitrust case required an intensive factual analysis and prohibitively expensive expert testimony, such that plaintiffs could not enforce their rights except on a class-wide basis); *Bradford v. Rockwell Semiconductor Systems, Inc.*, 238 F.3d 549, 556 (4th Cir. 2001) (invalidating an arbitration clause after considering “the claimant’s ability to pay the arbitration fees and costs . . . and whether that cost differential [between arbitration and litigation] is so substantial as to deter the bringing of claims”).

180. 133 S. Ct. 2304 (2013).

181. See *In re Am. Express Merchs.’ Litig.*, 554 F.3d 300, 315–16 (2d Cir. 2009) (finding that plaintiffs had met their burden with evidence that they “would incur prohibitive costs if compelled to arbitrate” because the non-recoverable, per-claimant costs of bringing their claims in arbitration would exceed their expected recoveries many times over).

written.<sup>182</sup> Revealing a strong anti-lawsuit sentiment, Justice Scalia asserted that, despite Congressional authorization of private rights of action and treble damages, “[t]he antitrust laws do not guarantee an affordable procedural path to the vindication of every claim.”<sup>183</sup> Nor do these substantive federal statutes demand a departure from the “usual rule” that “litigation is conducted by and on behalf of the individual named parties only.”<sup>184</sup> Accordingly, the majority found that arbitration clauses which rely on the “usual rule” and deny the availability of class-based adjudication, are entirely enforceable.<sup>185</sup>

### C. Regulatory Reversal?

The status quo is straightforward. Unless Congress enacts legislation to overrule *Italian Colors* and *Concepcion*,<sup>186</sup> or the Supreme Court reverses itself, class action bans in arbitration clauses—with the possible ex-

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182. *Am. Express Co.*, 133 S.Ct. at 2311 (“[T]he fact that it is not worth the expense involved in proving a statutory remedy does not constitute the elimination of the right to pursue that remedy.” (internal citations omitted)).

183. *Id.* at 2306.

184. *Id.* at 2309 (citing *Califano v. Yamaski*, 442 U.S. 682, 700–01 (1979)).

185. In a scathing dissent, Justice Kagan summarized the majority’s rejection of plaintiffs’ cost-based vindication of rights challenges in three words: “Too darn bad.” *Id.* at 2313.

186. There have been a smattering of area-specific legislative prohibitions against mandatory arbitration. See, e.g., Dodd-Frank Wall Street Reform and Consumer Protection Act, 7 U.S.C.A. §26 (providing that an employee cannot waive his right to a judicial forum regarding a dispute that arises under the whistleblower protection section of the act); 10 U.S.C. § 987(e)(3), (f)(4) (voiding arbitration clauses in payday loan or consumer credit contracts, with the exception of residential mortgages and car loans, for members of the military or their families); 15 U.S.C. § 1226(a)(2) (prohibiting automobile manufacturers from imposing pre-dispute arbitration clauses in their franchise agreements with dealers); Truth In Lending Act, 15 U.S.C.A. § 1639c (no mortgage lender may include a pre-dispute arbitration clause in its loan agreements); Sarbanes-Oxley Act, 18 U.S.C. § 1514A(e) (contracts requiring pre-dispute arbitration of whistleblower claims under the Sarbanes-Oxley Act not enforceable); Department of Defense Appropriations Act of 2010, Pub. L. No. 111-118, §8116(a), 123 Stat. 3409, 3454 (prohibits federal contractors who receive funds under the Act for contracts in excess of \$1,000,000 from requiring their employees or independent contractors to arbitrate “any claim under Title VII of the Civil Rights Act of 1964 or any tort related to or arising out of sexual assault or harassment”). Numerous bills also seek broader overriding of the Supreme Court’s pro-arbitration jurisprudence. See, e.g., Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 2929 (2011); Arbitration Fairness Act of 2009, H.R. 1020 § 4, 111th Cong. 155 Cong. Rec. H. 1517 (2009); Arbitration Fairness Act of 2007, S. 1782 § 4, 110th Cong. 153 Cong. Rec. S. 9144 (2007). The most recent version of this bill was introduced by Senators Al Franken (D-Minn.), Richard Blumenthal (D-Conn.), and Representative Hank Johnson (D-Ga.) immediately after *Concepcion* was decided, and would prohibit class action bans in all consumer, employment, and civil-rights related contracts. See David Lazarus, *Bill Aims to Restore Consumers’ Right to Sue*, L.A. TIMES (Oct. 18, 2011), available at <http://articles.latimes.com/2011/oct/18/business/la-fi-lazarus-20111018>. See also Consumer Mobile Fairness Act of 2011, S. 1652, 112th Cong. § 3 (2011). This bill, introduced by Senators Blumenthal and Sheldon Whitehouse (D-Pa.), would void arbitration clauses in mobile phone contracts. While both the Arbitration Fairness Act and the Consumer Mobile Fairness Act were referred to the Senate Judiciary Committee, which held hearings under the chairmanship of Senator Patrick Leahy (D-VT), neither bill cleared the committee. See Michelle L. Caton, *Form Over Fairness: How the Supreme Court’s Misreading of the Federal Arbitration Act Has Left Consumers in Lurch*, 21 GEO. MASON L. REV. 497, 527 (2014) (“Of the 139 bills introduced into Congress between 1995 and 2010 that sought to restrict or eliminate various uses of mandatory arbitration, only five were eventually passed into law.”).



ception of the truly onerous and extreme rights stripping variety<sup>187</sup>—are presumptively enforceable. Lower federal and state courts are thus rendered powerless from preventing even the most serious claims of systemic wrongdoing from “slip[ping] through the legal system.”<sup>188</sup> Indeed, some judges—disturbed by this state of affairs—have granted motions to compel arbitration under protest, pleading with the Supreme Court to rethink its jurisprudence.<sup>189</sup>

One possible counteractive force lies with the Consumer Financial Protection Bureau (“CFPB”), which has authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act to regulate or prohibit mandatory arbitration clauses in consumer financial contracts.<sup>190</sup> On March 10, 2015, the agency released the results of its three-and-a-half-year empirical study on the incidence and impact of these clauses on consumers—a statutorily mandated precursor to rulemaking.<sup>191</sup> The 727 page study found that millions of consumers are currently subject to mandatory arbitration clauses containing class action waivers in a variety of contracts<sup>192</sup>—though the vast majority are completely unaware of this fact—and that companies aggressively seek to enforce these provisions.<sup>193</sup> Yet,

187. See, e.g., *Ambler v. BT Americas Inc.*, 964 F. Supp. 2d 1169 (N.D. Cal. 2013) (refusing to enforce an arbitration clause mandating cost-splitting and denying attorneys’ fees).

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

189. See, e.g., *Schnuerle v. Insight Commc’ns, Inc.*, 376 S.W.3d 561, 569, 573 (Ky. 2012) (“[U]pon application of *Concepcion*, we are now constrained to conclude that under contracts like the one now before us, which contain a class action waiver and also require disputes to be arbitrated under the FAA, the federal policy favoring arbitration preempts any state law or policy invalidating the class action waiver as unconscionable based solely upon the grounds that the dispute involves many *de minimis* claims which are, individually, unlikely to be litigated. . . . We, of course, yield as we must to the United States Supreme Court’s interpretation of federal law.”); *Willis v. Debt Care, USA, Inc.*, No. 3:11-cv-430-ST, 2011 WL 7121456, at \*7–8 (D. Or. Oct. 24, 2011) (“[T]he vast majority of numerous, small-value claims . . . for statutory violations will go unprosecuted unless they may be brought as a class due to the high costs associated with pursuing individual claims. . . . This court is sympathetic to the [plaintiffs’] argument. Regrettably, *AT&T* forecloses many consumer class actions which may provide the only recovery for wronged individuals.”); *Porreca v. Rose Grp.*, 2013 WL 6498392, at \*1, \*15 (E.D. Pa. Dec. 11, 2013) (complaining that the decision to uphold the class action ban was “unappetizing” and “lamentable”); *Dean v. Draughons Junior Coll., Inc.*, 917 F.Supp.2d 751, 765 (M.D. Tenn. 2013) (“While required by the FAA, this result strikes the court as manifestly unjust and, perhaps, deserving of legislative attention. . . . [I]n cases such as the one presented here, requiring impoverished individuals to arbitrate could effectively prevent them from exercising their rights as state citizens.”).

190. Dodd-Frank Act, Pub L. No. 111-203, § 1028(a), (b), *codified in* 12 U.S.C § 5518(b); Pub L. No. 111-203, § 1414, *codified in* 15 U.S.C § 1639c(e). Section 1028(a) states that the agency may “prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties,” if it finds such a prohibition “in the public interest and for the protection of consumers.”

191. See CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) § 1, at 2, 5 (Mar. 2015) [hereinafter CFPB ARBITRATION STUDY], available at [http://files.consumerfinance.gov/f/201503\\_cfpb\\_arbitration-study-report-to-congress-2015.pdf](http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf).

192. The Study examined mandatory arbitration clauses in contracts for credit cards, prepaid cards, payday loans, checking accounts, private student loans, and mobile wireless contracts. *Id.* §1, at 9–10.

193. *Id.* at 11. The CFPB consumer survey found that 79% of consumers didn’t know whether any credit card agreements they signed had an arbitration clause, and only 7% understood that they could

despite the ubiquity of these dispute resolution provisions, only a miniscule number of complainants with claims under \$1,000 ever seek to resolve their claims in arbitration.<sup>194</sup> Further, the handful of intrepid consumers who do file individual arbitrations are rarely successful in persuading arbitrators of either the merit of their claims or the extent of their damage.<sup>195</sup>

To determine whether litigation provides greater benefits to consumers, the CFPB then studied 422 consumer financial class action settlements approved between 2008 and 2012 and concluded that these settlements entitled roughly 160 million class members to some kind of relief—totaling \$2.7 billion.<sup>196</sup> The contrast is stark: over the relevant period studied, class actions delivered far greater relief to vastly more consumers—especially those with small value claims—than individual arbitration.

Based on these findings, many observers expect the agency will soon propose rules regulating or prohibiting class action bans in standard form consumer contracts.<sup>197</sup> One well regarded financial industry report declared that the CFPB Arbitration Study has “earthshattering implications,” signaling the agency is finally prepared to be the first “federal regulator [to] propose[] rules that would make it unlawful to force consum-

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not sue their credit card issuer if their contract did include such a clause. *Id.* § 3, at 19, 22. Further, the Study found that companies invoked arbitration clauses to block class actions in 65% of credit card class cases studied, and observed that “it is rare for a company to try to force an individual lawsuit into arbitration but common for arbitration clauses to be invoked to block class actions.” *CFPB Study Finds that Arbitration Agreements Limit Relief for Consumers*, CONSUMER FIN. PROT. BUREAU (Mar. 10, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers/>.

194. CFPB ARBITRATION STUDY, *supra* note 191, §1, at 12. The CFPB found that only twenty-five consumers with claims of less than \$1000 obtained relief in an AAA arbitration in 2010 and 2011. Further, the agency refuted the hypothesis that these small value claimants were taking advantage of the small claims court carve-outs provided in some arbitration clauses, finding few claims filed by consumers in these fora. *Id.* at 15–16.

195. *Id.* §5, at 48. The CFPB found that when consumers attempted to arbitrate claims arising under the three most commonly-asserted consumer protection laws—the Fair Credit Reporting Act (“FCRA”), Truth In Lending Act (“TILA”), and the Fair Debt Collection Practices Act (“FDCPA”)—they rarely succeeded. Indeed, even where consumers were successful on the merits, they won only an average of twelve cents for every dollar claimed (or five cents of each dollar in debt disputes). *Id.* at 13. Financial services companies, on the other hand, won 93% of arbitrations and were awarded ninety-eight cents for every dollar claimed (primarily in debt collection disputes). *Id.* at 14.

196. *Id.* §8, at 3–4. Of the class action settlements studied, the total amount of gross relief—defined as the total amount defendants offer to provide in cash relief or in-kind relief and to pay in fees and other expenses—was \$2.7 billion. *Id.* This estimate includes cash relief of \$2 billion and in-kind relief of \$644 million, net of attorneys’ fees and costs. *Id.*

197. See, e.g., Carter Dougherty, *CFPB Finds Arbitration Harms Consumers, Presaging New Rules*, BLOOMBERG BUS. (Mar. 10, 2015, 8:53 AM), <http://www.bloomberg.com/news/articles/2015-03-10/cfpb-finds-arbitration-harms-consumers-in-study-presaging-rules>; *CFPB Releases Final Arbitration Study Results*, BALLARD SPAHR LLP (Mar. 10, 2015), <http://www.ballardspahr.com/alertspublications/legalalerts/2015-03-10-cfpb-releases-final-arbitration-study-results.aspx> (warning that the Arbitration Study seems to “set the stage for a rulemaking that will not be favorable to the industry”).

consumers to go to arbitration.”<sup>198</sup> The battle lines over the scope of such rules are clearly drawn, as interest groups and lobbyists for both consumer advocates and the financial services industry jockey for position.<sup>199</sup>

But most prominent in this impending regulatory clash are the anti-litigation crusaders, who have darkly warned that banning arbitration clauses containing class action waivers will only serve to reinvigorate the lawsuit industry.<sup>200</sup> In particular, the U.S. Chamber of Commerce, irked by what it perceives as the CFPB’s pro-consumer, pro-lawsuit stance, has become much more forceful in its opposition.<sup>201</sup> For example, the Chamber issued a statement upon release of the CFPB Arbitration Study questioning whether “the Bureau is really trying to protect consumers or is instead trying to protect plaintiffs’ lawyers.”<sup>202</sup> An earlier iteration of the CFPB Arbitration Study was met with the Chamber’s own review of the costs and benefits of class action litigation.<sup>203</sup> While the methodology and conclusions of this “study”—drafted by the Chamber’s lobbyists at Mayer Brown LLP<sup>204</sup>—have been widely disputed, its persistent message that

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198. Jenny Lee & Isabelle Ord, *CFPB 2015 Arbitration Study: Coming Curbs on Consumer Financial Services Contract Arbitration Provisions—6 Steps for Business*, DLA PIPER (Mar. 11, 2015), <https://www.dlapiper.com/en/us/insights/publications/2015/03/cfpb-2015-arbitration-study/>.

199. On one side, a number of consumer groups (such as the Center for Responsible Lending, the National Association of Consumer Advocates, the National Consumer Law Center, and Consumers Union) signed a letter urging CFPB Director Richard Cordray to issue a flat-out ban against mandatory arbitration clauses. Letter from National Association of Consumer Advocates et al., to Richard Cordray, Director, Consumer Fin. Prot. Bureau (Mar. 24, 2015), available at <http://www.consumeradvocates.org/sites/default/files/Ltr%20to%20CFPB%20arbitration%20FINAL%203-24-2015%20updated%205-18-15.pdf>. Similarly, Americans for Financial Reform has also come out strongly in support of regulations, concluding that the CFPB Arbitration Study “makes a compelling case for banning forced arbitration” in that bureau’s data “refutes financial industry claims that giving consumers access to the court system raises costs.” Katalina M. Bianco, *CFPB Report Jumpstarts Debate on Pros/Cons of Arbitration Clauses*, BANKING AND FIN. L. DAILY (Mar. 11, 2015), [http://www.dailyreportingsuite.com/banking-finance/news/cfpb\\_report\\_jumpstarts\\_debate\\_on\\_pros\\_cons\\_of\\_arbitration\\_clauses](http://www.dailyreportingsuite.com/banking-finance/news/cfpb_report_jumpstarts_debate_on_pros_cons_of_arbitration_clauses). On the other side, a coalition of financial services industry heavyweights—the U.S. Chamber of Commerce, the Financial Services Roundtable, and the Consumer Bankers Association—strongly oppose any rulemaking. *Id.*

200. See, e.g., *U.S. Chamber Comments on Consumer Financial Protection Bureau Arbitration Study*, U.S. CHAMBER OF COM. (Mar. 10, 2015, 8:15 AM), <https://www.uschamber.com/press-release/us-chamber-comments-consumer-financial-protection-bureau-arbitration-study> (asserting that the CFPB Arbitration Study contains “predetermined conclusions” that “ignore key facts and are the result of an unfair and biased approach” leading to “fatal flaws” and “lawyer-driven class actions lawsuits that provide millions in legal fees to lawyers, but little or no benefit to consumers”).

201. The Chamber’s Center for Capital Markets Competitiveness (“CCMC”) maintains a *CFPB Spotlight* that focuses on all the ways the Chamber believes the CFPB is overreaching or imposing onerous regulations on business. *CFPB Spotlight*, <http://www.cfpbspotlight.com/> (last visited Oct. 29, 2015).

202. See, e.g., *U.S. Chamber Comments*, *supra* note 200.

203. *Do Class Actions Benefit Class Members? An Empirical Analysis of Class Actions*, MAYER BROWN LLP 1, 2–3 (Dec. 11, 2013), available at <http://www.classdefenseblog.com/files/2013/12/Mayer-Brown-Class-Action-Study.pdf>.

204. See Alison Frankel, *Class Action Mystery: Where Does the Money Go Post-Settlement?*, REUTERS, Dec. 11, 2013, available at <http://blogs.reuters.com/alison-frankel/2013/12/11/class-action-mystery-where-does-the-money-go-post-settlement/> (“I would have been shocked if Mayer Brown’s new study of 148 federal-court class actions filed in 2009 concluded that the cases are of any real benefit to class members. Mayer Brown Supreme Court litigator Andrew Pincus, remember, is not only frequently counsel to the U.S. Chamber of Commerce, but was also the winner of the U.S. Supreme

“lawyers rather than class members are the principal beneficiaries” of litigation continues to have traction with policymakers and the populace.<sup>205</sup>

Take for example a new bill by Republican lawmakers to “restructure” the CFPB.<sup>206</sup> Currently, the independent agency is shielded from both congressional and presidential influence because it is funded by a fixed percentage transfer from the Federal Reserve Bank, rather than by the appropriations process.<sup>207</sup> Further, its sole director serves a five-year term and can be removed only for cause.<sup>208</sup>

In a bid to change all that, Texas Republican Randy Neugebauer, Chairman of the House Financial Services Financial Institutions and Consumer Protection Subcommittee, introduced legislation that would make the CFPB appropriations dependent and would change its structure from Director-led to a bipartisan five-person commission appointed by the President for five-year terms.<sup>209</sup> While Representative Neugebauer has stated that this bill “is not an attempt to weaken the CFPB,”<sup>210</sup> it seems reasonable to expect it would stop all ongoing activities—including any work on regulations banning mandatory arbitration—dead in their tracks. Observers expect that, given Republican control of the House and Senate, the current bill has some chance of passing; President Obama

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Court’s landmark 2011 endorsement of mandatory arbitration in *AT&T Mobility v. Concepcion*.”); *U.S. Chamber of Commerce*, OPENSECRETS, <https://www.opensecrets.org/lobby/clientsum.php?id=D000019798&year=2014> (last visited Oct. 10, 2015) (listing Mayer Brown as the top billing lobbyist firm for the Chamber of Commerce in 2000–2003 and 2007–2015).

205. The author, among others, has publicly stated that the Mayer Brown “study” fails to account for real but intangible benefits in the form of changed corporate behavior, deterring other, future wrongdoing, and statutory enforcement and rule-of-law principles. *The Federal Arbitration Act and Access to Justice: Hearing Before the S. Comm. on the Judiciary*, 113th Cong. 29-30 (2013) (testimony of Myriam Gilles, Prof. of Law, Benjamin N. Cardozo School of Law), available at <http://www.judiciary.senate.gov/imo/media/doc/CHRG-113shrg89563.pdf>. See also NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, CLASS ACTIONS ARE A CORNERSTONE TO OUR CIVIL JUSTICE SYSTEM: A REVIEW OF CLASS ACTIONS FILED IN 2009 3 (Feb. 27, 2015), available at [http://www.consumeradvocates.org/sites/default/files/Class %20Action%20Report%202-27-15.pdf](http://www.consumeradvocates.org/sites/default/files/Class%20Action%20Report%202-27-15.pdf).

206. This is not the first time Republicans have sought to “delay, defang and derail” the bureau in the hopes of slowing its regulatory agenda. For example, on February 27, 2014, the House of Representatives passed the Consumer Financial Freedom and Washington Accountability Act, H.R. 3193, 113th Cong. (2014), a bill that would replace the CFPB’s Federal Reserve-derived funding with a yearly appropriation. The bill failed to pass the Senate, as have other attempts to disarm the bureau. See *H.R.3193—Consumer Financial Freedom and Washington Accountability Act*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/3193> (last visited Oct. 10, 2015). See also Gilles & Friedman, *supra* note 163, at 655–56 (describing long-standing disputes concerning the CFPB’s independence and Republican concerns surrounding its mission).

207. See 12 U.S.C. § 5497(a)(2)(A)(iii) (2012) (requiring the Federal Reserve Bank to provide the CFPB with twelve percent of its budget from fiscal year 2013 onward).

208. See 12 U.S.C. § 5491(b)(1) (2012) (establishing the director’s position); *id.* § 5491(c)(1) (providing for five-year term); *id.* § 5491(c)(3) (providing for-cause removal for the director).

209. The proposed bill was introduced by 20 Republican co-sponsors in the House. See H.R. 1266, 114th Cong. (2015), available at <http://randy.house.gov/sites/randyc.house.gov/files/documents/CFPB%20Commission%20Bill%20RN%202015.pdf>. Similar legislation, H.R. 3193, passed the House by a wide margin in 2014, but was never taken up by the Senate. See H.R. 3193, 113th Cong. (2014).

210. Randy Neugebauer, *Neugebauer Introduces CFPB Reform Bill*, RANDY.HOUSE.GOV (Mar. 4, 2015), <http://randy.house.gov/press-release/neugebauer-introduces-cfpb-reform-bill>.

would then presumably exercise his veto, and the political fight over the structure and accountability of the CFPB would continue.<sup>211</sup>

Importantly, even if the CFPB is able to navigate this political gauntlet and promulgate rules banning forced arbitration and class action waivers, its authority is limited. First, Dodd-Frank mandates that any regulation limiting or prohibiting the use of arbitration provisions must be forward looking rather than retroactive and applicable only to agreements entered 180 days after the regulation's effective date.<sup>212</sup> Second, the CFPB has authority only over enumerated statutes that involve consumer financial arrangements.<sup>213</sup> Accordingly, any rulemaking in this arena will not affect employees, small businesses, or others injured by mandatory arbitration clauses and class action bans.<sup>214</sup>

#### D. Arbitration Tomorrow

Barring legislative action or regulatory reversal, mandatory arbitration clauses containing class action bans are fully enforceable. Consequently, as I have discussed elsewhere, almost any case where the defendant stands in a contractual relation to the plaintiffs is a candidate for an arbitration clause and class action waiver.<sup>215</sup> Predictably, many compa-

211. Jordan Fabian, *Obama Looks to Defend CFPB from Republican Attacks*, THE HILL (Mar. 26, 2015, 2:29 PM), <http://thehill.com/homenews/administration/237099-obama-looks-to-defend-cfpb-from-republican-attacks>.

212. See Gilles & Friedman, *supra* note 163, at 658 (observing that this “grandfather clause” might create a mad dash for companies to insert class action bans in the immediate aftermath of rulemaking, and may also prove problematic in the credit card arena, where consumers enter into “evergreen” contracts that remain in place for many years).

213. The Dodd-Frank Act expressly lists the “enumerated consumer laws” that are within the agency’s jurisdiction. See Dodd-Frank Act § 1002(12), 12 U.S.C. § 5481(12). The list includes the following statutes: Alternative Mortgage Transaction Parity Act of 1982, Pub. L. No. 97-320, 96 Stat. 1545 (codified at 12 U.S.C. § 3801); Consumer Leasing Act of 1976, Pub. L. No. 94-240, 90 Stat. 257 (codified at 15 U.S.C. § 1667); Electronic Fund Transfer Act, Pub. L. No. 95-630, 92 Stat. 3728 (1978) (codified at 15 U.S.C. § 1693); Equal Credit Opportunity Act, Pub. L. No. 93-495, 88 Stat. 1521 (1974) (codified at 15 U.S.C. § 1691); Fair Credit Billing Act, Pub. L. No. 93-495, 88 Stat. 1511 (1974) (codified at 15 U.S.C. § 1666); the Fair Credit Reporting Act, Pub. L. No. 91-508, 84 Stat. 1128 (1970) (codified at 15 U.S.C. § 1681); Home Owners Protection Act of 1998, Pub. L. No. 105-216, 112 Stat. 897 (codified at 12 U.S.C. § 4901); Fair Debt Collection Practices Act, Pub. L. No. 95-109, 91 Stat. 874 (1977) (codified at 15 U.S.C. § 1692).

214. Some observers anticipate that CFPB rulemaking might lead to what amounts to “government peer pressure” on other agencies, such as the Federal Trade Commission, Securities and Exchange Commission, and Commodity Futures Trading Commission promulgate their own rules regulating mandatory arbitration clauses. See, e.g., Nicholas M. Gess et al., *CFPB and the Future of Arbitration Clauses: Consumer Financial Protection Bureau*, NAT’L L. REV. (Mar. 12, 2015), <http://www.natlawreview.com/article/cfpb-and-future-arbitration-clauses-consumer-financial-protection-bureau>.

215. See, e.g., Gilles, *supra* note 16, at 413 (“[I]t is apparent that sufficient contractual bases for the imposition of arbitration clauses and class waivers, under current doctrine, are present in virtually all areas of contemporary class action practice.”); Gilles & Friedman, *supra* note 163, at 631 (stating that class action bans are “capable of reaching all class actions based on any sort of contractual relationship between the plaintiffs and the defendant—a condition that is satisfied in all federal antitrust class actions, where plaintiffs must be ‘direct purchasers,’ the vast majority of consumer cases, employment and Employee Retirement Income Security Act of 1974 (ERISA) cases, and indeed just about all class actions” (internal citations omitted)).

nies are responding to the current legal order by swiftly inserting these provisions into standard form contracts.<sup>216</sup>

Going forward, then, we should expect that all companies for whom the ministerial costs of implementing arbitration clauses are outweighed by the elimination of exposure to class action liability will adopt class bans. And where a company's relationships are governed by standard form agreements (which make class actions attractive to plaintiffs' lawyers), and standard form dispute resolution clauses (which make the waiver of class liability possible), then it is reasonable to expect this calculus will weigh in favor of including arbitration provisions. Huge swaths of modern commerce are, of course, governed by standard form agreements<sup>217</sup>—and it seems obvious that these agreements form the predicate for the majority of cases in entire areas of the law, including antitrust, consumer, and employment cases. Indeed, the available evidence bears out the supposition that, in areas where class exposure has traditionally been a concern, arbitration clauses and class bans are already becoming universal.<sup>218</sup>

In a small subset of areas, the costs of implementation may be high—for example, if pharmaceutical companies would require FDA approval to place an arbitration clause and class waiver on their labels or ancillary materials.<sup>219</sup> And it is also possible, in some cases, that consumer backlash to the imposition of arbitration and class waivers will impose a formidable cost.<sup>220</sup> But by and large, I assume that the targets of class litigation will effectively insulate themselves.

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216. See, e.g., Jean Sternlight, *Disarming Employees: How American Employers are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1344–45 (2015) [hereinafter Sternlight, *Disarming Employees*] (reporting on a recent study of general counsels showing that the number of arbitration provisions containing class action waivers more than doubled from 2012 to 2013, and that “management-side attorneys” view the Supreme Court’s recent decisions as “an opportunity . . . to avoid expensive class actions” (internal citations omitted)).

217. See generally MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* (2013) (describing the rise of standard form agreements).

218. See, e.g., CFPB ARBITRATION STUDY, *supra* note 191, at 12–13 (finding that just over 50% of credit card loans and 44% of insured deposits were subject to arbitration, and that nearly all arbitration clauses contained class action waivers, and observing that the percentage of credit card loans subject to arbitration will likely rise for numerous reasons); Theodore Eisenberg et al., *Arbitration’s Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REF. 871, 882–84 (2008) (reviewing study of internet, phone, and data service contracts finding that 75% contained mandatory arbitration clauses and 80% contained class action waivers); Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 BYU L. REV. 1, 38 (post-*Concepcion* study finding 93.6% of credit card arbitration clauses covering 99.9% of credit card loans outstanding, contained class action prohibitions).

219. FDA Prescription Drug Product Labeling Requirements, 60 Fed. Reg. 44, 182–83 (proposed Aug. 24, 1995).

220. The archetypal case for consumer backlash would be online communities and social media companies. Thus, three months after it purchased the photo sharing app Instagram in 2012, Facebook altered its “Privacy and Terms of Service” to announce it had a right to license and sell all public Instagram photos its users had shared—without any notice or payment. In addition (and in anticipation?), this announcement also imposed upon Facebook users a mandatory arbitration clause with a class action ban. See Dan Levine, *Instagram Furor Triggers First Class Action Lawsuit*, REUTERS (Dec. 24, 2012, 2:45 PM), <http://www.reuters.com/article/2012/12/24/us-instagram-lawsuit-idUSBRE8BN0J>

Importantly, the adoption of arbitration by companies seeking to avoid class action exposure has implications for non-class cases as well. After all, the same contracts that form the predicate of class liability are also the basis of individual suits. When Wal-Mart imposes an arbitration clause in its standard form employment agreement, it may be motivated by class-exposure avoidance, but it is also ensuring that any individual employment dispute will be arbitrated rather than litigated. Likewise, as manufacturers and shippers add arbitration language to their standard forms in a bid to avoid class exposure, they ensure that all disputes with counterparties will unfold in the arbitral forum. Like dolphins that get swept up in tuna nets, individual claims arising under these standard form agreements are ensnared by the same mandatory arbitration clauses that proscribe class litigation.

And so, as companies are handed judicially-sanctioned tools to escape broad liability to employees, consumers, and other counterparties, some core goals of the Reagan anti-lawsuit movement have been realized, or more aptly, rendered moot. It is, to say the least, unclear what point is served by fee or damages caps, cost shifting, or discovery limitations if private ordering can permissibly mandate that the case cannot be prosecuted in the first instance. And for cases featuring widely distributed, small value harms, one-on-one arbitration provisions mandate precisely that.

Still, there are consequential differences between what the Reagan reformers sought to achieve with specific legislative reforms and the broad effects wrought by the blunt instrument of the arbitration revolution. Lawsuit reform was about filtering out meritless but financially attractive claims. The arbitration movement has no time for such niceties; it

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I20121224. Facebook quickly back-pedaled, retracting the mandatory arbitration provision; Instagram, however, has retained its arbitration clause, which prohibits users from joining a class action lawsuit unless they mail a written “opt-out” statement to Facebook headquarters within 30 days of joining Instagram. *Terms of Use*, INSTAGRAM, <http://instagram.com/legal/terms/#> (last updated Jan. 19, 2013).

More recently, General Mills sought to impose mandatory arbitration terms on consumers in “virtual privacy”—i.e., those “downloading coupons, ‘joining its online communities like Facebook,’ participating in sweepstakes and other promotions, and interacting with General Mills in a variety of other ways” on the internet. Stephanie Strom, *General Mills Reverses Itself on Consumers’ Right to Sue*, N.Y. TIMES, Apr. 20, 2014, <http://www.nytimes.com/2014/04/20/business/general-mills-reverses-itself-on-consumers-right-to-sue.html>. The company also indicated that even just buying its products would bind consumers to mandatory arbitration. Stephanie Strom, *When ‘Liking’ a Brand Online Voids the Right to Sue*, N.Y. TIMES, Apr. 16, 2014, <http://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html>. In a “stunning reversal” made after intense media and public pressure, General Mills withdrew its mandatory arbitration provisions. See Kirstie Foster, *We’ve Listened—and We’re Changing our Legal Terms Back*, GEN. MILLS (Apr. 19, 2014) <http://www.blog.generalmills.com/2014/04/weve-listened-and-were-changing-our-legal-terms-back-to-what-they-were/> (“We’re sorry we even started down this path.”).

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

evicts entire classes of claims from the public justice system. Some of these claims (e.g., high value employment disputes) may find their way into arbitration; many others will simply die (e.g., mass harm consumer or antitrust cases). But the point here is that all of these claims are removed from the civil justice system, and that fact—*in and of itself*—has significant implications for the development of legal doctrine.

Accordingly, as major industries decamp en masse for the green pastures of arbitration—as they exit the judicial system, taking with them whole categories of cases from antitrust to consumer to employment law—we should ask: Just what are the implications for the law?

#### IV. THE END OF LAW

In his seminal 1984 work *Against Settlement*, Owen Fiss warned that the private settlement of disputes could eventually weaken the ability of public adjudication to articulate and apply commonly held legal rights.<sup>221</sup> By trading the public function of judicial decision-making for the efficiency gains of private ordering, Fiss warned that we risk undermining the law itself.<sup>222</sup> In the thirty years since *Against Settlement*, numerous scholars have taken up Fiss's concern<sup>223</sup>—asking, theoretically, what happens if “the common law . . . cease[s] to be a living organism”?<sup>224</sup> But now, as companies seeking to insulate themselves from class liability enact broad arbitration clauses that sweep up the resolution of *all* disputes with contractual counterparties, the relevant questions are no longer so speculative. Today, we must ask: What happens if entire areas of the law were shunted off into the black box of arbitration, where the proceedings are confidential and non-precedential?

At the outset, there can be no dispute that arbitration—as called for in the standard agreements binding consumers, employees, and others—

221. Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (observing that judges do not exist “to maximize the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in authoritative texts such as the Constitution and statutes: to interpret those values and to bring reality into accord with them”).

222. *See id.*

223. *See, e.g.*, Edwards, *supra* note 117, at 671 (“[W]e must determine whether ADR will result in an abandonment of our constitutional system in which the ‘rule of law’ is created and principally enforced by legitimate branches of government . . .”); Carrie Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 500 (1985) (“When an authoritative ruling is necessary, I believe Fiss is right—the courts must adjudicate and provide clear guidance for all . . .”).

224. Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 786 (2002). Over the past few decades, a number of scholars and policymakers have tied these concerns in with the arbitration movement, at a high level of generality. *See, e.g.*, *Arbitration Fairness Act of 2007: Hearing Before the Subcomm. on the Constitution of the S. Comm. on the Judiciary*, 110th Cong. 10 (2007) (statement of Richard M. Alderman) (“[A]rbitrators cannot create or modify the common law; [we are] essentially freezing the common law” by submitting everything to arbitration, “denying courts the ability to develop and adapt the law” as society and business changes.”); Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945, 1963 (1996) (arguing that arbitration cannot replace “the social, historical, and cultural investment a community makes in a national legal system”).



fundamentally precludes common law development.<sup>225</sup> First off, arbitrators are simply not expected or paid to write precedential decisions—and if they were, the expense of arbitration would grow exponentially.<sup>226</sup> No arbitral body even requires that a legal record of the proceedings be kept<sup>227</sup> or that an arbitrator explain his or her reasoning for any particular ruling or resolution.<sup>228</sup> Indeed, even in a jurisdiction such as California that compels disclosure of arbitral awards, there is still no requirement that an arbitrator explain her reasons or provide any reliable analysis of the issues.<sup>229</sup> As such, these mandatory disclosures read nothing like the

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225. In contrast, the rules governing international trade, commercial and labor arbitration often do require reasoned awards. *See, e.g.*, The International Chamber of Commerce (“ICC”) Rules of Arbitration, Art. 31(2) (providing that “the award shall state the reasons upon which it is based”), available at [http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article\\_25](http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/#article_25). Arbitral tribunals in these contexts have historically and self-consciously played “a lawmaking role—one that promotes consistency within the broader judicial system” creating case law which extends beyond the specific dispute. D. Brian King & Rahim Moloo, *International Arbitrators as Lawmakers*, 46 N.Y.U. J. INT’L L. & POL. 875, 878 (2014). Yet, even in these areas, arbitration decisions do not constitute binding precedent. *Id.* at 882 (“[T]here is no recognized system of binding precedent in international arbitration (or in international law, for that matter.)”).

226. *See, e.g.*, William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238–39 (1979) (“[Arbitrators] may have little incentive to produce precedents. They will strive for a fair result between the parties in order to preserve a reputation for impartiality, but why should they make any effort to explain the result in a way that would provide guidance for future parties?”); Edward Brunet & Jennifer J. Johnson, *Substantive Fairness in Securities Arbitration*, 76 U. CIN. L. REV. 459, 473 (2008) (“Written arbitration awards currently are the exception in arbitration, which normally operates behind a veil of privacy. There is no tradition of written awards except for those generated in labor grievance arbitration, maritime arbitration, and international arbitration. The substantial cost associated with written awards must, of course, be considered. Nonetheless, these costs may be low compared to the significant value generated by creating a set of precedents to guide arbitrators to an accurate result and to aid the settlement of arbitrations by creating norms helpful to parties who are now relatively unguided by legal rules.”); Bruce L. Hay et al., *Litigating BP’s Contribution Claims in Publicly Subsidized Courts: Should Contracting Parties Pay Their Own Way?*, 64 VAND. L. REV. 1919, 1944–45 (2011) (“Even if arbitrators were as qualified as judges to make precedent, it is doubtful that the parties would be willing pay the price for comparable services. And that price would be quite steep, far higher than the cost of simply deciding the legal questions for the sole benefit of the present parties. To begin with, arbitrators would labor longer and more intensively to decide legal questions for the benefit of parties other than those financing the proceedings; indeed they do this for the benefit of an entire industry.”).

227. *See, e.g.*, FINRA Rule 12514(d) (2009); *see also* Gordon Firemark, *Arbitration in Entertainment Contracts: Worth Fighting About?*, LAW OFFICES OF GORDON P. FIREMARK (Mar. 24, 2011), <http://firemark.com/2011/03/24/arbitration-entertainment-contracts-worth-fighting-about/> (“[S]ince no written opinion exists, an arbitration award has little or no significance as precedent for the parties or others to follow in future situations.”); Hon. Jennifer Walker Elrod, *Is the Jury Still Out?: A Case for the Continued Viability of the American Jury*, 44 TEX. TECH L. REV. 303, 324 (2012) (“Arbitrations with no public record do not develop the law in any way.”).

228. *See, e.g.*, *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 598 (1960) (“Arbitrators have no obligation to the court to give their reasons for an award.”); *Wilko v. Swan*, 346 U.S. 427, 435–36 (1953) (expressing concern that that arbitrators “without judicial instruction on the law” would make findings and issue awards without any explanation of their reasoning); Kenneth S. Abraham & J.W. Montgomery, III, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355, 357 (2003) (“[A]rbitration often involves a form of contractual ‘lawlessness’ that is especially undesirable in claims that involve new legal issues. This lawlessness not only adversely affects the parties to each dispute, but the legal system as a whole.”).

229. *See* CAL. CIV. PROC. CODE § 1281.96 (2011). *See also* W. Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 U. MICH. J. L. REFORM 843, 869 (2008) (describing the serious limitations of the California arbitration database).

cases that fill the California Reporter, but rather, like a bloodless database of names (often redacted) and amounts (with no explanation or context).<sup>230</sup>

Accordingly, even where an arbitral resolution is known—for example, where a party seeks to confirm or vacate an arbitration award in court<sup>231</sup>—the arbitral ruling has no binding effect upon subsequent proceedings involving the same parties, let alone precedential force more generally.<sup>232</sup> And on the resulting flip side, arbitrators themselves are not bound to follow precedent, but instead, “are given wide latitude in their interpretation of legal concepts.”<sup>233</sup>

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230. See Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 108, 108 n.156 (reporting that California’s disclosure law requires providers to “collect, publish . . . , and make available to the public” information about parties, categories of disputes, time to disposition, and outcomes,” but that “providers do not, however, provide comprehensive data”).

231. 9 U.S.C. § 13 (2012) (requiring the party seeking to confirm, vacate or modify an award to submit documents to the court, which may negate the confidentiality of some aspects of the arbitral proceeding).

232. See, e.g., *Dean Witter Reynolds, Inc. v. Byrd* 470 U.S. 213, 222 (1985) (noting that “it is far from certain that arbitration proceedings will have any preclusive effect on the litigation of nonarbitrable federal claims”); *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 291 (1984) (refusing to accord collateral-estoppel effect to an arbitration award on the grounds that “arbitral factfinding is generally not equivalent to judicial factfinding,” as “the record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable” (internal citations omitted)); *Barrentine v. Ark.-Best Freight Sys.*, 450 U.S. 728 (1981) (same). See also Richard M. Alderman, *Consumer Arbitration: The Destruction of the Common Law*, 2 J. AM. ARB. 1, 11 (2003) (“Even assuming an arbitrator is committed to following the law, however, he or she cannot make it. Therein lies the problem . . . Arbitration eliminates litigation in a public forum, precedent-establishing decisions, and stare decisis.”); Jean R. Sternlight, *Is the U.S. Out on a Limb? Comparing the U.S. Approach to Mandatory Consumer and Employment Arbitration to that of the Rest of the World*, 56 U. MIAMI L. REV. 831, 835 (2002) (noting that a hallmark of mandatory, binding Arbitration is the “eliminati[on of] the claimant’s right to present claims to a judge or jury . . . preventing litigants from setting public precedents”); Richard C. Reuben, *Democracy and Dispute Resolution: Systems Design and the New Workplace*, 10 HARV. NEGOT. L. REV. 11, 42 (2005) (“[A]rbitration provides little accountability, as arbitration awards are generally not subject to the substantive review that is available for decisions in public adjudication.”); Lillian T. Howan, Comment, *The Prospective Effect of Arbitration*, 7 IND. REL. L.J. 60, 62 (1985) (“In contrast to the judicial doctrine of stare decisis, an arbitrator’s interpretation of the contractual relation is not technically binding on a future arbitrator. Instead, the arbitrator must exercise independent and impartial judgment in each case.” (internal citations omitted)).

This point has been weakly contested by some scholars. See, e.g., Keith N. Hylton, *Agreements To Waive or To Arbitrate Legal Claims: An Economic Analysis*, 8 SUP. CT. ECON. REV. 209, 245 (2000) (“In certain settings, parties may develop an institutional common law through repeated dealings. An arbitral forum may have an advantage in developing and interpreting that institutional common law.”); Stephen J. Ware, *Default Rules from Mandatory Rules: Privatizing Law Through Arbitration*, 83 MINN. L. REV. 703, 746 (1999) (suggesting that, theoretically, arbitrators “can be contractually required to follow precedents” though no arbitration provisions or forum rules impose such a requirement).

233. Brunet & Johnson, *supra* note 226, at 477. See also Edwards, *supra* note 117, at 678 (observing that private arbitration of disputes is “troubling when we have no assurance that the legislative- or agency-mandated standards have been followed, and when we have no satisfactory explanation as to why there may have been a variance from the rule of law”); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 259 (1987) (Blackmun, J., concurring in part and dissenting in part) (observing that “arbitrators are not bound by precedent”).

Moreover, it would be naive to assume that this transparency and publicity can be injected into the arbitral process through back end judicial review of arbitral decisions.<sup>234</sup> While the FAA section 10 specifically provides for limited judicial review of arbitral rulings, the Supreme Court has repeatedly held that arbitration is final and binding, subject to review only where arbitrators evince a “manifest disregard” of the law.<sup>235</sup> But, given that few arbitrators feel bound by formal law and few arbitral outcomes are accompanied by reasoned decisions, “it is all but impossible [for the judiciary] to determine whether [the arbitrator] acted with manifest disregard of the law.”<sup>236</sup>

Nor can we rely on arbitration providers—such as the AAA and JAMS<sup>237</sup>—to provide open access to this data, because, once again, these entities are selling the promise of confidentiality.<sup>238</sup> Privacy is core to the institution of arbitration<sup>239</sup> and guaranteed, not only by the providers,<sup>240</sup> but also by the standard terms of contemporary arbitration agreements.<sup>241</sup>

234. See Richard Frankel, *State Court Authority Regarding Forced Arbitration After Concepcion* 70, POUND CIVIL JUSTICE INST. (2014), available at <http://www.poundinstitute.org/sites/default/files/2014PoundReport.pdf> (observing that where the parties later challenge an arbitration award, “the information submitted in arbitration will . . . become a public record as part of the court proceeding,” though may be “subject to any protective order that the trial court might impose”). The standard of review, however, is quite high: courts may only overturn an arbitral award that was procured by fraud or corruption; as such, arbitral claimants may be less likely to seek judicial review—and certainly cannot be expected to do so in order to create a more public record of their dispute for the purpose of advancing the law.

235. See, e.g., *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 586 (2008) (allowing only limited judicial review under FAA §10 where arbitral awards evidence “egregious departures from the parties’ agreed-upon arbitration”); Jennifer J. Johnson, *Wall Street Meets the Wild West: Bringing Law and Order to Securities Arbitration*, 84 N.C.L. REV. 123, 142 (2005) (discussing limited grounds for judicial review of arbitration decisions) (citing *Univ. Commons-Urbana, Ltd. v. Universal Constructors Inc.*, 304 F.3d 1331, 1337 (11th Cir. 2002), stating, in the face of unreasoned awards, it is nearly impossible for the court to determine whether arbitrators “acted in disregard of the law”); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Jaros*, 70 F.3d 418, 421 (6th Cir. 1995) (stating, when panel does not explain award, party seeking to vacatur faces tremendous hurdle).

236. *Dawahare v. Spencer*, 210 F.3d 666, 669 (6th Cir. 2000); see also *STMicroelectronics, N.V. v. Credit Suisse Sec. (USA) LLC*, 648 F.3d 68, 78 (2d Cir. 2011) (even where an arbitration panel does “not explain the reason for [its] decision, we will uphold it if we can discern any valid ground for it”); *Brunet & Johnson*, *supra* note 226, at 477 (observing that securities arbitrators are expressly instructed “that they are not strictly bound by legal precedent or statutory law. . . [r]ather, they are guided in their analysis by the underlying policies of the law, and are given wide latitude in their interpretation of legal concepts” (internal citations omitted)).

237. *Sternlight, Disarming Employees*, *supra* note 216, at 1314 n.31.

238. See, e.g., *id.* at 1323–24 (“Arbitration providers do not need to open their files to researchers and most have not. When arbitration providers do provide access . . . one can never be sure if the particular provider skewed the data.” (citing Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEG. STUDS. 1, 1 (2011) (noting lack of publicly available data on arbitration and fact that “[m]ost empirical research has had to rely on cases or files that individual arbitration service provider organizations have chosen to provide access to,” as well as fact that data sets provided tend to be “relatively small in size and potentially lacking representativeness of the broader population of arbitration cases”))).

239. See, e.g., Michelle Andrews, *Signing a Mandatory Arbitration Agreement with a Nursing Home Can Be Troublesome*, WASH. POST., Sept. 17, 2012, [http://articles.washingtonpost.com/2012-09-17/national/35497405\\_1\\_arbitration-john-mitchell-vital-signs](http://articles.washingtonpost.com/2012-09-17/national/35497405_1_arbitration-john-mitchell-vital-signs) (reporting that arbitration hearings “are conducted in private and [these] proceedings and materials are often protected by confidentiality rules”); Richard C. Reuben, *The Dark Side of ADR*, CAL. LAW. (Feb. 1994), at 54 (“For all the prom-

Taken together, these policies and practices destroy any means of transmitting information adduced in one arbitration to subsequent proceedings, effectively nullifying *stare decisis* and common law development. Put simply: law cannot grow in the darkness with which arbitration shrouds its activities, and when law ceases to grow, it stagnates and eventually ceases to be (or be relevant).<sup>242</sup>

So now, in a post-*Concepcion*<sup>243</sup> and post-*Italian Colors*<sup>244</sup> world, where companies have unprecedented incentives and latitude to deploy arbitration clauses, we must ask: What implications are there for the law as we know it? To answer this question, I consider the following thought experiment: Assume that every company that might reasonably be interested in avoiding class action exposure were to write arbitration clauses and class action bans into all of its standard form contracts. Given the private and non-precedential nature of arbitration, what implications does this hold for the development of the law? And how consequential is legal development anyway?

To rephrase the thought experiment: If companies deploy arbitration clauses to the full extent necessary to insulate against class liability, what cases will we no longer see in the court system? As a general matter, of course, we will no longer see class actions that are based on contractual relationships (because the contracts will now contain arbitration clauses). But less obviously, we will no longer see in the courts individual claims based on the same contracts that companies will alter in their efforts to avoid class exposure.<sup>245</sup> Like dolphins that get swept up in tuna nets, entire categories of non-class claims are certain to find themselves in arbi-

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ised benefits of ADR, independent statistics documenting them are almost nonexistent. One reason is the secrecy of the proceedings; few records exist for researchers to examine.”)

240. See AAA Consumer Due Process Protocol, Principle 12.2, available at [https://adr.org/aaa/ShowPDF?doc=ADRSTG\\_005014](https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014) (stating that arbitrator must “maintain the privacy of the hearing to the extent permitted by applicable law”); AAA Commercial Rule 25, available at [https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG\\_004103](https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_004103) (directing arbitrators to “maintain the privacy of the hearings unless the law provides to the contrary”).

241. Myriam Gilles & Anthony Sebok, *Crowd-Classing Individual Arbitrations in a Post-Class Action Era*, 63 DEPAUL L. REV. 447, 449 (2014) (discussing the worrisome effects of “confidentiality terms that are standard in contemporary arbitration agreements”).

242. See Elrod, *supra* note 227, at 324–25 (“Without cases, our common law will stagnate. . . . Without cases, lawyers and judges will be unable to continue in their work of perfecting the law.”); Elizabeth G. Thornburg, *Going Private: Technology, Due Process, and Internet Dispute Resolution*, 34 U.C. DAVIS L. REV. 151, 200–06 (2000) (asserting that a lack of transparency in dispute resolution causes harm to the public by, among other things, allowing corporate actors to circumvent legal requirements and denying claimants their proverbial day in court).

243. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

244. *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304 (2013).

245. Judge Harry Edwards intimated a similar concern nearly 30 years ago when he suggested that “by diverting particular types of cases away from adjudication, we may stifle the development of law in certain disfavored areas of law.” Edwards, *supra* note 117, at 679. Edwards asked the reader to “[i]magine, for example, the impoverished nature of civil rights law that would have resulted had all race discrimination cases in the sixties and seventies been mediated rather than adjudicated.” *Id.*

tration as companies seek to exploit the benefits handed them in *Conception* and *Italian Colors*.<sup>246</sup>

To understand these dynamics, the following subsections run this thought experiment through some specific areas of the law.

### A. *The Impact On Antitrust*

As a more-or-less random sample, I looked at all of the antitrust cases decided by the Supreme Court since John Roberts became Chief Justice,<sup>247</sup> of which there are sixteen.<sup>248</sup> Six were class actions that arose under contracts that will require arbitration in the future, under the assumptions governing this thought experiment.<sup>249</sup> In other words, these six cases would have been diverted out of the court system by a contractual provision mandating arbitration of claims. Another three cases featured non-class claims brought by direct purchasers who were parties to contracts that (on the same assumptions set forth above) would also require arbitration.<sup>250</sup> These cases—dolphins caught in tuna nets—would likewise be swept out of the court system. So nine of the sixteen antitrust cases decided by the Roberts Court would not have existed. Of the remaining seven, three were FTC cases,<sup>251</sup> three were suits by (essentially) competitors,<sup>252</sup> and one was a *parens patriae* action by a state attorney general.<sup>253</sup>

246. *Italian Colors*, 133 S.Ct. 2304; *Conception*, 563 U.S. 333.

247. This list of Roberts Court antitrust cases is derived from a paper by Joanne C. Lewers and Robert A. Skitol, *The Developing Antitrust Legacy of The Roberts Court*, 28 ANTITRUST 7 (2014).

248. *N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101 (2015); *Gelboim v. Bank of Am. Corp. et al.*, 135 S.Ct. 897 (2014); *Miss. ex rel. Hood v. AU Optronics Corp.*, 134 S.Ct. 736 (2014); *Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304 (2013); *Fed. Trade Comm'n v. Actavis, Inc.*, 133 S.Ct. 2223 (2013); *Comcast Corp. v. Behrend*, 133 S.Ct. 1426 (2013); *Fed. Trade Comm'n v. Phoebe Pitney Health*, 133 S.Ct. 1003 (2013); *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183 (2010); *Pacific Bell Tel. Co. v. Linkine Commc'ns, Inc.*, 555 U.S. 438 (2009); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007); *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264 (2007); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312 (2007); *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28 (2006); *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006); *Volvo Trucks North Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

249. See *Gelboim*, 135 S.Ct. at 901 (class action brought on behalf of purchasers of bonds with LIBOR-linked interest rates); *Italian Colors*, 133 S.Ct. at 2310; *Behrend*, 133 S. Ct. at 1429 (antitrust consumer class action consisting of 2 million subscribers against cable company); *Credit Suisse*, 551 U.S. at 270 (investor antitrust class actions against banks acting as underwriters); *Twombly*, 550 U.S. at 550 (claim brought by class of subscribers of local telephone and high-speed internet services); *Dagher*, 547 U.S. at 3 (claim brought by a class of Texaco and Shell Oil service station owners).

250. See *Leegin*, 551 U.S. at 884 (claim brought by distributor against manufacturer); *Volvo Trucks*, 546 U.S. at 169 (claim brought by franchised dealers against manufacturer). Likewise, in *Pacific Bell*, 555 U.S. at 442, the plaintiffs were four of the many internet service providers who purchased service from defendant Pac Bell under contracts that will also be subject to arbitration under the terms of this analysis.

251. *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. 1101; *Phoebe Pitney Health*, 133 S. Ct. 1003; *Actavis, Inc.*, 133 S. Ct. 2223.

252. *Am. Needle*, 130 S. Ct. at 185 (plaintiff claimed its competitor, Reebok, had an illegal, exclusionary agreement with the NFL for licensed products); *Weyerhaeuser*, 549 U.S. at 314 (plaintiff claimed predatory buying where competitor illegally monopolized market for red alder sawlogs); *Ill. Tool Works*, 547 U.S. at 31 (claims by competitor of illegal tying).

If the nine cases identified above had been diverted by arbitration clauses, the doctrinal landscape would look much different. For example, the Court in *Leegin* jettisoned a ninety-six-year old rule making vertical price setting per se unlawful, fundamentally altering the analysis of vertical price restraints.<sup>254</sup> As Justice Breyer observed in dissent, the rule that *Leegin* overturned—the so-called *Dr. Miles* rule—was “one upon which the legal profession, business, and the public have relied for close to a century.”<sup>255</sup> *Dagher* too emphasized the Court’s increasing aversion to per se rules, holding that price fixing claims against joint venture members are to be judged under a rule of reason standard.<sup>256</sup>

*Twombly*, meanwhile, reversed a half century’s worth of notice pleading with a new standard requiring litigants to plead “enough facts to state a claim to relief that is plausible on its face.”<sup>257</sup> Applying this new standard, the *Twombly* majority concluded that an antitrust complaint could not merely allege a conspiracy, but must state specific facts that “allow [an] illegal conspiracy to be distinguished from legal parallel independent action.”<sup>258</sup> In dissent, Justice Stevens (joined by Justice Ginsberg), derided the majority’s decision as a “dramatic departure from settled procedural law” that creates a “significant new rule.”<sup>259</sup> Finally, *Credit Suisse* made important and novel law by determining that the regulation of securities underwriters, under the federal securities laws, may preempt private antitrust litigation under certain circumstances.<sup>260</sup> Here, too, the Court cut back sharply on decades of implied immunity jurispru-

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253. *Miss. ex rel. Hood*, 134 S.Ct. at 737.

254. *Leegin*, 551 U.S. at 881–82.

255. *Id.* at 909 (Breyer, J., dissenting). But, importantly, “the Court had been moving towards abandoning the per se rule of *Dr. Miles*” for nearly thirty years before *Leegin* was decided a pronounced example of the importance of common law evolution within the antitrust laws. Andrew I. Gavil, *Antitrust Bookends: The 2006 Supreme Court Term in Historical Context*, 22 ANTITRUST 21, 24 (2008).

256. 547 U.S. at 3–4.

257. 550 U.S. at 570, reversing *Conley v. Gibson*, 355 U.S. 41 (1957). One could argue that *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) gets us to the same place, or that some other vehicle would have arisen to make the same doctrinal point if *Twombly* had disappeared into the black box of arbitration. But *Twombly* was very much an antitrust case, addressing the specific problems associated with litigation costs in antitrust cases in deciding what must be alleged to make out a claim for price fixing. *Twombly*, 550 U.S. at 558 (“Thus, it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery . . . but quite another to forget that proceeding to antitrust discovery can be expensive.” (internal citations omitted)). Arguably, the broader implications for civil practice, including *Iqbal*, kind of bubbled out from there. If the Court had not been called on to address the price fixing pleading standard, as it was in *Twombly*, who can say whether *Conley*’s notice-pleading standard would still be in place.

258. Randal C. Picker, *Twombly, Leegin and the Reshaping of Antitrust*, 2007 SUP. CT. REV. 161, 162 (2007).

259. *Twombly*, 550 U.S. at 573, 596.

260. Gavil, *supra* note 255, at 24 (observing that *Credit Suisse* “generated a new precedent that likely will invite aggressive efforts by firms in regulated industries to hold up federal regulation as a substitute for antitrust”).

dence, strongly suggesting that regulation was far preferable to private litigation.<sup>261</sup>

Had all of these cases been subject to private, mandatory arbitration, the implications for the development of antitrust doctrine would be profound.<sup>262</sup> Without this body of decisional law, critical questions concerning regulatory policies, the role of private enforcement, and doctrinal line drawing would be lost. But even beyond the immediate impact of the Court's decisions on the specific antitrust issues presented and resolved, each represents a step in the "case-by-case evolution that is the common law of the Sherman Act. . ."<sup>263</sup> None of those steps could have been taken, nor any of this consequential precedent established, in private arbitrations sealed off from the rest of the legal universe.

### B. *The Impact on Consumer Law*

To consider the effects of arbitration in the infinitely varied area of consumer law,<sup>264</sup> I took a typical state consumer protection statute—I chose the Illinois Consumer Fraud Act ("ICFA")<sup>265</sup>—and examined cases arising under that statute in both the Seventh Circuit and the Illinois Supreme Court from 2005 to 2014, which roughly coincides with the time period examined above in the antitrust arena.<sup>266</sup>

A search of the Seventh Circuit yielded thirty five ICFA cases. In three, there was no contractual nexus—i.e., these cases are not amenable to arbitration provisions.<sup>267</sup> Nineteen of the cases were consumer class actions.<sup>268</sup> Five of these class cases would likely remain on the judicial dock-

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261. See, e.g., *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kan. City*, 452 U.S. 378 (1981).

262. See, e.g., *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826–27 (2d Cir. 1968) (observing that an antitrust violation "can affect hundreds of thousands—perhaps millions—of people and inflict staggering economic damage," such that arbitration of such "issues of great public interest" was ill advised).

263. *Picker*, *supra* note 258, at 163.

264. Consumer cases can encompass a wide variety of claims against, for example, "mortgage lenders, credit card companies, commercial banks, and others under truth in lending and fair credit statutes; unreasonable charges claims against telecommunication carriers under the Federal Communications Act and state analogues; deceptive trade practices and false advertising claims against manufacturers and service providers; and numerous other actions." *Gilles*, *supra* note 16, at 414.

265. 815 ILL. COMP. STAT. 505/1 (2007).

266. My WestlawNext search for "Illinois Consumer Fraud Act" or "ICFA" from 1/2005 to the present in the Seventh Circuit and Illinois Supreme Court databases yielded thirty-five Seventh Circuit decisions, and thirty-six Illinois Supreme Court decisions. Note: one case, *Zeidler v. A&W Rests., Inc.*, was the subject of two separate decisions based upon the same franchise contract; it is counted as one case for the purposes of this thought experiment. See *Zeidler v. A&W Rests., Inc.*, 230 Fed.Appx. 615 (7th Cir. 2007); *Zeidler v. A & W Rests., Inc.*, 219 Fed.Appx. 495 (7th Cir. 2007).

267. Cases involving no contractual relationships: *Kim v. Carter's Inc.*, 598 F.3d 362 (7th Cir. 2010) (individual consumer claim alleging false advertising); *Russian Media Grp., LLC v. Cable Am., Inc.*, 598 F.3d 302 (7th Cir. 2010) (suit against broadcaster for pirating content); *Schrott v. Bristol-Myers Squibb Co.*, 403 F.3d 940 (7th Cir. 2005) (product liability suit involving faulty breast implants).

268. See *Johnson v. Pushpin Holdings*, 748 F.3d 769 (7th Cir. 2014) (class suit against debt collectors); *Batson v. Live Nation Entm't*, 746 F.3d 827 (7th Cir. 2014) (class suit by concert ticket buyers against sellers); *Cohen v. Am. Sec. Ins. Co.*, 735 F.3d 601 (7th Cir. 2013) (class action by mortgage-

et owing to the (current) difficulty of imposing arbitration clauses in the sale of consumer goods like cigarettes, gasoline, or soda, or in connection with publicly traded securities.<sup>269</sup> The remaining fourteen class cases would disappear from the court system, if we assume the broad imposition of arbitration clauses by companies who have reason to be concerned about class liability.

The thirteen remaining non-class cases rested on both standard form and negotiated or bespoke agreements. Under the suppositions of this thought experiment, dispute resolution clauses mandating one-on-one, confidential arbitration would have been easily inserted into all the underlying standard form contracts upon which ten non-class cases were predicated, expelling them from the court system—more dolphins in the tuna nets. This includes six insurance and/or mortgage agreements,<sup>270</sup> two mass brand distributorship contracts,<sup>271</sup> a real estate contract,<sup>272</sup> and a

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holders against bank); *Howland v. First Am. Title Ins. Co.*, 672 F.3d 525 (7th Cir. 2012) (class action by insureds against title insurer alleging kickbacks); *Cleary v. Philip Morris Inc.*, 656 F.3d 511 (7th Cir. 2011) (consumer class action by purchasers of cigarettes); *Morrison v. YTB Int'l, Inc.*, 649 F.3d 533 (7th Cir. 2011) (class action by distributors alleging injury from seller's pyramid scheme); *Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Walgreen Co.*, 631 F.3d 436 (7th Cir. 2011) (putative class action by third-party payor against pharmacy contracted to fill member prescriptions); *Greenberger v. GEICO Gen. Ins. Co.*, 631 F.3d 392 (7th Cir. 2011) (class action by insureds against insurer); *Siegel v. Shell Oil Co.*, 612 F.3d 932 (7th Cir. 2010) (class action against oil companies for artificially inflating gasoline prices); *Crichton v. Golden Rule Ins. Co.*, 576 F.3d 392 (7th Cir. 2009) (class action against insurance company for systematic failure to pay claims); *Marshall v. H&R Block Tax Servs., Inc.*, 564 F.3d 826 (7th Cir. 2009) (class action by consumers of tax preparers for false advertising); *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663 (7th Cir. 2008) (class action by consumers of telecommunications bundling service); *Clark v. Experian Info. Solutions, Inc.*, 256 Fed.Appx. 818 (7th Cir. 2007) (class action by consumers against credit reporting agency); *Courtney v. Halleran*, 485 F.3d 942 (7th Cir. 2007) (class action by depositors against directors of failed S&L); *Oshana v. Coca-Cola Co.*, 472 F.3d 506 (7th Cir. 2006) (consumer class action by purchasers of soda for false advertising); *Gavin v. AT&T Corp.*, 464 F.3d 634 (7th Cir. 2006) (class action by investors for fraud); *Home Depot, Inc. v. Rickher*, 2006 WL 1727749 (7th Cir. May 22, 2006) (consumer class action for sale of damage waivers in tool rental agreement); *Ruffin-Thompkins v. Experian Info. Solutions, Inc.*, 422 F.3d 603 (7th Cir. 2005) (class action by consumers of credit reporting services); *Dreamscape Design Inc. v. Affinity Network, Inc.*, 414 F.3d 665 (7th Cir. 2005) (class action against long-distance service provider for undisclosed fees).

269. See *Cleary*, 656 F.3d 511 (cigarettes); *Siegel*, 612 F.3d 932 (gasoline); *Oshana*, 472 F.3d 506 (soda); *Gavin*, 464 F.3d 634 (securities fraud). A final class action, *Windy City*, 536 F.3d 663, would likely remain in court due to the lack of a contractual nexus between the consumers and the assignee of the defunct telecommunications firm.

270. *Addison Automatics v. Hartford Cas. Ins. Co.*, 731 F.3d 740 (7th Cir. 2013) (assignee of insured seeking declaratory judgment that insurer owed duty to defend under terms of the contract); *Wigod v. Wells Fargo Bank, N.A.*, 673 F.3d 547 (7th Cir. 2012) (mortgagee sues bank for failing to modify loan agreement as required by federal law); *Medmarc Cas. Ins. Co. v. Avent Am., Inc.*, 612 F.3d 607 (7th Cir. 2010) (insurer seeking declaratory judgment that it owed no duty to defend under terms of the contract); *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543 (7th Cir. 2009) (insurer seeking declaratory judgment that it owed no duty to defend under the terms of the contract); *Geschke v. Air Force Ass'n*, 425 F.3d 337 (7th Cir. 2005) (executor of insured's estate brings action against insured for failure to comply with terms of contract); *Parks v. Wells Fargo Home Mortg. Inc.*, 398 F.3d 937 (7th Cir. 2005) (lenders sue mortgage bank for failure to pay tax installments pursuant to terms of the agreement).

271. *Sound of Music Co. v. Minnesota Mining and Mfg. Co.*, 477 F.3d 910 (7th Cir. 2007) (former dealers suing 3M for terminating distributorship contract); *Muzumdar v. Wellness Int'l Network, Ltd.*, 438 F.3d 759 (7th Cir. 2006) (claims by distributors against manufacturer).



franchise agreement.<sup>273</sup> Less certain but still possible is the inclusion of a mandatory arbitration clause in the bespoke agreements that formed the basis for three non-class cases. These include a family investment fund agreement,<sup>274</sup> a collective bargaining agreement,<sup>275</sup> and an employment contract.<sup>276</sup>

Meanwhile, the ICFA also accounted for thirty five cases before the Illinois Supreme Court since 2005.<sup>277</sup> Nine disputes arose in contexts where arbitration clauses appear infeasible—though these were mostly cases that did not implicate classic “consumer” claims at all, such as defamation, tax, and seaman’s personal injury cases.<sup>278</sup> Fourteen of the remaining cases were garden variety class actions<sup>279</sup> brought by consumers of insurance products,<sup>280</sup> mortgage services,<sup>281</sup> telecommunications,<sup>282</sup> utilities,<sup>283</sup> and ordinary products,<sup>284</sup> including three cases (concerning ciga-

272. *Goldberg v. 401 N. Wabash Venture LLC*, 755 F.3d 456 (7th Cir. 2014) (purchaser of hotel condominium units sue vendor and corporate affiliate for breach of real estate contract).

273. *Zeidler v. A&W Restaurants, Inc.* 230 Fed.Appx. 615 (7th Cir. 2007) (franchisor-franchisee dispute over dissolution of franchise agreement); *Zeidler v. A & W Rests., Inc.*, 219 Fed.Appx. 495 (7th Cir. 2007) (same).

274. *Gandhi v. Sitara Capital Mgmt., LLC*, 721 F.3d 865 (7th Cir. 2013) (fund investors sue for fraud).

275. *Chi. Dist. Council of Carpenters Pension Fund v. Reinke Insulation Co.*, 464 F.3d 651 (7th Cir. 2006) (pension fund sues employer for failure to make contributions to multiemployer fund as required by collective bargaining agreement).

276. *Hess v. Kanoski & Assocs.*, 668 F.3d 446 (7th Cir. 2012) (attorney sues former law firm employer for breach of employment agreement).

277. One case, *Price v. Philip Morris, Inc.*, was the subject of two separate decisions based upon the same contractual question; it is counted as one case for the purposes of this thought experiment. See *Price v. Philip Morris, Inc.*, 2011 IL 112067 (Ill. 2011); *Price v. Philip Morris, Inc.*, 219 Ill. 2d 182 (Ill. 2005).

278. *Evanston Ins. Co. v. Riseborough*, 2014 IL 114271 (Ill. 2014) (claim by insurance company against law firm that represented insured in underlying personal injury suit); *Crittenden v. Cook Cnty. Comm’r on Human Rights*, 2013 IL 114876 (Ill. 2013) (claim against public agency for ordering punitive damages in underlying sexual discrimination claim); *City of Chi. v. Stubhub*, 2011 IL 111127 (Ill. 2011) (city’s claim against internet ticket resale service seeking judgment that service was responsible for collecting special tax); *Kaufmann v. Schroeder*, 241 Ill.2d 194 (Ill. 2011) (med mal claim); *Ready v. United/Goedecke Servs., Inc.*, 232 Ill.2d 369 (Ill. 2008) (personal injury claim against scaffolding company for negligent collapse); *Imperial Apparel, Ltd. v. Cosmo’s Designer Direct, Inc.*, 227 Ill.2d 381 (Ill. 2008) (defamation claim by retail competitor); *Brucker v. Mercola*, 227 Ill.2d 502 (Ill. 2007) (med mal claim); *Bowman v. Am. River Transp. Co.*, 217 Ill.2d 75 (Ill. 2005) (seaman personal injury claim under the Jones Act where FAA explicitly excludes “contracts of employment of seamen” from its scope, 9 U.S.C. §1).

279. Two of the class actions lack a contractual nexus upon which an arbitration clause might rest. See *Italia Foods, Inc. v. Sun Tours, Inc.*, 2011 IL 110350 (Ill. 2011) (class action against company sending unsolicited faxes); *Smith v. Ill. Cent. R.R. Co.*, 223 Ill.2d 441 (Ill. 2006) (class action against railroad company for train derailment that resulted in toxic exposure).

280. *Gridley v. State Farm Mut. Auto. Ins. Co.*, 217 Ill.2d 158 (Ill. 2005); *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100 (Ill. 2005).

281. *King v. First Capital Fin. Servs. Corp.*, 215 Ill.2d 1 (Ill. 2005).

282. *Kinkel v. Cingular Wireless LLC*, 223 Ill.2d 1 (Ill. 2006).

283. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166 (Ill. 2011) (power company).

284. *Carr v. Gateway, Inc.*, 241 Ill.2d 15 (Ill. 2011) (consumer class action against computer manufacturer); *Solon v. Midwest Med. Records Ass’n*, 236 Ill.2d 433 (Ill. 2010) (consumer class action against medical records custodian for overcharges); *Kean v. Wal-Mart Stores, Inc.*, 235 Ill.2d 351 (Ill. 2009) (consumer class action against on-line retailer for excessive shipping charges); *Barbara’s Sales*,

rettes and prescription drugs) that would likely remain in court under our experiment.<sup>285</sup> Of the twelve remaining non-class cases, eight arose under standard form agreements—like insurance or auto lease contracts—that will carry arbitration clauses in our counterfactual world.<sup>286</sup>

So the majority of consumer cases in this sample would disappear from the judicial docket under the conditions posited here. Most of the cases that would remain are not the stuff of consumer common law development (it turns out ICFA allegations are often sprinkled onto unrelated pleadings). The full deployment of arbitration clauses in standard form agreements, then, would surely have an immense impact on the development of consumer protection law. The cases captured in my ICFA sample provide just a tiny illustration of the range of doctrinal developments that would be foreclosed. These cases include a controversial pronouncement by the Seventh Circuit that “federal banking laws [do not] preempt state laws of general applicability like the Illinois Consumer Fraud Act,”<sup>287</sup> a test for resolving “a conflict between a state rule of procedure and a federal rule of procedure” where facts pled under the ICFA do not meet the pleading standards under the federal rules,<sup>288</sup> and numerous, substantive Illinois Supreme Court rulings interpreting the ICFA.<sup>289</sup>

*Inc. v. Intel Corp.*, 227 Ill.2d 45 (Ill. 2007) (consumer class action by PC purchasers against chip manufacturer).

285. *De Bouse v. Bayer*, 235 Ill.2d 544 (Ill. 2009) (prescription drugs); *Philip Morris USA, Inc. v. Byron*, 226 Ill.2d 416 (Ill. 2007) (cigarettes); *Price v. Philip Morris, Inc.*, 219 Ill.2d 182 (Ill. 2005) (cigarettes).

286. *Bridgeview Health Care Ctr., Ltd. v. State Farm Fire & Cas. Co.*, 2014 IL 116389 (Ill. 2014) (declaratory judgment sought by insurer to determine duty defend/indemnify under insurance contract); *Standard Mutual Ins. Co. v. Lay*, 2013 IL 114617 (Ill. 2013) (declaratory judgment sought by insurer to determine scope of coverage of insurance contract); *Vincent v. Alden-Park Strathmoor, Inc.*, 241 Ill.2d 495 (Ill. 2011) (claim against nursing home for negligence); *K. Miller Constr. Co v. McGinnis*, 238 Ill.2d 284 (Ill. 2010) (claim by general contractor against homeowners for non-payment under contract); *MD Elec. Contractors v. Abrams*, 228 Ill.2d 281 (Ill. 2008) (contractor claim against homeowners for non-payment under contract); *Orlak v. Loyola Univ. Health Sys.*, 228 Ill.2d 1 (Ill. 2007) (patient claim against hospital for failure to inform of potential risks under informed consent agreement); *Krautsack v. Anderson*, 223 Ill.2d 541 (Ill. 2006) (consumer claim brought against safari tour operator seeking damages under contract); *Valley Forge Ins. Co. v. Swiderski Elecs., Inc.*, 223 Ill.2d 352 (Ill. 2006) (claim by insurance company seeking declaratory judgment that it owed no duty to defend insured under contract); *Paul v. Gerald Alderman & Assocs., Ltd.*, 223 Ill.2d 85 (Ill. 2006) (claim by pension fund trustee seeking dismissal of fraud claims); *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill.2d 218 (Ill. 2006) (legal malpractice claim by disappointed client); *Chatham Foot Specialists v. Health Care Serv. Corp.*, 216 Ill.2d 366 (Ill. 2005) (claim against insurance company to recover payment under provider agreement); *Ford Motor Credit Co. v. Sperry*, 214 Ill.2d 371 (Ill. 2005) (claim for breach of auto lease contract).

287. *Courtney v. Halleran*, 485 F.3d 942, 951 (7th Cir. 2007).

288. *Windy City Metal Fabrications & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 671 (7th Cir. 2008) (comparing FED. R. CIV. P. 8 (requiring only notice pleading), with 735 ILL. COMP. STAT. 5/2–601 (requiring that pleadings contain substantial allegations of fact)).

289. See, e.g., *De Bouse*, 235 Ill. 2d at 548 (finding that a claim under the ICFA can be based on an “indirect deception theory,” but that the mere sale of a drug is not a representation that it is safe for use); *Price*, 219 Ill. 2d at 194 (ruling that manufacturer compliance with FTC rules on labelling and advertising do not trigger regulatory exemption under ICFA); *Avery v. State Farm Mut. Auto. Ins. Co.*, 216 Ill.2d 100, 168–69 (Ill. 2005) (finding that neither an “if you’re not satisfied” guarantee nor a “breach of contractual promise,” without more, are actionable under ICFA); *King v. First Capital Fin. Servs. Corp.*, 215 Ill. 2d 1, 8 (Ill. 2005) (in claim that mortgage companies engaged in unauthorized

Who can say what doctrinal developments will never happen—can never happen—if the substantive body of consumer law is largely swept out of the public judicial system?

### C. *Employment Law*

Another obvious area is employment law. As Jean Sternlight and others have estimated, “roughly 20% of the non-unionized American workforce is covered by mandatory arbitration provisions, and this number may well increase.”<sup>290</sup> Accordingly, as more employment disputes are decided in private arbitral fora, the development of legal doctrines responsive to new developments in the workplace, changing demographics of workers, and theories of liability will simply cease.<sup>291</sup>

But here, it hardly seems necessary to extract a random sample of cases and take stock of the doctrinal developments that would be lost if arbitration clauses had been fully deployed in form employment agreements. First off, as in consumer law, it is uncontroversial that employment agreements are easily fitted with arbitration requirements, and that employers are highly motivated to add these terms in order to avoid costly discrimination, wage-and-hour and other cases.<sup>292</sup> And second, as in antitrust, it is obvious that legal doctrine in the employment area is constantly evolving and provides the *content* of the law itself.<sup>293</sup> It is judge made rules that define permissible conduct under Title VII, the FLSA, and state employment laws.<sup>294</sup> Removal of these claims from the public justice system—save only for the stray EEOC case—would fully arrest

practice of law by preparing mortgage documents and charging fee for such service, court finds these acts within pro se exception to general rule and, further, that no private right of action for damages exists under the Attorney Act for the unauthorized practice of law).

290. Sternlight, *supra* note 216, at 1310, (citing 2015 CARLTON FIELDS JORDEN BURT CLASS ACTION SURVEY: BEST PRACTICES IN REDUCING COST AND MANAGING RISK IN CLASS ACTION LITIGATION, available at <http://classactionsurvey.com/wp-content/uploads/2014/04/2014-class-action-survey.pdf>).

291. See, e.g., Judge Craig Smith & Judge Eric V. Moyer, *Outsourcing American Civil Justice: Mandatory Arbitration Clauses in Consumer and Employment Contracts*, 44 TEX. TECH. L. REV. 281, 292 (2012) (“[B]ecause arbitrators generally do not issue opinions, mandatory arbitration would result ‘in a lack of public knowledge of employers’ discriminatory policies, an inability to obtain effective appellate review, and a stifling of the development of the law.’” (internal citations omitted)).

292. See, e.g., Sternlight, *supra* note 216; Nancy Levit, *Megacases, Diversity and the Elusive Goal of Workplace Reform*, 49 B.C. L. REV. 367, 368 (2008) (describing a “number of the employment cases against major corporations from the late 1990s and early 2000s resulted in multimillion-dollar settlements,” such as the \$175 million settlement with Texaco, the \$190 million settlement with Coca-Cola, and the \$81.5 million settlement against Publix, among others (internal citations omitted)).

293. See, e.g., Orly Lobel, *The Four Pillars of Work Law*, 104 MICH. L. REV. 1539, 1550 (2006) (“The body of employment law is therefore found in hundreds of separate statutes and thousands of court decisions,” and has “evolved through social practice, judicial doctrine, and statutory enactment . . . .” (internal citations omitted)).

294. See, e.g., Nancy Gertner, *Losers’ Rules*, 122 YALE L.J. ONLINE 109 (2012), <http://www.yalelawjournal.org/forum/losers-rules> (discussing how “judges have made rules that have effectively gutted Title VII”).

common law development.<sup>295</sup> Ultimately, private arbitration of these disputes allows defendant-employers to disregard federal civil rights statutes, “while also preventing the laws from accounting for and evolving to address various claims and disputes.”<sup>296</sup>

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Indeed, my thought experiment has already materialized in one important area of public law: disputes between investors and their brokers. Since the mid-1980s, when the Supreme Court overruled *Wilko* and broadly endorsed the use of mandatory pre-dispute arbitration provisions in the securities industry,<sup>297</sup> these clauses have become “universally demanded by broker-dealers as a condition for an investor to open an account.”<sup>298</sup> Since then, essentially all investor claims against brokers have been determined in private arbitral fora overseen by the Financial Industry Regulatory Authority (“FINRA”) rather than in public courts.<sup>299</sup> Brokerage customers who allege, for example, that their broker recommended unsuitable investments, placed unauthorized trades, or committed fraud must arbitrate those claims in FINRA’s arbitration forum—which shares all the relevant characteristics of private arbitration described above.

And sure enough, where there once was robust common law development on the contours of broker-dealers’ duties to their investors<sup>300</sup>—concerning, among other things, the “suitability doctrine,”<sup>301</sup> the “know

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295. As one commentator has put it: “Imagine a sexual harassment case in private arbitration. If the arbitrator ruled that the employer did not perform an adequate investigation of the sexual harassment complaint, who will learn what kind of investigation should have been performed?” Christine Godsil Cooper, *Where Are We Going with Gilmer? Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203, 215 (1992) (internal citations omitted). See also Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts of the 1990’s*, 73 DEN. U. L. REV. 1017, 1046–47 (1996) (asserting that confidential dispute resolution hinders the development of precedent in the employment discrimination field).

296. Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 163–64 (2015).

297. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 477 (1989); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 220 (1987).

298. William B. L. Little, *Fairness is in the Eyes of the Beholder*, 60 BAYLOR L. REV. 73, 102 (2008) (internal citations omitted).

299. Constantine N. Katsoris, *Roadmap to Securities ADR*, 11 FORDHAM J. CORP. & FIN. L. 413, 525 (2006) (chronicling rise of arbitration claims from 1980s to early 2000s). Until 2007, the National Association of Securities Dealers, Inc. (“NASD”) and the New York Stock Exchange (“NYSE”) ran separate arbitration forums. On July 30, 2007, NASD and NYSE consolidated and formed FINRA, which now operates the single largest dispute resolution forum in the securities industry. See Press Release, FINRA, NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority (July 30, 2007), available at <http://www.finra.org/Newsroom/NewsReleases/2007/P036329>.

300. See, e.g., Manning Gilbert Warren III, *Legitimacy in the Securities Industry: The Role of Merit Regulation*, 53 BROOK. L. REV. 129, 139 (1987) (describing, in 1987, the “avalanche of customer complaints of broker-dealer sales abuses (an avalanche which includes twelve times more accusations of account churning and misrepresentation than five years ago)” (citing Bruce Ingersoll, *Inundated Agency, Busy SEC Must Let Many Cases, Filings Go Uninvestigated*, WALL ST. J., Dec. 16, 1985, at 23)).

301. Robert H. Mundheim, *Professional Responsibilities of Broker-Dealers: The Suitability Doctrine*, 1965 DUKE L.J. 445, 449 (1965) (discussing then current conflict concerning proper standards for regulating broker-dealers, including making sure that he “discharge his responsibility under the suita-

your customer rule,” and the prohibition against “churning” or other forms of self-dealing<sup>302</sup>—that doctrinal development completely stalled in the late 80s.<sup>303</sup> Today, the law reporters are nearly devoid of any mention of these subjects, as the “law” of broker-dealer duties has disappeared into the vortex of FINRA arbitrations.<sup>304</sup> As one commentator put it, “[s]ince *McMahon*, the flow of securities law precedent has virtually ceased.”<sup>305</sup>

## V. CONCLUSION: HIGH-STAKES MUSICAL CHAIRS

The wholesale removal of entire categories of cases from the public judicial system would arbitrarily freeze doctrinal development to the point of removal. To oversimplify, if all direct purchaser antitrust cases, consumer cases, or employment cases were evicted from the judicial system on Date X, the doctrinal development of antitrust law, consumer law, and employment law would be largely frozen as of Date X. Plaintiffs bringing claims in arbitration for decades to come would be prosecuting those claims under the standards that prevailed on Date X, as would the handful of cases that for whatever reason found their way into the courthouse. The standards that prevailed on Date X would be extremely important. What would matter, for all participants in the system, is where they were when the music stopped.

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bility doctrine by informing the customer of the risk aspects of the transaction in a way which will enable the customer, in light of his individual capabilities, to relate these risks to his risk threshold and thus make his own determination of suitability.”).

302. Plaintiff must prove three elements in order to establish a cause of action for “churning”: (1) trading in his account was excessive in light of his investment objectives; (2) broker exercised control over trading in the account; and (3) broker acted with intent to defraud or with willful and reckless disregard for investor’s interest. See *Leib v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 461 F. Supp. 951 (E.D. Mich. 1978).

303. See, e.g., *Hobbs v. Bateman Eichler, Hill Richards, Inc.*, 164 Cal. App. 3d 174, 204 (Cal. Ct. App. 1985) (“On the one hand, brokers act as investment advisors to their clients. On the other hand, they are salespersons, dependent upon their brokerage commissions for a livelihood. Commissions are received only when customers engage in transactions. Individual brokers employed by a brokerage firm normally obtain as their sole compensation between 30 and 40 percent of the commissions they produce. Under this compensation system, few brokers are immune to the temptation to consider their financial interest from time to time while they are advising clients. Being at once a salesman and a counselor is too much of a burden for most mortals.” (internal quotations omitted) (internal citations omitted)).

304. See, e.g., Jonathan Kord Lagemann & Robert V. Cornish, Jr., *The Role of Experts in Securities Arbitrations*, 16 AM. J. TRIAL ADVOC. 721, 722 (1993) (“Prior to *McMahon*, a significant number of securities disputes between customers and broker-dealers were tried in court. As expected in our Anglo-American jurisprudential system, judicial opinions were published on the subjects of suitability, churning, and other typical securities claims.”).

305. *Id.* at 724; see also Matthew P. Allen, *A Lesson From History, Roosevelt to Obama—The Evolution of Broker-Dealer Regulation: From Self-Regulation, Arbitration, and Suitability to Federal Regulation, Litigation, and Fiduciary Duty*, 5 ENTREPRENEURIAL BUS. L. J. 1, 30 (2010) (observing that, once “broker-dealers added mandatory arbitration provisions to all their customer agreements,” the “standards governing broker-dealers have not been developed to keep pace with the changing landscape of the global securities market and products”).

What happens when the music stops will vary by area. In antitrust, our small Roberts Court sample suggests there will still be a stream of government and competitor suits in the federal courts. Further, some direct purchasers will surely find it worthwhile to arbitrate.<sup>306</sup> But the judges and arbitrators entertaining those cases will have a greatly impoverished body of decisional law to draw upon—and it will be a static one. The price of this stasis is especially high in the antitrust arena, where—it is universally acknowledged—the central lawmaking role for the past 100 years has been played by the federal courts.<sup>307</sup> If the music had stopped in 2005, before *Dagher* and *Leegin*, joint venture price-setting and resale price maintenance would likely be per se illegal today.<sup>308</sup> And if it had stopped twenty years earlier, much of the law-and-economics revolution in antitrust law would never have occurred.<sup>309</sup>

In employment law, likewise, the banishment of claims to arbitration will not mean the end of claiming. But it will largely mark the end of common law development. And here again, given the courts' central role in giving content to the employment laws, the price of stasis is high. Courts are called on to define bias, harassment, and protected classes of employees, and these standards are necessarily evolving. If the music had stopped ten years ago, the protections afforded gay and transgendered employees, victims of retaliation, whistleblowers, pregnant employees, and many others would be radically different.

Consumer law is no different, as courts develop standards to govern consumer privacy issues, consumer credit scoring, debt collection practices, mortgage foreclosure practices, payday lending, credit discrimination,

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306. Politics will play a role here too. During the entire George W. Bush administration, the Antitrust Division did not bring any civil actions for anticompetitive conduct outside the merger area.

307. See *supra* Part III.A; see also *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

308. See, e.g., Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 429 (2007) (“The Sherman Act is a clear-cut and self-conscious delegation of lawmaking power to courts.”) See also *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (“[T]he legislative history [of the Sherman Act] makes it perfectly clear that [Congress] expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition . . .”).

309. See, e.g., Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 55–71 (2007) (describing “a creeping transition from rules to standards” in antitrust law). Professor Crane catalogues numerous examples of the shift from *per se* rules to a fact-sensitive approach under the “rule of reason”: compare *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 380–81 (1967) (applying the *per se* standard), with *Cont'l T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 59 (1977) (overruling *Schwinn* and applying the rule of reason); compare *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659 (1961) (applying the *per se* standard), with *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 297 (1985) (applying a rule of reason analysis); compare *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213–14 (1959) (applying *per se* standard), with *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 735–36 (1988) (rejecting the *per se* standard). See also Crane, *supra*, at 59–69. See also Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 931–32 (1977) (observing that the Chicago school “made little impact either on scholarly opinion or on policy” in the 50s, but “[t]wenty years later, the position is dramatically changed,” as “[t]he Chicago school has largely prevailed with respect to its basic point: that the proper lens for viewing antitrust problems is price theory”).

and scores of other issues. It is difficult to see how this law will continue to get made if the stuff of today's consumer litigation is, by and large, shunted into private arbitration.

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It is hard to imagine that this game of high stakes musical chairs would have been a welcome outcome to the Reagan anti-lawsuit reformers. Much as the arbitration revolution does reduce lawsuits (the primary goal of the anti-lawsuit movement), it carries an externality that the reformers' carefully crafted legislative agendas did not: namely, the cessation of common law development in entire areas of the law. This externality, all else being equal, is as likely to prejudice the interests of conservatives as it is liberals; it all depends on where you are when the music stops.