THE POLITICAL ECONOMY OF COMMERCIAL ARBITRATION

THE CORPORATIZATION OF U.S. ARBITRATION LAW

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A DISSERTATION SUBMITTED TO THE FACULTY OF GRADUATE STUDIES IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE DEGREE OF DOCTOR OF PHILOSOPHY

GRADUATE PROGRAM IN POLITICAL SCIENCE

NOVEMBER 2018

Abstract

Arbitration is not just about economic and business efficiency, as its advocates argue, reducing the costs and delays associated with litigation. As I shall illustrate in this thesis, corporations have used arbitration reform as a means of restructuring the regulatory state in ways that suit their interests. Drawing on the legislative history of the Federal Arbitration Act, as well as on documents detailing the rise of the corporate arbitration lobby, I show how corporations have used arbitration reform as a means of enacting conservative political change by "non-political" means. This corporate legal mobilization is animated by a libertarian conception of private law in which government plays a minimal role in the oversight of business disputes. The dissertation traces the development of this corporate arbitration movement and shows how it is actively reshaping arbitration law to protect the "freedom of enterprise" from outward challenge or encroachment, with important implications for the state's ability to monitor and govern corporate behavior.

Dedication

To my parents.

Acknowledgements

Stephen Gill's curiosity and knowledge of political-economy were indispensable to the progress of this dissertation. I am appreciative that both he and Isabella Bakker were open to taking on a cross-disciplinary project. Their role in fostering a diverse intellectual atmosphere is testament to the great tradition of political-economic thought built by York University's Political Science program. I also would like to thank Amy Cohen for her suggestions and cogent criticisms. She is a world-class arbitration scholar and it has been an honor to work with her.

I have benefited from the vibrant community at the Harvard Institute for Global Law and Policy. I wish to thank John Haskell, Karolina Januszewski, Zoran Oklopic, Ramzan Alnoami, Richard Lehun, Toni Marzal Yetano, Farshad Godoshi, Liam McHugh Russell, Roxana Banu, Christopher Webster, Jose Toro and Guillermo Moro for their intellectual support and friendship. I would especially like to thank Boris Mameluke for his illuminating comments and encouragement at the 2015 IGLP workshop in Doha, Qatar.

The community fostered by Peer Zumbansen through both Osgoode Law School and the Transnational Law and Institute at King's College have played a large part in galvanizing interest in the politics of private law. Thank you to Prabha Kotiswaran, Prabhakar Singh, Bryant Garth, Yves Dezalay, Jothi Raja, Jenny Lander, Rebecca Schmidt, and Emilio Mayer, all of whom I had the pleasure of meeting at the Transnational Law Summer Institute in 2016.

Osgoode Law School's faculty provided me with generous advice and guidance throughout this research project and their contributions to knowledge to international and domestic arbitration were critical to my development as a scholar. A great thank you to Trevor Farrow, Robert Wai and Gus Van Harten, all

of whom were fantastic interlocutors and teachers. I would also like to thank David Schneiderman at University of Toronto Law School for his guidance early on in the project.

It has been a tremendous privilege to work alongside Martha McCluskey, Angela Harris, Danielle Hart, Jamee Moudud, Rohan Gray and Jay Varellas in forming the Journal of Law and Political Economy. They are indefatigable organizers and the most generous of intellectual spirits. The JLPE truly has a bright future in store.

I am indebted to a loyal group of friends with whom I have grown over the course of the PhD. Sune Sandbeck, Donya Ziaee, David Ravensbergen, Sarah Maceda Maciel, Chris Malcolm, Elif Genc, Hulya Genc, Brenda McComb, Joseph Baines, Karl Dahlquist, Jordan Brennan, Joel Roberts, and Fatema Jivaji. You are extraordinary people whose humor and tenacity carried me through the PhD. The joy I carry with me as a result of your words and actions is indelible. Early on in the PhD, Jeremy Green and Sandy Hager's camaraderie and unrelenting wit made the York department feel like a second home to me.

Finally, I wish to thank my family whose love and support helped me throughout my studies. Thank you to Steven, Anna, Kevin, Emilie, Joe and Madison.

Table of Contents

Abbreviations

AAA American Arbitration Association
ABA American Bar Association
ADR Alternative Dispute Resolution
BRT The Business Roundtable of the United States Chamber of Commerce
CIETAC China International Economic and Trade Arbitration Commission
CPR International Center for Conflict Prevention (formerly Center for Public Resources)
DELCOG Delaware Coalition for Open Government
DSD Dispute Systems Design
FAA United States Federal Arbitration Act
HKIAC Hong Kong International Arbitration Center
ICC International Chamber of Commerce
ICSID The International Centre for the Settlement of Investment Disputes
ICDR International Center for Dispute Resolution
ISDS Investor-State Dispute Settlement
LCIA London Court of International Arbitration
MNC Multinational Corporation
SVAMC Silicon Valley Arbitration and Mediation Center
UNCITRAL United Nations Commission on International Trade Law
UNIDROIT International Institute for the Unification of Private Law
UNCTAD United Nations Conference on Trade and Development

Introduction

Commercial arbitration is conventionally treated by its advocates as a private, contractual, non-adjudicative mechanism of dispute resolution that provides individuals and businesses with a faster, cheaper, and overall more efficient means of settling disputes than litigation in court.[1] The point of arbitration is to allow the two disputing parties (one claimant, another respondent) to collectively appoint a neutral decision maker; an arbitrator (or panel of arbitrators), whose decision they agree to submit to in advance. In order to expedite proceedings, and to minimize procedural delays, the arbitrator's decision is usually final and

[1] There is no universally recognized definition of commercial arbitration. In the United States, the Federal Arbitration Act adopts a broad definition commercial arbitration. As Section 2 of the FAA states, "In any maritime transaction or a contract evidencing a transaction involving commerce, an agreement contained in a record to submit to arbitration any existing or subsequent controversy is valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. In the absence of such a ground, the arbitration agreement is enforceable by the remedy of specific performance." Edward Brunet, Richard E. Speidel, Jean R. Sternlight, and Stephen J. Ware. *Arbitration Law in America* (New York: Cambridge University Press: 2006): 343.

binding. Arbitral awards are rarely subject to review or appeal. Disputes are duly settled and business can proceed as usual.

While arbitration has historically been looked upon with suspicion by the courts, most liberal capitalist countries now have laws permitting parties to resolve disputes in private arbitration forums. This is especially true in the United States, where the last forty years have witnessed a proliferation of laws and policies encouraging the use of arbitration, a shift which has been accompanied by a boom in the arbitration services sector, today valued in the billions of dollars.[2] The arbitration movement has been guided by the Supreme Court's pro-arbitration decisions. Beginning in the 1980s, and continuing to the present, the Court has interpreted the Federal Arbitration Act, the 1925 legislation that overturned judicial suspicion of arbitration, as manifesting a "liberal Federal policy favoring

[2] For an excellent overview of the Supreme Court's pro-arbitration jurisprudence, see. Stephen L. Hayford "Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change." *Wake Forest Law Review*. 31 (1996): 1. See also, Jodi Wilson "How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act." *Case Western Reserve Law Review*. 63 (2012): 91. Hiro N. Aragaki "The Federal Arbitration Act as Procedural Reform." *New York University Law Review*. 89 (2014): 1939. Judith Resnik "Fairness in numbers: A comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers." *Harvard Law Review*. 125 (2011): 78. Jean R. Sternlight "Panacea or Corporate Tool--Debunking the Supreme Court's Preference for Binding Arbitration." *Washington University Law Quarterly*. 74 (1996): 637.

arbitration"[3] giving wide berth to parties to arbitrate a vast array of commercial disputes. Today, arbitration agreements are not only routinely enforced by American courts, but potential litigants are encouraged to use arbitration whenever possible. Judicial suspicion of arbitration, which was widespread in the early twentieth century, is now largely a thing of the past. Arbitration is widely seen to be an inexpensive and effective surrogate to litigation in US courts. Federal and state courts enforce arbitration awards unless they are procured by "corruption, fraud, or undue influence" or exhibit "manifest disregard" of the law.[4]

This all might be read as a legal movement guided by the need to cut on legal costs. Still, it is important to point out that the view that arbitration is cheaper and faster than litigation is not new. Despite the frequency with which it appears in modern legal commentary, complaints about legal fees, sluggish judicial processes featured prominently in the promotional statements of early 20th century

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[3] *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* , 460 U.S. 1, 24–5 (1983).

[4] United States Arbitration Act, ch. 213, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §§ 1–15 (2012)).

arbitration reformers, and can be traced as far back as the antebellum period.[5] Commercial arbitration's promise to do away with formal legal proceedings appeals to a recurrent theme in American history; the desire to produce what Jerold Auerbach calls justice "without law". The aim to peaceably resolve disputes without the paternalistic intervention or assistance of government, courts, or the legal profession, thereby allowing individuals to assert their freedom and autonomy.[6]

In more recent times, *efficiency* (not just cost-cutting) has become the central justification for promoting arbitration law. Indeed, at present, the view that arbitration is more efficient than litigation could be said to form the basis of the contemporary arbitration movement's "common-sense". It is a view that is

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[5] As early as 1796, Massachusetts lawmaker Benjamin Austin could argue that "The 'order' of lawyers ... so far from being a 'necessary,' are in most cases a useless body. As the laws can be better executed without them; and as they are of late so rapidly increasing in all parts of the Commonwealth, ... it is become absolutely necessary, as we regard the welfare of the community, that the people direct their Representatives to lay before the Legislature, the present pernicious practice of this 'order,' that some measure may be adopted effectually to stop them in their dangerous progress." Aaron T. Knapp "Law's Revolution: Benjamin Austin and the Spirit of '86." *Yale Journal of Law and the Humanities.* 25 (2013): 277.

[6] See for example, Jerold S. Auerbach. *Justice without law?* (Oxford University Press, 1984).

seemingly taken to be self-evident by lawmakers, business officials, to the point of not requiring systematic exposition. One doesn't need to look far to gain a sense of the integral role the concept of efficiency plays in arbitration discourse. It is the main selling point of the arbitration industry. Private service providers like the American Arbitration Association (AAA), the International Center for Conflict Prevention (CPR), JAMS international, and the more recently founded Silicon Valley Arbitration and Mediation Center (SVAMC) seek to draw clients to their arbitration services by promising faster and cheaper resolutions to their disputes.[7] At the 2014 Alternative Dispute Resolution Institute of Canada's (ADRIC) annual meeting in Toronto, for example, representatives of London Court of International Arbitration spoke of the way their clients wait for years multi-year for their disputes to be heard in court. Arbitration, they attested, allowed their clients to significantly reduce, if not eliminate these wait times

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[7] The Silicon Valley Arbitration and Mediation Center, a recently formed arbitration provider specializing in high-tech and aerospace disputes advertises to potential clients by warning them of the waste cause by high-stakes corporate litigation. "In recent years, bulging patent portfolios and multi-million dollar patent litigations have characterized the technology sector, especially the smartphone and tablet industry. Accumulating lawsuits between the world's most prolific technology companies - Apple, Google, HTC, Microsoft, Motorola, Nokia and Samsung - span a multitude of courts and several continents."
"Android Wars," SVAMC, accessed October 23rd 2017,https://svamc.org/wp-content/uploads/2013/09/ACC-Android-Wars-Sept-2014.pdf

altogether. Proponents of arbitration thus see themselves to be rendering a practical service to their clients, while at the same time remedying the public justice system's shortcomings.

Private service providers are not the only proponents of efficiency. Courts have also sponsored the view. Indeed, the U.S. Supreme Court's support for arbitration has been advanced under the premise that it is cheaper and more expeditious than litigation. As the late Justice Scalia reaffirmed in two important opinions, AT&T v. Concepcion and American Express Co. v. Italian Colors Restaurant, the purpose of the Federal Arbitration Act is to ensure that disputes can be arbitrated swiftly and cheaply, and to avoid what he called "procedural morass".[8] Although arbitration imperfectly recreates the formal rules of procedure available in federal and state courts, these procedural imperfections are seen as tolerable, and ultimately justifiable, because their effect is to greatly reduce the courts' caseloads, and to allow disputants the chance to settle their disputes on their own.

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[8] AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011).

1. Explaining the Rise of Arbitration

Arbitration practitioners, corporate lobbyists, major law firms and the U.S. Supreme Court have been vocal about their wishes to reduce the costs and delays of litigation, and to ensure that expediency and efficiency remain the central features of arbitration. And who could blame them? Nobody wants more litigation, nor does anyone appear to want dispute resolution services to be more costly and expensive. In fact, for many, litigation is something to be avoided at all costs. Anti-litigation attitudes permeate our culture, from the depiction of lawyers as "ambulance chasers" to the much hyped "frivolous lawsuit", often condensed in mythic stories about our legal system, like the McDonald's "hot coffee" case. This aversion to litigation has been a recurrent theme in American history and political discourse, and can be traced as far back as the colonial period. Indeed, some of America's most distinguished statesmen have been detractors of litigation. In his 1850 *Notes for a Law Lecture*, Abraham Lincoln implored Americans,

> Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser — in fees, expenses, and waste of time. As a peacemaker the lawyer has a

> superior opportunity of being a good man. There will still be business enough.[9]

Lincoln's comments are only mildly more verbose than the ideas one can find expressed in a brochure for a modern ADR services provider. Just as 19th century advocates of arbitration were wary of formal adjudication, today, litigation is more often than not associated with acrimony, unnecessary procedure, cost and delay. Indeed, in America, the connation of "litigation", or a "litigious person" is usually a negative one. It often evokes a sense of unnecessary combativeness and appetite for conflict over dialogue and civility.[10] Worse still, lawyers (the people who are most immediately associated with litigation) are often seen as fueling needless court battles for no other reason than to get paid as much as possible.[11] In

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[9]Abraham Lincoln, Notes for a Law Lecture, in *The Complete Works of Abraham Lincoln II* (J. Nicolay & J. Hay ed. 1894): 142.

[10] Laura Nader. "Controlling Processes in the Practice of Law: Hierachy and Pacification in the Movement to Re-Form Dispute Ideology." *Ohio State Journal on Dispute Resolution* 9 (1993): 1.

[11] Marc Galanter's work critically examines the discourse of "hyperlexis" that is often attributed to litigation in America. One determinant that stands out surrounding this discourse is the absence of, or the paucity of data in support of it. "The assertion that we engage in too much disputing and litigation implies two determinations: first, ascertainment of how much we have, and, second, establishment of how much is too much. What are the data from which such determinations can be made? Until recently there have been few attempts to measure the amount of contention and litigation. Although court statistics have been compiled for management use, they are incomplete." Marc Galanter

light of these attitudes, it is unsurprising that arbitration would be welcomed as a reasonable compromise between informal settlement and full-blown litigation in court. Perhaps most importantly, nobody is obliged to submit to arbitration if they do not wish to. The pro-arbitration policy agenda is seen to produce a "win-win" scenario; nobody is actually denied their right to a fair trial, but those who wish to voluntarily opt out litigation in favor of privately-run proceedings can do so if they wish.

These justifications for arbitration reform are appealing at face value, but they conceal a much broader private restructuring of the American state, and a very important modification of "the legal institutions of capitalism", to borrow a term from John Commons. Underlying the common-sense view that arbitration is more efficient than litigation is a politically charged process involving corporations, lawmakers and lobbyists who are vying to reshape the American legal system in ways that benefit their own interests.

"Reading the landscape of disputes: What we know and don't know (and think we know) about our allegedly contentious and litigious society." *UCLA Law Review.* 31 (1983): 3.

Arbitration reform, I claim, is integral to the transformation of adjudication The reason for this is that for all its purported values of voluntariness, dialogue, and informality, arbitration ultimately involves binding decisions supported by state power. Moreover, these decisions are of regulatory significance because they determinately impact the social obligations to which business are subject. Arbitration is matter of power, not just because it empowers private citizen arbitrators, but because it alters the parameters of the state's authority, the dimensions of the regulatory state and the application of coercive force more generally.

The shifts of power engendered by contemporary arbitration reform, however, are either denied, or when they are acknowledged, taken to be a pale reflection of the powers commanded by the courts. In the domains of law, political science and political theory, arbitration law has not been subject to the same rigorous theoretical scrutiny that are the norm in federal and state led adjudication, international law and constitutional law. This lack of theoretical grounding, however, does not mean that arbitration law is not important.

I want to argue that arbitration reform is a potent means of effectuating political change, not least because it allows corporate disputants to use contractual agreements to divert conflict to private channels that are far less subject to public oversight and common-law rules than litigation in court. This political and regulatory potency is reinforced by the fact that since arbitration is private, not public, it has the semblance of being a step's remove from elections, political parties, and legislative enactments and executive decrees, the institutions and processes that are typically subject to much closer political analysis. Changes to arbitration law are seen to be much less politically suspect than other areas of policy-making.

I challenge the conventionally accepted belief that the arbitration movement is driven by economic efficiency, and the concomitant assumption that arbitration is itself politically inconspicuous. The history of arbitration is richer than that. It involves powerful social forces vying to shape the legitimate parameters of state power. Presently, arbitration reform is being used as a form of political capture that is being advanced by a broad coalition of business lobbyists, jurists, and pro-arbitration think tanks, all of whom wish to ensure that the courts are "safe for business". This is to say that arbitration reform is not merely about reducing the

costs and delays of litigation, but a politically transformative process that has radically changed the way law is used to govern corporate behavior, including, but not limited to issues involving employment rights, consumer rights, anti-trust claims, environmental damages, intellectual property claims and shareholder derivative suits. Since all of these issues have some bearing on the greater public interest and the integrity of the U.S. legal system, not to mention the distribution in society at large, we need a broader view of arbitration law that links the corporate pursuit of profit with the Rule of Law.[12] Arbitration is not just a technical means of resolving conflicts between individuals, it is a reform movement that is effectuating a sea change in the way society "names, blames and claims" through its institutions of dispute resolution.[13] The powers that are attributed to arbitrators, and the strategic behaviors that arbitration law enables (corporate) disputants to pursue need to brought to light and theorized in relationship to the neo-liberal reorganization of the regulatory state that have dominated the economic policy agenda of the last four decades.

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[12] Gregory C. Shaffer "How Business shapes law: A socio-legal Framework." *Connecticut Law Review.* 42 (2009): 147.

[13] William L. Felstiner, Richard L. Abel, and Austin Sarat. "The Emergence and Transformation of Disputes: Naming, Blaming, Claiming..." *Law and society review* (1980): 631-654.

To do this, I locate the power of arbitration in relation to the history of the welfare state over the twentieth century. Specifically, the study focuses on the making of the Federal Arbitration Act and on the parallel development of the private arbitration service sector, where many of the practical effects of arbitration policy can be identified. Contextualizing the rise of arbitration historically enables me to highlight the intimate relationship between business power and contemporary justice reform that more technical and doctrinal studies overlook. Arbitration reform needs to be understood in the context of the business practices it emerges in response to, as well as the over-arching regulatory state it is ineluctably part of.

While arbitration is an active site of legal transformation in many countries, including my own country, Canada, I have chosen to focus on the United States because of its leading role in promoting arbitration reform, as well as its centrality as a global economic power. Owing to the magnitude of its economic and geopolitical power ; the U.S is generally accepted to be a very important shaper of the international legal system.[14] The United States' exerts an important influence

[14] Many commentators identify the United States as a leader in global legal practices. See. Terence Halliday, and Bruce Carruthers. *Bankrupt: global lawmaking and systemic financial crisis*. Stanford University Press, 2009. See

on the international arbitration system, for example. Section 2 of the Federal Arbitration Act (a piece of national legislation) plays a critical role in the international system law by setting out the parameters for the enforcement of arbitral awards in U.S. courts.

The size of the United States legal market also means that it is an important shaper of arbitration practices. America is home to major arbitration service providers including the American Arbitration Association (and its international wing, the International Center for Dispute Resolution), JAMS, and the International Center for Conflict Prevention, not to mention hundreds of specialty service providers targeting domestic and international business disputes.

Finally, the U.S. corporations still, although to a declining degree, dominate international commerce. The dispute resolution practices that they adopt have a major influence on global business culture. Thus, while arbitration law is popular

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also, Kelemen, R. Daniel, and Eric C. Sibbitt. "The globalization of American law." *International Organization* 58, no. 1 (2004): 103-136. Leo Panitch and Martijn Konings, eds. *American empire and the political economy of global finance*. Springer, 2008.

many countries, the convergence of political, economic, and ideological forces in the U.S. make it an ideal subject for a study of the relationship between corporate power and arbitration law.

It is very common to separate the study of domestic arbitration from international arbitration. Even though I believe the case for separating these practices is often overstated, this study focuses mainly on domestic institutions and national policy formation to the relative neglect of international developments. Nevertheless, there are a number of important points of overlap between international and domestic arbitration. There are critical commonalities between the institutions, actors, and ideologies that comprise the domestic and international arbitration systems. To enumerate just a few examples, the doctrine of party-autonomy, the framework which informs virtually all contract-based arbitration, is critical to both domestic and international and arbitration. There is also institutional crossover between domestic and international arbitration institutions at the level of service provision. For instance, the American Arbitration Association, which is usually treated as a hub of domestic arbitration, has its own international wing, the International Center for Dispute Resolution, a major player in the international arbitration services market, but they are unified as one organization. And

importantly, the arbitrators and lawyers who work in domestic arbitration often "graduate" to the high stakes world of international arbitration. Thus, while there are important distinctions between international and domestic arbitration, an analysis of the development of U.S. arbitration law can help shed light on the interests and ideas at play in the international arbitration system.

A recurring point of focus in this study is the way that corporations seek to effectuate political change by "non-political" means. Contracts, not necessarily legislation, are the primary mechanisms through which disputes are resolved in arbitration. But contracts can be powerful mechanisms of shaping social behavior. This reflects the influence of American legal realism on my thinking. As the realists brilliantly illustrated, private law mechanisms, which ostensibly have their basis in contract, are not typically associated with what the liberal political tradition identifies as "power". As the realists showed as early as the 1920s, however, the apolitical status of contract law was largely an illusion. Contracts, which were traditionally demarcated as private, and thus separate from politics, often doubled as mechanisms of political and distributional power. Contracts between workers and employers, for example, had the appearance of being negotiated on equal terms, but they concealed the unequal application of the

state's power to enforce these same contracts, acts which they ultimately saw as betraying the state's purported distributional neutrality.[15] Through their rejection of the legal formalist analysis that dominated the Lochner era, which they accused of being abstract and divorced from material relations of political-economic force, the realists wanted to focus on "law in action", and in so doing, to challenge the Lochner era's laissez-faire distinction between what was "political" and what was "commercial".

Although it is a dated school of thought, the realist paradigm can yield important insights into the dynamics governing contemporary arbitration system. Whereas arbitration is normally seen as an apolitical mechanism that it is at a step's remove from political parties, legislatures, and even courts (which are often accused of carrying out politically driven agendas), it is in reality, a very important institution of power that has the ability to tilt the balance of adjudicative power between groups in society like business, consumers, workers, regulators, public watchdog groups and courts. This is especially important in a litigious society like America, in which adjudication is often argued to play a disproportionately important role

[15] See, Louis L. Jaffe "Law making by private groups." *Harvard Law Review* 51 (1937): 201. See also, Robert Lee Hale "Coercion and distribution in a supposedly non-coercive state." *Political Science Quarterly* 38, no. 3 (1923): 470-494.

in balancing relationships between government, business, and individuals.[16] While many have been suspicious of arbitration because it allows businesses to manipulate the terms of a contract in their favor, there has been much less focus on the way arbitration reform has been used as a vehicle of state building.

Arbitration is not just about asymmetric bargaining, but about the privatization of key areas of American justice, thereby increasing business control over the legal system. Corporations are using arbitration reform as a way of enacting conservative political changes to the justice system that effectively shield them from unwanted lawsuits, government oversight, and public control. Corporate lobby groups have used the pretext of making litigation "less costly" to diminish their exposure to specific kinds unwanted litigation, and then again, to kinds of procedural formalism associated with it (documentary discovery, common-law precedent) that they have often viewed as an anathema to their interests. Whereas there have been liberal conceptions of arbitration law that sought to expand ordinary citizens access to legal services, and to promote procedural justice reform, the contemporary corporate movement focuses almost exclusively on the

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[16] See for example Sean Farhang. *The litigation state: public regulation and private lawsuits in the US*. Princeton University Press, 2010.

freedom on contract and the freedom of enterprise. This interpretation of arbitration law, I claim, conceals a neo-conservative view of society in which the use of legislation, administrative law, social policy and collective struggle are seen to interfere with the natural order of the free-market. The current vision of arbitration law, as it is being advanced by the U.S. Supreme Court and the business arbitration lobby, downplays public policy and the history of using law as a means of progressive social change, and instead elevates the values of "market civilization" in which business (read, corporations) determine which social obligations (if any), they ought to be subject to.

In this broader theoretical context, the periodization of arbitration reform is illuminating. Students of the history of political-economy cannot help but take stock of the fact that the two most active periods of arbitration reform in twentieth century, the 1920s and the 1980s, coincide with periods of increasing corporate power, accompanied by greater faith in free-markets, the privatization of public services, as well as business efforts to insulate their activities from encroaching government regulation. There is a story to be told here about the relationship between arbitration and neo-liberal politics that has not been given sufficient

attention in the arbitration literature, nor in the broader political-economy literature.[17] As I shall show, arbitration reform cannot be dissociated from the politics of privatization that are associated with neo-liberal economic reforms that recast and in fact intensify the laissez-faire dogma that was prevalent in the 1920s. There are important points of overlap between the politics of deregulation and the dynamics that drive firms to embrace private alternatives to court. Such reforms not only involve the privatization of adjudication, but the development of a doctrine, now embraced by the U.S. Supreme Court, that arbitration is ultimately about "the freedom of contract", and that most efforts to impose greater public oversight on the process amount to a betrayal of one's individual liberty and a arbitrary limitation on the freedom of enterprise.

[17] Amy Cohen, Ugo Mattei and Laura Nader's work have identified the focus on individuality, autonomy, and privately-led initiatives in the ADR movement as engendering a form of neo-liberal politics. Cohen, Amy J. "Dispute Systems Design, Neoliberalism, and the Problem of Scale." *Harvard Negotiation Law Review*. 14 (2009): 51. Mattei, Ugo, and Laura Nader. *Plunder: when the rule of law is illegal*. John Wiley & Sons, 2008.

2. Arbitral Control

So far, I have spoken about the structure of American arbitration law. But the political-economic transformation that I am identifying is not only occurring at the level of law and legislation, it also permeates arbitration practice. Arbitration practice is itself being developed in ways that allow corporations to gain strategic disputing advantages, often with important distributional consequences.

Consider what arbitration commentators routinely refer to as *contro*l; the powers that parties may exercise over the arbitration process. In the broader arbitration literature, control usually refers to a property of commercial arbitration, as though it were a natural feature of arbitration practice itself. Indeed, control is used as a catch-all term that encompasses virtually all of the features arbitration procedure including the appointment of the arbitrator, the ability to choose institutional rules, the choice of location (the situs) of the arbitration, as well as the ability to guarantee the confidentiality and privacy of the arbitration process.[18]

[18] The concept of control features prominently in arbitration textbooks, but is usually loosely defined. Lisa Bingham, drawing on Robert Fisher and William Ury's popular conception of Dispute System Design emphasizes two separate aspects of control; *party self-determination* and control over the arbitration

These control mechanisms may appear inherently desirable, but their value and function is rendered more clearly when they are compared to the relative absence of control available to parties in court, not to mention the comparative ease with which arbitration agreements are enforced.

In some ways, the "strategic" value of arbitration is obvious. Adjudication in courts of law, at least in the United States, is associated with broad powers of

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process. As she writes, "Control over dispute-system design includes making choices regarding which cases are subject to the process, which process or sequential processes are available (mediation, early neutral evaluation, or binding arbitration, for example), which due process rules apply, and other structural aspects of a private justice system. Control at the case level includes the process and outcome, such as whether within a discrete dispute the process results in a voluntary, negotiated settlement agreement or an imposed, binding, third-party decision." Bingham, Lisa B. "Control over dispute-system design and mandatory commercial arbitration." *Law and Contemporary Problems* 67, no. 1/2 (2004): 222.

The strategic application of arbitral control is also emphasized by David Lipsky and Ronald Seeber in their 1997 survey of practices employed by Fortune 500 general counsel. As they write, "…many corporations believe the American system of civil justice in the 1990s is out of control. One of the foremost trends in corporate America in recent years has been the shift from traditional litigation and agency resolution of disputes toward the use of alternative dispute resolution (ADR)." David B. Lipsky, Ronald L. Seeber. "In search of control: The corporate embrace of ADR." University of Pennsylvania Journal of Labor & Employment Law. 1 (1997): 133.

documentary discovery (enabling them to recuperate e-mails, correspondence, written records and financial data), jury trials, appellate review, and mechanisms enabling participation for third parties like expert witnesses and indirectly affected parties. These features of litigation are mechanisms designed to elevate the quality of the judicial decision, and to ensure that the ruling is made impartially and fairly. They increase the gradation of truth attributed to the decision. Arbitration, to be sure, may be very rigorously formal, but it is seen to be *less* formalistic that adjudication. Discovery may be curtailed, there is generally little room for appeal of the arbitrator's decision, there are no juries, and third parties are generally barred from participating in the process. These conditions ostensibly exist to accelerate the judicial process, but they also enable judicial avoidance strategies that may have important regulatory effects. These regulatory avoidance strategies, I claim, are the less often registered effect of arbitral control. They only make sense if we think of them in the context of the broader history of business dispute resolution, and the regulatory and adjudicative powers exercised by the welfare state. The power of arbitration thus needs to be contextualized and understood in relation to the concrete actors who use it.

Control, as Max Weber aptly illustrated in his works, is not a natural or inherent property of any institution or authority as such, it is a socially constructed and historically mediated practice. This is true of all institutions of power, and it is certainly true of arbitration. Despite the fact that modern arbitration practices are compared to medieval merchant practices, not all legal orders have given parties the same degree of control over arbitration, nor have they enforced arbitration agreements in the same way. Moreover, the range and variety of disputes that are subject to arbitral have changed. Many areas of litigation that were once seen to be too complex to leave to arbitrators like class-actions and anti-trust suits are now routinely subject to their rule. Likewise, it has not always been the case that corporations were given such great latitude to design the terms by which their contractual and statutory disputes would be adjudicated.

The history of political economy has an important lesson to teach here. The relations of control that arbitration enables only make sense if we situate them in relation to available alternatives of dispute resolution, and the political and constitutional regimes that have historically sustained them. Moreover, the way that businesses use arbitral control mechanisms clearly have an impact on their broader ability to navigate their legal environment. Negative publicity, class-

actions, judicial inquiries, and embarrassing lawsuits may all diminish a firm's ability to turn a profit. Instead of asking whether or not control mechanisms are in fact available in arbitration, we should think about the disputing behaviors that control mechanisms enable, and the strategic purposes to which they are set.

The meaning and substance of arbitral control also seems to be highly "user dependent". While it is true that arbitration control mechanisms can be exercised by anyone who enters into an arbitration agreement (and arbitration is indeed used in a wide number of disputing contexts), corporations and commercial interests historically have been, and remain some of the most active users of arbitration practices. Corporations have been active in defining and developing the practices and played a major role in shaping arbitration law itself. The types of conflict that corporations deem most important, as I shall illustrate in the development of the arbitration lobbies in the 1920s and 1980s critically inform the history of arbitration.

Why have corporations, apart from being important commercial actors, been so heavily involved in the development of arbitration law? In an advanced capitalist economy in which multinational corporations constitute the principal

organizations of trade and investment, the ability to control the outcomes of legal conflict is very important. Corporations have unique disputing problems that do not beset other actors. As Joel Rogers and Terence Dunworth illustrated in their work on the history of business disputing in America, corporations litigate more, more often, (and appear to win more) than any other classification of disputant in the United States.[19] This is true of both federal and state courts. They also spend more on litigation than any organized group in the country. For such actors, litigation is not an "occasion" or aberration from normalcy, it is a matter of structural routine. Litigation is integral many corporations entire business model. In fact, for some companies that aggressively pursue mergers or intellectual property litigation, "litigation" may be said to constitute their main way of making profit. Similarly, companies like Apple, Uber, Wal-Mart, Air BnB, and Amazon litigate constantly, they employ a wide variety of dispute resolution processing tactics with contractors, employees, "associates", suppliers and consumers. Greater control over such conflict creates the possibility of engaging in a series of strategic disputing behaviors that reduce the likelihood that disputes will escalate into what litigators have referred to as "litigation warfare";

[19] Terence Dunworth and Joel Rogers. "Corporations in court: Big Business litigation in US federal courts, 1971–1991." *Law & Social Inquiry* 21, no. 3 (1996): 560.

protracted, acrimonious, and what may seem to be ultimately wasteful legal conflict that sap firms' resources, can lead to unwanted negative publicity, and which may sever business relationships.[20] From a political-economy angle, what is important to seize here is that these relationships also have to do with issues of distributional consequence.

I want to show how arbitral control changes depending on who is using it, and for what purpose, and how this figures in the broader political-economy of the American state. This study argues that the organizational size and wealth of the actors involved in arbitration matters, as does the broader political-economic setting in which arbitration reform is being waged. If we wish to understand the true meaning of contemporary arbitration reform, we need to have a sense of the strategic motivations that corporations have sought to enact, and the broader

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[20] As Jonathan Molot writes "Corporate America, in particular, complains that litigation is too expensive, time consuming, and unpredictable." Jonathan Molot "A market in litigation risk." The University of Chicago Law Review (2009): 367. Corporations often complain of their exposure to litigation, particularly regulatory litigation. Joanna Chung. "Flood of investor legal actions set to hit peak." Financial Times October 21, 2008 Retrieved from http://ezproxy.library.yorku.ca/login?url=http://search.proquest.com/docview/250137440?accountid=15182 Alison Smith. "Fear of litigation cited for US companies' reluctance to disclose." Financial Times April 6, 2011 Retrieved from

effects of the privatization of adjudication. This is not to say that corporations are the only actors involved in arbitration reform; organized labor for example, has also played an important role in shaping American arbitration law. But over the last forty years, corporate lobby groups led the charge in shaping the policy agenda. They have formed groups like the Center for Conflict Prevention and the Business Roundtable to promote the use of mandatory arbitration clauses in consumer and employment contracts, and they have sought to develop arbitration systems for disputes that previously were deemed too complex, or important, for arbitral tribunals. This is true of anti-trust disputes, defense contracts, high-tech disputes, and intellectual property disputes amongst others. In addition, there are an increasing number of private arbitration service providers that who serve corporations exclusively. In both of the most recent arbitration decisions made by the U.S Supreme Court, corporate lobby groups wrote amicus briefs in favor of AT&T and American Express from the perspective of what they viewed as

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http://ezproxy.library.yorku.ca/login?url=http://search.proquest.com/docview/860327308?accountid=15182

policies that might usurp the future of American arbitration by making unsafe for business.[21]

My focus on the corporate lobby's influence in judicial privatization and arbitration reform is meant to supplement the existing literature on arbitration and ADR reform more largely. Scholars like Owen Fiss, Judith Resnik, Jean Sternlight, Bryant Garth and more recently, Sarah Staszak have illustrated some of the policy effects of relying on privately-led judicial reform initiatives, and dilution of the legal system's public values associated with them.[22] Similarly, in

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[21] In AT&T Mobility v. Concepcion, virtually all of the amicus briefs filed in favour of the petitioner (AT&T) were written by pro-corporate think tanks and business associations. In the brief of the American Bankers Association, for example, the American Financial Services Association, the Consumer Bankers Association, the Financial Services Roundtable, and the California Bankers Association, they claimed that a California court's invalidation of a class-action waiver would "invalidate the overwhelming majority of arbitration agreements, which provide for individual arbitration and disallow class proceedings." Brief of Amici Curiae American Bankers Association, American Financial Services Association, Consumer Bankers Association, Financial Services Roundtable and California Bankers Association in Support of Petitioner, p. 3, AT&T Mobility v. Concepcion, 563 U.S. 333 (2011).

[22] Fiss, Owen M. "Against settlement." *Yale Law Journal* 93 (1983): 1073. Judith Resnik. "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights." *Yale Law Journal* 124 (2014): 2804. Sternlight, Jean R. "Panacea or Corporate Tool - Debunking the Supreme Court's Preference for Binding Arbitration." *Washington University Law Quarterly* 74 (1996): 637. Garth, Bryant G. "Tilting the Justice System: From ADR as Idealistic

the international sphere, scholars like Claire Cutler, Robert Wai, Horatia Muir Watt and Gus Van Harten have illustrated the shifts of power taking place through the increasing importance of arbitral tribunals in investment conflict.[23] In the Canadian public policy setting, Trevor Farrow's work illustrates the often skewed form of justice produced by ADR practices, and suggests pathways for reform.[24] By bringing corporations back into the frame of national policy discussion, I wish to raise awareness about the divergent uses and motivations for arbitration reform, as well as to challenge the still prevalent view that arbitration reform is a force in the service of progressive politics and efficiency.

Movement to a Segmented Market in Dispute Resolution." *Georgia State University Law Review*. 18 (2001): 927. Staszak, Sarah. *No day in court: Access to justice and the politics of judicial retrenchment*. Oxford University Press, 2014.

[23] Claire A., Cutler. *Private power and global authority: transnational merchant law in the global political economy*. Vol. 90. Cambridge University Press, 2003. Horatia Muir Watt. "The contested legitimacy of investment arbitration and the human rights ordeal." (2012). Van Harten, Gus. "Arbitrator behaviour in asymmetrical adjudication: an empirical study of investment treaty arbitration." *Osgoode Hall Law Journal* 50 (2012): 211. Wai, Robert. "Transnational liftoff and juridicial touchdown: the regulatory function of private international law in an era of globalization." *Columbia Journal of Transnational Law*. 40 (2001): 209.

[24] Trevor CW Farrow. *Civil justice, privatization, and democracy*. University of Toronto Press, 2014.

3. Is Arbitration Efficient?

The question of efficiency is integral to the contemporary pro-arbitration policy agenda. The most prevalent defense of arbitration is that it is not only cheaper and faster litigation, but that it creates second-order efficiency gains for society as whole. According to the proponents of the efficiency hypothesis like Gillian Hadfield and Lawrence Ribstein, when business disputants resort to arbitration, they spare the courts of unnecessary litigation, they increase the speed of legal service delivery, and they place downward pressure on legal costs.

I challenge this set of propositions. The idea that business use arbitration because it is more efficient than litigation, while elegant as an axiom, is unsatisfactory as an historic explanation for why the use of arbitration has proliferated. From the outset, there are insufficient data to evaluate whether or not cost and time savings have in fact been the main driver of arbitration reform. There is not enough data on the use of arbitration that would permit such a wide sweeping evaluation to be made. Most of the evidence presented in favor of the efficiency relies on interviews with corporate managers and general counsel. Moreover, this claim is

complicated by an increasing number of complaints that arbitration is becoming exactly like litigation; formal, rigid, and expensive.[25]

These are only some of the empirical grounds to be skeptical about arbitration's superior efficiency. But claims about arbitration's improvements to the legal system are in my view, even more importantly theoretically incomplete both as historical explanations and as broader conceptions of justice. As works like those of Ian Macneil, Katherine Stone, Jerold Auerbach, Bryant Garth and Yves Dezalay have shown, the history of arbitration is richer than a striving for cheaper and faster dispute resolution but in fact involves an entire constellation of social actors including judges, lawmakers, retired legal professionals, businesses and trade associations seeking to reform the legal process with rival conceptions of justice. Moreover, using efficiency as a criterion for judging the effectiveness of any legal system seems to relegate core features of democratic lawmaking like fairness, representation, impartiality and rationality to a secondary role. Even if these substantive matters of justice are being cast aside in pursuit of efficiency, it

[25] David Lipsky and Ronald Seeber's study found an increasing number of executives and counsel voicing the complaint that arbitration was becoming more like litigation, formalized, costly, and sluggish. David B. Lipskey and Ronald L. Seeber. "In search of control: The corporate embrace of ADR." *University of Pennsylvania Journal of Law and Public Policy* 1 (1997): 133.

is still necessary to theorize how arbitration fits into the broader fabric of constitutional democracy.

The efficiency thesis also faces limitations as an explanation for arbitration's increased popularity. It may be true that arbitration main appeal has been its promise to make the justice system more efficient, but this leaves out many other features of the arbitration system. For starters, arbitration involves the creation of a privately administered legal system in which arbitrators and corporate officials (not judges) determine what is just. It involves binding decisions made by commercial arbitrators, the deployment of powers of decision making that are normally attributed to public officials, not to mention the "sanctification" of such judgments as legitimate expressions of justice. Efficiency can be used as a criterion to evaluate the effects of this movement, but it tells us very little about the quality and substance of justice that these actors are involved in producing.

Moreover, from the point of view of the disputants, arbitration involves a wide array of strategic disputing activities including the concealment of private information, the re-location of dispute to strategically favorable jurisdictions, and

the selection of arbitrators who are more likely to render a favorable ruling. These relations of power cannot be satisfactorily explained by efficiency. They need to be theorized as serious expressions of a political theory, even if that political theory is more obliquely expressed than more familiar and immediately observable ideologies like liberalism, conservatism, populism and nationalism. Since arbitration involves the creation of a privately run, privately financed system of adjudication, any analysis of arbitration has to begin with an evaluation of its broader social significance as a social system, not just its ability to resolve discretely conceived disputes. Greater attention needs to be paid to the difference between public and private power, not the least because corporations constitute some of the most important users of the contemporary ADR system.

4. From Arbitration Reform to the Corporatization of Arbitration

Corporations and business groups have been very important actors in the arbitration reform movement, and they have mobilized a set of justifications and arguments to advance their agenda. One of the most commonly deployed arguments in favor of arbitration is that there has been a "litigation explosion", a snowballing of various forms of litigation, including frivolous litigation, that can

easily be done away with by promoting institutions of alternative dispute resolution and settlement.[26] Reformers use tropes like these to justify legal forms that radically expand the range of commercial disputes that may be arbitrated, while in the same stroke delimiting public oversight on the arbitration system. What these proponents do not say is that arbitration reform involves radical transformations in the powers of the courts and the state to regulate corporate behavior. For all its claims of being dialogic, informal and voluntary, arbitration reform is ultimately about the deployment (or non-deployment) of state power.

This involves a paradox. On the one hand, arbitration reform involves a very *active* role on the part of the state. On the other, it involves judicial and regulatory *restraint* from interfering too much in the arbitration process. This dual movement often leads to contradictory formulations and policy proposals. For example proponents of arbitration like to imagine that arbitration is market-led, demand driven, and relative removed from government oversight. But they have also lobbied aggressively to ensure that the state does not enact reforms that would place limitations on the use of arbitration in consumer and employment settings.

[26] Leo A. Levine, and Denise D. Colliers. "Containing the Cost of Litigation." *Rutgers Law Review* 37 (1984): 219.

They have also sought to ensure that regulators and civil-society groups do not interfere in the "stateless" domain of arbitration. Following the insights of Karl Polanyi, it seems as though creating a private economic sphere requires a lot of state planning.

Much of this policy reform is couched in the rhetoric of progressive values. Making arbitration available is seen to improve the quality of justice available to disputants. But this corporate legal mobilization, underscored by supportive U.S. Supreme Court decisions, has little to do with the aspirations that animated progressive arbitration reformers like Julius Cohen and Louis Brandeis in the early 20th century, or then again the community activists that embraced the alternative dispute resolution movement of the 1980s as means of extending legal services to underrepresented groups. What is emerging today is a corporate movement that reflects the structural interests and managerial systems of the nation's largest business corporations, and their desire to control the litigation landscape.

The active role that corporations have taken in advancing arbitration reform is concealed by a universalizing discourse of arbitrators, scholars and jurists that

makes it seem like arbitration is a demand-led consumer movement, and moreover, that it benefits all members of society equally. In reality arbitration reform has been a political project of a relatively small array of business lobby groups, jurists, think tanks and scholars. As Austin Sarat pointed out in 1984, speaking of court reform generally.

> Court reform is not one of those issues that galvanize or energize visible widespread public sentiment. Court reform and court reform efforts are almost exclusively the concern of a restricted group of judges, professional court administrative personnel, selected law professors at predominantly elite law schools, leaders of the organized bar, and a rather small group of state and federal legislators.[27]

This statement is as true of arbitration reform as it is of court reform generally. Arbitration reform continues to be spoken about in terms of its benefits to consumers and workers, not to the giant corporations who have been active in organizing and financing the arbitration movement. In fact, one of the facts that struck me most over the course of this research project was that, although commercial arbitration conferences are attended by corporate litigators, international arbitrators who preside over contract dispute valued in the hundreds of millions of dollars, trade officials and a whole series of business auxiliaries like

[27] Austin Sarat. "The litigation explosion, access to justice, and court reform: examining the critical assumptions." *Rutgers Law Review* 37 (1984): 320.

accountants, economists, and academics, seldom are "corporations" mentioned at in arbitration discourse or the arbitration literature at all. The agents of the arbitration system, as well as arbitration practice manuals speak of "parties", "interests", "claimants" and "respondents", but virtually never of the structural properties that characterize the global business giants whose disputes they administer. The discourse of arbitration and ADR is anti-sociological in the sense that it does not consider differences of power, market-share, institutional size, scale, or wealth as legitimate categories of analysis. The following chapters positively identify the corporation's influence on the arbitration system by more closely examining the dimensions of wealth, political power, and business lobbying that have found expression in the arbitration reform movement.[28]

5. Bringing the Corporation Back In

[28] The anti-sociological nature of litigation discourse is underscored by Owen Fiss. "Dispute resolution depicts a sociologically impoverished universe, one that does not account for social groups and bureaucratic institutions. There is no room in the story for the sociological entities that are so familiar to contemporary litigation." Owen Fiss "The social and political foundations of adjudication." *Law and Human Behavior* 6, no. 2 (1982): 122.

The structural cleavages that I am identifying are important to parse out if we are to make sense of the many policy goals advocated by proponents of the arbitration movement. The arbitration system enables the strategic pursuit of specific disputing tactics, while discouraging others. The abstract and axiomatic nature of arbitration discourse should not blind us to the fact that corporations have been very active in advancing arbitration reform to enact regulatory changes that advance their particular interests. Nor should it blind us to the constellation of jurists, business managers, and intellectuals who are advancing the free-market model of arbitration.

One major contributor to the perceived legitimacy of the arbitration reform movement is that inter-business disputes, unlike disputes between individuals and business, or investment disputes between states and business, involve voluntary relationships between equals. This makes it seem like arbitration is inconspicuous – its effects do not spill over to those who are not immediately involved in the dispute. The power exercised in the arbitrator's decision seems to be delimited to the two disputants in question, and not to place anyone's interests at stake. This is arguably not the case in high-stakes investment arbitrations, in which the interests of the general public make be implicated when a state is ordered to pay damages

to a host corporation. In fact, most people do not seem to think it is a matter of public concern whether two corporations litigate or arbitrate their contractual relationships at all. It is uncommon to attribute political relevance to the fact that two corporations, say Kraft Foods and Starbucks, prefer to resolve their problems amongst one another in private rather than fight it out in court. High-stakes commercial disputes often attract the attention of the business press, as did the patent wars between Apple and Samsung between 2009 and 2016, but it is uncommon for them to generate genuine political pressure that is typically reserved for public interest litigation and "values-based" litigation like criminal justice reform, abortion rights and gun control. The reasons for this are complex. For one, most people have an intuitive understanding, garnered from ordinary experience, that an entire range of conflicts can be resolved without making recourse to formal means. Arbitration appeals to the subconscious notion that legal conflict is a matter of "misunderstanding", and that mutual reconcilement of interests (with the assistance of a third party) is possible without resorting to court. This is especially true in America, where distrust of bureaucracy has been elevated to the level of a civil religion. Adding to this depoliticized view of contractual relationships is the classical public/private distinction, in which politics is seen to be consigned the acts of the executive and legislative branches

of government and "police powers", not to the acts of private parties like business, NGOs, civil society groups and individuals.

What the conventional view of business arbitration leaves out are the immense powers that have been created by fostering the culture of alternative dispute resolution, especially amongst business. In mainstream arbitration discourse, no differentiation is made between corporations, small business, and individuals. But can the size, scale, and economic importance of corporate conflict in our global capitalist system be compellingly compared that which emerges between much smaller parties? For many proponents of arbitration and ADR – the answer to this question is yes. Roger Fisher and William Ury's model of interest-based disputes resolution featured in the popular *Getting to Yes* seamlessly shifts lens from conflict between individuals, to conflicts between business, to international geopolitical conflict.[29]

What this compression of scale achieves, and which is very relevant from the standpoint of political economy, is a "flattening" effect, an ideological

[29] Roger Fisher, William L. Ury, and Bruce Patton. *Getting to yes: Negotiating agreement without giving in*. New York: Penguin, 2011.

concealment of structural political-economic interests involved in arbitration reform. Just as Karl Marx observed that classical political economy erroneously posited "man" severed from all social ties, as its main unit of analysis, so does arbitration discourse present the arbitration system as a meeting of "individuals", free of historical context, structural power, and class interest.[30] Indeed, in arbitration discourse, organizations as varied as corporations, states, NGOs, families and individuals are seen to operate in accordance with the same logic of rationality. This assumption has its roots in neo-classical economic theory, which conceives of society, not as competing classes, structures, organizations or

[30] As Marx wrote in the *Grundrisse* "The individual and isolated hunter and fisherman, with whom Smith and Ricardo begin, belongs among the unimaginative conceits of the eighteenth-century Robinsonades, which in no way express merely a reaction against over-sophistication and a return to a misunderstood natural life, as cultural historians imagine. As little as Rousseau's *contrat social*, which brings naturally independent, autonomous subjects into relation and connection by contract, rests on such naturalism. This is the semblance, the merely aesthetic semblance, of the Robinsonades, great and small. It is, rather, the anticipation of 'civil society', in preparation since the sixteenth century and making giant strides towards maturity in the eighteenth. In this society of free competition, the individual appears detached from the natural bonds etc. which in earlier historical periods make him the accessory of a definite and limited human conglomerate." Karl Marx, *Grundrisse* https://www.marxists.org/archive/marx/works/1857/grundrisse/ch01.htm (accessed September 26, 2018)

regimes, but as an agglomeration of rational, utility-maximizing individuals endowed with relatively equal information competing in open marketplace.[31]

The superimposition of neo-classical concepts of atomistic individualism upon arbitration discourse is a theme that has been identified by Amy Cohen. As she observes "Interest based dispute resolution, aims, quite sensibly, to achieve at an interpersonal level what neoliberalism aims to achieve writ large: to take bounded individuals as the basic unit of analysis and to encourage them to pursue their interests in relation to the interests of others in order to achieve their maximum overall good."[32] Not all interests, however, are expressed equally. Organized economic interests like corporations have different strategic aims at stake than do individuals and small business. Class-action lawsuits, for example, in which corporations are often involved as defendants, are collectively designed to enable individual disputants (who would be legally toothless on their own) to *create* and

[31] As Martha McCluskey explains "The preoccupation with extracting redistribution from efficiency grows out of neoclassical economics' early-twentieth-century quest for a formal and objective tool for measuring societal well-being that could establish economic policy analysis as a science." Martha T., McCluskey" Efficiency and social citizenship: challenging the neoliberal attack on the welfare state." *Indiana Law Journal* 78 (2003): 788.

[32] Amy J. Cohen. "Dispute Systems Design, Neoliberalism, and the Problem of Scale." *Harvard Negotiation Law Review.* 14 (2009): 63.

redress asymmetries of legal power and that therefore make it more possible to hold more wealthy and powerful disputants to account.

Mainstream arbitration discourse distorts the real social impact of corporate disputes. In so doing, it conceals the broader political content of the contemporary corporate arbitration reform agenda. The historical emergence of modern ADR needs to be fleshed out sociologically. We need a more critical, sociologically informed analysis to distill the political and distributive impact of arbitration reform that pays attention to the social forces involved in it.

It is important to point out that although this dissertation takes issue with foundational theories of arbitration and the modern arbitration policy agenda, it is neither "pro" nor "anti" arbitration. What I am interested in doing is examining the nature of justice engendered by the corporate arbitration movement, considered as a historical development. To do this, it is necessary to observe the activities and interests of the actors involved in arbitration reform in the first place, and to situate their emergence historically. Most arbitration commentary elides this problem altogether by operating at a very abstract level of analysis,

ignoring differences of scale and power between disputants, and by assuming that arbitration does not fundamentally change across history. In so doing, they overlook the immense advantages that corporations stand to gain new forms of legal protection from the further entrenchment of the Lochner-inspired arbitration jurisprudence, itself underwritten by the sponsorship of the U.S. Supreme Court. When large-volume of high-stakes corporate conflict is diverted to private channels, it may be true that the courts are freed from having to deal with corporate litigation, but we also lose sight of the fault lines and points of economic, political and social *friction* that constitutes an important source of policy-making knowledge. The "political" significance and visibility of conflict depends largely upon the concepts we use to make sense of it. Corporations perceive the conflicts in which they are engaged as a matter of "ownership" – they literally "own" the dispute in question. As Brunet writes, "When parties select arbitration, they privatize their dispute and take a form of market ownership of their disputing procedure."[33] From a sociological point of view, however, we know that all conflict is ultimately social, even if it categorized as a strictly individualized relationship. Moreover, we know that such conflict does not

[33] Brunet, Speidel, and Sternlight, *Arbitration Law in America…7.*

merely "arise" but is actively pursued or avoided by *agents*.[34] Conflict does not occur in a vacuum, but in the foreground of a broader disputing regime with its own historically determined properties. We thus need a better sense of the agents involved in contemporary arbitration reform, their structural properties, organizational interests, and the ultimately political expression of the legal regimes they engender.

From a regulatory perspective, arbitration can facilitate the resolution of commercial conflict, but it can also frustrate efforts of public authorities who wish to ensure that corporations are abiding by the law. Progressives and liberals tend to think that this problem can be resolved by evening the playing field in disputes involving asymmetries of wealth.[35] Yet the problem of arbitral power that I locate in this study does not necessarily lie where many have found it to be most problematic; in arbitral bias, or then again, in inequalities of wealth between

[34] "In the hypothetical state of nature where the dispute resolution story transpires, there are no public values or goals, only the private desires of individuals, in this instance, the desire for property." Owen M. Fiss. "The Social and Political Foundations of Adjudication." *Law and Human Behavior* 6, no. 2 (1982): 122.

[35] Carrie Menkel-Meadow. "Do the Haves Come Out Ahead in Alternative Judicial Systems: Repeat Players in ADR." *Ohio State Journal on Dispute Resolution.* 15 (1999): 19.

disputants. Although bias and asymmetric bargaining power may taint the integrity of an arbitration, the broader historical and structural backdrop of state authority against which commercial arbitration practice has been developed is even more important than inequality between parties. This deeper architecture of state power forms what Duncan Kennedy calls the "legal background rules" that make enforcement possible, and which sanctions the legitimacy of arbitral authority. Corporate interests have not stood back silently in the formation of arbitration policy.[36] Through business associations like the International Center for Conflict Prevention, and more recently through groups like the Business Roundtable of the U.S Chamber of Commerce, they have lobbied government for arbitration reforms that benefit them.

6. Business Actors and the Arbitration Reform Movement

Arbitration is not just about changing the forum for the adjudication of disputes, it involves a transformation of state power that has radically altered the legal

[36] For an overview of the way that legal background rules conditions disputing behavior, see. "The whole list of factors that we include in bargaining power is subtly constituted by the legal background." Duncan Kennedy "The stakes of law, or Hale and Foucault." *Legal Studies Forum.* 15 (1991): 331.

conditions to which corporations are subject, thereby creating strategic disputing advantages that they would not otherwise have had in court. What is at stake is the creation of a privately administered dominion of legal activity that is virtually immune from state oversight, much like offshore tax havens are legally constituted, but simultaneously opaque.[37] Arbitration services providers, in conjunction with the sanction of the Supreme Court have sought to stretch the range of disputes that can legitimately be decided by arbitrators. There is virtually no area of corporate litigation that cannot legitimately be arbitrated today. I therefore use the term "corporatization", not only to denote the fact that corporations are important users (and consumers) of arbitration services – but to place emphasis on the subjection of arbitration law and procedure to corporate interests.

Business associations like the International Center for Conflict Prevention (CPR), the Business Roundtable of the U.S Chamber of Commerce (BRT), and other corporate think-tanks, in conjunction with a constellation of free-market ideologues are vying for a system of arbitration that is fashioned on a laissez-faire

[37] Sune Sandbeck and Etienne Schneider. "From the sovereign debt crisis to authoritarian statism: Contradictions of the European state project." *New Political Economy* 19, no. 6 (2014): 847-871.

doctrine of business "self-regulation" which can thematically be traced back to Lochner-era jurisprudence.[38] The Lochner era presented government regulation as antithetical to the freedom of commerce, modern proponents of commercial arbitration, likewise, argue that greater "judicial interference" in arbitrations is sapping the "freedom of contract". Courts need to "honour parties' agreements" to defend this freedom. These commitments color the arbitration system with latent, but nevertheless, discernable ideological content. That ideology is entrusting the private sector to administer private adjudication according to their own terms, and in the same measure, ensuring that possibly destabilizing

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[38] The U.S. Supreme Court's decision in *Lochner v. New York* came to emblemize an entire era of laissez-faire jurisprudence in which the "freedom of contract" was elevated to a constitutional right protected under the due process clauses of the Fifth and Fourteenth Amendments, and then invoked that right to strike down a variety of state and Federal laws, virtually all of which sought to regulate the terms of labor contracts. The struggle between the courts and the legislatures in the United States over "liberty of contract" came to a head in a series of notorious cases in the first two decades of the twentieth century, in which the Court struck down various pro-labor measures that (along with antimonopoly legislation) were the centerpiece of progressive legislative reform. The Court in Lochner struck down a New York statute setting maximum hours for bakers, asserting that it was an unconstitutional infringement of the "liberty of person and freedom contract" of "master and employe[e] alike." Barbara Fried. *The progressive assault on laissez faire*. (Cambridge MA, Harvard University Press, 2009), 32.

interferences from judges, legislators, and the broader public, is as minimal as possible.

The creation of a private system of dispute settlement, unbound by formal rules of procedure and largely sheltered from public oversight, means the multinational firms who constitute the dominant business institutions in the global economy now have the ability to exclude an entire range of actors and processes that might interfere with the outcomes of the legal conflict in which they are implicated. This includes lawsuits involving anti-trust suits, intellectual property claims, environmental damage suits that if publicized, could potentially bring reputational damage upon those involved. When corporations have the assurance that their arbitration agreements will in all likelihood, be enforced, and furthermore, that their disputing activities will not be subject to public oversight (whether from judges, regulators, watchdog groups, or individual citizens), they gain, in the words of Max Weber greater latitude to apply their will without encountering interference from others.[39] This new form of legal authority is very puzzling

[39] Political economists and historians have challenged the notion that the corporation is an "economic" entity, see David Ciepley. "Beyond public and private: Toward a political theory of the corporation." *American Political Science Review* 107, no. 01 (2013): 139-158. Marc Galanter. "Planet of the APs: Reflections on the Scale of Law and Its Users." *Buffalo Law Review* 53, no. 5

because it is at once "legal" and "extra-legal". It is at once *law*, *law-like*, and *non-law*. The arguments and justifications that are made in favor of it read very much like the statements of lawmakers and politicians ,only that they are not, they are often made by private functionaries who have no formal accountability to the public at all. This new form of legal power needs to be disentangled and theorized, especially because it manifests itself in more innocuous ways than has traditionally been suspected. That is to say that there are existing conceptualizations of arbitral power, but they tend to focus on the immediately observable differences of bargaining power between the disputants, rather than the structural effects of the arbitration system as a whole, or then again, on the substantive content of arbitral justice.

As it currently stands, there are two central critiques of arbitration, both focusing on the issue of asymmetric bargaining power. Interestingly, both critiques begin at opposite ends of the arbitration system, yet their fundamental content is the same. In investment arbitration, the critique is that multinational firms have been able to

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(2006). According to Max Weber "In general, we understand by, "power" the chance of a man or of a number of men to realize their own will in a communal action even against the resistance of others who are participating in the action." Reinhard Bendix and Seymour Martin Lipset. *Class, Status and Power*. (New York: Free Press, 1966): 64.

manipulate bilateral investment treaties to sue governments for economic damages, thereby placing states, particularly developing states, at a disadvantage. Likewise, recent critiques of the manipulative use of consumer and employment contracts have shed light on the way that corporations have used mandatory arbitration clauses and fine print contracts to manipulate weaker parties into accepting agreements that they otherwise would not have agreed to, they have largely overlooked the relations of power engendered in arbitration between disputants of roughly equal bargaining power. Since commercial parties e.g (two corporations) are thought to be of roughly equal bargaining power, and agreements are consensual, the prospect that a firm might gain significant advantage over another seems counter-intuitive, and does not normally rouse the suspicion of otherwise very critical observers.

These theories center on important aspects of arbitration, but they are incomplete. I want to suggest that the form of political-economic power engendered in the commercial arbitration system is not necessarily about the creating conditions under which corporations will "win" more often, (taking winning to mean securing of favorable decisions in the discrete sense of the term) but of creating a

deregulated adjudicative "space" that is free from public oversight and government interference. This more oblique transformation is very important because it alters the distributive potential of law. It can be analogized to what Duncan Kennedy, drawing on the legal realist tradition refers to as the "legal background rules".[40] For Kennedy, the legal background rules are distributionally significant, even though they do not appear to bear on the immediate bargaining strength of the parties in question. What they do is shape what disputants can and cannot bring to bear in the dispute in the first place. From this point of view, policies that are seen to interfere with the "freedom of contract", to make

[40] Duncan Kennedy's conception of "background rules" is based upon early 20th century legal realist analyses of the politics of private law, which figure importantly in this study. Legal realism was a diverse intellectual movement, but one of its most lasting and intellectually potent themes was the idea that political power found expression through seemingly apolitical arrangements like contracts, rate-making in utilities, and other innocuous institutions. In the 1960s and 1970s, a new wave of legal scholars like Morton Horwitz and Duncan Kennedy drew on realist thought to better illustrate the historical and distributional importance of private legal arrangements. See for example, Morton J. Horwitz "The Transformation in the Conception of Property in American Law, 1780-1860." *The University of Chicago Law Review* 40, no. 2 (1973): 248-290. Morton J. Horwitz. "The history of the public/private distinction." *University of Pennsylvania Law Review* 130, no. 6 (1982): 1423-1428. As Kennedy writes, "In the realist analysis, there are two particularly important general categories of rules affecting bargaining strength. The first and more obvious contains the rules governing the conduct of the parties during bargaining. The second is the set of rules that structure the alternatives to remaining in the bargaining situation." Duncan Kennedy. "The stakes of law, or Hale and Foucault." Legal Studies Forum. 15 (1991): 327.

arbitration more sluggish or costly, or to jeopardize "party autonomy," constitute a threat to the autonomy of the arbitration system.

In sum, this dissertation presents evidence and arguments in support of the following five claims, each of which addresses specific positions and problems in the broader arbitration literature.

1. Arbitration is presented as though it a species of private law and thus politically and distributionally neutral. However, as I argue, arbitration reform has been used as a means of effectuating political change by non-political means. I make a case for thinking of arbitration as an expression of political-economic power.

2. Arbitration reform is modeled upon an ideologically charged, Lochnerian conception of contract law that crystallized in the late 19th century and became an entrenched feature of the American political economy in the early 20th century. This doctrine is about limiting public interference and "encroachment" on private activity, conceived as a domain of contractual freedom and "party autonomy". I illustrate the origins of this ideology in the formation of the Federal Arbitration Act, and the way that it has been reinvigorated by contemporary proponents of the

arbitration lobby in what has come to be known as the "contractualist" approach to arbitration.

3. Historically and presently, actors including arbitrators, retired federal and state judges, corporate officials and organic intellectuals have been important agents in advancing this ideologically charged conception of arbitration reform. In this way, arbitration constitutes a form of elite politics.

4. The benefits of the arbitration system are not evenly distributed. They have been organized in such a way that disproportionately benefits corporate capital.

5. Points one through four beckon a set of normative questions. What kind of justice is engendered by the contemporary arbitration system, and what is its relationship with democracy and the Rule of Law? I claim that the present course of arbitration law in the United States contrasts sharply with principles of constitutional democracy and presents challenges to the future legitimacy of arbitration law.

7. The Division of Chapters

Chapter one defines arbitration and outlines the methods employed by the study. It clarifies some of the definitional problems that emerge when distinguishing commercial arbitration from other forms of arbitration including international arbitration and alternative dispute resolution. It makes a case for thinking of the arbitration as a what Edward Purcell defines as a "social litigation system" that is historically bound and embedded within a broader political-economic regime.

Chapter two situates arbitration reform in its political context and develops the idea that arbitration is a site of political-economic transformation. It examines the wide powers and techniques that are attributed to the proverbial "arbitration revolution" and some of the political problems that emerge therewith.

Chapter three theorizes arbitral power by placing contemporary arbitration reform in historical context. The chapter focuses on one of the most important historical precursors to our contemporary era of arbitration reform, the making of the Federal Arbitration Act. I place emphasis on two social transformations, both of which have tended to be overlooked in the arbitration literature. The first is movement that paralleled the rise of arbitration, the ascent of the corporation as

the central unit of business organization in the U.S economy. The second is the development of Lochner-era jurisprudence, a laissez-faire inspired form of legal thought that dominated American legal though for much of the early twentieth century. By contextualizing the rise of arbitration in relation to these two parallel developments, I wish to show how arbitration embedded within a broader ideological framework of corporate dominance and laissez faire ideology.

Chapter four is a critique of contemporary arbitration ideology. The chapter identifies the parameters of contemporary liberal-legalism, a political-economic ideology which treats both the activity of arbitrators and the arbitration system more broadly as separate from politics, (and from) distributive conflict. I identify central tenets of this ideology: party autonomy, the principle of judicial non-interference, and the notion that the effects of arbitral awards are delimited to the claimant and the disputant. This doctrine, though seemingly devoid of ideological content, effectively forms part of a neo-liberal approach to arbitration.

Chapter five examines the resurgence of the contemporary corporate arbitration lobby and their efforts to create a system of business dispute resolution that is insulated from public control. I highlight the way the seemingly innocuous features of business arbitration: confidentiality, limited review mechanisms, lack

of precedent, and profit-based forms of adjudication enable strategic disputing behaviors that disproportionately benefit corporations

In the concluding chapter, I discuss the emergent concept of private justice engendered in the arbitration system. I provide a summary of my findings, and restate my contribution to law and political science. I discuss potential avenues for future research. Finally, I reflect on the nature of private power as it is engendered in the contemporary regime, and the sites of political contestation in which corporate power is being challenged today.

1. Definitions and Methodology

1. What is Arbitration?

Before examining the history, role and function of corporate involvement in the arbitration system, what in the first place *is* commercial arbitration, and what do I mean by specifying the object of study as "corporate arbitration" rather than relying on the conventional classifications? In what follows, I explain why I have chosen to focus on corporations to the exclusion of other disputants. I criticize the formalism, technicality and generality of arbitration discourse, and some of the common sociological oversights that emerge from it. Finally, I outline my choice of methods derived from political-economy, socio-legal studies and the history of business disputing developed by Marc Galanter, Terence Dunworth, Joel Rogers, Thomas Palay and the Wisconsin business disputing project.

This chapter explains how routinely used classifications like "commercial arbitration", "international commercial arbitration" and "alternative dispute

resolution" can give the false sense that each of these areas of arbitration discretely defined systems unto themselves. When they are treated separately, or as reified "things", divorced from the networks of social actors who compose them, we lose sight of the interests of those who have been involved in developing them, as well as the range and comprehensiveness of corporate lobbying efforts to reform arbitration.

Arbitration discourse is technical, abstract, and like much dispute resolution literature, is written by and for practitioners. It is not generally geared toward social scientists, let alone a general readership. Like accounting and insurance, arbitration is typically seen as a profession and practice, not a structure of power, and thus, is not usually described or theorized in relation to politics and/or political economy. This is important because this very formalism and technicality also constitutes the linguistic medium through which the activities of arbitrators and the broader arbitration system are described. Thus, when Kraft Foods arbitrates a billion dollar dispute with Starbucks, it will be reported in the language of "parties" contending over "property rights", formal proceedings, and award enforcement, not as a political-economic contest over control of resources. Arbitration is presented as though it were quarantined from politics and public

policy, and the actors who use it are usually conceived as rational individuals, not as agents with material interests at stake or endowed with a broader political consciousness. Clearly, however, such material interests and political consciousness are at stake in modern arbitration law, given the organizational unity with which corporations have vied for specific arbitration reforms (and other which they have opposed). We need a more structural and systemic understanding of corporate influence on the arbitration system asymmetries of power, not just between the actors who are immediately party to the dispute, but in shaping the background rules of the arbitration system more broadly. To track these changes, I outline a mixed-methods approach to the study of arbitration informed by political-economy, socio-legal studies and the history of business disputing.

Despite the fact that arbitration is ubiquitous and routinely used by legal practitioners, there are disagreements about what in fact constitutes "commercial arbitration". Gary Born's widely used practice manual defines arbitration as:

> Arbitration is a contractual method of resolving disputes. By their contract the parties agree to entrust the differences between them to the decision of an arbitrator or panel of arbitrators, to the exclusion of the Courts, and

> they bind themselves to accept that decision, once made, whether or not they think it right.[41]

Similarly, a Swiss court has defined arbitration as:

> Arbitration is an agreement according to which two or more specific or determinable parties agree in a binding way to submit one or several existing or future disputes to an arbitral tribunal, to the exclusion of the original competence of state courts and subject to a (directly or indirectly) determinable legal system.[42]

These definitions highlight the contractual basis of arbitration, its non-adjudicative nature, as well as the parties' acceptance to defer to the will of arbitrator. Apart from this, most forms of arbitration share the following features in common:

A) Basis in Contract

With the exception of investment arbitration, which is treaty-based, arbitration is usually has its basis in a contractual agreement. Arbitration may be preordained in the terms of a contract if the parties anticipate a dispute in the future (as is

[41] Born, Gary. *International Arbitration: Law and Practice*. (Kluwer Law International, 2012), 4.

[42] Born, *International Arbitration,* 4.

frequently the case in construction contracts, which frequently incur production delays from disputes), or it may arise in response to the onset of an unforeseen dispute that was not covered in the language of the contract case. In the former case, parties will determine the institutions, the range of issues, and the governing law under which the arbitration will take place. In the latter, the parties must agree on these matters after the onset of the dispute.

B) Institutional or Ad Hoc

Second, arbitration may be either institutional or *ad hoc*. In institutional arbitration, parties submit their dispute to a particular arbitral institution such as the International Chamber of Commerce, the London Court of International Arbitration or the American Arbitration Association. In ad hoc arbitration, it is left to the arbitrator to determine which rules of dispute settlement will be used.

C) Choice of Rules

In addition to being institutional or ad hoc, disputants may also choose the rules that govern the dispute. They may select specific national laws, rules provided by a particular arbitral institution, or then again, general commercial practices like

the rules outlined by the United Nation's Conference on International Trade and Investment Law (UNCITRAL), which provides a model for U.N. member states upon which to build their arbitration practices. Major arbitration service providers like the International Chamber of Commerce (ICC), the American Arbitration Association (AAA), the London Court of International Arbitration (LCIA), and the International Center for Dispute Resolution (ICDR) have their own designated rules, as well as specialized subsets of rules for specific disputing scenarios.

D) Choice of Arbitrator

Most courts randomize the selection of the judge to ensure that the judgment is made impartially. Arbitration is unique in the sense that the disputants hand-pick the arbitrator or arbitrator(s) who will make the binding judgment, and for this reason, is very alluring to those who desire an expert ruling. Selection processes vary depending on the arbitration institution or terms of the contract. Disputants can agree to let the arbitration institution appoint the arbitrator, or they can decide on the choice themselves. Typically, an arbitration either involves a single arbitrator agreed upon by the disputants, or it involves a panel of three arbitrators, one appointed by the claimant, one by the respondent, and a third neutral.

E) Finality

Fourth, once an arbitral award is made, the disputants may not normally challenge the decision. Unlike judicial decisions, which may be subject to review or appeal, arbitral awards are final. Given the proliferation of laws and policies that are supportive of arbitration, it has become increasingly uncommon for arbitral awards subject to review and even more uncommon for them to be overturned, even though specific grounds for appeal may be contained in the arbitration agreement itself.

2. Different Types of Arbitration

Scholars and practitioners usually distinguish between investment-treaty arbitration, international commercial arbitration, commercial arbitration, and then again, the long list of dispute resolution mechanisms that fall under the term alternative dispute resolution (ADR). It is worth going through each of these to illustrate some of the definitional problems at hand in these categorizations.

A) Investment Arbitration

Investment arbitration, also known as investor-state dispute settlement (ISDS) is a unique form of arbitration that has its basis in a treaty between two or more states (bilateral treaties or multilateral treaties).[43] Unlike in commercial arbitration, in which the parties are individuals or businesses, the signatories to investment treaties are states, but the claimants are individuals, investors and businesses (mainly corporations). The protections afforded by investment treaties extend to private parties including institutional investors, multinational corporations, and individuals who may bring claims against a state that is violation of the investment treaty. Conversely, states may not bring claims against private parties. For this reason, ISDS might be said to be *inherently* asymmetrical in the sense that its protections apply to one category of disputants to the exclusion of another. I have chosen not to focus on investment arbitration in this study because the treaty-form diverges significantly from the private law framework of international commercial arbitration and domestic arbitration.

[43] For an overview of the defining features of international investment arbitration, see. Gus Van Harten, and Martin Loughlin. "Investment treaty arbitration as a species of global administrative law." *European Journal of International Law* 17, no. 1 (2006): 121-150.

B) International Commercial Arbitration

International commercial arbitration (sometimes referred to as transnational commercial arbitration), by contrast, involves disputes between two international business parties from different host states. The designation "international" may refer to a) the international character of the dispute itself b) to the fact that the parties are connected with different jurisdictions, c) to institutions of dispute resolution governing the arbitration proceedings d) a combination of any or all of these elements.[44]

C) Commercial Arbitration

When used on its generic sense, the term "arbitration" usually refers to what is in fact *commercial* arbitration; contractual arbitrations that fall under the ambit of national arbitration law like the Federal Arbitration Act. The term "commercial" in commercial arbitration, although used routinely, is the source of considerable confusion, especially since it has become popular to use terms like "consumer

[44] Julian Lew, Loukas A. Mistelis, and Stefan Kröll. *Comparative international commercial arbitration*. (Kluwer Law International), 58.

arbitration", "employment arbitration" and "labor arbitration" as if they are stand-alone areas of law. In the United States, all of these areas of arbitration are commercial arbitration. Even though the term "commercial" suggests that both parties are businesses, this needn't necessarily be the case. A commercial arbitration might involve a consumer in a dispute with a major multinational corporation, or two small businesses in a disagreement over a sales contract. These overlapping terms, as well as the divergent histories of labor arbitration, international arbitration, and business arbitration often make for discursive confusion, all of which are compounded by the next term I cover; alternative dispute resolution.

D) Alternative Dispute Resolution

The term "alternative dispute resolution" has been used to refer to any form of dispute resolution that is not litigation, although it is most often associated with arbitration and mediation. Like "commercial arbitration" the term ADR also generates confusion since it is often used interchangeably, especially in the

promotional literature, with arbitration *generally*.[45] For example, the term "ADR" has been used to refer to any form of dispute resolution that does not take place in courts of law including consumer-arbitration, employment arbitration, sports arbitration, court-annexed arbitration, mediation, early neutral evaluation, and a number of "rent-a-judge" programs. To make matters even more puzzling, many *international* arbitration providers have adopted the term "ADR" and now offer a range of "international ADR" products, which may or may not include arbitration. The International Chamber of Commerce's website, for example, lists "international ADR" amongst its service offerings.

[45] The term ADR initially saw use in the 1970s when it was used to denote the renewal of interest in alternatives to court including arbitration, mediation and other forms of non-binding dispute resolution. There is something of an irony in this term since it appears to have emerged from left-wing and progressive circles – only to be adopted by the corporate sector for its own purposes. From the left/progressive point of view, informal approaches to dispute resolution were seen to be preferable to the excessively formalistic and impersonal forces of judicial machinery. The ADR movement drew the attention of political activists, community organizers and others who sought more dialogic and "human" forms of dispute resolution than those that were attributed to state courts. It was almost as though alternative dispute resolution was law's answer to the humanist school of management – it promised a less hierarchical, less bureaucratic, and more humanly engaged form of interaction. In a twist of events and outcomes, however, corporations and other institutions of concentrated decision making power also adopted the term ADR when describing their own novel institutions of dispute settlement. For this reason, there has always been something of an ambiguity in the use of the term ADR, and some have even called for terminating its use.

These different, and in some ways, competing definitions of what arbitration actually is seems to sometimes lead to organizational confusion in the arbitration profession itself. At the Toronto Alternative Dispute Resolution Institute of Canada conference in 2014, for example, political activists interested in using ADR as an organizing tool found themselves on the same panels and receptions as those specializing in international business conflict amongst oil companies. In the world of practice, these "ADR" specialists would probably never cross paths, given the different stakes of the conflict they deal with. However, ADR discourse, like that found in the popular "Getting to Yes" is sufficiently general that it attracts professionals from many different walks of the legal profession, and interested in radically different types of conflict.[46] Many have suggested that the

[46] Jean Sternlight relates a similar experience at an arbitration conference. "One ABA Dispute Resolution Section conference on international ADR was even rather comical in this regard. The conference brought together many countries' high powered international arbitrators, community mediators primarily from the U.S. and persons attempting to use mediation approaches to facilitate political change throughout the world. Although these diverse groups were provided with separate time slots, they mingled over cocktails and meals. Pin stripes with birkenstocks. Everyone was very polite, but it was an odd event. While perhaps extreme, the event was not atypical. Most "ADR" conferences reflect a similar discomfort, if not tension, between major forms of ADR." Jean R. Sternlight "Is Binding Arbitration a Form of ADR: An Argument That the Term ADR Has Begun to Outlive Its Usefulness." *Journal on Dispute Resolution.* (2000): 97.

term ought to be dispensed with altogether. Others have sought to distinguish themselves from ADR with new acronyms like “dispute resolution design”(DSD) “conflict management” and “conflict prevention”.

It is worth keeping in mind that many of the varied concepts and buzzwords in arbitration discourse make claim to nearly identical laws and practices, and moreover that very specific forms of arbitration are subsumed under very broad definitional categories . This conceptual overlap, and the lack of sociologically determinate categories renders the task of the focusing on corporate disputing behavior all the more challenging.

E) International arbitration as distinguished from “domestic” arbitration

One final important distinction must be identified, the difference between domestic and international arbitration. Some scholars draw sharp lines of distinction between international arbitration and domestic arbitration and even refuse to speak about the respective systems in the same breath. International arbitrator Jan Paulsson, for example, claims that no comparison ought to be made

between the two, and arbitration textbooks often separate international arbitration from the national arbitration law.[47] Others have pointed out important areas of crossover between the systems. For example, almost all the international investment arbitrators at some point have arbitrated commercial disputes at the domestic level. Likewise, domestic arbitration institutions like the American Arbitration Association have developed their own distinctive international branches. Garth and Dezalay's study also identified historical lines of continuity between the development of national and international arbitration systems.[48]

My own view is that there is sufficient institutional and ideological overlap between U.S. arbitration and international arbitration to give the relationship between both systems close analysis. The primary focus of this study, as I outlined in the introduction, is the history and development of commercial

[47] In Paulsson's view, international arbitration has de facto monopolistic character by virtue of the fact that the system does not "compete" with adjudicative alternatives. See for example, Jan Paulsson. 2008. "International Arbitration is Not Arbitration." John E.C Brierley Memorial Lecture, McGill University, 2008. https://www.mcgill.ca/pjrl/files/pjrl/john_e._c._brierley_memorial_lecture_jan_paulsson.pdf

[48] Yves Dezalay and Bryant G. Garth. *Dealing in virtue: International commercial arbitration and the construction of a transnational legal order*. University of Chicago Press, 1998. 12. Richard L. Abel "The contradictions of informal justice." *The politics of informal justice* 1 (1982): 267-320.

arbitration law in the U.S. and the role that corporations have played in lobbying in favor of arbitration reform. Although my focus is on the domestic setting, there are important points of crossover with international commercial arbitration. For example, many of the lobbyists that campaigned in favor of the Federal Arbitration Act, like Owen Young and Felix Warburg, were also active in developing international arbitration law. There are other points of contact. U.S law, like the Federal Arbitration Act, and key Supreme Court decisions like Mitsubishi Motors v. Soler Plymouth have had an important act in shaping the international arbitration regime. Most strikingly, many of the "ADR" institutions that I analyze like the International Center for Conflict Prevention and the American Arbitration Association have been active in virtually every aspect of arbitration, including international commercial arbitration and investment arbitration.

I have outlined the similarities and differences between investor-state arbitration, international commercial arbitration, commercial arbitration and ADR. I then distinguished between the different settings in which these arbitrations take place, and some of the definitional entanglements that emerge from them. In the next

section, I explain why particular features of arbitration law have puzzled contemporary commentators, and why it has continued to inhabit multiple, parallel existences as a species of "law" and "non-law".

3. Arbitration Between Law and Lawlessness

Thus far, I have focused on technical definitions of arbitration. But where the real disagreement in arbitration scholarship emerges is in what kind of law arbitration actually is.

Consider the following: arbitration is in one respect *law*; it is ingrained national legislation that enables disputants to adjudicate disputes by appointing arbitrator. The Federal Arbitration Act makes agreements to arbitrate "valid, enforceable and irrevocable", and courts will typically enforce arbitrations so long as they do not exhibit "manifest disregard" of the law. Thus, arbitration, from this perspective, is a legitimate form of dispute resolution that is backed by Federal legislation.

In another respect, arbitration is not law. Arbitrators are neither lawmakers nor judges, they are not elected and no public obligations are attributed to them.

Arbitrators, those who decide the outcomes for those bound by an arbitration agreement, do not have the power to compel behavior over those who have not agreed beforehand to submit to their rule. Arbitrators are not obligated to observe legal precedent, nor do their decisions create new legal precedent. Unlike the application of executive or legislative power, arbitral authority is not considered "coercive", since it rests upon the precondition of consent. The decisions of arbitrators, while routinely approved by the courts, do not carry the same weight and societal importance as those of judges. From this vantage point, arbitration is not law.

Despite the general dissociation of arbitration from law and politics, intuition suggests that arbitration cannot so easily be disassociated from questions of governance and the common good. For this reason, arbitration is *law-like* in the sense that is a system of rule that holds the participants in that system to certain predetermined rules and norms. Taken together, the acts of all arbitrators constitute, however informally, a "legal system", and a number of theorists have claimed that arbitration is akin to "law without a state", complicating the relationship between law, arbitration and politics.

Last and perhaps most interestingly of all, arbitration is "outside" the law. In many ways arbitration appears to operate independently of state oversight altogether. It lacks the formality, transparency, checks and balances, and mechanisms of oversight that are normally attributed to systems of justice in Westphalian parliamentary democracies. It's methods of self-reflexivity and rationality appear to be second-rate, if not distorted images of those familiar to judges. And since it is so opaque, very little of substance is known about the arbitration system, it cannot be studied in the same detail as one can discuss the history of international law or civil rights, for example.

These multiple, overlapping, if not contradictory modes of being make arbitration something of an anomaly, and that anomaly is reflected in the current state of arbitration scholarship. There are very real disagreements about the role, social function, and values that arbitration fulfills.[49] These are not merely theoretical matters for legal scholars to ponder even though it may often seem to be the case.

[49] Wai, Robert. "Transnational private law and private ordering in a contested global society." *Harvard International Law Journal* 46 (2005): 471. Watt, Horatia Muir. "Private international law beyond the schism." *Transnational legal theory* 2, no. 3 (2011): 347-428.

Disagreements about what arbitration is, what legitimate social ends it is designed to achieve, and whom the system benefits have played out in recent Supreme Court decisions that set the terms for millions of consumer contracts, in social contestation to major international trade agreements, and in defining the role of the courts managing conflict in a capitalist society more broadly. If we wish to better understand the social role and function of commercial arbitration, we need to focus more closely on the social actors whom have been active in shaping it.

4. Methods and Scope

Any researcher interested in arbitration is ineluctably faced with an obstacle; much of the information concerning the arbitration system is private and/or confidential. This places serious limitations of the nature and scope of information available for analysis. Arbitration scholarship has been severely limited by the lack of reliable data, the secrecy of awards, not to mention the general reluctance (or then again, legal/professional *obligation*) of arbitration practitioners to share information about their practice. Unlike other areas of corporate activity in which one can access rich databases with relative ease, there is comparatively very little information about business involvement in arbitration. To enumerate just a few

examples, there is a serious paucity of reliable data concerning the size, volume, and frequency of arbitral awards, and even less information on the size and scope of the arbitration services market.[50] We know little about what arbitrators are paid, what the financial stakes involved in arbitration are, and perhaps most importantly, what most disputes are in fact about. Even when institutions like the ICC and AAA compile statistics, their mode of classifying them gives over minimal information about their substance. The fact that the AAA arbitrates a "contract" dispute for example, tells us little about who was involved, what the stakes were, and what the substantive legal questions involved in the case were.

It should be noted that this lack of information does not stem from a lack of interest or curiosity in the arbitration system. There in fact seems to a great desire on the part of legal scholars to learn more about the dynamics governing the arbitration system. In fact the confidentiality and privacy of arbitration is itself "alluring" to outward observers. The lack of information exists, and continues to exist because of legal protections guaranteeing the privacy and confidentiality of parties involved in arbitration agreements. Most arbitrators, and arbitration

[50] Joshua Karton. "A Conflict of Interests: Seeking a Way Forward on Publication of International Arbitral Awards" 28." *Arbitration International* 3 (2012): 447.

institutions for that matter, operate on a private basis, their decisions are not available for public consumption. For these reasons, most of what is known about the arbitration system is schematic or fragmentary in character. Discussions tend to revolve what little data *is* available, published arbitration law, as well as the formal rules of procedure that are published by bodies like the ICC and the AAA.

In order to address some of the barriers presented by the lack of reliable data (especially quantitative data), I have employed a mixed-methods approach known in the social science literature as "triangulation". In its original sense, triangulation is a term derived from navigation to denote the use of multiple reference points to locate an object's exact position. To carry the metaphor to the social sciences, triangulation involves the use of multiple methods of inquiry and data collection to give a more complete picture of the studied object. In order to do this, I have collected documents from arbitration publications, compiled documents from the legislative history attended of the Federal Arbitration Act, attended four major conferences on investment arbitration and commercial arbitration, and spoken to a number of arbitrators and lawyers. I have also assembled secondary sources from financial newswire services, professional surveys, and reports published by arbitration service providers and think tanks in

an effort to illuminate the nature and scope of the upper segment of the arbitration service sector.

The reliance on multiple sources of data, rather than a single set, is an effort to better understand the social conditions that have made the rise of arbitration possible. But there is another reason for relying on the mixed-methods approach. In the past, methods triangulation was merely thought of as a means of producing a more objective picture of the phenomenon in question. Recent years, however, have seen the emergence of a more reflexive trend in mixed methods approaches named "retroduction" that I believe is well suited to this study. Retroduction, or abductive reasoning, seeks to interpret and contextualize phenomena within a conceptual framework or set of ideas. Abduction is different from purely inductive research in which one moves from empirical observations to theoretical inferences. Rather, it relies heavily on theories as mediators for deriving explanations.

In this case, the mediating body of theory is political economy, the study of power and the distribution of income. I believe that this method is well suited to the object in question (arbitration amongst corporations) for two reasons. First, the

mixed-methods approach seeks to exploit the incompleteness of arbitration data – and to make the most of the fragmentary information that is available. There is data about arbitration - perhaps not the type of data that would satisfy positivistic pattern explanation. The second reason has to do with the theoretical parameters that have traditionally been brought to bear on arbitration. Most of what is written about arbitration is written by members of the profession, people are directly involved in arbitration. With the exception of Heinrich Kronstein's essay "Arbitration is Power" the interpretive framework of political-economy has been wholly absent from the study of arbitration law. Approaching the object of study from this point of view allows one to dislodge and suspend categories of understanding that are ensconced in existing frameworks can help yield alternative understandings of arbitration.

Most of the arbitration literature consists of formal rules (or commentary on the rules) that govern arbitration proceedings. In the case of this study, however, am less interested in the technicalities of arbitration procedure and more in the strategic motivations and social interests that come bear in the arbitration system broadly. While I do examine doctrinal developments, I am more interested in the way these developments alter the disputing behavior of corporations. Following

work of Marc Galanter, Joel Rogers, Terence Dunworth, and Matthew Zeidenberg of the Wisconsin Business Disputing Project this study takes a more actororiented approach than other studies of arbitration. This means that I focus less on the formal rules that govern arbitration procedure and more on the actors whom together "constitute" the arbitration system (arbitration institutions, businesses, arbitrators, lawyers, intellectuals, publicists). A paraphrase of a well known quote by the famous law professor Karl Lewellyn conveys the spirit of the approach. In his Bramble Bush lectures delivered to incoming students at the University of Chicago, Lewellyn said that if "what judges, lawyers, and law enforcement officers do about disputes is, to my mind, the law itself".[51] What Lewellyn meant by this was that students of law should focus less on legal rules, and more on the substantive activity of those agents who "make' law. For the purposes of this study, we may recast Lewellyn's problem in a slightly different direction. If arbitration is not law, then what is that arbitrators, arbitration lawyers, arbitration service providers and corporate disputants do when they arbitrate disputes?

[51] Llewellyn, Karl N. *The bramble bush: On our law and its study*. Quid Pro Books, 2012.

5. Linking Law and Political Economy with Arbitration

There are three fundamental pre-conditions to my argument.

The first is Thomas C. Grey's view that that all legal systems fulfill a series of critical functions. A) They all purport to give an accurate *descriptive* account of legal institutions B) They all seek to explain and outline a method of operating them (technique) (C) all legal systems seek to provide a justification of these institutions for those who operate the system, but also, for outsiders.[52] If this is true, then one of the tasks of critical legal theory would be to denaturalize those explanations or rationales, which representatives of a given legal system take for granted. Another would be to critically separate normative representations of a system from the reality of that system. A third task would be to situate the role of legal systems in maintaining a given distribution of power and wealth.

Grey's schema is useful because it acknowledges a tendency to merge description, practice, and legitimation together, which creates a set of descriptive and

[52] Thomas C. Grey "Langdell's orthodoxy." *University of Pittsburgh Law. Review.* 45 (1983): 1.

normative problems. In the case of arbitration law in which most of the material is produced by arbitration practitioners, that is to say, people who have a vested stake in the continued existence of the arbitration system, one has to be all the more alert of the overlap between descriptive and normative. One dimension of the arbitration system that I did not anticipate to focus on, but nevertheless found to be very important as I proceeded with this study, was the use of language, and the way that concepts that were deployed as neutral terminology tended to be ideologically loaded. When pressed, the use of seemingly neutral conceptions like "costs", "speed", and "efficiency" could be located within a specific historical matrix of ideas, interests and institutions that was organized along a more or less coherent system of belief.

All legal systems, no matter how autonomous they claim to exist from outside social influence, ineluctably exist in relation to a given distribution of power and wealth in society at large. One of the main points that the realists pressed against the proponents of classical legal formalism was how impervious their conceptions of contract law were to understanding the role of power and coercion in the economy generally. In assuming that contracting parties bargained on equal, consenting terms, they foreclosed analysis into the coercive and ultimately

distributive role of the state. The realists were able to dispute one of the cardinal tenets of contract law, and to revert the focus on the differential distribution of power between parties that seemed to be bargaining on equal terms, and to place this inequality as a starting point of political-economic study of the law.

Arbitration is a species of contract law. It assumes that disputants meet on equal bargaining terms, and moreover, that "the effects" of their disputes are contained to them and them only. For this reason, no real distributive or coercive relations are assumed to emerge from them. I want to challenge this view. It may be true that disputants meet voluntarily and agree to have an arbitrator make a judgment which they accept. But if we take a more systemic view, it becomes possible to compare the processes, outcomes, and actors involved in arbitration in juxtaposition to what they might have encountered in a public setting, it becomes easier to discern some of the hidden, albeit real, mechanisms of redistribution and power involved in arbitration.

Grey's observation about the general function of legal systems is useful for this project. As much as any legal system insists on its universality and neutrality, and as much as it asserts that its rules are " it must always be situated in relation to the

contemporary global legal-economic order, that is to the given distribution of political power and wealth in which it exists. Arbitration is a perfect example of a quasi-legal system whose self "definition" is a negative, or oppositional one. Its features: a "private, confidential, informal, cheaper, faster" exists in relation to features of the public legal system it negates "public, transparent, formal, expensive, sluggish". Thus, when I speak of the political content of arbitration, or of arbitration as a means of conducting "politics by other means", I always mean it relatively speaking, in opposition to the politics, law and procedures that exists in relation to.

Second, I use Edward Purcell's idea of "social litigation system" as a methodological framework to understand corporate commercial arbitration. Purcell defines a social litigation system as:

> […] a coherent, and dynamic set of patterns of claims disputing behavior that arises from an identifiable combination of social and legal factors. The idea assumes that historical conditions regularly lead certain types of parties to dispute a relatively limited number of issues against one another in certain consistent ways and that most of the legally-related activity in any given period can be broken down into some number of different behavioral patterns that are recognizably "legal" and at the same time markedly different. Social litigation systems are defined by prevailing historical conditions, the social characteristics of the parties, the types of issues that the parties are led to regularly dispute, and the special subsets

> of legal rules – both substantive and procedural – that are particularly relevant and useful to their litigation strategies.[53]

The "social litigation system" conception conceptualized by Purcell is helpful for two reasons. First it places arbitration in its social context. When we examine the claims disputing behavior of corporations, as opposed to other types of disputants, we gain a much different perspective of the motivations, aims, and justifications of arbitration that we would if we examined their use amongst smaller-scale disputants.[54] Second, the conception is historical. It assumes that arbitration has not always been motivated for the same reasons. This can help us better answer the question as to why arbitration has only expanded to such a degree in recent times, as opposed to at other points in history.

Finally, the effects of the transformation can be better understood by placing them in the broader context of the history of corporate disputing.[55] And though

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[53] Edward A., Purcell Jr. . *Litigation and Inequality: Federal Diversity Jurisdiction in Industrial America, 1870-1958*. New York, Oxford: Oxford University Press, 1992: 3.

[54] Amy J. Cohen "Dispute Systems Design, Neoliberalism, and the Problem of Scale." (2009).

[55] Some key contributions to this area of study include. Terence Dunworth, and Joel Rogers. "Corporations in court: Big Business litigation in US federal courts,

seemingly innocuous (and according to many, even benign), they are in fact, very politically important. By allowing particular interests of extraordinary concentrated economic power like multinational corporations to administer disputes according to rules developed by privately appointed arbitrators, arbitration negates the regulatory impact of public courts. The net effect of this transformation is the creation of a largely opaque "regulatory space" that has disempowered governments, regulators, and the public at large, from directly or indirectly interfering with the proceedings. The development of private systems of arbitration modifies, delocalizes, and in some cases disrupts the public systems of adjudication they exist in tension with. These changes are political because they alter structures of decision-making authority both at the domestic and international levels. Such changes to the structure of authority in both domestic and international orders cannot be dissociated from the central problem of political economy: who gets what and why.

1971–1991." *Law & Social Inquiry* 21, no. 3 (1996): 497-592. Purcell, Edward A. *Litigation and inequality: Federal diversity jurisdiction in industrial America, 1870-1958*. Oxford University Press on Demand, 1992. Macaulay, Stewart. "Non-contractual relations in business: A preliminary study." *American sociological review* (1963): 55-67.

2. Context: A Counter-Revolution Through Arbitration Reform

1. Introduction

Suppose we were to privatize the provision of law for corporate relationships. How would this legal system differ from what we have today? As things stand now corporations can design almost all of the elements of their contractual relationships. They can even choose to have their disputes adjudicated in private arbitration systems, according to procedures designed by private arbitrators. – Gillian Hadfield[56]

Arbitration is always melded into a particular culture and will always reflect existing currents of power; it could be socially neutral only if those currents were in equipoise; this never happens. – Ian Macneil[57]

Is society justified in placing the responsibility for the resolution of business disputes in the hands of business itself? – Arthur Zariski[58]

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[56] Hadfield, Gillian K. "Privatizing commercial law." *Regulation* 24 (2001): 40.

[57] Macneil, Ian R. *American arbitration law: reformation, nationalization, internationalization*. Oxford University Press on Demand, 1992.

[58] Archie, Zariski. "Dispute about Dispute Resolution: A Study in the Dialectics of Law and Economics." Osgoode Hall Law School, 1990.

"Legal revolution" is a term that is normally used sparingly. Scholars use it to refer to landmark moments of legal change that have carried pervasive effects on society at large.[59] The U.S. Supreme Court's *Lochner* ruling, Roosevelt's New Deal Constitutional Revolution, the US Rights Revolution of the 1960s, and the more recent Canadian "Charter Revolution" are all pivotal periods of legal upheaval that have had an extraordinary impact on the Rule of Law in the North American setting. Although these events fall short of the momentous breaks with the characteristic of past revolutions like the French Revolution or the October Revolution, legal scholars use the "legal revolutionary" label to capture the sweeping character of these events.[60] These events have fundamentally re-shaped

[59]For a general review of "legal" revolution, see Harold Berman's magisterial work in which he traces the origins of legal revolution throughout Western history. See *Harold Berman, Law and Revolution, II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard: Harvard University Press, 2009) Hauk Brunkhorst emphasizes the specifically *legal* dimension of the great revolutions of the past. In his words "All great revolutions are legal revolutions that create a new level of normative constraints which are implemented through legal and constitutional norms." Hauke Brunkhorst, *Critical Theory of Legal Revolutions: Evolutionary Perspectives*. (New York: Bloomsbury Publishing USA, 2014), 83.

[60] Alfred C. Aman Jr. identifies the New Deal era, the environmental era, and the global era as marking three crucial turns in the 20th century administrative state Alfred C. Aman Jr. *The democracy deficit: Taming globalization through law reform*. (New York: NYU Press, 2004).

the nature of modern government. They altered the distribution of rights and legal protections for groups and individuals, brought about new administrative agencies and regulatory initiatives, and overhauled the powers of the state. But perhaps most importantly, these legal revolutions changed the way that people *thought* about law. They actualized political possibilities that had hitherto been considered illegitimate or "unthinkable" in the prior order. The revolutionary label is used to designate these legal ruptures' sweeping character.

This chapter examines a historic transformation that has been characterized as a legal revolution (at least by its proponents) but which nevertheless bears a much lower profile in the popular imagination than the events I have just named. Unlike the revolutions of the past, it is not characterized by charged oratory, popular struggle, or even "politics", at least not in any conventional sense of which we think of these. I am addressing what an increasing number of legal professionals, judges, corporate officials and scholars now refer to as the "arbitration revolution"[61;] the remarkable rise of arbitral institutions over the last forty years and the manifold changes to Rule of Law that have followed in its wake.

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[61] Many commentators have invoked the term "arbitration revolution". Thomas Carbonneau, one of the most prolific writers on arbitration, including domestic

and international arbitration, analogizes the rise of arbitration to a "revolution in law". One of the most pronounced features of this revolution is the sheer increased use of arbitration. As he writes, "It is not a hyperbole to state that civil justice or adjudication in the United States (or in international cases) is achieved primarily through arbitration." Thomas E., Carbonneau. "Revolution in Law through Arbitration, The Eighty-Fourth Cleveland-Marshall Fund Visiting Scholar Lecture." *Cleveland State Law Review* 56 (2008): 236.

Writing in 1984, Eric D. Green characterized the corporations' widespread adoption of alternative dispute resolution as a "revolution". See. Green, Eric D. "Corporate Alternative Dispute Resolution." *Ohio State Journal on Dispute Resolution.* 1 (1985): 206.

According to Thomas Stipanowich, former director of the Center for Conflict Prevention (formerly the CPR), an advocacy group which seeks to promote the use of arbitration in the corporate sector, describes the corporate turn towards non litigious forms of dispute resolution as a "revolution". Stipanowich, Thomas. "Arbitration: The New Litigation." *University of Illinois Law Review* 2010, no. 1 (2010): 24.

In the Canadian setting, the Mulroney government's adoption of UNCITRAL Model Law in the 1980s is said to have inaugurated its own "arbitration revolution". Kenneth-Michael. "Redefining Public Policy in International Arbitration of Mandatory National Laws." *Defense Counsel Journal.* 64 (1997): 271.

Likewise, the widespread adoption of arbitration clauses in consumer and employment contracts has been dubbed as a revolution. Horton, David, and Andrea Cann Chandrasekher. "Employment Arbitration After the Revolution." (2015). In the words of Stephen Huber, "An arbitration revolution has taken place in recent years that has dramatically reshaped the law and practice of contracting, and the resolution of disputes between parties to contracts." Huber, Stephen K. "The Arbitration Jurisprudence of the Fifth Circuit." *Texas Tech Law Review.* 35 (2004): 497.

As Patti Waldmeir of the Financial Times writes, "Americans may have not noticed this truncation of their rights but that does not mean they did not agree to

2.What Kind of Revolution?

Even a cursory overview of the changes that are associated with the arbitration revolution suggests that it is unlike those with which political scientists and historians are familiar. For one, it is only in the remotest sense connected to what most people think of when they think about revolutionary conflict. As Lawrence Stone, the eminent scholar of the English Revolution reflected, revolutions are normally associated with abrupt transfers of political power and total overhauls of systems of rule, often by violent means.[62] What could "arbitration", defined in standard practice books as, "a contractual mechanism of dispute resolution"… in which a third party serves as a neutral decision maker" - have to do with all that? If anything, the resolution of conflict by a third party neutral seems to be like the

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it - or, for that matter, benefit from it. For the legitimacy of arbitration depends on consent; and to judge from the signatures on millions of contracts for everything from septic tank maintenance to executive compensation, Americans have consented to the arbitration revolution." Patti Waldmeir, "How America is privatizing justice through the back door," *Financial Times,* 30 June 2003, accessed April 20, 2017, https://global-factiva-com.ezproxy.library.yorku.ca/ha/default.aspx#./!?&_suid=149272609462002932545224003362

[62] Noting the often violent character of revolutionary activity. See. Lawrence Stone "Theories of revolution." World Politics 18, no. 02 (1966): 159-176.

precise opposite of conflict between ideologically charged partisans. Indeed, it was precisely for the attenuation of such conflict that Thomas Hobbes himself endorsed arbitration in the 17th century.[63]

If arbitration itself is not associated with revolution, one might pose the same question about the arbitration system's agents, what kind of revolutionaries might they be? The arbitrators and corporate lawyers who themselves practice commercial arbitration are not the first people to come to mind when one thinks of the charismatic authorities whose temperament for command was theorized by Max Weber.[64] They work for corporate law firms. These are not people who are occupied with revolution in any ordinary sense of the term.

Even when arbitration does enter the political arena, as it has in proposals to amend or even dismantle the Federal Arbitration Act, for instance, it seems to be

[63] Devine, Francis Edward. "Hobbes: The Theoretical Basis of Political Compromise." *Polity* 5, no. 1 (1972): 57-76.

[64] Yves Dezalay and Bryant Garth see the original commercial arbitrators of continental Europe as wielding some form of charismatic authority, but interestingly, attribute the "routinization of charisma" to the Anglo-American model of commercial arbitration. Yves Dezalay and Bryant Garth, *Dealing in Virtue International Commercial Arbitration and the Construction of a Transnational Legal Order.* (Chicago: University of Chicago Press, 1996)

at a good step's remove from more hotly contested political issues like geopolitics, electoral contests, and Supreme Court appointments that dominate today's headlines.[65] Indeed, it seems fair to say that to an unacquainted observer, arbitration appears as a rather dry, technical affair, at considerable remove from the clamor that is characteristic of contemporary televised politics.

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[65] With the notable exception of the recent Transatlantic Trade and Investment Partnership and Transpacific Partnership agreements, both of which contained provisions for arbitral tribunals in their initial conceptions, and thus, sparked mass public outcry arbitration has rarely been the focus of public attention. "TTIP protesters take to streets across Germany." *The Guardian*, September 17, 2016. Accessed April 22, 2017. https://www.theguardian.com/business/2016/sep/17/ttip-protests-see-crowds-take-to-streets-of-seven-german-cities. More recently, there has been increasing attention on the unfair application of consumer and employment arbitration agreements in in fine print contracts. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, New York Times Dealbook (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 As Justice Rakoff writes, …companies have widely imposed mandatory arbitration clauses on their employees and customers, so as to deny them access to the courts, as well as to exclude them from exercising their constitutional right to a jury. In addition, since the *Concepcion* decision, most such clauses also forbid people with complaints to bring class action claims, even in arbitration. Jed. S., Rakoff, *Why You Won't Get Your Day in Court*, New York Review of Books, (Nov. 24, 2016), http://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court/

What then, do these commentators mean when they speak of arbitration in "revolutionary" terms?

What these authors are referring to is a transfiguration of law and its associated values. The arbitration revolution is used as shorthand to encompass at least four distinctive developments. These include 1) national governments' and courts' adoption of distinctly "pro-arbitration" laws and policies[66] 2) the expansion of the

[66] It is worth noting that designation "pro-arbitration" is itself contested. Scholars and arbitrator Margaret Moses notes that being "pro-arbitration" may mean radically different things in different disputing contexts. For example, the connotations of being pro-arbitration in collective bargaining setting are of an altogether different order than being pro-arbitration in the corporate setting. Margaret L. Moses "Arbitration Law: Who's in Charge?," *Seton Hall Law Review* 40 (2011), 174-175. Similarly, according to Tom Ginsburg, the often used term "pro-arbitration" should be understood as a euphemism that can usually be translated to mean "a fairly deferential" policy toward the review of arbitral awards. In his view, however, there is no universal rule for determining the validity of arbitral awards. Tom Ginsburg "The Arbitrator as Agent: Why Deferential Review Is Not Always Pro-arbitration." *The University of Chicago Law Review* (2010): 1013-1026. For an overview of the U.S. Supreme Court's embrace of arbitration over the last forty years, see. Stephen L. Hayford "Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change." *Wake Forest Law Review.* 31 (1996): 1. See also, Katherine Van Wezel Stone. "Rustic Justice: Community and Coercion Under the Federal Arbitration Act." *North Carolina Law Rev.* 77 (1998): 931. More recent assessments of Supreme Court echo Hayford's observation that the Court has adopted policy of deference to the rulings of arbitrators. See e.g, Hiro N. Aragaki, "The Federal Arbitration Act as Procedural Reform," New York University Law Review. 89 (2014), 1939.

arbitration services market and the marked increase in number of arbitration specialists amongst members of the legal profession[67] 3) the proliferation of arbitral forms of dispute settlement in new organizational settings[68] 4) greater willingness to use arbitration as a response to the loss of faith courts as efficient administrators of justice.[69] Together, these trends form an arbitration "movement" that is thought to have changed the courts and the values of fact-

[67] Noting the proliferation of institutions, firms, arbitrators and auxiliary service institutions, particularly amongst Wall Street firms, see. Dezalay and Garth, *Dealing in Virtue*, 162. The Global Arbitration Review's annual awards issue lists the total portfolio value of the top 30 global arbitration firms at over 1 trillion U.S dollars. "Global Arbitration Review 30 - The Guide to Specialist Arbitration Firms 2013." Accessed October 11, 2016, http://files.bakerbotts.com/files/Uploads/Documents/GAR%20100%202013.pdf.

[68] As early as 1984, Eric Green observed business' increased consumption of arbitration services, see. Eric D. Green "Corporate Alternative Dispute Resolution." *Ohio State Journal on Dispute Resolution.* 1 (1985): 203. Julie Macfarlane identifies increased demand for arbitration services amongst the corporate sector. See, *The new lawyer: How settlement is transforming the practice of law*. UBC Press, 2008. David B. Lipsky and Ronald L. Seeber. "In search of control: The corporate embrace of ADR." *University of Pennsylvania. Journal of Labor & Employment Law.* 1 (1997): 133.

[69] "Practicability has emerged as the dominant force in the definition and implementation of law." Carbonneau, "The Revolution in Law," 234. As Julie Macfarlane writes "Both corporate and personal customers appear increasingly unwilling to passively foot the bill for a traditional, litigation-centered approach to legal services, preferring a more pragmatic, cost-conscious, and time-efficient approach to resolving legal problems." Julie Macfaralen. "The Evolution of the New Lawyer: How Lawyers are Reshaping the Practice of Law." *Journal on Dispute Resolution.* (2008): 61.

finding, impartiality, fairness and truth that are associate with law, judging and adjudication more broadly.[70]

These changes may appear disparate but they are all unified by a relatively straightforward system of belief; the view that arbitration is faster, cheaper, and more satisfying means of resolving legal conflict than courts of adjudication, and that such a system is the most appropriate means of managing disputes during this period of contemporary capitalism.[71] Indeed, the technical literature, theoretical literature, and vast promotional literature suggests that concerns over costs and speed are the driving force behind the rise of arbitration.

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[70]Carbonneau, The Revolution in Law, 233.

[71]John Lande notes the CPR Institute for Dispute Resolution's campaign to solicit pledges from large corporations (and more recently, law firms) to consider using ADR disputing procedures. See "Getting the faith: why business lawyers and executives believe in mediation." *Harvard Negotiation Law Review*. 5 (2000): 145. ICC arbitrator Janet Walker argues that the increasingly porous nature of national economies has generated increased demand for arbitration services. Janet Walker "Beyond Big Business: Contests between Jurisdictions in a Vertically Integrated Global Economy" (November 16, 2000). Law Society of Upper Canada, Civil Litigation Forum, Toronto 2007. Available at SSRN: https://ssrn.com/abstract=1490723 or http://dx.doi.org/10.2139/ssrn.1490723 Gillian Hadfield argues that a private market for the adjudication of corporate conflict would benefit society by diverting disputes away from overly-congested courts. Hadfield, Gillian K. "Privatizing Commercial Law." *Regulation Magazine* 24, no. 1 (2001).

Buttressing this belief system is a complementary view that arbitration is good for society as a whole. Arbitration may help resolve individual disputes, but at a more systemic level, it is believed to produce a series of desirable secondary-effects. Amongst other things, it is believed to decongest crowded court dockets, and to create faster, more efficient and responsive legal services. And when courts are able to defer disputes to private arbitrators, it makes room for more socially pressing cases to which they can then devote their attention. In short, arbitration is seen to be more efficient than litigation. Its benefits extend beyond the two parties involved in the dispute and benefit the legal system in its entirety. [72]

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[72] Proponents of investor-state dispute resolution (ISDS) argue that it facilitates international trade and commerce by enabling disputants to attract capital. When investors can bypass the parochialism and national favoritism that has been attributed to national courts, they gain assurance that their investment will be secure. "…parties face the threats of parallel or multiplicitous litigation in different national court systems, often located on one another's home territory, often facing local courts that may have parochial predispositions against one party or the other, and often producing judgments that cannot be effectively enforced. Court litigation also presents other pitfalls, such as forum shopping, conflicting court judgments, procedural quagmires, corrupt or inept decision-makers and lengthy proceedings that can go on for years. Born, Gary. "BITs, BATs and Buts: Reflections on International Dispute Resolution." *Kiev Arbitration Days* (2012): 15-16.

3.Toward a Political-Economy of Arbitration

All of this might suggest that the rise of arbitration is a rational response to difficulties associated with modern litigation, and as many claim, the best solution to legal conflict in a globalized economy.[73] Such accounts, in my view, are too simplistic. They end up naturalizing what is in fact the very specific form of arbitration regime that has taken shape over the last forty years. Arbitration may appear like it has seamlessly and incrementally advanced to what it is today, but it is important to suspend the seemingly conventional views and take stock of the fact that not long ago, belief in arbitration[74] was much weaker and ill-defined. It had far fewer proponents, and did not find as thoroughgoing theoretical exposition

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[73] Thomas Nathan Hale claims that international arbitration is a rational response to the problems associated with cross-border trade. Hale, Thomas, and Thomas Nathan Hale. *Between Interests and Law*. Cambridge University Press, 2015. Walker, Janet. "Beyond Big Business: Contests between Jurisdictions in a Vertically Integrated Global Economy." (2000). Rational choice theories also inform approaches to domestic arbitration.

[74] John Lande analogizes belief in arbitration to a religion. Lande, John. "Getting the faith: why business lawyers and executives believe in mediation." *Harvard Negotiation Law Review*. 5 (2000): 137. Ralf Michaels discusses belief in the "statelessness" of international arbitration as a religion. Ralf Michaels. "The Mirage of Non-State Governance." *Utah Law Review*. (2010): 31.

by legal scholars.[75] The arbitration service sector was also much less developed. The arbitration business was not very large, though certainly playing a role in the adjudication of commercial conflict, it was not nearly as prestigious (or profitable) as it is has become today. Even though arbitration has been used by American business for sometime prior to the 1980s, it was not considered either reliable or serious enough for the high-stakes business disputes that were characteristic of Wall-Street litigation.

Over the last forty years, the situation has changed markedly. Commercial arbitration, at one time delimited to a few specialist institutions, has become, in the words of one commentator "ubiquitous".[76] Not only has belief in the advantages of commercial arbitration now widespread, but arbitration has risen

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[75] Arbitration law was a largely technical subject – and the literature reflected the view of the arbitration specialist. As Stavros Brekoulakis argues "…the field of international arbitration scholarship has been developing in isolation from crucial theoretical developments in other legal and non-legal disciplines. Partly because of its close relevance to legal practice, arbitration was not originally considered a subject of academic importance." Stavros Brekoulakis "International Arbitration Scholarship and the Concept of Arbitration Law," *Fordham International Law Journal* 36 (2013): 745-1767.

[76] Wilson, Jodi. "How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act." Case Western Reserve Law Reviwe 63 (2012): 91.

markedly in stature. Commercial arbitration has emerged from occupying a relatively minor position in the market for dispute resolution services to become a multi-billion dollar business. Corporations routinely use arbitration for high-profile legal disputes. Commercial arbitration awards have been known to surpass the billion dollar mark, and decisions are routinely decided for high-stakes cases in virtually every area of commercial litigation. Virtually every firm on the AmLaw 100 ranking list, boasts dozens of arbitration specialists.[77] Arbitration law, which scarcely featured in law school curriculums, has become integrated into regular course offerings and specialty degrees. The proliferation of arbitral institutions, the increasing size of the market for arbitration services, national governments' and courts' adoption of law and policy supporting arbitration, and last but not least increasing scholarly interest in arbitration would suggest that the arbitration revolution has been successful, and that it is "here to stay".

4. Corporations as Partisans of the Arbitration Revolution:

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[77] "The legal 500 Ranking Tables, International Arbitration," accessed April 23, 2017.http://www.legal500.com/c/london/dispute-resolution/international-arbitration#table_2405

Amidst increasingly scholarly interest in arbitration in all its forms, there is a dimension of the arbitration revolution that has not received much attention. I am speaking of the corporate embrace of arbitration, as evidenced by the increased consumption of arbitration services by large-scale corporations on the Fortune 500, by the proliferation of corporate litigators specializing in arbitration, and by corporate-led efforts to reform arbitration law.[78] This is especially relevant in a corporate dominated economy like our own. As early as 1973, sociologist James S. Coleman observed that "individuals in society, natural persons, show a general and continual loss of power to corporate actors."[79] Coleman, along with a small

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[78] The increased profile of commercial arbitration in the corporate sector may also be registered by observing the steadily expanding caseloads of the major international arbitration service providers including the International Chamber of Commerce (ICC), the American Arbitration Association (AAA) and the London Court of International Arbitration (LCIA). "Statistics - 2011." HKIAC-Homepage. http://www.hkiac.org/index.php/en/hkiac/statistics (accessed March 8, 2013). These "elite" providers are joined by boutique-style firms specializing in corporate disputing like JAMS International and the Silicon Valley Arbitration and Mediation Center. JAMS International https://www.jamsinternational.com/, The Silicon Valley Arbitration and Mediation Center "serves the global technology sector by promoting business-practical dispute resolution. https://www.svamc.org. Corporate law firms have recruited retired federal and state justices amongst their ranks to act as arbitrators. Former Prime Minister Jean Chretien acts as counsel in commercial arbitration , Bob Rae, former Premier of Ontario, is an arbitrator.https://www.cpradr.org/events-classes/annual/past/2015/AM15_Brochure.pdf

[79] Coleman, James S. "Loss of power." *American Sociological Review* (1973): 13.

group of American sociologists and political economists of his generation, was drawing to attention to an increasingly ineluctable feature of the American capitalist system; corporations were growing in economic and political importance – and their power to direct economic affairs was increasingly isolated from countervailing forms of resistance like organized class power.[80]

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[80] There is at this point a large-body of literature documenting the ascent of the large-scale business corporation over the course of the twentieth century – the transnationalization of its business operations, and the increasing power it holds over economic and political decision making. Bearle and Means observed in the 1930s that "the huge corporation, the corporation with $90,000,000 of assets or more, has co me to dominate most major industries if not all industry in the United States. A ra pidly increasing proportion of industry is carried on under this form of organizatio n. There is apparently no immediate limit to its increase. It is coming more and m ore to be the industrial unit with which American economic, social, and political li fe must deal." Adolf Bearle, and Means Gardiner C. *The Modern Corporation and Private Property*. (New Jersey, Transaction Publishers, 1991) 44.

As C. Wright Mills later observed in 1958. "The economy—once a great scatter of small productive units in autonomous balance—has become dominated by two or three hundred giant corporations, administratively and politically interrelated, which together hold the keys to economic decisions." Mills, Charles Wright. *The power elite*. New York: Oxford University Press, 2005.

As Robert Muller observed. "Between 1955 and 1970, Fortune's 500 industrial corporations increased their share of total manufacturing and mining employment, profits, and assets from slightly more than 40 percent to over 70 percent." Ronald Muller "Global Corporations and National Stabilization Policy: The Need for Social Planning" in State Society and Corporate Power, eds. Marc R. Tool and Warren Samuels (New Brunswick, Transaction Publishers, 1989). 437- 459.

Some forty-five years onward, the developments outlined by Coleman appear almost quaint compared to the staggering economic repertoire of the corporations. By virtually any measure of account, the large-scale, vertically integrated, limited liability multinational (MNC), is a formidable economic force. A typical corporation Fortune 500 controls billions in asset holdings, generates greater revenues than the annual GDP of entire nations, employs tens of thousands of employees, and manages operations across multiple continents. Corporate power, we are reminded at this point almost routinely in reports documenting the rise of the global one percent, who control the mass of the world's wealth through stock and dividends is omnipresent.[81] Not only have the firms that occupy the upper echelons of the Fortune 500 grown larger and wealthier, they command unprecedented influence in our daily lives. In agribusiness, entertainment, real-estate, pharmaceuticals, digital technology, and defense contracting, corporate power has grown increasingly concentrated. Indeed, the modern corporation's powers to direct human affairs have grown so great that the distinguished business historian Alfred Chandler analogizes these global business giants to "Leviathans", institutions whose wealth and organizational capacities eclipse those of the

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[81] Keister, Lisa A. "The one percent." *Annual Review of Sociology* 40 (2014): 347-367.

emergent nation-state documented and theorized by Thomas Hobbes in the 17th century.[82]

Corporations are not only important economically, their actions have a great impact on shaping the legal and political systems in which they operate.[83] The

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[82] For an account of the increasing power of agribusiness see. Joseph Baines "Food price inflation as redistribution: towards a new analysis of corporate power in the world food system." New Political Economy 19, no. 1 (2014): 79-112. In the film industry. McMahon, James. "The rise of a confident Hollywood: Risk and the capitalization of cinema." Review of Capital as Power 1, no. 1 (2013): 23-40. In pharmaceuticals. Gagnon, Marc-André. The nature of capital in the knowledge-based economy: The case of the global pharmaceutical industry. (doctoral thesis, York University, 2009). In investment banking, see. Hager, Sandy Brian (2012): Investment Bank Power and Neoliberal Regulation: From the Volcker Shock to the Volcker Rule, In: Overbeek, Henk van Apeldoorn, Bastiaan (Ed.): Neoliberalism in Crisis, Palgrave Macmillan, Basingstoke, pp. 68-92. In defence and aerospace. Eric George, the Consolidation of the U.S Arms-Sector 1990-present. Paper on File. Documenting the rise of the global tech-giants see. "World Investment Report - Investment and the Digital Economy." 2017. United Nations Conference on Trade and Development. http://unctad.org/en/PublicationsLibrary/wir2017_en.pdf.

It is no exaggeration that corporate activities can be analogized to those undertaken by nation states. Steve Coll, writing on Exxon-Mobil's foreign investment strategy, speaks of its activities much in the way one might speak of a state. "As it expanded, Exxon refined its own foreign, security, and economic politics. In some of the faraway countries where it did business, because of the scale of its investments, Exxon's sway over local politics and security was greater than that of the United States embassy." Coll, Steve. *Private empire: ExxonMobil and American power*. Penguin, 2012.

tension between democracy, given expression through popular sovereignty and the idea of equality before the law, and concentrated economic power, is a recurrent theme in the history of political-economic thought. The tendency of powerful economic interests to dominate political life is a thesis most often associated with the thought of Karl Marx and Friedrich Engels, but it also features prominently in the American tradition of political economy in the works of Thorstein Veblen, John Dewey, Adolf Bearle, Gardiner Means, and James Galbraith. The American tradition of political-economy, unlike the European, focused less on revolutionary class conflict, and more on the institutional parameters (legal, political, cultural) that shaped what Veblen called the "new order" of business enterprise. The new order was characterized by the general obsolescence of the state as an industrial unit, and the increasing importance of both the captains of industry and the pecuniary interests of finance.[84]

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[83] As Greg Shaffer writes, "To assess the relation of business to law, one must thus examine how law is created and applied through public institutions, how it is created and applied through private entities, and how these systems interact, including between the national and the transnational levels." Shaffer, Gregory C. "How Business Shapes Law: A Socio-Legal Framework." Connecticut Law Review 42 (2009): 150. For an overview the effect corporations have on law, see. Galanter, Marc. "Planet of the APs: Reflections on the Scale of Law and its Users." Buffalo Law Review 53 (2005): 1369.

[84] As Veblen wrote "As an industrial unit, the nation is out of date. This will have to be the point o departure for the incoming New Order. And the New Order will

The study of corporate power has an important intellectual lineage, but the idea that corporations exert disproportionate influence over politics is intuitively true to any observer of modern politics. Corporate campaign contributions, political-action committees, and political candidates like Donald Trump, Paul Ryan, Michael Bloomberg and Linda McMahon color the American political arena. Indeed, over the 2016 election cycle, Finance, Real Estate and Investment (FIRE) firms spent some $2 billion on campaign contributions to Federal candidates, and both presidential candidates were criticized for their cash-raising activities from corporate donors.[85]

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take effect only so far and so soon as men are content to make up their account with this change of base that is enforced by the new complexion of material circumstances which condition human intercourse. Life and material well-being are bound up with the effectual working of the industrial system; and the industrial system is of an international character - or it should perhaps rather be said that it is of cosmopolitan character, under an order of things in which the nation has no place or value." Thorstein Veblen, Essays in Our Changing Order (London, Read Books, 2013).

[85] Allison, Bill, and Mira Rojanasakul, Brittany Harris and Cedric Sam. 2016. Tracking the 2016 Presidential Money Race. Bloomberg. December 16. https://www.bloomberg.com/politics/graphics/2016-presidential-campaign-fundraising/

Law is a vehicle through which business asserts its power. Business influence on our legal system finds expression in many ways, from the innocuous to the more politically pronounced. First and perhaps most starkly, corporations are the most dominant consumers of legal services. As John P. Heinz and Edward Laumann argued in their classic study, Chicago Lawyers, the Chicago Bar was segmented into "two distinct, largely separate hemispheres" one serving corporate clients, the other smaller business and individuals. That is to say that the legal profession was a near mirror reflection of the relative importance of the corporation in American society. The upper hemisphere legal profession serving corporations drew more income, was more prestigious, and their actions were more politically and economically impactful than those in the bottom hemisphere. According to Heinz and Laumann, lawyers representing corporations had access to decisions that were "more likely to have important effects on the allocation of scarce goods and resources, on the manner of development and use of both public and private property, and on the course of governments."[86] The legal profession, was in their view, "overdetermined" by the relative dominance of corporate actors in American society. As they wrote, "The social power of the corporate sector of the

[86] John P., Heinz, and Laumann Edward. *Chicago Lawyers: The Social Structure of the Bar*. (New York, Russell Sage Foundation, 1982). 322.

bar is, then, based in its perceived influence on the distribution of the wealth of the society, influence that is derived from the belief of corporate officers in the wisdom and arcane skill of these lawyers […]"[87] Corporate lawyers were powerful to extent that they commanded the continued patronage of their corporate clients.

Corporations not only shape the law, they are creatures of law. Corporation owe their very existence to what has come to be known as the "legal fiction" of modern corporate personhood, a doctrine which emerged in the late 19th century endowing them with the same legal rights and protections as individual citizens.[88] As Lord Chancellor of England, Edward Thurlow famously proclaimed in the 19th century, corporations had "no soul to be damned, no body to be kicked".[89] Indeed, the corporation can sue, be sued, and as was starkly illustrated in Citizens United v. FEC, can seek protections for fundamental freedoms like the freedom of

[87] Heinz and Laumman. Chicago Lawyers, 383.

[88] For a history of the individual personhood doctrine in the 19th century United States, see. Horwitz, Morton J. "Santa Clara revisited: The development of corporate theory." *West Virginia Law Review* 88 (1985): 173.

[89] Coffee, John C. "No soul to damn: no body to kick": An unscandalized inquiry into the problem of corporate punishment." *Michigan Law Review* 79, no. 3 (1981): 386.

speech.[90] Indeed, as Laurence Baum has illustrated, even legal protections that have traditionally been associated with the protection of politically disenfranchised groups (free speech, discrimination, and voting rights) are now more likely to be exercised by corporations that individuals.

As corporations have grown in scale, scope, technological sophistication and importance, so has their propensity to engage in, and in fact propel social conflict. This is not because corporations are malign actors, but because their primary objective of maximizing the interests of their shareholders so often clashes with alternate ideas of how society ought to function. Over history, the tension generated between business and society has shifted axis. In the 19th century, Marx theorized that capital accumulation directly conflicted with the interests of workers. The interests of capital and the working class were contradictory and irreconcilable, and thus beckoned a revolutionary solution. For most of the capitalist West, the rise of the welfare-state in the twentieth century attenuated the conflict between labor and capital. Faced with social unrest and increasingly demanding electorates, governments launched an entire range of policies and

[90] Kuhner, Timothy K. "Citizens United as neoliberal jurisprudence: The resurgence of economic theory." *Virginia Journal of Social Policy & Law*. 18 (2010): 395. Baum, Lawrence, and Neal Devins. "Why the Supreme Court cares about elites, not the American people." *Georgia Law Journal* 98 (2009): 1515.

social programs to offset the economic anarchy associated with the laissez-faire order of the 1920s.[91] The question became whether counter-cyclical monetary policy could overcome the problems of recession and unemployment. In the 1960s and 1970s, new forms of rights struggles, progressive legislation, and litigation sought to rectify the problems of business dominance. Consumer protection laws, environmental regulations, and class-action lawsuits were used by progressives to accelerate social change, a tide of reform which inspired an entire generation of reform advocates to *use* litigation as a means of achieving social change.

In the pursuit of profit, corporations come into friction with other actors and organizations who do not share the same goals as they do. Laws, regulations, public scrutiny, organized labor, political volatility, corruption, crime cyber-attacks are all of these are potential sources of conflict that corporations face, or

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[91] As Charles S. Maier writes "The Depression led voters to shatter the Western political coalitions of the 1920s even when it did not destroy democratic regimes. Distress forced governments in the 1930s to become employers of last resort; by the 1950s they were called upon to assure continuing economic growth as well as high employment at a given level of national income." Maier, Charles S. "The two postwar eras and the conditions for stability in twentieth-century Western Europe." *The American Historical Review* (1981): 333.

very least - anticipate, on a more or less routine basis. Moreover, "non-human" factors like the finite nature of the earth's natural resources, present tangible limits to future of corporate growth. These obstacles to the realization of business objectives are recurrent sources of tension in capitalist society.

5. The Corporate Propensity to Litigate and the Search for Alternatives

From a sociological point of view, contemporary corporate conflict, by which I mean corporations' propensity to clash with other actors in the pursuit of their economic objectives, assumes a seemingly inexhaustible number of expressions ranging from the highly formal (litigation, regulation, collective bargaining, price competition) to the informal (environmental degradation, violations of workplace safety, crime), or what economists often call "negative externalities". The corporate pursuit of profit places strain on the environment, upon workers and consumers, upon business competitors, and on virtually any social system that does not share its institutional aims and values.[92]

[92] As, Marc Galanter writes "Such dissonance includes the "…concealment of information as it flows up the organizational hierarchy, the perpetuation of unrealistic belief systems, excessive optimism, and a bias against relinquishing commitments, even in the face of contrary evidence." Galanter, Marc. "Planet of

The nature and scope of corporate conflict seems so wide in scope, variegated, and to assume so many different forms that it seems futile to speak about in general terms. Any attempt to document the "nature" of his conflict, in its totality, seems like a gargantuan effort that is a relic of the grand-theorists of the 19th century like Comte, Saint-Simon, Engels and Marx, but definitely ill suited to the specialized nature of our contemporary social sciences. Still, it is possible to zero-in on some of the better-catalogued expressions of corporate conflict. One of its formal manifestations, which gives us a reliable documentary trace of their general "appetite" for social friction is the lawsuit.[93] Corporations are very litigious. In the United States, the country in which still most of the globe's largest corporations are headquartered (although at a declining rate), corporations

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the APs: Reflections on the Scale of Law and its Users." *Buffalo Law Review.* 53 (2005): 1374.

[93] Scholars associated with the Wisconsin Business Disputing Project have shown the multiple means by which corporations settle conflict. Strategies include settlement, mediation, arbitration, litigation – and sometimes outright "neglect". Dunworth, Terence, and Joel Rogers. "Corporations in court: Big Business litigation in US federal courts, 1971–1991." *Law & Social Inquiry* 21, no. 3 (1996): 497-592. See also Baar, Carl. "The Myth of Settlement." In *delivery at the Annual Meeting of the Law and Society Association, Chicago, Illinois*. 1999. Galanter, Marc. "Planet of the APs: Reflections on the Scale of Law and its Users." *Buffalo Law Review.* 53 (2005): 1369.

litigate more, more often, (and appear to win more) than any other classification of disputant.[94] Consider the fact that in 2007, Wal-Mart, the global retail giant, and currently ranked as the largest corporation on the Fortune 500 with a market capitalization of 271 US$ billion, is estimated to have faced some form of lawsuit at a rate of about twice an hour.[95] Indeed, a less documented aspect corporations' path to economic dominance has their increased litigiousness - not just against consumer and workers, but against one another, an issue that has given rise to a decades long corporate lobbying campaign against the "high costs of litigation".[96]

Corporate efforts to reform the legal process to better reflect their interests have taken many forms, from the unobtrusive (increasing reliance on in house counsel) to the more unscrupulous (oil companies lobbying to terminate the Arctic

[94] Dunworth, Terence, and Joel Rogers. "Corporations in court: Big Business litigation in US federal courts, 1971–1991." *Law & Social Inquiry* 21, no. 3 (1996): 497-592.

[95] As the U.S.A Today reports "By its own count, Wal-Mart was sued 4,851 times last year — or nearly once every two hours, every day of the year. Juries decide a case in which Wal-Mart is a defendant about six times every business day, usually in favor of the Bentonville, Ark., retail giant. Wal-Mart lawyers list about 9,400 open cases."

[96] See Dunworth, Terence, and Joel Rogers. "Corporations in court: Big Business litigation in US federal courts, 1971–1991." *Law & Social Inquiry* 21, no. 3 (1996): 497-592.

National Wildlife Refuge).[97] Many of these have directly targeted laws and policies that enable litigants to bring claims against them. Jay Feinman's book *Un-Making Law*, for example, documents the rise of the tort-reform movement, a campaign led by conservative think tanks, business associations, and elite jurists that has sought to diminish corporate exposure to tort liability by rolling back the gains made by the Rights Revolution of the 1960s and 1970s.[98]

Another strategy that the corporate sector has pursued in response to threats presented by the increasingly litigious nature of their environment has been a shift toward privately administered forms of adjudication like commercial arbitration and alternative dispute resolution (ADR). This campaign to place adjudication under private control, I argue, constitutes a form of politics pursued by private means, what the American legal realists called "lawmaking by private groups".[99]

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[97] Nelson, Robert L., and Laura Beth Nielsen. "Cops, counsel, and entrepreneurs: Constructing the role of inside counsel in large corporations." *Law and Society Review* (2000): 457-494.

[98] Feinman, Jay M. "Un-Making Law: The Classical Revival in the Common Law." *Seatle UL Rev.* 28 (2004): 1.

[99] Jaffe, Louis L. "Law making by private groups." *Harvard Law Review.* 51 (1937): 201.

Although it is ostensibly designed to make litigation less time consuming and less costly, thereby enabling firms to pass on cost-savings to consumers, greater reliance on arbitration has in fact allowed corporations to avoid the regulatory authority of the state, as well as to negate the potentially damaging aspects of public exposure. By effectively privatizing adjudication, arbitration has altered the corporation as an object of economic governance, thereby allowing it to engage in strategic disputing behaviors that would not otherwise have been possible in courts of law. For all these reasons, the wider commercial arbitration system, I argue, should be thought of as means by which corporations have led a structural change in the distribution of power in the legal system.

6. Theorizing Arbitration and Political-Economic Power

This is not the first study to examine the relationship between economic power and arbitration. Many studies have focused on the abuse of arbitration when the parties of are unequal bargaining power, what have come to be known as "asymmetric bargaining" scenarios. However, with the exception of Heinrich Kronstein's "Arbitration, Instrument of Private Government" written in 1944, and

his later 1962 piece "Arbitration is Power", there has been very little criticism of commercial arbitration between corporations. There is a good reason for this. Unlike employment arbitration, consumer arbitration, and investment arbitration between investors and government, commercial arbitration usually involves disputes between actors of roughly *equal* bargaining power. The agreement to arbitrate is consensual. Both parties voluntarily agree to waive their right to a public trial before a dispute even emerges between them. Since commercial disputants can only enter into arbitration with "eyes wide open", commercial arbitration is seen to be far less subject to manipulation that other forms. With the exception of the potential for arbitrator bias, it is generally not seen how, or why arbitration between commercial disputants might be unfair, forced, or engender relations of power.

This line of reasoning is understandable, but it overlooks a phenomenon of great importance, the more general regulatory role of the courts in governing corporate behavior through private law enforcement, and the subsequent dilution of this power achieved through corporations' increased use of commercial arbitration. This requires a suspension of the still widespread belief (attributed to hegemonic liberal legalism) that courts are *not* invested with real regulatory powers.

Although it is true that judges are not regulators, virtually everyone except the most austere formalists acknowledge in some way or another that courts have, and continue to play an important role in regulating the behavior of corporate actors through rule enforcement, deterrence, and informal tactics of "naming and shaming". Arbitration changes this. By privatizing adjudication, commercial arbitration places the adjudication of corporate disputes under business control, a qualitative shift that would appear to open the possibility of strategic manipulation, dilution, or redundancy of the courts' regulatory role.

Given the increased importance of multinational firms in the global political economy, and the intensification of legal conflict between them, this dissertation seeks to answer the following questions: *what is the significance of the corporate turn from litigation to private forms of dispute resolution like arbitration and ADR (alternative dispute resolution), and how have these forms of dispute resolution altered the relationship between business, government, courts and the state?* If courts play a role in governing corporate behavior, then what happens when the adjudicative power is placed in the hands of corporations themselves?

The corporate embrace of arbitration constitutes a revolution in the adjudication of commercial conflict, a revolution that has markedly altered the regulatory powers of the state. The corporate drive toward commercial arbitration is not just responsible for changing the way that business disputes are adjudicated (conceived in a technical sense), it has altered the legal conditions (read, political) to which businesses are subject, enabling new forms of strategic behaviors that have markedly increased their power. This dual transformation, on the one hand, initiated by changes to law and policy, but also, by increased consumption of arbitration "products" I shall argue, is best conceived as a political-economic shift. The arbitration revolution has involved a re-articulation of state power that has altered the function of the judiciary, and the ability of courts, regulators, and citizens to govern corporate behavior, a process that has hamstrung society's ability to govern corporate conduct effectively.

As I hope to show, the corporate sector is increasingly committed to investing in commercial arbitration, not only financially, but also, politically – at least in terms of lobbying, engaging in public relations campaigns, and through the activities of the U.S Chamber of Commerce. Indeed, since the 1980s, corporations have increasingly sought the use of private alternatives to litigation. In Canada, the

U.K. the United States and other countries in which pro-arbitration regimes are in place, corporations (and large-scale multinational corporations in specific) have embraced a variety of arbitration mechanisms including international commercial arbitration, domestic arbitration and various forms of alternative dispute resolution (ADR) as means of managing business related conflict.

Before illustrating how the contemporary arbitration lobby is using arbitration as a mechanism of political transformation, then next chapter provides a historical context by focusing the business actors and lawmakers who lobbied in favor of the Federal Arbitration Act of 1925. This historical backdrop shall help identify common political and regulatory themes between present day arbitration and the arbitration movement of the 1920s.

3. Corporate Power and the FAA

1.Introduction

The previous chapter presented an overview of the rise of commercial arbitration since the 1980s. It described the way that laws promoting the use of arbitration, the rapid growth of the arbitration service sector, and the use of arbitral forms of dispute resolution in new organizational settings had contributed to an "arbitration revolution" that had fundamentally altered the values and practices traditionally associated with adjudication. I then argued that arbitration reform is being used as a vehicle through which corporations can avoid forms of legal accountability that they view as an anathema to their interests. Specifically, I identified the way that corporations have lobbied for arbitration reforms as political response to what they perceive as encroaching regulatory authority and hostile courts, and the way they have integrated arbitration strategies into their dispute resolution management. The relations of power engendered by the corporate disputing

system need to be examined in greater detail and theorized historically in relation to the welfare state framework they are seeking to displace.[100]

Arbitration is seen to involve contractual relations between two parties, and thus, to be an unambiguous "private law" relation, distinctly separate from political power properly speaking.[101] A broader, historical analysis will reveal that arbitration reform is politically and distributionally significant system of power because it alters the architecture of the capitalist state, and the way that corporate conflict is governed by regulators, judges, and the broader public. The rules and norms to which corporations are subject to in the course of commercial conflict may seem arid and technical, but they are very important instruments of public policy. Historically, the form that institutions of business dispute resolution has taken has been politically contested, both by business, but also by regulators, lawmakers and citizens. Anti-trust law and class-actions, for example, a forms of

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[100] Many private legal theorists have called for a closer examination of the hidden politics of private law engendered in contractual relations. Zumbansen, Peer. "Law after the welfare state: Formalism, functionalism, and the ironic turn of reflexive law." The American Journal of Comparative Law 56, no. 3 (2008): 769-808. Feinman, Jay M. Un-Making Law: The Conservative Campaign to Roll Back the Common Law. Beacon Press, 2004.

[101] Kennedy, Duncan. "The stakes of law, or Hale and Foucault." *Legal Studies Forum.* 15 (1991): 327.

commercial litigation that clearly involve broader public stakes than the resolution of disputes between two parties. In the 1960s and 1970s legal reformers sought to use litigation as a means of accelerating social change. Lawsuits were used to address issues relating to pollution and environmental degradation, workplace safety, consumer protection, and wage protections. Today, judicial privatization by way of arbitration is being used to diminish the impact or undo these policies.

Arbitration reform allows disputants to resolve disputes under privately administered rules, thereby avoiding common-law precedent. It is being used to change the way court documents are collected and published. Most importantly, it alters business exposure to public oversight, creating asymmetries of information, and "information deficits" that change the way lawmakers, citizens, consumer and workers can respond to business behavior. Such issues are amplified when we consider that modern disputes between corporations can reach stakes in the billions and involve a wide array of stakeholders including shareholders, workers, employees, and in the case of trade litigation, the economic vitality of entire industries.

Corporate conflict is a regular feature of contemporary capitalism, but the way that it is perceived, managed, and ultimately decided has historically been subject

to political contestation. When corporate conflict is administered by business itself, new questions of legitimacy, distributive justice, and social values emerge that challenge our notions of what law is and what it is designed to do.

Chapters four and five outline the way that arbitration reform is being advanced by pro-corporate lobby groups, the Supreme Court, and libertarian academics in such a way that makes it more difficult for lawmakers and the public to control and monitor corporate conflict. It also shows how watchdog groups, dissenting judges, and progressive law groups have sought to resist this particular pro-business vision.

To truly capture the significance of this modern reform movement, it is first necessary to situate arbitration reform historically. The present chapter does this by examining the coalition of business interests and legal professional that coalesced to design the Federal Arbitration Act (FAA). I stress the ideological framework through which they advanced their agenda, and the way that a libertarian inspired reading of FAA history is presently being used to aggressively push for pro-business reformers.[102]

[102] As Morton Horwitz illustrates brilliantly in the Transformation of American Law, business mobilization in favor of arbitration is not new - nor is business

Why is the early 20th century so critical to understanding the modern U.S. arbitration system? With the exception of the present era, the 1920s was the most active period of arbitration reform in U.S. history.[103] It established federal legislation that reversed judicial suspicion of arbitration, thereby lending added legitimacy to the use of arbitration in a wide array of business settings including the textiles, banking, and insurance sectors. The general economic setting in which this transformation occurred is also important. The arbitration reform movement emerged amidst one of the most rapid economic expansions in the nation's history, during which the vertically integrated, limited liability corporation established its dominance over alternative forms of business organization.

The discourse in which arbitration reform was packaged in the 1920s scarcely differs from that which lawmakers and businesses use today. Like today, reform

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antipathy to dispute resolution in courts of law. Horwitz associates business expressions of "anti legal sentiment" with periods of experimentation with private alternatives to court. Horwitz, Morton J. "The Transformation in the Conception of Property in American Law, 1780-1860." *The University of Chicago Law Review* 40, no. 2 (1973): 248-290.

[103] Szalai, Imre Stephen. "Exploring the Federal Arbitration Act Through the Lens of History." *Journal on Dispute Resolution.* (2016): 115.

efforts were overtly declared to respond to the mounting costs and delays associated with litigation in court. Business, it was said, was unnecessarily mired by tedious and time-consuming litigation that could more swiftly be managed through arbitration. Making arbitration available to those who wanted it would decongest the courts and make justice available to the layman. Underlying this discursive commonality is a deeper set of ideological commitments. Arbitration reform was ideologically embedded in a conception of a free-market economy, unconstrained by government encroachment and oversight. Arbitration was seen to be a dominion of free-enterprise and managerial enlightenment over and against socialist or government controlled forms of arbitration. Arbitration reformers constantly made recourse values of contractual freedom, private autonomy, and self-regulation, all of which fit within the broad framework of laissez-faire capitalism. This language was ostensibly progressive in so far as it promised to cut down on unnecessary delays and guarantee litigants access to a speedy trial. But it was also wed to an anti-regulatory philosophy that saw legal conflict as a dominion that should remain controlled by business, not by external governmental authorities.

Once we understand the corporate interests, political-economic vision and legal justifications that converged in the making of the FAA, the neo-liberal contours of the present day arbitration system come into sharper relief. The political of arbitration discourse, as I shall show, makes it subject to ideological manipulation and distortion. In recent times, conceptions of progress through arbitration have been recast in such a way that gives business unprecedented control over the institution of "adjudication". Thus, when the Supreme Court emphasizes the idea that arbitration agreements ought to be "rigorously enforced", they also necessarily imply that they ought to be subject to minimal oversight and control from government authorities.

The chapter identifies central elements of the laissez-faire paradigm that emerged in the 1920s, and how they have been resuscitated by the Supreme Court and the corporate arbitration lobby and select arbitration intellectuals to construct a neo-liberal arbitration policy agenda. When the U.S Supreme Court defends the "freedom of contract" with the aim of keeping arbitration fast, expedient and flexible, it is in fact resuscitating a Lochnerian vision of arbitration that seeks to bolster business freedom against judicial and state interference. Protecting disputes from public scrutiny is important to corporations. Under this arbitration regime business disputants amass a wide range of strategic disputing advantages

that they otherwise would not have enjoyed in courts of law, including a form of "regulatory immunity" from the courts' power, the ability to conceal information from court records, and the possibility of avoiding punitive damages and treble damages in the case of anti-trust. The courts' ability to oversee and administer corporate conflict is diminished, and their ability to govern corporate behavior is effectively circumscribed. In the name of expediting legal conflict in such a way that suits the need of capital, what is being developed is a privately run, privately funded system of adjudication that yields to corporate demands for expedient, opaque forms of decision-making, that delimits public involvement in business activity, dampens the already quite delimited forms of democratic participation in the courts. It is very difficult for justice to flourish in such a system because all of the procedural safeguards that are necessary to produce it are curtailed.

Present-day corporate lobbying campaigns to shape the arbitration system have an important precursor in the early 20th century arbitration reform movement.[104] By examining the ways in which corporations sought to shape the development of the

[104] The Federal Arbitration Act sought to reverse longstanding judicial hostility to arbitration in the United States. As Wilson notes, "The FAA proved to be a turning point for arbitration, as it overcame judicial hostility such that arbitration agreements are now routinely enforced." See Jodi Wilson, Wilson, Jodi. "How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act." *Case Western Reserve Law Review*. 63 (2012): 91.

of the Federal Arbitration Act of 1925, we may better understand what is at stake in corporate lobbying efforts to reform arbitration today. Presently, the U.S Supreme Court, corporate actors, and arbitration professionals want to isolate commercial arbitration from public interference, and are reversing doctrines that previously put limitations on arbitration. Contemporary arbitration reform efforts mirror the past in at least two ways: They are wedded to a belief in the power of a self-adjusting market free from government interference. Proponents of arbitration present the beneficiaries of the arbitration system in universal terms, conflating the corporate interest with the interests of the general public.

In focusing on these historical parallels, I want to challenge a commonly made political association, the tendency to identify arbitration (and the development of the FAA in particular) with progressive legal reform. To be sure, both progressive and pro-market forces sponsored the FAA. What modern commentators tend to overlook, however, are the specific political-economic interests of the business forces had in promoting the Act, and their willingness to adopt progressive discourse. Corporate lobbying in favor of the FAA not only alerts us to the way powerful economic actors sought to reshape adjudication broadly speaking, but to

discursive strategies which powerful economic groups present their own interests as legitimate to the wider population.

The first section of this chapter provides an overview of the debate over the FAA that has emerged in the wake of the Supreme Court's recent decisions, specifically, AT&T v. Concepcion and American Express Co. v. Italian Colors Restaurant. I highlight the way that these decisions have inspired some legal historians to return to the origins of the FAA in search of an alternate narrative to the Court's embrace of "contractualism", the idea that arbitration agreements should be enforced according to their terms. While I am sympathetic to efforts to identify the political stakes at play in the Supreme Court's jurisprudence, I believe that efforts to retrieve a progressive jurisprudence from the FAA overlook a countervailing set of social forces that also supported arbitration, powerful economic interests.

In the second section, illustrate the nature and scope of corporate lobbying in favor of the FAA. I show how arbitration responded to structural legal problems that affronted corporations, and the way that arbitration figured within a broader economic vision of laissez-faire. The third section focuses on two intellectual exponents of "corporate" arbitration; Frances Kellor and Owen Young, and the

way that they envisioned arbitration as a means of addressing problems of corporate governance. The fourth section shows how corporations used arbitration as a means of regulatory avoidance, and of contending with the increasing regulatory powers of the Federal government. In the conclusion, I reflect the tension between public values and privatized dispute resolution, and the political-economic contests that emerge therewith.

2. The History of the FAA in Question

The Federal Arbitration Act is the cornerstone of arbitration law in America. It overturned what had been a longstanding judicial hostility to arbitration by making agreements to arbitrate "valid, enforceable and irrevocable". Prior to its passage, arbitration was much more ad hoc and unpredictable. While arbitration was certainly used in a wide array of settings, especially in maritime disputes and trade associations, judges were prone to overturn arbitration awards if they found that the arbitrator had erred in their decision, or had made a ruling that was contrary to existing law. The enforcement of an award depended, in the last analysis, on judicial discretion. The FAA changed all that by designating the proper scope of arbitration agreements, and by outlining criteria by which decisions could be challenged.

The FAA was passed nearly a century ago. But it has attracted a lot of scholarly attention in recent times. This turn to the history of the FAA is not merely a response to the increasing interest in arbitration and other forms of ADR. It is also takes aim at a series of U.S Supreme Court decisions which have used a particular reading of FAA history as justification for its pro-arbitration agenda.

According to the Court, in passing the FAA, Congress not only intended to promote the use of arbitration, but to create a "liberal Federal policy" in which agreements were "rigorously enforced". The criteria for challenging arbitration agreements, should thus be narrowed, in the name of keeping arbitration cost-efficient.

What I wish to emphasize is the way this particular reading of FAA history is being used to promote a neo-liberal policy agenda. What at first blush seems to be the Court's unobtrusive promotion of arbitration is, upon closer examination, a pro-business doctrine that makes it very difficult to challenge arbitral awards, and which serves to make arbitration immune to outward challenges from judges, lawmakers, watchdog groups and citizens.

In what follows, I outline the parameters of the current debate over the FAA. I provide an overview of U.S Supreme Court's current approach to arbitration. I then chart critical responses to the Court, and how they have sought to mine the history of the Federal Arbitration Act in search of a countervailing, progressive jurisprudence. This well-intentioned turn to history, I believe, overstates the degree to which the Court has departed from principles expounded by the founders of the FAA. As I shall show, another important element of the early twentieth century arbitration movement were corporate efforts to shape the arbitration system in ways that would shield capitalists from increasingly powerful forms of regulatory oversight and public interference.

Recent histories of the FAA take aim at the implications of the U.S Supreme Court's embrace of what it calls, the "emphatic" view of arbitration. According to this view, the Federal Arbitration Act was not merely designed to place agreements to arbitrate on the same footing as other contracts, but to actively promote the use of arbitration on a national scale. In AT&T v. Concepcion and American Express co. v. Italian Colors, Justice Scalia restated the Court's position, first stated in its 1983 Moses Cone decision, in which it decided that the

FAA signaled "a liberal policy strongly favoring arbitration".[105] The Moses Cone decision set the trend for the next decade. In subsequent rulings, the court ruled that the intention of the FAA's architects was not merely to reverse judicial hostility to arbitration by making arbitral awards "valid, enforceable, and irrevocable" (as is stated in section 2) but also, as it interpreted the Act, to actively promote the use of arbitration on a nationwide scale. On its own, this statement appears relatively benign. What critics have objected to, however, is the way this policy has been used to reverse laws and policies that sough to govern arbitration. These include, but are not limited to, judicial review of arbitral awards, public policy exception, measures that ensure fairness in arbitration etc.

The Court's arbitration jurisprudence has generated a considerable amount of backlash in the wider arbitration community.[106] Critics have read the Supreme

[105] ("Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state or procedural policies to the contrary. . . . The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ."). See 460 U.S. at 24–25

[106] See for example the New York Times investigation into the use of arbitration agreements in fine print contracts in October 2015, and more recently, by Justice Jed Rakoff of the Southern District Court of New York. Jessica, Silver-Greenberg, and Gebeloff Robert. "Arbitration Everywhere, Stacking the Deck of Justice." *The New York Times*. October 31, 2015, sec. Dealbook. http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-

Court's decisions in AT&T Mobility v. Concepcion, and American Express Co. v. Italian Colors Restaurant, as marking a turn toward a distinctly pro-business vision of arbitration that reneges on its progressive origins, placing consumers and workers at a disadvantage against more powerful disputants.[107] The betrayal of the FAA's progressive principles takes many forms: It is manifest in the Court's rulings against state law governing arbitration, in the turn against class-action arbitration, as well as in its reluctance to subject arbitral awards to review. Critics have argued that the Supreme Court has narrowly interpreted the FAA, denying citizens their right to trial and other forms of class-wide relief. They claim that the Court's willingness to enforce mandatory arbitration clauses, class-action waivers, and other fine-print arbitration agreements has served to deny consumers

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everywhere-stacking-the-deck-of-justice.html?_r=0. As Justice Rakoff writes, "…companies have widely imposed mandatory arbitration clauses on their employees and customers, so as to deny them access to the courts, as well as to exclude them from exercising their constitutional right to a jury. In addition, since the *Concepcion* decision, most such clauses also forbid people with complaints to bring class action claims, even in arbitration." Jed. S., Rakoff. Jed. S., Rakoff. "Why You Won't Get Your Day in Court." *The New York Review of Books*, November 24, 2016. http://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court/.

[107] Aragaki, Hiro N. "The Federal Arbitration Act as Procedural Reform." *NYUL Rev.* 89 (2014): 1939. Wilson, Jodi. "How the Supreme Court Thwarted the Purpose of the Federal Arbitration Act." *Case Western Reserve Law Review.* 63 (2012): 91. Schwartz, David S. "Claim-Suppressing Arbitration: The New Rules." *Indiana Law Journal* 87 (2012): 239.

and employees access to the courts, while at the same time relieving businesses of unwanted litigation from weaker parties, evidence a pro-business bias.[108]

This has set the stage for a return to the history of the FAA. In this context, a number of legal scholars have sought to probe the history of U.S arbitration to counter what they view as the Court's one-dimensional (pro-business) interpretation of the FAA. Recent contributions to FAA history depart from the usual focus on business actors and emphasize the role of legal progressives in lobbying for arbitration reform.[109]

Hiro Aragaki's commentary on Italian Colors, as well as his exploration of the value of "freedom" in arbitration discourse, is the most cogent instance of this critical response. Aragaki takes aim at the Court's narrow reading of the FAA. He argues that early 20th century arbitration reformers were not merely interested in

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[108] Sternlight, Jean R. "Creeping Mandatory Arbitration: Is It Just?." *Stanford Law Review* (2005): 1631-1675. Schwartz, David S. "Claim-Suppressing Arbitration: The New Rules." *Indiana Law Journal* 87 (2012): 239.

[109] Aragaki, Hiro N. "The Federal Arbitration Act as Procedural Reform." *NYUL Rev.* 89 (2014): 1939. Imre, Szalai. *Outsourcing Justice: The Rise of Modern Arbitration Laws in America*. Carolina Academic Press, 2013.

devising cheaper and faster alternatives to business litigation, but also committed to socially progressive change through procedural reform.

As he contends,

> On what I shall call the "procedural reform model," early twentieth-century businessmen did not lobby for the FAA solely because they embraced Adam Smith's invisible hand or Henry David Thoreau's motto that "government is best which governs least." They also did so because they—and the judges and lawyers who supported them—were desperate for qualitatively superior adjudicative alternatives to the increasingly unworkable public system of civil justice.

To be sure, Hiro Aragaki does not take issue with Katherine Stone's prior claims that a major force behind the FAA was the association movement, nor with Ian MacNeil's identification of the New York Chamber of Commerce as a central force in lobbying for arbitration reform. The role of business in supporting the FAA is acknowledged, the shift is on emphasis. Thus, Aragaki acknowledges that business support for arbitration reflected a "commitment to freedom of contract" and "privatized dispute resolution", he argues that it would be a mistake to derive that arbitration reform simply reflected a pro-business agenda. In Aragaki's view, reformers were also committed to a progressive program of court modernization that sought to facilitate access to an alternative forum characterized by simplicity, flexibility, and intolerance of technicalities.

I agree with Aragaki's assessment that the Supreme Court's jurisprudence in Italian Colors and Concepcion elevates the "freedom of contract" as the most important determinant in the enforcement of arbitral awards. This means that checks on arbitral power like state-law pre-emption, manifest disregard (explain), and public policy exception are secondary to the need to "enforce arbitration agreements according to their terms". This would indeed seem to suggest that the Supreme Court's approach to arbitration is "libertarian".[110] Yet Aragaki's response to this, an effort to rescue a progressive interpretation from the history of the Federal Arbitration Act, runs into three conceptual difficulties that merit closer scrutiny. The first problem is descriptive. In seeking to retrieve a distinctly progressive model of reform from the early 20th century arbitration movement, Aragaki actually underestimates the nature and scope of business lobbying efforts, and their strategic motives for doing so. The lobbying efforts of the New York Chamber of Commerce' Committee on Arbitration and the Arbitration Society of America, the organizational harbingers of the arbitration movement, were in fact

[110] "By freedom of contract, I mean the enforcement of arbitration agreements with minimal regulation by the state - what the U.S. Supreme Court has described as "rigorously enforcing[ing]' arbitration agreements according to their terms." Aragaki, Hiro N. "Does Rigorously Enforcing Arbitration Agreements Promote Autonomy." *Indiana Law Journal* 91 (2015): 1143.

dominated by corporate interests who did espouse the libertarian model of arbitration that he wishes to criticize. As I shall show in the next section, corporate mobilization in favor of arbitration reform was far greater than even mainstream accounts of the FAA acknowledge. Arbitration reform was not merely supported by trade associations and merchant's organizations, but by some of the largest corporate firms in America. These firms wanted to diminish judicial and government tampering in their affairs.

This descriptive problem, I argue, begs a political-economic question. Who benefited from the reforms enacted by FAA? Why was arbitration reform a priority for U.S corporations? And, by extension, nearly one hundred years later, who are the beneficiaries of the Supreme Court's pro-arbitration policy? This question becomes all the more thorny when we consider the fact that the contemporary Supreme Court own rhetoric is progressive in its own right, mirroring early twentieth century's focus on judicial morass, excessive technicality, cost, speed, accessibility and freedom. How were dominant corporate groups able to cast arbitration reform in such a way that appealed to members of the broader public? Without foreclosing the possibility that can arbitration be used to meet genuinely progressive ends, I wish to argue that commitments to

progressive legal reform are much more ambiguous and open to manipulation than Aragaki suggests they are. In fact, "progress through arbitration reform" has been the battle-cry of corporate-led arbitration campaign for years now. My point is that in the 1920s, just like today, the language of progressive legal reform permeates the discourse of those who favor the free-market model of arbitration. It thus becomes imperative to distinguish between genuinely progressive desire for reform from corporate ideology.

3. Corporate Legal Mobilization in Favor of the Federal Arbitration Act

Corporations were a major lobbying force behind the FAA. Their efforts, though nominally waged in the name of a progressive vision of legal order, were also aimed at promoting their own interests and shielding corporate power from public interference. While corporate support for the FAA does not necessarily preclude the possibility that its architects harbored progressive principles – it does beg the question as to how the needs of the corporate community were balanced with those of the more general population, and how these were reconciled into a more or less coherent legal ideology. I believe that this balancing act, I suggest, has become even more evident (and difficult to maintain) given the marked difference

between corporate disputing needs and the legal needs of the general population. If imbalances in the arbitration system are to be addressed, policymakers and jurists should pay greater attention to segmentations in the market for arbitration services, and the regulatory problems that these ineluctably give rise to.

The claim that business supported and lobbied in favor of the Federal Arbitration Act, at least in its generality, is on its own, uncontroversial.[111] Past histories of the FAA have documented the activities of a number of business and trade associations that lobbied in favor of the Act through the New York Chamber of Commerce, the American Bar Association, and the Arbitration Society of America, they have also pointed to the considerable support from merchant associations (mainly in New York and Chicago).[112]

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[111] Indeed, the main spokespersons for the Act were representatives of private associations, not by elected officials, and the greater share of congressional testimony appears to have come from private interests. As Szalai writes "During the 1924 Hearings regarding the proposed legislation, virtually all of the written and oral testimony came from witnesses appearing on behalf of or at the request of commercial interests." Szalai, Imre S. "Modern Arbitration Values and the First World War." *American Journal of Legal History* 49, no. 4 (2007): 380.

[112] See e.g Ian, Macneil. *American Arbitration Law: Reformation - Nationalization - Internationalization*. Oxford: Oxford University Press, 1992. Stone, Katherine Van Wezel. "Rustic Justice: Community and Coercion Under the Federal Arbitration Act." *North Carolina Law Review.* 77 (1998): 931.

Business support for the FAA is commonly attributed to three main forces. The first is the New York Chamber of Commerce' Committee on Arbitration, which, led by Charles Bernheimer and Julius Cohen, launched a massive lobbying campaign seeking to promote the use of arbitration amongst both business and the broader public.[113] The second is what Katherine Van Wezel Stone identifies as the "association movement", the increasing national prominence of trade associations that arose under by Secretary of Commerce, and future president, Herbert Hoover - who would later serve on the board of the American Arbitration Association.[114] The third is the American Bar Association's Committee on Commerce, Trade and Commercial Law, who produced the first draft of the bill.

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[113] Part of this campaign involved promotional work. "Arbitration Week" in 1923, Charles L. Bernheimer "arranged a program in which more than fifty trade and commercial organizations participated". Ian, Macneil. *American Arbitration Law: Reformation - Nationalization - Internationalization*. Oxford: Oxford University Press, 1992. Jerold S., Auerbach. *Justice Without Law?* (Oxford, UK: Oxford University Press, 1983), 23.

[114] Since many trade associations already had well-developed, privately-administered systems of arbitration in place to resolve disputes amongst their members, they were naturally in favor of efforts to bolster the legitimacy and national profile of arbitration. "The growth of commercial arbitration went hand in hand with the explosive growth of trade associations in the 1920s." Stone, Katherine Van Wezel. "Rustic Justice: Community and Coercion Under the Federal Arbitration Act." *North Carolina Law Review.* 77 (1998): 978.

Katherine Stone's work presents the most comprehensive attempt to locate business influence over the development of the FAA. In her view the FAA was corporatist, (by which she means that arbitration reform saw private-led initiatives as substitutes to government-led regulation). Increasing reliance on arbitration, in her view, can be understood as a by-product of Secretary of Commerce Herbert Hoover's vision of private-public cooperation.[115]

Part of the problem can be attributed to the very language that is used to describe actors in the arbitration system. Most studies mirror the language of early 20th century business representatives in speaking of the use of arbitration by "merchants" and "traders" as opposed to "capital" or "corporations". In so doing, however, they commit themselves to a certain conceptual short-circuiting that has the effect of diminishing the importance a radical transformation in business organization that shaped the early 20th century American economic system, the rise of the corporation. At a semantic level, it is true that corporations are "merchants" and "traders". But the commerce and trade in which corporations

[115] France's Kellor's largely promotional book, American Arbitration Law remains the most extensive source of documentation on the FAA's corporate support base. Kellor, Frances. *American Arbitration: Its History, Functions and Achievements*. Beard Books, 1999.

engage is on altogether different scale and scope than which prior configurations of business did. By the 1920s and 1930s, it had become increasingly evident to a new generation of American political economists that corporations had grown to such size as to make prior conceptions of a competitive market economy - characterized by competition amongst many buyers and sellers, out of joint with the reality of economic concentration.[116] In adopting such descriptive terms, scholars have overlooked the way in which support for both Bernheimer's Committee on Arbitration and Moses Grossman's Arbitration Society of America hailed from elements of the ascendant U.S. corporate sector, and the extent and scope of their political mobilization in favor of arbitration.

Indeed, the period 1910-1930 (the period of which the arbitration movement grew to its height) was also characterized by extraordinary advancements in corporate

[116] While corporations are in one sense - "merchants" in so far as they engage in "commerce", they are also concentrations of economic power with the wealth, managerial powers, and vast networks of planning necessary to conduct operations on a national and international scale. It was precisely these features that led a new generation of political economists in the 1920s and 1930s for obstructing the principles of liberalism. Berle, Adolf Augustus, and Gardiner Gardiner Coit Means. *The modern corporation and private property*. Transaction publishers, 1991. Veblen, Thorstein Bunde. *Essays in our changing order*. Transaction Publishers, 1964. Corey, Lewis. *The House of Morgan: A Social Biography of the Maters of Money*. G. Howard Watt, 1930.

organization, and saw the consolidation of business giants including General Motors, Ford, General Electric, the Radio Corporation of America, Westinghouse, and the Sears Roebuck corporation, many of whom were part of lobbying efforts in support of commercial arbitration.[117] These firms rapidly rose to a position of dominance in the American economy.

To gain a sense of the magnitude and scope of corporate backing for the FAA, it is instructive to observe the general membership of the New York Chamber of Commerce, acknowledged by virtually all histories as a driving force in the arbitration movement. Between 1910-1930, the period roughly coinciding with

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[117] The Arbitration Society of America (later to become the American Arbitration Association in 1926) was founded in 1922 by a number of prominent business figures and former justices. Its founders included Jules Bache, owner of one of the largest broker firms in New York and majority shareholder in the Chrysler Corporation, Julius Rosenwald President of Sears Roebuck corporation, Felix S. Warburg, of the European banking dynasty, John D. Rockefeller of Standard Oil. [117] When the Association was renamed The American Arbitration Association in 1926, Anson Burchard, president of General Electric, would later serve as the American Arbitration Association's President. "Decennial Report of the American Arbitration Association 1926-1936." American Arbitration Association , 1936. https://babel.hathitrust.org/cgi/pt?id=mdp.35112104315850;view=1up;seq=3.

Chandler Jr, Alfred D. *The visible hand*. (Harvard University Press, 1993.) Berle, Adolf Augustus, and Gardiner Gardiner Coit Means. *The modern corporation and private property*. Transaction publishers, 1991.

the height of the arbitration movement, the commodities traders that had dominated the Chamber's membership in the late 1900s were increasingly eclipsed by directors of large-scale corporations. The Chamber's 1922 annual report, for example, lists chief executives from virtually every major sector of American industry including banking, insurance, rail, radio and telecommunications, oil and gas, retail, automotive, and textiles.[118] These include the leaders of some of largest industrials in the United States, including Gerard Swope, President of General Electric, Owen D. Young of Chairman of the Radio Corporation of America, Jules Bache, investment banker and majority shareholder of Dome Mines, and Charles M. Schwab, President of U.S. Steel.[119]

On its own, the incidence of these corporate magnates amongst the Chamber's membership is nothing more than suggestive. It does not provide sufficient evidence to suggest that the FAA was necessarily any more "pro-corporate" than

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[118] "Sixty Fourth Annual Report of the Corporation of the Chamber of Commerce of the State of New York for the Year 1921-1922." https://babel.hathitrust.org/cgi/pt?id=mdp.39015067348808;view=1up;seq=5.

[119] "Decennial Report of the American Arbitration Association 1926-1936." American Arbitration Association 1936. https://babel.hathitrust.org/cgi/pt?id=mdp.35112104315850;view=1up;seq=3.

favored "small business" or any other classification of merchant. For example, it is possible that elements of the Chamber's activity took a passive stance on the arbitration, and left organizing activities to the Chamber's Committee on Arbitration. Yet there is evidence that corporate sponsorship of the Act was more than just salutary or incidental, but in fact, heavily enmeshed in the planning process. Frances Kellor, who acted as vice-president of the American Arbitration Society (which changed name to the American Arbitration Association in 1926), wrote a largely promotional, but nevertheless informative history of the arbitration movement in 1948 entitled American Arbitration, its History, Functions and Achievements.[120] In the section "Builders of American Arbitration" she lists some of key business patrons of the Arbitration Society. These included Julius Rosenwald, President of Sears Roebuck corporation; Felix S. Warburg, of the renowned European banking dynasty; and John D. Rockefeller of Standard Oil. Anson Burchard, vice-president of General Electric, would later serve as the first president of the American Arbitration Association, the result of the merger between Berheimer's Arbitration Foundation and Moses Grossman's

[120] Frances Kellor. *American Arbitration: Its History, Functions and Achievements*. (New York: Beard Books, 1999)

Arbitration Society of America.[121] By 1936, six years after the Federal Arbitration Act was ratified by President Coolidge, the AAA's board of directors, led by Thomas J. Watson, CEO of IBM, includes an even broader base of corporate support. They include Samuel McRoberts, vice-president of National City Bank of New York and president of Metropolitan Trust Company, P.W Litchfield, president and chairman of the board of GoodYear Tire and Rubber Company, Frederick Ecker, president of Metropolitan Insurance Company, and John Otterson of Western Electric.[122]

What, apart from desire to "have arbitration agreements enforced according to their terms" (a phrase so often deployed today) motivated corporations to endorse the emergent commercial arbitration system? Despite evidence that corporations sponsored the activities of the arbitration lobby, the documentary record is limited, making it difficult to answer this question with certainty. The memoirs of corporate magnate, diplomat and lawyer Owen Young, and the writings of France

[121] John N. Ingham. *Biographical dictionary of American business leaders*. Vol. 1. (New Haven: Greenwood Publishing Group, 1983.)

[122] "Decennial Report of the American Arbitration Association 1926-1936." American Arbitration Association , 1936. https://babel.hathitrust.org/cgi/pt?id=mdp.35112104315850;view=1up;seq=3.

Kellor, however, give a more in-depth look into the organizational efforts undertaken by leaders of the U.S corporate sector amidst the reform movement.

4. American Arbitration's Corporate Visionaries

In this section, I show how two figures in the early twentieth century arbitration reform movement articulated a vision of arbitration that would serve the interests of the American corporate sector.

Of all the business magnates in the arbitration movement, Owen Young, who served as chairman of GE, and later of RCA, left the most extensive commentary on arbitration. Both his official statements and memoirs give an even more revealing account of some of the regulatory matters that arose from the increasing ambit of the arbitration system, offering some clues as to why arbitration would have been particularly appealing to businesses at the time, and the ways in which it enabled corporations to shield themselves from regulatory scrutiny.

Young had long been supportive of resolving business disputes by means of arbitration. As he wrote to his associate,

> After active practice of nearly twenty years I am more and more impressed with the view that the lawyers must correct not only the form procedure in the courts but their own dilatory habits in order to effectively keep the judicial machinery in step with the needs of business. […] the delays in court today, compared with he speed with which business transactions are handled, are greater than they have ever been in the history of the world before. This means that the law is lagging further and further behind business.[123]

It is safe to assume that Young's experience of the dilatory habits of the legal profession was not of an abstract nature. As CEO, he had first-hand experience with the litigation caseload faced by the newly formed RCA. In his letters of the time, Young speaks of the "legal warfare" RCA had become engaged in with AT&T its major competitor in the market for radio appliances. The issue of broadcasting rights was particularly acrimonious, it involved a extraordinarily rapid divvying up of the national market amongst the radio giants – a plan explicitly endorsed by Hoover.[124] Unlike other countries in which national

[123] Josephine Case Young, and Everett Case Needham. *Owen Young and American Enterprise, A Biography*. (Boston: David R. Godine, 1982): 156.

[124] Young's business and political career was illustrious. An attorney by training, he was appointed as general counsel of GE in 1912, and was later the company's president in 1922. He served as U.S envoy to the League of Nations and participated in the Dawes plan proposals during the Versailles treaty negotiations. Young would also serve as the CEO of the Radio Corporation of America (RCA) when it was created in 1919. During his tenure at RCA, he forged close ties with two future presidents; Herbert Hoover (then secretary of commerce) and Franklin Roosevelt (then secretary of the navy). During his

broadcasting had been placed under state control, as secretary of commerce, Hoover was determined to place radio broadcasting under corporate control.[125] As Young's biographers note, "By 1925 the difficulties with patents and manufacturing were almost overpowering. The cutthroat competition which developed in the field as soon as it was clear that radio business meant money brought widespread pirating of the Radio group's patents and constant litigation."[126]

The fact that a firm like RCA was mired in legal conflict helps why Young would want to arbitrate, rather than litigate disputes. Eric Barnouw's history of American broadcasting also points to other motivations for arbitration. Barnouw documents the way that arbitration enabled firms like RCA to avoid entanglements with the Federal government. In the years leading up to the FAA, RCA and AT&T had been engaged in a "bitter behind-the-scenes private war"

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tenure at RCA, he presided over the formation of a cartel agreement involving AT&T, GE, United Fruit, Westinghouse and Marconi electric which divided control of American radio broadcasting.

[125] Smulyan, Susan. *Selling radio: The commercialization of American broadcasting, 1920-1934*. Washington, DC: Smithsonian Institution Press, 1994.

[126] Josephine Young, Case, and Case Everett Needham. *Owen Young and American Enterprise, A Biography*. Boston: David R. Godine, 1982. 156.

over broadcasting rights. By 1924 they were involved in a massive Federal Trade Commission investigation charging them with "combined and conspired for the purpose of, and with the effect of, restraining competition and creating a monopoly in the manufacture, purchase and sale in interstate commerce of radio devices … and in domestic and transoceanic communication and broadcasting."[127] In order to avoid the Federal probe, RCA and AT&T sought to revolve their broadcast licensing disputes in private, free from public oversight.

These first major phase of arbitration reform took place during the economic boom years of the late 1920s. By the 1930s, the status of the commercial arbitration came under closer scrutiny when it was perceived to an expression of the moribund laissez-faire system that was not only antithetical to economic growth, but business performance as well. Owen Young's vision of laissez-faire order would be subject to increasing challenge from the proponents of the New Deal, who sought to mobilize the state's powers of economic coordination as a means of stabilizing the corporate order. By 1934, Thurman Arnold could write that "The arbitration machinery has become a device to maintain the aloof position of courts and to isolate them from the technique of investigation and

[127] Barnouw, E., 1966. A Tower in Babel: A History of Broadcasting in the United States to 1933, vol. 1. *A Tower in Babel*, .

conference." And Heinrich Kronstein, a legal academic who had fled the Nazi regime, could write that arbitration was a form of "private government", empowering cartels to collude together to fix prices and avoid anti-trust litigation.

The second of these figures is Frances Kellor, who campaigned in favor of arbitration throughout the 1920s. Kellor was prolific. Her writings offer an insider's view of the general significance of the emergent arbitration movement, and the important corporate connections involved in its making. Prior to her work in arbitration, Kellor had been active in the Americanization movement, a movement that sought to politically assimilate and de-radicalize the growing immigrant population of the United States. The ostensible goals of this movement were to welcome European immigrants and to integrate them into the nation's economic and political life. Yet such pronouncements served as a thinly veiled anti-Bolshevik political campaign designed to de-radicalize the immigrant population, whose exposure to then raging class conflict overseas had made them an important population to control.

Kellor believed that arbitration had a fundamental role to play in what she called "industrial democracy" a cooperative scheme between, government, business and

labor. As noted, an active anti-Bolshevik and advocate of the neutralization of the "immigrant threat", Kellor believed that Americanism was the solution to America's labor problem. The American social contract would not stem from any the common rights of man or abstract utopian declarations, but from government cooperation with industry and labor in the name of "industrial democracy". The attenuation of class conflict could be achieved through the correct ordering of government and business institutions. Such rhetoric was popular at the time amongst business, government and progressive reformers alike. Through feats of institutional engineering, the American system would transcend the class-divided politics that were miring Europe.[128]

In Kellor's vision business elites would play an important role in fostering this model of industrial democracy. As Kessler writes, Arbitration was, in her eyes, a means of fortifying American values at home and extending them abroad—and all by relying, as she always had, on the help of business elites. Indeed, it is striking to note that some of the very same financial magnates who assisted Kellor in her

[128] According to Kellor, the new industrial society hinged on the development of a new approach to governance—one in which "industry, labor, the government and the consumer become partners." Kessler, Amalia D. "Arbitration and Americanization: The Paternalism of Progressive Procedural Reform." *Yale Law Journal* (2015).

capacity as leader of the Americanization movement went on to play a central role in the AAA. During her work in the anti-immigrant Americanization movement, Kellor had come into contact with powerful business magnates like Felix Warburg. It is noteworthy that despite the close relationships that Kellor forged with Rockefeller, Warburg, Astor, and other elements of the American ruling class, Kellor did not see the activities of the of the Arbitration Society as promoting the particular interests of the American corporate sector. In her view, arbitration was an instrument in the service of the "common good".

5. The Making of American Arbitration

This chapter illustrated the way that corporations lobbied in favor of arbitration reform, and the laissez-faire ideological framework in which they advanced their agenda. It showed the way that arbitration was being used as a form of regulatory avoidance by some of the nation's largest corporations, and the way that intellectual exponents of the movement like Charles Bernheimer, Owen Young, and Frances Kellor conceptualized the reform agenda.

The convergence of corporate giants in the arbitration movement, and the subsequent influence they exerted on its central institutions should cast doubt on the still widely held view that the arbitration movement was in the first instance, inspired by the values of progressivism. While the movement did enlist the contributions of social reformers like Roscoe Pound, and saw business representatives speak of the importance of improving judicial machinery for "the layman," such commitments seem to pale in comparison to the business forces that mobilized behind the FAA. [129] Instead of juxtaposing two mutually exclusive visions of arbitration, one dedicated to laissez-faire, another to progressive reform, the more interesting question is how the business has been able to successfully frame its campaign of judicial privatization in such a way that has the appearance of benefiting the common good.

In chapters four and five, this historical overview of the FAA shall help shed light on a contemporary development; corporate efforts to insulate arbitration from public oversight, and to separate it from democratic control. When the U.S

[129] It provides a forum admirably adapted for the settlement of the troubles of the small man or the poor man who cannot stand the stress and expense of protracted litigation. Bernheimer, Charles L. "The Advantages of Arbitration Procedure." *The ANNALS of the American Academy of Political and Social Science* 124, no. 1 (1926): 99-100.

Supreme Court defends the "freedom of contract", with the aim of keeping arbitration cheap, expedient and flexible, it is in the same stroke, dismantling state policies that placed arbitration under public supervision, resuscitating a Lochnerian vision of arbitration that seeks to bolster business freedom against judicial and state interference. By analogy, when arbitration theorists like Jan Paullson, Erin O'Hara and Lawrence Ribstein designate arbitration as a zone of freedom against the coercive powers of "state" encroachment, they are aligning themselves with a Hayekian philosophy of market freedom that has increasingly served as template for a pro-business counter-revolution against progressive regulation.

Adherence to these principles does not just create a slanted form of jurisprudence, it also results in concrete advantages for business disputants. Under the parameters of this particular arbitration regime - corporations amass a wide range of strategic disputing advantages that they otherwise would not have been able to manipulate in courts of law. The ultimate effect of this is the creation of a form of "regulatory immunity" from the courts' power, both its formal powers to sanction commercial disputants, but also, the wide array of informal penalties and costs that come along with adjudication in court. Under the current arbitration system,

the courts' ability to oversee and administer corporate conflict is circumscribed. Government and citizens' knowledge of economic activity is diminished. In the name of expediting legal conflict in such a way that suits the need of capital, what is being developed is a privately run, privately funded system of adjudication that yields to corporate demands for expedient, opaque forms of decision-making, that delimits public involvement in business activity, dampens the already quite delimited forms of democratic participation in the courts, all ultimately bolstering corporate power.

4. The Political Economy of Arbitration Reform

> The process of depoliticization and the creation of state-free spheres is a political process.[130] – Carl Schmitt

1. Reviving Lochner Politics

The previous chapter identified an ideological and material undercurrent informing the development of the Federal Arbitration Act. I argued that early twentieth century reformers embraced a vision of arbitration reform that was premised on the values of "self-government" and "private ordering". This ideology placed emphasis on reducing the costs and delays of litigation while seeking delimit government and judicial interference in commercial disputes as much as possible. This framework emphasized the pre-eminence of corporate-led initiatives over public planning, and at the same time, warded off more collectivist (and militant) approaches to conflict resolution emerging from the labor movement. I further showed how the arbitration movement overwhelmingly received its financial and political backing from corporate dominated business

[130] Quoted in Renato Cristi. "*Carl Schmitt and Authoritarian Liberalism: Strong State, free economy.*" (Wales, University of Wales Press, 1998).

associations. Business giants from virtually every economic sector including the banking, telecommunications, shipping, chemicals, the automotive sector, and textiles converged in their support as the FAA both directly, as well as through business associations like the New York Chamber of Commerce. Arbitration reformers adopted the discourse of progressivism to advance their goals, even as it was a predominantly elite-led, and corporate financed movement.[131]

The period between 1870-1940 marked a time of extraordinary business restructuring in America that had important implications on patterns of business disputing and the structure of the courts more generally.[132] As the scale and scope

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[131]As Jerold Aeurbach writes, "The problem, freshly perceived by New Dealers for whom corporate business was the new enemy, was not the legalization of arbitration but the immunity it provided business from public regulation. To them arbitration symbolized the deficiencies of a laissez-faire economy; law, constantly criticized by liberals since the turn of the century for retarding progress, was now rediscovered as an instrument of reform that protected public interests against private rule making. Auerbach, Jerold S. *Justice without law?*. Vol. 762. (Oxford University Press, USA, 1984.) 112.

[132] Alfred Chandler highlights the growth of modern corporation in the late 19th and early 20th century. Alfred D. Chandler. "Organizational capabilities and the economic history of the industrial enterprise." Journal of economic perspectives 6, no. 3 (1992): 79-100. "In the United States, […], the main thrust of the centralization of capital became vertical integration." Giovanni Arrighi. The long twentieth century: Money, power, and the origins of our times. (New York, Verso, 1994): 295.

of conflict increased, as its frequency conflict intensified, corporations sought to alter the procedural and substantive rules that governed commercial conflict.[133] At the height of the laissez-faire era, they designed a system of private law enforcement that would avoid cost and delay, as well as public entanglements in the resolution of private controversies.[134] Since it significantly altered corporate

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[133] Edward Purcell's study of diversity litigation emphasizes the structural changes created by the rise of the corporation at the turn of the century. "The roughly three-quarters of a century from the 1870s through the 1940s constituted a period of rapid and massive industrialization that helped transform social and economic relations in the United States. The period also witnessed the emergence of large national corporations and their rise to positions of social and economic power. That complex historical development, in turn, produced an essentially new social type of legal dispute, one between aggrieved individuals and national corporations, and it generated literally millions of such disputes". Edward Purcell A. *Litigation and inequality: Federal diversity jurisdiction in industrial America, 1870-1958*. (Oxford, Oxford University Press on Demand, 1992.) 17.

[134] Gabriel Kolko has conceptualized the use of progressive political themes as a means of furthering capitalist objectives as "political capitalism", as he argues, "Progressivism was initially a movement for the political rationalization of business and industrial conditions, a movement that operated on the assumption that the general welfare of the community could best be served by satisfying the concrete needs of business. But the regulation itself was invariably controlled by leaders of the regulated industry, and directed toward ends they deemed acceptable or desirable. In part this came about because the regulatory movement were usually initiated by the dominant businesses to be regulated, but it also resulted from the nearly universal belief among political leaders in the basic justice of private property relations as they essential existed, a belief that set the ultimate limits on the leaders possible actions." Gabriel Kolko. *The Triumph of Conservatism*. (New York, Simon and Schuster, 2008.): 19.

exposure to countervailing forms of power (especially unwanted litigation), arbitration reform, I claimed, constituted an important, even if oblique - expression of political-economic restructuring.

Statistical data on the extent and scope to which commercial arbitration agreements were used by corporations is very limited. While there is no body of arbitration cases available to determine the degree to which law-avoidance practices were pursued by corporations during the early stages of the arbitration reform movement, there are instances to suggest that they were important. Already in the 1920s, major radio corporations like the Radio Corporation of America (*led* by arbitration reformers like Owen Young) were using arbitration as a mean of curbing their exposure to the Sherman Anti-Trust Act. Already by the New Deal, critics of laissez-faire like Heinrich Kronstein and Philip G. Phillips were characterizing commercial arbitration as "an instrument of private government" and a system of "business anarchy", suggesting that the commercial arbitration system was a site of deregulated lawlessness, the adjudicative expression of a pro-business laissez-faire order.[135] While the New Deal critiques

[135] Heinrich Kronstein, who had fled the Nazi regime, was especially concerned about the use of arbitration by cartels, who would design self-serving agreements argued that business would use "ultilize the arbitration device for their own

did not substantively culminate in any fundamental alterations to the Federal Arbitration Act, they did set the stage for the public policy exception, and delimitations on the scope of arbitration practice in securities arbitration in the postwar era.[136]

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purposes, making use of the three basic functions of tribunals legislative, judicial and disciplinary." Heinrich Kronstein. "Business arbitration instrument of private government." *The Yale Law Journal* 54, no. 1 (1944): 44.

[136] In Wilko v. Swan (1953), the Supreme Court held an arbitration clause in an agreement between an customer and a securities brokerage firm to be invalid. As the court ruled "[i]n unrestricted submissions . . . the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation." 346 U.S. 427 (1953)

As Stewart Sterk observes "Arbitrators cannot be expected to sacrifice the most equitable resolution of the dispute between the parties in favour of the economic needs of society as expressed in the antitrust laws. This is not because arbitrators are any less capable or unbiased than judges, but because the task of arbitration is inconsistent with the purposes and functions of antitrust laws. Arbitrators are entrusted with the responsibility of working justice between the parties as it appears to them and without explaining their conclusions. Antitrust laws, by contrast, have little to do with justice between the parties. Thus, there is a choice to be made. Either arbitrators should be permitted to resolve disputes that implicate antitrust issues as they do other disputes - unbound by rules of law and at the possible sacrifice of antitrust policies - or they must be prohibited entirely from arbitrating such disputes. There is no middle ground consistent with the arbitration process as it has developed in this country." Stewart E. Sterk "Enforceability of agreements to arbitrate: an examination of the public policy defense." *Cardozo Law Review.* 2 (1980): 481.

2. Arbitration Reform from the Lochner era to the Present

This historical freeze frame of the development of arbitration law during the Lochner era, and the ensuing debate that it generated is instructive for my present purposes. It provides a frame of political-economic frame of reference that I believe helps to better understand the *legal structure*, *political agents, business interests* and *ideological themes* at play in contemporary arbitration reform.

The U.S Supreme Court and the corporate arbitration lobby are not advancing arbitration reform in an ideological vacuum, they are spearheading it in accordance with a neo-Lochnerian doctrine that is inspired by the pro-business arbitration reforms I described in the previous chapter. This ideology is designed as a justification for giving corporations very wide latitude to determine the rules by which their disputes will be adjudicated, and to reduce and/or eliminate their exposure to countervailing forms of power. One way of putting this is that arbitration reform maximizes "individual autonomy" and "efficiency" but another is that it insulates corporate activity from unwanted forms of interference like regulators, judges, watchdog groups, consumer advocacy groups and citizens. This reform process is playing out at multiple sites of contestation. It has found

expression in Supreme Court judgments, in the policy proposals and amicus briefs of pro-corporate lobby groups, and in professional and scholarly representations of the arbitration system. Together it constitutes a relatively unified movement to create a privately financed, privately administered system of business disputing that is virtually insulated from public participation and discussion.

The revival of arbitration reform modeled on laissez-faire thinking is not merely a throwback to early 20th century ideology. It is an intensification of it. Contemporary arbitration in fact radicalizes Lochner politics in such a way that almost completely insulates business arbitration from any form of governance, including state law, statutory law, and from common law principles of contract enforcement generally, as well as from being deliberated by regulators, jurists, social-scientists, and ordinary citizens. This means that arbitration reform is not simply an instance of "old wine in new bottles" as Ian Macneil once suggested. The Supreme Court, business associations, arbitration professionals and ideologues are seeking to push arbitration in a direction that is even further removed from any form of oversight or accountability.

The revivification of Lochner style politics finds expression in arbitration reform through:

An emphasis on the strictly "private" character of commercial disputes. Just as the Lochner era crystallized the 19th century private/public distinction according to which contracts (including arbitration agreements) were considered to be separate from politics and public policy, so does modern arbitration dogmatically insist on the non-public character of private disputes, even in areas where there are clear ambiguities (anti-trust, class-actions, environment).

1) A *radical shift of scale in the business actors involved.* Just as the 1920s witnessed the emergence of the large-scale limited liability corporation to a position of economic dominance, altering the structure of litigation, the period 1970-present has seen the rise of the multinational "mega-corporation" whose litigation behaviors differ substantially from those that prevailed during the four decades following the postwar period.

2) An emphasis on privately-led initiatives. Arbitration reform was packaged in a variation of Americanist ideology in which private ordering was a harbinger of

the broader regulatory order. 4) *Divesting private law enforcement of its public content.* Corporate elites saw commercial arbitration as embodying a more enlightened, and superior order of justice than would have been possible through public channels. As I shall show, these themes have resurfaced, even if in inconspicuous or latent form, suggesting that the broad acceptance of commercial arbitration in North American legal culture is more problematic than is conventionally assumed, and more pertinent to the study of political-economy than most commentators have realized.

3) The legal framework of the Federal Arbitration Act remained intact through the postwar era, even as the momentum for arbitration reform diminished. The reason for this for the relative decrease in importance of commercial arbitration may be explained by decreasing rates of corporate litigiousness by corporate reluctance to engage in formal litigation tactics throughout the postwar period. Amidst conditions of rapid economic-growth, corporations tended to avoid litigation in favor of informal, non-binding modes of settlement that sought to avoid acrimony.[137] The preservation of business relationships took priority over the

[137] Macaulay, Stewart. "Non-contractual relations in business: A preliminary study." In The Law and Society Canon, pp. 155-167. As Joel Rogers and Terence Dunworth summarize, "Manufacturers and their dealers, who engaged in

aggressive litigation tactics that later became the hallmark of Wall Street law firms during the 1980s.[138] Even corporate litigation took a backseat to more lucrative aspects of lawyering like mergers and acquisitions and deal-making.

Looking back nearly forty years onward, the parallel emergence of the arbitration movement, and the politics of neo-liberal economic restructuring are striking. As deregulation, denationalization, and increasing hostility toward the achievements of the Rights Revolution became palpable as a political force in the national

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relationships lasting for years, were unwilling to do anything to disturb the relationship, particularly something so extreme as threatening or starting litigation. Firms in long-term continuing relations, such as those Macaulay described, were likely to develop dispute resolution mechanisms that avoided lawyers and the courts. Continuing relations between businesses are valuable to the extent that the parties value future transactions, the stakes of the transactions are high, and there is a high probability of continued relation." Dunworth, Terence, and Joel Rogers. "Corporations in court: Big Business litigation in US federal courts, 1971–1991." *Law & Social Inquiry* 21, no. 3 (1996): 497-592.

[138] William Nelson attributes the rise in contract litigation in the 1980s to the increasing array of social groups seeking representation through legal means, as well to conditions of increased competition amongst business. "To account for the long-term, nationwide increase, it is necessary to search for equally long-term transformations in the business corporations served by large law firms and in the elite legal profession itself. Important structural changes did, in fact, occur both in business and in law and the legal profession during the 1960s and 1970s." " The internationalization of business in the 1970s and 1980s has simply repeated this process on a larger scale." Nelson, William E. "Contract litigation and the elite bar in New York City, 1960-1980." *Emory Law Journal* 39 (1990): 413.

politics, a legal movement sought to side-step the courts, was suspicious of judicial authority, and to promote privately led approaches to dispute resolution.

Could there be a link between arbitration reform (expressed through hostility to adjudication) and neo-liberal restructuring (expressed through a preference for privatization over regulatory initiatives)? Modern critics of arbitration have focused on the erosion of public values that the increasing reliance on private tribunals has brought about.[139] Arbitration, it is claimed, forfeits the integrity of civil procedure in favor of cheap, expeditious dispute resolution – as long as it agreed to by the parties. This chapter argues that the relationship between arbitration reform and the politics of neo-liberal privatization is closer than has previously been recognized. I claim that a distinctive body of Supreme Court jurisprudence, arbitration scholarship, and ideological production converges in a neo-liberal arbitration *political* doctrine that has opened the field for business to resolve disputes according to their own terms, while imposing significant restrictions on smaller-scale disputants. The ideal typology of this politics is

[139] Fiss, Owen M. "Against settlement." *The Yale Law Journal* 93, no. 6 (1984): 1073-1090. Cohen, Amy J. "Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values." *Fordham Law Review* 78 (2009): 1143. Resnik, Judith. "For Owen M. Fiss: Some Reflections on the Triumph and the Death of Adjudication." *University of Miami Law Review* 58 (2003): 173.

closest to what Timothy Kuhner calls "neo-liberal jurisprudence" – an effort to apply neo-classical economic principles to legal reform, while in the same stroke, dismantling the state's regulatory powers and the gains of the 1960 and 1970s rights revolution. This is the policy by which jurists and corporations have advanced a politics of privatization through "non-political" means.

The implications of my argument are that we rethink the way power operates through the arbitration system and private law generally, and how the arbitration movement has altered the relationship between corporations, law and the state.

We should not be deceived by the apoliticial conceptions of efficiency and freedom at the heart of arbitration discourse. Arbitration reform involves a politics of redistribution that seeks to immunize business from unwanted forms of litigation. While the judiciary is not considered a regulatory institution, the 20th century has witnessed important contests over the court's ability to govern economic policy. Arbitration reform is a site of political-economic struggle in which this contest over the court's broader "regulatory" role is brought into sharp relief. My claim is that, just as the Lochner era involved the judicial invalidation

of state and federal legislative efforts to regulate business, so does the new pro-business arbitration regime severely delimit the ability of courts, government, and the public broadly, to govern arbitration agreements.[140]

Neo-liberal arbitration reform needs to be distilled from the more universalistic discourse of "democracy", "the common good", "efficiency", and "the Rule of Law" in which it is embedded. Most proponents claim that arbitration is aligned

[140] According to the dichotomy set out in Lochner, political power was vested in the legislative and executive branches of government. Private law constituted a sphere of property rights, individual liberty and private transactions that stood separately from politics. Laws and policies that infringed upon the private sphere were seen to be an illegitimate use of public power. Arbitration policy was perfectly in keeping with these ideological principles. The Lochner era was characterized by judicial invalidation of state and federal legislative efforts to regulate business. The Supreme Court's 1905 Lochner decision involved the state of New York's efforts to delimit the number of hours that bakeries could remain open. In this case, which subsequently came to emblemize an entire era of laissez-faire jurisprudence, the Supreme Court invalidated a New York statute that limited bakery workers to a sixty-hour workweek as breach of the freedom of contract. As the court ruled there was "no reasonable ground for interfering with the liberty of the person or the right of free contract, by determining the hours of labor, in the occupation of a baker. Lochner may have involved a seemingly small stakes dispute, but its symbolic effect was very great it impact. It effectively gave the nod to federal state and courts to strike down legislation that interfered business.[140] It was not until the fallout of the stock market crash of 1929, and the subsequent economic crisis, that New Deal reformers sought to challenge the free market orthodoxy that Lochner locked in. Feinman. Feinman, Jay M. "Un-Making Law: The Classical Revival in the Common Law." *Seattle University Law Review*. 28 (2004): 1.

with liberal democracy because it defends individual rights and places great weight on the enforcing of contracts, themselves seen to be integral to private freedom from state encroachment.[141] In reality, such arbitration is radically conservative in that it revives dogmatic conception of laissez-faire – that markets, not public policy, are the best way of ordering the economy. These ideas

[141] As Edward Brunet writes, "In a democratic society, party autonomy should be the fundamental value that shapes arbitration. The personal autonomy inherent in arbitration con- stitutes a dominant policy in all areas of a democracy. The freedom to select arbitration procedure is a choice that one anticipates should exist in a state that values personal autonomy. Arbitration liberty is achieved by making party autonomy the highest priority in the pantheon of arbitration values." Edward Brunet Jr. Richard E. Speidel, Jean R. Sternlight, and Stephen J. Ware. "Arbitration Law in America." (2006): 4.

Thomas Carbonneau frequently asserts that arbitration is a pillar of democracy. "At a domestic level, arbitration has permitted the United States to maintain and reinforce the democratic character of American society by empowering a class of Americans, often neglected and ignored by the legal system, to have a right of redress of their grievances. Further, it allows merchants and companies to expend more resources on their commercial activities by supplying them with a frugal, fair, and final form of expert and effective adjudication. The Court's activity on arbitration during the last forty years has created a new civil procedure that warrants the attention, support, and endorsement of all American citizens. The legal experimentation with arbitration needs to continue to shape the character of American economic relations, society, and democracy." Thomas E. Carbonneau "Judicial Approbation in Building the Civilization of Arbitration." *Penn State Law Review.* 113 (2008): 1367.

obfuscate the degree to which corporations in fact dominate the contemporary arbitration market. The end result is a vision of law in which asymmetries of wealth and power are naturalized, and in which efforts to correct such asymmetries is seen to be a violation of "individual liberty", "the freedom of contract", to sacrifice the inherent efficiencies of arbitration, and ultimately, present an affront to the "idea of arbitration" itself.

The contemporary Supreme Court's pro-arbitration jurisprudence, coupled with corporate America's broad endorsement of commercial arbitration constitutes a political-economic shift of great importance. Not only has this dual shift ideologically aligned with Lochnerian principles of market freedom – it has in many ways, radicalized the early 20th century laissez-faire dogma by further empowering business to design contractual agreements without any government or judicial oversight. This creates a three-pronged policy shift that empowers corporations. On the one hand, it allows corporations to side-step the law and its disciplinary power, on the other, it allows them to design the terms of their contracts, creating a "procedural vacuum" that enables the pursuit of disputing strategies that courts might not otherwise enforce. Finally it creates conditions of near total opacity, blocking arbitration awards from being published discussed, or

debated. This amounts to a shift or privatization of political power in favor of companies and the commercial arbitrators who serve them.

The embrace of neo-Lochnerianism involves a de-emphasis, and even abandonment on the "regulatory" paradigm that emerged in the New Deal, and later became a mainstay of arbitration law over the several decades of the post-war period. It also involves a concomitant push *toward* privately administered binding dispute resolution. The end result is striking. Arbitration law is being pushed in a direction that is not merely "free-market" but in fact, corporatized – placed under the administrative control of the nation's largest corporations, namely arbitration becomes a free-enterprise self-regulating part of the legal order. Even claims that arbitration is compatible with liberal democracy are difficult to square with the special deference courts now accord to arbitration agreements. Even neo-liberals like Hayek, who was highly suspicious of all socially oriented ordering, whether its expression was public policy, administrative law, or regulation generally wished for private law relationships to be guided by common-law principles. Arbitration reform is heading in such a direction that is hostile to both public policy *and* the common-law, and which departs from even conservative understandings of contract law.

This political shift is both legitimized and concealed by the resuscitation of a 19th century conception of private law, in which commercial contracts are thought to stand separately from public law and political power. While proponents of this doctrine believe that arbitration stands separately from politics and political-economic power, I show that this seemingly apolitical doctrine is in fact permeated with *direct and direct* distributional implications. These include a narrowing, or effective termination of virtually all the criteria by which arbitration awards have traditionally been subject to review, invalidation, or annulment. They involve the creation of conditions of near total opacity, preventing accurate information about arbitration from being published and debated. Furthermore, the new free-market arbitration doctrine marginalizes those critical moments of arbitration history that delimited the applicability and scope of arbitration agreements.

Judicial privatization, delimitation of state interference, opacity, the circumscription of traditional common-law principles, atomistic individualism, and depoliticization, I claim – are the central elements of a more or less unified neo-liberal doctrine that seeks to legitimize and conceal corporate power. This

makes it possible to identify contemporary arbitration ideology as a positive political doctrine, both in terms of the legal order it *negates*, but also in the new, deregulated order it seeks to *create*. Not only does it determinately spell out the parameters of a project of judicial privatization, it changes the very structure of U.S. arbitration law, a shift which spells important changes for virtually all levels of arbitration international, commercial, as well as employment and consumer arbitration. This is not merely a commitment to an abstract set of principles – the embrace of this governing ideology spells out very real consequences for the way that arbitration is organized, practiced, and the way that arbitration agreements are ultimately enforced. What is being forged is a privately funded, privately administered, deregulated "legal space" that is tailored to the interests of corporate disputants, and that is paradoxically dependent on the sanction of government and the courts.

From a policy point of view, what is important to seize from this critique is not that arbitration is inherently devoid of merit, or that litigation is necessarily superior to the type of justice that arbitration provides for disputants. Too often, criticism of arbitration is portrayed in a superficial binary of either/or that leaves little room for nuance or content. Either one is supportive of arbitration as a free

and efficient process, or one is in support of a rigid model of judicial procedure in which virtually all disputes, no matter how routine are litigated. These two poles are equally superficial. Even moderate reforms could be implemented to circumscribe the power of arbitrators, or to limit the egregious use of arbitration agreements, or to curb the use of arbitration in areas of commercial dispute resolution that affect public interests, the point is that virtually all of the modes by which arbitration was previously governed: through common-law, through state law, or through doctrines enabling the review or annulment of arbitration awards are being reversed.

Neo-liberal arbitration law is not a neatly ordered doctrine, nor is it necessarily internally coherent. It comprises multiple, overlapping elements – some of which feature more prominently in some variants than others. Despite the apparently uneven and un-systemic character of such thinking, it is possible to positively identify five central "unifying" themes, and to locate them in concrete policy changes. These include:

1) *Privatization* - Emphasis on privatization of adjudication coupled with the creation of a private, unregulated market for litigation services. This market

should subject to conditions of price competition that are absent in the public provision of adjudication services.

2) *Contractualism* – The development of a "contractualist" interpretation of contracts that places emphasis on contract *enforcement* above procedural and substantive considerations, public policy, and common-law principles generally. This is effectively a Lockean understanding of arbitration in which the state's role is delimited to honoring parties' private agreements. From this point of view, efforts to enforce arbitration agreements according to alternative criteria are invalid, and a threat to the integrity of commercial arbitration itself.

3) *Atomistic Individualism* - The embrace of a political-economic epistemology of "atomistic individualism" in which individuals resolve private law disputes as "equals", a view which distorts the considerable asymmetries of power and wealth that may exist between disputants, but also, conceals the general control that large scale business actors have in the system generally.

There are many purveyors of this doctrine, including jurists, corporate officials, business associations and scholars. Moreover, there are many degrees of

intellectual sophistication to the expression of neo-liberal doctrine, ranging from the promotional, to more sophisticated legal treatises and legal-economic analyses. Irrespective of its given form, not a single representative of these views, as far as I have been able to determine, self-identifies with conservative political ideology, or even embraces "neo-liberalism", at least not in name. Nevertheless, my claim is that the manifest content of this body of thought contains a very conservative political-economic system of belief that has proven to be very influential as a source of public policy. Such thinking reinforces existing economic hierarchies by discouraging any form of public policy that would interfere with the "freedom" of "individuals", even when such individuals are companies like Pfizer, Wal-Mart, Apple, Lockheed Martin and Royal Dutch Shell. This doctrine fundamentally informs arbitration practice, it has found expression in amicus briefs to federal and state courts- and more recently have served as the basis for the Supreme Court's arbitration jurisprudence. It involves a depoliticized conceptualization of markets, private law, and of commercial conflict generally that harkens on 19th century classical legal doctrine. This is part and parcel of disavowal of the regulatory effect of private law enforcement, both presently and historically. This not only obscures the power implicated in the

exercise of the arbitrator's power, discretely conceived, but in the power of the system, conceived in aggregate terms.

In the following five sections, I illustrate the way that neo-liberal arbitration ideology advances these central motifs, and sites of arbitration reform in which this transformation is at play.

3. Privatization

3.1 Widening the Dominion of Arbitrability and Corporate Control

Commercial arbitration has traditionally been treated as a species of private, not public law. At first blush, there is nothing controversial in this assertion. It simply reaffirms the classical private/public divide that crystallized in the late 19th century.[142] According to this separation, public law concerns acts of regulation and politics and the application of coercive force. Private law, on the other hand,

[142] "Although one can find the origins of the idea of a distinctively private realm in the natural-rights liberalism of Locke and his successors, only in the nineteenth century was the public/private distinction brought to the center of the stage in American legal and political theory. " Morton J. Horwitz. "The history of the public/private distinction." *University of Pennsylvania Law Review* 130, no. 6 (1982): 1494.

involves the coming together of equals to resolve matters of property and contract law.[143]

Upon closer examination, however, the act of asserting arbitration's *private status,* is not just an act of legal classification, but a rhetoric of legitimation that neutralizes the relations of power that find expression through arbitration reform. It is important not to conflate the fact that commercial arbitration is *private* with the *politics of privatization* generally. The former involves a traditional legal designation, the latter a political-economic process whereby government services have effectively delegated the provision of public services to private actors. Although there are important points of contact between the two, they are not the same thing – and it is easy to confuse them, since the latter often masquerades as the former. This section examines the discursive parameters of arbitration reform and the way that neo-liberals have made a powerful case for delegating judicial powers to private arbitrators.

[143] Amr A. Shalakany. "Arbitration and the Third World: A Plea for Reassessing Bias Under the Specter of Neoliberalism." *Harvard International Law Journal* 41 (2000): 419.

The politics of privatization *through* arbitration reform, I claim, that has become a hallmark of the U.S Supreme Court's jurisprudence.[144] It has been given financial backing by the corporate arbitration lobby, and defended by associated scholars and intellectuals. Its political significance lies in the fact that virtually all areas of commercial litigation can now be arbitrated by privately appointed arbitrators, irrespective of the stakes in dispute, and areas of private litigation that were traditionally considered to be of public importance can also be arbitrated behind closed doors. Even grounds for the invalidation of arbitration agreements like the public policy exception have become increasingly narrow, suggesting that it is not uncommon for issues of public relevance to be arbitrated in forums that are totally removed from public deliberation.

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[144] The Supreme Court' s pro-arbitration jurisprudence from Wilko onwards has been the subject of extensive commentary. This section only schematically covers this line of decision making, highlighting its dimensions of regulatory importance. For detailed overviews of the Supreme Court's interpretation of the Federal Arbitration Act, see Hayford, Stephen L. "Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change." *Wake Forest Law. Rev.* 31 (1996): 1. Moses, Margaret L. "Arbitration law: Who's in charge." *Seton Hall Law Review.* 40 (2010): 147. Stone, Katherine Van Wezel. "Rustic Justice: Community and Coercion Under the Federal Arbitration Act." *North Carolina Law Review.* 77 (1998): 931.

Arbitration reform would be a very controversial affair if it meant that privately appointed arbitrators, with no obligations to the broader public, came to take on the powers of adjudication and lawmaking that is normally attribute to judges. The expression of such power would not only breach of Article III of the U.S Constitution[145], which outlines the scope of the judicial power, but present an affront to the ideas of transparency, rationality, and accountability that are attributed to constitutional democracy.[146] While nobody denies the fact that arbitrators act as surrogates to judges, the main line of defense has been to argue that the arbitrator's power is not in violation of constitutional principles.

The discourse of arbitration reform makes it seem like arbitral power is circumscribed by the arbitration agreement, and for this reason, to be politically unobtrusive. Since commercial disputes are not seen to involve the application of the state's coercive power, but only the mutual agreement of equals to forego

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[145] Rutledge, Peter B. "Arbitration and Article III." *Vanderbilt Law Review.*61 (2008): 1189.

[146] Reuben, Richard C. "Democracy and Dispute Resolution: The Problem of Arbitration." *Law and contemporary problems* 67, no. 1/2 (2004): 279-320.

litigation in court, the arbitrator's power is seen to be circumscribed by the terms of the contract, as well by as by federal arbitration law as outlined in the FAA. Moreover, the fact that arbitration is *legal*, and that commercial disputes involve matters of *contract* between parties of *roughly equal bargaining power*, theoretically serves to effectively delimit the arbitrator's power over others. The decisions that commercial arbitrators make are understood to be legitimate so long as it involves two commercial parties who have agreed to the terms of the contract, and questions of public policy are not at stake. Underscoring this system of accountability is the public policy exception, an unwritten, but nevertheless acknowledged part of the federal arbitration law that has, in the past, been used to invalidate arbitration awards. For most commentators, this system serves to delimit the application of arbitral power.[147] Like the systems of checks and balances that are the hallmark of constitutional democracy, and which contain the

[147] On the other hand, absolute deference is inappropriate. The Constitution vests the judicial power of the United States in the federal courts, not in arbitrators. Therefore, federal courts should review the merits when arbitration awards impinge on the judicial power. For example, courts have the responsibility to represent the general public interest and cannot permit a violation of public policy, enforce illegal contracts, or otherwise condone illegal behavior. Therefore, arbitration awards violating public policy or the law require federal court review. Randall, Bret F. "The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards." Brigham Young University *Law Review*. (1992): 759.

application of executive, legislative, and judicial power, the general architecture of the commercial arbitration system prevents the unfettering of arbitral power, and the egregious use of arbitration agreements to promote particular interests.

In reality, the fault lines of the private/public separation, and the delimited zone of authority that it designates are not as clear as they are often presented by advocates of arbitration reform. Commercial arbitrators now routinely rule over questions of public importance – both *directly* and *indirectly*. What I mean by this is that the "private" activities of commercial arbitrators now involve the adjudication of multi-million dollar defense contracts [148], environmental disputes[149], anti-trust disputes, as well as class-actions involving thousands of

[148] The 2014 dispute between Raytheon and the U.K. Home Office, for example, not only involved a state security contract involving data collection for all travellers entering and leaving the U.K, but damages awarded to Raytheon for upward of £49,000,000. That is to say that a defense contract between the U.K. government and one of the globe's largest arms dealers, which concerned matters of public security, and the use of public funds was left to the decision of a privately appointed LCIA arbitrator. Similarly, U.S. law and EU law now allow corporations to arbitrate anti-trust claims.

[149] Commercial arbitration has also been used to resolve environmental claims. In Anderson et al. v PG&E, the residents of Hinkley California, instituted private arbitration proceedings against the Pacific Gas and Electric Company. The dispute involved allegations concerning the contamination of water caused by chromium, a carcinogen, that had alleging that the company had been discharging toxic water, into the groundwater system for more than forty years. As "Because

consumers. At present, such uses of arbitration are no longer "aberrations" from the norm, but regular features of modern business disputing.

Such forms of corporate disputing were novel in the 1980s, but they have become normal features of the arbitration system. Private service providers like the AAA, the ICC and JAMS openly offer such services on the market, and openly advertise arbitration for environmental, anti-trust, and class action disputes. The widespread availability of such services, however, should not prevent us from seeing what is historically novel, and by extension, politically potent about the widening scope of the commercial arbitration system, especially as it pertains to disputes involving corporations. The increasing degree and scope of corporate disputes being decided by commercial arbitrators presents a shift of control that changes the legal conditions to which corporations are subject, and in turn, shifts the risks and rewards involved in the resolution of business controversies. Disputes not

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these proceedings took place during private arbitration, it is unknown what kind of scientific proof the plaintiffs' attorneys presented and whether or not PG&E's chromium pollution contributed to the ailments of Hinkley's residents (and if so, to what extent). In fact, even some of the plaintiffs involved in the case did not know how it was settled, as they were discouraged from attending these private trials, and had to rely on attorneys' letters to learn the details of the case proceedings." Benoit Le Bars. http://www.uncitral.org/pdf/english/congress/Papers_for_Congress/106-LE_BARS-International_arbitration_and_the_protection_of_the_environment.pdf

only involve substantive issues that pertain to public wellbeing, they also directly involve corporations' ability to protect their public reputation, and by extension, their "property".

Arbitration may be a matter of private law, but the politics of privatization *through* arbitration reform is about subjecting increasing areas of law to private control, and concomitantly to delimiting the ability of the public to challenge it. The stakes in question are not only the ability to challenge corporations legally, but "information" more broadly, which could be used to make informed decisions. This broad shift, I argue, should in fact be thought of as a *political doctrine* has become a hallmark of the U.S Supreme Court's arbitration jurisprudence, given financial backing by the corporate arbitration lobby, and is at this point, defended by a wide range of professional and academic supporters. Taken together, the significance of this doctrine lies in the fact that virtually all areas of commercial litigation can now be arbitrated by privately appointed arbitrators, irrespective of the stakes in dispute or the wider public impact of the issues at hand. This is all supplemented by a systemic *narrowing* of criteria by which arbitration awards may be subject to appeal, challenge or review,

underscored by the creation of conditions of near total opacity that prevent meaningful discussion and deliberation of the arbitration system generally.[150]

What is significant to seize from the point of view of political-economy is that judicial privatization has made it so that issues of distributional importance, including defense contracts, consumers disputes, anti-trust disputes, environmental disputes and class-actions can legitimately be arbitrated by commercial arbitrators. This involves on, the one hand, a delimitation of the state's sphere of action, and on the other, an expansion of business power to determine the rules by which they will resolve questions of "justice" both in controversies *between themselves*, as well as with other individuals and groups. Finally, this politics creates conditions of opacity that conceal and make it very difficult to have a public debate about the merits of arbitration reform generally. This is not merely the result of corporations and lawyers devising strategies of law avoidance, but also, of policy-makers actively encouraging the use of arbitration, dismantling and diluting standards of review, while at the same time widening the scope of arbitrability.

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[150] Hayford, Stephen L. "Law in Disarray: Judicial Standards for Vacatur of Commerical Arbitration Awards." *Georgia Law Review.* 30 (1995): 731.

3.2 Divesting Arbitration Reform of Political Content

Despite this distinctive shift, arbitration is presented as though it were devoid of political content. Arbitration reform *through privatization* is portrayed as though it were politically innocuous or unobtrusive because it does not present an affront to judicial, legislative or executive power. Although it is acknowledged that arbitrators make *decisions*, and that their decisions are *effective* to the extent that parties are inclined to obey them, these decisions are conceived differently than the application of state force.[151] Since arbitration does not involve elected officials, acts of state, party politics, grassroots movements or any agents we normally associate with politics, it is for many professionals, jurists, practitioners and theorists, simply not politically relevant.

Crucially, the apolitical representation of arbitration is not merely the result of systemic oversight, it is actually rigorously asserted and defended by jurists, legal

[151] As Jan Paulsson declares. "Acceptance of arbitration is a distinctive feature of free societies. It is rejected by totalitarian states. It is viewed with scepticism by enthusiasts of central planning." Paulsson, Jan. *The idea of arbitration*. (Oxford University Press, 2013): 1.

professionals, and scholars.[152] Its manifest content is a "negative image" of private relations that makes it seem like commercial arbitration is "frictionless" and devoid of political significance. What is most important to recall here is that efforts to depoliticize spheres of commercial activity, irrespective of their intention, themselves constitute political acts. Carl Schmitt captured this "declarative" politics when he saw the depoliticization of economic spheres as necessary for the purposes of creating an economic zone characterized by conditions of opacity and expediency. The manifest expression of commercial arbitration may appear separate from those processes and activities that we associate with politics and public life, but that does not mean that they do not have any effect or bearing on the distribution of wealth and political power broadly.

[152] As Thomas Schultz suggests, "arbitration dependents" are "…people whose income, social status, intellectual recognition, or professional power, depends to a large extent on arbitration, on the continued existence of arbitration as we have known it for last few decades. For such people, arbitration must not change. They would fight tooth and nail to keep the arbitration system as it is, or similar to it, to protect it from possibly destabilizing interferences." Schultz, Thomas. *Transnational legality: stateless law and international arbitration*. (Oxford, Oxford University Press, 2013.): 3.

3.3 The Neo-Liberal Political Imaginary of Arbitration Reformers

Even those who have associated arbitration law with politics, like Erin O'Hara and Lawrence Ribstein do in their book, *The Law Market*, mean so in the delimited sense that the market for arbitration services creates *competition* between lawmakers and private service providers. This, they argue presents a challenge to the traditional model of politics whereby "voters" elect new leaders when they desire change. In their words, the law market turns people into "consumers" or "buyers" of laws rather than simply voters." If citizens are dissatisfied with laws, they may seek out private service providers who will meet their legal needs at a lower cost than a public provider might have been able to meet.[153] For O'Hara and Ribstein, the political content of arbitration reform is that lawmakers must compete with private service providers over the administration of disputes. They see this dynamic of competition as a promising site of reform because, as they "a law market also might serve the interests of smaller groups that the political process otherwise might ignore."[154]

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[153] Ribstein, Larry E., and Erin A. O'Hara. *The law market*. (Oxford, Oxford University Press, 2009): 14.

[154] Ribstein and O'Hara. *The law market*, 14.

Similarly, Gillian Hadfield captures the logic of privatization when she characterizes the state's power over binding dispute resolution as a "monopoly", and arbitration reform as a means of breaking it. Since this would only involve a widening of choice, and not a full-scale affront on the court's powers of adjudication – the privatization of commercial dispute resolution is not seen to present a direct challenge to the state's authority, nor to its democratic legitimacy. As Hadfield writes,

> The state's monopoly over legitimate coercive power is not, in itself, problematic; this monopoly is definitional of the state. The problem lies in the state's monopoly over the rules and procedures governing the application of coercion. Not only does the state enforce a contract, it designs and administers contract law and procedure. And it does so with all the drawbacks of an insulated service provider: unresponsive to costs, reluctant to innovate, bureaucratic in its methods of collecting and processing information, shut off from entrepreneurial creativity and effort.[155]

This statement demarcates the state's legitimate authority in its monopolization of force, which is conceived as discretely separate from its creation and application of rules of civil procedure. Through this conceptual separation, Hadfield argues that the state's control over rules of procedure could be delegated to private service providers without any compromise of its democratic integrity. The state

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[155] Hadfield, Gillian K. "Privatizing commercial law." *Regulation* 24 (2001): 40.

can forfeit its control over the creation of these rules without losing its legitimacy as the ultimate enforcer of contracts. This is followed by an attribution of bureaucratic complacency to judicial control over rule-formulation. In a system characterized by a single, not multiple, rules of procedure, adjudication "services", are bound to become insulated from the inherent dynamism of market competition, thereby contributing to what Hadfield calls, "the high cost of law".[156]

As Hadfield writes, the privatization of adjudication for contracts between corporations can successfully achieved without any forfeiture of the state's "democratic legitimacy".[157] How is this so, are not the "rules of procedure" what we otherwise know as procedural law, and do these rules of procedure (evidence, discovery, appeals) not have an important bearing on substantive law? Is it not the case that placing the creation of procedural rules in the hands of private parties, particularly businesses opens the door for "private lawmaking"?

[156] Hadfield, Privatizing Commercial Law, Regulation, 41.

[157] Democratic legitimacy does impose limits on the extent to which we can use private legal regimes to direct the state's coercive powers. But the state can legitimately delegate significant areas of the law to private entities, especially the areas governing relationships between corporate entities. Hadfield, Privatizing Commercial Law, Regulation, 41.

For Hadfield, corporations can, and should be able to determine the rules that govern the adjudication of private controversies. Because they, better than any other body of authority, are experts in their particular area of business, they are best poised to determine by what means their conflicts are adjudicated. This special knowledge is not only better acquainted with the problems immediately faced by business, it would be able to resolve it faster, and at less cost than the courts would. In fact, Hadfield suggests that even lawyers may be removed from the equation. Lawyers unnecessarily contribute "procedural morass", to borrow a term from the late justice Scalia.[158] This discourse has been adopted by a number of arbitration service providers, in which the option of selecting an arbitrator or counsel who is not a legal expert, but a business expert, is seen to be desirable in itself.

The privatization of adjudication through commercial arbitration does not create *new or parallel* relations of power, it "suspends" them. As Edward Brunet writes,

> Arbitration represents a volitional opt out of the conventional court system

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[158] "The switch from bilateral to class arbitration sacrifices arbitration's informality and makes the process slower, more costly, and more likely to generate procedural morass than final judgment. And class arbitration greatly increases risks to defendants." 131 S. Ct. 1740 (2011).

> into a realm of private dispute resolution. When parties select arbitration, they privatize their dispute and take a form of market ownership of their disputing procedure. Rather than litigate in the conventional public court system, the parties to an arbitration agreement opt for adjudication in a private forum. In this context, an arbitration clause operates as a sort of forum selection clause and can be conceived as a rejection of the public courts.[159]

It is clear that Brunet does not think of this "volitional opt out" as itself a political act, but more like a *lateral shift*, or "choice" initiated by the parties from one forum (the courts) to another (private tribunal). The parties "own" the controversy in question. So long as this relationship only involves the two parties immediately involved in the dispute, and these parties meet on relatively equal bargaining terms, neither the interests of third parties, nor the interests of "society" generally seem to be compromised or place in jeopardy.

This suspended space is theorized by neo-liberals a zone of individual freedom, a space in which parties willingly forfeit the rigors of judicial procedure in favor of cheap, expeditious dispute resolution.[160] It follows from this set of precepts that the law governing corporate relationships can be privatized without presenting

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[159] Brunet, Edward, Richard E. Speidel, Jean R. Sternlight, and Stephen J. Ware. "Arbitration Law in America." (2006): 151.

[160] In Concepcion v. AT&T Antonin Scalia approvingly cited Preston v. Ferrer in which it was stated that "A prime objective of an agreement to arbitrate is to achieve 'streamlined proceedings and expeditious results" 131 S. Ct. 1740 (2011).

any affront to "democracy". Commercial arbitration constitutes a dominion of "efficiency" that can be conceived as analytically separate from the democratic functions of the state.

> In its democratic function law protects rights, structures the institutions of democratic governance, redistributes wealth, promotes social objectives such as equality or clean air, and resolves disputes among citizens. In its market function, law provides the structure of markets determining property rights, providing a means of commitment through contract to support cooperative activity-and regulation to correct for market failures in the achievement of efficiency. The democratic function of law is one that must be accomplished through public institutions, accountable to the polity in order to preserve democratic legitimacy. The market function of law, however, is not so clearly a function that cannot be privatized.[161]

What Ribstein and O'Hara, Gillian Hadfield, Brunet as well as other proponents of the privatization of adjudication overlook, however, is that private law enforcement is itself an important feature of constitutional democracy, and historically, has played a very important role in governing corporate behavior.[162]

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[161] Hadfield, Gillian K. "Privatizing Commercial Law: Lessons from ICANN." *Journal of Small & Emerging Business Law.* 6 (2002): 263.

[162] "Although it has roots in earlier times, this tradition of reliance on private regulation of business dates in America from the era of industrialization in the 19th century. An important 19th century example is the federal antitrust law providing for treble damages." Carrington, Paul D. "The American tradition of private law enforcement." *German Law Journal* 5 (2004): 1413.

Paul Carrington for example, illustrates the wide range of private litigation that has historically been used as a deterrent for errant business behavior.

> The system seeks to attract plaintiffs to courthouses not merely to seek compensation for an injury or disappointment they may have experienced, but to deter antisocial conduct by those who might escape accountability if we relied upon our clumsy governments to provide the deterrence and punishment needed to constrain corporate greed, a state of mind perhaps especially rampant in the United States.[163]

But how much can we dissociate democracy from rules of procedure? The conceptual separation presented by Hadfield suggests that *procedure* is something extraneous, or which can forfeited without diluting the integrity of the democracy generally. Procedure is "technical", whereas the democratic legitimacy of the state lies in its monopolization of "force". This presents a version democracy and the historical development of private law in the United States. Aspects of judicial procedure like discovery, evidence, jury trials, and appeals all constitute modes of reasoning and public deliberation that are designed to ascertain a higher degree of

[163] "…private law enforcement is the primary method of enforcing the securities laws, the consumer protection laws, the civil rights laws, antitrust laws, and environmental laws." Carrington, Paul D. "The American tradition of private law enforcement." German Law Journal 5 (2004): 1413.

truth than if disputants were left to their own devices. They are markers of public participation, accountability, transparency, and rationality.[164]

More importantly, and more to the point of governing corporate behavior, the procedural rules to which individuals and business are subject, are, and historically have been, very important in regulating business. Anti-trust law, environmental law, class-actions and even free speech law have been used to regulate errant corporate behavior. Efforts to relegate the state's democratic legitimacy to the "enforcement" function take on a distinctively neo-liberal quality because they divest the public values that have traditionally been embodied in law and legislation.

The innocuous political transformation involved in the privatization of adjudication is at this point, firmly entrenched in a series of Supreme Court opinions that assert the primacy of arbitration law in America. The seminal case, Mitsubishi Motors Corp. v. Soler Plymouth Inc. illustrates the innocuous politics of judicial privatization involved in the Supreme Court's embrace of its "pro-arbitration" doctrine.

[164] 563 U.S. 333 131 S. Ct. 1740, 179 L.Ed. 2d 742

At first glance, Mitsubishi may have appearance of being a dispute over the relative merits of domestic and international arbitration law, and the order of priority of domestic U.S law vis-à-vis the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Upon closer examination, however, Mitsubishi's significance lies in spelling out a doctrine according to which the range of business disputes (domestic and international) that could be arbitrated was radically widened, even where such claims stood in conflict with domestic law and/or public policy. In so doing, the Court expanded the general ambit of the commercial arbitration system, set the stage for the development of a doctrine in which the enforcement of arbitral awards was seen to pre-empt the public policy exception. It foreshadowed a distinctive line of neo-liberal jurisprudence, in which areas of litigation traditionally associated with public policy and the regulatory state not only came under private control, but was "immunized" from outward legal challenge.

In Mitsubishi, the Supreme Court sought to decide on the question as to "whether an American court should enforce an agreement to resolve antitrust claims by

arbitration when that agreement arises from an international transaction."5 The dispute involved an attempt to resist arbitration on the grounds that Mitsubishi had violated the Sherman Anti-Trust Act. The Japanese manufacturer, Mitsubishi, sought an order from an American court compelling arbitration in Japan. The Puerto Rican Soler corporation, however, defended on the grounds that the arbitration agreement was A) not designed to include antitrust claims, and B) that antitrust claims were not capable of being arbitrated.

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that, if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history.[165]

In determining that the violation of statutory claims was not a special subset of law pertaining to the violation of arbitration agreements, the Court indicated it's strong proclivity to enforcing commercial arbitration agreements, and paved the way for radically expanding the dominion of arbitrability to areas that were

[165] (Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., 473 US 614 (1985), at 628).

previously seen to involve questions of public policy. Anti-trust is an obvious instance of commercial litigation that has a broader public-policy function, but environmental litigation, securities litigation, and class-actions are others that have traditionally fulfilled a policy effect. But even areas of commercial litigation that are *not* associated with public policy may nevertheless have important "governance effects" on corporate behaviour. For example, the negative publicity that firm may incur amidst high stakes lawsuits may weaken investor confidence in their stock, thereby negative affecting their ability to turn a profit in the future. Such "effects" of commercial litigation are not just about the successful resolution of individual claims, but about deterring socially unacceptable behaviour. As it currently stands, corporations find themselves in a legal climate in which they have the assurance that their awards will not be subject to review or appeal.

The law avoidance strategies that corporations may pursue by resorting to arbitration means that the procedural rules that they are encounter may be less stringent, and present a dilution of the state's power to administer commercial conflict. They take for granted the fact that lawmakers should be responsive to market demand for adjudication services, but in so doing, lose sight of the

important regulatory functions performed by the private law enforcement, and the forfeiture of adjudication's policy relevance in the meantime.

4. Contractualism

4.1 The Doctrine of Contractualism

> Arbitration liberty is achieved by making party autonomy the highest priority in the pantheon of arbitration values.[166] – Edward Brunet Jr.

Commercial arbitration has its basis in contract - an arbitration agreement, which sets out the rules of procedure, the selection of arbitrators, and the scope of disputes that can be arbitrated. Under the Federal Arbitration Act, agreements to arbitrate are valid, enforceable and irrevocable, unless procured by force, fraud, or exhibit manifest disregard of the law. Crucially, the Federal Arbitration Act reversed judicial antipathy to enforcing arbitral awards by placing agreements to arbitrate on the *same footing* as other contracts.

[166] Brunet, Edward, Richard E. Speidel, Jean R. Sternlight, and Stephen J. Ware. "Arbitration Law in America." (2006): 151.

Arbitration's basis in contract law is uncontroversial. What is politically potent, I claim, is the emergence of the doctrine of contractual*ism* which asserts the primacy of contract enforcement *over and above* alternative approaches of governing arbitration agreements, including state law and public policy. What contractualist doctrine does is effectively make the arbitration agreement a form of robust "super contract" that is very unlikely to be overturned or appealed. Business can use these contracts to exercise a form of decision-making control over the conduct and nature of the arbitration, with the near total assurance that the outcome will not be subject to appeal, review, or public scrutiny. Thus, even though contractualists claim that arbitration will be in keeping with the Rule of Law, they advocate the dismantling of virtually all mechanisms that in fact are able to determine whether arbitral decisions are in fact in keeping with common-law principles and public policy.

This approach to arbitration law has found intellectual exposition by arbitration scholars, and has steadily been advanced by the Supreme Court, most notably in recent cases AT&T v. Concepcion and Italian Colors v. American Express Co. Even though its ostensible presentation and defense is apolitical, contractualist doctrine, I argue, is being used to broaden the scope of arbitrability, and in the

same stroke, delimit the ability of judges and lawmakers to regulate, oversee, and govern the arbitration process. This gives business a form of de facto lawmaking power that immunizes them from legal procedure, an immunity that they may deploy at will to engage in strategic forms of disputing. More generally, it makes the arbitration system virtually totally insulated from public participation – even from oblique forms of participation like research and reflection.

At face value, the norms and policy choices that contractualists advocate are intuitively desirable. Proponents of contractualism like Stephen Ware, Edward Brunet and Christopher Drahozal claim that rigorously enforcing arbitration agreements "according to their terms" promotes efficiency and personal autonomy.[167] When disputants have the assurance that their arbitration agreement will be enforced, and the terms of the contract are the rules that will govern the arbitration award, they are spared the time-consuming processes of discovery, jury trials, and appellate review that are associated with public courts. Furthermore, allowing disputants to design the terms of their contracts, on their own terms, with minimal interference from the judiciary and legislature preserves

[167] "Acceptance of arbitration is a distinctive feature of free societies. It is rejected by totalitarian states. It is viewed with scepticism by enthusiasts of central planning." Paulsson, Jan. *The idea of arbitration*. Oxford University Press, 2013.

the main benefits of informal dispute resolution; control, expediency, opacity, and cost-effectiveness. And like the agents of judicial privatization I covered in the last section, contractualists argue that the greater availability of arbitration services lends itself to a more efficient use judicial resources, and encourages price competition on the law market, thereby reducing the cost of legal services.

The language of contractualism, I claim, is deceptive in its generality and claims to universality. Its emphasis on "rigorous enforcement" in the name of efficiency and autonomy, conceals a neo-Lochnerian political-economic transformation – a transfer of lawmaking power to private actors that insulates them from legislative and judicial "interference" (read, public authority). The paradox of this insulation is that its very condition is one that involves aggressive judicial intervention in arbitration policy, in which the courts become the arbitration system's "underwriter of last resort". In other words, without active judicial intervention, the validity and effectiveness of contractualist doctrine, itself designed to delimit judicial authority, would topple on top of itself.

This transfer of power is more impactful than merely delegating judicial power to private arbitrators, something that at this point, is accepted by all legal commentators, even those critical of arbitration. Its real potency lies in the fact that it makes such decisions virtually immune to outward challenge. In the words of Elena Kagan, it as though the courts are saying to those who object to arbitration, "too darn bad".[168] In the name of efficiency and freedom – contractualists effectively endorse a form of authoritarian arbitral rule, a form of business decisionism, if you will. Such decisionism has little to do with the personal integrity of the arbitrator, the ethics of the arbitration profession, or the fact that the parties may have consented to the arbitrator's final decision – it simply derives from the fact there are fewer modes of challenging the arbitrator's decision, and that parties have very wide latitude to design the terms of their contract, with the assurance that it will in all likelihood be enforced by the courts.

By prioritizing enforcement in the name of promoting autonomy and the "freedom of contract", the doctrine of contractualism effectively gives private

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[168] Weiss, Debra Cassens. "'Too Darn Bad'? SCOTUS Enforces Contracts barring Class Arbitration, despite High Litigation Cost." ABA Journal. June 20, 2013. Accessed October 12, 2017. http://www.abajournal.com/news/article/too_darn_bad_scotus_enforces_contracts_barring_class_arbitration_despite_hi/.

disputants a form of "lawmaking" power that is unchecked by any countervailing power. The point is not necessarily the case that the emphasis on enforcement means that commercial arbitrators will rule arbitrarily, but that private disputants gain a whole series of protections that they otherwise would not have had in courts of law. This power has been strategically deployed to limit the ability of others to meaningfully participate in, and even monitor arbitration. It also allows business disputants to design virtually every part of the commercial contract with the assurance that it will be enforced. This state affairs, I claim, stands in problematic relation to principles of constitutional democracy and its attendant values, rationality, accountability and transparency, all of which are giving concrete meaning in the separation of powers. It creates an unchecked form of arbitral power that can be manipulated by wealthy disputants, a power which is paradoxically dependent on the American state as "guarantor" and "underwriter" of the contemporary arbitration regime.

In theory, contractualist doctrine is universal in application. An arbitration agreement between a landlord and tenant might be said to be just as *enforceable* as a one between two pharmaceutical corporations, for instance.

The abstract nature of contractualist discourse, however obscures the way that corporate disputants are better poised to reap the benefits of the courts' tendency to enforce arbitration agreements "according to their terms". Repeat litigants like corporations whose disputes involve complex, high-stakes claims, and whose exposure to unwanted lawsuits can have deleterious effects on their public image and their ability to generate profit in the future can repeatedly "divert" sensitive disputes to arbitration tribunals, closed from public scrutiny. This has already happened in the domain of anti-trust litigation,[169] environmental litigation, and in defense-related contracts, and if recent Supreme Court decisions are any indication of things to come, new areas of traditionally "public" litigation will likely be open to private arbitral rule in the future.

4.2 The Elements of Contractualist Doctrine

[169] As Vera Korzun writes "Now, the national courts of most developed economies accept (and even mandate) adjudication of antitrust claims by private international arbitral tribunals. This transformation may be predictive of future acceptance of international arbitral tribunals as trustworthy forums for dispute resolution of other "public" subject matters." Korzun, Vera. "Arbitrating Antitrust Claims: From Suspicion to Trust." New York University Journal of International Law & Policy. 48 (2015): 867.

The historical development of contractualist thought is difficult to pin down exactly, since its propositional content is, at least at face value, very general. Elements of contractualist thinking, as I illustrated in the previous chapter, can be traced back to the 1920s. The freedom of contract, desire for cheap and expeditious dispute resolution, and the idea that judges and legislators meddle too much in private affairs has a long lineage in American history. Despite important lines of precedent, it is only in the last forty years that contractualism has become more pronounced and given rigorous intellectual exposition and developed into a positively identifiable body of legal thought that is being advanced by judicial, business, and legal actors.

Those who defend the contractualist position like Stephen Ware, Edward Brunet and Christopher Drahozal claim that rigorously enforcing arbitration agreements "according to their terms" promotes individual autonomy and efficiency.[170] In their view, the expeditiousness and cost-effectiveness of arbitration is preserved by promoting the principle of party-autonomy, the idea that arbitrations should be

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[170] Ware, Stephen J. "Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements." *Journal of Dispute Resolution* (2001): 89. Ware, Stephen J. "Default rules from mandatory rules: Privatizing law through arbitration." *Minnesota Law Review.* 83 (1998): 703.

as free as possible from legislative and judicial interference as possible. Legislative and judicial efforts to "interfere" in the arbitration process should be kept to a minimum, and when they do, should honor the terms set out by the parties in the contract.

The ostensible purpose of contractualist doctrine is to assert the autonomy and independence of the parties, and to give them as much control as possible over the design of their dispute.[171] These principles of dispute resolution, often presented within the more general framework of Dispute Resolution Design, are defended as an extension of liberal democracy.

As Edward Brunet writes in *Arbitration Law in America*,

> Arbitration liberty is achieved by making party autonomy the highest priority in the pantheon of arbitration values. Viewed in this light, the important value of party autonomy is directly related to the freedom essential in a democratic state. A strong version of arbitration party autonomy exemplifies the significance of freedom of contract. In a state such as ours characterized by the respect for individual liberty, courts should enforce customized agreements to arbitrate and the legislature should regulate minimally. In a society governed by rules of the free market, contract norms that guide exchanges are necessarily based on

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[171] Brunet, Edward, Edward J. Brunet, Richard E. Speidel, Jean E. Sternlight, and Stephen H. Ware. *Arbitration law in America: a critical assessment*. Cambridge University Press, 2006.

> autonomous action of individual economic actors.[172]

As Brunet explains, echoing the language of early 20th century reformers, the promotion of such autonomy promotes self-governance. The enforcement of arbitration agreements enables disputants to create their own "private culture".

> The delegation to a private arbitrator of hand-forged procedures to resolve a dispute creates a form of self-governance that operates outside more direct government regulation. When courts enforce party crafted procedures, they create an incentive for parties to draft their own rules of dispute resolution rather than leave the problem of future disputes to government. In this way, law is internalized by the disputants who form their own private culture.[173]

Taken on their own, these statements seem like intuitively sound principles, and in keeping with values of liberal democracy. Nobody wants "government controlled" arbitration, nor do they want arbitration law cast such a long shadow over arbitration procedure that parties lose all of the advantages attributed to alternative dispute resolution. The idea that government would in every instance, monitor and dictate the terms by which business and individuals resolve conflict seems overbearing and "authoritarian". It for this reason, for example, that Jan

[172] Brunet, Arbitration Law in America, 5.

Paulson, associates arbitration with "free societies", and similarly, Jurgen Basedow makes the case that arbitration is an expression of Karl Popper's "Open Society". Conversely, states that do not recognize the validity of arbitration awards are seen to be tyrannical or overbearing on disputants.

Contractual "freedom", of course, is not just about the ability to design a contract *as such*, but to make a contract that is enforceable in accordance with accepted principles of law and justice. The paradox of contractualist doctrine is that for all of its emphasis on the integrity of contracts, and their centrality to a functioning liberal democracy – they are surprisingly willing to forfeit the rigors of proceduralism that arguably, make contracts meaningful.

In application, contractualism's strong emphasis on the *enforcement* of arbitration agreements "according to their own terms", has been used to dismantle laws that ensured that arbitration awards were fair and did not violate law or public policy. Under the discourse of "rigorously enforcing arbitration agreements" what the U.S. Supreme Court is doing is making corporate designed contracts increasingly difficult to challenge. Moreover, the priorities of enforcement are clearly unevenly applied. While the Court considers "bilateral agreements" (disputes

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[173] Brunet Jr. Brunet, Edward J. *Arbitration law in America: a critical*

between two "individuals") to be unproblematic, it has been far more restrictive in enforcing class-action arbitration, which it claims violates the simplicity, informality and cost-effectiveness of arbitration involving two parties.

4.3 The Supreme Court's Embrace of Contractualism

Contractualism is not just an abstract position advanced by scholars. In a series of recent decisions, it has become the centerpiece of the Supreme Court's arbitration jurisprudence. The first wave of the Court's embrace of contractualism can be traced back to seminal arbitration cases in the early 1980s when, as part of a general effort to support arbitration, the Court began to assert its *emphatic* approach to the Federal Arbitration Act as a "liberal federal policy favoring arbitration.[174] In a string of landmark decisions including *Moses H. Cone Memorial Hospital v. Mercury Construction Corporation*[175], *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*[176] and *Southland Corp. v. Keating*[177], the Court

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assessment. (New York: Cambridge University Press, 2006): 5.

[174] Hayford, Stephen L. "Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change." *Wake Forest Law Review.* 31 (1996): 1.

[175]60 U.S. 1, 24 (1983)

[176]73 U.S. 614 (1985)

[177] 465 U.S. 1 (1984)

began to spell out policy favoring arbitration that placed emphasis on enforcing arbitration "according to their terms", and in the same stroke, sought to assert the autonomy of the arbitration agreement from state law and public policy.[178]

As I illustrated in section 2, in *Mitsubishi*, the Court affirmed that that disputes involving statutory claims could be arbitrated, even when they involved issues of public policy. Citing the "liberal federal policy favoring arbitration agreements" established in *Moses Cone*, the Court affirmed that the Federal Arbitration Act is "at bottom a policy guaranteeing the enforcement of private contractual arrangements: the Act simply "creates a body of federal substantive law establishing and regulating the duty to honor an agreement to arbitrate". Similarly, in *Southland Corp. v. Keating*, the Court asserted that ""the purpose of the [FAA] was to assure those who desired arbitration [that] their expectations would not be undermined by federal judges, or . . . by state courts or legislatures." These decisions definitively set up an anti-legislative, anti-judicial interpretation

[178] As Hiro Aragaki writes "The Rehnquist and Roberts Courts have further extended FAA preemption to a point where, with limited exceptions, private arbitration agreements now enjoy the status of federal legislation, which effectively gives them the power of supremacy over all contrary state law and public policy." Aragaki, Hiro N. "The Federal Arbitration Act as Procedural Reform." *New York University Law Review.* 89 (2014): 1939.

of arbitration in which the Federal Arbitration Act emphasis is not just on placing arbitration clauses on the same footing as other contracts, but in fact favouring the use of arbitration. Moreover, placing emphasis on enforcement, the Court overrides alternative criteria of governing arbitration awards.

The second wave of contractualist policy has asserted the autonomy of the arbitration agreements even more, and takes arbitration in an even more anti-legislative, and anti-judicial direction. In *AT&T Mobility v. Concepcion* and *Italian Colors v. American Express Co.* Antonin Scalia restated the Federal Arbitration Act's commitment to cheap and expeditious dispute resolution, and underlined the need to enforce arbitration agreements "according to their terms" to guarantee speed and cost-effectiveness. These policies, I claim, have emboldened corporations like American Express, Mastercard, AT&T, and others to introduce strategic mandatory disputing agreements into their contracts with consumers, workers, and employees, and to dilute the potency of class action lawsuits. Perhaps even more importantly, by attacking the class action as a betrayal of "bilateral" arbitration principles, the corporate arbitration lobby has succeeded in further insulating commercial arbitration agreements from governmental control.

In Concepcion v. AT&T Mobility, the Concepcion family claimed that AT&T fraudulently marketed its phones as "free", but ultimately charged them sales tax on the full value of the phones. The Concepcions, who were charged $30.22 for the "free" phone, sought class-action relief under California's Discover Bank Rule, which classified that most class-action waivers were unconscionable, and were eventually granted it by a California Court. According to the Court, AT&T's insertion of a class-action waiver in its consumer contracts violated state-law doctrine of unconscionability. They granted the Concepcions a motion to compel class-action arbitration with AT&T.

AT&T appealed the California Court's motion to compel class-action arbitration, claiming that California's Discovery Bank Rule ran contrary to the strong federal policy favoring arbitration indicated by the FAA (or more accurately, the pro-arbitration interpretation of the FAA established by the 1980s rulings). AT&T's petition not only declared that class-action arbitration was contrary to the spirit of the FAA, but that California's application of the Discover Bank Rule would spell the "death knell" for *all* arbitration, since it created specialized legislation that

they claimed unfairly targeted arbitration agreements.[179] This point of view was echoed by a series of corporate lobby groups in the amici. For example, the U.S Chamber of Commerce, in its petition in favour of AT&T, argued that "Decisions like the [the 9th circuit's], which invalidated a class-arbitration waiver, *frustrate the parties' intent*, undermine their existing agreements, and erode the benefits offered by arbitration as an alternative to litigation."[180] (emphasis mine). Here, what the Chamber of Commerce interprets as the "parties' intent" radically gives the benefit of the doubt to stronger disputants who in fact design the arbitration agreements and insert them into small-print consumer and employment contracts. "Rigorous enforcement" does not mean rigorously enforcing arbitration agreements in accordance with principles of common-law or public policy – but

[179] As Andrew Pincus stated in his petition in support of AT&T's : "For if an arbitration agreement that contains "perhaps the most fair and consumer-friendly provisions" that one judge has ever seen is unenforceable under California law, then no agreement providing for bilateral arbitration will be enforceable under California law." Andrew Pincus, Brief for Petitioner AT&T. https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_893_Petitioner.authcheckdam.pdf (Accessed September 1st, 2018): 1.

[180] Andrew Pincus, Brief for Petitioner AT&T. https://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_893_Petitioner.authcheckdam.pdf (Accessed September 1st, 2018): 2.

something else altogether, it means elevating the principle of enforcement *as such,* even when the underlying contract is unconscionable or in conflict with state-law.

The U.S Chamber of Commerce even warned that upholding the Discover Bank rule would propel businesses to boycott arbitration altogether. "We should expect the same flight from arbitration in the many other industries that rely on bilateral arbitration to minimize their dispute resolution costs, including credit, brokerage, insurance, financial services, legal, accounting, health care services, and still others."

Ultimately, the Court followed the logic presented by AT&T, and the petitioners. It then effectively quarantined class-action action arbitration from the broader pro-arbitration language of the FAA. In other words, while the Court recognized that the routinized enforcement of arbitration clauses was necessary in bilateral contracts (contracts between two individual parties), this reasoning did *not* extend to class-action arbitration, which was too complex, and included questions that arbitrators were not experienced in.

> Classwide arbitration includes absent parties, necessitating additional and different procedures and higher stakes. Confidentiality becomes more

> difficult. And while it is theoretically possible to select an arbitrator with some expertise relevant to the class-action certification question, arbitrators are not generally knowledgeable in the often-dominant procedural aspects of certification, such as the protection of absent parties. The conclusion follows that class arbitration, to the extent that it is manufactured by Discover Bank rather than consensual, is inconsistent with the FAA.[181]

Similarly, in *American Express Co. v. Italian Colors Restaurant*, the Supreme Court denied Italian Colors' restaurant's motion for anti-trust litigation against American Express. The plaintiff, Italian Colors Restaurant, a small family-owned restaurant franchise in California brought an anti-trust suit against American Express that had been charging higher fees than its competitors for use of its credit cards. Italian Colors filed for class-action certification against American Express, even though their contractual agreement with American Express contained a class-action waiver. Italian Colors claimed that the arbitration waiver forced them into bilateral arbitration that would make it all but impossible to recover its costs.

The Second Circuit initially sided with Italian Colors, and refused to enforce the class-action waiver. American Express appealed the decision, which was subsequently reversed by the Supreme Court. It ruled that the vindication doctrine

[181] 563 U.S. 333 131 S. Ct. 1740, 179 L.Ed. 2d 742

invoked by the second circuit applied only to cases where a party can demonstrate that a particular arbitration procedure operates as a prospective waiver of its "*right to pursue*" federal statutory remedies. Thus, even though the *costs* of pursuing statutory arbitration against American Express made the case a surefire loss for Italian Colors, there was no nominal forfeiture of its federal rights to it.

As the Court proclaimed, the effective-vindication doctrine, which remained established that arbitration was legitimate so long as it did not prevent parties from exercising their Federal statutory rights, did not guarantee disputants the assurance that they could arbitrate low-value claims. The Supreme Court's judgment thus struck a blow not only to class-action arbitration, but any disputant seeking to use arbitration to recover low value claims. In the meantime, it further consolidated its permissive approach to the enforcement of bilateral claims.

Curiously, in no other area *other* than class-wide arbitration has the court *or* the arbitration lobby suggested that any dispute is too complex for arbitration. Even the most notoriously complex areas of commercial litigation, including anti-trust suits, intellectual property suits, and environmental suits are seen to be arbitrable because they are "bilateral". However, class-arbitration, the only form of

arbitration which allows smaller-scale disputants to challenge large businesses, is "too complex", and thus, unfit for arbitration.

4.4. Contractualism as Business Decisionism

Contractualism masquerades as an ordinary defense of contract law when it is in fact something else altogether. Contractualist doctrine is about creating special conditions for arbitration agreements that would not otherwise hold for other contracts. It involves the creation of "super-contracts", which MUST be enforced, no matter what is in them.

The doctrine of contractualism is not just about recognizing the enforceability of arbitration awards, but about *prioritizing and emphasizing* their enforcement, even when there is evidence to suggest that there were problems with the award, or that the award is in conflict with law or public policy. What the doctrine of contractualism is really about is making "enforcement" the cardinal value of arbitration, and in the same stroke, narrowing virtually all of the other criteria by which arbitration awards have traditionally been governed. The ultimate effect of this doctrine is that judicial activity is delimited to a Lockean "minimalist" form

of state intervention in which the superimposition of any extraneous form of rules of procedure, interpretation, or governing philosophy *other* than what is laid out in the contract is seen to be illegitimate, a violation of the idea of arbitration itself.

Contractualism creates a furtive transfer of power to corporations which makes them far less likely to incur challenges to the agreements they design. What contractualism is really about is delegating greater legal authority to commercial arbitrators by making the standards for review and annulment of arbitration agreements more narrow, and in some instances, eliminating them altogether. As a result, business not only gain a form of "lawmaking" power, they get everything but a full assurance from the courts that their disputes will not be subject to outward challenge. This doctrine, theoretically, applies to everyone. But it is especially significant to large-scale corporations who constitute the most litigious entities in the United States and who, by virtue of the size and scope of their business operations, have different stakes at play in legal conflict generally. When corporations gain the assurance that the arbitrations in which they are involved will not be subject to challenge, they gain greater latitude to act without encountering interference – in other words, more power. Upon closer inspection,

contractualism has very little to do with contract law, and more with creating conditions of deference to business and arbitrators.

The contractualist interpretation of commercial arbitration conceals a shift of power to business. By expulsing questions of procedure and substantive law, and delimiting the legitimacy of award enforcement to the narrow grounds of whether or not the parties agreed to arbitration in a contract, courts are effectively vesting private parties the ability to design their own rules of procedure, turning a blind eye to the question as to whether or not they deviate from rules of civil procedure, as well as to other grounds for annulling or vacating arbitration awards.

5. Depoliticizing Commercial Arbitration

Proponents of market-led arbitration like to point out that the use of arbitration in America can be traced back centuries. They do this as proof that deregulated "law-markets", can work, and have worked, without state interference. (Benson, Posner, Hadfield). But there is a persistent anti-sociological streak in these analogies. 17th century arbitration involves relatively small-scale disputes between "merchants". But we are no longer dealing with a "Jeffersonian" nation of small

property holders, nor with merchants and traders that informed 19th century laissez-faire thought. Arbitration involves giant multinational capitalists whose primary mode of conducting business is concentrated in the institutional framework of the modern business corporation.[182] These involve household names Chevron, ConocoPhillips, Mastercard, Pfizer, Kraft Foods, and others. While 19th century arbitration involved merchants involved in maritime disputes and product exchanges - contemporary arbitration amongst corporations often involves complex, multi-party issues with elevated stakes. These include "bet-the-company" scenarios, situations in which a lawsuit jeopardizes a company's future. Such disputes can have financially ruinous results for companies, placing their very existence in jeopardy. Moreover, modern corporate litigation is *systemic.* A single corporation like Wal-Mart may at any point in time be involved in hundreds of ongoing suits in multiple jurisdictions across the globe. In this organizational context, arbitration is not about an informal meeting of individuals

[182] Heinrich Kronstein, already in 1944, perceived this anti-sociological quality. "The danger that arbitrative procedure might be used to overthrow this naturally achieved balance and establish control by monopolies and cartels was not generally foreseen, particularly since arbitration seemed to operate primarily in connection with the product exchanges, a traditional fortress of free enterprise." Kronstein, Heinrich. "Business arbitration. instrument of private government." *The Yale Law Journal* 54, no. 1 (1944): 36-69.

to resolve grievances, but a managerial strategy aimed at managing corporate caseloads.

Modern arbitration discourse renders the organizational properties, and distributional stakes involved in corporate conflict invisible. Even though it is well known that commercial arbitration frequently involve corporate entities - the parties to arbitration are conceived abstractly as "individuals", "parties", or "interests" with little attention to the underlying scale and structure of their actual organization.[183] The discourse of individual freedom masks the issues involved in contemporary economic conflict. Arbitration discourse makes no differentiation between the *individual* and the *corporate personality* and presents their freedom

[183] Amy Cohen illustrates the radically different social problems when we cross the spectrum of scale in arbitration discourse. "The dangers I am envisioning arise simply when we forget that the idea of equivalence across scale is fictitious. Dispute systems designers may reasonably find this fiction convenient, even necessary: configuring the organization, the city, the NGO, and the business as each like an individual greatly facilitates our ability to design horizontal dispute processing systems that can encompass a multitude of public and private entities in a parsimonious, representative, and coherent fashion. But it is a fiction nonetheless, and one that can cause human suffering when it masks the "complex realities behind [it]." Cohen, Amy J. "Dispute Systems Design, Neoliberalism, and the Problem of Scale." *Harvard Negotiation Law Review.* 14 (2009): 51.

as though it were coeval.[184] Despite the increasing importance of large-scale, multinational corporate actors in the international economic system, as well as a structural change in the scale and scope of commercial conflict, arbitration discourse is in fact *reverting* closer to the laissez-faire model that crystallized in the late 19th and early 20th century. This discourse emphasizes individual autonomy from state encroachment, and the idea that private parties ought to have as much latitude as possible to draft the terms of their contracts.

The corporate embrace of arbitration appears to be a privately led initiative in which self-interested individual agents have opted, out of their own volition, for the most economically efficient means of resolving disputes. It appears to provide relatively clear cut example of what Lawrence Ribstein and Erin O'Hara call the "law market" – an ideal typology of forum shopping in which people and firms "choose" amongst different available legal regimes.[185]

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[184] Classical political economy in the United States was dedicated to the principle that the state could best encourage economic development by leaving entrepreneurs alone, free of regulation and subsidy. Hovenkampf, Herbert. "The classical corporation in American legal thought." *Georgia Law Journal* 76 (1987): 1594.

[185] "Once a state or nation produces a law, people and firms connected with the polity must obey the law or suffer consequences. But people and firms increasingly have another choice, that is, to move beyond laws' reach. These

Yet, this shift would not be nearly pronounced were it not for the dosage of steroids that arbitration has received from the Supreme Court's pro-arbitration jurisprudence, which is characterized by two parallel shifts: 1) Its interpretation of the Federal Arbitration Act as a "liberal Federal policy favoring arbitration"[186] that it has used to strike down state laws governing arbitration 2) its reversal of

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moves are becoming easier with faster communication and transportation and freer trade. Parties, in effect, can shop for law, just as they do for other goods. Nations and states must take this "law market" into account when they create new laws." Ribstein, Larry E., and Erin A. O'Hara. *The law market*. (Oxford, Oxford University Press, 2009.) 3.

[186] This opinion was first advanced in the Court's 1983 Moses Cone Memorial Hospital v. Mercury Construction Corporation decision, in which the court ruled that section 2 of the Federal Arbitration Act "was a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." This opinion has since been reaffirmed but has since been restated arbitration related cases including AT&T Mobility v. Concepcion and Italian Colors v. American Express Co. Moses H. Cone Memorial Hospital. v. Mercury Construction Corp, 460 U.S. 1, 24 (1983). As Margaret Moses points out "The so-called policy favoring arbitration appears to be one created by the judiciary out of whole cloth." Margaret Moses . Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress." *Florida State University Law Review*. 34 (2006): 123.

laws and policies that had previously placed restrictions on the types of conflict that could legitimately be submitted to the rule of arbitrators.[187]

The distributional changes implied by arbitration reform are both direct and indirect.

Direct examples include curtailing the potency of class-actions and anti-trust litigation – both of which provide rather obvious cases of using private law to achieve public policy end.[188]

Indirect examples corporate empowerment through arbitration reform provide less intuitive, but nevertheless significant forms of redistributive policy. They include the ability to curb the "spotlight" effect created by litigation – allowing firms to avoid the significant negative publicity and loss of reputational standing that firms

[187] Stephen L. Hayford "Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change." *Wake Forest L. Rev.* 31 (1996): 1.

[188] Deepak Gupta, and Lina Khan. "Arbitration as Wealth Transfer." *Yale Law & Policy Review*. 35 (2016): 499.

may incur as a result of lawsuits from competitors, consumers, or workers.[189] This not only allows firms to curb potential losses in the event of litigation that hurts their public image, it also deprives other actors of information that would allow them to make fully informed economic decisions. Thus, the asymmetries of information created by the opacity of the contemporary arbitration regime must also be considered forms of economic power.

There is evidence that American corporations are experimenting with new ways of pushing arbitration agreements in ways that shield them from unwanted litigation. In 2012, the private equity firm, the Carlyle Group, upon making its initial public offering, announced that shareholders would be bound by arbitration agreements, thereby forfeiting their right to trial.[190] Under Carlyle's securities

[189] The Merck Vioxx case involved a massive effort to contain the financial damage and loss of reputational standing from the medical complications associated with the arthritis drug. McClellan, Frank M. "The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Role of Lawyers in Mass Tort Litigation." *DePaul Law. Review*. 57 (2007): 509. The Valdez Spill offers another example. Bardwick, Deborah S. "The American Tort System's Response to Environmental Disaster: The Exxon Valdez Oil Spill as a Case Study." *Stanford. Environmental Law Journal* 19 (2000): 259.

[190]Kevin Rose. "Carlyle Drops Arbitration Clause from IPO Plans." *Dealbook* February 3, 2012. Accessed February 12, 2012. https://dealbook.nytimes.com/2012/02/03/carlyle-drops-arbitration-clause-from-i-p-o-plans/

governance structure, securities claims would be arbitrated in a private tribunal in Delaware. Carlyle's efforts to effectively ban securities litigation, and in the same stroke, terminate the possibility of class-actions, was ultimately stopped by the Securities and Exchange Commission. However the case illustrates the efforts business are making to push the scope and power of arbitration agreements.[191]

Most commentators, even critical commentators, have tended to overlook the latter set of distributional problems because they do not appear as nakedly they do in cases where both parties are of radically uneven bargaining power. When two corporations arbitrate, rather than litigate, no party to the dispute seems to be placed at a significant disadvantage. Yet there is a more generalized political shift at play. When large-volumes of disputes involving corporations are arbitrated, rather than litigated, is it not only the case that the formal rules of procedure change (e.g discovery, evidence, and appeals) – but the general architecture of

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[191] As Steven Davidoff Wrote in the wake of the Carlyle proposal. "It is quite possible that the Carlyle Group, the private equity firm that is preparing to go public, is proposing the most shareholder-unfriendly corporate governance structure in modern history." Steven Davidoff. Carlyle Readies an Unfriendly IPO for Shareholders. *Dealbook* January 18, 2012. Accessed January 24, 2012. https://dealbook.nytimes.com/2012/01/18/carlyle-readies-an-unfriendly-i-p-o-for-shareholders/

public oversight, public authority, and public deliberation is radically altered along with it. This political shift is scarcely perceptible at the level of individual lawsuits, but taken in the aggregate, it marks a radical overhaul of modern commercial litigation, and thus, of the public policy relevance of private law enforcement.

6. Reviving Lochner Through Arbitration Reform

Modern arbitration law has distinctive Lochnerian themes, it is based on a philosophy of "negative liberty" that places emphasis on individual freedom from state encroachment.[192] Still, it would be a mistake to see a mere repetition of Lochernian principles in present reform efforts. Modern arbitration law is based on creating a zone of private activity that is virtually insulated from government regulatory power, but this comes with a twist. While Lochner era arbitration law sought to legitimize arbitration by placing arbitration agreements *on the same*

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[192] As Hiro Aragaki writes "In recent decades, contract—together with its associated values of autonomy, consent, and self-determination—has become the principal lens through which arbitration law and policy are debated and analyzed." Aragaki, Hiro N. "The Federal Arbitration Act as Procedural Reform." *New York University Law Review.* 89 (2014): 1939.

footing as other contracts, contemporary free-market proponents of commercial arbitration have gone a step further. The Supreme Court, the corporate arbitration lobby, as well as arbitration ideologues have sought to *consign* the state's role to merely *enforcing* agreements, leaving questions of substantive law and procedure to the parties involved. This agenda is pursued in the name of abstract principles of cost-savings, expediency and individual freedom, however, it involves a transfer of "political" power to corporations, who as a result gain far greater discretion over the design of contracts that than they otherwise would have if they were adjudicating their claims in courts of law. According to Brunet, "Arbitration liberty is achieved by making party autonomy the highest priority in the pantheon of arbitration values."[193] Party autonomy, he claims, is a central feature of a democratic society.

> In a democratic society, party autonomy should be the fundamental value that shapes arbitration. The personal autonomy inherent in arbitration constitutes a dominant policy in all areas of a democracy. The freedom to select arbitration procedure is a choice that one anticipates should exist in a state. Viewed in this light, the important value of party autonomy is directly related to the freedom essential in a democratic state. A strong version of arbitration party autonomy exemplifies the significance of freedom of contract. In a state such as ours characterized by the respect for individual liberty, courts should enforce customized agreements to

[193] Brunet Jr. Brunet, Edward J. *Arbitration law in America: a critical assessment*. Cambridge University Press, 2006.

> arbitrate and the legislature should regulate minimally. In a society governed by rules of the free market, contract norms that guide exchanges are necessarily based on autonomous action of individual economic actors.[194]

This statement sets out a vision of democracy in which economic policy is governed by free-market principles and in which the state role in governing contracts seems to be delimited to "enforcement". Alternative models of democracy and economic policy notwithstanding, this pledge begs an important question. What is it about contracts themselves that might have invited non-enforcement from the judiciary, or then again, greater regulation from government? Why is it necessary to dismantle these efforts in order for arbitration guarantee autonomy?

> The FAA should not stand as a barrier to what seems to be a judicial green light toward the contract model. The thrust of the FAA is that of party autonomy. The drafters appear to have recognized the use of arbitration as a means to achieve merchant self-governance among business constituents. The theme of upholding the intent of the parties resounds throughout the legislative history of the FAA.

The Supreme Court's arbitration policy not only seeks to delimit state involvement in the governance of arbitration, but to guarantee and bolster the

[194] Brunet Jr. Brunet, Edward J. *Arbitration law in America: a critical assessment*. Cambridge University Press, 2006.

autonomy of "individuals". These individuals, of course, include multinational firms with billions in market capitalization, hundreds of millions in annual revenue, thousands of employees, and operations across the globe. In so doing, however, it has equipped corporations with the possibility of pursuing strategic disputing behaviors and law avoidance strategies. Then again, arbitration may involve *actual* individuals like Vincent and Liza Concepcion, whose motion for class-action relief against AT&T was denied by the U.S Supreme Court.

Irrespective of the ideal subject it is addressed to, the doctrine of freedom has important consequences. In practice, it effectively routinizes the enforcement of arbitration awards. This furtively vests corporations with powers of law-making and what for lack of better term we may call "legal strategizing". The neo-Lochnerian flavor of modern arbitration reform is not just about "enforcing contracts", as is claimed by some of its exponents. Arbitration agreements are being accorded a special status that makes them immune to challenge, review, and oversight. This is especially significant for corporate disputants, because they have everything short of a guarantee that their arbitration agreements will be enforced, irrespective of their irregularities. Although the Federal Arbitration Act states that awards may be overturned for fraud, corruption, or "manifest disregard

of the law" – in reality, the scope that would even allow for such challenges to arise is narrowing.

This is a matter of political-economic importance because it alters the legal and regulatory conditions to which corporations are subject, particularly to forms of *private* litigation that they view as an anathema to their interests. The Supreme Court does not say as much, but by deferring to commercial arbitrators (and the disputants who hire them) it is effectively unfettering commercial litigation from any system of checks and balances, including government regulation, judicial scrutiny, public deliberation, and even written record.[195]

This doctrine grants corporations a form of legal immunity, virtually guaranteeing that arbitration awards will not be subject to scrutiny or annulment. Part and parcel of this policy shift is a delimitation of the criteria that can be used to revoke

[195] As Robert Lee Hale wrote against proponent of marginalist economics, Thomas Nixon Carver. "What is the government doing when it " protects a property right"? Passively, it is abstaining from interference with the owner when he deals with the thing owned; actively, it is forcing the non-owner to desist from handling it, unless the owner consents." Hale's emphasis on both *active* and *passive* elements of government "activity", and its resultant distributive consequences can easily be applied to arbitration law. Hale, Robert L. "Coercion and distribution in a supposedly non-coercive state." *Political Science Quarterly* 38, no. 3 (1923): 470-494.

arbitration awards. It gives business a great degree of latitude to custom-design the contracts they create with others, and to include tailor-made arbitration clauses that are strategically placed to ward off unwanted litigation, including class-action litigation. Conceived in aggregate terms, the Supreme Court's pro-arbitration jurisprudence effectively creates a privately funded, privately administered parallel legal system that is virtually insulated from outward interference – including interference from judges, regulatory probes, press coverage, and generally speaking, citizen participation.

This transformation is often described and theorized as though it merely entailed a shift from public to private forums governed by pragmatic concerns. However, it involves changes to the architecture of the regulatory state, and along with it, a transfiguration of the values of justice that have traditionally been attributed to it. Arbitration reform, I claim, is a means by which corporations have sought to implement political change by non-political means.

5. The Corporatization of ADR

The (Supreme) Court's "national policy favoring arbitration" has no basis in any legislative enactment or

indeed any expression by any political body, state or federal, that is accountable to the people."[196] - Paul Carrington

1. The Beginnings of the Corporate Arbitration Movement

In 1984, Eric D. Green, a prominent figure in the American arbitration profession, co-founder of JAMS International, Resolutions LLC, the Center for Public Resources and professor of law at Harvard University described the emergent corporate embrace of alternative dispute resolution as a "consumer movement."[197] This observation was in many ways prescient.[198] The "corporate" segment of the

[196] Carrington, Paul D. "Self-Deregulation, the National Policy of the Supreme Court." *Nevada Law Journal* 3 (2002): 259.

[197] "To a large extent, corporate interest in ADR constitutes a consumer movement at the upper end of the legal market." Green, Eric D. "Corporate Alternative Dispute Resolution." *Ohio State Journal on Dispute Resolution.* 1 (1985): 203. As Green himself noted, corporate interest in ADR did not appear to be motivated by the same concerns as those progressives using it for community building purposes or delivering access to justice – it was more likely a response to hyperlexis - the idea that America was becoming a more litigious society, and that the costs associated with it were overburdening corporate America.

[198] I follow Bryant Garth's 2003 article, "Tilting the Justice System" in identifying a pyramidal structure of the arbitration system. As Garth writes "There is a very special elite group of judges, retired judges, commercial courts, mediators, and arbitrators who provide tailor-made justice geared specifically to large business disputes-a category that includes the new wave of large class actions. This elite has its own sets of lawyers as well, and this relatively small group dominates the agenda for federal court reform as well as the elite ADR

arbitration sector has since grown to a billion dollar industry with hundreds of specialized law firms, arbitration tribunals, arbitrators, and consultants who derive their income from the provision of ADR services.[199]

But the corporate embrace of ADR has not merely been a matter of consumption, it has also been politically driven. By expanding the corporate arbitration system, corporations have been able to pursue strategic disputing behaviors that have little to do with what is written in arbitration textbooks, or contained in formal arbitration doctrine.

This chapter argues that corporate lobbying in favor of arbitration reform constitutes an elite legal mobilization that has sought to delimit public

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market. Garth, Bryant G. "Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution." *Georgia State University Law Review.* 18 (2001): 927.930.

[199] There is very little statistical data on the size of the arbitration service sector. According to the Global Arbitration Review annual awards, the combined portfolio value of the Global Arbitration Review's Global top 30 law firms is in excess of 1 trillion U.S dollars. (This only denotes the value of the disputes in question, not income derived from the delivery of arbitration services themselves). One private study estimates that the value of the Toronto arbitration market at around $273 million annully. https://www.crai.com/sites/default/files/publications/An-Economic-Study-of-the-Size-of-the-Arbitration-Sector-in-Toronto.pdf

interference corporate activity, a shift that I theorize as political, because it entails a reorganization of state power in favor of capital, and has been directed against the historical legacy of the regulatory state. In addition to developing dispute resolution programs and services of their own, corporations have pledged financial, political, and intellectual resources to fostering a neo-liberal system of dispute resolution that is severed from public control (and even knowledge), is thus, "safe for business". The historical emergence of this corporate legal mobilization[200], its governing ideology, and its relationship to democracy - are the subject of this chapter.

Corporate sponsorship of arbitration reform has been *political in* four major ways. 1) It is an elite driven movement, comprised of corporate litigators, active and

[200] For an account of elite political mobilization, and its ties to corporate capital, see Stephen Gill. Stephen Gill. *American hegemony and the Trilateral Commission*. Vol. 5. CUP Archive, 1991.For a different account of elite politics, see Steven M. Teles, *The rise of the conservative legal movement: The battle for control of the law*. Princeton University Press, 2012. See also Sarah Staszak's more recent work traces conservative attacks on Rights era litigation through ADR. Staszak, Sarah. *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment*. Oxford University Press, 2014. Both Teles' and Staszak's works differ from traditional accounts of lobbying campaigns in so far as they focus on informal networks, intellectual leadership, and attempts to influence "culture", rather than the legislative process or the structure of the economy. Both Teles and Staszak appear to associate business interests with the political right.

retired jurists, former government officials and intellectuals 2) it has been advanced through non-democratic channels including business associations, think-tanks, and through elite networks 3) the ideology the lobby has given expression to is ultimately *conservative,* favoring existing powers interests *against* redistribution 4) it has enabled new strategic disputing behaviors that benefit wealthy disputants. This form of "law-making by private groups" has given business a way of opposing judicial and regulatory reforms that they resented for having expanded the regulatory state throughout the 1960s and 1970s.

To be sure, I am not arguing that there is anything inherently manipulative or biased about arbitration *as such*, nor am I denying that there have been genuine parallel efforts to use ADR for progressive purposes. What I am drawing attention to are efforts by corporate lobbyists to "capture" arbitration law and to advance reforms that are modeled on neo-liberal conceptions of state and market.

There is reason to be suspicious of the movement's claims to defend the interests of consumers, workers and ordinary Americans, or to embody a universal system

of justice that advances the common good. In reality, corporate arbitration reform dedicated to a conservative view of free market politics that serves to protect the interest of capital. Put differently, the corporate ADR movement is best understood as a form of elite politics that has sought to radically altered the rules and norms to which corporate disputants are subject, a shift which spells important changes for both the distribution of power and authority in the capitalist state, not to mention, for the "value" of justice itself.[201]

At the forefront of the corporate arbitration movement is a coalition of business officials, jurists, former government officials and professional ideologues who have waged a decades-long lobbying campaign aimed at combatting the "high

[201] Jay Feinman has written about such an elite coalition in the tort-reform movement. "Politicians, academics, and ideologues have joined the cause to advance their own interests and to promote a conservative agenda. A network of trade groups, think tanks, right-wing foundations, membership organizations, lobbyists, and litigation centers link the elements of the cam- paign in a coordinated effort of funding, lobbying, networking, and advocacy to advance the new approach to law." Feinman, Jay M. *Un-Making Law: The Conservative Campaign to Roll Back the Common Law*. Beacon Press, 2004.

For a discussion of conservative philosophy as the protection of privilege. Robin, Corey. *The Reactionary Mind: Conservatism from Edmund Burke to Sarah Palin*. Oxford University Press, 2011. While I focus specifically on arbitration reform, judicial privatization through arbitration reform should be read as part of a greater deregulatory vision of the past forty years.

costs of litigation". They have converged in think tanks and business associations like the International Center for Conflict Prevention (CPR), the Business Roundtable of the U.S Chamber of Commerce (BRT), and the dispute resolution section of the American Bar Association. The lobby says that it wants to make litigation faster and cheaper, and to promote the "freedom of contract" - commitments that have been echoed in a series of U.S Supreme Court decisions, most notably, in the decisions of the late Justice Scalia.[202]

The lobby's commitment to cheap and expedient system of arbitration comes along with, and in fact necessitates, the forfeiture of many of the mechanisms that ensure that judicial decisions are lawful. At this point, these features of arbitration are well known, and are routinely cited in the scholarly and professional literature. Arbitrators are not bound by rules of common law precedent, their decisions are *final* and not normally subject to review or appeal. Press coverage is next to non-

[202] For an ideological contextualization of the Supreme Court's emphasis on cost, speed, and the freedom of contract. See. George, Eric. "A Historical Reflection on Arbitration and the Corporation as an Object of Economic Governance." *Western New England Law Review* 39, no. 4 (2017): 557. For the Court's embrace of neo-liberal principles. Aragaki, Hiro N. "Does Rigorously Enforcing Arbitration Agreements Promote Autonomy." *Indiana Law Journal* 91 (2015): 1143. Aragaki, Hiro N. "Constructions of Arbitration's Informalism: Autonomy, Efficiency, and Justice." *Journal on Dispute Resolution.* (2016): 141.

existent in arbitration, awards are published in highly redacted form. In other words, arbitration happens in conditions of complete opacity. Clearly, the integrity of what we call justice would suffer if the entire court system were to be reformed according to these principles. However, arbitration law does not superimpose these conditions upon anyone who does not want them. It effectively enables the *voluntary* forfeiture of one's right to a trial in exchange for swift and cheap dispute resolution.

But there is a broader regulatory problem at stake that has received little attention in the arbitration literature. Adjudicating commercial conflict (and civil litigation generally) is not just about resolving disputes in a way that is satisfactory to the two parties[203] but as Owen Fiss once put it "an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals."[204] The rise anti-trust litigation in the late 19th century, and the growth of administrative law in the 20th century saw the use of civil litigation as a means of governing corporate

[203] Contrast this with Gillian Hadfield's statement that "The rules we want in these interactions are the rules that promote and facilitate efficient market relationships between corporations. In this setting, we are not interested in what is fair or just between two corporations; we are interested in what makes their economic relationship as productive and valuable as possible."

[204] Fiss, Owen M. "Against settlement." *Yale Law Journal* 93 (1983): 1073.

conduct.[205] Historically part of that use of state power has been to deter and govern corporate behavior however, the fact that commercial arbitration dilutes and/or eliminates these features of the courts is very important because it radically alters the corporation as an object of economic governance.

The privatization of adjudication[206], engendered through arbitration reform, enables corporations to pursue strategic disputing behaviors that would not have been possible in courts of law. In the same stroke, arbitration negates the "spotlight effect" created by litigation. It delimits the public's access to information that would have enabled them to make informed (consumer, voting and planning) decisions about the kind of society they would like to live in.

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[205] Carrington, Paul D. "Self-Deregulation, the National Policy of the Supreme Court." *Nevada Law Journal* 3 (2002): 259.

[206] As Brunet writes. "The desire for secrecy, the attraction of moving to a custom of using industry experts as arbitrators, and the selection of trade norms as the rules of decision each play an important part in the privatization story. I support the positioning of privatization as one of the few most important values of arbitration." Brunet, E.J., 2006. *Arbitration law in America: a critical assessment*. Cambridge University Press.

While privacy and confidentiality may be desirable for even small-scale disputants who wish to protect sensitive information, opacity takes on special significance when it applies to multinational business giants whose disputes oven exceed sums of hundreds of millions of dollars and often involve public policy issues like environmental damages and anti-trust claims. Even disputes that seem to be of relatively low social consequence, like patent litigation, can have great impact if their details are made public. Such disputes may be formally treated as "private" and thus, of significance to only the two parties involved in the dispute, but they are in effect, matters that are of broader concern to "third parties" including shareholders, workers, consumers, communities and citizens.

Proponents of commercial arbitration see themselves to be doing the public a service by diverting their disputes to private forums. (It is telling that the main corporate arbitration think tank was initially called "The Center for Public Resources"). The greater availability of dispute resolution mechanism (arbitration, mediation, and preventative tactics like early neutral evaluation) are seen to present a net benefit to society. The building of the "multi-door courthouse", as it was famously conceived by Frank Sander, a pioneer of ADR, was meant to multiply the tools available to judges and disputants by affording them with a

greater range of *choice.* Since there is no "one size fits all" model of justice, ADR was seen to widen the spectrum of available dispute resolution options. Within this broader schema, commercial disputes were often seen to be the *least suspect*, and moreover, the least subject to potential abuse, because the parties were assumed to be on roughly equal bargaining terms.

Thus, the diversion of corporate litigation to arbitration tribunals was - and continues to be seen as a mere "lateral movement" of litigation from one (public) forum to another (privately administered) tribunal. The problem with this line of reasoning is not necessarily that it is false but that it moves too quickly. To be sure, nobody denies that litigation is public and arbitration private. But the promotion of ADR cannot be dissociated from the privatization of adjudication generally – which is to say that a transformation of the *value* of dispute resolution and its place in the broader democratic order, is in play. The forfeiture of the procedural formality and relative transparency of trial litigation is seen to be a small price to pay for faster, cheaper and more responsive decisions, especially if both disputants are of roughly equal bargaining power and they agree to arbitration in advance

While privatization has received extensive treatment in the critical literature[207], what has been less discussed is the way that corporations have been able to make strategic gains from the privatization, especially in commercial dispute resolution, seen by many to be least vulnerable to manipulation. My argument is that in its current manifestation, the proliferation of ADR mechanisms implies a dilution of public power over the enforcement of private conflict, a transformation which spells out important changes for the nature of the courts and regulatory agencies – as well as for the architecture of the modern capitalist state more generally. This radically changes the corporation as an object of governance, and in the same stroke, diminishes citizens' ability to make informed decisions about the kind of society they want to live in.

2. The Corporatization of Alternative Dispute Resolution 1977-Present

[207] Hensler, Deborah R. "Our courts, ourselves: How the alternative dispute resolution movement is re-shaping our legal system." *Penn St. L. Rev.* 108 (2003): 165. Fiss, Owen M. "Against settlement." *Yale Law Journal* 93 (1983): 1073.

American corporations are no longer tolerating the high costs of litigation.[208]

James F. Henry – President and Founder of the Center for Public Resources 1985

A new corporate arbitration lobby is afoot today, and it has remobilized and in many ways intensified, the political-economic themes that I identified in the early 20th century corporate arbitration lobby. The lobby includes corporate think-tanks and associations like the International Center for Confliction Prevention (CPR), the American Bar Association and the Business Roundtable (BRT) of the U.S. Chamber of Commerce. These organizations are joined by elite jurists, former state officials and intellectuals who have lent their intellectual patronage to a corporatized vision of arbitration (and alternative dispute resolution more broadly).

3. Elements of the Corporate Arbitration Lobby

This section describes the re-making of the corporate arbitration lobby from 1977-to present. The corporate arbitration lobby, I argue, is constituted by an informal

[208] Henry, James F. "Alternative Dispute Resolution: Meeting the Legal Needs of the 1980s." *Ohio State Journal on Dispute Resolution.* 1 (1985): 113.

set of business associations, think tanks and intellectual representatives. It is characterized by a form of elite politics that transcend partisan lines – and in some ways defies conventional categorization of "conservative" and "liberal", since it draws support from both former Democrats and Republicans, as well as jurists appointed by both Republic and Democratic presidents. What this politics shares in common is an acute sensitivity to corporate frustrations with the legal system, a set of attitudes that is perhaps best encapsulated in the term "compliance fatigue" the idea that the combination too many regulations have sapped the competitive dynamism of business.[209] In the name of reducing costs and delays, and of promoting the "freedom of contract" corporations have used ADR as a means of transforming the American judicial system, and of limiting their exposure to unwanted forms of public interference – from government, watchdog groups, the press, workers, consumers and citizens.

Corporate arbitration reform is often portrayed as though it arose from objective conditions. On their own, costs, delays, and "technicalities" of civil procedure do

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[209] Binham, Caroline. "Multinational Companies Suffer 'compliance Fatigue'." Financial Times, June 10, 2014. Accessed June 10, 2014. https://www.ft.com/content/b9072126-ef14-11e3-acad-00144feabdc0.

not strike one as political. Certainly nobody defends the integrity of the justice system on the grounds that it is expensive, time-consuming and has a labyrinth of rules to navigate. Complaining about "delays", "costs", and "excessive technicality" of the courts does not raise political suspicion because it is directed against problems that nobody actually defends. Upon closer examination, however, these complaints are often waged against attributes of the regulatory state, and against specific types of litigation that were perceived to be responsible for precipitating the litigation crisis. As Bayless Manning put the matter in 1977 in a piece entitle "hyperlexis",

> A significant contributor to the flood of litigation, regulations and legislation is a rising feeling among many members of the public that the society as a whole should in some way compensate the individual for almost any loss he sustains. That is a political proposition, not an attribute of the legal system itself.[210]

In other words, Manning perceives at least one source of increasing litigation to be part of the tide of regulatory measures and rights litigation that gained increasing traction in the 1960s and 1970s.[211]

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[210] Manning, Bayless. "Hyperlexis: Our national disease." *Northwestern University Law Review.* 71 (1976): 767.

[211] The 1971 Powell memorandum, written by Supreme Court Justice Lewis F. Powell Jr. called upon business to organize against what he called the "broad-

Indeed, by the 1980s statements were routinely expressed by corporate officials and elite jurists decrying the increasing tide of rights litigation – and the accompanying belief that litigation could redress all of society's ills.[212] Chief Justice Warren Burger, for example, warned of the problems of delay, high cost, and unnecessary technicality in the American court system. As he wrote in 1984,

> One reason our courts have become overburdened is that Americans are increasingly turning to the courts for relief from a range of personal distresses and anxieties. Remedies for personal wrongs that once were considered the responsibility of institutions other than the courts are now boldly asserted as legal "entitlements." The courts have been expected to fill the void created by the decline of church, family, and neighborhood unity.[213]

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based and consistently pursued" assault on the American free enterprise system that was "gaining momentum and converts." As Galanter writes, this document foreshadows the pronounced increase in business spending on politics, as well as the arrival of right-wing think tanks, institutes and foundations and the establishment of conservative public-interest law firms. Powell advises the Chamber of Commerce to mount an aggressive campaign to cultivate and support scholars, "who do believe in the system", to critique textbooks, to promote a "steady flow" of scholarly and popular articles, and to intervene in the courts.

[212] As Steven Teles writes "Although conventional wisdom holds that the Republican coalition was held together by anticommunism and opposition to taxes, just as important were the specter of "activist judges" and the liberal organizational network that supported them. Businesses hated the courts for legitimizing and accelerating the expansion of the federal regulatory state."

[213] Burger, Warren E. "Isn't there a better way." *ABA Journal* 68 (1982): 274.

To be sure, there is evidence that a "litigation crisis" being experienced by business *was* in fact happening. Rates of contract litigation in Federal district courts grew substantially in the 1980s, as did the size of the legal profession. In retrospect, the politics of the litigation crisis was the apportionment of blame. Many business elites and elite jurists blamed the encroaching regulatory state.[214]

Like the development of the Federal Arbitration Act of 1925, the corporate arbitration lobby has acted outside of traditional political channels, and in near total isolation from democratic participation. It is an initiative comprising CEOs from Fortune 500 corporations, general and outside counsel from corporate law firms, retired judges, former government officials, and intellectuals. While these actors do not necessarily see themselves as politically motivated, the structural effect of their activity *is*, the corporatization of ADR has effectuated a major transformation of state power that has served corporate interests. Together, these actors form a "corporate legal mobilization" that has sought to transform the

[214] By the mid 1960s, courts, legislatures, and lawyers had transformed the legal landscape. Civil rights, enlarged tort-liablity, the emergence of poverty law, consumerism, and environmentalism all reflected higher expectations of institutional performance by manufacturers, doctors, and government. Government responded by to and promoted rising public expectations by launching a "War on Poverty" as well as by enacting a wave of civil rights, consumer, and environmental legislation.

judiciary, government agencies, the internal governance structure of the corporation, as well as the values and ethics traditional associated with the legal profession.[215]

At the center of the lobby's activity is an effort to replace conventional approaches to commercial adjudication with a "corporate" concept of ADR. Corporate ADR has little to do with the progressive ADR techniques that leftists envisioned in the 1970s, and in many ways, go well beyond the FAA, which placed agreements to arbitrate on the same footing as other contracts. The idea behind "corporate ADR" is that private arbitrators and mediators are often better equipped to manage corporate conflict than judges, and that a private market for "decisions" would better allocate society's legal resources than the judiciary's monopoly over dispute resolution.

4. The Center for Public Resources

[215] Garth, Bryant. "From Civil Litigation to Private Justice: Legal Practice at War with the Profession and Its Value." *Brooklyn Law Review.* 59 (1993): 931.

One of the most important agents in the arbitration lobby has been the Center for Public Resources (now the International Center for Conflict Resolution). Since 1979, the CPR has been a fixture of the corporate arbitration movement, playing a leading role in promoting interest in ADR for virtually every aspect of corporate conflict including asbestos litigation, class-actions, anti-trust suits, and environmental litigation.

The CPR was founded as a non-profit by James F. Henry in New York in 1977, one year after Harvard Law Professor Frank Sander had made his now famous address to the American Bar Association, "The Causes of Popular Dissatisfaction with the Administration of Justice,"[216] a speech many view as having spearheaded the ADR movement in the 1970s[217]. At the time, the support base for ADR was diverse – it included many left wing and progressive elements who wanted to use

[216] This phrase was stylized version of Roscoe Pound's 1906 address.

[217] The organization's title is somewhat counter-intuitive, since arbitration is a private good, not a public resource. Alternative dispute resolution is not strictly speaking, a public resource, it is a private service that can be bought and sold much like any other commodity. Any pretension to being a public resources has to do with its desired effects. It is notable that the CPR has changed names twice since 1979. The center was renamed the CPR Institute for Dispute Resolution in 1994, and later, marking its establishment in the field of international arbitration - the International Center for Conflict Prevention and Resolution in 2004.

alternative dispute resolution as a means of promoting "access to justice" to marginalized groups. But alternatives also drew considerable attention from business, who by the 1970s had begun to complain about an increasing tide of regulatory and consumer litigation that they perceived to be sapping their ability to compete in international market.

The CPR took on a multi-pronged approach to promotion of ADR principle, targeting jurists, corporate officials and educators. First, it assembled general counsel from firms including General Electric, Royal Dutch Shell, ConocoPhillips, and Monsanto to devise cost-saving dispute resolution strategies to the litigation crisis. By 1986, the CPR had attracted a coalition of over 140 major corporations and law firms to adopt its corporate pledge, a voluntary agreement indicating their commitment to using ADR over litigation whenever it was deemed appropriate.[218]

[218] "Our company pledges to commit its resources to manage and resolve disputes through negotiation, mediation and other ADR processes when appropriate, with a view to establishing and practicing global, sustainable dispute management and resolution processes." Signatories of the CPR pledge include major American corporations including Conoco Phillips, IBM, Pfizer, Microsoft, Mastercard, Raytheon, Royal Dutch Shell, and Xerox. https://www.cpradr.org/resource-center/adr-pledges/21st-century-pledge

The CPR's early activities involved the creation of programs targeting specific areas of problem litigation. For example, in 1984, the center was approached by major asbestos producers (including Union Carbide and Chevron) to develop a program to manage over 38.2 billion dollars in claims over the subsequent three decades.[219] Another CPR initiative was the development of "mini-trial" services, abbreviated trials with limited power of discovery in which disputants would present their "best case" before one of the CPR neutrals. These trials could be administered by retired justices, arbitrators, or corporate managers with no formal judicial training, but whose expertise in specific areas of business qualified them to serve as a neutral. By the mid 1980s, CPR mini-trials had been used to settle a number high-stakes commercial disputes, including multi-million dollar disputes involving firms like Amoco, Gillette Oil, Union Carbide.

While corporations had the option to arbitrate commercial disputes prior to the 1980s, the caseload of major arbitration tribunals had remained relatively small. U.S companies were still averse to entrusting high-stakes disputes to commercial

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[219] Green, Eric D. "Corporate Alternative Dispute Resolution." *Ohio State Journal on Dispute Resolution* 1 (1985): 203.

arbitrators. To overturn corporate antipathy to using ADR for high stakes disputes, the CPR sought to bolster its perceived legitimacy through the recruitment of high-profile government officials, federal and state justices who formed its national "Judicial Panel". Not only did this provide an important symbol of legitimacy, it allowed judges to cash-in on their experience as neutral decision-makers. The CPR recruited Irving Younger, Harold Tyler and Simon Rifkin of the prestigious District Court for the Southern District of New York. It also was able to bring in former government officials from the Carter administration including former White House Counsel Lloyd Cutler, Attorney General Griffin Bell, and secretary of education Shirley Hufstedler. Such additions helped CPR led efforts to establish the Federal Office of Dispute Resolution, as well as the Federal Interagency ADR Working Group under the Clinton Administration.

The CPR also targeted top U.S law schools by establishing connections with law schools Harvard's Program on Negotiation, which had famously delivered the Pound lecture as well as Harry Wellington, Dean of Yale Law School. Other key contributors have been Mark Fisher and William Ury of Harvard's Program on Negotiation as well as representatives of the Law and Economics variety like

Gillian Hadfield, and Robert Mnookin. These intellectuals have generally taken a favorable view of the further privatization of commercial law.[220] By securing intellectual representation amongst the nation's top law schools, the corporate lobby succeeded in both popularizing ADR as a legitimate mode of dispute resolution for commercial conflict.

In addition to honoring CEOs, lawyers and arbitrators who have made contributions to the development of corporate ADR, the CPR regularly invites elite politicians. Contributors to its annual conference have included former Canadian Prime Minister Jean Chretien, Chairman of the Democratic National Commitee Howard Dean, Senator George Mitchell, and Harriet Miers, White House Counsel to George W. Bush.

It would be some misnomer to speak of the CPR as a lobby group, at least in the more familiar sense of the term, because most of its activities are not directed at legislative change properly speaking.

[220] Hadfield, G.K., 2001. Privatizing commercial law. *Regulation*, *24*, p.40.

5. The Delaware Arbitration Experiment

The corporate arbitration lobby also draft amicus briefs in cases where it perceives corporate interests to be at stake. Although these activities do not constitute "lobbying" in the formal sense of the term, they are a way that the business associations and think tanks can directly communicate to their views to judges. What can be seen in recent cases is the convergence of business groups and jurists behind a "pro-arbitration" doctrine that emphasizes the importance of cost cutting, expediency and "the freedom of contract".[221]

The issues that arose in Strine v. Delaware Coalition for Open Government, Inc. are illustrative of the corporate arbitration lobby's commitment to maintaining the arbitration system's *opacity*. In 2011, the public watchdog group, the Delaware Coalition for Open Government (henceforth DelCOG) filed a lawsuit against Delaware's Chancery Court, challenging the constitutionality of its recently implemented Uniform Arbitration Act. The case drew attention from the legal

[221] The Delaware Coalition for Open Government is a coalition of journalists, lawyers, elected officials, news organizations, business owners, government employees, civic associations and private citizens dedicated to promoting and defending the people's right to transparency and accountability in government.

commentators not just because of the nature of the claims, but because of the stature of the chancery court. The state of Delaware is a very important jurisdiction in the broader U.S corporate system. Its sophisticated system of incorporation, its lower tax rates, and its historic role in building the legal architecture of the U.S. corporate system make it an attractive jurisdiction for corporate-led legal experimentation.[222] Roughly six in ten Fortune 500 corporations are registered in Delaware, and its chancery court system is reputed for its expertise in corporate law matters, as well as for making expeditious judgments.

The Uniform Arbitration Act was implemented in in 2009 at the recommendation of Delaware's Corporate Council. This legislation permitted Delaware chancery court judges could arbitrate private disputes during "off hours". The arbitrations conducted under the program were for all intents and purposes, exactly like civil trials, with the exception that the proceedings were confidential, and the judgments final and binding. The act applied to business disputes valued at upward of $1 million dollars. The only restriction was that the disputes not

[222] Horwitz, Morton J. "Santa Clara revisited: The development of corporate theory." *West Virginia Law Review.* 88 (1985): 173.

involve consumers. By 2012, the court had arbitrated six such cases, including a $262.5 million deal involving an attempt by Skyworks Solutions to escape its agreement to buy Advanced Analogic Technologies.[223] The fee for an arbitration was $15,000, with an additional cost of $6000 per day. Judges oversaw the proceedings, effectively "bracketing" their public function – and temporarily assuming the role and function as commercial arbitrators.

DelCOG objected to the Uniform Arbitration Act on the grounds that it effectively enabled "secret judicial proceedings" that violated the First Amendment's requirement that the public and the press have access to civil and criminal trials. Since the arbitration proceedings were carried out by public justices on public premises, Delcog argued that the proceedings should have been subject to a public right of access. In their view, public access to civil trials was a fundamental right in democratic society.

[223] Steven Davidoff, Solomon. "A Troubled Deal and the Law of Unintended Consequences." *Dealbook*, November 7, 2014. Accessed October 17, 2017. https://dealbook.nytimes.com/2011/11/07/a-troubled-deal-runs-into-the-law-of-unintended-consequences/.

DelCOGs' objection to the Delaware program, and the Delaware Supreme Court's subsequent decision to terminate it, elicited a series of condemnations from the arbitration program's business supporters. In an amicus brief, the Business Roundtable of the U.S. Chamber of Commerce[224], condemned the Delaware Supreme Court's decision to annul the arbitration program, arguing that the judgment squandered the potential for Delaware to compete with international arbitration tribunals. Similarly, TechNet,[225] a lobby group representing "more

[224] As the U.S Chamber of Commerce stated in its petition. "The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of significant concern to the nation's business community." Brief of the Chamber of Commerce of the United States of America as Amici Curiae in Support of Petitioners. Del. Coal. v. Strine, 2012 U.S. Dist. http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/Strine-Chamber-BRT-amicus-2014.pdf

[225] Technet's amicus brief describes the organization as "an association of chief executive officers and senior executives of the Nation's leading technology companies, including in the fields of information technology, biotechnology, clean technology, venture capital, e-commerce, and finance. Together, they represent more than two million employees and $800 billion in revenues. By uniting technology industries' strongest voices with federal and state leaders, TechNet helps to shape public policy that promotes the growth of technology-led innovation. TechNet therefore has a substantial interest in this case, because the statute at issue is part of an ongoing effort by the State of Delaware to provide

than two million employees and $800 billion in revenues", petitioned the court's decision, citing the importance of the arbitration program in innovating faster, cheaper modes of resolving tech disputes.

But perhaps most telling is the general hostility expressed by counsel to the idea of public participation.

> Beyond that, what the panel majority cited as beneficial here - educating the public, promoting public confidence, deterring corruption and misrepresentation - could be invoked to justify access to virtually any governmental activity, be it a hearing about driver's licences or the herding of horses.[226]

Similarly, TechNet failed to see any real purpose, beyond "theoretical" to Delcog's objection.

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businesses—including technology innovators—with an efficient and effective forum for resolving their disputes." Motion for Leave to File Brief as Amici Curiae and Brief for Technet in Support of Petitioners. Del. Coal. v. Strine, 2012 U.S. Dist. http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/TechNet-Amicus-Brief.pdf

[226] Brief for Technet in Support of Petitioners. http://sblog.s3.amazonaws.com/wp-content/uploads/2014/02/TechNet-Amicus-Brief.pdf

The response the Delaware Supreme Court's decision provoked by Technet and BRT gives us a glimpse into the current state of business arbitration in the U.S. First, the Delaware case illustrates the way that private arbitration places a direct limit on the values of judicial oversight and transparency. Second, it involves a revolving-door effect of public justices, whether active or retired, acting as patrons to the private sector. This means that businesses are consulting judges to see what a court "might rule" if they were in fact were to go to trial, and are making legal decisions based on this information. The view that arbitration would lead to "a better outcome" is indicative of a pragmatic approach to justice that pervades the arbitration literature: these practices are not seen as belonging to a specific political philosophy or involving a normative vision of what a justice system should do.[227] Perhaps most strikingly is Steven Davidoff's offhand comment that the Delaware experiment led to a situation in which "corporate law is made but nobody would know about it".

6. The Elite Politics of the Contemporary Arbitration Movement

Like its early 20th century precursor, the lobby is almost completely removed from popular representation, its main agents and spokespersons act in private capacity, they are not democratically elected or formally accountable to public body. Just as the early 20th century lobby saw arbitration as an expression of "self-governance," the modern corporate lobby speaks of the arbitration system as a bastion of individual freedom. Moreover, the lobby is committed to widening the scope of arbitrability, thereby expanding the dominion of the arbitration system, most strikingly, to government-business disputes, as well as regulatory issues. Finally, it has recruited "organic" intellectuals who have expounded a general theory of arbitration that seek to give the movement its "universal character".

Does this mean we are merely witnessing a repetition of early 20th century themes that I identified in the last chapter? While the analogy is tempting, there are key differences between the early twentieth century arbitration movement and today's. For one, the methods and scope of the corporate arbitration movement's agenda are much more intensive than the reforms envisioned than its predecessor. The lobby has sought to make arbitration a legitimate mode of dispute resolution for virtually every aspect of modern litigation, including anti-trust disputes, environmental disputes, weapons and aerospace contract disputes, and

shareholder derivative suits. Although initially focused on arbitration between commercial parties, the movement has channeled its energies to applying private dispute resolution techniques into government-business disputes, as well as regulatory matters.[228]

Like their early 20th century forebears, the contemporary corporate arbitration movement's ostensible commitments have little or nothing to do with politics, regulation, distribution or even the governance of corporate behavior properly speaking.[229] Arbitration is seemingly pragmatic and technical, it does not stem from first principles like socialism or conservatism. The lobby's language, oft-repeated over in public relations communiqués suggests that they are occupied

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[228] As the CPR's founder, James F Henry writes, "government agencies have crafted procedures to serve the full range of corporate and government conflict, including complex, multiparty conflicts, and even mega-disputes, such as mass torts or the Sept. 11 claims."[228] Steven Davidoff and David Zaring speak of the replacement of government-led regulatory functions with privately administered negotiations as "regulation by deal". Davidoff, Steven M., and David Zaring. "Regulation by deal: the government's response to the financial crisis." *Administrative Law Review*. 61 (2009): 463

[229] The contemporary arbitration movement's language is scarcely different from that of its predecessors. Charles Bernheimer's 1922 statement that "To litigate, the most wasteful procedure to which a business man can resort, means strife, expense, annoyance and the rupture of business friendship, sapping the very lifeblood of commerce" is not substantively different from the oft repeated

with the intricacies of highly specialized areas of commercial litigation - not with a broader normative framework, let alone with the general architecture of the capitalist state

Thus, one will search in vain for an explicitly *political* treatise spelling out this neo-liberal vision, as well as any suggestion that arbitration law is being developed to advance this or that *particular* interest. Even though associations like the CPR and the SVAMC are overwhelmingly occupied with corporate clients – they do not see their promotion of ADR as benefitting any specific class of disputants. They make no differentiation, for example, between the progressive aims of the early ADR movement, and their own distinctly "corporate" brand of ADR." Like the promoters of arbitration in the 1920s, the benefits of arbitration are thought to be a distributed to an assortment of actors including workers, small business, and families, amongst others.

My claim is that this neo-liberal political-economic ideology is concealed, but it is nevertheless discernable in a body of professional and judicial opinion that informs the Supreme Court's current interpretation of the FAA. The ideology is

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statements of arbitration PR campaigns. Galanter, Marc. "A world without

best illustrated in those cases where these central principles have been subject to challenge – and where corporate lobby groups have deemed it necessary to defeat measures that they see as antithetical to vitality and success of the ADR movement. From an intellectual vantage point, the closest expression of this worldview can be found in the writings of Gillian Hadfield, Erin O'Hara, and the late Lawrence Ribstein. In jurisprudence, it is best illustrated in the string of decisions delivered by Justice Scalia and the "contractualist" school of arbitration law defended by Edward Brunet Jr. and Stephen J. Ware. When arbitration law is governed according to these principles, corporations gain a series of strategic advantages. They are able to divert sensitive cases to private tribunals that delimit negative exposure to the public. They are able to hand-pick arbitrators who are more likely to give them a favorable ruling. Moreover, they are able to diminish their exposure to unwanted forms of conflict.

The corporatization of arbitration involves the efforts of lobby groups, jurists, and intellectuals seeking to make litigation as conducive as possible to business interests. Coporatization involves more than the fact that corporations are in fact routine users of arbitration – it involves the superimposition of managerial

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trials." Journal on Dispute Resolution. (2006): 7

strategies and de-regulatory politics upon the institution of adjudication. It involves a transformation of litigation, the delimitation of common-law practices, and the subsumption of commercial conflict to logics of commodification, profit, and corporate control, and concomitantly, to the exclusion of public control and democratic oversight.

Conclusion

Throughout the 1990s and 2000s, the use of arbitration proliferated so rapidly that its proponents resorted to accolades to describe it. Thomas Carbonneau, one of the most prolific arbitration commentators, described the rise of arbitration as a "civilization".[230] He characterized arbitration as "force for good in American Society", and the U.S Supreme Court's role of promoting arbitration as "instrumental to American democracy.[231] While there were problems with

[230] Carbonneau, Thomas E. "Building the Civilization of Arbitration-Introduction." *Penn State Law Review* 113 (2009): 983.

[231] "If arbitration, in any of its applications, withers, it will besmirch the process and negatively effect American democracy and citizens. The duplicity of the

arbitration, namely, the use of "forced" arbitration clauses in consumer and employment contracts, he downplayed such issues, declaring that arbitration "was ultimately in the best interest of American citizens."[232] Others appealed to social theory to bolster arbitration's profile. For Jurgen Basedow, arbitration best reflected the law of Karl Popper's Open Society, and its attendant values of rationality, the Rule of Law, open dialogue and tolerance.[233] With the exception of Owen Fiss, who warned about the dilution of justice in the informalism movement, there were few outspoken critics. Litigation was acrimonious, outmoded, and provincial, arbitration was lean, efficient, and presented a seemingly simple solution to the popular notion that America was a litigious society, flooded with needless lawsuits.

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leftwing critique of arbitration should not be allowed to prevail. The interests of American citizens should be given expression through the triumph of arbitration and the workable form of adjudication it embodies." Carbonneau, Thomas E. "Arguments in Favor of the Triumph of Arbitration." *Cardozo Journal of Conflict Resolution.* 10 (2008): 396.

[232] Carbonneau, "Arguments in Favor of the Triumph of Arbitration." 396.

[233] Basedow, Jürgen. *The Law of Open Societies: Private Ordering and Public Regulation of International Relations: General Course on Private International Law*. Place of pub? Martinus Nijhoff Publishers, 2013.

An entire host of functions were attributed to the arbitration revolution. Arbitration had a key role to play in the transcending the limitations of national courts, and of upholding principles of justice in a globalized economic system. It was credited with surmounting outmoded judicial formalism, and of providing new avenues for people to get justice. Arbitration values and practices were sufficiently flexible to be integrated in all kinds of conflict. One of the best testaments to the success of ADR values is the popularity of Robert Fisher and William Ury's bestselling *Getting to Yes*, which promoted ADR and the principles of "interest-based dispute resolution". Rather than resorting to adversarial procedure, disputants could tailor their own forms of dispute resolution with the aid of a mutually appointed party. The scope of Fisher and Ury's project was ambitious. As they saw it, ADR principles were just as applicable to family disputes as they were to the Arab-Israeli conflict. They advocated the techniques in their book not only to lawmakers and managers, but also to families, couples and entrepreneurs.

The optimism that surrounded arbitration extended to both the domestic and international settings. Arbitration was not just a promulgator of speed and

efficiency, but of democratic values. As Carbonneau wrote in a response to critics,

> Arbitration does not contribute to, or act as a vehicle for, injustice; rather, it fills wide gaps and makes adjudication accessible to individuals by promoting economy and effectiveness through the provision of expertise, basic fairness, and binding determinations. Statutory rights and the freedom from discrimination are more certain of application in an adjudicatory process that can actually function.[234]

For some time, the critics of arbitration seem not only outnumbered, but to be hopelessly out of fashion. Criticism of arbitration was equated with a defense of litigation in court, something that was neither particularly well viewed, nor seen as desirable. Worse still, at the end of the Cold War, precisely at the historical moment when the Soviet behemoth of state-planning was crumbling, proponents of adjudication sounded *statist.* Why would anyone deny willing disputants the opportunity to resolve their disputes amongst one another if it did not come at anyone else's expense? There in fact was very little opposition to arbitration, and its popularity was evidenced by its broad-backed basis of support both business, access to justice circles and community groups.

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[234] Carbonneau, "Arguments in Favor of the Triumph of Arbitration." 396.

The seemingly untrammeled ascent of arbitration, both international and domestic, however, has recently been met with a backlash that members of the profession do not appear to have seen coming – and the attack is coming from multiple fronts.

At the domestic level, the use of mandatory arbitration agreements has drawn criticism from progressive jurists for not only violating the consensual nature of arbitration, but of superimposing unfair rules that place consumers workers in an unfair position against business. While no immediate linkage is normally made between domestic and international arbitration. There are commonalities in the focus on secrecy, opacity, and lack of oversight. In 2016 criticism of investment arbitration – hitherto confined to academic circles – drew tens of thousands of Europeans to march against the Transatlantic Trade and Investment Partnership (TTIP) and the Transpacific Partnership (TPP), both of which were to include privately administered arbitration tribunals for the resolution of international trade conflict. In Berlin, some 250,000 gathered in opposition to CETA and the TTIP. Though these protests focused on the way multinationals would use the Canada Europe Trade Agreement, and the TTIP to avoid environmental, consumer protection and labor laws – it was the structure of the arbitration tribunals that

drew some of the most heated criticism from onlookers. The TTIP, TPP, and CETA (all of which have been indefinitely scrapped by the Trump Administration) would have integrated arbitration tribunals that were not only isolated from public oversight, but had no mechanisms available for challenge or review. The secretiveness of the selection of investment arbitrators, and the small pool from which they are drawn, made the operation of these tribunals seem completely removed from public engagement and democratic processes.

These types of objections to arbitration have not been delimited to and demonstrations, they have found expression in mainstream electoral politics. U.S. Senator Elizabeth Warren, for example, claimed that ISDS was used by corporations to challenge environmental, health, and safety regulations, including decisions on plain packaging rules for cigarettes , natural resource policies, health and safety measures, and denials of permits for toxic waste dumps. Perhaps most interestingly, criticisms of international arbitration not been confined to the political left. The neo-corporatist Trump campaign (dismissed by many until its eventual victory in November of 2016) took many political commentators by surprise when Trump announced that the U.S would back out of further TTIP and TTP negotiations – and would seek to renegotiate the North American Free Trade

Agreement – whose own arbitration tribunal has been subject of repeated political contestation for decades. Unlike the left, the nationalist flank of the conservative movement attacks multilateral arbitration agreements, not because they promote business interests at the expense of the general public, but because they erode national sovereignty, and surrender U.S power to the forces of liberal internationalism and "globalization".

There has also been greater attention to the manipulative use of arbitration in the domestic setting. In the 2016, Jessica Silver Greenberg and Robert Gebeloff, writing for the New York Times, reported on widespread use of mandatory arbitration clauses in consumer and employment contracts, and the way that business were using them to avoid unwanted litigation.[235] These arbitration agreements are not only conducted in private, but administered by business-friendly arbitrators. Greenberg and Gebeloff documented the widespread use

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235 Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, New York Times Dealbook (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 [https://perma.cc/4ZHD-LWTW].

Jed. S., Rakoff, *Why You Won't Get Your Day in Court*, New York Review of Books, (Nov. 24, 2016), http://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court/ [https://perma.cc/7KRG-KXQD].

these agreements by American retailers including Sears, Macy's and Wal-Mart, as well as by credit card companies like Visa, Mastercard and American Express. Such criticisms have been echoed by U.S. jurists. Jed Rakoff of New York's Southern District Court has repeatedly criticized the way that business use of mandatory arbitration clauses in consumer and employment contracts to deny weaker parties their day in court. More recently, these criticims have been articulated by Supreme Court justice Elena Kagan, who already since her 2010 appointment by Barack Obama, has issued a number of dissenting opinions against the Roberts Court's pro-arbitration stance.

What these critiques unwittingly share in common is a focus on inequality between disputants. If arbitration was unjust, this clearly had to do with the asymmetries of power between disputants, not with the broader architecture of the arbitration system as such. But what about disputes involving parties of relatively equal bargaining power. The critics' well-meaning focus on inequality, however, was ultimately informed by time-honored liberal principles. Contracts are legitimate so long as they are entered into willingly. Things went wrong when one party was able to use its superior wealth, connections, influence over another to gain a favorable outcome. What this well-meaning suspicion of arbitration left

out, however, was an extraordinarily large segment of the arbitration system; the segment administering disputes *between* large-scale corporations. It was merely assumed that any problem with such disputes would be offset by these disputants wealth. I also suspect that such disputes were not ultimately seen to involve substantive issues of *justice.* Corporate litigation has an air of technicality and routine to it that does not strike observers as being as worthy a *cause* of justice as criminal trials, discrimination suits, and civil rights issues. In fact, this is precisely Gillian Hadfield's argument. The segment of the arbitration system administering disputes between corporations could be effectively quarantined from the rest of the legal system, thereby allowing judges to rule on more pressing issues.

The general assumption that arbitration between corporate disputants can safely be left to business to administer is an empirical oversight *caused* by a set of ideological parameters. It is a longstanding conceit of liberal political theory that a harmonious society can be achieved through a balancing of interest group power *through* the state. But what of those social frictions that are not only left unresolved, but unaddressed altogether? In the 19th century, that major contradiction, at least according to the followers of Marx and Engels, was class warfare. Today, it may well be ecological survival. The arbitration system has a

brilliant and elegant conceptual architecture to hide its true impact – but that does not mean that this system is adequate as a historical and sociological explanation of arbitration's function. The arbitration system's claims to legitimacy, I claimed, concealed direct and indirect forms of distributive conflict. To challenge this view, I sought to go to the root of arbitration ideology and its basis in private law theory. I then moved to the institutional actors who insist of defending this set of parameters.

This dissertation has sought to identify the constellation of practices and values associated with arbitration as a *politics*. This politics may be oblique, and it certainly does not have the same candor or rhetoric as the politics that dominate national headlines, but it can nevertheless be positively identified.

To shed light on this arbitral politics, I did three things.

First, I traced the development of the Federal Arbitration Act historically. Most histories focus on the testimony of the official spokespersons of the arbitration movement; Charles Bernheimer and Julius Cohen. But in the background was a vast business lobby that financed, organized, and supported the movement.

Drawing on the New York Chamber of Commerce's Annual reports, as well as on documents detailing the members of the Arbitration Society of America, I showed how corporate capital figured prominently in the arbitration movement. Owen Young, one of the key figures of the arbitration movement, was himself CEO of the RCA Corporation, and directly involved in anti-trust arbitration while the FAA was being developed. 1920s arbitration thought, I argued, was rooted in a laissez-faire paradigm that sought to give as much latitude to business to order their affairs as they pleased. It is precisely for this reason that contemporary libertarians return to the FAA to draw inspiration. What they do mention is that the 1920s paradigm was severely challenged throughout the New Deal, and then again in the postwar period by a new generation of jurists who saw the Lochner doctrine as a thinly veiled defense of big business.

Second, I went to the very core of arbitration ideology, the private law relation that is established as a matter of contract, and ultimately governed by national arbitration law. This seemingly elegant and simple doctrine, I showed, is more puzzling than first meets the eye. Contractual relations normally have meaning because they are enforced in accordance with common-law principles. In arbitration however, it is coming to be the case that contracts are enforced

because it is considered expedient to do so. This is true of individual arbitration agreements, but also, for the vitality of the arbitration system as a whole. But what kind of justice does that lead to? Surely enforcement in the name of speed and efficiency is not itself a theory of justice. It turns out however, that it is concurrently the basis of the Supreme Court's argument in favor of arbitration.

This focus on speed and efficiency *as animating principles* begs the question as to what the substance of arbitral justice actually is. It turns out that we do not know much about this – and we cannot know, because the data that would be required to make such an assessment either are not available or simply do not exist. We are not, however, completely in the dark. Challenges to arbitral awards, the exposure of cases that were thought to be confidential via leaks, and points of friction between competing policy proposal and judicial rulings tell us a lot about the stakes in question. The forces that have to combat the Such anecdotal or incomplete information can take us so far, but if people wanted to know the full extent and scope of the power of contemporary arbitral justice, it would require a full public investigation that, for the time being (and given the current political climate) seem very far removed from the realm of possibility.

The prevailing theory of *contractualism*, I claimed, obscures the impact, scale and dimensions of the segment of the arbitration system that is serving corporations. Arbitration is supposed to involve two parties and two parties only – but it clearly is being used in areas where third parties are affected. The private law theory upon which arbitration law is based is for lack of a better term, a necessary illusion that sustains contemporary arbitration practices, and the income of the arbitrators and lawyers who draw their income from it.

Third, I focused on the corporate actors who themselves have sought to alter the course of arbitration law. Drawing on policy memos of the organizations like the Center for Public Resources and the Business Roundtable of the U.S. Chamber of Commerce, I showed how a new corporate lobby is trying to push arbitration law in a pro-business direction. These actors actively lobby the Supreme Court through amicus briefs and conduct public relations campaigns to promote arbitration. The Supreme Court plays a very important role in shaping arbitration law. The late Justice Scalia played a major role in directing this politics in a pro-business direction. Given the conservative consolidation of the Court in the recent confirmations of Neil Gorsuch and Brett Kavanaugh, it would appear as though the Court is prepared to continue in the spirit of contractualist doctrine, while

ignoring or downplaying the objections the more liberal justices, particularly those of Elena Kagan, who has been the most vocal on the arbitration front.

While there are reasons to believe things will get worse, or will not change, I will remark the following. Even over the course of writing this dissertation, perceptions about international and domestic arbitration were clearly in motion. Critiques that were at one time relegated to the margins of academia began seeing greater discussion. The Corporate Europe Observatory's Profiting from Injustice, for example, drew a great deal of academic attention. Gus Van Harten's work on the inequalities of international investment arbitration became the focal point of discussion in the events leading to the TPP and TTIP negotiations. Perhaps most importantly, an entire generation of young legal academics went through a crash course in arbitration as the proponents of the TTIP and TPP crash and burned in the wake of the U.S's exist from further talks. The new generation is increasingly attuned to issues of transparency, environmental justice, and human rights. There is undoubtedly a general malaise with arbitration, and this malaise has arisen in academic, policy-making, and commentary. Some of it seem to have made the arbitration movement increasing self-conscious. Increasingly, the titles of arbitration conferences speak of a crisis of legitimacy, the need for awareness of

human rights issues, and transparency deficit. Still, merely talking about these issues does not necessarily mean that anything will be done about them. None of criticisms of arbitration have yet to be translated into any comprehensive political vision that would issue a challenge, let alone "replace" the existing arbitration regime.

Some Remarks Concerning Potential Avenues for Future Research

One of the things that struck me most over the course of this project is how little is actually known about corporate litigation at all. Economists have general models and data to study virtually every aspect of modern trade and investment. This is distinctly not true of the legal scholars who study contemporary dispute resolution. Not only is there very little data – that which does exist is not as reliable as commonly used economic indicators. To aggravate matters, there is a paucity of corporate litigation *theory*. There is no general theory of corporate litigation – why it arose, how it has changed, or what drives it today. The main brunt of the material consists of individual cases – not *patterns of disputing behavior*. Case analysis, for all its intrigue, gives one very little sense of the size, scope, frequency and impact of litigation *generally*. Clearly, however, corporate

litigation is important, and not just because it involves vast sums of money. Corporate conflict is important because it tells us a lot about the social frictions what our most important business actors face, and how they are resolved, if at all.

At present, there is very little reliable data, and that which does exist in painstaking to collate in any meaningful sense. In the literature review, I relied greatly on the work of the Wisconsin Business Disputing Group led by Marc Galanter, Thomas Palay, Terence Dunworth and Joel Rogers. This group is one of the few to systematically inquire into the patterns of litigation of the Fortune 1000. Apart from this, very little has been written about the political-economy of the corporate litigation system, let alone the segment of the arbitration system serving corporations. Much more could be written about corporate litigation, and even more could be written about corporate *arbitration.* This dissertation merely scratched the surface of the multi-billion dollar industry for business disputes. Given the increasing importance of such conflict – especially in high-impact areas like natural resources, defense, and intellectual property, future research could seek to shed light on the profitability of private dispute resolution markets.

There is clearly an aura intrigue surrounding commercial arbitrators themselves. For the most part, they come across as extraordinarily articulate and learned legal practitioners whose judgment is well worth the money that they charge their clients. Intrigue and "virtue" is one thing, but what do arbitrators get paid, how much money do the arbitration services offered by private service providers and the major law firms generate, and what are the determinants of competition and change in the sector? Other areas of the professions, like medicine, are intensively studied. But we still lack any meaningful body of knowledge, especially quantitative knowledge, of the arbitration profession. Future research could zone-in on these aspects of commercial arbitration.

Apart from these very significant empirical deficits, there is also a lack of meaningful arbitration theory. Most of what passes for arbitration theory is in fact appraisal of arbitration and ADR values. A lot of arbitration scholarship is in fact written by arbitration practitioners whom, it would appear, have a strong interest in promoting it. This dissertation sought to take arbitration theory seriously, and by way of immanent critique, to shed light on its limits. The language of contractualism that is at the heart of arbitration law needs to be subject to greater scrutiny. What good are contracts without a governing body of law to enforce

them, and then again, without a system of oversight to ensure that they are enforced in accordance with meaningful principles. These statements cannot be taken for granted or at face value. It cannot merely be assumed that arbitration is in fact an expression of liberal principles of contract. More work needs to be done on the substantive content of arbitral justice, and to analyze that content in relation to traditional conceptions of justice.

Finally, this dissertation showed how development in U.S arbitration law cannot be disassociated from the international arbitration system. Too many studies treat these systems as discretely separate spheres than have no bearing on one another. In reality, the boundaries of these respective systems are far more porous and fluid that one might expect, especially given the routine way in which they are usually separated.

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