Why We Really Need the Arbitration Fairness Act

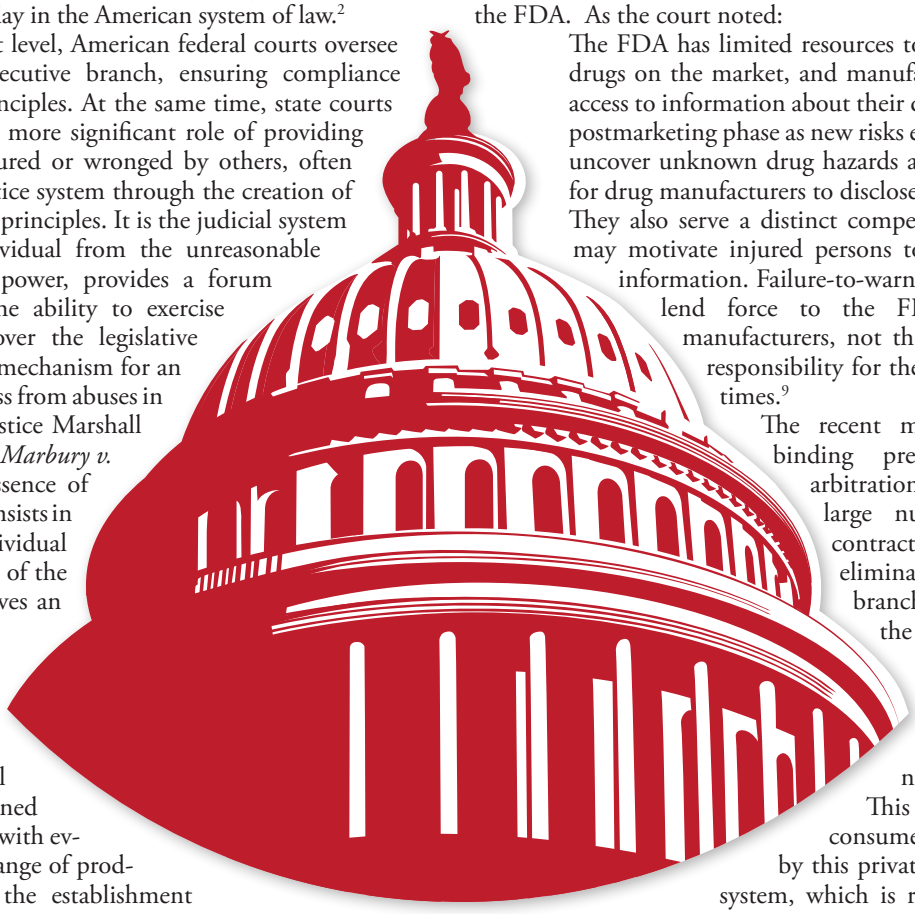
It's All About Separation of Powers

©Richard M. Alderman*

Introduction

Ask any American middle-school student to explain his or her system of government and you will quickly be told of "separation of powers"—the division between the legislative, judicial and executive branches of government—a system of "checks and balances."[1] We have long appreciated the way in which our founding fathers established an independent judiciary, and the important role courts play in the American system of law.[2]

At the highest level, American federal courts oversee the legislative and executive branch, ensuring compliance with constitutional principles. At the same time, state courts serve the perhaps even more significant role of providing remedies for those injured or wronged by others, often supplementing our justice system through the creation of common law rules and principles. It is the judicial system that protects the individual from the unreasonable exercise of legislative power, provides a forum for those who lack the ability to exercise significant influence over the legislative process, and provide a mechanism for an individual to seek redress from abuses in the marketplace. As Justice Marshall long ago recognized in *Marbury v. Madison*, "The very essence of civil liberty certainly consists in the rights of every individual to claim the protection of the law, whenever he receives an injury."[3]



American consumers have benefited greatly from this Anglo-American legal culture. Our civil justice system has spawned judicial reform dealing with everything from a wide range of product safety issues,[4] to the establishment of premises liability and the creation of performance standards in landlord-tenant[5] and service contracts.[6] Courts have become increasingly receptive to claims of overreaching,[7] and have liberally construed our many consumer protection laws to provide increased protection from false, misleading and deceptive acts.[8] As the Supreme Court recently recognized, private civil lawsuits are often necessary to supplement statutory regulation, for example the FDA. As the court noted:

> The FDA has limited resources to monitor the 11,000 drugs on the market, and manufacturers have superior access to information about their drugs, especially in the postmarketing phase as new risks emerge. State tort suits uncover unknown drug hazards and provide incentives for drug manufacturers to disclose safety risks promptly. They also serve a distinct compensatory function that may motivate injured persons to come forward with information. Failure-to-warn actions, in particular, lend force to the FDCA's premise that manufacturers, not the FDA, bear primary responsibility for their drug labeling at all times.[9]

The recent movement to impose binding pre-dispute mandatory arbitration[10] in an increasingly large number of consumer contracts, however, threatens to eliminate this "fundamental" branch of government from the consumer law arena, substituting a system of private, often secret, justice,[11] neither bound by precedent nor able to create it.[12] This article considers how consumers' rights are impacted by this privatization of the judicial system, which is rapidly resulting from

widespread use of pre-dispute mandatory arbitration.[13] It suggests that as consumer access to the civil justice system and juries is reduced or eliminated, consumer protection similarly decreases.[14] The article concludes with a bit of optimism that the Arbitration Fairness Act, prohibiting pre-dispute binding arbitration, must be, and in fact may be, enacted by Congress.[15]

American Consumer Protection.

As a "movement," American consumer protection is relatively young. Consumerism began in earnest in the 1960's. [16] Federal legislation, such as the Truth in Lending Act,[17] attempted to level the playing field through meaningful disclosures and standardization. Numerous other state and federal laws were enacted to deal specifically with false, misleading and deceptive practices and warranties. For example, at the federal level the Magnuson-Moss Warranty Act[18] attempted to establish minimum warranty standards, while the states enacted lemon laws and deceptive trade practice acts of varying scope and applicability.[19] Even the Uniform "Commercial" Code provided some special protections for consumers, creating implied warranties, making it more difficult to limit damages, and easier to sue remote parties.[20]

Along with the enactment of new laws came a change in the manner in which consumer protection laws were enforced. Early in the 20th century, the enforcement of consumer protection measures generally was left to federal and state governments. It was soon recognized, however, that private litigation and private remedies were necessary to achieve effective reform. Writing almost 40 years ago, Professor William Lovett[21] correctly noted the importance of private enforcement:

> Consumer protection has achieved dramatic new popularity within the last few years, and as a result, significant progress has been made in regulating product safety, enforcing disclosures to the public, and in making deceptive trade practices unlawful at the state and local—as well as federal—levels of government. But much less has been done to provide adequate private remedies in the law against frauds or other deceptive trade practices which victimize consumers. There is still too little appreciation of the very healthy and complementary relationship that should exist between private and administrative remedies for deceptive trade practices, even though the potential for such complementary remedies is amply demonstrated in federal securities and antitrust law. What we need now in the deceptive trade practices area is comparable development of private remedies to match the recent growth of government investigation and prosecution efforts. *Without effective private remedies the widespread economic losses that result from these trade practices remain uncompensated and furthermore, private remedies are highly desirable for additional consumer bargaining power and more complete discipline against fraud in the marketplace.*[22]

Professor Lovett's desire for private remedies quickly came to fruition. Most consumer statutes provide for liberal remedies and possible treble damages in a sufficient amount to justify litigation, and perhaps more importantly, for the award of attorneys' fees for a successful consumer.[23] Private litigation of consumer disputes did not just supplement public enforcement, it effectively replaced it.

The Role of the Courts—Interpretation and Creation of Law.

1. Interpreting the Law.

As consumer litigation increased, courts found themselves dealing more and more with consumer issues. For example, all of the newly enacted laws had to be applied and interpreted--consumer legislation was not always the best example of judicial clarity and precision. Perhaps more importantly, the gaps left by the failure of the legislature to act, or the enactment of ambiguous legislation, provided an opportunity for courts to create common law doctrine. During the past four decades, American consumer law has been created, modified, reformed, and refined by the courts. Perhaps no other area of law better demonstrates the role of the courts in our civil justice system, and the relationship between its three branches of government.

A recent decision of the United States Supreme Court indicates how essential the courts are to implementing our consumer laws and maintaining their consistent application. In 1995, Congress amended section 1640(a)(2)(A) of the Truth-in-Lending Act, changing the remedy provisions for a violation of the Act.[24] Unfortunately, the language used by Congress was not the most precise, and courts gave differing interpretations to a significant issue—whether damages under this section were capped at $1,000.[25] In *Koons Buick GMC, Inc. v. Nigh*[26], the United States Supreme Court was called on to resolve the controversy that had arisen, and provide an interpretation that would allow for consistent application of the law. The Supreme Court, with five separate opinions, held that the cap applied.[27] Without the ability of a court to review this statute, and render a decision that was binding on all other courts to consider the issue, lower courts would have continued a non-uniform application of the statute, and consumers and businesses would remain uncertain as to how to apply the law. As demonstrated by *Koons Buick,* the American system of binding precedent and *stare decisis* ensures that damages under the Truth-in-Lending Act will now be computed is a consistent manner. All courts must now abide by the meaning given section 1640(a)(2)(A) by the Supreme Court.

2. Creating Common Law.

In the our system of government, it also is not unusual for state courts to create legal rights. While the legislature enacts laws, courts "legislate" through their interpretation of legislation, as well as enactment of the "common law." Every first year student at an American Law School is taught that precedent and stare decisis are the foundations of the common law. Courts are bound by precedent and must follow decisions of higher courts, and all courts should give serious consideration to the rationale of others. [28] As Justice Stone noted almost seventy years ago, the common law's,

> [D]istinguishing characteristics are its development of law by a system of judicial precedent, its use of the jury to decide issues of fact, and its all-pervading doctrine of supremacy of the law—that the agencies of government are no more free than the private individual to act according to their own arbitrary will or whim, but must conform to legal rules developed and applied by courts.[29]

Through this process of judicial precedent, courts create and mold legal rights, co-existent with, and supplemental to, those created by statute.[30]

Although the current consumer protection movement is relatively young, American courts have attempted to deal with the problems presented by marketplace deception and product defects since the turn of the 20th century. Both tort and contract theories have been used as methods of providing consumer redress. The development of traditional contract and tort theories to deal with consumer issues demonstrates the application of our common law tradition. For example, contract law, primarily warranty, offered consumers a cause of action that was often easier to establish

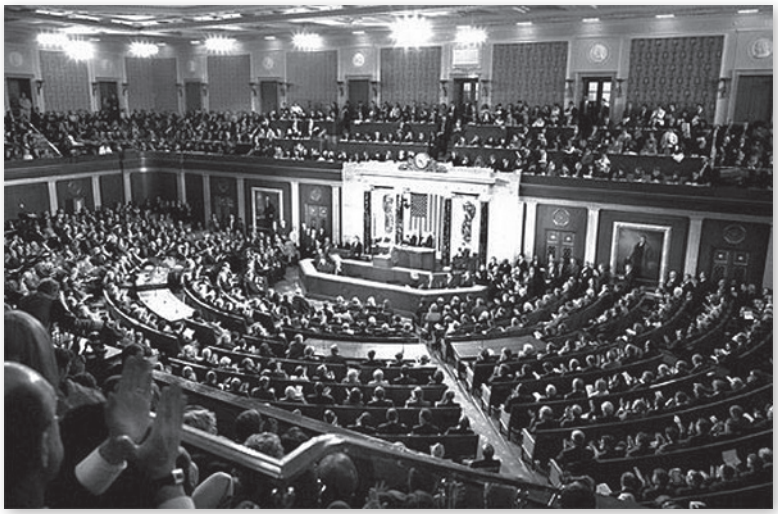
than tort, however, it required privity and was easily limited or disclaimed. Tort liability, on the other hand, was available without privity, but it was often more difficult to establish because of culpability requirements inherent in the concept of negligence or scienter requirements of fraud or misrepresentation. Gradually, both contract and tort requirements were judicially relaxed to permit liability for personal injury without regard to fault or privity, and provide a claim for false representations without regard to knowledge or intent.[31]

More recently, American courts have found less need for major doctrinal pronouncement, and a much greater demand for review of more specific scenarios. Decisions such as *Williams v. Walker-Thomas Furniture Co.,*[32] *Unico v. Owen*[33] and *Henningsen v. Bloomfield Motors, Inc.,*[34] refused to put form over substance and provided relief to consumers. Today, courts are often called on to deal with individual claims of overreaching, and must regularly deal with the application of traditional principles to newly developed technology, such as the internet.[35]

The courts also provide a significant "gap-filling" role, dealing with transactions that either slip through the cracks of legislation or simply were not dealt with. One of the most significant roles of the common law is maintaining consistency between similar rights in the absence of legislative action. For example, the Uniform Commercial Code comprehensively governs contracts for the sale of goods. Until the enactment of Article 2A, lease agreements were treated in a similar manner by common law analogy to Article 2.[36] Today, Article 2 and 2A comprehensively regulate the creation of warranties, as well as disclaimers and damage limitations, in the sale or lease of goods. There is no similar statute, however, governing service contracts. Analogous law in the area of service contracts, therefore, is left to common law development by the courts.[37] The state of Texas provides a good example of how this area of law has been developed and demonstrates the importance of the courts to the creation of consumer rights.

Until 1987, the Texas Supreme Court had not recognized an implied warranty in a service contract. In *Melody Home Manufacturing Co. v. Barnes*,[38] the court noted that the United States had shifted from goods to a service oriented economy. Based on a "public policy mandate," the court imposed a warranty of good and workmanlike performance in any contract to repair or modify existing tangible goods or chattels. The court also defined the warranty as "the quality of work performed by one who has the knowledge, training, or experience necessary for the successful practice of a trade or occupation and performed in a manner generally considered proficient by those capable of judging such work."[39]

As with the development of any judicially created rule, *Melody Home* has been refined, modified, expanded and limited in the years since it was decided. The Texas Supreme Court has cited the opinion no less than a dozen times, initially broadening its scope and recently sharply limiting it. For example, after some question,[40] the Texas Supreme Court held the warranty does not apply to professionals,[41] and recently the court excluded certain "incidental services."[42]



Meanwhile, more than 100 other Texas courts have cited *Melody Home* in their opinions. This is the life of the common law—a deliberate process of molding doctrine to the times. It is also a process that probably would not have occurred if the problem that gave rise to the decision in *Melody Home* arose today. *Melody Home* involved a manufactured home. The likelihood is that today, the contract in *Melody Home* would have contained a clause mandating arbitration—precluding a court from considering any of the legal issues involved.

Consumer Arbitration—Bye-Bye Courts

For some time now, arbitration has been heralded as a panacea for the ills of the American judicial system. It has been widely touted as a voluntary system of alternative dispute resolution, that is more efficient, less expensive, and more flexible than our clogged and congested courts. The use of an alternative forum to hear consumer disputes would seem to be the best of both worlds; prompt resolution for consumers, and less expense for business.

Arbitration is generally viewed by the courts reviewing it as nothing more than a voluntary forum selection clause, simply moving a dispute to a more convenient, efficient, and less expensive forum.[43] Recently, arbitration clauses have been embraced by American courts, particularly the Supreme Court, with open arms, uniformly adopting a pro-arbitration stance.[44] The support shown by the United States Supreme Court has been well documented,[45] and is demonstrated by the Court's decision in *Buckeye Check Cashing, Inc. v. Cardegna.*[46]

Cardegna involved the question of whether an arbitration clause in an illegal and void payday loan agreement was enforceable against a consumer. The supreme court of Florida held that the arbitration clause was not enforceable, and the illegality of the contract was an issue for the courts. The United States Supreme Court disagreed. It noted three propositions for determining the validity of an arbitration clause:

> First, as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract. Second, unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance. Third, this arbitration law applies in state as well as federal courts.[47]

Applying these rules, the Court held that the issue of whether the contract was illegal was to be decided by the arbitrator, pursuant to the contract's arbitration provision. An arbitration clause, even if contained in an otherwise unenforceable contract, is none the less enforceable.

Consumer Arbitration—Substance Over Form

As noted above, the courts "strongly favor" arbitration clauses, even in consumer contracts, based on the notion that such clauses are valid contract provisions, knowingly and intentionally entered into, and that such clauses do not deny any substantive rights. In fact, however, consumer arbitration is not about an alternative forum for dispute resolution, it is about a modification of

substantive rights. Consumer arbitration is often simply a way for a business to reduce the number of disputes, avoid the courts and juries, and achieve more favorable results. Arbitration is not about relocating or simplifying consumer dispute resolution; it is about eliminating consumer disputes and controlling their resolution.

For example, a recent article discussing damages for mental anguish in Alabama suggests that the current Alabama rule is an improper extension of the law, resulting in overly generous damage awards in cases involving the sale of automobiles and homes.[48] The authors provide strong support for the argument that the Alabama courts should review and modify this rule. The authors, however, may never see their article considered by the courts. The Alabama courts may never have the opportunity to modify the law in a way consistent with the premise of the article. Why? Because auto dealers and homebuilders have taken matters into their own hands and "opted out" of our civil justice system. They have found a way to avoid the laws of Alabama, and achieve the results they want. As the authors of the article note:

> The auto and home industries, fearing catastrophic verdicts before Alabama juries, now require customers, nearly across-the-board, to enter into pre-dispute binding arbitration agreements as a condition of doing business. These industries have effectively divorced themselves from the Alabama civil justice system in hopes of obtaining fairer and more just awards before arbitrators.[49]

As this excerpt indicates, American businesses dissatisfied with the civil justice system may privatize the dispute resolution process through arbitration, thereby controlling outcome as well as forum. The Alabama auto and homebuilding industries did not choose arbitration to promptly resolve disputes or provide consumers with an alternative forum. They imposed arbitration to avoid the legal rules of Alabama that would be applied by a court and jury.[50]

The use of arbitration to achieve substantive results different from what would be available in the courts not only circumvents our legal system, it also denies the courts the opportunity to review legal doctrine and make changes when appropriate.[51] The validity of arbitration clauses is based on the premise that they are a voluntarily chosen alternative forum of dispute resolution. In the consumer context, arbitration is anything but voluntary and it is becoming the norm, not an alternative. A recent study of commercial arbitration clauses supports the proposition that the widespread use of arbitration in consumer cases may in fact be based on something other than the efficiency benefits of an alternative forum:

> We present evidence that large corporate actors do not systematically embrace arbitration. International contracts include arbitration clauses more than domestic contracts, but also at a surprisingly low rate. Our results have implications for the justifications for the widespread use of arbitration clauses in consumer contracts. If the reasons that some have advanced to support the use of arbitration in the consumer context - that it is simpler and cheaper than litigation - are correct, it is surprising that public companies do not seek these advantages in disputes among themselves. In the simple economic view, our results suggest that corporate representatives believe that litigation can add value over arbitration. [52]

Consumer Arbitration Under Attack.

In response to this privatization of justice, arbitration in America, particularly pre-dispute consumer arbitration, has come under attack by consumer advocates and others who have found fault with both the manner in which arbitration is agreed to, the process itself, and the results of arbitration proceedings.[53] For example, the adhesive nature of the contracts upon which arbitration is based is often cited as a reason to not impose arbitration on the consumer.[54] Courts and commentators alike have also noted the often-excessive costs of arbitration, which may deny access to those unable to pay.[55] A recent dissenting opinion in a Florida arbitration decision summarizes the situation most consumers face:

> What we have begun to see is that virtually all consumer transactions, no matter the size or type, now contain an arbitration clause. And with every reinforcing decision, these clauses become ever more brazenly loaded to the detriment of the consumer -- who gets to be the arbitrator; when, where, how much it costs; what claims are excluded; what damages are excluded; what statutory remedies are excluded; what discovery is allowed; what notice provisions are required; what shortened statutes of limitation apply; what prerequisites even to the right to arbitrate are thrown up -- not to mention the fairness or accuracy of the decision itself. The drafters have every incentive to load these arbitration clauses with such onerous provisions in favor of the seller because the worst that ever happens, if the consumer has the resources to go to court, is that the offending provisions are severed. The state courts, demoralized by the United States Supreme Court's disapproval, have too often allowed these overreaching provisions to succeed. Most consumers can't read them, won't read them, don't understand them, don't understand their implication and can't afford counsel to help them out.[56]

An additional problem inherent in the widespread use of arbitration is the fact that an arbitration clause may preclude the use of the class actions device.[57] Although widely criticized, the class action device often proves a valuable tool for achieving consumer redress, and controlling the marketplace. In *Greentree Financial Corp. v. Bazzle*,[58] the Supreme Court recognized that an arbitration clause was not invalid when applied to a request for class action status and relief, and that arbitration could be conducted as a "class arbitration." The Court also held that the interpretation of an arbitration provision in an arbitration clause was to be decided by the arbitrator. Thus, whether the proceeding may be maintained as a class action, and the procedures employed to do so, are questions for the arbitrator. More significantly than what the court proclaimed, however, is what it did not discuss. The *Bazzle* Court did not resolve the question of whether an arbitration clause could prohibit class relief. In light of the deference shown to an arbitration clause and the weight given to the notion of freedom of contract when interpreting them, it appears that in light of *Bazzle*, a contractual prohibition on class action status may be enforceable.[59] It may be just a matter of time before "anti-class action clauses"[60] are included in all agreements, possibly eliminating the consumer class action.[61]

It may be argued, as it has been with arbitration in general, that all the Court did in *Bazzle* was shift the forum for class actions from the courts to arbitration. Even assuming the correctness of this statement, and that arbitration provisions are not drafted to preclude class action, the arbitration class action and arbitrations in general do not provide the same relief in terms of either procedure or substance. Even in the event a class action arbitration is held, there may be no requirement that the process comply with the due process requirements imposed upon the courts.[62]

Finally, consumers forced to arbitrate are also subject to what is perceived as the unfair advantage for the repeat player.[63] It has been argued that the repeat player, such as the business that has

thousands of arbitrations a year compared to the consumer who has just one, has an unfair advantage due to its greater familiarity with the process, as well as the process itself. In most arbitrations, either party as the right to "strike" an arbitrator. The repeat player, therefore, may be favored by the arbitrator because of the possible consequence of ruling against it. Arguably, the arbitrator, who could be precluded from hearing a large number of cases, will consciously or subconsciously favor the repeat player rather than risk offending him and be "blackballed" in the future.[64]

Due to the secret nature of most arbitrations and unavailability of public data, it is hard to verify or dispel the repeat player advantage. The *Christian Science Monitor*, however, recently evaluated available data from the National Arbitration Forum [NAF], one of the largest arbitration organizations.

> A *Monitor* analysis of the last year of available data from NAF found that arbitrators awarded in favor of creditors and debt buyers in more than 96 percent of the cases. Such results may be similar to outcomes in court. It also found that the 10 most frequently used arbitrators – who decided almost 60 percent of the cases heard – decided in favor of the consumer only 1.6 percent of the time, while arbitrators who decided three or fewer cases decided for the consumer 38 percent of the time.[65]

The *Monitor* also found support for the notion that arbitrators who rule against business are "blackballed" and not selected again. "[T]wo former NAF arbitrators say banks took them off of cases after they issued rulings unfavorable to the institution."[66]

All of the above arguments against the use of arbitration clauses in consumer contracts are to some extent valid; some even compelling. Yet none of these arguments will be discussed here. Instead, the remainder of this article will focus on a different, and perhaps substantially more significant problem inherent in the widespread use of consumer arbitration—the elimination of a core component of the American justice system.

The Real Problem

As binding pre-dispute arbitration is increasingly used, and consumer access to the civil justice system is proportionately denied, consumer protection in the United States will be diminished as business structures a system of private dispute resolution that it finds acceptable.[67] Arbitration clauses and arbitration procedures will be designed to choose the system of arbitration that most favors business, and clauses will be drafted in a manner that precludes attack and limits redress, within the limits imposed by the courts. [68] For example, language will be included to prevent the use of class actions, and costs will be structured to be sufficiently low enough to meet unconscionability and due process standards, yet sufficiently high enough to deter many valid consumer claims.

Under the current system, it appears inevitable that consumer arbitration will eventually replace litigation.[69] As consumer dispute resolution is fully privatized, the development and application of consumer law in America gradually will be skewed toward those who control the process. For example, in most arbitrations, arbitrators are selected through a process that enables either side to eliminate potential arbitrators. In commercial arbitrations, arbitrators must be concerned with fairness because either party may exercise its pre-emptive strike against that arbitrator in a future dispute. For example, an arbitrator who rules "unreasonably" in favor of one party or the other will soon be without work[70]. The fact that both sides to the dispute will have the right in the future to again select an arbitrator, helps ensure fairness. Common sense tells us that one of the reasons an arbitrator must be fair and impartial is that an arbitrator will not be inclined to rule in a manner one side finds offensive, and which may adversely affect his or her future selection.[71]

This concept works well in commercial arbitrations, but not in the consumer context. Unlike commercial arbitration, where each party has the same potential to be involved in future disputes and exercise equal influence over the selection process, in consumer arbitration one party is involved in multiple arbitrations, while the other is a one-shot player. For example, a bank or credit card company may be involved in thousands of arbitrations a year. The consumer is generally involved in one. Arbitrators, consciously or unconsciously, are probably aware of the fact that a few adverse decisions could preclude him or her from selection in the future. Consumers are not repeat players, and lack the ability to obtain information from others regarding arbitration decisions because such decisions generally are not published. A system of private justice will always favor those who control access and the purse strings.[72] As noted above, this is explicitly recognized in Alabama, where auto dealers and homebuilders have chosen to "opt-out" of the civil justice system to obtain the substantive benefits of arbitration.[73]

Precedent and Stare Decisis

Even assuming an arbitrator is committed to impartially following the law; he or she still cannot create or shape it. Therein lies perhaps the most serious problem with increased use of arbitration. The interpretation of statutes, the development of the common law, and the courts' ability to continually establish and refine legal rights depends upon litigants, cases, public written opinions, and appeals regarding questions of law.[74] Arbitration eliminates litigation, preventing our appellate courts from playing the role they were designed to play in our civil justice system. [75]

Even assuming an arbitrator is committed to impartially following the law; he or she still cannot create or shape it. Therein lies perhaps the most serious problem with increased use of arbitration.

Unlike court opinions, most of which are published, most decisions of arbitrators are secret, and are often not even accompanied by a written opinion. Even when published and made available to the public, the decision of one arbitrator or panel of arbitrators, is in no way binding on any other arbitrator or panel. In fact, arbitrators generally are not compelled to follow the law,[76] and their decisions are not appealable.[77] Arbitration precedent and stare decisis do not exist. Arbitrators can interpret the law, but the interpretation of one arbitrator is not binding upon another. Consequently, arbitration lacks the ability to formulate policy, impose consistency, or change existing law. Most would argue, and I concur, that this is the way it should be. Arbitrators are not elected judges; they do nothing more than decide the single dispute before them.[78] The problem, however, is that our beliefs regarding the value of arbitration are based on the underlying assumption that arbitration is an "alternate" method of dispute resolution. In other words, many disputes will remain within our civil justice system and our courts will continue to actively mold the common law. Consider the possible effects as this alternative system of justice becomes the norm.

Return to the development of the warranty of good and

workmanlike performance in Texas, beginning with the Texas Supreme Court's decision in *Melody Home Manufacturing Co. v. Barnes.*[79] *Melody Home* involved a dispute over services performed on a manufactured home. The likelihood today is that the contract for the sale of that home would include an arbitration provision. The Barneses would be in arbitration, not court. The arbitrators would apply the law, not create it, and implied warranties in service contracts would not exist.

Arbitration precludes the courts from creating substantive rights through the common law. It also prevents the modification of existing rights. The common law allows the courts to create the law, and it also allows them to change it.[80] In theory, this consequence of precluding access to the courts favors neither side to a dispute. It is neither pro-consumer nor pro-business.

For example, in *Melody Home*,[81] the Texas Supreme Court created a very pro-consumer warranty, of apparently broad applicability. Recent decisions, however, have limited its scope and drawn into question its continued validity.[82] Because most consumer contracts now contain a mandatory arbitration clause, the case that gave rise to the opinion in *Melody Home* may never have arisen, or there might not have been subsequent decisions that limited it. In other words, arbitrators could find themselves applying law that a court, if given the opportunity, might modify, or even reverse. Arbitration has the potential to "freeze" the common law as it exists at the time universal arbitration is imposed, creating a "time warp" of consumer protection, unable to accommodate change.

But this analysis ignores an important fact: arbitration in consumer contracts is imposed almost as a matter of right by businesses. American consumers have no choice but to agree, businesses have the choice to leave out an arbitration provision whenever they wish to pursue litigation, or waive arbitration, and proceed to court. Through the sophisticated use and enforcement of mandatory arbitration provisions, business may engage in a form of selective creation of the common law. That is, selecting which disputes, if any, our courts will be allowed to deal with. In other words, consumer arbitration may stall the development of the common law, or even worse, it may allow business to control common law development to accommodate the needs of business.

Consumer Arbitration is Different

It is recognized that much of the above discussion applies to all forms of arbitration, not just consumer arbitration. For example, employment, securities or commercial arbitration also have the potential to preclude resort to the courts.[83] It is suggested, however, that consumer arbitration presents a unique situation that exacerbates the problems inherent in arbitration. What is special about consumer arbitration and why does it present problems different from those presented in other contexts, such as commercial agreements or employment contracts? First, arbitration is not used with the same frequency in non-consumer contexts. Commercial parties actually bargain for an arbitration provision, and many commercial contracts do not include such provisions. In the employment context, many employees do not work subject to a written arbitration provision.[84] Further, even a valid arbitration clause in an employment contract does not prevent litigation from being brought by a federal agency on behalf of the employee.[85] In the consumer context, however, there is in fact no bargain and arbitration provisions are becoming universal. For example, all of the major credit card companies, most banks, most home builders, and many service providers, including professional service providers, currently include an arbitration provision in their agreements.[86] As businesses realize the advantages of arbitration, more and more begin to include such provisions. Based solely on my personal experiences and anecdotal stories from friends and colleagues, it appears that today, most written consumer agreements contain an arbitration provision.

Second, commercial parties have the resources to influence legislators and government agencies to deal with problems through legislative or administrative rulings. For example, automobile dealers who found it unfair that they be forced to arbitrate recently successfully encouraged Congress to amend the Federal Arbitration Act to prevent automobile manufacturers from imposing arbitration on dealerships.[87] Similarly, employees have labor organizations, as well as federal regulatory agencies such as the EEOC, to represent their interests within legislative and regulatory communities. Consumers, on the other hand, have almost no effective lobbying group, and little in the way of support from agencies such as the FTC. Consumers have historically relied upon litigation and the courts to provide relief from false, misleading, deceptive and unconscionable practices.

Finally, consumer law is a newer body of law and consequently is undergoing more changes than might be seen in other areas. Until 40 years ago, there were few consumer statutes and *caveat emptor* reigned. Federal and state consumer law is still being actively interpreted by the courts and common law doctrines of fraud, deceit, misrepresentation and warranty continue to undergo substantial change.

In other words, although pre-dispute mandatory arbitration may present problems in the context of commercial or employment agreements, consumer arbitration poses the greatest challenge to the our common law tradition. Consumers must rely more upon the courts to establish and refine rights. Yet at the same time, they are being precluded from the courts with greater frequency.

Conclusion

As discussed above, binding pre-dispute mandatory arbitration clauses are quickly becoming the norm in consumer contracts. Mandatory arbitration is imposed on consumers who lack the knowledge or bargaining power to knowingly agree to waive their right to use the courts, and in a manner that imposes significant increased costs and substantial deterioration

of substantive rights. For these reasons alone, steps should be taken to slow down or stop the advance of pre-dispute mandatory arbitration clauses in consumer contracts. But as this article has pointed out, there is an additional and perhaps more compelling reason businesses should not be allowed to unilaterally preclude access to the courts.

Our civil justice system relies on courts and juries to regulate the marketplace. Unlike many other countries, private lawsuits are the means by which American consumers are compensated for damage caused by over-reaching, and most consumer protection laws have been enacted based on the premise that they will be enforced by private lawsuits in our courts.

The common law is the system that we have adopted and developed over the centuries for ensuring the law stays current with rapidly changing social and economic conditions. As Justice Harlan F. Stone noted, "If one were to attempt to write a history of the law in the United States, it would largely be an account of the means by which the common-law system has been able to make progress through a period of rapid social and economic change." [88] The American judiciary is much more than just a check on the legislative and executive branches of government. It is an independent branch of government, often looking out for the rights of those who lack the power or influence to receive the attention of our elected representatives. Our common law tradition is an essential part of the development and continuation of consumer protection;[89] arbitration destroys it.

Pre-dispute mandatory arbitration must not be allowed to preclude consumer access to the courts and circumvent the civil justice system. Courts must be able to decide issues of statutory interpretation, and precedent must be established to maintain consistency of results and provide certainty for the decision making process of parties who must predict the result of legal challenges. For example, it is extremely doubtful any of the legal issues surrounding the use of credit cards and credit card agreements will again see the light of a courtroom. Thus, questions such as the one recently addressed by the United States Supreme Court in *Koons Buick GMC, Inc. v. Nigh,*[90] will be left to individual arbitrators, who will be free to decide the case as they see fit, with no consistency of results, and no applicable standard the next time the same issue arises.

Although consumers have had some success challenging individual arbitration provisions, it is just a matter of time until business structures the "perfect" clause, immune from judicial attack.[91] As I have noted elsewhere,[92] the only way to prevent the continued growth of arbitration and the degeneration of consumers' rights, is through a change in federal law, namely amending the Federal Arbitration Act. Current law assumes the validity of arbitration provisions and makes it extremely difficult to avoid enforcement. Exceptions to the current law, designed to ensure arbitration agreements are voluntary and consumers are provided a meaningful choice, must be enacted. The simplest change is to preclude pre-dispute arbitration clauses in consumer contracts, while permitting parties to agree to arbitration after a dispute has arisen and other alternatives have been considered.[93] The law must ensure that consumers retain the right to resolve disputes through the civil justice system, and that the common law tradition continues to be a viable part of our system of justice. What are the chances that will soon happen?

On July 12, 2007, Senator Russell Feingold and Representative Hank Johnson introduced the Arbitration Fairness Act[94] in Congress. The Act was recently re-introduced as the Arbitration fairness Act of 2009.[95] The Act prohibits the use of pre-dispute binding arbitration clauses in consumer and employment contracts.[96] If enacted, it will restore the consumers' right to sue and ensure that American courts continue to play a significant role in the development of consumer rights. Hopefully, Congress will see the wisdom in this bill and promptly enact it. My fear, however, is that the business lobby may be too strong for consumers to expect any prompt, favorable action.[97]

* Associate Dean, Dwight Olds Chair in Law and Director of the Center for Consumer Law, University of Houston Law Center. LL.M. University of Virginia, 1973; J.D. Syracuse University, 1971; B.A. Tulane University, 1968. An earlier version of this article appears as "*The Future of Consumer Law in the United States, So-long Consumer Protection,"* 257-285 The Yearbook of Consumer Law 2009 (2009)

1 A popular children's book states:

> There are three branches of federal government, charged with different responsibilities. The legislative branch (the House of Representatives and the Senate) creates laws for the nation. The executive branch (headed by the president of the United States) executes, or carries out, the laws. The judicial branch (The Supreme Court and other lower courts) interprets the law and can overrule them.
>
> In addition to separating powers, the Constitution also provides for numerous ways in which these bodies of government overlap. This is so they can check up on one another in case one body does something that isn't good for the country.

Mark Friedman, Government, at 12 (2005).

2 For example, two books on very different topics discussed our separation of powers and the importance of an independent judiciary. *See* Carl T. Bogus, Why Lawsuits are Good for America at 45 (2001) ("The division of powers among three branches of government is perhaps the most fundamental feature of American government. It is also the feature most distinctly American."), and David McCullough, John Adams at 222 (2001) ("But it was through the establishment of an independent judiciary, with judges of the Supreme Court appointed, not elected, and for life, that Adams made one of his greatest contributions not only to Massachusetts but to the country, as time would tell.").

3 5. U.S. 137, 163 (1803). *See also* Thomas Phillips, *The Constitutional Right to a Remedy,* 78 N.Y.U.L.Rev. 1309 (2003), wherein he quotes Sir Edward Coke:

> Every subject of this realm, for injury done to him in goods, lands, or person, by any other subject, be he ecclesiastical, or temporal, ... or any other without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay…
>
> Justice must have three qualities; it must be ... free; for nothing is more odious than Justice let to sale; full, for justice ought not to limp, or be granted piecemeal; and speedily, for delay is a kind of denial; and then it is both justice and right

Id. at 1321. (portions of quotation translated from Latin by Phillips).

4 "The single greatest development of the common law during the twentieth century has been the creation of a new area of law known as products liability." Carl T. Bogus, Why Lawsuits are Good for America at 137 (2001). *See also* Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 Seattle U. L. Rev. 1, 35 (2004) (While negligence cases are most numerous in tort law, the most significant area of development in neoclassical law was the law of products liability).

5 For example, some courts have created an implied warranty

of habitability in residential leases. *See, e.g.,* Javins v. First Nat'l Realty Corp., 428 F.2d 1071 (D.C. Cir. 1970); Pines v. Perssion, 14 Wis. 2d 590, 111 N.W.2d 409 (1961). Similar protections have also been provided to commercial tenants. *See* Davidow v. Inwood N. Prof'l Group, 747 S.W.2d 373 (Tex. 1988).

6 *See, e.g.,* Melody Home Mfg. Co. v. Barnes, 741 S.W.2d 349 (Tex. 1987) (implied warranty of good and workmanlike performance in contract to repair or modify existing tangible goods or property). *See also* Humber v. Morton, 426 S.W.2d 554 (Tex. 1968) (implied warranty of good and workmanlike performance and habitability in contract for construction of new home).

7 Perhaps the most notable decision to consider overreaching in a consumer context is *Williams v. Walker-Thomas Furniture Co.,* 350 F.2d 445 (D.C. Cir. 1965) (applying unconscionability to a consumer contract).

8 A recent book review comments upon the development of plaintiffs common law rights in tort:

> In 1969 Robert Keeton wrote that "the most striking impression that results from reading the weekly outpouring of torts opinions handed down by appellate courts across the nation for the decade commencing in 1958 is one of candid, openly acknowledged, abrupt change." Keeton observed that the state courts had, between 1958 and 1968, "candidly and explicitly" overruled precedents in a "wide range of problems in the law of torts," and he listed ninety overruling decisions on at least thirty-five topics, ranging from eliminating or limiting common law immunity doctrines, to expanding the right to recover for pure emotional distress, to expanding the doctrine of strict liability. As Gary Schwartz famously commented, until the early 1980s these changes were "almost all triumphs for plaintiffs; the collection of these cases could be referred to as "plaintiffs' greatest hits.'"

Anthony J. Sebok, *Dispatches From the Tort Wars,* 85 Tex. L. Rev. 1465, 1110-11 (2007). (Reviewing William Haltom and Michael McCann, Distorting the Law: Politics, Media, and the Litigation Crisis; Herbert M. Kritzer, Risks, Reputations, and Rewards: Contingency Fee Legal Practice in the United States; and Tom Baker, The Medical Malpractice Myth.)

9 Wyeth v. Levine, 129 S. Ct. 1187, 1202 (2009).

10 I have chosen to use the term "pre-dispute mandatory arbitration" to emphasize that the practice under consideration is the use of arbitration agreements contained in a contract entered into prior to the existence of a dispute. As others have recognized, pre-dispute arbitration itself is often referred to as "mandatory arbitration." *See, e.g.*, Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute (Mandatory) Arbitration Outlived Its Welcome?*, 40 Ariz. L. Rev. 1069 (1998). This essay uses the phrases "pre-dispute mandatory arbitration" and "mandatory arbitration" synonymously.

11 In most cases, the decisions of arbitrators are private. In fact, it is not unusual for arbitrators to rule without any written opinion.

12 The "threat" posed by the privatization of law may already be real. In a recent article discussing the effect of arbitration on the development of contract law, Professor Charles L. Knapp notes the diminishing number of decisions discussing contract issues. He notes, "Far and away the most pervasive contract-related issue litigated during this period [2002] has been this: Will the court enforce an arbitration contract in the parties' written agreement?" Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 Fordham L. Rev. 761, 763 (2002). *See also* Chris A. Carr and Michael R. Jenks, *The Privatization of Business and Commercial Dispute Resolution: A Misguided Policy Decision,* 88 Ky. L. J. 183 (1999).

13 I recognize that others have discussed the effects of the privatization of law through arbitration agreements. *See, e.g.,* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law,* 71 Fordham L. Rev. 761, 798 (2002), wherein the author concludes with a question and answer:

> Can powerful private interests with the ability to control most of the terms of most of the contracts they make, deprive large segments of American society of their access to the courts for which all of us pay, and to which all of us have historically had access? The answer, until now, sadly, to some of us—they apparently can. And do. And will.

See also Geraldine Szott Moohr, *Arbitration and the Goals of Employment Discrimination Law,* 56 Wash. & Lee L. Rev. 395 (1999) (arbitration does not produce a uniform or consistent law). As will be discussed in this paper, however, I believe that the impact of arbitration on consumer law is of particular concern because of the increasingly widespread use of mandatory arbitration in consumer cases, and consumers' inability to meaningfully bargain for an alternative.

14 Other authors have noted the broader impact arbitration may have upon our civil justice system. *See, e.g.,* Jean R. Sternlight, *The Rise and Spread of Mandatory Arbitration as a Substitute for the Jury Trial*, 38 U. San Francisco L. Rev. 17, 38 (2003) ("If our society is to eliminate the civil trial right we should do so in the open, following a full public discussion. It is wrong to allow companies to use mandatory arbitration clauses to surreptitiously eliminate this precious right.").

15 The Arbitration Fairness Act prohibits the inclusion of pre-dispute arbitration clauses in consumer contracts, as well a certain other agreements where one side lacks sufficient bargaining power to negotiate terms. Congress has been considering prohibitions on pre-dispute consumer arbitration clauses for two years. The 2009 bill is the Arbitration Fairness Act of 2009, S. 931, H.R. 1020, 111th Cong. (2009). In 2008, the bill, which was not enacted, was Senate Bill: Arbitration Fairness Act, S. 1782, 110th Cong. (2007), House Bill: Arbitration Fairness Act, H.R. 3010, 110th Cong. (2007).

16 Webster's dictionary defines consumerism as "a movement for the protection of the consumer against defective products, misleading advertising, etc." Limited consumer protection was present until the 1950s and early 1960s. In the 1950s, a significant breakthrough occurred with the establishment of the product-liability concept, whereby a plaintiff did not have to prove negligence but only had to prove that a defective product caused an injury. In his 1962 speech to Congress, President John F. Kennedy outlined four basic consumer rights, which later became known as the Consumer Bill of Rights. Later, in 1985, the United Nations endorsed Kennedy's Consumer Bill of Rights and expanded it to cover eight consumer rights. Consumer protection can only survive in highly industrialized countries because of the resources needed to finance consumer interests. Kennedy's Consumer Bill of Rights included the right to be informed, the right to safety, the right to choose, and the right to be heard." Answers.com, available at http://www.answers.com/topic/consumer-bill-of-rights?cat=biz-fin

17 15 U.S.C.A. §§1601—1667. Although there was some pre-1960s consumer protection legislation, it usually was directed primarily at attempts to increase competition or eliminate a very specific health or safety problem.

18 Manguson-Moss Warranty—Federal Trade Commission Improvement Act of 1975, Title 1, §§101-112, 15 U.S.C.A. §§2301-11. *See generally*, Curtis R. Reitz, Consumer Protection Un-

der the Magnuson-MOSS Warranty Act (2d ed 1987).

19 For a list of all state deceptive trade practice legislation, and an excellent discussion of the subject, see Unfair and Deceptive Acts and Practices 6th ed (2004 and supp.), published by the National Consumer Law Center. *See generally* Richard M. Alderman and Dee Pridgen, Consumer Protection and the Law 2008 Edition (2008).

20 *See, e.g.,* sections 2-312, 2-316, 2-318 and 2-719 of the UCC.

21 *See* William A. Lovett, *Private Actions for Deceptive Trade Practices*, 23 Admin. L. Rev. 271 (1970).

22 *Id.*at 271.

23 For example, the Truth in Lending Act, a federal consumer credit law, provides that a successful consumer claimant shall be entitled to recover from the creditor "the costs of the action, together with a reasonable attorney's fee as determined by the court," as well as punitive damages between $100 and $1,000. TILA §130(a)(3); 15 U.S.C. §1640(a). The Texas Deceptive Trade Practices Act, a state consumer protection statute, allows for attorney's fees and punitive damages up to three times economic and mental anguish damages. Tex. Bus. & Com. Code §17.50(a)(b). Most state consumer laws allow the recovery of reasonable attorneys' fees, *see generally* Richard M. Alderman and Dee Pridgen, Consumer Protection and the Law 2008 Edition (2008); Unfair and Deceptive Acts and Practices 6th ed (2004 and supp.), published by the National Consumer Law Center.

24 Truth in Lending Act Amendments of 1995, Pub L 104-29, § 6, 109 Stat 274.

25 As the Supreme Court noted, "We granted certiorari, to resolve the division between the Fourth Circuit and the Seventh Circuit on the question whether the $100 floor and $1,000 ceiling apply to recoveries under §1640(a)(2)(A)(i)." Koons v. Buick GMC, Inc., 543 U.S. 50, 59 (2004).

26 543 U.S. 50 (2004).

27 *Id.* at 64. The opinion was written by Justice Ginsburg, joined by Justices Rehnquist, Stevens, O'Connor, Kennedy, Souter, and Breyer. Concurring opinions were issued by Justice Stevens, joined by Justice Breyer; Justice Kennedy, joined by Chief Justice Rehnquist; and Justice Thomas. Justice Scalia dissented.

28 The importance of *stare decisis* was recently recognized by the Supreme Court:

> Basic principles of *stare decisis,* however, require us to reject this argument. Any anomaly the old cases and *Irwin* together create is not critical; at most, it reflects a different judicial assumption about the comparative weight Congress would likely have attached to competing legitimate interests. Moreover, the earlier cases lead, at worst, to different interpretations of different, but similarly worded, statutes; they do not produce "unworkable" law. Further, *stare decisis* in respect to statutory interpretation has "special force," for "Congress remains free to alter what we have done.". Additionally, Congress has long acquiesced in the interpretation we have given.

John R. Sand & Gravel Co. v. United States, 128 Sup. Ct. 750, 756 (2008) (citations deleted).

29 Harlan F. Stone, *The Common Law in the United States,* 50 Harv. L. Rev. 4, 5 (1936).

30 The need for a common law supplement to legislation has been described as follows:

> Our society has an enormous demand for legal rules that actors can live, plan, and settle by. The legislature cannot adequately satisfy this demand. The capacity of a legislature to generate legal rules is limited, and much of that capacity must be allocated to the production of rules concerning governmental matters, such as spending, taxes, and administration; rules that are regarded as beyond the courts' competence, such as the definition of crimes; and rules that are best administered by a bureaucratic machinery, such as the principles for setting the rates charged by regulated industries. Furthermore, our legislatures are normally not staffed in a manner that would enable them to perform comprehensively the function of establishing law to govern action in the private sector. Finally, in many areas the flexible form of a judicial rule is preferable to the canonical form of a legislative rule. Accordingly, it is socially desirable that the courts should act to enrich that supply of legal rules that govern . . . [business] conduct-not by taking on lawmaking as a free-standing function, but by attaching much greater emphasis to the establishment of legal rules than would be necessary if the courts' sole function was the resolution of disputes.

Carr and Jencks, *supra* note 12 at 193. *See generally* Jay M. Feinman, *Un-Making Law: The Classical Revival in the Common Law*, 28 Seattle U. L. Rev. 1 (2004) (discussing changes and trends in the development of the common law).

31 *See, e.g.,* McPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (eliminating the requirement of privity); Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1963) (imposing strict products liability). *See generally* Prosser, *The Fall of the Citadel (Strict Liability to the Consumer),* 50 Minn. L. Rev. 791 (1966). *See also* Seavy, *Caveat Emptor as of 1960*, 38 Tex. L. Rev. 439 (1960); Hester*, Deceptive Sales Practices and Form Contracts—Does the Consumer Have a Private Remedy?,* 1968 Duke L.J. 831 (1968).

32 350 F.2d 445 (D.C. Cir. 1965).

33 50 N.J. 101, 232 A.2d 405 (1967).

34 32 N.J. 358, 161 A.2d 69 (1960).

35 This is not to imply that recent decisions uniformly recognize the lack of bargaining in the typical consumer contract of adhesion. In fact, most courts use a traditional contract analysis to find assent and a valid contract. *See generally* Jean Braucher*, The Afterlife of Contract,* 90 Nw. U. L. Rev. 49 (1995).

36 *See, e.g.,* KLPR TV, Inc. v. Visual Electronics Corp., 327 F. Supp. 315 (W.D. Ark. 1971) (express warranty in leased equipment); Sarafanti v. M.A. Hittner & Sons, 35 App. Div.2d 1004, 318 N.Y.S.2d 352 (1970) (implied warranty in lease of automobile). *See generally* Hawkland, *Impact of the Uniform Commercial Code on Equipment Leasing,* 1974 Ill. L. F. 446 (1972). *See also* Amelia H. Boss, *The History of Article 2A: A Lesson for Practitioner and Scholar Alike,* 39 Ala. L. Rev.575 (1988); Edwin E. Huddlesin, III, *Old Wine in New Bottles: UCC Article 2A—Leases,* 39 Ala. L. Rev. 615 (1988).

37 For a general discussion of the development of the law with respect to the sale of goods and service transactions, see Ellen Taylor, *Applicability of Strict Liability Warranty Theories to Service Transactions*, 47 S.C. L. Rev. 231 (1996).

38 741 S.W.2d 349 (Tex. 1987).

39 *Id.* at 354.

40 In *Archibald v. Act III Arabians,* 755 S.W.2d 84 (Tex. 1988), the court suggested that the warranty could be applied to professional services.

41 Murphy v. Campbell, 964 S.W.2d 265 (Tex. 1998) (no implied warranty for professional services).

42 Rocky Mountain Helicopter, Inc. v. Lubbock County. Hosp. Dist., 987 S.W.2d 50 (Tex. 1999) (no implied warranty for services incidental to helicopter maintenance).

43 *See, e.g.,* Scherk v. Alberto-Culver Co., 417 U.S. 506, 519 (1974) ("An agreement to arbitrate before a specified tribunal is,

in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute.")

44 The provisions of the FAA [Federal Arbitration Act] manifest a "liberal federal policy favoring arbitrations agreements." Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991). This pro-arbitration stance of the Supreme Court began in earnest with the decision in Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983). Subsequent Supreme Court cases all evidence a strong pro-arbitration position. *See, e.g.,* Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (FAA's employee exception should be narrowly construed); Green Tree Fin. Corp. v. Randolph, 531 U.S. 79 (2000) (Possibility of excessive costs is insufficient to defeat arbitration clause); Doctor's Assocs., Inc. v. Casarotto, 517 U.S. 681 (1996) (FAA preempts state statute restricting arbitration); Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (courts should "rigorously enforce agreements to arbitrate").

45 "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, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like to arbitrability." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983). *See also* Shearson/Am. Express, Inc. v. McMahon, 482 U.S. 220, 226 (1987) (stressing that courts should "rigorously enforce agreements to arbitrate"); Dickinson v. Heinold Sec., Inc., 661 F.2d 638, 643 (7th Cir. 1981) (describing the "established federal policy that, when constructing arbitration agreements, every doubt is to be resolved in favor of arbitration"); Wick v. Atl. Marine, Inc., 605 F.2d 166, 168 (5th Cir. 1979) (asserting that courts should stay proceedings pending arbitration "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue"); Becker Autoradio U.S.A., Inc. v. Becker Autoradiowerk GmbH, 585 F.2d 39, 44 (3d Cir. 1978) (recognizing that even in international agreements, the federal courts continue to favor arbitration of disputes); Germany v. River Terminal Ry. Co., 477 F.2d 546, 547 (6th Cir. 1973) (acknowledging that using arbitration to resolve disputes, with consent of the parties, reduces "court congestion").

46 546 U.S. 440 (2006).

47 *Id.* at 446.

48 W. Scott Simpson, Stephen J. Ware, and Vickie M. Willard, *The Source of Alabama's Abundance of Arbitration Cases: Alabama's Bizarre Law of Damages for Mental Anguish,* 28 Am. J. Trial Advoc. 135 (2004).

49 *Id.* at 177. The authors also note that, "It is virtually impossible now for Alabama consumers to purchase a new automobile or home without first signing a pre-dispute arbitration agreement. *Id.* at 138.

50 Although the auto and home industries have "divorced" themselves from the Alabama civil justice system, I assume that if the courts adopted a more pro-business stance these same industries would again "opt-in" to the civil justice system by removing their arbitration provisions. Because the decision of whether to include an arbitration provision rests exclusively with the business, business alone can determine when to arbitrate and when to allow a matter to proceed to court.

51 As a general rule, a court may not review the decision of an arbitrator. A federal court may set aside an arbitration award under the FAA only upon a finding that certain statutory or judicial grounds are present." The Andersons, Inc. v. Horton Farms, Inc., 166 F.3d 308, 328 (6th Cir. 1998). Those statutory grounds are:

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10. It is extremely unusual for a court to find a basis upon which to set aside an arbitrator's decision.

Although some courts have also allowed review of an arbitrator's decision based on additional "non-statutory" grounds, such as manifest disregard of the law, that approach appears to no longer be proper. For example, in *Citigroup Global Mkts, Inc. v. Bacon*, 562 F.3d 349 (5th Cir. 2009), the U.S. Court of Appeals for the Fifth Circuit held manifest disregard is no longer a basis to vacate arbitration awards. The court noted that its ruling was demanded by the reasoning of the Supreme Court's decision in *Hall Street Associates v. Mattel*, 128 S. Ct. 1396 (2008). In *Citigroup*, the court stated:

> The question before us now is whether, under the FAA, manifest disregard of the law remains valid, as an independent ground for vacatur, after *Hall Street*. The answer seems clear. *Hall Street* unequivocally held that the statutory grounds are the exclusive means for vacatur under the FAA. Our case law defines manifest disregard of the law as a nonstatutory ground for vacatur. Thus, to the extent that manifest disregard of the law constitutes a nonstatutory ground for vacatur, it is no longer a basis for vacating awards under the FAA.

52 Theodore Eisenberg and Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies,* 56 DePaul L. Rev. 335, 373-74 (2007).

A recent article discusses arbitration, and compares it with an alternative, a contract to modify the rules of litigation. Henry S. Noyes, *If You (Re) Build It, They Will Come: Contracts to Remake the Rules of Litigation in Arbitration¹s Image*, 30 Harv. J.L. & Pub. Pol. 579 (2007). As the article points out, contractual modification of the rules of litigation can offer the parties substantial procedural and cost benefits over the current alternative, arbitration. Parties do not, however, use such contractual agreements in consumer arbitration, and it is unlikely they will. As discussed above, this is because arbitration in consumer cases is not used to provide a simpler, quicker, more efficient and less costly alternative to litigation. It is used to change the substantive results of the civil litigation system. As Professor Noyes points out, if business truly wanted a better alternative to our current litigation system, it could contractually modify the rules to effectuate cost and time reductions, while maintaining the traditional role of the courts.

53 *See, e.g.,* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform,* 38 Hous. L. Rev. 1237 (2001); Anne Brafford, *Arbitration Clauses in Consumer Contracts of Adhesion: Fair Play or Trap for the Weak and Unwary?* 21 J. Corp. L. 331 (1996); Frederick L. Miller, *Arbitration Clauses in Consumer Contracts; Building Barriers to Consumer Protection,*

78 Mich. B.J. 302 (1999); David S. Schwartz, *Correcting Federalism Mistakes in Statutory Interpretation: The Supreme Court and the Federal Arbitration Act*, 67 Law & Contemp. Probs. 5 (2004) David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration,* 1997 Wis. L. Rev. 33; Richard E. Speidel, *Consumer Arbitration of Statutory Claims: Has Pre-Dispute [Mandatory] Arbitration Outlived its Welcome?,* 40 Ariz. L. Rev. 1069 (1998); Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns,* 72 Tul. L. Rev. 1 (1997).

54 One of the few challenges to arbitration provisions that has met with limited success is unconscionability. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002) (employer's "Dispute Resolution Agreement" is unconscionable and unenforceable); Gibson v. Neighborhood Health Clinics, Inc., 121 F.3d 1126, 1131 (7th Cir. 1997) (declining to enforce an employment arbitration agreement in the absence of consideration); Hull v. Norcom, Inc., 750 F.2d 1547, 1550 (11th Cir. 1985) (holding that "the consideration exchanged for one party's promise to arbitrate must be the other party's promise to arbitrate at least some specified class of claims" and, absent such an exchange, an arbitration provision in an employment agreement is invalid and unenforceable); Ting v. AT& T, 182 F. Supp.2d 902 (N.D. Cal. 2002) (agreement unconscionable where consumer had no meaningful choice); Kloss v. Edward D. Jones, 2002 Mt. 123, 54 P.3d 1 (Mont. 2002) (arbitration agreement in contract of adhesion not enforceable); Armendariz v. Found. Health Psychare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000) (refusing to enforce an agreement to arbitrate employment disputes and finding the agreement unconscionable because it required arbitration for claims brought by employees but did not require arbitration of claims brought by the employer); Stirlen v. Supercuts, Inc., 60 Cal. Rptr. 2d 138, 158–59 (Cal. Ct. App. 1997) (declaring an arbitration clause in an employment agreement unenforceable, unconscionable, and against public policy because it was adhesive, the duty to arbitrate was unilateral, and the terms unfairly benefited the employer).

55 The United States Supreme Court recently had an opportunity to rule on this point in *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79 (2000). The court side-stepped the issues, however, noting that although "[i]t may well be that . . . large arbitration costs could preclude a litigant . . . from effectively vindicating her federal statutory rights, ... [t]he 'risk' that Randolph will be saddled with prohibitive costs is too speculative to justify the invalidation of an arbitration agreement." *Id.* at 91. For cases that have considered the effect of excessive costs, see e.g., Paladino v. Avnet Computer Technologies, Inc., 134 F.3d 1054 (11th Cir. 1998); Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997); Dunlap v. Berger, 567 S.E.2d 265 (W. Va. 2002); Armendariz v. Foundation Health Psychare Servs., Inc., 6 P.3d 669, 694 (Cal. 2000).

Although most small claims courts provide a judge and jury for less than $100, the costs of arbitration far exceed this amount. A recent study by Public Citizen concludes that the costs of arbitration almost always exceed the costs of litigation. *The Costs of Arbitration, April 2002.* (The report's publication number is B9028. It is available from Public Citizen, www.citizen.org) For example, AAA cites $700 per day as the average arbitrator's fee in 1996. Kenneth May, *Labor Lawyers at ABA Session Debate Role of American Arbitration Association*, 31 Daily Lab. Rep. (BNA) A-12 (Feb. 15, 1996). Judicial Arbitration and Mediation Services arbitrators charge an average of $400 per hour. Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 Hofstra Lab. & Emp. L.J. 381, 410 n.189 (1996). Fees up to $600 per hour are not uncommon. *See* Margaret A. Jacobs, *Renting Justice: Retired Judges Seize Rising Role in Settling Disputes in California*, Wall St. J., July 26, 1996, at A1; David Segal, *Have Name Recognition, Will Mediate Disputes*, Wash. Post, Dec. 16, 1996, Wash. Bus. at 5. The CPR Institute for Dispute Resolution estimates arbitrators' fees of $250-$350 per hour and 15-40 hours of arbitrator time in a typical employment case, for total arbitrators' fees of $3,750 to $14,000 in an "average" case. CPR Inst. For Dispute Resolution, Employment ADR: A Dispute Resolution Program for Corporate Employers I-13 (1995).

56 Mercedes Homes, Inc. v. Colon, 966 So. 2d 10, 28-29 (Fla. Ct. App. 2007) (Griffin, dissenting).

57 In *Greentree Financial Corp. v. Bazzle*, 399 U.S. 444 (2003), the Court recognized class arbitration, and held that the interpretation of an arbitration provision in an arbitration clause was to be decided by the arbitrator.

Courts to consider whether such clauses preclude a class action have reached differing results. For example, in *Discover Bank v. Superior Court of Los Angeles*, 36 Cal. 4th 148, 167, 113 P.3d 1100, 1110, 30 Cal. Rptr. 3d 76, 87 (2005) the California Supreme Court found a class action prohibition unconscionable and unenforceable, stating:

> We do not hold that all class action waivers are necessarily unconscionable. But when the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then, at least to the extent the obligation at issue is governed by California law, the waiver becomes in practice the exemption of the party "from responsibility for [its] own fraud, or willful injury to the person or property of another." Under these circumstances, such waivers are unconscionable under California law and should not be enforced.

The Ninth Circuit reached a similar conclusion with respect to a cell phone contract. *See* Shroyer v. New Cingula Wireless Servs., 498 F.3d 976 (9th Cir. 2007) ("Applying that law to the class arbitration waiver at issue here, we conclude that under the test set forth in *Discover Bank v. Superior Court of Los Angeles*, 36 Cal. 4th 148 (Cal. 2005), the waiver is both procedurally and substantively unconscionable and, therefore, unenforceable.") *See also* Homa v. American Express Co., 558 F.3d 225 (3rd Cir. 2009) (class action waiver invalid); In re American Express Merchant's Litig., 554 F.3d 300 (2nd Cir. 2009) (class action waiver unenforceable). However, the Supreme Court of North Dakota, in *Strand v. U.S. Bank Nat'l Assoc.*, 693 N.W.2d 918 (2005), recently upheld a class action prohibition, noting:

> Nor has Strand established that he will be left without an effective remedy if the "no class action" provision is enforced. The arbitration provision here requires that the arbitration take place in Strand's home jurisdiction and provides for advancement of fees and costs by the Bank. Furthermore, if Strand prevails in his claim against the Bank he will be entitled to an award of attorney fees…. under the facts of this case the arbitration provision between Strand and the Bank creates a chance that Strand can be made whole through individual arbitration. [t]he facts certified to us have failed to show that enforcement of the disputed contractual provision would leave Strand without an effective remedy. We therefore

> conclude Strand has failed to demonstrate that the "no class action" provision is substantively unconscionable.
>
> Because a showing of both procedural and substantive unconscionability is required to declare a contractual provision unconscionable and unenforceable, we conclude that, under the facts of this case, the "no class action" provision is not unconscionable.

Id. at 927. S*ee generally* Alan S. Kaplinsky & Mark J. Levin, *Consensus or Conflict? Most (But not all) Courts Enforce Express Class Action Waivers in Consumer Arbitration Agreements,* 60 Bus. Law. 775 (2005).

58 539 U.S. 444 (2003).

59 S*ee generally* Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (2000).

60 For example, many arbitration provisions contain clauses similar to this one:

> PLEASE READ THIS AGREEMENT CAREFULLY. IT PROVIDES THAT ANY DISPUTE MAY BE RESOLVED BY BINDING ARBITRATION. ARBITRATION REPLACES THE RIGHT TO GO TO COURT. YOU WILL NOT BE ABLE TO BRING A CLASS ACTION OR OTHER REPRESENTATIVE ACTION IN COURT SUCH AS THAT IN THE FORM OF A PRIVATE ATTORNEY GENERAL ACTION, NOR WILL YOU BE ABLE TO BRING ANY CLAIM IN ARBITRATION AS A CLASS ACTION OR OTHER REPRESENTATIVE ACTION. YOU WILL NOT BE ABLE TO BE PART OF ANY CLASS ACTION OR OTHER REPRESENTATIVE ACTION BROUGHT BY ANYONE ELSE, OR BE REPRESENTED IN A CLASS ACTION OR OTHER REPRESENTATIVE ACTION.

American Express contract provision received by the Author.

61 "Bazzle's twin holdings - and just as importantly, the manner in which arbitration administrators and courts have responded to them - make it possible for corporations to draft arbitration clauses so as to virtually guarantee that claims will not be arbitrated on a classwide basis." Note: *Beyond Unconscionability: Preserving the Class Mechanism Under State Law in the Era of Consumer Arbitration,* 83 Tex. L. Rev. 1715, 1721 (2005). Although some courts continue to uphold such clauses and prohibit class action arbitrations, the recent trend appears to be to invalidate limits on class action arbitrations. *Compare* Gay v. CreditInform, 511 F.3d 369 (3d Cir. 2007) (class action ban enforceable) *with* Dale v. Comcast, 498 F.3d 1216 (11th Cir. 2007) (ban on class arbitration is unenforceable). *See also*, Chalk v. T-Mobile USA, Inc., 560 F.3d 1087 (9th Cir. 2009) (class action waiver was unenforceable and not severable); Homa v. American Express Co., 558 F.3d 225 (3rd Cir. 2009) (class action waiver invalid); In re American Express Merchant's Litig., 554 F.3d 300 (2nd Cir. 2009) (class action waiver unenforceable); Pleasants v. Am. Express Co., 541 F.3d 853 (8th Cir. 2008) (class action waiver enforceable); Scott v. Cingular Wireless, 156 Wn.2d 1001, 135 P.3d 478 (Wash. 2007) (ban on class action arbitration unenforceable); Kinkel v. Cingular Wireless, 223 Ill. 2d 1; 857 N.E.2d 250 (2006) (class action ban is unconscionable).

62 *See, e.g.,* Carole J. Buckner, *Due Process in Class Arbitration,* 58 Fla. L. Rev. 185, 263 (2006) ("State action may require due process in some models of class arbitration, and perhaps would not require such protections under other models.")

63 This theory is based on the seminal work by Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95 (1974). Galanter's thesis was rather simple: repeat-players with substantial assets can use the legal system to their advantage. This conclusion was based on his observations concerning the ability of the "Haves" as repeat-players to manipulate the legal system to optimize long-term results. Those with a greater stake in the outcome of future litigation will attempt to optimize long-term results. *See also* Susan S. Silbey, *Do The "Haves" Still Come Out Ahead?*, 33 Law & Soc'y Rev. 799 (1999) ("Since its publication in 1974, Galanter's paper has been cited more often than any other piece of sociolegal scholarship, and it stands among the most well cited law review articles of all time." (citing Fred R. Shapiro, *The Most-Cited Law Review Articles Revisited*, 71 Chi.-Kent L. Rev. 751, 766 (1996), which ranks Galanter's article as thirteenth on the list of most cited law review articles).

Whether the "haves" come out ahead in consumer arbitration is virtually impossible to prove or disprove. In the consumer context, there is almost no data available. Even in the employment area, where the most data is available, it is hard to come to any meaningful conclusions. This is due, in part, to the fact that the most meaningful statistic would be one that compared not only arbitration numbers, but also similar cases in the courts. *See, e.g.*, Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1485 n.17 (D.C. Cir. 1997) ("It is hard to know what to make of these studies without assessing the relative *merits* of the cases in the surveys."). It must be assumed, however, that if businesses are increasingly imposing mandatory arbitration provisions on consumers, they see some benefit in precluding resort to the courts.

64 *See generally Id*.

65 *Consumer Advocates Slam Credit-Card Arbitration*, July 16, 2007 available at http://www.csmonitor.com/2007/0716/p13s01-wmgn.htm

66 *Id.* The *Christian Science Monitor* report is not alone in finding that consumers do not fare well in arbitration. In a recent study of nearly 34,000 arbitration cases conducted by the National Arbitration Forum in California, it was found that the business prevailed in over 94% of the cases. The study also found that arbitrators charge up to $10,000 a day and some make $1 million a year. The report, entitled, "*The Arbitration Trap: How Credit Card Companies Ensnare Consumers*," shows that "binding mandatory arbitration is a rigged game in which justice is dealt from a deck stacked against consumers." The complete 74 page study is available through Public Citizen at www.citizen.org.

67 Because pre-dispute arbitration clauses are drafted by the business and presented to the consumer on a take it or leave it basis, the business has the ability to draft an arbitration clause in whatever manner is most beneficial to the business. For example, the business may select the arbitration forum, specify the time and location of the arbitration, designate what claims will or will not be subject to arbitration, whether class-action arbitrations will be permitted, and whether there will be a written opinion.

68 One of the results of litigation against arbitration clauses is that even when consumers prevail, the result is often simply a stronger clause used in the future. Many pro-consumer opinions strike specific language and do so with such specificity that it enables the business to modify its arbitration clause in a manner that complies with the law.

69 In fact, this is already happening. Many have noticed that jury trials are vanishing in the United States, and that this has been caused at least in part by the increased use of arbitration clauses. Much has been written recently about the privatization of justice and the vanishing jury trial. *See generally* The Privatization of Justice? Mandatory Arbitration and the State Courts—Report of the 2003 Forum for State Appellate Court Judges (Pound Civil Justice Institute 2006) *See also 2004 ABA Annual Meeting--Program Materials Bench and Bar: The Vanishing Jury Trial (2004)*, available at http://www.abanet.org/abanet/

litigation/mo/premium-lt/prog_materials/2004_abaannual/20.pdf (membership required); Glenn A. Ballard, Jr., *The State of Trial Work – 2007*, 44 Houston Lawyer 6 (2007); Ileana Blanco and Tanya C. Edwards, *Arbitration v. Litigation Pros and Cons: What Business Lawyers Need To Know (Arbitration and the Vanishing Jury Trial)*, 69 Tex. Bar Journal 858 (Oct. 2006); Scott Brister, *Decline in Jury Trials: What Would Wal-Mart Do?,* 47 S. Tex. L. Rev. 191 (2005); Dennis J. Drasco, *The American Jury Project and the Image of the Justice System*, 32 Litigation No. 2 at 1 (2005), *available at* http://www.abanet.org/litigation/journal/opening_statements/ 05winter_openingstatement.pdf; John Fleming, *Using Best Practices to Draft Arbitration Agreements (Arbitration and the Vanishing Jury Trial)*, 69 Tex. Bar Journal 866, 868 (2006); Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. Tex. L. Rev. 163 (2005); Patrick E. Higginbotham, *Point-Counterpoint: Two Judges' Perspectives on Trial by Jury: Mahon Lecture*, 12 Tex. Wesleyan L. Rev. 501 (2006); Ed Kinkeade, *Point-Counterpoint: Two Judges' Perspectives on Trial by Jury: Introduction*, 12 Tex. Wesleyan L. Rev. 497 (2006); David T. López, *Arbitration and the Vanishing Jury Trial: Realizing the Promise of Employment Arbitration*, 69 Tex. Bar Journal 862 (2006); Jason Mazzone, *Symposium: Justice Blackmun and Judicial Biography: A Conversation with Linda Greenhouse: The Justice and the Jury*, 72 Brook. L. Rev. 35 (2006); Tracy Walters McCormack, *Privatizing the Justice System*, 25 Rev. Litig. 735 (2006) (Symposium); Terry R. Means, *Point-Counterpoint: Two Judges' Perspectives on Trial By Jury: What's so Great About a Trial Anyway? A Reply to Judge Higginbotham's Eldon B. Mahon Lecture of October 27, 2004*, 12 Tex. Wesleyan L. Rev. 513 (2006); Kirk W. Schuler, *Note: ADR'S Biggest Compromise*, 54 Drake L. Rev. 751 (2006); Task Force on the Vanishing Jury Trial, Boston Bar Association, *Jury Trial Trends in Massachusetts: The Need to Ensure Jury Trial Competency Among Practicing Attorneys as a Result of the Vanishing Jury Trial Phenomenon* (2006); Mark R. Trachtenberg and Christina F. Cozier, *Risky Business: Altering the Scope of Judicial Review of Arbitration Awards by Contract*, 69 Tex. Bar Journal 868 (2006); Pamela Tynes, *Design Your Own Arbitration: Redesigning Arbitration to Fit Your Dispute? (Arbitration and the Vanishing Jury Trial)*, 69 Tex. Bar Journal 872 (2006); William G. Young, *Vanishing Trials, Vanishing Juries, Vanishing Constitution*, 40 Suffolk U. L. Rev. 67 (2006).

70 In the typical arbitration, the parties are presented with a list of arbitrators and are allowed to delete some or all members of the list. The arbitrators for that specific dispute are then selected from the remaining names. In other words, a party may not select the arbitrator but he may prevent someone from serving. If an arbitrator were viewed as unreasonable, he or she could effectively be out of work because neither side would want to run the risk of an unfair decision. An unfair or unreasonable commercial arbitrator would have his or her name deleted from the list of acceptable arbitrators.

71 Arbitrators generally are well compensated, and many rely upon being selected as an arbitrator as their sole means of income. As discussed above, if an arbitrator were deemed to be "unfair" or "unfit" he or she would effectively lose all income because both sides to a dispute would "strike" him or her. In the context of consumer arbitration, however, an arbitrator viewed as unfair by the consumer loses little. The consumer is involved with one arbitration and is not a repeat-player. On the other hand, many businesses are involved in thousands of arbitrations a year. Being deemed unfair by business would preclude most future employment.

72 A similar problem may exist with respect to financial contributions to the campaign of judges. Spending on judicial elections has been skyrocketing, and data suggests that the spending is often rewarded with favorable rulings. *See, e.g.,* Adam Liptak & Janet Roberts, *Campaign Cash Mirrors a High Court's Rulings*, N.Y. Times, Oct. 1, 2006, *available at* http://www.nytimes.com/2006/10/01/us/01judges.html. Whether and to what extent contributions to judges affect their decisions is still an open question.

73 *See* notes 48-50 and accompanying text, *supra.*

74 "As trials shrink as a presence within the legal world, they are displaced from the central role assigned them in the common law. [C]ommon law procedure has been defined by the presence of this discreet plenary event, to which all else was a prelude or epilog." Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. Empirical Legal Studies 459, 524 (2005).

75 As one author discussing arbitration has stated, "A private civil justice system is evolving, one that is relatively unconstrained by law and relatively uninformed by systematic empirical research." Using what is described as "Dispute Resolution Darwinism," the author concludes that, "We may already be witnessing the first mass extinction as large institutional organisms move in to occupy entire habitats in the civil justice ecosystem." Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration,* 56 U. Miami L. Rev. 873 (2002).

76 *See generally,* note 51 *supra.*

77 As a general rule, decisions of arbitrators are not appealable. Under the Federal Arbitration Act (FAA), a court has very limited authority to vacate an arbitrator's award. Federal Arbitration Act, 9 U.S.C. § 10 (1994) (indicating that an arbitral award can be vacated only on narrow grounds including corruption, fraud, partiality, and misconduct). In most cases, the award may not be appealed based on the incorrect application of law or an improper factual finding. The review process was nicely explained in *Stark v. Sandberg, Phoenix & Von Gontard, P.C.*, 381 F.3d 793 (8th Cir. 2004) as follows:

> When reviewing an arbitral award, courts accord "an extraordinary level of deference" to the underlying award itself, because federal courts are not authorized to reconsider the merits of an arbitral award "even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." Indeed, an award must be confirmed even if a court is convinced the arbitrator committed a serious error, so "long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority."

Id. at 798. *See also* Major League Baseball Players Ass'n v. Garvey, 121 S. Ct. 1724, 1728 (2001) ("Courts are not authorized to review the arbitrator's decision on the merits despite allegations that the decision rests on factual errors or misinterprets the parties' agreement."); Universidad Interamericana v. Dean Witter Reynolds, Inc., 208 F. Supp.2d 151 (D. Puerto Rico 2002) (courts do not sit to hear claims of factual or legal error by an arbitrator). For a general discussion of the grounds for vacating an arbitrator's award, see Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga. L. Rev. 731 (1996).

78 Not only are arbitrators without authority to develop the law, they also have little incentive to do so. Because their decisions are final and limited to the purpose of resolving the immediate dispute, arbitrators have little motivation to explain their awards in a way that makes them useful to future litigants or the general public. *See generally* Moohr, *supra* note 13 at 436.

79 741 S.W.2d 349, discussed at note 38 and accompanying text.

80 "There is another characteristic of litigation in the Anglo-American system, however, much less frequently manifested but

perhaps of equal importance: the ability to *depart* from precedent." Knapp, *supra* note 13 at 785 (Emphasis in original).

81 741 S.W.2d 349 (Tex. 1987).

82 *See, e.g.,* Rocky Mountain Helicopters, Inc. v. Lubbock County. Hosp. Dist., 987 S.W.2d 50 (Tex. 1998) (no implied warranty found).

83 This fact has been noted and discussed elsewhere, *see generally* Knapp, *supra* note 13, Moohr, *supra* note 13, and Carr and Jencks, *supra* note 12.

84 Section 2 of the FAA requires that the arbitration provision be contained in a written contract. It is also interesting to note that some have argued that employers are better off not including an arbitration provision. *See*, e.g., Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 Rutgers L.J. 399,470 (2000) ("The increasing use of mandatory arbitration by some employers has constituted an ill-advised departure from the overwhelmingly successful experience of employers in the court system.").

85 *See, e.g.,* Equal Employment Opportunity Comm'n. v. Waffle House, Inc., 534 U.S. 279, 122 S.Ct. 754 (2002) (An agreement between an employer and an employee to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief, such as backpay, reinstatement, and damages, in an ADA enforcement action.).

86 *See, e.g.,* Johanna Harrington, Comment, *To Litigate or Arbitrate? No Matter—The Credit Card Industry is Deciding For You,* 2001 J. Disp. Resol. 101.

87 The Motor Vehicle Franchise Fairness Act has been codified at 15 U.S.C. §1226 and reads as follows:

> § 1226. Motor vehicle franchise contract dispute resolution process
>
> (a) Election of arbitration.
>
> (1) Definitions. For purposes of this subsection--
>
> (A) the term "motor vehicle" has the meaning given such term in section 30102(6) of title 49 of the United States Code; and
>
> (B) the term "motor vehicle franchise contract" means a contract under which a motor vehicle manufacturer, importer, or distributor sells motor vehicles to any other person for resale to an ultimate purchaser and authorizes such other person to repair and service the manufacturer's motor vehicles.
>
> (2) Consent required. Notwithstanding any other provision of law, whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to such contract, arbitration may be used to settle such controversy only if after such controversy arises all parties to such controversy consent in writing to use arbitration to settle such controversy.
>
> (3) Explanation required. Notwithstanding any other provision of law, whenever arbitration is elected to settle a dispute under a motor vehicle franchise contract, the arbitrator shall provide the parties to such contract with a written explanation of the factual and legal basis for the award.

Interestingly, many of those same dealers who found it unfair that they should be forced by the manufacturer to arbitrate, often impose arbitration on their customers.

88 Harlan F. Stone, *The Common Law in the United States,* 50 Harv. L. Rev. 4, 11 (1936).

89 Our common law tradition, while not perfect, generally ensures that parties to a dispute can rely on the fact that similar cases will be dealt with in a similar manner. The consistency and predictability of the common law is lost in arbitration.

90 543 U.S. 50 (2004), discussed at note 26, and accompanying text.

91 There is the additional problem of the cost and inefficiency of individual challenges to arbitration clauses. Because most of these attacks are based on unconscionability, they establish little if any precedent for other consumers. Judicial attacks against arbitration provisions are also extremely expensive and take a great deal of time.

92 *See* Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform,* 38 Hous. L. Rev. 1237, 1264-67 (2001) (proposing amendments to the Federal Arbitration Act).

93 For example, Congress has recognized the "unfairness" of arbitration clauses and prohibited the inclusion of pre-dispute arbitration clauses in contracts between automobile dealers and manufacturers. Motor Vehicle Franchise Contract Arbitration Fairness Act of 2002, 15 U.S.C. §1226. *See, e.g.,* Volkswagen of America, Inc. v. Sud's of Peoria, Inc., 474 F.3d 966 (7th Cir. 2007).

94 Arbitration Fairness Act, S. 1782, H.R. 3010, 110th Cong. (2007).

95 The 2009 bill is the Arbitration Fairness Act of 2009, S. 931, H.R. 1020, 111th Cong. (2009).

96 In a recent article, the authors recognize that employees face problems similar to consumers. The authors recommend enactment of the Arbitration Fairness Act.

> The Arbitration Fairness Act of 2007 is based on findings that the FAA was intended to resolve disputes of commercial entities with the same bargaining power and level of sophistication, and that the Supreme Court has extended the FAA to disputes between parties with limited bargaining power. Congress should make this legislation law and properly balance the policy goals of the FAA and Title VII. An emphasis on values other than efficiency and economy is needed…. It seems that the desire to embrace arbitration and the policy goals of FAA have overshadowed all other concerns. There needs to be a rebalancing of interests: efficiency and economy versus the protection of important substantive rights. Hopefully, this reform effort will be more successful than past endeavors.

Landry, Robert J., III and Benjamin Hardy. *Mandatory pre-employment arbitration agreements: the scattering, smothering and covering of employee rights*, 19 U. Fla. J.l. & Pub. Pol'y 479, 495 (2008).

97 On December 12, 2007, I testified before the Senate Judiciary Committee in support of the Arbitration Fairness Act. My testimony, was based in large part on this article. *Testimony Before the United States Senate Committee on the Judiciary—Arbitration Fairness Act of 2007,* 11 J. Consumer and Comm. L. 85 (2007). Reprinted in 14 The Consumer Advocate 9 (2008). A video of my testimony may be found at http://www.peopleslawyer.net/arbitration.html.