

SELF-DEREGULATION, THE “NATIONAL POLICY” OF THE SUPREME COURT

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I. INTRODUCTION: AN AGE FOR TULIP BULB SALESMEN

The last quarter century or so has been a period of extraordinary national hubris. That hubris was reflected in the widely shared and self-congratulatory belief that the death of Marxism proved that its adversary, our Capitalism, is the true path to public virtue and social welfare. Since about 1980, we have been insistently assured that we will all prosper most and enjoy life best if we will just allow the markets of the world to apply their magical unseen hands. Freedom of contract, the Nineteenth century notion definitively deflated by Roscoe Pound in 1909,¹ was revived and elevated to the level in many minds of one of the Four Freedoms for which World War II was fought.²

An appropriate insignia for this recent period is the tulip bulb, an emblem redolent of the obsession of the Dutch people during a time in the Seventeenth century when that country experienced its embarrassment of riches.³ The comparable obsession of our time was that with “dot-com” investments. The lesson to be re-learned from recent experience is that effective law enforcement is needed to control the behavior of the sharks found in every marketplace. Economic power is, like any other form of power, subject to abuse, as most Americans well understood a century ago.

The policy assuring unfettered freedom of contract is, for that reason, one of the bigger tulip bulbs of our time, begetting a false faith in deregulation in all its forms. The poster boy of our Tulip Bulb Era is Kenneth Lay, the leader of Enron, an institution resembling a Seventeenth century tulip bulb in its incredible overvaluation. Mr. Lay and his associates were the utmost champions of the principle of deregulation except when regulation was to Enron’s own advantage.⁴ Just as a bed of tulips can be very ornamental, some forms of

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¹ See Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454. See also Edwin W. Patterson, *The Delivery of A Life-Insurance Policy*, 33 HARV. L. REV. 198 (1908-1909); Friedrich Kessler, *Contracts of Adhesion – Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 632 (1943); W. David Slawson, *Mass Contracts: Lawful Fraud in California*, 48 S. CAL. L. REV. 1 (1974); Lewis A. Kornhauser, *Unconscionability in Standard Forms*, 64 CAL. L. REV. 1151 (1976).

² See, e.g., Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873 (1987); G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 COLUM. L. REV. 431 (1993).

³ For an account of the Dutch tulip market, see SIMON SCHAMA, *THE EMBARRASSMENT OF RICHES* 350-66 (1987).

⁴ See *The Newshour*, (Public Television Broadcast, Feb. 22, 2002).

deregulation can be very beneficial to the public; but as a broad policy uncritically acclaimed, it is moral and political snake oil.

II. THE AMERICAN TRADITION OF PRIVATE LAW ENFORCEMENT

Associated with our momentary blindness to the realities of marketplace predation has been a reaction against important features of our legal traditions and of the profession bearing much of the burden of defending people from sharks. Standing at the head of that reaction and leading the assault on laws enacted to control business sharks has been our Supreme Court of the United States.⁵

The Court's assault on business regulation has often seemed to be unwitting, the product of a shared ignorance of the realities of the human condition as experienced by ordinary mortals and a timely, if misplaced, confidence in the enduring virtues of the freedom of contract empowering business to shape the rights of lesser citizens. Justices have consistently explained their actions through assertions about the world in which instruments purporting to be contracts are made that are at odds with manifest reality. Their program has been no less improvident because of their apparent innocence of motive. They have led the federal judiciary to foster lawlessness in the relationships between the corporate champions of free enterprise and the consumers, patients, debtors, employees, franchisees, and others over whom they exercise economic dominion.

Central to the Court's un wisdom has been its failure to notice the importance of private law enforcement in the American constitutional scheme. The willingness of the American people to tolerate the aggressive conduct of much American business has been fostered by their sense that the law is theirs and is available to deter and remediate the ubiquitous, predatory instincts and conduct of business. Through most of the Twentieth century, to secure fair dealing in the marketplace, Americans fearing economic bullies have relied neither on the charity of those who write contracts nor on the integrity of a bureaucracy regulating them. They have depended primarily on the private bar and the civil jury, institutions that cannot be controlled by economic barons in the ways that governmental regulators sometimes can.

This American tradition of private law enforcement has roots in Eighteenth century mistrust of government. It is an indirect result of the schemes of checks and balances, designed to prevent any part of our federal, state, or local governments from gaining too much political power over the people or, incidentally, predatory business enterprises. Among those checks and balances,

⁵ For a review of the Court's decisions through 1995, see Paul D. Carrington & Paul Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997). See also Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. ON DISP. RESOL. 297 (1996); Thomas E. Carbonneau, *Arbitration and the U.S. Supreme Court: A Plea for Statutory Reform*, 5 OHIO ST. J. ON DISP. RESOL. 231 (1989).

none has been more important than the right to jury trial in civil cases.⁶ The universal affirmation of that right in both state and federal constitutions assured separation of powers within the judicial branches,⁷ limiting the power of both state and federal judges, virtually all of whom bring partisan political credentials to their work and who are therefore at least in appearance vulnerable to domination by those with great economic power. Eighteenth century Americans insisted on the civil jury as an institution less vulnerable to bribery or intimidation than any other institution of the governments they were creating.⁸ Trial by jury served then, and serves now, to establish democracy at the courthouse, assuring individual citizens that they have a convenient, independent, and apolitical forum to hear grievances they may have against all kinds of predators.

In the Nineteenth century, law enforcement by private lawyers and civil juries came to be recognized as an essential element of our legal system. That recognition led to the development of the American rule against fee-shifting,⁹ the allowance of contingent fees,¹⁰ and the award of bounties to lawyers and their clients who pursued predatory business with claims of rights created to constrain the excesses of economic power. Among federal statutes creating civil bounties were the voting rights law of 1870,¹¹ the Interstate Commerce Act of 1887,¹² and the Sherman Act of 1890.¹³ The first two employed a one-way fee shift, so that the bounty was paid directly to the plaintiff's lawyer; the third introduced the concept of treble damages. The English tradition of exemplary damages available in all manner of trespass actions was also dusted off and given wider use.¹⁴

Private law enforcement was further enhanced in the Twentieth century with the developments of discovery rules, enabling counsel to investigate abuses of economic power,¹⁵ and the class action rule, facilitating the aggregation of small claims against predators and thus making the assertion of such

⁶ Morris S. Arnold, *The Civil Jury in Historical Perspective*, in *THE AMERICAN CIVIL JURY* 9 (1987). All eleven of the states having constitutions predating the federal constitution guaranteed the right to trial by jury in civil cases. A compilation is *THE CONSTITUTIONS OF THE UNITED STATES OF AMERICA* (E. Duycinck ed., 1820).

⁷ Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87, 106.

⁸ See generally Charles Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 670-705 (1973); Stanton D. Krauss, *The Original Understanding of the Seventh Amendment Right to Jury Trial*, 33 U. RICH. L. REV. 407, 412 (1999).

⁹ John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47-1 LAW & CONTEMP. PROBS. 9, 17 (1984). On the uniqueness of the American rule, see Werner Pfennigstorf, *The European Experience with Attorney Fee Shifting*, 47-1 LAW & CONTEMP. PROBS. 37, 42 (1984).

¹⁰ See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 527 (1987); F.B. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 36-39 (1964); HERBERT M. KRITZER, *RHETORIC AND REALITY . . . USES AND ABUSES . . . CONTINGENCIES AND CERTAINTIES: THE AMERICAN CONTINGENT FEE IN OPERATION* (1996).

¹¹ Act of May 31, 1870, Ch.16, Stat. 140 (repealed 1894).

¹² Act of February 4, 1887, Ch. 24 Stat. 379.

¹³ Act of July 2, 1890, Ch. 26, Stat. 209, 210.

¹⁴ 1 LINDA L. SCHLUETER & KENNETH R. REDDEN, *PUNITIVE DAMAGES* 16 (4th ed. 2000).

¹⁵ This was, of course, the major consequence of the promulgation of the Federal Rules of Civil Procedure in 1938. The pertinent rules are Fed. R. Civ. P. 36-37. See generally ROB-

claims economically viable.¹⁶ There was also enlarged use of the one-way fee shift as a bounty to successful hunters of business predators.¹⁷ By 1970, the private lawsuit was widely recognized in the United States as the most effective means of controlling the abuse of economic power. And American courts were recognized around the world as those most hospitable to individuals who have experienced harm at the hands of economic sharks and the most effective at protecting their interests by deterring economic predation.¹⁸

This unique hospitality of our courts has served to compensate for defects in our legislative and executive branches, deliberately weakened by the Founders with their scheme of checks and balances. It also compensates for a major flaw in our political process that has appeared in the last half century, i.e., expensive political campaigns requiring large contributions from persons and groups advancing special interests,¹⁹ including those of diverse business interests, thus enhancing the political power of those with wealth and weakening the political power of those lacking it. While legislatures and politically responsive bureaucracies have been inhibited by the influence of special interests, the state and federal courts have stood as the political institutions most responsive to the concerns and interests of individual citizens who work for a living.

This traditional political role of American courts has, of course, always been regretted by those who put their faith in the beauty of market economics, freedom of contract, and the profit motive as means to achieve the public good. Those views have often prevailed in our tulip bulb age, and they generated an epidemic of deregulation, withdrawing the executive branches of federal and state governments from many programs of law designed to protect the public.²⁰ Deregulation was accompanied by plentiful journalism reporting a much exag-

ERT WYNESS MILLAR, CIVIL PROCEDURE IN THE TRIAL COURT IN HISTORICAL PERSPECTIVE 201-29 (1952).

¹⁶ The important development in 1966 was the promulgation of Fed. R. Civ. P. 23(a)(3). That amendment was made to facilitate the aggregation of small claims against a common malefactor. See also Bryant Garth et al., *The Institution of the Private Attorney General: Perspectives from an Empirical Study of Class Action Litigation*, 61 S. CAL. L. REV. 353 (1988); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problems"*, 92 HARV. L. REV. 664 (1979). On the history of class actions, see STEPHEN YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987).

¹⁷ See Thomas D. Rowe, Jr., *Predicting the Effects of Attorney Fee Shifting*, 47-1 LAW & CONTEMP. PROBS. 139, 147-48 (1984).

¹⁸ The noted Lord Dunning observed, "As a moth is drawn to the light, so is a litigant drawn to the United States." *Smith Kline & French Lab. Ltd. v. Bloch*, 2 All E.R. 72, 74 (Eng. C. A. 1983).

¹⁹ See, e.g., Paul D. Carrington, *Big Money in Texas Judicial Elections: The Sickness and Its Remedies*, 53 SMU L. REV. 263, 266-67 (2000); Paul D. Carrington & Adam Long, *Selecting Pennsylvania Judges in the Twenty-first Century*, 106 DICKINSON L. REV. 743 (2002). Paul D. Carrington & Adam Long, *The Independence and Accountability of the Ohio Supreme Court: Recalling the Work of Frederick Grimke*, CAP. U. L. REV. (forthcoming 2003) (manuscript on file with author).

²⁰ See generally WILLIS EMMONS, *THE EVOLVING BARGAIN: STRATEGIC IMPLICATIONS OF DEREGULATION AND PRIVATIZATION* (2000); ALAN SHIPMAN, *THE MARKET REVOLUTION AND ITS LIMITS: A PRICE FOR EVERYTHING* (1999); DANIEL A. YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKET-PLACE IN REMAKING THE MODERN WORLD* (1998); IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (Donald R. Harris et

gerated law explosion and dramatizing allegedly extravagant awards and lawyers' fees said to disable American business from competing effectively in the world markets.²¹

At the same time that many of our leaders disparaged the instruments of private law enforcement, they were prone to glorify corporate management. A measure of that glorification has been the astonishing levels of compensation conferred on corporate executives by their interlocking boards of directors. A few years ago, we observed the merger of Daimler Benz and Chrysler resulting in the consolidation of their management teams. A major problem during this consolidation was that Chrysler executives received compensation packages many multiples of those of their German colleagues, despite the fact that the German factory workers received compensation substantially higher than that of their American co-employees.²² This reality of executive compensation reflected a tradition of mutual indulgence infecting American boardrooms, whose members are like Justices removed from much contact with the human condition by guarded subdivisions and skyboxes.

Congress had a hand in the development of this elevated managerial class. The system of tax incentives set forth in the Internal Revenue Code in the last quarter of the Twentieth century²³ not only resulted in extravagant levels of compensation for top managers, but also encourages predatory behavior by the corporations over which they preside. This is a manifest effect of provisions providing capital gains treatment for income acquired from the exercise of stock options provided as part of a package of executive compensation, a system known as "stealth compensation."²⁴ The stock option prods management to secure short-term profits, thereby inflating the current market price of the securities they have rights to sell.²⁵ Managers are thus induced to leave to their successors any public relations or other secondary problems resulting from conduct imposing costs or harms on those over whom they can exercise economic

al. eds., 1992); DEREGULATION OR REREGULATION? REGULATORY REFORM IN EUROPE AND THE UNITED STATES (Giandomenico Majone ed., 1990).

²¹ E.g., WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* (Penguin Books 1991). See also STEPHEN DANIELS & JOANNE MARTIN, *CIVIL JURIES AND THE POLITICS OF REFORM* (1995); ELLEN E. SWARD, *THE DECLINE OF THE CIVIL JURY 101-145* (Durham 2001); Marc Galanter, *News from Nowhere: The Debased Debate on Civil Justice*, 71 DENV. U. L. REV. 77 (1993); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093, 1109-12 (1996); Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System - And Why Not?*, 140 U. PA. L. REV. 1147 (1992).

²² Brian Coleman & Gregory L. White, *Daimler Chrysler Pay Scale to Lean Toward U.S.*, WALL ST. J. Aug. 7, 1998, at A3; Scott Miller, *Daimler Sets Higher Bonus In Germany*, WALL ST. J. Feb. 9, 2001, at A8.

²³ The implications of the tax treatment of stock options were not well understood when it was liberalized. See U.S. House of Representatives, Committee on Ways and Means, *Hearings on Tax Treatment of Options to Buy and Sell Stock, Securities or Commodities*, 94th Cong. (1976). There were, of course, other motives in encouraging ownership to share profits with managers.

²⁴ United States Senate Committee on Governmental Affairs Subcommittee on Oversight of Government Management, *Hearings on Stealth Compensation of Corporate Executives: Federal Treatment of Stock Options*, 102nd Cong. (1992).

²⁵ See generally MARIA RUTH BUENAVENTURA & CHARLES PECK, *STOCK OPTIONS: MOTIVATING THROUGH OWNERSHIP* (The Conference Board, Rept. No. 1040, 1993).

power. It is likely also a factor in the short-term perspective of American managers that so much publicly held stock is in the hands of portfolio managers who demand short-term profits to soothe the anxieties of their investors.

One can then imagine the management of an automobile company responsible for making and selling ill designed sports utility vehicles having a tendency to roll over. Our tax law and our institutional investors urge the directors of such a firm to reward the responsible managers for postponing revelation of information regarding the dangerous defect at least long enough that those officers and directors responsible for the resulting harms can exercise their options and thereby obtain an early and comfortable retirement. Even *The Economist*, ever an advocate of extensive freedom of contract, has decried our system of executive compensation as an inducement to economic recklessness.²⁶

It is in the context of these developments that the actions of the Supreme Court ought be seen. In the apparent belief that unrestrained profit seeking brings out the best in corporate management, the Court has established its "national policy" allowing economic predators to contract at least partially out of the system of effective private law enforcement, thereby exposing consumers, employees, small businesses, and other persons of limited economic bargaining power to a thousand wounds.

A. *The Federal Arbitration Act of 1925*

The instrument of the Court's mischief has been the Federal Arbitration Act of 1925,²⁷ a statute re-written by the Court a half-century after its enactment and applied not only to trump later-enacted federal laws but also to preempt all state laws enacted to protect citizens and small business from the predatory impulses of some business executives, features no elected body would ever enact.

The 1925 Act expressed the limited purpose of Congress to reverse a rule imposed by some federal courts, one declared under the authority of *Swift v. Tyson*²⁸ to be a rule of federal common law, a form of jurisprudence eradicated by the Supreme Court thirteen years after enactment of the Arbitration Act.²⁹ Had *Erie* been decided fifteen years earlier, there would have been no Federal Arbitration Act and the present subject would have been left in the hands of the National Conference of Commissioners on Uniform State Laws where, in the constitutional scheme of things, it would seem to belong.³⁰ It was an oversight on the part of Congress that the statute was not repealed in 1940, for after *Erie*, it had lost its purpose.

The objectionable rule of federal common law that Congress sought to reverse was one holding that predispute agreements to arbitrate are revocable.

²⁶ January 19, 2002, at 9.

²⁷ 9 U.S.C. § 1 et seq. (2002).

²⁸ 41 U.S. (16 Pet.) 1 (1842).

²⁹ See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

³⁰ On the development of the Uniform Arbitration Act, see IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 15-133 (1992); Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 *Yale L.J.* 595 (1927).

That rule was often observed by Nineteenth century courts as a protection of improvident individuals from their tendency to underestimate the value and importance of clauses reducing their procedural rights in an unforeseen dispute over the performance of the contract. It recognized the limits to the foresight, interest, and energy most individuals bring to the planning of transactions and events with respect to the remote possibility that they might lead to disputes, limits that are not imposed on parties who are engaged in one of many similar transactions, some of which are certain to end in controversy.

This common law rule was associated with the doctrine that arbitration is a method of dispute resolution entirely dependent on private contract.³¹ There were no rules or standards imposed on arbitrators and there could be no review of their awards unless the contract explicitly so provided. A different scheme was generally found in legal systems not rooted in English common law but in the Roman civil law tradition; the continental scheme enforced predispute arbitration agreements but imposed legal restraints on arbitrators to assure their compliance with the governing code provisions.³² English law was amended in 1950 to convert arbitration into a legal process.³³ That did not happen in the United States.

As re-written by the Supreme Court a half century after its enactment, the 1925 Act now directs state as well as federal courts to enforce predispute arbitration clauses applicable not only to disputes arising out of the contract, but also to disputes arising out of the enforcement of legislation enacted to protect one party to a contract from the other, and (unlike the practice in most other countries) relieves arbitrators of a duty to adhere to the law. By this reconstruction of an old law, the Court has empowered those with economic power to use contracts to diminish the enforceability of laws enacted to inhibit their power.

The common law rule addressed by the 1925 Act was partially obsolesced by the railroad. A manufacturer in New York and a wholesaler in Iowa had trouble making deals if each was at risk of being sued in the other's state's courts. They needed to create a private forum more to be trusted than the courts of either, a problem soon to be encountered in international trade. Many commercial states therefore departed from the common law rule against enforcement of predispute agreements restricting access to legal forums and allowed merchants to make enforceable predispute agreements designating a forum to enforce the terms of the contracts of which they were a part. But some federal courts declined to adhere to local state law as so modified. Congress therefore sought to liberate business from what had become an anachronism. While thus allowing them to make predispute agreements to arbitrate that could be enforced in federal as well as state courts, Congress did nothing to assure that arbitrators would be bound by law, surely because no one then envi-

³¹ Sayre, *supra* note 30, at 598.

³² See generally A.J. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 359-82 (1981). On the legalistic tradition of international arbitration, see YVES DEZALAY & BRYANT G. GARTH, *DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER* 31-114 (1999).

³³ Arbitration Act, 1950, 14 Geo. 6, c. 27, § 21.

sioned the possibility that a Court would require anyone to arbitrate claims other than those between merchants involving alleged breaches of contract. Its law was intended for the use of businessmen who were presumably able to evaluate, and sometimes to negotiate, contract provisions controlling the resolution of contract disputes in neutral private forums. If businessmen wanted to make elastic deals to be enforced by neutrals at some place equally remote to the parties, who were not bound by rules of court and were free to make compromise awards, that was not a concern to Congress.

Thus, in its first half century, the Federal Arbitration Act posed no serious problems for anyone. It was interpreted in a manner generally consistent with state law expressed in many states in a uniform law upholding predispute arbitration agreements in commercial contracts.³⁴

Meanwhile, however, the role of private law enforcement was steadily growing in its importance as a distinctive feature of our political system. While the New Deal was a moment of enthusiasm for the administrative process,³⁵ by 1950 most American legislators had come to suspect (as had Eighteenth and Nineteenth century Americans) that administrative agencies at all levels of governments of separated powers tend to become too closely allied with those whom they regulate to be as effective as they need to be.³⁶

In the middle of the Twentieth century, it was consistently held in both federal and state courts that claims *arising under state or federal laws enacted to protect weaker parties to contracts* (to be distinguished from claims seeking to enforce contracts) are not subject to binding arbitration unless both parties agree to resolve an existing dispute by such private means. Among the federal statutory rights explicitly held to be immune to predispute binding arbitration were claims arising under the Fair Employment Practices Act,³⁷ the Securities Act,³⁸ and the antitrust laws.³⁹

Similarly, bills of lading and passenger tickets had long been subjected to statutory regulation.⁴⁰ No one can be reasonably expected to read such instruments recording routine events in the conduct of commercial carriage; federal law has accordingly long forbidden the use of such instruments by carriers to disclaim or limit liability.⁴¹ Notwithstanding federal laws proscribing provisions that "lessen" the carriers' liabilities, and long-honored decisions invalidating choice of forum and arbitration clauses in such contracts, the Court has in recent times reduced the ability of bailors to enforce their property rights by

³⁴ IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION AND INTERNATIONALIZATION* 122-33 (1992).

³⁵ See, e.g., JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

³⁶ Louis L. Jaffe, *The Effective Limits of the Administrative Process: A Reevaluation*, 67 HARV. L. REV. 1105, 1107 (1954).

³⁷ E.g., *Donohue v. Susquehanna Collieries Co.*, 138 F.2d 3 (3d Cir. 1943).

³⁸ *Wilko v. Swan*, 346 U.S. 427 (1953). The Court there concluded that "the intention of Congress concerning the sale of securities is better carried out by holding invalid . . . an agreement for arbitration of issues arising under the Act." *Id.* at 438.

³⁹ E.g., *Am. Safety Equip. Corp. v. J.P. Maguire & Co., Inc.*, 391 F.2d 821 (2d Cir. 1968).

⁴⁰ Michael F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. MAR. L. & COM. 1 (1991).

⁴¹ E.g., *Carriage of Goods by Sea Act*, 46 U.S.C. §§ 1300-15 (2000).

requiring them to arbitrate in compliance with clauses buried in the fine print of the instrument given them when they entrusted their goods to the carriers.⁴²

It seemed obvious as recently as 1975 that laws enacted in the public interest to confer rights on individuals or small business should not be defeated by contract provisions making such laws inapplicable to the contracting parties. If parties can agree not to be bound by the otherwise applicable antitrust laws or minimum wage laws of the United States, many of the business practices constrained by those laws could be shielded from enforcement of those laws by the terms of contracts between the predator and the victim, who would be required to consent to victimization as a condition of doing any business or work at all.⁴³ And if contracting parties could not agree to nullify regulatory laws, it followed that neither could a business self-deregulate by imposing contract provisions stripping weaker parties of procedural rights needed to enforce their statutory rights. Predispute arbitration clauses having that effect were not explicitly forbidden in Twentieth century legislation only because no legislators, judges, or lawyers making or enforcing federal laws imagined the enforcement of such clauses. The Supreme Court acknowledged this general principle in 1953 with respect to the Securities Act.⁴⁴ That decision was overruled in 1989 as the Court extended its "national policy" impeding private law enforcement.⁴⁵

The shared assumption that mandatory predispute arbitration is unsuited to the enforcement of statutory rights conferred on weak parties to contracts is also expressed in international law. Article V of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, promulgated in 1958 and ratified by the United States in 1970,⁴⁶ relieves the courts of ratifying nations from any obligation to enforce arbitration awards that are contrary to the public policy of the nation in which enforcement is sought. Article II of the Convention requires enforcement of agreements to arbitrate only matters that are "capable of settlement by arbitration."⁴⁷ For example, many nations regard disputes between employers and employees as non-arbitrable, and awards resulting from mandatory arbitration as non-enforceable on grounds of public policy.⁴⁸ The Convention thus gives the force of international law to the restraint on freedom of contract that was a part of the federal law in 1970.

⁴² E.g., *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995); see also Elizabeth A. Clark, *Foreign Arbitration Clauses and Foreign Forum Selection Clauses in Bills of Lading Governed by COGSA: Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 1996 B.Y.U. L. REV. 483.

⁴³ See CORBIN ON CONTRACTS §§ 1373-1544 (1950). See also Edward L. Rubin, *Towards A General Theory of Waiver*, 28 UCLA L. REV. 478 (1981). Cf. *Fuentes v. Shevin*, 407 U.S. 67 (1972); see also *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 188 (1972).

⁴⁴ *Wilko*, 346 U.S. at 435-37. Cf. *Boyd v. Grand Trunk Western R.R. Co.*, 338 U.S. 263 (1949).

⁴⁵ See *Rodriguez de Quijas v. Shearson/Am. Express*, 490 U.S. 477 (1989).

⁴⁶ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, Art. V, para. 2, 21 U.S.T. 2517.

⁴⁷ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, Art. II, para. 1, 21 U.S.T. 2517.

⁴⁸ Justice Stevens cites Belgian, Italian, and German examples in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 660-61, n. 35-36 (1985). See GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY &

Had the Convention superseded American laws limiting freedom of contract in that respect, there would have been substantial, indeed overwhelming, opposition to ratification without a reservation to protect the system of private enforcement of such regulatory laws as the antitrust or minimum wage laws.

The Court, while giving sweeping application to the 1925 Act as an expression of a "national policy" favoring private dispute resolution (a policy first discovered in the statute in 1983⁴⁹), acknowledged that the Act does not apply "where Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."⁵⁰ However, the Court has not yet encountered a statute that appeared to it to evince such an intention. There were, indeed, several important laws enacted by Congress around the time of the ratification of the international treaty that would, at the time of their enactment, have been deemed (like the antitrust and securities laws) not capable of enforcement by arbitration. Let us consider how the federal courts have effected impairments of their enforceability by applying the Court's "national policy."

B. *The Automobile Dealers' Day in Court Act of 1956*

No one in 1970 could have supposed that a claim arising under the federal Automobile Dealers' Day in Court Act of 1956⁵¹ was arbitrable pursuant to a predispute arbitration clause in a dealership contract. That 1956 statute reflected the widely shared perception that private enforcement of law is necessary in America if small business is to be protected from predatory big business.⁵² It commissioned automobile dealers and their lawyers to cabin the economic power of manufacturers as private attorneys general. Dealers and lawyers enforcing that law are not merely private seekers of gain but are protectors of what Congress perceived to be the public interest in the sustenance of locally-owned businesses.

The legislation was drafted in the chambers of Senator Joseph O'Mahoney of Wyoming. It was designed to strengthen in a general way the legal position of the automobile dealers in their relationship to manufacturers, especially the positions of dealers in small towns who sell relatively few cars and who accordingly have weak bargaining positions in their relations with the manufacturers from whom they buy their inventory.⁵³ Manufacturers are tempted to favor larger dealers with better supplies of the best-selling models, and to dump on small dealers the inventory that is hardest to sell. The public interest served

MATERIALS 527 (2d ed. 2000). With respect to the enforceability of adhesion contracts, even in international commerce, compare CIVIL CODE OF ITALY, Arts. 1341-1342.

⁴⁹ Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983). In 1985, the Court proclaimed, contrary to its legislative history, that the Act reflected a "congressional desire to enforce agreements into which parties had entered." Dean Witter Reynolds, Inc. v. Byrd, 470 U. S. 213, 220 (1985).

⁵⁰ *Mitsubishi Motors Corp.*, 473 U.S. at 628.

⁵¹ 15 U.S.C. § 1221 (1998).

⁵² See generally Friedrich Kessler, *Automobile Dealer Franchises: Vertical Integration by Contract*, 66 YALE L.J. 1135 (1957).

⁵³ See *Hanley v. Chrysler Motors Corp., Inc.*, 433 F.2d 708 (10th Cir. 1970); *Woodward v. Gen. Motors Corp.*, 298 F.2d 121 (5th Cir. 1962); *Bateman v. Ford Motor Co.*, 302 F.2d 63 (3d Cir. 1962).

by regulatory law is the preservation of a measure of autonomy in local business, thus protecting our communities – especially smaller ones – from the deadening effect of making all their citizens the servants of enormous enterprises.

The substantive provisions of the 1956 Act thus shared the purpose of the federal antitrust laws to prevent brutal deployment of economic power. They were crafted with a jury trial in mind. Manufacturers were simply enjoined to deal with dealers "in good faith,"⁵⁴ and afforded a defense if they could prove a lack of "good faith" on the part of the dealer.⁵⁵ That elastic standard, like the law of negligence, was designed to invoke the moral judgment of the community served by the law. A litigant mistrustful of a politically appointed or elected judge was expected to demand trial by jury.

The standard of good faith was perhaps correctly interpreted narrowly to forbid only threats or unreasonable coercion by the manufacturer. The common form of coercion was to require small dealers to buy more cars or cars of different models than they were able to sell. Few "good faith" cases under the Act have actually been presented to a jury, and fewer still are the verdicts for dealers that have withstood post-trial motions or appeals.⁵⁶ Yet, courts declined to apply any special standard for the review of verdicts rendered on claims brought under the Act; and if there was evidence of coercion, good faith was an issue for the jury.⁵⁷

Although the 1956 Act does not explicitly authorize injunctive relief, preliminary injunctions have been afforded to dealers who appeared to be victims of coercion or intimidation.⁵⁸ The Supreme Court of Minnesota, deciding a case brought under the federal law but in a state court, held that courts are empowered by the Act to enjoin a dealership termination that would not meet the standard of "good faith."⁵⁹

The Automobile Dealers' Day in Court Act did not produce a flood of litigation.⁶⁰ It did cause manufacturers to modify their business practices favorably to the interests of smaller dealers, and it did change the tone of the conversation when dealers were bargaining with manufacturers over diverse issues arising in the conduct of their shared enterprise.

Because the federal law was narrowly interpreted, there remained grievances by local automobile dealers who were overborne by national and international manufacturers. States enacted similar laws and, by 1990, every state except Alaska had enacted a statute on the subject. The federal statute was

⁵⁴ See, e.g., Volkswagen Interamericana, S.A. v. Rohlsen, 360 F.2d 437, 435 (1st Cir. 1966) (rejecting the argument that this standard was unconstitutionally vague).

⁵⁵ 15 U.S.C. § 1222 (1998).

⁵⁶ E.g., Kotula v. Ford Motor Co., 338 F.2d 732 (8th Cir. 1964).

⁵⁷ E.g., Autowest, Inc. v. Peugeot, Inc., 434 F.2d 556 (2d Cir. 1970).

⁵⁸ E.g., *Bateman*, 302 F.2d at 66.

⁵⁹ *Dahlberg Bros., Inc. v. Ford Motor Co.*, 137 N.W.2d 314, 326 (1965).

⁶⁰ Louis Kenworthy, Stewart Macaulay & Joel Rogers, "The More Things Change" – *Business Litigation and Governance in the Automobile Industry*, 21 LAW & SOC. INQ. 660, 667 (1996).

explicit that no state law protective of dealers was preempted by it.⁶¹ Some state laws provided more explicit standards than Senator O'Mahoney's "good faith" standard. Some created administrative agencies to hear disputes between manufacturers and dealers.⁶² All of this legislation, like the federal law, was intended to limit the manufacturers' freedom of contract. In no state was there a "flood" of cases under state laws. The primary effect of the state legislation, like that of the federal, was to alter bargaining positions of the parties and reduce the vulnerability of franchisees to arbitrary use of the economic power of manufacturers.

Only one case involving the federal automobile dealers' statute has reached the Supreme Court of the United States,⁶³ and the Court decided no issue regarding it. So far as one can tell, the Justices have never given serious thought to the problem of the relationship between local dealers and manufacturers or to that of effective enforcement of laws enacted to regulate that relationship. The one case they reviewed involved a dispute between a Mitsubishi dealer in San Juan, Puerto Rico and the Japanese manufacturer. Mitsubishi initiated arbitration pursuant to the dealership agreement, which provided for arbitration in Japan of all disputes arising between the parties, and it brought an action in the federal court in Puerto Rico to compel Soler to arbitrate. Soler counterclaimed for defamation and violations of the Sherman Act, the Federal Automobile Dealer's Day in Court Act, the Puerto Rico Competition Act, and the Puerto Rico Dealers' Contracts Act. In its defense, Soler alleged that Mitsubishi had forced it to buy more cars than he could sell. The franchise agreement provided for arbitration in Japan. The District Court stayed its proceeding pending arbitration of the dealer's claims. The Supreme Court held that the dealer would indeed have to arbitrate his antitrust counterclaim against the Japanese manufacturer in Japan, thus overruling earlier decisions holding that antitrust claims are not subject to predispute arbitration clauses.⁶⁴ It offered the Puerto Rican dealer the reassurance that the arbitrators in Japan would faithfully enforce the Sherman Act, calculating that the task for the Japanese arbitrators was not different from that performed by federal courts discerning foreign law in the manner provided by Federal Rule 44.1.⁶⁵ Perhaps a transcript would be made, the Court assured itself, the three Japanese arbitrators would prepare an opinion, and the federal court in Puerto Rico would review their award for errors of law.⁶⁶ If such review of an award were indeed to be provided, this would be an extraordinary revision of traditional arbitration law in the United States.⁶⁷

⁶¹ See 15 U.S.C. § 1225 (1998) ("This chapter shall not invalidate any provision of the laws of any State except insofar as there is a direct conflict between an express provision of this chapter and an express provision of State law which can not be reconciled.").

⁶² E.g., UTAH CODE ANN. §§ 13-14-101 et seq. (2002).

⁶³ See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 614 (1985).

⁶⁴ E.g., *Am. Safety Equip. Corp. v. J.P. Maguire & Co., Inc.*, 391 F.2d 821 (2d Cir. 1968).

⁶⁵ Fed. R. Civ. P. 44(1).

⁶⁶ *Mitsubishi Motors Corp.*, 473 U.S. at 634 n.18.

⁶⁷ IAN R. MACNEIL, RICHARD E. SPEIDEL, & THOMAS J. SYPANOWICH, *FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS AND REMEDIES UNDER THE FEDERAL ARBITRATION ACT* § 16.3.2.2 (1999).

Not presented to the Court⁶⁸ was the question of whether the dealer's claim under the Automobile Dealer's Day in Court Act should be decided in the first instance by an arbitrator in Japan. The Court justified its decision with respect to the antitrust laws by dismissing the public purpose of the law, denying the role of the San Juan dealer as a private attorney general, and declaring the purpose of the antitrust laws to be merely the compensation of private victims that have a right to waive such recompense.⁶⁹ That declaration entailed a judicial rewriting of the antitrust laws having the specific effect of repealing the treble damage provision, because of the general unavailability of that remedy in any forum in Japan.⁷⁰ If an automobile dealer can sell to the manufacturer, in advance of needing them, its rights under the antitrust laws, it would seem to follow that it can also sell its rights under the 1956 Act. Lower federal courts have since so held,⁷¹ despite the manifest distortion of the term "day in court" to mean a "day in arbitration" and the equally manifest impropriety of moving the jury issue of "good faith" into a private forum. If such decisions are upheld, the 1958 statute will have been trumped or superseded by a 1925 statute. The Court has not explained the jurisprudence reflected in this intellectual gymnastic.

The National Automobile Dealers Association did not take the matter lightly. Mandatory arbitration deprives them of the fruits of many years of struggle in the corridors of Congress and our state legislatures. The Judiciary Committee of the United States Senate unanimously reported a bill denoted as the Motor Vehicle Franchise Contract Arbitration Fairness Act of 2001.⁷² As modified, it became law on November 2, 2002, and exempts controversies arising out of motor vehicle franchises, unless both parties consent in writing to use arbitration to settle an existing controversy.⁷³

⁶⁸ Chrysler Corporation was also a party to the claim under the Act, but not to the arbitration clause.

⁶⁹ *Mitsubishi Motors Corp.*, 473 U.S. at 635.

⁷⁰ *C.f.* *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (holding that New York law precluding arbitrators from awarding punitive damages is overridden by an arbitration agreement governed by the FAA that authorizes that remedy). *But see* RONALD A. BRAND, *ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD* 51-192 (1992) (It is an extraordinary step to extend that decision to a Japanese arbitral forum. It is generally established in international law that the powers of the arbitrator are governed by the law of the place of the arbitration. Most and maybe all of the countries with whom Americans regularly deal do not recognize the concept of the private attorney general and they will not enforce an American judgment awarding treble damages, much less provide such a remedy in their own courts or arbitral forums. This reflects the entrenched principle that the courts of one nation do not enforce the penal or revenue laws of another.).

⁷¹ *See generally* *Bondy's Ford, Inc. v. Sterling Truck Corp.*, 147 F. Supp. 2d 1283 (M.D. Ala. 2001).

⁷² Enacted as H.R. 2215, The 21st Century Department of Justice Appropriation Act.

⁷³ S. 1140, 107th Cong. § 2 (2001) (Whenever a motor vehicle franchise contract provides for the use of arbitration to resolve a controversy arising out of or relating to the contract, arbitration may be used to settle such controversy only, if after such controversy arises, both parties consent in writing to use arbitration to settle such controversy.).

C. *The Petroleum Marketing Practices Act of 1978*

In 1978, a similar federal law was enacted to protect owners and operators of filling stations. The Petroleum Marketing Practices Act⁷⁴ was enacted to protect local businesses smaller than automobile dealers. It recognized their "continuing vulnerability . . . to the demands and actions of the franchisors," i.e., major oil companies who were their suppliers. This law was enacted in response to predatory behavior by the oil companies during the petroleum shortage caused by the OPEC conspiracy of the late 1970s. Like the law protecting automobile dealers, that Act plainly envisioned private enforcement in law courts. The term "good faith" reappears as the standard of conduct to which the local businessman may be held by a franchisor canceling or refusing to renew a franchise.⁷⁵ And the statute explicitly authorized equitable relief against wrongful termination of a franchise.⁷⁶ Some lawsuits resulted, but hardly a flood. The statute succeeded in modifying the power relationships between filling station operators and major oil companies.

The Supreme Court has never heard argument on a case brought under this Act. And no court has yet been reported to hold that claims arising under it are arbitrable pursuant to a predispute agreement. At least one major oil company, ARCO, has written an arbitration clause into its franchise agreements. The Ninth Circuit held that clause invalid because it was not merely an arbitration clause; the features dooming its enforcement were that it explicitly reversed the statute's provision for fee shifting, foreclosed the statutory provision for exemplary damages, and foreshortened the time for asserting a claim.⁷⁷ Whether in light of the Supreme Court's re-writing of the 1925 Act the courts should enforce a less overbearing arbitration clause in a petroleum dealer's franchise agreement remains to be decided.

Unlike most federal commercial law including the Dealers' Day in Court Act, the petroleum marketing law explicitly preempted otherwise applicable state franchise laws limiting the right of the oil companies to terminate a franchise.⁷⁸ This had the effect of making the federal courts the forum of choice for the entertainment of dealers' claims. The preemption provision was, however, in keeping with long-established practice, read narrowly to retain in force other state laws protecting franchisees.⁷⁹ The framework of state contract and tort law remained in place.⁸⁰ In 1994, the petroleum marketing act was amended explicitly to preempt state laws requiring an oil company to pay for the goodwill of a terminated dealership.⁸¹ The policy of Congress in enacting the law in 1978 was to add strength to the position of the vulnerable franchis-

⁷⁴ 15 U.S.C. §§ 2801-06 (1998).

⁷⁵ 15 U.S.C. § 2802(b)(2)(B) (1998).

⁷⁶ 15 U.S.C. § 2805(b) (1998). See *Moody v. Amoco Oil Co.*, 734 F.2d 1200 (7th Cir. 1984) (finding the section to include the possibility of a preliminary injunction).

⁷⁷ *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244, 1248-49 (9th Cir. 1994).

⁷⁸ See 15 U.S.C. § 2806 (1998). See also *In re Herbert*, 806 F.2d 889 (9th Cir. 1986); *Mobil Oil Corp. v. Va. Gasoline Marketers and Auto. Repair Ass'n*, 34 F.3d 220, 227 (4th Cir. 1994).

⁷⁹ See *Bellmore v. Mobil Oil Corp.*, 783 F.2d 300, 304 (2d Cir. 1986); *Unocal Corp. v. Kaabipour*, 177 F.3d 755, 770-71 (9th Cir. 1999).

⁸⁰ E.g., *Carter v. Exxon Co., U.S.A.*, 177 F.3d 197 (3d Cir. 1999).

⁸¹ 15 U.S.C. § 2806(a)(2) (1998).

ees. It would be contrary to the purpose of that legislation for the courts to weaken the position of franchisees by enforcing dispute resolution clauses impeding the access of the franchisees to the federal judicial forum provided by that Act in lieu of pre-then existing remedies available to franchisees under state law. When Congress perceives a need to confer protection on the oil companies from greedy filling station owners, it knows how to do that, as it did in 1994.

D. *The Truth in Lending Act of 1968*

In 1968, Congress addressed the need to protect borrowers from deceitful and overbearing terms written into loan agreements.⁸² The Truth in Lending Act respected the freedom of the creditor and debtor to contract, but sought to enable borrowers to understand the terms of loans so that comparison shopping might be possible and so borrowers might know when they were victims of usurious charges.

A problem faced by Congress was devising a suitable remedy for violations of the Act. Individuals victimized by violations of the law would have difficulty in proving damages because they would have to show in what respects they might have fared better if they had been more fully informed. The solution reached was to provide penalties limited in amount to \$1,000 to be paid to a successful plaintiff, plus attorneys' fees.⁸³

It was recognized at the outset that the primary method of enforcement of the Act would be through the class action device created by the Supreme Court in the 1966 amendment to Rule 23. Lobbyists for organizations of lenders were horrified by their prospects. Their fears were overborne by the advocacy of the Federal Reserve Board who reported that the class action would be indispensable to enforcement, affirming that its "threat elevates a possible Truth in Lending lawsuit from the ineffective 'nuisance' category to the type of suit which has enough sting in it to assure that management will strive with diligence to achieve compliance."⁸⁴ The Act's sponsors reiterated this point. To reassure lenders that they would not be exposed to massive penalties for trivial offenses, a cap of \$100,000 was imposed, to be raised in 1974 to \$500,000.⁸⁵

While the Federal Reserve Board and the Federal Trade Commission were assigned roles in the administration of the Act, enforcement was left largely to private class action lawyers. The scheme, including class action enforcement, was extended in a 1976 law to lease transactions.⁸⁶ As recently as the late 1990s, there were about a dozen reported class action cases a year brought to enforce these laws.⁸⁷ This was hardly a bursting of the floodgate, but it was a sufficient level of regulatory activity to keep lenders at least somewhat on their

⁸² 15 U.S.C. § 1601 (1998).

⁸³ See Richard B. Cappalli, *Arbitration of Consumer Claims: The Sad Case of Two-Time Victim Terry Johnson or Where Have You Gone Learned Hand?*, 10 B.U. PUB. INT. L.J. 366, 390-401 (2001) (recounting the legislative history of the act).

⁸⁴ 119 CONG. REC. 25415 (July 23, 1973).

⁸⁵ Pub. L. No. 93-495, 88 Stat. 1500 (1976).

⁸⁶ 15 U.S.C. §§ 1667(a)-(f) (1998).

⁸⁷ F.T.C. ANN. REP. 59-61 (1998).

toes in providing the necessary information to borrowers and to keep the law's requirements in the public eye.

In recent years, some lenders and lessors have succeeded in substantially deregulating themselves by barring suits to enforce the law. The trick is, of course, the predispute arbitration clause that binds each debtor to pursue his claim individually in a private arbitral forum created for him. This is a complete bar to most valid claims because a \$1,000 claim is, to almost everyone, not worth asserting in arbitration or otherwise.

The practice of using arbitration to defeat Truth in Lending law has been contested. But the court of appeals entertaining the issue found that Congress has never explicitly prohibited individual arbitrations as a means of enforcement, and therefore the "national policy favoring arbitration" made predispute clauses enforceable notwithstanding their devastating effect on the legislative scheme.⁸⁸ The court followed the example of the Supreme Court in disregarding the role of the class action plaintiff and counsel as a private attorney general performing a public service in bringing to account those who violate the Act.⁸⁹

E. *The Magnuson-Moss Act of 1975*

In 1975, Congress enacted the Magnuson-Moss Act,⁹⁰ applicable to contracts for the sale of "consumer goods," and declared a national policy encouraging "warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms."⁹¹ The Act does not apply to sellers of services except services of repair or maintenance of goods sold. It provides a federal judicial remedy for breaches of express warranties, but authorizes sellers of consumer goods to contract for private resolution of warranty disputes through *non-binding* arbitration if the private forum offered to the consumer meets standards imposed by the Federal Trade Commission. When such an informal forum is provided, consumers can invoke federal jurisdiction to enforce a warranty only after they have presented their grievance to such a non-binding forum. This would be a rare outcome, but the possibility left the consumer with some modicum of power in his or her relationship with the seller. The Act also expressly proscribes "deceptive warranties," defined in part as those failing "to contain information which is necessary in light of all of the circumstances, to make the warranty not misleading to a reasonable individual exercising due care" or those whose terms limit their "scope and application as to deceive a reasonable individual."⁹²

⁸⁸ See, e.g., *Johnson v. W. Suburban Bank*, 225 F.3d 366 (3d Cir. 2000), *cert denied sub nom.*, *Johnson v. Tele-Cash, Inc.*, 531 U.S. 1145 (2001).

⁸⁹ See generally Cappalli, *supra* note 83; Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1 (2000); Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237 (2001); Christina S. Lewis, *Class Actions vs. Arbitration: Does TILA Support Class Actions in Arbitration Where Statutory Rights Are Concerned?*, 2001 J. DISP. RESOL. 133.

⁹⁰ Magnuson-Moss Warranty-Federal Trade Commission Improvement Act, 15 U.S.C. §§ 2301-12.

⁹¹ 15 U.S.C. § 2310(a)(1).

⁹² "The comprehensive disclosure requirements of Magnuson-Moss are an integral, if not the central, feature of the Act, perhaps eclipsing even the civil action and informal dispute

Any dispute resolution clause in a contract for the sale of consumer goods in interstate commerce, that reduced the access of consumers to law courts to enforce express warranties, would seem to violate the Act, the sole exception being a clause authorizing non-binding arbitration conducted in an ADR program approved by the Federal Trade Commission. Moreover, a clause lessening the ability of the consumer to enforce a warranty could be properly seen as "deceptive" and thus a substantive violation of the Act. Indeed, what could be more deceptive than a written warranty tucked inside a package that requires a consumer to assert any claim for its breach in a prohibitively distant or expensive forum?⁹³

Congress was explicit in the Magnuson-Moss Act that it did not intend in any way to pre-empt state law remedies for breach of implied warranties of merchantability imposed by the Uniform Commercial Code.⁹⁴ Such remedies might be pursued in state court or federal court if an independent basis for federal jurisdiction were available. Of course, the 1975 Act did not override the Federal Arbitration Act because, in 1975, the 1925 Act was not thought to be applicable to consumer transactions. It is now being contended, however, that the 1925 Act, as rewritten by the Supreme Court after its enactment, overrides the Magnuson-Moss Act by allowing the seller of consumer goods to impose on the unwary consumer mandatory binding arbitration in a forum not approved by the Federal Trade Commission.⁹⁵ That interpretation of the legislation is at odds with utterances of the Federal Trade Commission, designated by Congress as the overseer of compliance with the Act.⁹⁶ It is contended, however, that the FTC's policy is not an expression of the necessary Congressional intent to preclude arbitration, that only Congress itself can articulate an exception to the Supreme Court's national policy.⁹⁷

It is true that the Act, in its provisions encouraging non-binding arbitration, manifested a hope of Congress that civil juries would not be needed to enforce warranties. But, while the Magnuson-Moss Act encourages more ami-

resolution mechanisms in their importance to consumers." CURTIS R. REITZ, CONSUMER PROTECTION UNDER THE MAGNUSON- MOSS WARRANTY ACT 31 (1978).

⁹³ *E.g.*, Hill v. Gateway 2000, Inc., 105 F.3d 1147 (7th Cir. 1997); *cf.* Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569 (App. Div. 1998).

⁹⁴ HOWARD J. ALPERIN & ROLAND F. CHASE, 2 CONSUMER LAW: SALES PRACTICES AND REGULATION § 214 (1986) (describing design of Magnuson-Moss Warranty Act as complementing rather than superseding state warranty law). *See, e.g.*, Chrysler Corp. v. Tex. Motor Vehicle Comm'n, 755 F.2d 1192, 1205 (5th Cir. 1985).

⁹⁵ *See* Richardson v. Palm Harbor Homes, Inc., 254 F.3d 1321 (11th Cir. 2001). *But see* Pitchford v. Oakwood Mobile Homes, Inc., 124 F. Supp. 2d 958 (W.D. Va. 2000); Wilson v. Waverlee Homes, Inc., 954 F. Supp. 2d 1530 (M.D. Ala. 1997), *aff'd* 127 F.3d 40 (11th Cir. 1997).

⁹⁶ *See* 40 FED. REG. 60.168, 60.211 (1975) (stating "reference within the written warranty to any binding, non-judicial remedy is prohibited by the Rule and the Act"); 16 C.F.R. § 702.5(j). The Commission stated shortly after passage of the Act that nothing in Magnuson-Moss prevents warrantors from offering binding arbitration options to consumers *after non-binding informal dispute settlement mechanisms have been completed*. 40 FED. REG. 60.168, 60.211 (1975). More recently, the FTC has reiterated that warrantors are not precluded from offering consumers a binding arbitration option after a warranty dispute has arisen. 60 FED. REG. 19.700, 19.708 (1999).

⁹⁷ Katie Wiechens, *Arbitrating Consumer Claims Under the Magnuson-Moss Warranty Act*, 68 U. CHI. L. REV. 1459, 1469-86 (2001).

able alternatives, it, like the Truth in Lending Act, explicitly anticipates the use of the class action⁹⁸ as a last resort to correct the behavior of predatory sellers of consumer goods who make their sales with the help of deceptive warranties or whose transgressions are too minor to warrant individual lawsuits.⁹⁹ A party bound by an arbitration clause in an adhesion contract is thereby excluded from participation in a class action.¹⁰⁰ A business that includes such a clause in all its consumer contracts can thus elude the risk of class action enforcement of Magnuson-Moss at the same time that it defeats enforcement of Truth in Lending.

In addition, the Magnuson-Moss Act provides a one-way fee shift as a bounty to the successful plaintiff's lawyer to encourage private law enforcement.¹⁰¹ An arbitrator may enforce such an entitlement, but on the other hand it may not.¹⁰² Indeed, an arbitrator is free to forsake the American rule and tax fees against an unsuccessful plaintiff,¹⁰³ thereby discouraging private law enforcement fostered by the Act.

Predispute arbitration clauses in consumer transactions should be especially suspect. It is fanciful to speak of such instruments as contractual for they are anything but an expression of mutual assent. Like bills of lading or insurance policies, they are inherently unreadable to most citizens, and few consumers are contemplating a future dispute at the time they are making a purchase.¹⁰⁴ Like other provisions in contracts of adhesion, they should be carefully scrutinized by any court asked to enforce them. However, unless lower federal courts are in error in their reading of the Supreme Court's "national policy," a vendor of consumer goods can substantially gut the Magnuson-Moss Act by writing an expedient predispute arbitration clause into his written bill of sale form.¹⁰⁵ And it seems likely that many are now doing so.

⁹⁸ 15 U.S.C. § 2310(e). In this respect, the Act was like the Truth in Lending Act, erected on the foundation laid by the 1966 amendments to the Federal Rules of Civil Procedure promulgated by the Court.

⁹⁹ See note 16, *supra*. See, e.g., *Walsh v. Ford Motor Co.*, 807 F.2d 1000 (D.C. Cir. 1986).

¹⁰⁰ E.g., *Dominium Austin Partners L.L.C. v. Emerson*, 248 F.3d 720 (8th Cir. 2001).

¹⁰¹ 15 U.S.C. § 2310(d)(2).

¹⁰² See *infra* Part III for an explanation of the customary lack of an enforceable duty of arbitrators to render awards conforming to law.

¹⁰³ E.g., *Donel Corp. v. Kother Overseers Ass'n of Am. Inc.*, 2001 U.S. Dist. LEXIS 2314 (S.D.N.Y. 2001).

¹⁰⁴ See Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 *STAN. L. REV.* 211 (1995).

¹⁰⁵ In *Cunningham v. Fleetwood Homes of Georgia, Inc.*, 253 F.3d 611 (11th Cir. 2001), the court held that a third party beneficiary to a consumer contract cannot enforce an arbitration clause that does not explicitly provide for such enforcement. Perhaps with some diffidence, it explained that:

[T]he FTC has noted, the 'requirement of minimum uniformity in warranty disclosures should enable consumers to make valid and informed comparisons of warranties for similar products' Allowing Fleetwood to condition the warranty by invoking an arbitration agreement executed by the buyer and seller confounds this purpose in that consumers confronted with warranties that do not contain arbitration clauses that are nonetheless subject to arbitration will have no basis for judging the suitability of a warranty. This is of particular concern because the warranty is issued unilaterally, and, as the enactors of Magnuson-Moss noted, a consumer cannot bargain with manufacturers to adjust the terms of a warranty offered voluntarily by the manufacturer:

F. *The Racketeering Influenced and Corrupt Organizations Act of 1970*

RICO¹⁰⁶ was yet another law enacted to encourage private attorneys general to punish predatory business practices. The statute is chiefly a criminal law, but one provision authorizes law enforcement in civil actions brought by private counsel and subject to the Seventh Amendment right to trial by jury.¹⁰⁷ To win a RICO civil case, the plaintiff has to prove the elements of the criminal case, but does not have to overcome the presumption of innocence faced by a public prosecutor seeking a verdict of conviction.¹⁰⁸ The case to be proved, whether in a civil or in a criminal proceeding, is that a defendant has engaged in a pattern of activities of the sort enumerated in the Act; these include diverse forms of fraud, bribery, and extortion.¹⁰⁹ The role of the plaintiff as a private attorney general is confirmed by statutory provisions for treble damages and one-way fee-shifting.

Despite these features of the law, the Court held in 1987 that civil RICO claims are not to be distinguished from antitrust claims with respect to their arbitrability under the 1925 Act.¹¹⁰ Again, it seems clear that no one voting for the Act in 1970 could have anticipated the possibility that the Court would impose its "national policy" extending the Federal Arbitration Act into almost every corner of the legal landscape. In 1970, it would have been quite clear that the 1925 Act did not apply to claims under the Act.

The extent of the impairment of RICO enforcement is a matter for speculation. One Court of Appeals has held that an arbitrator may (but of course need not) award treble damages under the Act.¹¹¹ Nevertheless, it seems clear that the Congressional purpose in imposing civil liability on offenders was made less likely of attainment by the imposition of the Court's arbitration policy. Businessmen who fear the risk of liability for fraud, bribery, or intimidation can gain some comfort by imposing predispute arbitration clauses on those with whom they deal, with the arbitration to be conducted without civil discovery or the American rule on fee-shifting by a tribunal bearing no resemblance to a jury.

G. *State Laws Regulating Contracts*

Thus far, we have considered only the Court's national policy of weak enforcement of *federal* laws regulating business. Its weakening of state law regulating business has been, if possible, more complete. A majority of the

'[t]he warranty provisions of [Magnuson-Moss] are not only designed to make warranties understandable to consumers, but to redress the ill effects resulting from the imbalance which presently exists in the relative bargaining power of consumers and suppliers of consumer products.' The unilateral nature of warranties by manufacturers makes full disclosure in a single document mandatory for the attainment of Congress's goals.

Id. at 623 (second, third alterations in original) (citations omitted).

¹⁰⁶ 18 U.S.C. §§ 1961 et seq. (2000).

¹⁰⁷ 18 U.S.C. § 1964(a) (2000).

¹⁰⁸ *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985).

¹⁰⁹ 18 U.S.C. §§ 1961-68 (1970).

¹¹⁰ *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

¹¹¹ *See Kerr-McGee Refining Corp. v. M/T Triumph*, 924 F.2d 467 (2d Cir. 1991).

members of the present Court have acknowledged at one time or another that this was a dreadful mistake.

The critical decision came in 1984 in *Southland Corp. v. Keating*.¹¹² The Court there interpreted the Federal Arbitration Act to preempt a provision in the California Franchise Investment Act voiding mandatory arbitration clauses in franchise agreements made between local enterprises and national or international ones.¹¹³ As dissenting Justices O'Connor and Rehnquist observed at the time, this interpretation was contrary to any purpose ever expressed by Congress.¹¹⁴ Congress had acted in 1925 to shield state law governing commercial transactions from an intrusive federal judiciary. The Court in 1984, instead of enforcing the national law protecting the legislative jurisdiction of the states, created its "national policy favoring arbitration." That "national policy" has been applied to frustrate every effort of states to employ their courts to enforce regulations of business, whether in its relations to consumers, employees, or any other individuals who might be victimized by the exercise of superior economic power. As dissenting Justice Stevens observed at the time, the decision in *Southland* was contrary to the long-established principles of preemption that dictate that preemption "in a field traditionally occupied by state law" occurs only when Congress clearly expresses that intent, and then no more than absolutely necessary to effect the Congressional purpose.¹¹⁵ Those principles are exemplified in the treatment of the federal regulatory laws discussed above, as each was assigned minimal or no preemptive effect except insofar as Congress clearly expressed an intent to preempt. Congress has never expressed any purpose of pre-empting state laws that limit freedom of contract or authorize private enforcement of legislative policy, save perhaps in the field of health care insurance.¹¹⁶

It is true that the law of most states favors arbitration as an informal method of resolving *contract* disputes. The Uniform Arbitration Act expressing that policy has been fairly widely enacted.¹¹⁷

Nevertheless, all states also regulate contracts. For example, the terms of insurance policies written and sold by insurers are regulated in every state.¹¹⁸ It is the premise of insurance regulation that citizens cannot be expected to read and understand the intricate terms of the policies they buy. No state would allow an insurance company to write a clause into an insurance policy authorizing an arbitrator not bound by law to act as the authoritative interpreter of the instrument. Insurance policies are perhaps more difficult to read than most printed contracts, but they are on the other hand more likely to be read and considered than documents intended to govern transactions with consumers, or

¹¹² 465 U.S. 1 (1984).

¹¹³ *Id.* at 10.

¹¹⁴ *Id.* at 25-29.

¹¹⁵ *Id.* at 18 (Perhaps the Court has generally relaxed its traditional self-restraint in finding state laws to be pre-empted.). See, e.g., *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 549-51 (2001); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 866 (2000).

¹¹⁶ E.g., United States Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 (2002).

¹¹⁷ MacNeil et. al., *supra* note 70, at § 5.4.2.

¹¹⁸ SPENCER KIMBALL & WERNER PFENNIGSTORF, *THE REGULATION OF INSURANCE COMPANIES IN THE UNITED STATES AND THE EUROPEAN COMMUNITIES* 12 (1981).

employment manuals that the employee knows to be quite non-negotiable. Congress has disavowed any intent to preempt state insurance laws¹¹⁹ with such clarity that even the Supreme Court would presumably agree that insurance policies are not subject to the Federal Arbitration Act.

But conventional American contract law, expressed in the American Law Institute's Restatement of Contracts¹²⁰ and in the Uniform Commercial Code¹²¹ adopted in every state, cautions against the enforcement of overbearing terms in other printed "adhesion" contracts. One of the first cases refusing to enforce dictated terms in such a "contract" was decided as a matter controlled by federal common law by the Supreme Court of the United States in 1889, in the days of its strongest commitment to freedom of contract.¹²² The contract law of no state allows parties to contract out of its regulatory laws, or to write unconscionable terms into printed forms recording routine transactions. It is perhaps the law in all states that it is unconscionable for a party who is a "repeat player" to write into a standard form contract a dispute resolution clause having the effect of stripping the "single-shot player" of procedural rights useful in private enforcement of laws enacted to deter predatory behavior by businesses. "Single-shot players" might be consumers, employees, patients, franchisees, and others who are not in a position to evaluate and resist onerous provisions disabling them from performing the role of private attorney general.

So far as I am able to detect, no legislature, state or federal, has ever knowingly authorized parties to write predispute arbitration agreements into contracts of adhesion. Nor has any state supreme court repudiated the long-standing and widely shared practice of disregarding business self-deregulation through contracts with vulnerable parties. But many states have enacted many diverse laws to protect consumers, employees, and small businesses. Most such laws are privately enforceable in state courts with civil juries.

Thus, the specific California law invalidated in 1984 was not unusual; many states have legislation enacted to protect franchisees other than automobile dealers from predatory contract provisions. Because franchise agreements are commercial transactions resembling the contracts for the sale of goods in interstate commerce that Congress had in mind in 1925, the Court could have limited the 1984 decision preempting state law invalidating predispute arbitration clauses to contracts between business men who are presumably advised by counsel and who might possibly be expected to walk away from a deal infected with a dispute resolution clause stripping them of substantive rights not derived from the contract, or to exact a price for such a clause in other terms of the agreement.

No such distinction was made. In 1995, the Supreme Court extended its application of the Federal Act to preempt Alabama law protecting consumers of services from mandatory arbitration clauses in standard form contracts.¹²³ The consumer in that case had ill advisedly signed a printed contract for the removal of termites from his home without deleting a provision requiring him

¹¹⁹ McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (2002).

¹²⁰ RESTATEMENT (SECOND) OF CONTRACTS § 211.

¹²¹ *Id.* at § 2-302.

¹²² *Liverpool Steam Co. v. Phoenix Ins. Co.*, 129 U.S. 397, 441-42 (1889).

¹²³ *Allied Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995).

to make any claim for breach of warranty to an arbitrator to be appointed by the American Arbitration Association. Twenty state attorneys general filed an amicus brief calling the Court's attention to the consequences of the 1984 interpretation of the 1925 Act. They made the point that much law in most if not all states that regulates business practices is privately enforced by individual attorneys general and that arbitration clauses often serve to deter and even prevent such enforcement. Justice Breyer, writing for the Court, reassured the states' attorneys general that their governments were not preempted from regulating standard form contracts so long as the regulation did not discriminate against arbitration clauses. He underscored the language of Section 2 of the 1925 Act providing that an arbitration clause may be held invalid "upon such grounds as exist at law or in equity for the revocation of any contract." These grounds would seem clearly to include unconscionability.

Justice O'Connor, concurring in the termite case, justified her vote on the ground that she felt bound by the doctrine of precedent to adhere to the Court's 1984 interpretation, wrong though she continued to think that it had been. Perhaps she was also explaining the votes of Justices Rehnquist and Stevens, who had also dissented in the earlier case. Justice Thomas was not persuaded by her appeal to precedent and dissented on the grounds stated in her 1984 dissent. Justice Scalia also dissented, acknowledging that his support of the 1984 decision had been so erroneous that the Court had a duty to reverse it whenever five votes could be assembled for that purpose.

Thus, there are five members of the present Supreme Court who have stated in judicial opinions that the 1984 decision was erroneous and in need of correction by Congress. The other four members of the Court have reassured us that the power lies in state legislatures to regulate standard form contracts so long as they do not discriminate against arbitration clauses. Not a single Justice of the present Court has openly avowed the belief that federal arbitration law *should* impede or prevent enforcement of state laws regulating business practices and limiting freedom of contract as applied to consumers or employees. The New Mexico legislature has responded to Justice Breyer's invitation,¹²⁴ and perhaps others will soon follow. We ought to hope so.

However, the lower federal courts have been prone to deploy the Court's "national policy" to effect change not only in state law providing for judicial enforcement of business regulation legislation, but also in the state law of consumer and employment contracts. In order to resolve all doubts in favor of arbitration, some federal courts have also resolved all doubts in favor of contract, even where the existence of any mutual assent is more than dubious. This has been most evident in the enforcement of arbitration clauses in package inserts and the like.¹²⁵ The provisions of Section 2 of the Act emphasized by

¹²⁴ See N.M. STAT. ANN. §§ 44-7-1 to 44-7-22 (Michie 2001).

¹²⁵ Sajida A. Mahdi, *Gateway to Arbitration: Issues of Contract Formation Under the U.C.C. and The Enforceability of Arbitration Clauses Included in Standard Form Contracts Shipped with Goods*, 96 Nw. U. L. REV. 403, 417 (2001).

Justice Breyer in his reassurance to the state attorneys general have been widely disregarded.¹²⁶

III. THE LIMITATIONS OF ARBITRATION AS A METHOD OF LAW ENFORCEMENT

The Supreme Court has concealed, perhaps from itself, the consequences of its misdeeds by repeatedly asserting that arbitration is just another way of enforcing one's legal rights.¹²⁷ The Court would have us believe that those who impose predispute arbitration clauses on consumers and employees are merely serving the public interest in saving legal costs. Frequent repetition by the highest authority does not make the words true. The Court notwithstanding, commercial arbitration as it has developed in the United States is not a legal process and differs in vital ways from the adjudication of rights by courts. There are at least five fundamental differences.

First, there are concerns regarding the identity of arbitrators. Even if the issue is only one of contract interpretation, "*Who* interprets . . . will frequently be more significant than what the applicable law says about the agreement."¹²⁸ The arbitrators appointed pursuant to form contracts are generally screened by an arbitration organization accustomed to serving business interests.¹²⁹ The arbitrators employed by such institutions are almost all formerly connected to business enterprise, or they are former judges whose judicial work was approved by businessmen.¹³⁰ Prospective jurors with the same connections would be excused from sitting on many of the cases that the arbitrators decide. It is not unlikely that such decision makers will, at least unconsciously, tend to favor "repeat players" who may select them to decide future disputes against "single shot players" such as consumers or employees who are not likely ever to need their services again.¹³¹ Also, arbitrators are commissioned by contract and are therefore likely to be more diligent and effective in enforcing contract obligations than in enforcing statutes that intrude on the freedom of contract. While good arbitrators certainly try to overcome these sources of bias, and may often even succeed in doing so, there is no way that they can overcome the appearance of bias that is certain to diminish the optimism of individual claimants engaged in a dispute with a business firm. In this respect, appearance is

¹²⁶ Charles Davant IV, Note, *Tripping on the Threshold: Federal Courts' Failure to Observe Controlling State Law Under the Federal Arbitration Act*, 51 DUKE L.J. 521, 538 (2001).

¹²⁷ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 634 n.18 (1985); *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538-42 (1995).

¹²⁸ William W. Park, *When and Why Arbitration Matters*, in *THE COMMERCIAL WAY TO JUSTICE* 73, 75 (G. M. Beresford Hartwell ed., 1997).

¹²⁹ On the commercial nature of these institutions, see *Reynolds Holding*, *Private Justice Part II*, SAN FRANCISCO CHRONICLE, October 8, 2001, at 5-6.

¹³⁰ *Id.* at 7-8.

¹³¹ This suspected bias has been given some confirmation in an empirical study by Professor Lisa Bingham of the Indiana University Business School. Lisa Bingham, *On Repeat Players, Adhesion Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGEORGE L. REV. 228, 233 (1998). See also Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 E.M.P.L. RTS. & E.M.P.L. POLICY 189 (1997) (acknowledging that her data is inconclusive as to the reality of bias).

more important than reality because it is the appearance that controls the settlement value of claims, and most claims are settled.¹³²

More fundamentally objectionable than the appearance of conflicts of interest of arbitrators is that they are not jurors selected to represent the community at large. In its authorization of self-deregulation, the Court has savaged not only the Seventh Amendment to the Constitution of the United States, but also the similar provisions of state constitutions empowering citizen-jurors to regulate the conduct of businessmen in their community. The Court in 1973 manifested its indifference to the institution of the civil jury by authorizing the jury in federal courts to be halved in size,¹³³ thereby assuring that there would be more exceptional juries and more exceptional verdicts of the sort to which critics of private law enforcement can point.¹³⁴ No Congress would have enacted such a "reform" of the jury, nor have states followed the federal practice in that regard.¹³⁵

As noted above, numerous laws have been enacted by Congress to regulate business that were clearly drafted with the expectation that they would be enforced by civil juries. And many states have long regarded predispute waivers of the right to trial by jury as voidable in order to protect the rights of weaker parties to contracts.¹³⁶ Any such law has been set aside by the Court's preemption decisions.

Second, arbitrators need not be lawyers and are not required to know or enforce law. Where jury verdicts are subject to review to assure their fidelity to law, arbitral awards are not. As noted, arbitrators in the United States are free to do equity or justice as they see it, and may render Solomonian awards giving a little something to each party to a dispute. They need not explain the reasons for an award and their decisions are rarely, if ever, subject to review on the substantive merits.¹³⁷ While this feature of traditional arbitration practice is subject to modification by contract,¹³⁸ it would be surprising indeed to find it

¹³² Marc Galanter & Mia Cahill, *Most Cases Settle: Judicial Regulation of Settlement*, 46 STAN. L. REV. 9 (1994).

¹³³ *Colgrove v. Battin*, 413 U.S. 149, 159-160 (1973).

¹³⁴ Richard O. Lempert, *Uncovering "Nondiscernible" Differences: Empirical Research and the Jury Size Cases*, 73 MICH. L. REV. 643, 651-53 (1975). See also MICHAEL SAKS, *JURY VERDICTS: THE ROLE OF GROUP SIZE AND SOCIAL DECISION RULES* (1977).

¹³⁵ Some states do use smaller juries for the resolution of some disputes, and may make other accommodations. See *Developments in the Law: The Civil Jury*, 110 HARV. L. REV. 1408, 1480-83 (1997).

¹³⁶ 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).

¹³⁷ E.g., *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 502, 511 (2001) (While the Court has sometimes reassured us that arbitrators must obey statutory law, lower federal courts have generally disregarded that reassurance.). See also Edward Brunet, *Toward Changing Models of Securities Regulation*, 62 BROOK. L. REV. 1459, 1473-74 (1996); *Hill v. Norfolk & W. Ry.*, 814 F.2d 1192, 1194-95 (7th Cir. 1987) (containing an emphatic threat from Judge Richard Posner to punish suits seeking to overturn arbitration awards).

¹³⁸ Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 47 (1999); Alan Scott Rau, *Contracting Out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 239 (1997); Thomas J. Stipanowich, *Contract and Conflict Management*, 2001 WIS. L. REV. 831, 885-86.

modified in an arbitration clause in a printed contract presented to a consumer or employee.

Third, arbitrators in the United States have no enforceable duty to inquire into the facts. While they have a subpoena power,¹³⁹ they need not use it, and parties presenting their cases to an arbitrator have no right to compel the testimony of witnesses or the production of documents unless the arbitrator chooses to require it. The lack of access to adversary discovery of evidence (such as state and federal courts allow) can, for example, prevent an automobile dealer or filling station owner from investigating possible violations of the antitrust laws of the United States or other state or federal laws enacted to protect local dealers or franchisees that make predatory intent an element of a plaintiff's claim. There is no requirement that a record be kept of the evidence considered by an arbitrator.

Fourth, arbitrators in the United States cannot administer the full array of legal remedies available in court. They are not generally able to provide preliminary injunctions for those in need of that form of relief. While they can utter commands to a party, they have no contempt power enabling them to enforce any command regarding the future behavior of a party and can only hope for judicial support to compel compliance. They are sometimes legally disabled from awarding exemplary damages¹⁴⁰ or imposing penalties or bounties conferred by statute.

Fifth, arbitration is not an open public process. It is clear that this is one of its attractions to predatory business because it diminishes the likelihood that the success of one claim by a consumer or employee will encourage others like it. Secrecy can also be achieved by settlement, but the settling claimant is always compensated for his or her forbearance. It may reasonably be questioned whether documents and other material uncovered by a private attorney general or personal injury plaintiff should ever be withheld from public view. A public enforcement proceeding also alerts the general public to the need for regulation and enables them to measure the usefulness of their legal institutions. Secret proceedings or suppressed discovery material conceal from the public not only the risk of the harm at issue, but also an awareness that the public at large is being served by the law enforcement efforts of their fellow citizens.¹⁴¹ Meanwhile, the business defendant resolving disputes secretly knows all about any successful claims and can guide itself accordingly while his or her adversary negotiates in ignorance.

In many of these respects, American arbitration law is to be distinguished from the law and practice of international commercial arbitration. Traditionally, the arbitrators in international commercial practice involving businessmen on both sides are appointed by a group having no connection to either party, thus neutralizing the influence of the repeat player. Often, there are three arbi-

¹³⁹ *E.g.*, 9 U.S.C. § 7; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM ARBITRATION ACT § 7.

¹⁴⁰ *See* Thomas J. Stipanowich, *Punitive Damages in Arbitration: Garrity v. Lyle Stuart, Inc. Reconsidered*, 66 B.U. L. REV. 953 (1986). *But cf.* Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995).

¹⁴¹ Adriaan Lanni, *Protecting Public Rights in Private Arbitration*, 107 YALE L.J. 1157, 1161 (1999).

trators, a custom rare in American commercial practice because it materially elevates the cost. Indeed, international commercial arbitration may be much more expensive than litigation in the courts of any country. Arbitration conducted under conventional international standards is usually preferred by those engaged in international commerce only because it is perceived to be a means of securing a neutral forum. In addition, it is customary in international practice for the award to include a finding of facts and a statement of reasons linking the decision to the controlling law.¹⁴² In some systems, such as that of the International Chamber of Commerce, there is even a possibility of appellate review of sorts.¹⁴³ In any event, it is almost universally agreed in international practice that the arbitration panel is to enforce the law, not weigh the equities. The most commonly used rules of international commercial arbitration explicitly forbid arbitrators to decide “*ex aequo et bono*” as *amiable compositeurs* of business relationships, unless the parties ask for such cheerful conciliation service.¹⁴⁴

Mandatory arbitration pursuant to a predispute agreement should also be contrasted with consensual arbitration undertaken on an agreement between parties having knowledge of what is at stake in an existing dispute. Arbitration under those circumstances can save real costs. The agreement of parties to submit a case to arbitration reflects a level of mutual trust facilitating the voluntary exchange of information and evidence. They are also in a position to insist that the arbitrator be a person unlikely to be influenced by the relative frequency with which the parties might become future employers of the arbitrator. And they are not unlikely to welcome the possibility that the arbitrator will try to render a conciliatory award in lieu of straightforward enforcement of controlling law.

The D.C. Circuit, in an opinion by Judge Harry Edwards, has sought to confront some of these issues by imposing requirements on arbitration proceedings involving employees’ claims of statutory rights.¹⁴⁵ These “minimal standards of due process” require, for example, that the arbitrator be a lawyer schooled in the pertinent law who would write an opinion subject to judicial review.¹⁴⁶ These standards are also reflected in Protocols observed by the American Arbitration Association in handling employment and consumer disputes.¹⁴⁷ But predatory businesses writing predispute arbitration clauses into

¹⁴² *E.g.*, RULES OF ARBITRATION OF THE INTERNATIONAL CHAMBER OF COMMERCE Article 25 (1998); LONDON COURT OF INTERNATIONAL ARBITRATION RULES, Article 26 (1998).

¹⁴³ *Id.*, Article 27.

¹⁴⁴ *Id.*, Article 17; UNCITRAL ARBITRATION RULES, Article 33.

¹⁴⁵ Legislation to protect non-unionized employees is not given full attention in this article. Of all the laws enacted by Congress to regulate business, perhaps the least suited to mandatory arbitration is the Fair Labor Standards Act. *See, e.g.*, *Bailey v. Ameritrust Mortgage Co.*, 2002 WL 1835642 (D. Minn. 2002).

¹⁴⁶ *Cole v. Burns Int’l Sec. Servs.*, 105 F.3d 1465, 1486 (D.C. Cir. 1997); *cf.* *Shankle v. B-G Maint. of Colo., Inc.*, 163 F.3d 1230 (10th Cir. 1999); *Hooters of Am., Inc.*, 173 F.3d 933, 941 (4th Cir. 1999); and *see* Robert A. Gorman, *The Gilmer Decision and the Private Adjudication of Public Law Disputes*, 1995 U. ILL. L. REV. 635, 645 (1995).

¹⁴⁷ NATIONAL CONSUMER DISPUTE ADVISORY COMMITTEE, DUE PROCESS PROTOCOL ON MEDIATION AND ARBITRATION OF CONSUMER DISPUTES (1998); DUE PROCESS PROTOCOL ON MEDIATION AND ARBITRATION OF HEALTH CARE DISPUTES (1998); NATIONAL ACADEMY OF ARBITRATORS, GUIDELINES ON ARBITRATION OF STATUTORY CLAIMS UNDER EMPLOYER-

forms used to record consumer or employment transactions need not employ the AAA, and the opinion of Judge Edwards has not yet resonated outside the field of employment contracts. It seems not unlikely that if his standards of due process were applied to all mandatory predispute arbitration clauses, few would be written. Even minimal due process would materially enhance the costs and risks to the party writing the printed contract.

Many predispute arbitration agreements, as they are written, load the dice to the advantage of the repeat player drafting the forms. The ARCO franchise agreement clause previously adverted to is an example.¹⁴⁸ The draftsmen of such forms are not satisfied merely to require the weaker individual party to engage in arbitration, with its inherent inadequacies as a means of rights enforcement, but they also add bells and whistles making the designated arbitration forum especially ineffective as a means of enforcing one's legal rights. They may seek to locate the arbitration at a distant place, or conduct it with an institution charging an enormous filing fee, or reverse the American rule on fee-shifting, or exclude the weaker party from participating in a class action, or forbid an award of exemplary damages, or shorten the limitations period, or make the individual promise to keep the award secret, or devise perhaps many other impediments to effective private law enforcement. Some or perhaps many of these bells and whistles may, as in the ARCO case, render the arbitration clause unenforceable.¹⁴⁹ But to the extent that they are valid, they magnify the degree to which business can self de-regulate by means of arbitration clauses in adhesion contracts.

A striking example of bells and whistles is provided by the contract AT&T recently sought to impose on its California customers for long distance service.¹⁵⁰ It was laden with added features leading Judge Bernard Zimmerman, in deciding a suit challenging the terms of that contract, to conclude that:

This lawsuit is not about arbitration. If all AT&T had done was to move customer disputes that survive its informal resolution process from the courts to arbitration, its actions likely would have been sanctioned by the state and federal policies favoring arbitration. While that is what it suggested it was doing to its customers, it was really doing much more; it was actually rewriting substantially the legal landscape on which its customers must contend. . . . It is not just that AT&T wants to litigate in the forum of its choice – arbitration; it is that AT&T wants to make it very difficult for anyone to effectively vindicate her rights, even in that forum. That is illegal and unconscionable and must be enjoined.¹⁵¹

Even if my observations possibly overstate the weaknesses of arbitration as a means of rights enforcement – as indeed they would if Judge Edwards' due process requirements were universalized – they reflect the perceptions of most lawyers whose clients are afflicted with mandatory arbitration clauses written into adhesion contracts. The usually-intended effect of the predispute arbitra-

PROMULGATED SYSTEMS, DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1997). The Judicial Arbitration and Mediation Service observes similar rules.

¹⁴⁸ *Graham Oil Co. v. ARCO Prods. Co.*, 43 F.3d 1244 (9th Cir. 1994).

¹⁴⁹ *See, e.g., Circuit City Stores v. Adams*, 279 F.3d 889, 893 (9th Cir. 2002).

¹⁵⁰ *Ting v. AT&T*, 182 F. Supp. 2d 902 (N.D. Cal. 2002).

¹⁵¹ *Id.* at 938-39.

tion clause is to intimidate the weaker party, perhaps especially one whose statutory rights threaten the client of the draftsman. While predispute arbitration clauses written into standard form adhesive contracts are thus not straightforward renunciations of the statutory rights of weaker parties, they often are, as Judge Zimmerman states, restructurings of the legal landscape to be traversed by a claimant. Because arbitration is, for numerous reasons, less likely to result in the enforcement of legal rights, a legal claim that can only be arbitrated has less value to the plaintiff than a legal claim that can be litigated in an American court, and in some instances the settlement value may be reduced to zero. It is sophistry to deny this practical effect, which has the secondary consequence of weakening the enforcement of much law enacted to protect the public from predatory behavior by those with economic power.

IV. ARBITRATION AS A MEANS OF SAVING LEGAL COSTS

In addition to the assurance offered by the Supreme Court that arbitration is just another way of enforcing one's legal rights, the Court also assures those resisting that mandatory arbitration is just as a means of saving legal costs.¹⁵² Perhaps this assumption is the result of a conflation of predispute mandatory arbitration and consensual arbitration that has unquestioned capacity to reduce legal costs. It was indeed the assumption of the Magnuson-Moss Act that voluntary ADR can save legal costs and facilitate the assertions of rights by persons of limited means in disputes of limited value. In diverse forms, including mediation, non-binding arbitration, early neutral evaluation, as well as binding arbitration, there may often be real opportunities to save costs.¹⁵³ The problem is that those drafting mandatory predispute arbitration clauses are not motivated by any desire to facilitate the assertion of claims against themselves. The Court's contrary assumption is one made in a legal skybox or perhaps in fairyland.

We can be sure, of course, that mandatory arbitration does improve the profit picture for the parties who write such clauses into their standard form contracts. If that were not so, of course, the clauses would not be in the contracts. It is also surely true that enforcement of mandatory arbitration clauses relieves the public fisc of costs that they must bear when disputants litigate. It also lightens the workloads of judges. In the latter respects, the question is raised whether the investment of public resources in the enforcement of rights and in the regulation of predatory business is a good investment. Those who are regulated may think not; those whose interests are protected are likely to disagree.

Possibly mandatory arbitration pursuant to a predispute agreement might also incidentally relieve some individual parties to adhesion contracts of some of their legal expenses. Cost saving is possible when the law applicable to the events is reasonably settled and the factual issues are uncomplicated and require the use of no special expertise. The Supreme Court, in enforcing a

¹⁵² This is the premise of *Green Tree Financial Corporation of Alabama v. Randolph*, 531 U.S. 79 (2000).

¹⁵³ For a brief summary, see Judith A. McMorrow, *The Advocate as Witness: Understanding Context, Culture and Client*, 70 *FORDHAM L. REV.* 945, 972-75 (2001).

mandatory arbitration agreement in 2000, indicated that it might not enforce such an agreement if it appeared that arbitration would be more expensive for the weaker party to the agreement.¹⁵⁴ It would, however, be remarkable if mandatory arbitration clauses were intended by those who write them to strengthen the prospective bargaining positions of their adversaries by reducing their costs relative to those of the party writing the standard form. Nevertheless, the Court requires proof that this is so.

Economic theorists can and do argue that individuals benefit indirectly from the savings accruing to the corporate enterprise or the government in the form of lower prices or higher wages, and lower taxes.¹⁵⁵ No doubt some cost savings are passed on as a result of market pressures. This is likely to be the case in markets featuring intense price or wage competition, such as the market for long-distance telephone service. It is, however, by no means clear that a *prudent* person of the sort envisioned by economic theory would trade a minor reduction in the price of goods and services, or a minor increase in wages, for a material reduction in his or her ability to enforce his or her rights under statutes enacted to protect such persons from their weakness. And redistribution of some of the savings in the form of lower prices or higher wages does nothing to deter or correct corporate misconduct, so that the public interest in law enforcement by private attorneys general is consistently disserved by mandatory arbitration clauses when applied to claims of statutory rights.

As suggested, the savings on legal expenses, if that is in the public interest, could be maximized simply by repealing laws enacted to regulate contracts to protect consumers, workers, patients, franchisees, and others. However, none of the latter-day champions of freedom of contract are heard to advocate repeal of any of the laws whose enforcements they would impede. Implicit in regulatory legislation by Congress and state legislatures are their economic determinations that (a) it is worth the cost to the public fisc to provide a public forum in which the individual rights conferred can be effectively enforced and the public interests served, (b) the business competitors whose conduct is regulated should bear the costs incident to effective private enforcement of laws enacted to deter their predatory impulses, and (c) the citizens protected benefit more from having enforceable rights than from having marginally lower prices or higher wages.

V. CONCLUSION

There are those who applaud the Court's national policy. One such group are persons whom Justice Stevens denoted as believers that arbitration is "an institution designed to implement a formula for world peace."¹⁵⁶ The ADR movement has been a shelter for that sentiment, although some of its more ardent theorists have come to recognize that they have been ill-used.¹⁵⁷ Also

¹⁵⁴ See *Green Tree*, 531 U.S. 79.

¹⁵⁵ See, e.g., Christopher E. Drahozal, "Unfair" Arbitration Clauses, 2001 U. ILL. L. REV. 695 (2001).

¹⁵⁶ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 665 (1985).

¹⁵⁷ E.g., Carrie Menkel Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems? Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19 (1999).

sharing that faith are many professionals who make a living from arbitration; they include those active in the American Arbitration Association, JAMS, and other similar organizations. A second constituency is members of the federal judiciary who see arbitration as a device for relieving themselves of part of their workloads or for preventing the dilution of their status by obviating the need to create additional judgeships. A third are economic theorists who suppose that the saving of legal costs is passed on to consumers and employees, generously compensating them for the weakening of their ability to enforce their rights with lower prices or higher wages.¹⁵⁸ Politically more important than any of these groups is the fourth who are the members of the United States Chamber of Commerce and who see mandatory arbitration as a boon to their bottom lines because it liberates them from effective enforcement of unwelcome regulation.

However, the Court's "national policy favoring arbitration" has no basis in any legislative enactment or indeed any expression by any political body, state or federal, that is accountable to the people. In insisting on the application of predispute arbitration clauses in adhesion contracts to the resolution of claims of statutory rights, the Court has erred, in some respects reflecting an optimism characteristic of the tulip bulb or dot-com mentality. It was unfounded optimism to suppose, contrary to reality and common sense, that the purpose of such contract provisions is merely to save needless expense on all sides. It was similarly unfounded optimism for the Court to embrace notions regarding freedom of contract that manifest ignorance of, or indifference to, the frailties of their fellow citizens who lack the time, the interest, the foresight, the energy, and especially the power to renegotiate adhesion contracts to protect themselves from predatory business.

No legislature or court accountable to the people would have made the errors made by the Court in its radical re-writing of the Federal Arbitration Act. What it has achieved has been a serious impairment of the tradition of private law enforcement and the creation of a system of self-deregulation comforting to business predators.

¹⁵⁸ For an application of this view, see Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996); Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (With a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195 (1998).