No Day in Court

Access to Justice and the Politics of Judicial Retrenchment

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Introduction

To obtain a credit card today, one has to sign a lengthy and detailed contractual agreement with a bank provider. Most people sign their name or click the relevant online box without reading the fine print and paragraph upon paragraph of legalese. Were they to do so, they would typically find a clause buried in the contract stating that should the cardholder wish to dispute fees at any point with the provider, he or she must do so through a process of arbitration. This means that consumers are not able to resolve their complaint in court, regardless of the nature and severity of their dispute with the bank.

In the first decade of the new millennium, millions of credit card users in the United States have become bound by this process of mandatory arbitration to resolve disputes with their banks. As of 2006, more than 200,000 cases a year were handled by the National Arbitration Forum (NAF), a for-profit company that specializes in resolving disputes where a consumer, or group of consumers, believes that a bank, credit card company, or major retailer owes them money.[1] A 2007 Public Citizen report found that arbitrators in California working for the NAF had ruled against consumers 94 percent of the time; a subsequent lawsuit filed by the City of San Francisco provided data showing that the NAF won 99.8 percent of the time.[2] In 2009 Public Citizen found that 80 percent of credit card companies (including all ten of the nation's largest), 70 percent of banks, and 90 percent of cell phone companies currently have mandatory arbitration clauses in their contracts with consumers,[3] and a report issued by the Consumer Financial Protection Bureau at the end of 2013 determined that more than half of outstanding credit card

loans are subject to arbitration clauses, a number that could soon reach as high as 94 percent if some of the prominent banks that agreed to remove the clause from their contracts temporarily decide to reimplement it.[4]

These reports, and the trend that they reflect, sparked a flurry of intensely partisan congressional hearings on the practice of mandatory arbitration, where consumers are required to sign away their right to legal redress as part of the terms of service.[5] The titles of the majority and minority reports published from the hearings illustrate the fundamentally different understandings of the nature of the problem that has given rise to this trend. The title of one House majority report, written by Dennis Kucinich, the Democratic chairman of the Domestic Policy Subcommittee, was "Arbitration Abuse: an Examination of Claims Files of the National Arbitration Forum"; the minority report, authored by Jim Jordan, the Republican ranking subcommittee member, was alternatively entitled, "Justice or Avarice: The Misuse of Litigation to Harm Consumers."[6] The Democrats' report focused on harms to consumers with regard to debt collection arbitration, claiming that consumers' due process rights were denied by the NAF's debt collection processes, and it promoted legislative action to end mandatory arbitration in the industry. The Republican report, by contrast, criticized the cost, excess, and greed of trial lawyers who promote and potentially benefit from traditional litigation, defending mandatory arbitration as a process that is therefore to the consumer's advantage.[7]

Credit cards and loan agreements are not the only areas of American life pervaded by mandatory arbitration agreements. Increasingly, working Americans have to sign contracts with employers specifying that they must enter into similar binding arbitration to resolve any workplace-related claims that may arise, and students are increasingly bound to arbitration when they obtain student loans or enroll at for-profit colleges. One study of twenty-one major corporations found provisions for mandatory arbitration in 93 percent of their employment contracts, and another estimated that at least one-third of nonunionized employees in America are bound by mandatory arbitration clauses.[8] Individual workers fare only slightly better with their employers than they do in disputes with credit card companies; a study of nearly 4,000 employment arbitration cases found that arbitrators found in favor of employees only 21 percent of the time, significantly lower than rates of success in litigation proceedings.[9] Members of Congress have responded to this phenomenon in the same partisan manner that reflected the split on the use of arbitration in banking. When the Commercial and Administrative Law subcommittee of the House Judiciary Committee held hearings entitled

"Mandatory Binding Arbitration: Is It Fair and Voluntary?," Republicans on the committee praised arbitration as "a critical tool in our society because it makes justice prompt and accessible for millions of Americans, and without it too many citizens would be left out in the cold by overburdened courts and overpriced lawyers."[10] By contrast, Democrats such as John Conyers and Loretta Sanchez expressed concern that mandatory arbitration denied proper legal redress for consumers and employees, forcing them to go through a biased and unequal bargaining process designed to protect big business at the expense of civil and legal rights.[11] Cliff Palefsky, co-founder of the National Employment Lawyer's Association, argued to House members that while arbitration is a dispute resolution system, it is "not a justice system." Instead, he stressed that "what is going on is do-it-yourself tort reform."[12]

The Supreme Court has decided various cases in the last few years in which it clearly adopted the position that businesses may use mandatory, binding arbitration to deny consumers and students the opportunity to litigate disputes and that individuals are bound by those agreements. In 2011 the Court held that AT&T Mobility could force customers to settle their disputes through arbitration and to waive their right to participate in any future class action lawsuits (notwithstanding a California law prohibiting contracts that disallow class action litigation), a decision that Andrew Cohen, writing in the *Atlantic*, called "as big a pro-business, pro-corporate ruling as we've ever seen from the Roberts Court."[13] Lower courts extended the holding to students seeking damages from both their universities and the financial institutions handling their student loans as well.[14] The next year, the Court again upheld the use of mandatory, binding arbitration (with only Justice Ruth Bader Ginsburg dissenting), holding that consumers who sign credit card agreements with arbitration clauses do not have the option to dispute any charges or fees in court—despite specific provisions in the Credit Repair Organizations Act that provided for precisely that.[15] And in 2013, the Court held that courts were not permitted to invalidate a contractual waiver requiring class arbitration for antitrust claims against a restaurant, effectively prohibiting merchants from pursuing a class action. This, too, occurred despite the fact that the maximum limits of an arbitration award as designated in the contract at hand would not allow the individuals to recover enough to afford arbitrating their claim.[16]

The majority defended each of these cases on the grounds that Congress has had a long-standing "liberal federal policy favoring arbitration agreements"[17] dating back to the Federal Arbitration Act (FAA) of 1925, and that

the act was explicitly designed to curb "widespread judicial hostility to arbitration agreements." The Court's interpretation of the FAA as forcing individuals into arbitration and prohibiting groups with similar claims from asserting their rights by filing class action law suits, however, may well have surprised those who crafted the law in 1925. The interpretation certainly prompted skepticism from liberals as to what might be motivating a conservative Court to so fervently defend arbitration clauses, an innovation that was initially championed more than a century ago as a development geared toward giving workers in labor disputes greater access to justice. As Vermont Senator Patrick Leahy commented, "Congress never intended the law to become a hammer for corporations to use against their employees."[18]

The increasing use of mandatory arbitration to settle disputes without the option of going to federal courts is part of a broader trend toward the use of "alternative dispute resolution," a term that encompasses a number of conflict resolution techniques that fall outside of the traditional legal process. These techniques, which include not only arbitration but also mediation, settlement, and negotiation, typically involve the use of a nonjudicial third party actor to facilitate a resolution outside of court.[19] Because ADR consists of dispute resolution techniques that fall outside of the traditional judicial process, it by nature lessens judicial authority and access to courts. This has always raised the question of whether or not it relegates certain categories of claims to a system of second-rate justice—and over time, the ADR infrastructure has, in fact, arguably moved from being a form of justice enhancement for those unable to represent themselves adequately in court to one co-opted by groups less concerned with matters of justice and more concerned with defining certain types of legal claims as not warranting a hearing by judge and jury.[20] Moreover, the normative and practical impacts of these developments are, in many ways, continually controversial, raising questions about how well the judicial system is suited to meeting its goals, and whether these alternative mechanisms address the shortcomings of our justice system or just complicate them further.

The use of ADR to constrict access to courts has been a strikingly successful retrenchment strategy for conservatives, who seem to have co-opted these resolution procedures in order to impose binding mechanisms that reduce access to courts. Both national and state-level studies have found that the expansion and availability of arbitration and other forms of ADR has clearly resulted in a significant number of cases being "diverted" away from traditional court proceedings. One study found that nearly one-seventh of the cases filed in federal courts in 2001 were channeled to some form of

ADR.[21] According to the American Arbitration Association's Department of Case Administration, the caseload of ADR practitioners nationwide grew from 63,171 cases in 1993 to 95,143 cases in 1998, and dramatically increased again (arguably due to the Alternative Dispute Resolution Act passed that year) to 140,188 cases in 1999, reaching all the way to 230,258 cases in 2002.[22] State-level data suggest that these numbers may even underestimate the magnitude of the shift toward ADR, given that the state of Florida alone reports that its state courts referred 120,000 disputes to mediation in 1998 (compared to 34,000 in 1989), and courts in Los Angeles, California, referred 28,000 to mediation in 2003.[23] While such litigation and arbitration data remain piecemeal, it is clear that a significant number of litigants either choose or otherwise find themselves in the realm of alternative dispute resolution in lieu of their day in court. As such, this trend is now considered a leading cause of what Marc Galanter has called the phenomenon of the vanishing trial.[24] As Stephen Subrin and Thomas Main describe, "The jurisprudence of binding arbitration is now redirecting cases from courthouses to suburban office parks."[25]

But while liberals such as Senator Leahy frequently condemn its use—particularly mandatory arbitration clauses, in which disputes are resolved without judges, juries, or guarantees of due process—the idea of creating alternatives to traditional litigation actually received extensive bipartisan support over time and has been described as "so universal across both time and space ... that we can discover almost no society that fails to employ it."[26] In fact, despite the unique "juridification"[27] and "litigiousness"[28] that arguably define American political culture, ADR also has a long and vibrant history in the United States, particularly at the state and local level. Many ADR procedures were entrenched decades prior to the beginnings of the conservative legal movement, and the fact that these procedures were well established made co-opting them for purposes of retrenchment even easier, as reformers did not need to dismantle the "litigation state" nor create an "arbitration state" to pursue their goals. The initial impetus for ADR stemmed from a liberal desire to address the problems of an overloaded judiciary and sub-par justice by giving litigants the option to handle their dispute in a less adversarial, expensive, and time-consuming way. Early arguments in its favor centered around (1) a desire to give more citizens better access to justice than were found in the courts (often coinciding with time periods when courts and lawyers were under attack by political interests that saw themselves as ill-represented by the judicial branch), (2) creating an incentive to avoid the costs of the adversarial legal process, and (3) providing individuals and groups

the opportunity to avoid using lawyers in an effort to more directly and easily participate in the resolution of their disputes.

Although proponents of ADR have been strikingly consistent in their arguments over time, far less consistent has been *who* has invoked these arguments. From its earliest stages, much of the support for ADR came from business interests who saw arbitration as a cost-effective and efficient way of handling daily disputes involving commercial transactions. In the Progressive era, they were frequently joined by liberals in the Democratic Party who saw arbitration and conciliatory courts as ways of responding to the perceived crisis that the adversarial litigation model was creating for overburdened dockets.[29] ADR became increasingly mainstream once it was embraced by the federal government in the 1920s and 30s (beginning with the passage of the Federal Arbitration Act in 1925 and incorporated into foundational New Deal statutes such as the National Labor Relations Act of 1935), and as it gained further support in the 1960s and 70s through the consistent efforts of a coalition of liberal rights activists, private donors and foundations, law schools, and the American Bar Association (ABA).

When Congress passed further legislation codifying its use in the 1980s and 90s, it was the professional organizations that had developed to promote, expand, and train individual practitioners in ADR techniques (largely funded by liberal donors like the Ford Foundation) that provided them with the substance needed to pass relevant laws: namely an established, entrenched body of battle-tested ADR procedures. These organizations also trained thousands of professionals to carry out ADR in practice, and these professionals, in turn, worked closely with judicial administrators from within government, themselves authoring procedural innovations to alleviate the overburdened judicial system. Once it became clear that ADR was here to stay, the ABA helped to entrench it further, establishing an organized section devoted to promoting ADR practices in 1993. This translated over time into the development of legal journals devoted to the topic, inclusion in law school curriculum, and the establishment of masters and doctoral programs in the field.

However, as the infrastructure for ADR grew and developed, other actors were gradually able to utilize these institutional mechanisms for their own purposes. Although liberals concerned with the rights protections of workers, the poor, and other less powerful plaintiff groups were critical to the creation and entrenchment of ADR, conservatives were rarely active in their opposition to it and, in fact, grew to support it increasingly over time. The reasons for their support, however, do not track with those of Democrats; instead, conservatives have arguably supported ADR as a device for keeping

less profitable claims by less wealthy litigants out of the courts, and as a way of preventing management and corporate interests from facing costly litigation in labor, employment, commercial, and consumer disputes. In recent years, businesses and corporations also realized that they have clear incentives to create an "alternative procedural universe" for themselves in which they can use arbitration clauses to shorten statutes of limitations, restrict discovery, require confidentiality, waive plaintiffs' rights to recovering a variety of remedies, and contract with arbitrators sympathetic to their position as businesses. Arguably the most "advantageous aspect of their control over arbitral procedures" has been in avoiding class action lawsuits, which are particularly costly for corporations.[30]

Much of this has been enabled by a conservative Supreme Court, which has succeeded in "converting" the FAA into a modern device for relegating certain individuals and groups to a system of quasi-judicial dispute resolution in which sophisticated legal actors rewrite the procedural rules that govern the proceedings—very often to their advantage. When enacted in 1925, the act provided for judicial facilitation of private dispute resolution through contractually-based compulsory and binding arbitration and, as such, serves as the foundational legislation for arbitration in the United States. However, starting in the late 1980s, and subsequently through a series of approximately twenty decisions, the Supreme Court has given the FAA an increasingly prominent role in shaping dispute resolution, applying it to a wide range of disputes, and in a manner that is arguably far beyond what the FAA was initially intended to do. This has included considering arbitration sufficient for protecting most statutory rights, including major civil rights provisions,[31] limiting judicial review of arbitration outcomes, determining that the FAA preempts state law,[32] and allowing corporations to prohibit class action lawsuits against them.[33] These outcomes represent successes for legal and political conservatives, who seem to have co-opted the ADR infrastructure in order to pursue these goals. Yet at the same time, many Democrats continue to promote the virtues of ADR as well, further complicating the prognosis.

Part I: Origins of the Arbitration State

Ousting the Courts of Jurisdiction

The idea of using alternative dispute resolution to lesson the "delay, expense, and formality of a lawsuit" percolated throughout American communities as early as the late 1700s.[34] Some saw ADR as simply a benign matter of efficiency

and ensuring proper access to justice; as a legislator in the Pennsylvania House of Representatives argued in 1791, "The idea that we are lessening the jurisdiction of the courts of law, and curtailing the benefits of young lawyers" is absurd. Defending a proposal to extend the jurisdiction of justices of the peace to small monetary disputes, he argued that "a physician should not envy his neighbors good state of health; neither ought a lawyer to be unhappy by feeling the causes of litigation done away with."[35] A decade later, the Pennsylvania legislature passed a law establishing that arbitration, rather than courts of law, would be used for *all* civil cases. The law was praised for lessening the expense of and time spent on litigation ("that unwieldy machinery of a jury trial is necessarily promotive of a great waste of time and money, compared with this simple principles of arbitration")[36] and alternatively attacked by those who believed that the law would violate the constitutional right to a jury and empower an arbitrator, as opposed to a judge, as the sole determinant of law. If arbitration courts supplant the function of lawyers, opponents argued, "then in all cases in which fact is mixed with the law, and many are the cases of this description, the judges must grope for the meaning of an intricate statute, or for the nature and extent of a custom, with what Rights they may"; if judges fail to find a specific law to apply, "the law will have the same measure as the arbitrator's floor."[37]

In the mid-nineteenth century, there was a flurry of legislative activity at the state level to create "courts of conciliation." In 1846 the state of New York amended its constitution to include conciliation tribunals in order to regulate costs and "carry out in Christian rule, that before you turned your adversary over to be dealt with by the judge, you should make a reasonable effort to conciliate and settle the difficulty before the arbitrators—who, without the aid of counsel, heard the parties, and sought to bring them to a settlement."[38] Conciliation courts were designed to "go very far to repress litigation, and speedily to arrange those controversies that sometimes spring up between very honest and well meaning men, without the costs and delays attending upon a litigation in our courts."[39] An editorial in the *Baltimore Sun* at the time believed these courts to be "among the interesting and excellent propositions of reform," the "desirable effect which is promised by such a benevolent project, cannot be too highly estimated, for it is those of our fellow citizens less favored in pecuniary means, who experience the greatest amount of oppression, from the burdensome and costly legal system in operation amongst us."[40] The narrative was convincing, as numerous other East Coast states and cities followed suit and established similar courts. Prominent newspapers like the *Boston Herald* bemoaned rising litigation rates and speculated that "the

root of the mischief lies in the temper of the litigants and their abettors, and deeper than courts, juries or counsel can reach; perhaps, if it cannot be eradicated, its propagation may be shocked by legislation."[41] As the *Massachusetts Spy* put it, we do "not expect that either courts or lawyers are to be annihilated; but every sensible man will agree with us that very much of the ordinary litigation could be dispensed with, at a great advantage to all classes."[42]

As such, courts of conciliation became a popular innovation, backed by a range of supporters. In the years before widespread industrial strife and labor organization became national news, much of the support came from local business and railroad leaders who saw arbitration as a quick and cheap way of resolving conflicts with other railroads.[43] Even Colonel Thomas Benton, speaking before the new "Americans" in territory claimed in the Mexican-American War, recommended to the new citizens that they create courts of conciliation that can "terminate disputes without litigation, by means of a Judge; they can be easily engrafted on the Roman law, which you already have." Such a process, he argued, was "founded on the declarations of Scripture—'Agree quickly with your opponent, whilst he is ready to do so.' "[44]

The legal community, however, was never of one mind about these proposed courts of conciliation. Many lawyers and judges believed such courts could play an important role in keeping more "trivial" matters from cluttering their dockets, and some envisioned that they might have a role to play in these new courts as less adversarial administrators of justice.[45] But others saw arbitration schemes as a direct attack on judicial authority and jurisdiction. A significant swath of federal and state judges in the early nineteenth century were consistently skeptical of arbitration proceedings, embracing Lord Coke's 1609 sentiment that such proceedings must not "oust" the courts of their jurisdiction and deprive the parties of the right to an appeal on a matter of law.[46] Judges interpreted arbitration agreements as only pertaining to fact finding and in no way legitimately barring parties in a dispute from pursuing civil litigation in the future. Supreme Court Justice Joseph Story, for instance, argued that the "policy of the common law" prohibits people from giving up their rights and interests to an arbitration policy. "Nay, the common law goes farther," he argued, "and even if a submission has been made to arbitrators, who are named, by deed or otherwise, with an express stipulation, that the submission shall be irrevocable, it still is revocable and countermandable, by either party, before the award is actually made."[47] Relying entirely on English common law precedent, Story further argued "that a man cannot, by his act, make such authority, power, or warrant not countermandable, which is by law, and of its own nature, countermandable; as if a man should, by express

words, declare his testament to be irrevocable, yet he may revoke it, for his acts or words cannot alter the judgment of law, to make that irrevocable, which is of its own nature revocable."[48]

Justice Story was also particularly suspicious of the use of a professional arbitrator—as opposed to a judge—as a finder of law. Arbitrators, he said, "at the common law, possess no authority whatsoever, even to administer an oath, or to compel the attendance of witnesses. They cannot compel the production of documents, and papers and books of account, or insist upon a discovery of facts from the parties under oath. They are not ordinarily well enough acquainted with the principles of law or equity, to administer either effectually, in complicated cases."[49] In 1874 the Supreme Court took a similar position when it struck down a Wisconsin state law that attempted to deny a disputing corporation the right to appeal to the federal courts. Justice Ward Hunt, writing for the majority, referenced both Justice Story's skepticism and English common law when arguing that no entity could legitimately divest a court of its jurisdiction by binding himself "in advance by an agreement, which may be specifically enforced, thus to forfeit his rights at all times and on all occasions, whenever the case may be presented."[50]

But the momentum behind ADR continued to build, particularly in the last decades of the century. Alternative dispute mechanisms were even proposed in the aftermath of the Civil War as a better way of reconciling international conflict.[51] The same year that Congress was debating its use in interstate commerce, the Senate Committee on Foreign Relations listened to the likes of Andrew Carnegie and respected judges who stressed the virtues of arbitration for settling differences between the United States and Great Britain. The Honorable David Dudley Field, also a member of the New York City committee for international arbitration, called upon Congress to "negotiate, talk, think, reason about the dispute rather than fight. Fight is vulgar. Fight is old. Let us have a new era."[52]

The growing conflict over the Industrial Revolution and the broader creation of a federal administrative state created a prominent forum for discussing the virtues of ADR and its expanded use.[53] Labor disputes between unionizing workers and numerous industries, most notably the railroads, were at the center of what would become an outpouring of the first notable arbitration legislation at both the state and federal level.[54] The first legislative enactments related to the railroad industry came in an attempt to stop workplace strikes from so frequently shutting down commerce. In 1888 Congress passed the Arbitration Act, providing for voluntary arbitration and ad hoc commissions for investigating the cause of railway labor disputes. While the

railroad industry typically opposed compulsory arbitration and federal intrusion, railroad brotherhoods supported arbitration as a way of making owners accountable by, at the very least, bringing them to the bargaining table. Other groups, like the Anti-Monopoly League, saw arbitration as a way of addressing and balancing the desires of what they perceived to be radicals on both sides: economic individualists on the right, and socialists and activist unions on the left. It was thought that the use of arbitration, particularly when consensual, would enable fair outcomes for both sides, mediated by state regulation.[55] As such, the act promoted a middle ground, authorizing voluntary but not compulsory arbitration, and providing little by way of enforcement provisions beyond requiring that arbitrator findings and conclusions were to be published and submitted to the president and commissioner of labor.[56]

The most ambitious legislative effort, however—the inclusion of ADR provisions in the Interstate Commerce Act of 1887 in order to ensure that railroads complied with the act's antimonopolistic regulations—was ultimately struck down by a resistant Supreme Court. Justice David Brewer led the charge against the ICC and broader efforts at establishing and regularizing ADR, arguing that would-be administrative reformers were "mischief makers who ever strive to get away from courts and judges" and opposing "the demand for arbitrators to settle all disputes between employees and employers and for commissions to fix all tariffs for common carriers."[57] During the same time period, the Court also struck down state-level commissions aimed at arbitrating interstate commerce disputes; for example, it held that a Minnesota railway commission "deprives the company of its right to a judicial investigation, by due process of law, under the forms and with the machinery provided by the wisdom of successive ages for the investigation judicially of the truth of a matter in controversy, and substitutes therefor, as an absolute finality, the action of a railroad commission which, in view of the powers conceded to it by the state court, cannot be regarded as clothed with judicial functions or possessing the machinery of a court of justice."[58]

Despite this continued resistance from the Supreme Court, by the turn of the century, half of the nation's state legislatures had created arbitration schemes designed to handle a range of disputes, primarily in the railroad industry and other labor matters.[59] Most of these state arbitration boards were appointed by governors, and participation was again largely voluntary in nature, although some states authorized arbitrators to compel witnesses and force decisions if both sides previously agreed to be bound by the outcome. A report commissioned by Congress in 1901, however, found that many of these state arbitration boards were still in their infancy, with some

states (notably Michigan) having failed to appoint board members, let alone take on any business. Illinois, Indiana, Massachusetts, and New York were notable exceptions, with their arbitration boards participating meaningfully in a number of major labor strikes, particularly in the coal mining industry. States typically created three-person arbitration boards, with one member selected by each party and a third from an outside source, and the boards were given the power of a final determination. But even in these states, compliance with the arbitration outcome was rare, and the inability of arbitrators to mandate participation or enforce agreements left them largely playing the role of mediator.[60] The New York board, for instance, found that "more is accomplished through mediation than by arbitration" because while at least one party was "disinclined to submit the matter in dispute to arbitration" the parties could sometimes nonetheless be compelled to make mutual concessions in conference meetings with the board.[61] As Herbert Schreiber has well pointed out, the significance of these state arbitration laws came less from their success on the ground (they were frequently ignored, as labor insisted on maintaining a right to strike and as management was unwilling to formally recognize union organizations through an arbitration hearing) than in establishing a model for future legislation at the federal level.[62]

Many judges also continued to reject arbitration schemes in these years, even in the midst of state-level legislation, claiming that such practices unconstitutionally ousted the courts of jurisdiction. Especially when faced with the question of whether and under what conditions arbitration could be considered a valid stand-in for litigation, many courts asserted that judges alone retained broad authority over questions of law. An early decision by Justice Benjamin Cardozo in New York was emblematic:

> Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist. ... Power lodged in the Supreme Court is not to be withdrawn merely that it may be transferred and established somewhere else. Power, though not transferred, is still not to be withdrawn, if fundamental or inherent in the conception of a court with general jurisdiction in equity and law. Changes, we may assume, will be condemned if subversive of historic traditions of dignity and power. Such is not the change effected by this statute. The Supreme Court does not lose a power inherent in its very being when it loses power to give aid in the repudiation of a contract, concluded without fraud or error, whereby differences are to be settled without resort to litigation. For the right to nullify is substituted the duty to enforce.[63]

Despite the push and pull between state legislatures and courts, and in the face of the rampant unenforceability of arbitration outcomes, the federal legislature continued to build a slow but steady accumulation of laws supporting ADR procedures. In response to the Pullman Strike, Congress passed the Erdman Act of 1898, which made available arbitration procedures that could be used as an alternative to judicial intervention when resolving railroad disputes. The Newlands Act of 1913 created a permanent arbitration board for these purposes.[64] And during the Wilson administration, the Department of Labor used the National War Labor Board as an arbitration tribunal, resolving over 1,200 industrial disputes in the short sixteen months of its existence (from 1918 to 1919.)[65] The creation of the Department of Labor in 1913 in particular, however, was a groundbreaking development for ADR. In its establishment, the new bureau was given "the power to act as mediator and to appoint commissioners of conciliation in labor disputes whenever in his judgment the interests of industrial peace may require it to be done." The Department immediately began mediating labor disputes, an effort led by the department's head, William B. Wilson. By 1917 Wilson had pushed Congress to approve the United States Conciliation Service, the oldest continuing mediation institution in the United States. The House Committee on Interstate and Foreign Commerce promoted further expansion as well, suggesting broadening the Erdman Act to provide for more mediators and establishing a permanent board of mediation and conciliation. More controversially, it also suggested removing the availability of judicial review, arguing that court review simply encourages parties to evade arbitration decisions and creates obstructions to the primary goals of the process.[66] But in all of this activity, arbitration remained voluntary, altering but not getting rid of court jurisdiction by allowing judges to use injunctions to enforce arbitration awards.[67]

In the early 1900s support for ADR, and particularly arbitration, came from a diverse set of individuals whose ideological and political interests favored expanding arbitration as a worthy alternative to litigation. Amidst the popular sense that the courts were primarily defending the interests of capital, business support for ADR was actually more widespread and far more enthusiastic than was the response from the labor community, for whom ADR was purported to benefit.[68] Indeed, a range of local chambers of commerce had long provided arbitration as an attractive alternative to its members seeking to resolve commercial disputes in a quicker, less costly, and less formal way.[69] In the early 1900s, the National Civic Federation promoted mediation and arbitration in labor disputes, much as prominent ADR groups like the

American Arbitration Association (AAA) would in later years. This privately funded group was composed primarily of corporate businessmen, although on the record it claimed support from union officials like Samuel Gompers, president of the AFL, and John Mitchell, president of the Mineworkers union.[70] The federation worked to promote a body where "industrial decisions could be jointly made," and where "the large and the largest employers of labor can meet with representatives of organized labor to discuss their relative interests and try to find a way out where mutual interests of both may best be conserved."[71]

By contrast, labor activists seemed ambivalent as to the likelihood that arbitration would produce truly fair agreements, particularly in situations where the two parties were unequal in bargaining power. On the one hand, they expressed a marked preference for union recognition over a reliance on third party arbitration.[72] Given that judges consistently used a range of constitutional and common law doctrines to break strikes with injunctions, arrest union members on conspiracy charges, deny union members standing, and prohibit government regulatory innovations on grounds of employer freedoms of due process, their hesitance to rely on *any* method of dispute resolution was unsurprising.[73] But on the other hand, many labor leaders saw arbitration as a way to at least bring employers to the bargaining table. The appeal of collective bargaining outside of the courtroom began to spread in many unions across the country, becoming an especially prominent feature of railroad and coal miner labor disputes. As Gompers said in an arbitration ratification meeting in New York City in 1897, "Labor has always been in favor of arbitration. ... [W]e want to settle these questions of controversy that arise and can be settled by an appeal to reason and an appeal to our judgment, an appeal to our sense of honor, an appeal to our interests; they can and should be settled around the table where discussion and judgment and truth and justice shall decide."[74]

With so much activity occurring both in government and the private sector, members of the organized bar began to see it as in their best interest to get involved in the conversation. The Pound Conference of 1916 brought together lawyers and legal academics concerned that the current civil litigation system made it difficult for ordinary citizens with relatively minor, less profitable cases to find lawyers willing to represent them. The dean of Harvard Law School, Roscoe Pound, was himself a leading critic of the legal system, suggesting in a famous 1906 speech to the ABA that the adversarial system of justice was on the verge of collapse under mounting pressures coming from industrial society, and that the way forward was a new form of "administrative

justice" that heavily involved ADR.[75] Some even feared that, because of these pressures, clients would stop using lawyers if these problems were not urgently addressed.[76] Like other Progressive reformers from both within and outside the legal community, Pound believed that the judicial system needed to adapt to the increasing complexity of an industrial America.[77] The promotion of ADR by those in the legal profession stemmed from many of the same concerns that fueled reforms of the Federal Rules of Civil Procedure, small claims courts, and legal aid societies: namely a fusion of ideological Progressivism concerned with addressing increasing inequality in society and in the law and an administrative pragmatism designed to deal with the problems of expense and delay by fostering greater efficiency in the judicial system. While there were concerns expressed at the conference about the potential consequences of the increasing use of ADR—as one lawyer wrote, "When arbitrators step in, lawyers step out. They are not essential to the arbitration process and are sometimes expressly barred"[78]—others focused on the rapidly growing criminal caseload that was squeezing out much civil litigation, making reform of some kind a necessity.

Arbitration's Triumph: The Federal Arbitration Act and the New Deal

The perceived need for federal legislation establishing arbitration came to the fore in the 1920s, benefiting from the support of business interests and the organized bar. Early in the decade, shortly after the passage of the New York arbitration statute, a New York lawyer named Moses Grossman created the Arbitration Society of America, which sought to promote arbitration by conducting conferences, disseminating pamphlets and information, and holding training sessions for would-be arbitrators. A year later, the state of New Jersey followed with a similar statute, and Congress began to hold hearings about the possibility of a similar federal law. At the same time, New York businessman and member of the New York Chamber of Commerce, Charles Bernheimer, wrote a series of articles and books promoting the merits of commercial arbitration.[79] "To litigate," he wrote, is "the most wasteful procedure to which a business man can resort, means strife, expense, annoyance, and the rupture of business friendship, sapping the very lifeblood of commerce. The application of some other less wasteful method for the settlement of such differences and disputes becomes imperative."[80] Arbitration, to Bernheimer, was comparatively "sane, speedy, and inexpensive"; it freed up what were otherwise "congested court calendars," relieved "the law office of the many irksome litigious

commercial matters that never pay," and helped the "small man or the poor man who cannot stand the stress and expense of protracted litigation."[81] After creating the Arbitration Foundation, Bernheimer quickly joined forces with Grossman and four others to form the American Arbitration Association (AAA), arguably the most influential and prominent source of support for ADR to the present.

Bernheimer teamed up with other leaders from regional chambers of commerce and leading members of the ABA to help promote and write what would become the Federal Arbitration Act (FAA) of 1925. The act provided for judicial facilitation of private dispute resolution through contractually-based compulsory and binding arbitration. Relying on its power to "prescribe the jurisdiction and duties of the Federal courts," the act mandated that courts uphold and enforce arbitration agreements unless such agreements were produced as the result of corruption, fraud, or prejudice. In drafting the legislation, Congress was explicit in its purpose; it sought to put arbitration agreements "upon the same footing as other contracts, where [they] belong."[82] This language was undoubtedly in response to the fact that, at the time, courts viewed arbitration agreements with hostility, perhaps because—as a Senate report on the bill hypothesized—it required them to surrender jurisdiction over particular issue areas: "The jealousy of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction."[83] In the congressional hearings, Bernheimer defended the interests of business, claiming litigation as the "most unprofitable thing" that can confront "anyone engaged in buying and selling."[84] Julius Henry Cohen of the ABA backed Bernheimer's endorsement, claiming that no one opposed the bill; he also downplayed fear on the part of judges that they were losing jurisdiction ("We oust the courts of jurisdiction everyday") and argued that lawyers "can handle an ordinary arbitration case in our offices and make more money out of it than we can if the case goes into litigation."[85]

The ABA's Commerce Committee ultimately drafted the language of the act and defended its proposal against those within the legal community who feared that the law constituted Congress attacking the authority of the courts. The committee accomplished this largely by downplaying court hostility, claiming that pushback was more "due to an adherence to precedent."[86] As Cohen argued before Congress, fear among judges that arbitration would enable the stronger to "take advantage of the weaker" was largely unfounded in the cases of commercial litigation to be addressed by the law because "people are protected today as never before" due to government regulation.[87]

Secretary of Commerce Herbert Hoover also endorsed the legislation, arguing that it would unclog the courts, speed up mercantilist transactions, and promote commerce. As he put it, "Next to war, the greatest source of economic waste in our national life is needless litigation."[88]

Business interests remained at least cautiously supportive of the use of ADR in certain contexts as a way of promoting labor peace and, as such, promoted the Railway Labor Act (RLA), which established a new board of mediation.[89] In order to avoid the violence and long-standing strikes that had dominated the national news during the 1920s, the board worked to resolve claims by promoting mediation first and arbitration second, should mediation fail. The RLA provided the board with the power to compel mediation *before* a union could strike, as well as to work with the president to create an emergency board to intervene with injunctions against recalcitrant parties.[90] The spirit of the act prompted dramatic proclamations that we had entered a new era of industrial democracy. The *New York Times* editorialist Evans Clark wrote that a "new government" was forming, one that was "the sum of a large number of separate and unrelated agreements between self governing economic groups to regulate their own concerns, to make rules for their own conduct and that of their members, and even to punish those who violate them. It will be a government of voluntary cooperation, of self-determination along natural economic lines."[91]

By the 1930s, arbitration provisions appeared frequently in federal legislation, coming at different times from Republican and Democratic majorities in Congress and the White House. The Norris-La Guardia Act was a particularly prominent example of jurisdiction stripping by Congress, largely prohibiting federal courts from issuing injunctions against labor unions, legitimating the authority of unions as economic actors, and expanding the availability of ADR practices for labor conflicts.[92] The National Labor Relations Act (NLRA) of 1935 further codified the availability of ADR and in important ways protected it from erosion by courts and other sources. The act, among other things, gave employees the right "to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid protections." The law also made it illegal for employers to refuse to bargain with union representatives selected by a majority of employees, institutionalizing negotiation through collective bargaining as national policy practice. The quasi-judicial body charged with handling disputes under the NLRA, the National Labor Relations Board (NLRB), consisted of a three-person panel that established policy and rendered decisions on unfair labor charges and issues of union

representation. The board's agents would investigate the parties' charges, oversee representation elections, require good faith bargaining by both employers and employees, and enforce collective bargaining agreements. If either side failed to bargain in good faith, or violated labor law by participating in illegal acts, the NLRB was authorized to prosecute and remedy the matter, whether through injunctions or mandating the enforcement of a collective bargaining agreement without the consent of the violating party.

These laws created a larger swath of policies in which arbitration could be used, but they often did not explicitly enforce arbitration outcomes. Over the next few decades, through executive orders, legislation, and court decisions, ADR continued to proliferate; but enforceability still largely relied on the "good faith" of the participants.[93] In response to the unprecedented number of labor strikes that occurred in 1945 and 1946, the Taft-Hartley Act (though better known for its extensive amendments to the NLRA) further expanded the use of ADR in labor disputes. Although continuing to reject compulsory arbitration, the "National Emergency Dispute" section of the law established mediation for national emergency disputes. Specifically, the law authorized the president to obtain a court injunction against a strike for eighty days if it was deemed a threat to the national interest, with the ability to then command participants to go before a newly created agency, the Federal Mediation and Conciliation Service (FMCS). The FMCS was to be used whenever labor or management wished to renegotiate an expiring contract and required that they give notice to the other side and to FMCS, which would assist in mediating.

One way to bookend the early development of ADR is when the judiciary switched its perspective. Especially in the area of labor, the courts were highly unsympathetic to unions and workers, and opportunities for ADR were crucial for protecting their rights in particular. In 1962, however, the Supreme Court decided several cases (known as the "Steel Trilogy") that evidenced a new willingness on its part to protect labor's interests. In *United Steelworkers v. American Manufacturing Co.*,[94] *United Steelworkers v. Warrior & Gulf Navigating Co.*,[95] and *United Steelworkers v. Enterprise Wheel & Car Corp.*,[96] the Court for the first time established a presumption in favor of arbitration of disputes stemming from collective bargaining agreements. In each of the cases, the employers had refused to enter into arbitration with employees and brought their case to the Court in hopes that they might rule on the legal merits of the dispute. The Court, however, refused to do so, instead enforcing the arbitration agreement and deferring to the expertise of the chosen arbitrators. Deference to arbitrators was not to be unlimited;

while "an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of justice," the decision must draw "its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."[97] But the Court nonetheless did hold that the arbitrator has the final word on the interpretation of a collective bargaining agreement. "So far as the arbitrator's decision concerns construction of a contract," the Court wrote, "the courts have no business overruling him."[98]

Thus, although the initial development of ADR did stem from a desire to make pursuing rights claims easier, more efficient, and less costly, it also fundamentally began as part of a deeply politicized process of shifting matters traditionally adjudicated by judges to other decision makers. Early in its development, however, this did not present much trouble as far as access to justice is concerned, as ADR practices were aimed to help those least apt to reach or succeed in court to have a fair hearing, and judicial review was rarely eliminated. This motivation persisted into the Civil Rights era, as judicial, congressional, and popular support led to its further development.

But at its seeming height in the mid-twentieth century, support for ADR began to crack under the weight of a diverse, growing, and mobilizing array of critics. Much of this opposition came from within the legal community, whose opposition had not disappeared during the height of the New Deal, but lingered importantly at the margins. A divided ABA never fully embraced the New Deal regulatory apparatus and the ADR procedures housed within it. The ABA's Special Committee on Administrative Law, chaired by Roscoe Pound, had argued in 1938 that the newly created agency model of regulatory enforcement was ineffective, unable to enforce decisions, and too easily captured by special interests. Pound wrote that unless "the bar takes upon itself to act, there is nothing to check the tendency of administrative bureaus to extend the scope of their operations indefinitely even to the extent of supplanting our traditional judicial regime by an administrative regime."[99] Many New Deal policy makers also became disenchanted with the administrative regulatory model, similarly finding it too vulnerable to interest group capture, as well as criticizing public commissions for their inability to plan, coordinate, or enforce policy agendas.[100] McCarthyism only furthered the fears of rights activists, as government-based administrative proceduralism was perceived as contributing to the denial of individual due process rights and civil liberties.[101]

In the rights revolution era, ADR would come under further attack for denying access to courts for those left out of the insider world of interest groups and regulatory politics. Labor unions were no longer on the outside being denied access by the courts; they were now seen as dominating arbitration procedures, not just in relation to business, but also in relation to individual workers.[102] The rights revolution, with its focus on those denied access to the political process—whether groups who were denied the right to vote, or individuals unable to form effective coalitions because of irrational prejudice in society against them—seemingly turned the legal tide away from ADR-type administrative procedures and back toward valuing traditional court proceedings and the legitimacy they provide. This was especially true when constitutional rights were at issue, with the Supreme Court taking the position that arbitration clauses could not prevent individuals from going to federal court to seek enforcement of their constitutional rights.[103]

These themes also struck a chord with organizations such as the Legal Defense Fund, the legal arm of the NAACP, which would eventually turn more aggressively toward litigation as a strategy for political change.[104] Landmark judicial victories in the Supreme Court in the areas of educational and public desegregation, employment discrimination, and voting rights only furthered the enthusiasm of legal activists. Prominent law professors were equally influenced by these developments, both embracing litigation as the most powerful way for disadvantaged groups to achieve justice and understanding ADR procedures as dangerously enabling powerful interests to dominate disadvantaged communities.[105] Owen Fiss, for instance, famously likened ADR to plea bargaining, characterizing it as an institutional device employed by the state to regulate and control disadvantaged populations: "We turn to the courts because we need to, not because of some quirk in our personalities. We train our students in the tougher arts so that they may help secure all that the law promises, not because we want them to become gladiators."[106]

In this way, the achievements of the rights revolution dampened what had been a seemingly triumphant moment for ADR as the primary method for enforcing rights policies. But as we will see, this was by no means the end of the regulatory state and ADR model; although the rights-based legislation of the 1960s created a strongly private litigation-based model of legislative enforcement, this new so-called "litigation state" would not supplant the "arbitration state."[107] In fact, ADR continued to expand, even if bruised and a bit removed from the limelight. Although many liberals embraced the litigation-based approach, many did not. This split among liberals regarding ADR's ability to

protect rights both provided a narrative palatable to conservatives and created an opening to use ADR as a strategy for judicial retrenchment.

Part II: Arbitration and Retrenchment

Liberals Divide, Conservatives Conquer

The passage of the Civil Rights Act in 1964, among many other things, marked yet another milestone for ADR. By creating the Equal Employment Opportunity Commission (EEOC), the act provided that violations identified by the commission would be assigned to mediation for resolution, going to the courts only if mediation failed. The act also created the more controversial Community Relations Service, designed to mediate interracial disputes. Given the compromises in the passage of the Civil Rights Act that ultimately denied the EEOC greater enforcement powers, scholars have tended to overlook these mediation provisions in favor of examining how private litigation came to the fore in enforcing the statute.[108] But at the same time, the continued centrality of mediation served to expand the infrastructure built for ADR, prompting entities like the Ford Foundation (which importantly funded many rights revolution–era efforts) to invest in its further growth. Notably, in the 1968 report issued by the National Advisory Commission on Civil Disorders in response to the widespread race riots of 1967, the Ford Foundation responded to the Kerner Commission by creating and funding the National Center for Dispute Resolution and the Center for Mediation and Conflict Resolution. These two organizations became the first to use ADR for community and racial disputes. Since the government's organization (the FMCS) was restricted to private sector labor management cases as a matter of statute, these new organizations provided an institutional infrastructure through which ADR could be expanded to other policy areas in the years to come.

In the 1970s, Congress passed new laws creating rights and benefits for environmentalists, prisoners, and the aged, and subsequently created more government agencies that used ADR procedures prior to court action.[109] Entire specialties of ADR developed around complicated environmental disputes, prisoner grievance arbitration, age discrimination, public employee disputes (including postal workers), health and safety issues, and Native American mediation. While much of this activity necessarily premised itself on new rights created by the government, the activity of private groups and organizations provided the support necessary to make ADR in these

new areas a reality, fueling the maturation of ADR as a profession. In 1972 yet another major organization—the Society of Professionals in Dispute Resolution—was founded in order to help expand ADR beyond the realm of labor management in order to address these new areas of rights. While the group's membership started with a majority of labor specialists, within ten years it gained an additional 1,000 members, with a majority specializing in policy areas other than labor. The group importantly contributed not only to expanding ADR into new policy areas, but also in terms of creating and training individuals in new ADR methods. Practitioners expanded their skills in terms of ADR techniques, ranging from mediation and arbitration to specialized training in the process of fact-finding and serving as ombudsmen.

In addition to these more longstanding sources of support, ADR also began to attract new advocates, including both liberal legal academics and the mainstream legal profession itself. Many academics and activists, increasingly frustrated with the perceived ineffectiveness of litigation, turned toward ADR as a way to provide justice to those who struggled in the traditional, adversarial legal process. Lawrence Friedman's influential 1967 law review article importantly echoed many of these concerns: "The cost of using the judicial process, especially if an appeal is made, is so high that it acts as a significant barrier against litigation that does not measure its outcome in thousands of dollars. ... [T]he high price of litigation comes with its own high price: the denial, in some areas, of justice to the poor. A middle-class democratic society may consider such a situation inherently evil."[110] Many scholars subsequently devoted increased attention to the limits of law and its inability to address important societal issues.[111] ADR was seen by some legal academics on the left as an "outgrowth of the participatory model of effecting change represented by direct action, and a response to the movement's critique of the legal model of civil rights advocacy."[112]

Public interest activists adopted a similar stance. Alan Houseman, the director of the Research Institute of Legal Services, argued that the government-sponsored Legal Services Corporation needed to find more nonadversarial means to reach out to broader populations of poor who were yet still being neglected by their services.[113] It was clear that litigation, they argued, was not helping to solve the problems of the poor. The perceived advantage of ADR mechanisms was predicated upon the assumption that litigants, and not their lawyers, would be the key actors engaged in dispute resolution. In contrast to the continued developments in the Federal Rules of Civil Procedure, which made the role of the lawyer even more central in the courtroom, many ADR procedures were designed to foster direct participation by litigants.

In this respect, some ADR mechanisms do not reject the adversarial mode but rather question the faith implicit in the lawyer–client relationship. Yet other ADR procedures confront the assumption of the desirability of adversarial approaches and seek to develop a range of more cooperative responses beyond those typically employed in and by courts.[114]

In 1976 the ABA addressed these claims with another "Pound Conference," called this time by Chief Justice Burger, with a similar goal of addressing how to improve the efficacy of the courts and the administration of justice more generally. The Chief Justice himself spoke in support of integrating ADR thoroughly into the justice system; without it, he argued, "we may well be on our way to a society overrun by hoards of lawyers, hungry as locusts, and brigades of judges in numbers never before contemplated" and "we have reached the point where our systems of justice—both state and federal—may literally break down before the end of the century."[115] Harvard University law professor Frank Sander also gave a speech entitled "Varieties of Dispute Processing," in which he proposed a "multidoor" courthouse where litigants would have a choice of not only formal dispute resolution (leading to trial), but also a range of other less formal possibilities, including arbitration and mediation.[116] The Pound Conference produced several other important recommendations as well, among them the idea of creating "neighborhood justice centers" for accessible dispute resolution, as well as stressing the continued importance of experimentation and innovation in developing and fine-tuning new ADR techniques.

Participants in the conference also addressed more "lawyer friendly" versions of ADR. The discussion reflected the intuition that lawyers might well fear losing their jobs due to the expansion of these "outside of the courtroom" dispute resolution techniques. They discussed these proposed innovations in tandem with Rule 16 of the Federal Rules of Civil Procedure, which itself encourages judges to use pretrial conferences to figure out ahead of time how best to move a given case through the legal process. As part of the pretrial conference, judges can also urge parties to consider and use ADR. In all, these methods would allow for the use of discovery and more "typical" legal procedures in cases where mediation was insufficient.

Since the livelihood of lawyers is potentially threatened by moving dispute resolution out of the courtroom, one might expect that groups like the ABA would have strongly opposed ADR. But instead, the profession started to embrace it, albeit while making sure that it had an enduring role to play in this arena. Introducing a variety of techniques—many discussed at the Pound Conference—in which lawyers would be ensured a central role in ADR was

crucial to this. As such, ADR grew to encompass practices such as moderated settlement conferences, which involve each side presenting a summary of its case to a panel of attorneys; summary jury trials, which involve each side presenting a case to both a jury and a judge, facilitated by lawyers; and early neutral evaluation, which involves the presentation of case summaries to an evaluator (often a lawyer) who asks questions, challenges evidence, and provides a written evaluation of each side's chances for success in litigation. As a sign of its intent to remain involved in the realm of ADR, in the aftermath of the Pound Conference, the ABA formed its first committee on the subject—the Special Committee on the Resolution of Minor Disputes—to maintain professional prominence in the field.

As with other areas of legal reform, the perceived crisis and the rising costs associated with litigation spurred yet another movement for reform, manifesting itself in a flurry of congressional activity in the late 1970s.[117] Notably, however, a split between two factions of the Democratic Party became apparent when it came to the question of whether arbitration and not litigation (with all the guarantees of due process) was actually ideal for resolving all types of disputes. Arbitration was the primary solution in the proposed "Federal Medical Malpractice Insurance Act of 1975," sponsored by Democratic Senator Gaylord Nelson of Wisconsin; it was also at the center of a similar bill proposed by Edward Kennedy and Daniel Inouye that promoted the use of arbitration for medical malpractice disputes.[118] In the introduction to his testimony in support of the bill, Senator Kennedy praised arbitration as a long-standing approach used for labor-management and commercial disputes, and one that would effectively improve health care while greatly cutting costs. He did concede, in a bow to critics, that such a bill must keep open the possibility that a plaintiff may have a day in court; but he took the position that judicial review should only be available *after* arbitration and with the arbitration panel's decision admissible as evidence.[119]

Trial lawyers were split on the matter. Richard Paulson, representing the Association of Plaintiffs and Trial Attorneys, took issue with the idea that individuals must use arbitration before going to court because "if he wins, he gets nothing in that he must give his entire recovery in court to the Secretary of HEW. The problem here is that in reality a freedom of choice is denied him by requiring arbitration as the first and only meaningful step, thus posing problems under the 7th and 14th Amendments."[120] But even the Association of Trial Lawyers of America (ATLA), which opposed federal regulation of medical malpractice remedies in 1974, nonetheless supported mandatory binding arbitration for medical malpractice suits involving less than $25,000.

Although recognizing that it lacks many of the safeguards provided by a full judicial proceeding, ATLA argued that "arbitration can often provide greater speed and economy through the more informal procedures which are utilized there."[121] The Senate also followed the Pound Conference with hearings of its own on the "Causes of Popular Dissatisfaction with the Administration of Justice," in which it was receptive to alternative dispute resolution as a way of increasing judicial access. The Senate did reject a proposal from Solicitor General Robert Bork, however, who argued that litigation arising from social welfare legislation was "legal trivia" and should be removed from federal court jurisdiction altogether.[122]

In 1977 hearings in the House of Representatives on the "State of the Judiciary and Access to Justice," conducted by Wisconsin Representative Robert Kastenmeier, began by referring to President Jimmy Carter's goal to expand the justice system, broaden standing to initiate suits against the government, and expand access to class actions.[123] But these goals were at odds with continued fears that federal courts were overwhelmed by litigation, especially in light of the fact that the number of cases in federal courts doubled between 1960 and 1975. This also meant spiraling legal costs: "Access to justice means access to the courts with legal counsel," Kastenmeier argued; "thus, for a large segment of our society, unable to pay the costs of legal representation, there is limited access to justice," rendering courts effectively unavailable for resolving minor disputes. This was especially problematic, he pressed, in light of a "growing perception that several recent Supreme Court decisions have had the effect of closing the courthouse doors to many citizens because of the Federal courts' rising workload."[124] Kastenmeier went on: "In return for aiding the Federal courts and reducing congested dockets by passing the judgeship bill and by legislating several of the proposals pending in this subcommittee, we will consider passing legislation to reopen threshold doors that the court has closed. Or, in the alternative, we ought to investigate the creation of other adequate forums—and I emphasize 'adequate'—to resolve the disputes that have been taken from the jurisdiction of the Federal courts."[125]

On the one hand, then, a strong contingent of the Democratic Party embraced arbitration and other methods of ADR as both a means for addressing the litigation crisis and providing access to justice for a broader array of citizens, most notably the poor. However, in the hearings on the "State of the Judiciary and Access to Justice," another liberal, rights revolution–era position emerged. The first two speakers—consumer advocate Ralph Nader and the president of Legal Services, Thomas Ehrlich—supported legislation that would

provide for larger attorney's fee awards and broader availability of class actions as a way of opening the courthouse doors in order to solve these problems.[126] Nader complained that the Burger Court was closing the courthouse to individuals, with great consequence: "It is one thing to tell citizens their legal claims are without merit, but it is an entirely different matter to tell them that their claims will not even be heard. If a sheriff stood at the courthouse door and prevented citizens from entering to present their grievances, the public outcry would generate page one headlines all across the nation." Ehrlich addressed the idea of expanding ADR in order to address these issues, but he ultimately feared that doing so would provide limited remedies and that "the new forums will become institutionalized 'screening mechanisms' for moving cases out of the court system instead of attempts to deliver justice with better results and greater access by the public."[127] As a result, he argued that—in the spirit of the rights revolution—a hearing in federal court was essential for maintaining rights, lest ADR become the venue for whatever constituted the "lesser" legal disputes of the day.

In many ways, those speaking in favor of ADR legitimated Nader and Ehrlich's fears. Attorney General Griffin Bell, for example, characterized the expansion of ADR as ideal for dealing with cases involving monetary and not injunctive relief, and also for cases in which the legal fees would outweigh the remedies. Notably, Bell also championed ADR for cases where there is not an "important" legal question at issue. Robert Bork, then a professor at Yale Law School, largely agreed with Bell, arguing that Congress should set up administrative agencies to deal with disputes regarding its statutory entitlement programs. In response to an alternative request to increase the size of the judiciary, Bork replied, "The Federal judiciary is now too large as it stands" and preferred restricting jurisdiction in a range of cases.[128] Clearly, differentiating between "important" legal questions as opposed to those dealing with statutory entitlement programs had the potential to make it difficult for certain categories of claims or litigants to have their day in court, which strongly contrasted with what liberal rights revolution activists set out to achieve.

Attention to these issues continued in Congress the following year. The Senate unanimously passed the Dispute Resolution Act, an act that Senator Edward Kennedy called "an incentive program" designed to encourage experimentation with alternative dispute mechanisms that are expeditious and inexpensive, and to create a Dispute Resolution Resource Center in the Department of Justice, as an initial response to the perceived litigation crisis that the ABA argued left two-thirds of citizens without "easy access" to

the courts.[129] This special committee, chaired by Talbot D'Alemberte, soon became a central player in a wave of congressional action promoting ADR. In August 1978 the Committee on the Judiciary in the Senate held hearings on the "Court-Annexed Arbitration Act," legislation designed to promote nonbinding arbitration as an alternative to litigation to "encourage prompt, informal, and inexpensive resolution of civil cases."[130] The proposal came in response to "widespread concern" that the federal judicial system was overloaded. On February 13, 1979, Senator Kennedy opened a Senate hearing on "Equal Access" by asserting that "equal access is more than just a hallmark of justice—it's a definition of justice, and no system merits that description if access is the privilege of a few and not the right of all. That principle is the foundation of our legal system, but the reality is that more than two-thirds of the American people lack easy access to the courts."[131] In response to these hearings, and in tandem with support from the ABA Special Committee, legislators sought to find ways to address this access deficit. Relying on examples of alternative dispute programs from different urban areas of the country, Kennedy proposed new legislation, the Dispute Resolution Act of 1979, with the intent of creating a dispute resolution resource center and providing federal seed money to states to experiment with ADR programs.

Prominent organizations in the business and legal communities supported the bill. Jeffry Perlman of the U.S. Chamber of Commerce argued in the hearings that ADR would help business resolve consumer disputes in "effective, expeditious, fair and inexpensive manner."[132] Speakers representing the ABA were also supportive, but with a much different emphasis. Shepherd Tate, the president of the ABA, focused on the need to expand legal services to help the poor, arguing that the ABA could only do so much with a private bar in this area. "There can be no doubt," wrote Mr. Tate, "that we must find ways to improve the settlement of small, personal or monetary disputes without the formalities or prohibitive costs of court action."[133] Tate embraced the concerns of public interest advocates like Nader and Ehrlich when he contrasted the legal needs of the poor, for whom the ABA recommended the expansion of opportunities for litigation through enhanced legal services programs and attorney's fee awards, with those issues that "ought" to be handled without lawyers and judges. "Minor disputes," he argued, could be handled by "neighborhood justice centers and other techniques."[134] As D'Alemberte described it:

> Consider the neighborhood dispute about a loud stereo: Is this really a matter for police, prosecutors and judges? Today it is, and the results

> are astonishingly poor: In court, the State says the defendant broke the law by x decibels. He will either be fined, or jailed, or both if proved guilty: neither if not. Yet there is no resolution of the underlying dispute between neighbors. A finding of guilty as well as a finding of not guilty can heighten the animosity between the disputants. Soon (estimates run to about 90 days), the parties will be back with the same problem, or one which has escalated, perhaps, into a serious criminal matter.[135]

While D'Alemberte's example was palatable and relatively benign—and therefore especially effective for making clear the value in dealing with issues like noise disturbances in places other than the courts—this narrative differentiating between "minor" and otherwise legitimate disputes would be furthered in more problematic ways in years to come.

But in the years following the passage of the 1980 Dispute Resolution Act, the use of ADR in nontraditional fields boomed; new organizations continued to spring up, such as the Academy of Family Mediators, the Conflict Resolution Education Network, and the U.S. Association of Ombudsmen; legal and other academics embraced it; and the approach itself subsequently began to change. Academic interest played an especially important role in these developments. In 1981 George Mason University became the first to offer a master's degree in conflict management, and in 1989 the school established the Institute for Conflict Analysis and Resolution, which also offers a doctorate. Harvard followed suit, forming its Program on Negotiation in 1983, which drew enrollment from several other Boston area schools. Law schools also began taking ADR seriously, and by the mid-1980s, most schools offered courses or clinics on the subject.[136] Further, as ADR became a permanent fixture in the law and in legal education, law schools also began to establish ADR-specific journals.[137]

These developments in academia were undoubtedly fueled by the ABA's highly public embrace of ADR. In 1987 the ABA expanded its interest in the topic even further by establishing a Standing Committee on Dispute Resolution, making it a regular ABA section in 1993. The section's mission—"to provide its members and the public with creative leadership in the dispute resolution field by fostering diversity, developing and offering educational programs, technical assistance and publications that promote problem solving and encourage excellence in the provision of dispute resolution services"—led to its rapid growth, reaching 6,000 members by the late 1990s.

Federal administrative policy making bodies became involved as well.[138] The Administrative Conference of the United States (ACUS) first entered the discussion in 1982 when it recommended procedures by which agencies could negotiate proposed regulations. It also offered itself as a support infrastructure for those agencies interested in implementing ADR procedures. In 1986 the ACUS issued the first of its recommendations for using ADR procedures in agency adjudication. These two series of recommendations would become the basis for major legislation involving ADR in years to come, namely the Negotiated Rulemaking Act and the Administrative Dispute Resolution Acts of 1990.

Congress continued to embrace the practice of arbitration and ADR in the 1980s as well, debating expanding its use in everything from civil cases to mediating disputes between the elderly to using administrative judges to handle civil rights housing matters to ADR for FOIA requests.[139] In the early 1980s, Republican Senator Robert Dole led hearings investigating the continued problem of case backlogs, beginning the hearings by arguing that Congress could not continue to simply expand the numbers of judges, but must instead look to alternative ways of handling civil matters.[140] The Alternative Dispute Resolution Promotion Act was proposed in the Senate in 1986 to "require attorneys to certify that clients have been apprised of alternatives to court action," with many Democrats and Republican supporting it. Democrats considered the act a necessary means for reducing courtroom backlogs, and Republicans viewed it as a means of tort reform.[141] In October 1988 Congress passed the Judicial Improvements and Access to Justice Act that, among other things, marked the first time that Congress empowered federal district courts to authorize the use of arbitration. Together, the statutes provided for a range of legal matters where judges could compel parties to participate in arbitration; but the laws also stipulated that participants would have the right to dispute the outcome of the proceedings and ask for a new trial. In providing the basic structure for court-annexed ADR programs, the act permitted courts to (1) allow arbitration when the parties consent, and (2) require arbitration when the relief sought consists only of money damages of $100,000 or less. In such cases, so long as the alleged conduct is not in violation of a constitutional right, arbitrators are empowered to conduct arbitration hearings, administer oaths and affirmations, and make awards. In practice, hearings take place before a single arbitrator or panel of three 80 to 180 days after filing, and parties have up to thirty days to request a trial after the arbitrator(s) renders an award.

During the same time period, many federal courts established mediation programs to handle major public policy–oriented and complex cases. These programs were enabled by the Supreme Court, which—over the course of approximately twenty decisions in the past twenty years—has given the FAA an increasingly prominent role in shaping the contours of dispute resolution. The Court began this process with its decision in *Southland Corporation v. Keating* in 1984, where the Court concluded that the FAA preempts state law on the basis that the Congress that drafted the original act would not have wanted state and federal courts to reach different outcomes on the validity of arbitration in like-cases. In the years that followed, the Court continued to apply the FAA to a wide range of disputes—arguably *far* beyond what the FAA was intended to do. This has included considering arbitration sufficient for protecting most statutory rights, including major civil rights provisions, as well as limiting judicial review and allowing businesses to disallow class actions as a matter of contract. These decisions mark the beginnings of a conservative championing of ADR as a remedy for unclogging the burdened judicial system—but with a very different idea of what constituted a "minor" dispute than those who promoted ADR at its origins.

Conservatives "Co-opt" Alternative Dispute Resolution

With the 1990s came more activity from Congress than had characterized previous years. Congress unanimously passed two major statutes that promoted the use of ADR by the federal government: the Administrative Dispute Resolution Act (ADRA) and the Negotiated Rulemaking Act, both enacted in 1990. In addition to having broad bipartisan support in Congress, both laws enjoyed support from the ACUS and the ABA, the latter of which, in fact, had listed ADR as one of its top ten legislative priorities for the 101st Congress.[142] As far as the ACUS was concerned, the impetus for further legislation was clear; as Marshall Breger, chairman of the conference, argued at the Senate Judiciary hearings for ADRA, "The Federal Government has lagged behind the states and the private sector in simplifying the procedures and lowering the cost of participating in litigation and policy making. While Congress has occasionally encouraged agency use of ADR, it has more often mandated slow, multi-layered procedures having great transaction costs."[143]

The ADRA gave federal agencies additional authority to use ADR in most types of administrative disputes. It also directed federal agencies to put ADR requirements in all of their standard contracts for goods and services, and expanded the FMCS's jurisdiction to offer mediation training to federal

agencies. Importantly, it also gave the ACUS the principal role for coordinating and promoting ADR in the federal government.[144] The Bush administration was clear in its support of the bill as well, considering it necessary in response to the "judicialization of the administrative process."[145] At the hearings, William Barr, Deputy Attorney General under President George H.W. Bush, made clear that the Department of Justice "has encouraged and continues to support the use of ADR techniques in those cases where ADR can reduce time and expense devoted to litigation."[146]

The second piece of legislation, the Negotiated Rulemaking Act, directed regulatory agencies to use negotiation to facilitate consensus building when developing federal rules, naming the FMCS as the facilitator when needed. In effect, the law signified Congress giving its blessing to regulatory negotiation. This technique brings agency representatives together with various affected interest groups to negotiate the text of a proposed rule, and facilitators help them to reach a consensus. The act itself drew widespread support for its potential to cut down on the number of agency regulations that often become the object of protracted litigation, on the basis that "in certain cases, agencies could make rules more fairly and efficiently through direct negotiations between the various interested parties."[147]

While each act had five-year sunset provisions, both pieces of legislation were renewed—and somewhat expanded—in 1996, alongside an executive order from President Bill Clinton directing federal litigation counsel to suggest and use ADR in "appropriate circumstances."[148] Notably, the ADRA officially added the use of "ombudsmen" to the definition of what constituted ADR practices, removed the authority of agency heads to vacate arbitration awards, and directed agencies to allow non-lawyers to act as representatives in ADR proceedings. The expansions are unsurprising given the amount of institutions employing ADR; by 1994, 52 percent of private companies reported using ADR for discrimination complaints. According to an EEOC survey in 1996, 31 percent of federal agencies used ADR, which increased to 49 percent just two years later.[149]

Congress also passed the Civil Justice Reform Act (CJRA) in 1990, which required all district courts to develop plans for reducing cost and delay. One of the primary methods for addressing these issues was to expand ADR. After the CJRA expired, Congress passed the Alternative Dispute Resolution Act of 1998, which not only requires federal courts to devise and implement ADR programs, but also authorizes them to order mandatory mediation or early neutral evaluations, and to ensure that the preexisting ADR programs conform to the ADRA's requirements. But unlike with earlier ADR legislation,

the ABA and the Judicial Conference of the United States initially opposed the 1998 statute because of the possibility that arbitration programs could be made *mandatory* for each district court. Mitchell Dolin of the ABA argued that mandatory arbitration denied citizens their Seventh Amendment rights to a jury trial, stressing that while arbitration "can be a useful, cost-effective way to resolve many legal disputes," it must be a party's own decision.[150] The Honorable D. Brock Hornby argued on behalf of the Judicial Conference that requiring courts to implement this one narrow form of ADR would be "unnecessary and duplicative," given that "80 districts have already got some form of ADR," and given that "what we've discovered as the years have passed, as more forms of ADR have developed, is that arbitration is not the most preferred method. In fact, it's one of the less preferred methods."[151] Instead, the Judicial Conference promoted the use of mediation, summary jury trials, and early neutral evaluations, the first and last of which were agreed upon in the final bill—and both of which were *voluntary*, not compulsory.

The nature of the debate over ADRA in 1998 reflected a reinvigoration of the debate over whether mandatory arbitration that would not be subject to review by courts posed insurmountable problems for the administration of justice. Arguably as part of the tort reform debate, in the 1980s numerous states had passed laws imposing ADR procedures as a precondition for trial in cases involving potential medical malpractice suits in particular. The Pennsylvania Health Care Services Malpractice Act, for example, mandated compulsory arbitration before a trial, only to be struck down by the state Supreme Court for infringing on the constitutional right to trial by jury. When Republicans became a majority in the House in 1995, its new speaker, Newt Gingrich, led the charge for furthering ADR, demanding that agencies like the EEOC increase its use in place of litigation as a condition of its congressional funding.[152] Democrats were themselves divided on the matter. In 1992 Democratic House member Barney Frank held hearings encouraging the use of ADR in lieu of medical malpractice litigation. Stuart Gerson, Assistant Attorney General in the Justice Department under the Bush administration, argued that "ultimately, I suggest we need to migrate toward a system where choice is allowed and ADR not only becomes an option, but becomes an option which, when selected, is binding."[153] Gerson criticized the organized bar and many politicians for emphasizing the expense of litigation, and Frank agreed: "The stress of an adversarial lawsuit would not always be, I think, medically indicated. So that having this done in a more relaxed fashion probably has something to be said for (ADR) as well."[154] At the same time, Frank defended lawyers: "Lawyer bashing obviously is out of hand, and

I think what we have is a systemic problem rather than, obviously, a series of personal failings—let's be very clear: If we're talking about alternative dispute resolution, we are talking about not excluding lawyers, but having lawyers work in different roles."[155]

In this instance, there was bipartisan support for reducing litigation by requiring ADR instead. Frank did, however, "forget" to invite ATLA to the hearings, but "regard[ed] them as important participants in this process" who would be involved in future hearings.[156] The American Medical Association, undoubtedly in favor of avoiding litigation, promoted ADR as a way of getting justice to more people, as "arbitration is the only adjudicatory mechanism available to most litigants with ordinary civil cases."[157] But Robert Raven, chair of the ABA's Standing Committee on Dispute Resolution, cautioned that while he had supported the expansion of ADR, particularly as a way to ease congested courts that were denying access in other arenas because of the backlog of civil trials, it "should be voluntary, shouldn't be brought about by other forces" and certainly should not interfere with "every disputant's constitutional and other legal rights and remedies."[158]

In the mid-1990s, while some Democrats were content that ADR procedures were as adequate as courts in protecting individual civil rights and liberties (evidenced, for example, in the proposed Voluntary Alternative Dispute Resolution Act, which would have permitted federal courts to establish ADR to resolve litigation for controversies involving up to $150,000), other Democrats seriously questioned its adequacy. A contingent of the Democratic Party sought to balance this concern with the growing antilitigation sentiment in its proposed Federal Employee Fairness Act,[159] which sought to ease what the Party considered federal administrative burdens that emphasized conciliation at the expense of civil liberties and rights for employees who claimed that they were the subjects of employment discrimination. Liberals rallied against mandatory arbitration clauses in a range of industries, particularly where they were seen as prohibiting individuals from filing civil rights claims in court.[160] EEOC officials and employee advocacy groups testified that federal administrative review of alleged discrimination was, among other criticisms, "unduly time-consuming, [and] fraught with procedural obstacles."[161] The Washington Council of Lawyers criticized existing conciliatory procedures as "representing the interests of the agencies that employ them" and for frequently attempting to "discourage the filing of complaints."[162] They proposed changes stipulating that ADR "shall always be voluntary on the part of the employee" and that employees must be notified that *both* ADR and civil litigation are available to them, especially where ADR

procedures fail to produce an acceptable outcome.[163] The congressional report both recommended improving the existing voluntary ADR processes so that they "are not used as a means of frustrating the protection the legislation seeks to extend to employees," and making sure that "substantive rights" are not "forfeited on procedural grounds" by providing the employee with the opportunity to forgo ADR and move forward in federal court.[164] Proponents of the bill also presented amendments to a number of civil rights laws, ranging from Title VII of the Civil Rights Act of 1964 to the Americans with Disability Act, which would have prevented employers from requiring arbitration of employment discrimination claims.

The Judicial Conference was also opposed to efforts to make ADR mandatory, especially in the realm of arbitration. While the Conference did not say much about it, complaining only that mandatory arbitration "would allow a district court to require all litigants to go through the extra step of arbitration," and "that could actually add to the cost in some cases, and add to the delay, and can also impinge upon the constitutional right to jury trial by that cost and delay," this was the first instance of judges opposing mandatory ADR for the very reasons that many of its proponents initially sought to remedy.[165] The ABA took a similar position; in its written statement in response to the Alternative Dispute Resolution and Settlement Encouragement Act of 1997, the association stated that it "strongly objects to the mandatory arbitration provisions ... but it does support those provisions that requires each federal district court to authorize by local rule the use of voluntary arbitration in civil actions."[166] Given that the ABA dispute resolution section has grown to 18,000 members to date, is supported by fifty specialized committees, holds annual and midyear conferences and training sessions, and provides its own publication, it is unlikely that ABA opposition stemmed from a concern about intrusions onto its professional turf. As the largest group of practitioners for ADR, then, its opposition—arguably like that of the Judicial Conference—is centered on the "mandatory" aspect. The 1997 hearings, in fact, prompted the ABA to clarify its official position on dispute resolution, which was revised to say that the group "support[s] legislation and programs that authorize any federal, state, territorial or tribal court ... in its discretion, to utilize systems of alternative dispute resolution such as early neutral evaluation, mediation, settlement conference and voluntary, *but not mandatory*, arbitration."[167]

Meanwhile, throughout the 1990s, the Supreme Court continued to apply the FAA to a wider and wider range of disputes, pursuing the ideologically conservative goal of allowing corporations to compel arbitration and to eliminate the potential for judicial review for the individuals and groups suing

them. This included wielding the FAA in cases such as *Gilmer v. Interstate/Johnson Lane Corp.* (1991),[168] in which the Court held that employers could require new employees to arbitrate any potential claims arising under the Age Discrimination in Employment Act as a condition of their employment; *Allied-Bruce Terminix Co. v. Dobson* (1995),[169] holding that the FAA applies to all disputes involving commerce; and *Doctor's Associates v. Casarotto* (1996),[170] holding that the FAA preempts any state law regarding arbitration provisions, in this case a Montana statute requiring that an arbitration clause be indicated on the first page of a contract, in prominent font. The Court continued this trend into the 2000s, most prominently with *Green Tree Financial Corporation-Alabama v. Randolph* (2000),[171] which treats agreements between individual citizens and large entities (such as those involved in employment contracts, school enrollment, and home finance loan agreements) as if they were fully bargained private contracts, and *Circuit City Stores, Inc. v. Adams* (2001),[172] which applies the FAA to disputes between employers and employees and addresses the scope of exclusions from the FAA of certain categories of employment contracts. More recently, the Court held in *Preston v. Ferrer* (2008)[173] that the FAA also overrules state laws declaring that certain types of disputes must be resolved by a state administrative agency (going further in stipulating that the FAA "supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative"), and in *Hall Street Associates LLC v. Mattel, Inc.* the Court held that, even if parties agree in the arbitration agreement to allow for expanded judicial review of the arbitration award, the grounds for review specified in the FAA cannot be expanded upon.[174] The Court reiterated consistently in these cases that the language of the FAA promotes a public policy stance strongly in favor of arbitration, thus requiring a narrower reading of statutes that arguably suggest exceptions.

Conservatives in Congress increasingly sought to insert ADR techniques in a variety of policy areas as well. Perhaps the most heavily trafficked policy area for these proposals has continued to be health care reform and the treatment of medical malpractice claims. For example, as part of the effort to remedy the perceived onslaught of medical malpractice claims and to "weed out frivolous lawsuits"—a fixation for conservatives in the debate over how best to lower health care costs—Senator Lindsey Graham proposed the Fair Resolution of Medical Liability Disputes Act of 2009,[175] which stipulates that a covered health care malpractice action may not be brought in any state or federal court unless it is initially resolved in an ADR system. If the parties then contest the arbitrator's decision, they have a ninety-day window in which they may file an action in court for review. The bill also sets

forth basic requirements for state ADR systems, including a requirement that they transmit to the state agency responsible for monitoring or disciplining health care providers any findings that a provider committed malpractice.[176] Even while Graham maintained "There is no better way to resolve a dispute than to have a jury do it," the bill's supporters argued that ADR mechanisms would be better suited to these particular cases, under these particular conditions, at least as a first step in the legal process.[177]

Conservatives have introduced legislation promoting the use of ADR in a variety of other areas as well. In 2000 Republican Representative Henry J. Hyde introduced legislation in which he proposed establishing a nonprofit organization, the "Asbestos Resolution Corporation," charged with the duty of adopting "rules, policies, and procedures for the fair and efficient conduct of medical review and alternative dispute resolution."[178] Because asbestos personal injury litigation is "unfair and inefficient, and imposes a crushing burden on litigants and taxpayers alike," he argued, redirecting such claims to the realm of ADR was arguably an obvious (though unrealized) potential remedy for the burden on the judicial system more broadly. Conservatives in Congress have also encouraged the use of ADR in areas like workplace disputes (proposing an ADR pilot program to assist the federal government in resolving "serious workplace disputes"),[179] in legislation "authorizing and encouraging" the president to establish and use ADR procedures regarding the award or denial of assistance to states, local governments, and private actors for damages suffered from hurricanes Katrina and Rita, as well as with regard to health care claims dealing with pregnancy trauma in particular.[180] While most of these bills die or remain in the committee stage, they reflect a concerted effort by Republicans to encourage "speedy resolution of claims" that notably takes place *outside* the traditional legal system.

Democrats have been active promoting their own proposals, particularly to end mandatory arbitration agreements in different industries. Legislators have frequently responded to Supreme Court decisions like *Circuit City* with statutory proposals designed to reinvigorate the rights of employees and consumers to a day in court. But these efforts have been piecemeal, frequently focusing on eliminating mandatory arbitration in areas ranging from automobile dealers to homebuilders to poultry and livestock producers to defense contractors to the credit card industry.[181] They have also consistently, with minor exceptions, failed to push these proposals beyond an initial hearing. Notably, however, the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act instructed the Consumer Financial Bureau to study the use of predispute arbitration provisions in consumer financial contracts. The

bureau's report (cited in the introduction of this chapter) will at minimum keep the issue on Congress' radar as various bills looking to reform arbitration continue to spring up. For now, however, the debate continues to center on the reach of the FAA, with the Supreme Court largely at the helm.

In a series of cases since 2010, the Court has continued the trend of expansively interpreting the FAA so as to allow corporations to compel arbitration, even when arbitration clauses involve individuals contracting out of rights. For example, in *Rent-A-Center West, Inc. v. Jackson*,[182] the Court held that, under the FAA, where an agreement between employer and employee to arbitrate includes a provision that an arbitrator will determine the enforceability of the agreement, if a party challenges the enforceability of that specific provision, the district court considers the challenge. However, if a party challenges the enforceability of the agreement as a whole, final authority rests with the arbitrator.

The case arose from a Rent-A-Center employee who filed suit against the company alleging racial discrimination and retaliation. In response, Rent-A-Center moved to dismiss the proceedings and compel arbitration. Siding with the employer, the Court determined that Jackson (the employee) had, in fact, challenged the validity—and therefore enforceability—of the contract as a whole, thereby precluding judicial review and making the arbitrator in the dispute the last stop. The dissenters in the case, and Justice John Paul Stevens in particular, thought this reasoning was particularly suspicious, given that the majority adopted a position not proposed by either party when arguing the case. Nonetheless, the case clearly reflects the current Court's willingness to preclude judicial review of arbitration clauses specifically.

Since 2011 the Court has expanded its support for binding arbitration in a variety of ways. First, the Court addressed the issue of whether or not the FAA prevents states from conditioning the enforcement of an arbitration agreement on the availability of classwide arbitration procedures. The case, *AT&T Mobility LLC v. Concepcion*,[183] involved customers who brought a class action lawsuit against AT&T in California federal district court. The group of customers alleged that the contract they agreed to when signing up for AT&T mobile service contained a fraudulent provision (namely that the company's offer of a free phone to anyone who signed up for service was fraudulent to the extent the company charged the new subscriber sales tax on the retail value of each free phone). AT&T moved to compel arbitration based on the arbitration clause within its contract of service, and the district court denied its motion.

On appeal, the Ninth Circuit held that the arbitration clause—which required that consumers waive their class action rights—was unconscionable on the basis of a California common law rule that allowed consumers to avoid contracts in which they waived their class action rights. According to this rule, they reasoned, the arbitration clause was unenforceable under California state law, and the intent to preempt state laws regarding class action rights is neither explicitly stated nor implied in the congressional record regarding the FAA. The Supreme Court, however, found differently. In reversing the lower court decision, a 5-4 majority opinion (authored by Justice Antonin Scalia) held that the FAA *does*, in fact, preempt "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives." In response, the dissenters argued what has by now become a familiar line; that there is nothing in the legislative history of the FAA or in the act itself that indicates the intention to compel arbitration to such an extent.

The debate continues. Shortly after deciding the AT&T case, the Court agreed to hear a new arbitration dispute, this time seeking to reconcile the FAA with a federal law that is arguably incompatible by the Court's current standards. In 1996 Congress passed the Credit Repair Organizations Act (CROA),[184] which was put into place to protect consumers from unscrupulous practices by organizations that claim to repair credit. In addition to making consumers who use credit repair services aware of their rights and listing what these organizations cannot do, the act explicitly allows consumers to sue offending organizations for actual damages, punitive damages, and attorney's fees. The act also makes clear that credit repair organizations cannot ask consumers to sign any kind of form that waives their rights—including the right to sue—under the act.

Consumers accordingly sued CompuCredit Corporation in federal court, arguing that while they were promised $300 in available credit in their first year, the company also charged them $257 in fees. The corporation countered that the dispute must be handled through arbitration, as per an agreement that the customers signed in order to receive the card. As the CROA stipulates clearly and succinctly, "you have the right to sue a credit repair organization that violates the Credit Repair Organization Act," the Ninth Circuit ruled that the language was intended to bar arbitration of claims under the law, concluding "Congress meant what it said in using the term 'sue,' and that it did not mean 'arbitrate.' "[185] The Supreme Court reversed, citing its decision in FAA and *Concepcion*. Justice Scalia wrote the opinion for the 8-1 Court (with Justice Ginsburg dissenting), which held that any congressional exclusion of particular classes of contracts from arbitration must be clear. Statutory

references to a "right to sue" and to "an action" in a statute are not sufficiently explicit.

In the aftermath of the Court's most recent decision in *American Express v. Italian Colors Restaurant* (in which the majority upheld an arbitration clause despite the fact that claimants would not be able to recover enough to afford the complex, expensive antitrust arbitration claim),[186] Andrew Pincus, the lawyer who defended both American Express and AT&T two years prior, argued that the Supreme Court "eliminated the last obstacle to adoption of fair, efficient arbitration systems that increase access to justice for consumers while reducing transaction costs for everyone."[187] Justice Elena Kagan's sharply worded dissent paints an even more dire picture for individual seeking redress against corporations: as she put it, the Court's decision means that "the monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse," and that the decision would encourage companies to "extract backdoor waivers of statutory rights" instead of adopting efficient arbitration procedures, as was intended by the FAA.[188] As such, the class action waiver has become "a favorite tool of corporate council" in seeking to insulate their clients from lawsuits.[189]

Conclusions

What is behind the support that conservatives have for these developments? Why is the Court so aggressively imposing the FAA's provisions onto such a wide array of statutes, arguably in ways that far exceed the intentions for the legislation? And why are conservatives in Congress increasingly promoting ADR procedures in legislation traversing a variety of policies? On the one hand, the Court seems to be normalizing ADR. Mediation and arbitration have become incorporated into courts at almost every level as a way to respond to increased case loads and budget cuts, and to promote less adversarial forms of conflict resolution.[190]

On the other hand, this series of decisions reaches well beyond merely an effort to bring arbitration onto even footing with litigation, raising skepticism regarding the Court's intentions, a skepticism that has certainly not escaped the attention of the Court's more liberal members. In *Circuit City*, Justice Stevens succinctly characterized the concerns of the Court's shrinking core of liberal justices, which have each voiced similar perspectives in their various dissents in this line of cases. He argued that the Court's recent decisions "have pushed the pendulum far beyond a neutral attitude and endorsed

a policy that strongly favors private arbitration" over litigation. Such a strategy is functionally hostile to litigation, premised on the belief that there is nothing superior or special about litigation as a process for resolving disputes. While entirely consistent with the Rehnquist and Roberts Courts' antilitigation sentiment, the consequences for the quality of rights protections for certain groups make it a more complicated issue than the majority of the Court seems to let on.[191]

Regardless, the ways in which ADR procedures have been handled by largely conservative courts in recent years (often in stark contrast to the ways in which more liberal district and appeals courts handle the same claims) represents what is, on the one hand, a real turning of the tides for ADR. While the statutory and bureaucratic bases for the expansion of ADR were mostly achieved within the policy-specific arena of labor and industrial strife in the early twentieth century, the later monetary support, development of techniques, training, personnel supply were largely supported from private and frequently liberal sources. In the 1960s and 70s, the Ford Foundation funded and created the institutional infrastructure for most ADR activity (alongside other private donors), and the American Bar Association (along with law and graduate schools) appropriated many of these roles by the 1990s. To say that ADR was founded and driven by purely liberal and progressive goals is overly simplistic; groups and organizations such as the AAA supported ADR for economic and efficiency reasons while the Judicial Conference often promoted it out of a concern for better institutional maintenance of an increasingly overburdened judicial system. However, liberal actors coming specifically from the Democratic Party who were concerned for the rights protections of the poor, the stigmatized, and other disadvantaged groups played a pivotal and foundational role.

The success that conservatives, primarily on the Supreme Court (and as attempted in Congress) have had in co-opting these established ADR procedures track generally with efforts by conservatives to scale back access to the courts and judicial authority by tinkering with adjudicative procedures. The influence of conservatives in Congress and a conservative Supreme Court has meant that statutes originally intended to promote access to justice (e.g., the Rules Enabling Act, the Administrative Procedure Act, and certainly the FAA) have been redirected and reinterpreted for the pursuit of goals contrary to the original impetus for such legislation. This has allowed conservatives to support and convert institutional developments in areas of law like ADR as devices for defending corporate and wealthy interests by keeping disputes away from the costs and dangers of courtroom litigation.

Importantly, however, conservatives have been able to pursue this tactic for constricting access to the courts without needing to create *or* scale anything back; and because of this, the use of ADR is not often identified as a potent mechanism for retrenchment. In many ways, this is because conservative activists have simply built upon both an institutional and rhetorical apparatus constructed over time by liberals, merely extending the logic that ADR is suitable for minor disputes in a way that extends "minor" to just about anything that confronts corporate capital. It also largely escapes our analysis when seeking to identify the expanse of the antilitigation movement because the partisan component is complex. While conservatives have found ADR to be an especially amenable terrain to co-opt for the purpose of keeping certain litigants and cases out of court, a significant swath of Democrats continues to promote ADR as well. As such, even the recent conservative activity is hardly a simply partisan story.

60. Jeb Barnes, "Courts and the Puzzle of Institutional Stability and Change: Administrative Drift and Judicial Innovation in the Case of Asbestos," *Political Research Quarterly* 61 (2008), 646. In his study of asbestos litigation, Barnes has found that administrative drift led to periods of judicial conversion and layering, indicating that drift (and presumably other forms of institutional change) can best be understood as transitional.

CHAPTER 3

1. See Stuart T. Rossman, Director of Litigation, National Consumer Law Center, "Recent Developments in the Forced Arbitration Market and the Continued Need for Protective Legislation," Subcommittee on Commercial and Administrative Law, House Committee on the Judiciary, September 15, 2009; "Firm Agrees to End Role in Arbitrating Card Debt," *New York Times*, July 19, 2009.
2. Public Citizen, "The Arbitration Trap: How Credit Card Companies Ensnare Consumers," September 2007; City Attorneys' complaint, *People of the State of California v. National Arbitration Forum, Inc. et al,* San Francisco Superior Court No. 473–569 (March 24, 2008).
3. Public Citizen, "Forced Arbitration: Unfair and Everywhere," September 14, 2009.
4. See Consumer Financial Protection Bureau, "Arbitration Study Preliminary Results: Section 1,028(a) Study Results to Date," December 12, 2013, 12, http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf.
5. Regarding the partisan nature of the current antilitigation movement, see, for example, Thomas F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle over Litigation in American Society* (Berkeley: University of California Press, 2002); William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago: University of Chicago Press, 2004).
6. Staff Report of the Domestic Subcommittee Majority Staff, Oversight and Government Reform Committee, Chairman Dennis J. Kucinich, July 21, 2009; Staff Report, Subcommittee on Domestic Policy, Committee on Oversight and Government Reform, Jim Jordan, July 22, 2009.
7. Ibid.
8. Theodore Eisenberg, Geoffrey P. Miller, and Emily Sherwin, "Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts," *University of Michigan Journal of Law Reform* 41 (2008), 883. CRS Report, "Courts Continue to Recognize Validity of Mandatory Arbitration Agreements," September 5, 2013. See, too, Amalia D. Kessler, "Stuck in Arbitration," *New York Times*, March 6, 2012.
9. Alexander J. S. Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes," *Journal of Empirical Legal Studies* 8 (2011), 5–6, 19.

10. "Mandatory Binding Arbitration: Is It Fair and Voluntary?," Subcommittee on Commercial and Administrative Law, House of Representatives, 111th Congress, 1st Session, September 15, 2009, at 2.
11. Ibid.
12. Ibid., at 86.
13. *AT&T Mobility LLC v. Conception*, 131 S.Ct. 1740 (2011). See also Andrew Cohen, "No Class: The Supreme Court's Arbitration Ruling," *The Atlantic*, April 27, 2011, http://www.theatlantic.com/national/archive/2011/04/no-class-the-supreme-courts-arbitration-ruling/237967/.
14. See Charles Pollack, "An American Crisis: Proprietary Schools and National Student Debt," *American University Business Law Review* 1 (2012), 157–58.
15. *Compucredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012). CROA stipulates clearly and succinctly, "You have the right to sue a credit repair organization that violates the Credit Repair Organization Act."
16. *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013).
17. *Compucredit Corp. v. Greenwood.*
18. "Workplace Fairness: Has the Supreme Court Been Misinterpreting Laws Designed to Protect American Workers from Discrimination?" Hearing before the Committee on the Senate Judiciary, October 7, 2009, 2.
19. The two most commonly used methods of ADR, arbitration and mediation, date back the furthest. Arbitration is a consensual process in which the opposing parties present their positions to a neutral third party or panel (agreed upon by the parties) with decision making authority, who is typically a respected expert in the subject area of a dispute. Arbitration is the ADR method that most closely resembles the process of adjudication. Arbitration clauses are typically included in contracts and, as such, are agreed upon as a means of adjudication well before a dispute arises; they also usually stipulate whether an award will be considered final and binding or whether judicial review is permissible. The most widely used court-based program, however, is mediation; a private, voluntary, informal process by which parties pick a third party neutral to assist them in reaching a mutually acceptable agreement. After listening to both sides, the mediator gives each party his or her assessment of the strengths and weaknesses of its case (and the opponent's) in hopes of facilitating settlement.
20. Regarding differences in interpretation, compare the ideologically contrasting writings of Ralph Nader, "Consumerism and Legal Services: The Merging of Movements," *Law and Society Review* 11 (1976), 247–56, and Laurence H. Tribe, "Too Much Law, Too Little Justice: An Argument for Delegalizing America," *The Atlantic Monthly*, July 1979, at 25, with the writings of Robert H. Bork, "Dealing with the Overload in Article III Courts," *Federal Rules Decisions* 70 (1976), 231–46, and Warren Burger, "Isn't There a Better Way?," *American Bar Association Journal* 68 (1982), 274–77. For a discussion of these alternative viewpoints, see Marc Galanter and John Lande, "Private Courts and Public Authority," *Law,*

Politics, and Society 12 (1992), 393–415; and Jeffrey W. Stempel, "Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood? *Ohio State Journal of Dispute Resolution* 11 (1996), 297–395.

21. Thomas J. Stipanowich, "ADR and the 'Vanishing Trial': The Growth and Impact of 'Alternative Dispute Resolution,' *Journal of Empirical Legal Studies* 1 (2004), 843. See also Stipanowich, "Arbitration: The 'New Litigation,'" *University of Illinois Law Review* 2010, no. 1 (2010), 1–58.
22. See American Arbitration Association, Department of Case Administration, Caseload Statistics, 2002.
23. For an overview of a range of state courts, see Stipanowich, "ADR and the 'Vanishing Trial.'" Regarding L.A., see the *Daily Journal*, December 6, 2004.
24. Marc S. Galanter, "The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts," *Journal of Empirical Legal Studies* 1 (2004), 459.
25. Stephen N. Subrin and Thomas O. Main, "The Fourth Era of American Civil Procedure," *University of Pennsylvania Law Review* 162 (2014), 1880.
26. Martin Shapiro, *Courts: A Comparative and Political Analysis* (Chicago: University of Chicago Press, 1986), 1.
27. Gordon Silverstein, *Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics* (New York: Cambridge University Press, 2009).
28. See Burke, *Lawyers, Lawsuits, and Legal Rights*; Haltom and McCann, *Distorting the Law*; Robert A. Kagan, *Adversarial Legalism: The American Way of Law* (Cambridge, MA: Harvard University Press, 2001).
29. Democrats during this time period also argued that there was a growing need to modernize state institutions to respond to the complexities of industrialized society, and that ADR was a novel approach.
30. See David Horton, "Arbitration as Delegation," *New York University Law Review* 86 (2011), 460–61.
31. *Gilmer v. Interstate/Johnson Lane Corp.* (500 U.S. 20 [1991], Age Discrimination in Employment Act); *Rodriquez de Quijas v. Shearson/American Express* (490 U.S. 477, [1989], Securities Act of 1933); *Shearson/American Express, Inc. v. McMahon* (482 U.S. 220 [1987], Racketeer Influenced and Corrupt Organizations Act and the Securities Act of 1934); *Perry v. Thomas* (482 U.S. 483 [1987], finding that the FAA preempts California law guaranteeing access to courts in wage collection actions).
32. See *Rent-A-Center West, Inc. v. Jackson*, 130 S.Ct. 2772 (2010).
33. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 (2011).
34. The quotation is from "Arbitration Proposition of Mr. Stevens in the Convention," *The True American*, August 5, 1846, 1.
35. "Legislative Acts/Legal Proceedings," *The Mail*, September 3, 1791, 3.
36. "To the Legislatures of the respective States," *National Intelligencer and Washington Advertiser*, September 5, 1804, 2. See, too, *Trenton Federalist*, February 27, 1804, 3.

37. "Constitution," *Gazette of the United States*, May 14, 1803.
38. "Constitutional Convention," *Albany Argus*, August 21, 1846, 2. It was proposed that this court be first tried in New York City, "and if it worked well there, to allow the legislature to extend it to other sections of the state." Massachusetts and Pennsylvania considered similar creations in 1855. See *Washington Review and Examiner*, February 3, 1855; "Courts of Mediation and Arbitration," *Boston Herald*, March 10, 1855.
39. Report of the Debates and Proceedings of the Convention for the Revision of the Constitution of the State of New York, 1846, 588. Quoted in Eric H. Steele, "The Historical Context of Small Claims Courts," *American Bar Foundation Research Journal* 6 (Spring 1981), 306.
40. "Courts of Arbitration," *Baltimore Sun*, August 27, 1846.
41. "Courts of Mediation and Arbitration," *Boston Herald*, March 10, 1855.
42. "A Court without Lawyers," *Massachusetts Spy*, February 23, 1859.
43. In further support of arbitration as preferable to litigation for speed, price, and common good, see "Plan for Diminishing Litigations," *The New-Yorker*, April 13, 1839, 52; "Litigation-Arbitration," *Friends' Weekly Intelligencer*, April 6, 1844, 9. With regard to Ohio, see R. W. Russell, "Reform in the Judiciary System of Ohio," *The Western Law Journal* (August 1844), 508; Speech of Mr. Pennington, "Law Reform in Ohio," *The Western Law Journal* (September 1849); "Courts of Conciliation," *Maine Farmer*, April 12, 1849, 2. On support from railroads fighting each other, "Arbitration in Railway Disputes," *American Railway Times*, October 16, 1858.
44. *Milwaukee Sentinel*, May 1, 1849, 2.
45. See, for example, Maxwell Bloomfield, "Lawyers and Public Criticism: Challenge and Response in Nineteenth-Century America," *American Journal of Legal History* 15 (October 1971), 276.
46. Morton Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, MA: Harvard University Press, 1977), 150. More generally on the early decades after the American Revolution, see chapter 5.
47. *Tobey v. County of Bristol*, 23 F. Cas. 1313, 1321, Circuit District Court of Massachusetts (May 1845).
48. Ibid.
49. Ibid., at 1321.
50. *Insurance Co. v. Morse*, 87 U.S. 445 (1874), at 451.
51. See, for example, Charles Sumner's promotion of international arbitration as an alternative to war. Mr. Sumner, "Resolutions," Senate, 43rd Congress, 1st Session, December 1, 1873.
52. Hearings before the Committee on Foreign Relations, Senate, 50th Congress, 1st Session, January 30, 1888, 6. Field also famously created the Field Code in 1850 in the state of New York, which moved the state's legal system away from common law pleading to code pleading. See Stephen N. Subrin, "David Dudley Field and

the Field Code: A Historical Analysis of an Earlier Procedural Vision," *Law and History Review* 6 (September 1988), 311–73.

53. As such, there are two separate questions regarding the administrative state and courts, only one of which is addressed in this chapter. What I am not addressing here is the constitutional fight over the "primacy between courts and administrators," one that involves questions of the delegation of power between branches of government and the scope of administrative discretion vis-à-vis judicial activism. For this, see, for example, Horwitz, *The Transformation of American Law*, 222.
54. See, for example, Karen Orren, *Belated Feudalism: Labor, the Law, and Liberal Development in the United States* (New York: Cambridge University Press, 1992); Herbert Schreiber, "The Majority Preference Provisions in Early State Labor Arbitration Statutes, 1880–1900," *Journal of American Legal History* 15 (1971), 186; John Fabian Witt, *The Accidental Republic: Crippled Workingmen, Destitute Widows, and the Remaking of American Law* (Cambridge, MA: Harvard University Press, 2004).
55. See the testimony of W. A. A. Carsey, chairman of the Anti-Monopoly League of the state of New York, before the Senate Committee on Interstate Commerce, 50th Congress, 1st Session, March 8, 1888.
56. Reports on the Industrial Commission on Labor Organizations: Labor Disputes and Arbitration, and on Railway Labor, House of Representatives, 57th Congress, 1st Session, Doc. No. 186, 1901, 423. Under the authority of the act, the president appointed a special commission to investigate the great railway strikes of 1894, but the investigation produced findings well after the dispute was settled.
57. See Stephen Skowronek, *Building a New American State: The Expansion of National Administrative Capacities 1877–1920* (New York: Cambridge University Press, 1982), 150–54, and in particular at 152, quoting Brewer.
58. *Chicago, Milwaukee and St. Paul Railway Co. v Minnesota*, 134 U.S. 418 (1980), at 457.
59. Reports on the Industrial Commission on Labor Organizations: Labor Disputes and Arbitration, and on Railway Labor, House of Representatives, 57th Congress, 1st Session, Doc. No. 186, 1901, 423–78.
60. Ibid., 428–31, 434–36, 442–44, 449–52.
61. Ibid., 455–56.
62. Schreiber, "Majority Preference Provisions," 187.
63. *Berkovitz v. Arbib and Houlberg, Inc.*, 230 NY 261 (1921), at 274–75. An editorial in the *New York Law Review* at the time pointed out that while judges are imperfect and lawyers are criticized for their self-interested promotion of litigation, arbitrators were struggling to provide a competent and fair alternative; and unlike judges who are bound by procedures and appeals, prejudicial arbitrators could issue orders against parties without recourse to counsel or appeal. "What Is the Matter with Arbitration?," *New York Law Review* 1 (September 1923), 355–63.
64. Orren, *Belated Feudalism*, 185.

65. Imre S. Szalai, "Modern Arbitration Values and the First World War," *American Journal of Legal History* 49 (October 2007), 355–91, 363–64, 376.
66. "Mediation, Conciliation, and Arbitration," House of Representatives, 62nd Congress, 2nd Session, Report No. 853, June 7, 1912.
67. George I. Lovell, *Legislative Deferrals: Statutory Ambiguity, Judicial Power, and American Democracy* (New York: Cambridge University Press, 2003), 81.
68. "Settlement of Business Disputes by Arbitration," *New York Herald*, July 30, 1881, 4; "Reform of the Judiciary," *Galveston Weekly News*, January 18, 1883, 5.
69. Jerold S. Auerbach, *Justice Without Law?* (New York: Oxford University Press, 1984), 33; Horwitz, *The Transformation of American Law*, 145.
70. See Christopher J. Cyphers, *The National Civic Federation and the Making of a New Liberalism, 1900–1915* (Westport, CT: Praeger, 2002).
71. Gompers is quoted in Christopher L. Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (Cambridge, MA: Harvard University Press, 1985), 73.
72. See Samuel Gompers, "The Limitations of Conciliation and Arbitration," *Annals of the American Academy of Political and Social Science* 20 (July 1902). See, too, Orren, *Belated Feudalism*, 186; Schreiber, "Majority Preference Provisions," 191.
73. See, for example, William F. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, MA: Harvard University Press, 1989); Orren, *Belated Feudalism*; Tomlins, *The State and the Unions*.
74. "Address of Samuel Gompers," *Advocate of the Peace*, issue 59, April 1897, 88.
75. See Horwitz, *The Transformation of American Law*, 217. See, too, John Fabian Witt, *Patriots and Cosmopolitans: Hidden Histories of American Law* (Cambridge, MA: Harvard University Press, 2007), 221.
76. Stephen N. Subrin and Margaret Y. K. Woo, *Litigating in America: Civil Procedure in* Context (New York: Aspen, 2006), 217.
77. Horwitz, *Transformation of American Law*, 219.
78. F. R. Aumann, "The Lawyer and His Troubles," *The North American Review* (1833), 31.
79. See, for example, Charles L. Bernheimer, "The Advantages of Arbitration Procedure," *Annals of the American Academy of Political and Social Science* 124 (March 1926), 98–104.
80. Bernheimer, "Advantages of Arbitration," 98.
81. Ibid., 98–99.
82. House of Representatives, 68th Congress, 1st Session, Report No. 96, 1924.
83. Mr. Sterling, Committee on the Judiciary, "To Make Valid and Enforceable Certain Agreements for Arbitration," Senate, 68th Congress, 1st Session, Report No. 536, May 14, 1924. See Preston Douglas Wigner, "The United States Supreme Court's Expansive Approach to the Federal Arbitration Act; a Look at the Past, Present, and Future of Section 2," *University of Richmond Law Review* 29 (1995), 1499–554.
84. "Arbitration of Interstate Commercial Disputes," Joint Hearings before the Subcommittees of the Committees on the Judiciary, 68th Congress, 1st Session, January 9, 1924.

85. Ibid., at 15 and 13.
86. See Committee on Commerce, Trade, and Commercial Law, "The United States Arbitration Law and Its Application," *American Bar Association Journal* 11 (1925), 153; "Plan to Promote Industrial Peace Considered," *American Bar Association Journal* 14 (1928), 166.
87. "Arbitration of Interstate Commercial Disputes," at 15.
88. Ibid., 21–22. Quotation is from Evans Clark, "Business Arbitration Spreads Over World: New Law Gives It a Legal Standing in the United States," *New York Times*, April 12, 1925, 26. Clark writes that "to the uninitiated it might seem as if commercial arbitration were a concerted movement on the part of business men, tired of the law's delays, to take matters into their own hands and settle their disputes among themselves. Whatever it may be, commercial arbitration has the hearty support of leaders of the bench and bar" because it would free them from clogged dockets.
89. The new board was seen as essential due to the perceived failing of the prior Railroad Labor Board, which was rarely able to enforce the outcomes of its administrative hearings.
90. See "Arbitration Between Carriers and Employees, Boards of Adjustment," Hearings before the Subcommittee of the Committee on Interstate Commerce, Senate, 68th Congress, 1st Session, March 18, 28, 29, April 4, 7, 1924.
91. Evans Clark, "Industry Is Setting Up Its Own Government: American Capital and Labor Find a New Way to Avoid Disaster," *New York Times*, March 21, 1926, 25.
92. Ibid., 117.
93. Charles O. Gregory and Richard M. Orlikoff, "The Enforcement of Labor Arbitration Agreements," *University of Chicago Law Review* 17 (1950), 233–69.
94. 363 U.S. 564 (1962).
95. 363 U.S. 574 (1962).
96. 363 U.S. 593 (1962).
97. *Enterprise Wheel & Car Corp.*, at 597.
98. Ibid., at 599.
99. Report of the Special Committee on Administrative Law, *Annual Report of the ABA* 63 (1938), 331 and 339. See also Horwitz, *Transformation of American Law*, 219–22.
100. See, for example, Alan Brinkley, "The New Deal and the Idea of the State," in Steve Fraser and Gary Gerstle, eds., *The Rise and Fall of the New Deal Order, 1930–1980* (1989), 85–121; Horwitz, *Transformation of American Law*, 230–33; Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York: W. W. Norton, 1967).
101. Horwitz, *Transformation of American Law*, 240–41.
102. See, for example, William B. Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," *University of Pennsylvania Law Review* 118 (1969), 40–68.
103. See, for example, *Alexander v. Gardner-Denver* 415 U.S. 36 (1974).

104. See, for example, Michael J. Klarman, *From Jim Crow to Civil Rights* (Cambridge, MA: Harvard University Press, 2004); Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton, NJ: Princeton University Press, 2008); Risa L. Goluboff, *The Lost Promise of Civil Rights* (Cambridge: Harvard University Press, 2010); Risa L. Goluboff, "We Live in a Free House Such as It Is: Class and the Creation of Modern Civil Rights," *Pennsylvania Law Review* 151 (2003), 1977–2018; Kenneth W. Mack, "Rethinking Civil Rights Lawyering and Politics in the Era Before Brown," *Yale Law Journal* 115 (2005), 256–354.
105. See, for example, Richard L. Abel, *The Politics of Informal Justice* (New York: Academic Press, 1982); Christine B. Harrington and Sally Engle Merry, "Ideological Production: The Making of Community Mediation," *Law and Society Review* 22 (1988), 709–36; Sally Engle Merry, "Disputing Without Culture: Review Essay of Dispute Resolution," *Harvard Law Review* 100 (1987), 2057; Laura Nader, "Disputing Without the Force of Law," *Yale Law Journal* 88 (1979), 998.
106. See Owen Fiss, "Against Settlement," *Yale Law Journal* 93 (1984), 1089.
107. Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the United States* (Princeton, NJ: Princeton University Press, 2010); Frymer, *Black and Blue*, chapter 4; R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (Washington, DC: Brookings Institution, 1994).
108. Indeed, it is the emphasis on mediation in the Civil Rights Act that has led many public law scholars to conclude (not incorrectly) that the EEOC had strikingly weak enforcement powers that subsequently necessitated private litigation to carry out its mandate. See, for example, Farhang, *The Litigation State*; Frymer, *Black and Blue*; Nicholas Pedriana and Robin Stryker, "The Strength of a Weak Agency: Title VII of the 1964 Civil Rights Act and the Expansion of State Capacity, 1965–1971," *American Journal of Sociology* 110 (2004), 709–60; John D. Skrentny, *The Minority Rights Revolution* (Cambridge, MA: Belknap Press, 2002).
109. See Jerome T. Barrett with Joseph P. Barrett, *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement* (San Francisco: John Wiley & Sons, 2004), 159.
110. Lawrence M. Friedman, "Legal Rules and the Process of Social Change," *Stanford Law Review* 17 (April 1967), 798–840; see the quotes on 801 and 803.
111. See, for example, *Mediating Social Conflict* (New York: Ford Foundation, 1978); Lon Fuller, "Mediation: Its Forms and Functions," *Southern California Law Review* 44 (1971), 305; James Willard Hurst, "The Functions of Courts in the United States, 1950–1980," *Law and Society Review* 15, (1980/1981), 401; Herbert M. Kritzer, "Studying Disputes: Learning from the CLRP Experience," *Law and Society Review* 15 (1980/1981), 503.
112. Tomiko Brown-Nagin, " 'Broad Ownership' of the Public Schools: An Analysis of the 'T-Formation' Process Model for Achieving Educational Adequacy and

Its Implications for Contemporary School Reform Efforts," *Journal of Law and Education* 27 (1998), 343, 374. She adds, "Alternative processes create channels through which communities, together with lawyers, may use techniques of pressure and negotiation to gain the attention of those in power, and ultimately, to generate change in the inequitable social and political relations reflected in the racially stratified system of public education."

113. Alan W. Houseman, "Legal Services and Equal Justice for the Poor: Some Thoughts on Our Future," *NLADA Briefcase* 35 (1978).
114. Abel, *The Politics of Informal Justice*; Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem Solving," *UCLA Law Review* 31 (1984), 754; Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law* (Ithaca, NY: Cornell University Press, 1990); Judith Resnik, "Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication," *Ohio State Journal on Dispute Resolution* 10 (1995), 211–66.
115. See Linda R. Singer, *Settling Disputes: Conflict Resolution in Business, Families, and the Legal System*, 2nd ed. (Boulder, CO: Westview Press, 1994); and H. Baer, "History, Process, and a Role for Judges in Mediating Their Own Cases," *New York University Annual Survey of American Law* (2002), 131–151.
116. See "The Pound Conference: Perspectives on Justice in the Future," in A. Levin and R. Wheeler, eds., *Proceedings of the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* (New York: West, 1979), 65.
117. Thomas F. Sheehan, "The Medical Malpractice Crisis in Insurance: How It Happened and Some Proposed Solutions," *The Forum* 11 (Section of Insurance, Negligence and Compensation Law, American Bar Association, 1975), 80–128; Tom Goldstein, "A Dramatic Rise in Lawsuits and Costs Concerns Bar," *New York Times*, May 18, 1977, 1.
118. *Congressional Record*—Senate (April 7, 1975), 9103; *Congressional Record*—Senate (January 29, 1975), 1716–17.
119. Ibid., 1717.
120. Ibid., 1035–1041.
121. Statement of the Association of Trial Lawyers of America before the Subcommittee on Health of the Senate Committee on Labor and Public Welfare on S. 188, S. 215, S. 482, S. 1211, Federal Medical Malpractice Insurance Act, 1975, April 9, 1975, 303.
122. "Causes of Popular Dissatisfaction with the Administration of Justice," Subcommittee on Constitutional Rights of the Committee on the Judiciary, Senate, 94th Congress, 2nd Session, May 19, 1976.
123. "State of the Judiciary and Access to Justice Act," Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House of Representatives, 95th Congress, 1st Session, June 20, 1977.
124. This was in reference to the Supreme Court's decision in *Warth v. Seldin*, 422 US 490 (1975).
125. Kastenmeier, "State of the Judiciary and Access to Justice Act," 6.

126. Ibid., 12.
127. Ibid., 47.
128. Ibid., 251.
129. "Dispute Resolution Act," Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, Committee on the Judiciary, House of Representatives, 95th Congress, 2nd Session, July 27 and August 2, 1978. See, too, "Consumer Controversies Resolution Act."
130. Senator Dennis Webster DeConcini, "Court-Annexed Arbitration Act of 1978," Committee on the Judiciary, Senate, Report No. 95-1103, August 10, 1978.
131. "Access to Justice," Hearings on the Judiciary Committee, Senate, 96th Congress, 1st Session, February 13 and 27, 1979, 1.
132. Ibid., 38.
133. Ibid., 48–49.
134. Ibid., 48–52.
135. Ibid., 9. Tate also pointed to a range of examples from the United States to England to Sweden involving small criminal and civil matters, "from a barking dog to an overhanging tree," that were best handled by small "public complaint boards." See 10–11.
136. Barrett and Barrett, *A History of Alternative Dispute Resolution*, 214.
137. Three prominent journals include the *Journal of Dispute Resolution* at Missouri/Columbia, *Ohio State Journal of Dispute Resolution*, and the *Negotiation Journal* at Harvard.
138. Regarding the use of ADR in federal district courts, see Elizabeth Plapinger and Donna Steinstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* (1996), http://www.fjc.gov/public/pdf.nsf/lookup/adrsrcbk.pdf/$File/adrsrcbk.pdf.
139. See, for example, "FOIA: Alternate Dispute Resolution Proposals," Subcommittee on Government Information, Justice, and Agriculture of the Committee on Government, December 1, 1987 (the ACLU was skeptical of ADR despite its recognition that litigation was inefficient and costly, because it feared the executive branch might resist requests against its own officials, whereas the courts offer an independent and equal branch of government that could stay independent from executive affairs). See also "Mediation and Older Americans: Consider the Possibilities," Committee on the Judiciary, House of Representatives, June 23, 1988; "Fair Housing Amendments Act of 1987," Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives, April 22, 1987. (The NAACP stated [233], "The NAACP has grave concerns about arbitration." It tries to split the difference, and doesn't deal with situations where "rights were denied.")
140. "The Problem of Civil Case Backlogs in the Federal Judicial System in District and Appellate Courts," Hearings before the Subcommittee on Courts of the Committee on the Judiciary, 98th Congress, 1st and 2nd Sessions, November 8, 1983, and February 1, 1984.

141. Senator Mitch McConnell, "Litigation Abuse Reform Act of 1986," Hearings before the Committee on the Senate Judiciary, February 21, 1986, 1.
142. See "Alternative Dispute Resolution," Hearing before the Subcommittee on Courts and Administrative Practice of the Committee on the Judiciary, Senate, 100th Congress, 2nd Session, S. 2274, May 25, 1988; "Alternative Dispute Resolution Use by Federal Agencies," Hearing before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary, House of Representatives, 100th Congress, 2nd Session, June 16, 1988; "Alternative Dispute Resolution Act of 1989," Hearing before the Subcommittee on Oversight of Government Management of the Committee on Governmental Affairs, Senate, 101st Congress, September 19, 1989; "Administrative Dispute Resolution Act," Subcommittee on Administrative Law and Governmental Relations, Judiciary Committee, House of Representatives, 101st Congress, 2nd Session, January 31, 1990.
143. Statement of Marshall Breger, Hearings on the Administrative Dispute Resolution Act, House Judiciary Committee Subcommittee on Administrative Law and Governmental Relations, January 31, 1990.
144. William Funk, "RIP ACUS," *Administrative & Regulatory Law News*, American Bar Association, Winter 1996.
145. I discuss these developments at length in Chapter Four.
146. Testimony of William P. Barr, Hearings on the Administrative Dispute Resolution Act of 1989, Subcommittee on Oversight of Government Management of the Committee on Governmal Affairs, United States Senate, 101st Congress, 1st Session (September 19, 1989), 10.
147. Statement of the Hon. Don J. Pease, "The Negotiated Rulemaking Act," House Judiciary Subcommittee on Administrative Law, May 3, 1989.
148. Executive Order No. 12,988,61 *Federal Register* 4,729 (1996). President Bush issued a similar order in 1991; see Executive Order No. 12,278,56 *Federal Register* 55,195 (1991).
149. "Alternative Dispute Resolution: Employer's Experiences with ADR in the Workplace," U.S. General Accounting Office, Report to the Chairman, Subcommittee on Civil Service, Committee on Government Reform and Oversight, House of Representatives, 1997, 2.
150. Statement of Mitchell F. Dolin, American Bar Association, "Alternative Dispute Resolution and Settlement Encouragement Act; Federal Courts Improvement Act, and Need for Additional Federal District Court Judges," Hearing before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, House of Representatives, October 9, 1997, 59.
151. Statement of Hon. D. Brock Hornby, Chief Judge, U.S. District Court for the District of Maine, on behalf of the Judicial Conference, Hearings before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, House of Representatives, 105th Congress, 1st Session, on H.R. 2603

(Alternative Dispute Resolution and Settlement Encouragement Act) and H.R. 2294 (Federal Courts Improvement Act, and Need for Additional Federal District Court Judges), October 9, 1997, 14.

152. "The Future Direction of the EEOC," Hearing before the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce, House of Representatives, 105th Congress, 2nd Session, March 3, 1998, 6.
153. "Examining the Use of Alternative Dispute Resolution for Medical Malpractice Claims," Hearing before the Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives, 102nd Congress, 2nd Session, June 24, 1992, 4.
154. Ibid., 16.
155. Ibid., 17.
156. Ibid., 20.
157. Ibid., 30.
158. Ibid., 137–8.
159. "Federal Employee Fairness Act," 103rd Congress, 2nd Session, House of Representatives, Report No. 103–599, Part 2, August 19, 1994.
160. See, for example, "Mandatory Arbitration Agreements in Employment Contracts in the Securities Industry," Hearings before the Committee on Banking, Housing, and Urban Affairs, Senate, 105th Congress, 2nd Session, July 31, 1998. Senators Grassley and Feingold promoted voluntary arbitration in the Motor Vehicle Franchise Contract Arbitration Fairness Act, *Congressional Record* (September 2, 1998), 19,461–19,462; Patricia Schroeder, "Mandatory Arbitration Violates Civil Rights," *Congressional Record* (August 2, 1996), 1486.
161. "Joint Oversight Hearing on Equal Employment Opportunity Commission's Proposed Reform of Federal Regulations," Subcommittee on Employment Opportunities of the Committee on Education and Labor and the Subcommittee on Civil Service of the Committee on Post Office and Civil Service, 101st Congress, 2nd Session, March 1, 1990.
162. "Federal Employee Fairness Act," 43.
163. Ibid., 20.
164. Ibid., 46–51.
165. Ibid.
166. Prepared statement of Mitchell F. Dolin, Attorney, American Bar Association, Hearings before the Subcommittee on Courts and Intellectual Property of the Committee on the Judiciary, House of Representatives, 105th Congress, 1st Session, on H.R. 2603 (Alternative Dispute Resolution and Settlement Encouragement Act) and H.R. 2294 (Federal Courts Improvement Act, and Need for Additional Federal District Court Judges), October 9, 1997, 54.
167. American Bar Association Greenbook, chapter 13, "Policy on Legislative and National Issues," 205.

168. 500 U.S. 20 (1991).
169. 513 U.S. 265 (1995).
170. 517 U.S. 681 (1996).
171. 531 U.S. 79 (2000).
172. 532 U.S. 105 (2001).
173. 552 U.S. 346 (2008).
174. 552 U.S. 576 (2008).
175. S. 2662, 111th Congress, introduced November 2, 2009.
176. The bill also directs the attorney general to: (1) certify state ADR systems that meet the requirements of this act; and (2) establish an alternative federal ADR system for any state that does not establish its own system. In addition, it directs the comptroller general to study the effectiveness of private litigation insurance markets in providing affordable access to courts, evaluating the merit of prospective claims, and ensuring that prevailing parties in "loser pays" systems are reimbursed for attorney's fees.
177. 111th Congress, 1st Session, 155 *Congressional Record*–Senate 11050 (November 3, 2009), 12,106.
178. H.R. 1283, 106th Congress, introduced July 24, 2000.
179. H.R. 2496, 106th Congress, introduced September 24, 2000.
180. See the Pregnancy and Trauma Care Access Act of 2005 (S. 367), introduced by Senator Judd Gregg on February 10, 2005.
181. See, for example, "Arbitration Fairness Act of 2007," Hearing before the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary, House of Representatives, October 25, 2007; "Automobile Arbitration Fairness Act of 2008," Hearing before the Subcommittee on Commercial and Administrative Law, Committee of the Judiciary, House of Representatives, March 6, 2008; "Arbitration: Is it Fair When Forced?," Hearing before the Committee on the Judiciary, Senate, 112th Congress, 1st Session, October 13, 2011.
182. 561 U.S. 63 (2010).
183. 563 U.S. 321 (2011).
184. P.L. 90–321, 82 Stat. 164.
185. *Compucredit Corp. v. Greenwood*, 615 F. 3d 1204, reversed and remanded.
186. 133 S. Ct. 2304 (2013).
187. Binyamin Applebaum, "Justices Support Corporate Arbitration," *New York Times*, June 21, 2013, B3.
188. *American Express Co. v. Italian Colors Restaurant*, at 2313 and 2315, respectively.
189. "Class Actions—Class Arbitration Waivers—*American Express Co. v. Italian Colors Restaurant*," *Harvard Law Review* 127, issue 1 (November 2013), 278. See also Myriam Giles and Gary Friedman, "After Class: Aggregate Litigation in the Wake of *AT&T Mobility v. Concepcion*," *University of Chicago Law Review* 79 (2012), 645–46.
190. "In Resolving Disputes, Mediation Most Favored ADR Option in District Courts," United States Courts, July 2006, http://www.uscourts.gov/news/

TheThirdBranch/06-07-01/In_Resolving_Disputes_Mediation_Most_Favored_ADR_Option_in_District_Courts.aspx.

191. There was a moment of indecision from the Court in 2003 when it heard *Green Tree Financial Corporation v. Bazzle* (539 U.S. 444), facing the question of whether or not the FAA permits classwide arbitration hearings. The plurality opinion managed to avoid speaking to the broader issue, focusing instead on a procedural question in concluding that an arbitrator must decide whether a specific contract forbids class arbitration, not the courts. The opinion came from an unlikely plurality, which included not only Breyer, Souter, and Ginsburg, but also Scalia. Further, Stevens concurred only in the judgment so that they were able to issue a controlling opinion.

CHAPTER 4

1. Adam Liptak, "Justices Void Ex-Detainee's Suit Against 2 Officials," *The New York Times*, May 19, 2009.
2. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).
3. Adam Liptak, "9/11 Case Could Bring Broad Shift on Civil Suits," *The New York Times*, July 21, 2009.
4. *Conley v. Gibson*, 355 U.S. 41 (1957).
5. *Ashcroft v. Iqbal*, at 681.
6. "Has the Supreme Court Limited Americans' Access to Courts?," Hearing before the Committee on the Judiciary United States Senate, 111th Congress, 1st Session, December 2, 2009, 14.
7. Robert G. Bone, "The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy," *Georgetown Law Review* 87 (1999), 887; Stephen B. Burbank, "The Rules Enabling Act of 1934," *University of Pennsylvania Law Review* 130 (1982), 1015; Judith Resnik, "Changing Practices, Changing Rules: Judicial and Congressional Rulemaking on Civil Juries, Civil Justice, and Civil Judging," *Alabama Law Review* 49 (1997), 133; Stephen N. Subrin, "How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective," *University of Pennsylvania Law Review* 135 (1987), 909.
8. Marc Galanter, "Why the 'Haves' Come out Ahead: Speculations on the Outcomes of Legal Change," *Law and Society Review* 9 (1974), 95–160.
9. See Stephen B. Burbank and Sean Farhang, "Litigation Reform: An Institutional Approach," *University of Pennsylvania Law Review* 162 (2014), 1543–1617.
10. The preexisting rules informing adjudication were known as the Field Code of Civil Procedure, which was part of the Laws of the State of New York, Section 258 (1848).
11. Judith Resnik, "Failing Faith: Adjudicatory Procedure in Decline," *University of Chicago Law Review* 53 (1986), 494; Subrin, "How Equity Conquered Common Law."