Studies in American Political Development, 34 (October 2020), 239–268.
doi:10.1017/S0898588X20000061
ISSN 0898-588X/20

Privatizing Employment Law: The Expansion of Mandatory Arbitration in the Workplace

Sarah Staszak, *Princeton University*

This article examines the institutional, political, and legal development of employment arbitration as it shifted from a Progressive Era form of justice enhancement to one co-opted by business-friendly conservatives arguably more concerned with protecting employers from litigation. While arbitration has a long history in the United States, the expanding use of mandatory, employer-promulgated arbitration clauses has more than doubled since the 2000s. In examining the nature of the shift, this article argues that it occurred through a gradual process of conversion in three institutional realms (1) legislative conversion, (2) private-sector conversion of public regulation, and (3) judicial conversion. Facilitated by a growing divide among Democrats on the value of arbitration, conservatives began to promote it in the 1970s and 1980s as backlash to the expansion of statutory employment rights. I argue that they did so by converting the institutional infrastructures of labor and commercial arbitration, a process continued by the private sector and Supreme Court. As such, this article argues that conversion is the product of multiple actors targeting multiple institutions, over decades, and with consequences for both the literature on institutional change and conceptions of equality under the law.

1. INTRODUCTION

The use of private arbitration for resolving disputes in the place of traditional proceedings in court has grown dramatically in recent decades. With this expansion has come significant controversy. In 2015, the *New York Times* ran an extensive three-part series, "Beware the Fine Print," detailing the dangers of the increasingly ubiquitous mandatory, binding arbitration clauses that individuals often sign unknowingly as part of the fine print for obtaining a credit card, cellphone contract, loan, or as part of the terms for accepting a new job. In signing these contracts, individuals subsequently sign away their right to have a dispute heard in a court of law and the rights to due process that go with it. In effect, these clauses allow corporations to circumvent the courts, "stacking the deck of justice" (as the *Times* put it) disproportionately in their favor.[1]

Today, arbitration is used widely in both the public and private sectors, with private businesses increasingly mandating its use to resolve workplace disputes. Since the early 2000s, the percentage of workers subject to mandatory arbitration has more than doubled, now including approximately 54 percent of non-union, private-sector employers.[2] A recent study estimates that by 2024, 80 percent of non-union, private-sector employees will be prohibited from suing their employers due to these clauses.[3] This means that more than 60 million workers today have signed mandatory or forced arbitration agreements.[4] These

Email: sstaszak@princeton.edu

Acknowledgments: The author thanks William Gould and the participants of the 2019 conference on Law and Work sponsored by the Program in Law and Public Affairs at Princeton University, Philip Rocco and the panelists of "Dynamics of Policy Change" at the 2019 meeting of the Western Political Science Association, and Margaret Weir and the participants of the 2019 Toronto Political Development Workshop for their extremely helpful feedback. Thanks also go to SAPD's anonymous reviewers for their indispensable feedback and Christian Potter for his excellent research assistance.

1. See the following *New York Times* articles, in the "Beware the Fine Print" series: Jessica Silver-Greenberg and Robert Gebeloff, "Arbitration Everywhere: Stacking the Deck of Justice," October 31, 2015; Jessica Silver-Greenberg and Michael Corkery, "In Arbitration, a 'Privatization of the Justice System,'" November 1, 2015; Michael Corkery and Jessica Silver-Greenberg, "In Religious Arbitration, Scripture is the Rule of Law," November 2, 2015.

2. Alexander J. S. Colvin, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute, April 6, 2018, https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

3. The Center for Popular Democracy and the Economic Policy Institute, *Unchecked Corporate Power: Forced Arbitration, the Enforcement Crisis, and How Workers Are Fighting Back*, May 20, 2019, https://populardemocracy.org/unchecked-corporate-power.

4. Colvin, *The Growing Use of Mandatory Arbitration*. While this article focuses on employment arbitration, expansions in this

agreements are more commonly used in low-wage workplaces and in industries that are disproportionately composed of female and African American workers, raising additional concerns regarding inequality.[5] Importantly, individuals often *must* sign these contracts in order to take a job; forgoing the employment opportunity is the only way around them.

While the use of mandatory arbitration in the private sector has grown in recent years, it is not new. Dating back centuries—and perhaps most famously used by the federal government to facilitate collective bargaining and resolve disputes between unions and employers—the rise of arbitration was led by liberal reformers during the Progressive Era who hoped to ensure access to a less costly, more efficient, and fair alternative dispute resolution forum for those who struggled in court.[6] While the legal community in the early 1900s initially resisted arbitration, progressives were joined by businesses and trade associations in passing the Federal Arbitration Act (FAA) in 1925, in which it directed resistant courts to uphold arbitration contracts, with some exceptions. Importantly, in contrast to the rule-oriented procedural reform movement active in the same time period, the law was shaped by a Progressive Era ethos that valued self-regulation and flexibility, all in the service of creating a less rigid and less adversarial form of dispute resolution.[7]

Arbitration as originally conceived, however, stands in stark contrast to the arbitration described by the *New York Times*, wherein predominantly conservatives in Congress, on the Supreme Court, and in the private sector began promoting its use in the latter part of the twentieth century as a way to protect corporate and other powerful institutional defendants from the rising costs of litigation. Private arbitration produces clear winners and losers, increasing its appeal among business-friendly conservatives. Disputes are often resolved in systems internal to businesses, designed and operated by the entity against which an individual is making their claim. Employees in arbitration win less frequently than in litigation and receive lower damages.[8] Employers, particularly when they use the same arbitrators repeatedly, win more frequently.[9] This is unsurprising, given that the employers largely choose the arbitrators. As such, conservative support for arbitration escalated in the years after the civil rights era, in response to a general shift toward a more liberal judiciary and an outpouring of statutes that created new rights and causes of action against employers.

In this article, I examine the institutional, political, and legal development of employment arbitration as it shifted from constituting a form of justice enhancement for those less well poised to find success in court to one converted by employers more concerned with protecting themselves from litigation. On the one hand, the conservative agenda in this realm seems overt; but on the other, I argue that any attempt to understand arbitration's current usage independent of its historical lineage obscures the process through which interested parties utilized and transformed an institutional construct that was initially put into place for very different purposes. Specifically, businesses and their conservative allies in government have not created a new dispute resolution procedure, but instead converted and privatized a multifaceted federal public policy first put into practice more than 100 years ago, often to the disadvantage of the groups that it was meant to serve. To understand how this shift occurred in the absence of meaningful statutory change therefore requires an examination of partisan and political agendas that have driven this change over many decades.

In response to these developments, I ask two questions: How did arbitration shift from providing a binding but voluntary dispute resolution procedure between institutions of relatively equal bargaining power to a private, nonreviewable, compulsory forum for resolving disputes between employers and employees, often on unilateral terms? What institutional, political, and legal dynamics shaped and enabled these processes of change? I find that, while a Progressive Era innovation, this shift occurred through a gradual process of institutional "conversion" in which "existing institutions are redirected to new purposes, driving changes in the role they perform and/or the functions they serve."[10] But whereas most studies of institutional change explain

realm are part of a much larger phenomenon encompassing a variety of areas of law and policy. For example, individuals also entered into almost three times as many consumer arbitration agreements in 2018 as the total population of the United States. See, for example, Imre Stephen Szalai, "The Prevalence of Consumer Arbitration Agreements by America's Top Companies," *UC Davis Law Review Online* 52 (February 2019): 233–59.

5. Colvin, *The Growing Use of Mandatory Arbitration*.

6. See, e.g., Amalia D. Kessler, "Arbitration and Americanization: The Paternalism of Progressive Procedural Reform," *Yale Law Journal* 124 (2015): 2973–80.

7. Katherine V. W. Stone, "Employment Arbitration under the Federal Arbitration Act," in *Employment Dispute Resolution and Worker Rights in the Changing Workplace*, ed. Adrienne E. Eaton and Jeffrey H. Keefe (Ithaca, NY: Cornell University Press, 1999), 40–44.

8. Alexander J. S. Colvin, "An Empirical Study of Employment Arbitration: Case Outcomes and Processes," *Journal of Empirical Legal Studies* 8, no. 1 (2011): 5–6, 19.

9. Andrea Chandrasekher and David Horton, "Arbitration Nation: Data From Four Providers," *California Law Review* 109 (2019): 1–66.

10. Kathleen Thelen, "How Institutions Evolve: Insights from Comparative-Historical Analysis," in *Comparative Historical Analysis in the Social Sciences*, ed. James Mahoney and Dietrich Rueschemeyer (New York: Cambridge University Press, 2003), 208–40.

conversion as a change in a single institution or policy, typically due to a shift in the actors empowered to control its form and function,[11] in the case of arbitration, conversion has occurred through the efforts of multiple actors targeting multiple institutions. As such, I argue that conversion must be understood through the lens of intercurrence, defined by "multiple orders arranged uncertainly in relationship to one another."[12] To understand arbitration's conversion, then, it is necessary to locate the intersection of unique institutional orders that developed in distinctive historical periods, driven by equally distinctive actors and interests.

In the case of employment, two institutional orders were the subject of this conversion: (1) the law and institutional infrastructure of labor arbitration, as it developed in the 1930s and 1940s, and (2) the FAA, passed in 1925 to govern commercial arbitration. While the rights of unions and the rights of individual employees to resolve disputes originated and developed along distinct paths, the law and politics of labor and employment arbitration have become increasingly intertwined—and this intermingling is crucial for understanding the foundations of private arbitration today. The first federal statutes involving arbitration that emerged in the late 1800s were specific to disputes between unions and employers. With continued industrial strife and strained labor-management relations, Congress later established processes for collective bargaining and grievance arbitration in the 1930s and 1940s with laws like the National Labor Relations Act (NLRA) and the Labor Management Relations Act (Taft-Hartley). These laws, however, were limited to arbitration between labor and management—not individual employees and employers—and the courts interpreted them as such.

During the same time period, Congress also passed the FAA to establish the legality of arbitration between private actors and institutions. The law, however, was widely considered to govern only commercial transactions, not contracts between employers and unions, or between employers and employees. As such, by the mid-twentieth century, there was no "law" of employment arbitration per se; labor law was the only province in which arbitration was widely used, and it was treated by the Supreme Court as distinct from the relatively dormant practice of commercial arbitration at the time. However, both the FAA and the institutional and legal apparatus of labor arbitration existed as available and ripe for conversion, each as institutions that could serve as the basis for arbitration in employment. In terms of labor, in 1960 the Supreme Court established a precedent of dramatic deference to arbitration, a standard later converted in favor of deference to *employment* arbitration. In terms of the FAA, the drafters of the law left much undefined, declining to empower or designate an administrative agency to oversee private arbitration, in effect relying on industry to shape the contours of arbitration in practice. From the start, this relative lack of rules and regulations made arbitration particularly ripe for "open-ended conversion,"[13] a common form of institutional change "when the political-institutional context poses formidable barriers to authoritative reform but a policy is highly mutable."[14]

Employment arbitration then emerged from the intersection of these two institutional orders. Importantly, by the 1960s both labor and commercial arbitration enjoyed support from a diverse arrangement of actors—including business, unions, the legal community, and Democrats in Congress—as well as a significant investment of resources. Because of this diversity of support, actors in multiple institutions were able to capitalize on consensus when converting these resources and malleable institutional tools to new ends. Because, as Eric Schickler has described, change often occurs through multiple processes, "a focus on a single institution or political interest is unlikely to help understand major political transformations."[15] Consistent with this conception of change as a multilayered process, in the case of arbitration, I find that conversion occurred in three institutional realms: legislative conversion, private-sector conversion of public regulation, and judicial conversion.

1.1. Legislative Conversion

The beginnings of this conversion came in the decades after the civil rights era. Even as Democrats in Congress passed a variety of employment rights statutes that explicitly deputized private citizens to enforce their provisions through litigation, and even as liberals began to split on the value of arbitration, some also continued to promote—even expand—its use. Continuing in the vein of its Progressive Era origins, liberal reformers continued to support arbitration in a variety of realms, including its use by administrative agencies and federal courts.

11. For example, Jacob Hacker's work on policy retrenchment focuses on institutional "drift." See Jacob S. Hacker, "Privatizing Risk without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States," *American Political Science Review* 98, no. 2 (May 2004): 248.

12. See Karen Orren and Stephen Skowronek, *The Search for American Political Development* (New York: Cambridge University Press, 2004), 114.

13. Kathleen Thelen, *How Institutions Evolve: The Political Economy of Skills in Germany, Britain, the United States, and Japan* (New York: Cambridge University Press, 2004).

14. Hacker, "Privatizing Risk." See also Thelen, "How Institutions Evolve."

15. Eric Schickler, *Racial Realignment: The Transformation of American Liberalism, 1931–1965* (Princeton, NJ: Princeton University Press, 2016).

Additionally, in the decades following, both conservatives and many liberals in Congress began to see arbitration as a potential litigation reform that could remedy the concerns that they had about the advent of new employment rights statutes, the private rights of action that came with them, and the increasingly busy courts interpreting them.[16] This temporary confluence of partisan interests led Congress to pass several bipartisan bills in the 1980s and 1990s that entrenched arbitration further. Notably, while many of the bills did promote processes that were binding, it was widely understood at the time that (1) arbitration must be a voluntary process, wherein individuals would retain meaningful autonomy to agree to or decline it, and (2) judicial review of arbitration outcomes would be available. However, the passage of the Civil Rights Act of 1991 (CRA) in many ways signified the moment where liberals and conservatives began to part ways. Passed in the aftermath of the Anita Hill hearings and a spate of Supreme Court decisions that undercut Title VII enforcement, the law is perhaps best known for the success of Democrats in dramatically expanding incentives for individuals and their lawyers to seek the enforcement of rights through lawsuits.[17] Less well known, however, is that Republicans also succeeded in including a provision that promoted experimentation with arbitration and other alternative dispute resolution (ADR) processes for employment disputes. Subsequently, in the context of a dramatic spike in litigation due to the CRA's new incentive structure, employers began to avail themselves of the ability to include arbitration provisions in their contracts in order to avoid litigation altogether.

1.2. Private-Sector Conversion of Public Regulation

As a first wave of employers began to use arbitration contracts in droves, the arbitration clauses themselves began to change into the mandatory, unilateral employer-promulgated provisions of today. Importantly, corporate experimentation with private arbitration from the 1970s onward—and especially after 1991—became an intentional strategy, with goals markedly different from those that drove corporate support early in the 1900s.[18] This new private-sector conversion, however, quickly came to exist in tension with the administrative state, itself divided on the extent to which arbitration should be used in the public and private sectors. While President Clinton continued in the vein of long-standing liberal support for arbitration, promoting its use by the federal government in particular, the Equal Employment Opportunity Commission (EEOC) took a strong position against the use of mandatory arbitration in the private sector. However, because Congress did not explicitly authorize the EEOC to oversee private employment arbitration, and given the limits on the EEOC's institutional capacity, the locus of conversion once again shifted as the courts began to dramatically expand and insulate the degree to which private employers could use arbitration.

1.3. Judicial Conversion

The Supreme Court in particular has engaged in conversion in two ways: (1) with a controversially expansive interpretation of the FAA that defends and enables forced arbitration in employment in most cases, and (2) with a similarly controversial application of labor law that treats private arbitration provisions as if they are collectively bargained and not the one-sided, employer-promulgated contracts so often signed by employees today. First, until the 1980s, courts interpreted the FAA in keeping with its legislative history, the scholarly consensus on which is that the use of arbitration was intended to be premised on consent and that it was only meant to apply to commercial transactions. But beginning with a landmark decision in 1991, in which it required the arbitration of a statutory rights claim for the first time, the Court developed a dramatically different conception. Second, also beginning in the 1980s and 1990s, the Court began to use its now long-standing history of deference to labor arbitration in order to support its new precedent of deference to employment arbitration. In aggregate, by raising the barriers to reform in these two ways, I argue that the Court's "conversion" jurisprudence has facilitated and entrenched the development of private arbitration in its current form, especially where other actors historically failed to entrench their vision. In so doing, the Court has effectively endorsed further experimentation by the private sector as well.

In total, this conversion was not the product of a critical juncture—as traditionally conceived by scholars of institutional change—but rather a process of gradual institutional change. In recent years, the literature on gradual change has theorized both the conditions under which specific types of institutional

16. For extended analyses of the development of employment law, see, e.g., Paul Frymer, *Black and Blue: African Americans, the Labor Movement, and the Decline of the Democratic Party* (Princeton, NJ: Princeton University Press, 2008); Daniel J. Galvin, "From Labor Law to Employment Law: The Changing Politics of Workers' Rights," *Studies in American Political Development* 33, no. 1 (2019): 50–86.

17. See Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* (Princeton, NJ: Princeton University Press, 2010).

18. For a larger discussion of the extensive mobilization of business in politics since the 1970s, see Alex Hertel-Fernandez, *State Capture: How Conservative Activists, Big Businesses, and Wealthy Donors Reshaped the American States—and the Nation* (New York: Oxford University Press, 2019).

change are likely to occur[19] and the attributes of subsequent institutional entrenchment (including policy feedback)[20] that bring the effects of path dependence to fruition.[21] Recent studies have also examined the ways in which multiple strategies for institutional change are often employed in sequence over time.[22] While processes of change are often tied to theories of path dependence, I argue that both the presence of vague institutional rules (as with labor law and the FAA) and extensive support for and investment in institutional resources (as with bipartisan support for arbitration broadly) can also widen an institution's path.[23] Attention to institutions and their rules and resources is therefore critical for understanding the conversion of arbitration; as businesses, the legal community, and the federal government invested in arbitration and created an infrastructure to support it, its capacity to be diverted to new ends was widened. Further, by allowing reformers to redeploy institutions to new ends, these conditions make conversion likely. This is also consistent with Eric Patashnik's rubric of post-reform dynamics, where a "reconfiguration" of policy is likely when extensive commitments are made to a new policy, and where "coalitional patterns undergo rapid change, upsetting previous alliances and patterns of political mobilization."[24]

At the same time, however, the subsequent processes of conversion are actually more complicated than predicted by existing theories of institutional change. While conservatives in Congress and on the Court gradually redeployed it for their use, the liberal proponents of arbitration at its origins were not simply replaced by conservative reformers; rather, in its formative moments, many liberals continued to support arbitration. When the original actors supporting a policy or institution persist, we would expect entrenchment to occur, as opposed to reconfiguration or conversion.[25] But in the case of arbitration, these shifting and at times hybrid coalitions fueled both. As an enduring contingent of liberal supporters continued to invest in arbitration, conservatives in Congress were able to move arbitration toward their preferences broadly but stopped short of legislating the terms of its mandatory versus voluntary nature. As such, while legislators began the process and carried out its early steps, the Supreme Court then played a pivotal role in arbitration's further conversion.

For path-dependent reasons, it is unsurprising that the courts would play this role. While the FAA does not entirely foreclose government regulation, its lack of delegation left arbitration policy particularly open to judicial oversight. As is consistent with the literature on the litigation state,[26] in the absence of a strong administrative capacity, the courts were able to use their tools to entrench the private "regulation" of arbitration instead. This is also consistent with Philip Rocco and Chloe Thurston's indicators of institutional change: The FAA granted actors the discretion to alter "institutional meanings," with the Court well-positioned to "manipulate interpretation of the institution's rules."[27] This distinct constellation of resource-based and path-dependent effects further complicates the processes of conversion in the case of employment arbitration.

I proceed by examining the origins of arbitration and its early use, focusing on the development of commercial and labor arbitration as the institutional orders for arbitration's later conversion. I then examine its expanding use through these three processes of institutional change. I conclude by discussing the implications of this analysis and the effects of today's private arbitration on our understanding of institutional conversion in particular and institutional change more broadly.

2. DISJOINTED ORIGINS: THE FAA AND MODERN LABOR LAW

2.1. Arbitration's Origins

The foundations of modern-day employment arbitration originate in spheres that have a tangential relationship to employment: commercial law and labor law. One major statute that impacts modern employment arbitration—the FAA—arose in the realm of commercial law. The FAA was the product of long-standing interests in the business community that

19. Hacker, "Privatizing Risk."

20. See, e.g., Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton, NJ: Princeton University Press, 2004).

21. See, e.g., Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," *American Political Science Review* 94 (2000): 251–67; James Mahoney and Kathleen Thelen, "A Theory of Gradual Institutional Change" in *Explaining Institutional Change: Ambiguity, Agency, and Power in Historical Institutionalism*, ed. James Mahoney and Kathleen Thelen (New York: Cambridge University Press, 2010), 1–37.

22. See, e.g., 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): 636–48; Sarah Staszak, *No Day in Court: Access to Justice and the Politics of Judicial Retrenchment* (New York: Oxford University Press, 2015).

23. Daniel Galvin posits a theory of institutional resources are a crucial component of institutional change; see "The Transformation of Political Institutions: Investments in Institutional resources and Gradual Change in the National Party Committees," *Studies in American Political Development* 26, no. 1 (2012): 51.

24. Eric M. Patashnik, *Reforms at Risk: What Happens After Major Policy Changes Are Enacted* (Princeton, NJ: Princeton University Press, 2008), 33.

25. Ibid.

26. See, e.g., Farhang, *The Litigation State* and Frymer, *Black and Blue*.

27. Philip Rocco and Chloe Thurston, "From Metaphors to Measures: Observable Indicators of Gradual Institutional Change," *Journal of Public Policy* 34, no. 1 (2014): 40.

often joined with progressives who were motivated by the idea that arbitration could be a cost-effective way of handling "daily" commercial disputes that was clearly preferable—as the chairman of the Arbitration Committee of the New York Chamber of Commerce put it in 1924—to "costly, time-consuming and troublesome litigation."[28] Support from businesses seeking a more expedient way to resolve disputes with each other dates back as far as 1768, when a group of merchants formed the New York Chamber of Commerce in order to further their business interests. The group soon established an arbitration committee to facilitate the resolution of disputes between merchants as an alternative to litigation.[29] The committee, which handled primarily disagreements involving shipping or the purchase of goods, gained legislative support through a state law in 1861 stipulating that parties to arbitration who agreed to accept the award granted by the committee could have the result entered as a final judgment in court.[30] Riding the momentum of this support, the New York State legislature passed a series of laws in the late 1800s that established an "arbitration tribunal" as a joint venture with the state itself. This culminated in the passage of the New York State arbitration law in 1920, which would later serve as the basis for the FAA.[31]

The legal community and judges, however, were more skeptical about arbitration, fearful that it threatened the authority of judges and concerned as to whether professional arbitrators could assess disputes accurately. But the increase in judicial caseloads during the Industrial Revolution and labor disputes between unionizing workers and the railroad industry kept arbitration on the agenda, and by the turn of the century, half of the nation's state legislatures had created arbitration boards to handle a range of disputes.[32] As the federal government and the private sector continued to promote arbitration, the legal community began to cautiously accept it as a voluntary alternative to litigation. Their eventual support was also an outgrowth of the same constellation of forces fueling the broader procedural reform movement of the early 1900s: 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 judicial expense and delay by fostering greater efficiency in the judicial system. For example, at the annual meeting of the American Bar Association (ABA) in 1906, Roscoe Pound, then the dean of Harvard Law School, tied the legal community's concern about the "backwardness" of procedure with ADR as a path forward. Like other progressive reformers from both within and outside of the legal community, Pound believed that the judicial system needed to adapt to the increasing complexity of an industrial America—and ADR processes were the way to do it.[33]

Importantly, support for commercial arbitration was also bipartisan. Progressives in the Democratic Party saw arbitration as way of responding to the crisis that expansive litigation was creating for overburdened dockets, notably embracing the legal community's burgeoning vision of arbitration as a way to avoid the "technical rules of civil procedure."[34] Republicans saw arbitration as a form of self-regulation that corresponded with the growth of trade associations in the 1920s.[35] Secretary of Commerce Herbert Hoover was also a vocal supporter of commercial arbitration, stemming from his belief in the promise of public and private cooperation wherein businesses and trade associations could recognize their shared goals—even when it came to resolving disputes with each other. In total, the parties shared a vision of arbitration as an amicable, voluntary method of dispute resolution for like-minded merchants. As William H. H. Piatt, chairman of the ABA's Committee on Commerce, Trade, and Commercial Law (and who would later draft the FAA) put it, a federal statute for arbitration would be "purely an act to give the merchants the right or the privilege of sitting down and agreeing with each other as to what their damages are, if they want to do it."

The perceived need for federal legislation establishing arbitration as national policy came to the fore in the early 1920s, benefiting from the support of business interests and, eventually, the organized bar. As states like New Jersey followed New York in passing a similar state arbitration law a year later, Congress began to hold hearings regarding the possibility of a federal law. From the start, both the language of and campaign for a federal arbitration statute were fueled by private-sector "visionaries" who in turn created organizations to support these efforts. For example, New York businessman Charles Bernheimer—who drafted and promoted the New York State arbitration law, as well as established the Arbitration Foundation—was arguably arbitration's chief

28. *Hearings on S. 4213 and 4214* before the Committee on the Judiciary, U.S. Senate, 67th Congress, 4th Sess., January 31, 1923, 203.

29. John Austin Stevens Jr., *Colonial Records of the New York Chamber of Commerce, 1768–1784*, (New York: John F. Trow, 1867), 8.

30. For an extensive discussion of the early development of commercial arbitration, see Imre Szalai, *Outsourcing Justice: The Rise of Modern Arbitration Laws in America* (Durham, NC: Carolina Academic Press, 2013).

31. Arbitration Law, 1920 N.Y. Laws 803, codified as amended at N.Y.C.P.L.R. 7501–14.

32. See, e.g., 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," *American Journal of Legal History* 15, no. 3 (July 1971): 186–98.

33. Horwitz, *Transformation of American Law*, 219.

34. See Chamber of Commerce of the State of New York, *Monthly Bulletin* (1911): 47.

35. Stone, "Employment Arbitration."

supporter in the federal campaign, writing a series of articles and books in the early 1920s that promoted the merits of commercial arbitration.[36] "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." Arbitration, to Bernheimer, was comparatively "sane, speedy, and inexpensive;" it freed "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."[37] Bernheimer later teamed up with leaders from regional chambers of commerce and utilized his connections with leading members of the ABA to write and promote a draft of the FAA, which was introduced in Congress at the request of the Chamber of Commerce in association with the ABA and numerous trade organizations.[38]

At the Senate Judiciary Committee hearings on the arbitration bill in 1923, Bernheimer stressed that there was too much "uncertainty" at the time as to whether or not arbitration agreements would be upheld by courts to make them effective. He also explicitly linked the arbitration bill to the procedural reform movement, now in its second decade. As far as groups like the Arbitration Society were concerned, the link was clear and simple: As representative Alexander Rose described, "people are dissatisfied with courts," and arbitration could provide a remedy.[39] As W.W. Nichols, president of the American Manufacturers' Export Association of New York, argued, in arbitration, "all technicalities of legal procedure and requirements are removed" because arbitration would occur "without any formality and without interference from the court."[40] This lack of "requirements" was presented as high value when it came to the process of streamlining dispute resolution. As the hearings stretched into the next year, there was repeated testimony as to the value that arbitration could have in reducing both this hyper-technicality and delays in litigation by avoiding court proceedings altogether. The ABA offered full support, promoting both arbitration and changes to civil procedure as essential for helping to alleviate overburdened dockets.

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."[41] 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."[42] During congressional hearings, Bernheimer often defended the interests of business by claiming litigation as the "most unprofitable thing" that can confront "anyone engaged in buying and selling."[43] Julius Henry Cohen of the ABA backed Bernheimer's endorsement by claiming that no one opposed the bill; but in so doing he downplayed enduring 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."[44]

Despite this, an ongoing task for the ABA's Commerce Committee was to defend its proposal against those within the legal community who feared that the law constituted a congressional attack on the courts. In response, Cohen argued before Congress that the fear that arbitration would enable the stronger to "take advantage of the weaker" was largely unfounded in the cases of commercial litigation addressed by the law because, to his mind, "people are protected today as never before" due to government regulation.[45] Members of Congress also bolstered the position—relevant both for its role in convincing arbitration's detractors in the legal community *and* for interpretations of the law's intent today—that judges and lawyers had little to fear; as Congressman Graham explained, the bill "simply provides for one thing, and that is to have an opportunity to enforce an agreement in commercial contracts and admiralty contracts—an agreement to arbitrate, when

36. See, e.g., Charles L. Bernheimer, "The Advantages of Arbitration Procedure," *Annals of the American Academy of Political and Social Science* 124 (March 1926); 98–104.

37. Ibid., 98–99.

38. Szalai, *Outsourcing Justice*, 138.

39. See Statement of Alexander Rose, "Bills to Make Valid and Enforceable Written Provisions or Agreements for Arbitration of Disputes Arising out of Contracts, Maritime Transactions, or Commerce among the States or Territories or with Foreign Nations," Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Congress, 1st Sess. 6, 1924, 26–27.

40. Ibid., "Statement of W. W. Nichols," 36.

41. H.R. Report No. 96, 68th Congress, 1st Sess., 1924.

42. Mr. Sterling, Committee on the Judiciary, "To Make Valid and Enforceable Certain Agreements for Arbitration," 68th Congress, 1st Sess., Senate, 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): 1499–1554.

43. "Arbitration of Interstate Commercial Disputes," Joint Hearings before the Subcommittees of the Committees on the Judiciary, 68th Congress, 1st Sess., (January 9, 1924).

44. Ibid., 15 and 13.

45. Ibid., 15.

voluntarily placed in the document by the parties to it."[46] Not only did Graham reiterate the importance of *voluntariness* in his testimony ("If you and I agree in the contract to arbitrate we must arbitrate and not shirk it afterwards"),[47] but his statements also encapsulate the scope of the law as it was understood at the time: The FAA was to apply only to commercial parties with equal bargaining power.

The FAA was signed into law by President Coolidge on February 7, 1925. 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.[48] With regard to later controversies involving employment arbitration in particular, Section 1 of the law includes an "exclusionary clause," which states that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." These exclusions came largely in response to criticism from the International Seamen's Union, who feared that the law would force workers into signing arbitration contracts where "rules of procedure" and "constitutional guarantees" would not apply.[49] The inclusion of this clause, however—alongside its legislative history—has led some scholars of the law to conclude that "the FAA was intended to govern voluntary arbitration agreements among merchants of equal bargaining power and to exclude all workplace disputes."[50]

In terms of constituting a set of institutional rules for arbitration, it is important to note that the FAA does not define "arbitration" as a term or a process. It also does not designate an administrative agency to oversee its implementation and use in practice, a decision that—in light of the literature on both the litigation state and administrative oversight—opened arbitration to alternate uses from the outset.[51] Put differently, had the FAA created a more robust structure for implementation and oversight, it would have been considerably more difficult for the business sector to convert its use so thoroughly to different ends in later years, as I will describe. Given this, and given these regulatory limitations, the processes of commercial arbitration were largely defined by the private sector itself, even in its earliest days.[52] Further, the law was considered a "procedural" piece of legislation that neither conferred nor detracted from statutory rights. With this history in mind, the Supreme Court initially resisted attempts to permit the forced arbitration of statutory rights, viewing the law as simply creating federal statutory support for voluntary arbitration between commercial businesses of equal bargaining power. The law was reenacted without any material change in 1947, and the widespread conception remained that what the law provided was a remedy: namely, "staying or dismissing pending lawsuits in favor of arbitration and enforcing awards when appropriate."[53]

In sum, the politics and passage of the FAA reflect a diverse arrangement of actors invested in arbitration's entrenchment. Strikingly, this community—including business and industry, progressives, and eventually the legal community—shared a similar paradigm when it came to arbitration's value: All considered it an efficient, less costly, and less adversarial dispute resolution mechanism that would also help to lessen the growing burden on the judiciary. This paradigm was put into practice through the FAA, with its goals and limits widely agreed upon and its lack of clear institutional rules and procedures perhaps as evidence of this shared conception. Despite this relative lack of controversy, and despite that the law would remain dormant for nearly half a century, it nonetheless constituted a key set of institutional rules that would be leveraged to shape the contours of private arbitration later in the century. Given that the law was largely understood to apply to commercial transactions, however, arbitration in the area of labor—and later employment—in many ways emerged on a distinct path. In fact, when considering laws like the NLRA, the FAA was not mentioned at all in congressional deliberations. As such, the development and entrenchment of labor arbitration played a critical and meaningfully independent role in building an

46. *Congressional Record* 65 (February 5, 1924), 1960.

47. Graham, *Congressional Record* 66 (1925), 3003.

48. The law clearly sought to preserve some measure of judicial review of arbitration outcomes. Although its primary intention was to put arbitration on equal ground with other types of contracts, thereby requiring judicial deference, there are grounds in the FAA for courts to vacate an arbitrator's award. Specifically, Sections 10 and 11 of the law define when judges can vacate and/or modify an award. While review of an arbitration award on matters "affecting the merits" of a dispute is not allowed by the FAA, it does give courts the authority to weigh in where a contract or arbitrator's decision involves "corruption," "fraud," or "undue means."

49. "Seamen Condemn Arbitration Bill," *New York Times*, January 14, 1923.

50. Carmen Comsti, "A Metamorphosis: How Forced Arbitration Arrived in the Workplace," *Berkeley Journal of Employment & Labor Law* 35, no. 1 and 2 (2014): 12.

51. We might also have expected arbitration's conversion by the private sector due to what Bruno Palier describes as "path-shifting reforms" that originate from what he calls decisions based on ambiguous agreements. See Bruno Palier, "Ambiguous Agreement, Cumulative Change: French Social Policy in the 1990s," in *Beyond Continuity: Institutional Change in Advanced Political Economies*, ed. Wolfgang Streeck and Kathleen Thelen (New York: Oxford University Press, 2005),127–44.

52. Jill J. Gross, "Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration," *Brooklyn Law Review* 81, no. 1 (2015): 118.

53. Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights," *Yale Law Journal* 124, no. 8 (2015), 2804–2939.

institutional and political infrastructure that supporters of employment arbitration could redeploy.

2.2. Labor Arbitration and the Expansion of Worker Protections

During the last two decades of the nineteenth century, labor disputes between unionizing workers and various industries were at the center of both federal and state-level efforts to use arbitration in order to prevent strikes and violent riots from so frequently shutting down commerce. Decades before the grievance arbitration procedures established in the NLRA,[54] these early laws were built around notions of fairness and equality between the parties to a dispute, with a particular sensitivity to the structural power differences that stood between capital and labor.[55] In this vein, labor leaders only supported arbitration insofar as their organizations constituted an equal bargaining party to employers. For example, in a report commissioned by the state legislature of Massachusetts in 1881, the future first U.S. commissioner of labor, Carroll Wright, wrote a detailed history of arbitration in which he described it as arising organically out of labor strife in European industrializing nations. Workers and capital, he noted, recognized that violence, strikes, and lockouts simply resulted in stagnation of the bargaining process; as a response, they quickly developed voluntary means for resolving their differences. In the United States, Wright was writing on the eve of movements by northern industrialized states to establish some form of institutionalized arbitration boards, most of which were to be compulsory. To Wright, arbitration served to harmonize relations between capital and labor, and to "effectually put an end" to the "barbarous method of strikes and lockouts."[56] Unlike those who promoted arbitration as a more fluid process in the commercial context, he argued that its promise actually laid in its formality: Unlike less formal efforts at conciliation between individuals, arbitration, he said, "sits in judgment. It implies that matters in dispute by mutual consent or by previous contract have been submitted to arbiters, and an umpire, whose decision is final and binding on both parties."[57] He further stressed, however, that success also rested on the arbitrator's ability to promise equal representation to both sides: As he put it, "it is impossible for one party to a dispute to arbitrate, as it is for one man to fight a duel."[58]

Wright was hardly the only Progressive Era policymaker to find the idea of labor arbitration appealing. The economist Richard Ely wrote that "mankind" had been making "a steady progress toward the ideal of Christian ethics; and the introduction of arbitration in political life and in industrial relations, at about the same time, has been an epoch-making event in the history of applied ethics."[59] For him, arbitration was a "simple" institutional fix for bringing together "the two great classes of industrial society."[60] Additionally, he argued, "arbitration recognizes the facts of the existing wages-system, and endeavors to improve the system. Yet it works against no reform of more thorough nature, and retards no healthy growth. It is conservative in the best sense."[61] Embracing this sentiment, in the late 1800s states began to pass basic arbitration laws in hopes of resolving strikes without violence: The state of Maryland, for example, passed the first of these laws in 1878, providing for voluntary, binding arbitration where the parties would equally share the costs. During the following decade, similar laws were passed in New Jersey, Pennsylvania, Ohio, Iowa, and Kansas. In 1886, New York and Massachusetts became the first states to create permanent, three-person arbitration boards, which had the authority to mediate and arbitrate labor disputes.[62]

Largely in response to these state-level efforts, the Senate held hearings in 1883 to discuss arbitration as part of a broader fact-finding initiative geared toward understanding the roots of ongoing conflict between labor and capital. Robert Layton, the grand secretary of the Knights of Labor, began the hearings by expressing "a growing desire on the part of our order, which is entertained also largely, I think, by many of the other labor organizations of the country, that arbitration shall prevail as far as possible as a means of settling disputes between employers and their employees." But he prefaced this support as contingent upon the parties being able to "meet on equitable grounds."[63] Under such circumstances, he argued, compulsory arbitration would help balance the power differential between employers and workers by giving labor representatives more

54. See, e.g., Leon Fink, "American Labor Justice and the Problem of Trade Union Legitimacy" in *Labor Justice Across the Americas*, ed. Leon Fink and Juan Manuel Palacio (Urbana: University of Illinois Press, 2018), 49–55; Schreiber, "The Majority Preference Provisions," 186–98.

55. Early statutes made no distinction between commercial and labor arbitration. Both were designed to overcome common-law disabilities in enforcement of agreements.

56. Carroll D. Wright, *Industrial Conciliation and Arbitration: Compiled from Material in the Possession of the Massachusetts Bureau of Statistics of Labor, by Direction of the Massachusetts Legislature, Chapter 43* (Boston: Rand, Avery, 1881), 53.

57. Ibid., 12.

58. Ibid., 108.

59. Ibid., 319.

60. Richard T. Ely, "Arbitration," *The North American Review* 143 (October 1886): 327.

61. Ibid.

62. For an extended discussion, 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: Wiley, 2004).

63. Senate Committee on Education and Labor, "Relations between Labor and Capital," vols. 1–4, testimony (various dates, 1883), 1:22.

information: "We have no means of telling whether his [the employer's] statements in regard to his business are true or not, and the only way the difficulty can be solved in many instances is for the workingman to strike."[64] In lieu of strike, he proposed an arbitration procedure where "a certain number of employees should meet an equal number of employers; they select an umpire, whose decision should be final." In his vision, labor would make demands, employers would then produce their financial records and other documents, and the arbitration board would make decisions that "must be final." For arbitration to be fair, to his mind, it needed to be institutionalized. As he put it, "we must have some delegated body authorized to accept or refuse any offer that is made."[65] Following Leighton's testimony, Frank Foster, the leader of the Boston printers union, expressed what would become another pervasive and persistent concern of labor: while arbitration had great potential, employers would nonetheless not choose to engage in it. As he pointed out, "the fact that arbitration with nothing back on it on one side and with great strength behind it on the other side is but a name… It is only the strong nations that arbitrate with each other. Very rarely a powerful nation arbitrates with a feeble one."[66] However, with sufficient organizational strength, and backed by federal regulation, he did believe that boards of arbitration could be successful in resolving labor-management conflicts.

At the time, the Knights of Labor were mobilizing hundreds of thousands of workers to strike against the railroad industry in an attempt to force them to negotiate. As such, they were in search of institutional tools that could help in this pursuit. Terence Powderly, a leader of the union in the late 1880s, wrote earlier in the decade of his frustration with the labor movement's constant turn to strikes. He thought that unions needed another remedy, and he suggested both broader trade union alliances and arbitration as possibilities.[67] He also thought that joint investment in arbitration was essential; "since they [labor and capital] must operate together, they must assume the proportions of a partnership, in which one invests his money, the other his brain and muscle."[68] In this vein, legislators and labor leaders proposed arbitration procedures frequently in these hearings, referencing a wealth of potential benefits.

At least some business leaders agreed. George Storm, the owner of the nation's largest manufacturer of cigars and one of the first American businessmen to establish arbitration procedures in his company, testified at length to senators about the merits of arbitration, considering it a process in which "calm judgment is supposed to prevail" and "false and extreme positions are not likely to be assumed."[69] He himself cooperated with his workers to establish his own arbitration board in the late 1870s after a strike had shut down operations, and he found that it brought both sides together and led them to strive for fairness, objectivity, and a common cross-cutting good. As he reported, since the establishment of his arbitration board, there had been little contentiousness. Employers often came to side with workers, and "by reason of the light brought to bear on the subject, the workmen on this committee have seen the question in a different form that they had imagined it at first."[70]

The first iterations of a labor arbitration law reached the House floor for a vote in 1886, when John O'Neill, a Democrat from Missouri and chair of the Committee on Labor, proposed a bill to create "boards of arbitration" for the purpose of speedy settlement of labor controversies.[71] The floor discussion was lengthy, with supporters couching the issue in the context of labor conflict described as causing "practically a revolution," as business was suspended in five states at the time. The Knights of Labor proposed the creation of an arbitration tribunal as a response, which attracted bipartisan support.[72] As Byron Cutcheon, a Republican representative from Michigan, characterized, this was the first effort by the federal government to ensure "the equitable distribution of the joint product of the operations of labor and capital, by bringing them into accordant action and preventing the friction and waste of antagonism."[73]

There was, however, extensive debate regarding the different forms that arbitration might take. The initial proposal suggested an "honest tribunal, where workmen can go without expense and ask for justice from the corporations that employ them." In this model, a three-person body would effectively be "a court, with full powers to send for persons and papers, examine witnesses under oath to obtain the fullest information and announce their verdict, trusting to the power of public opinion for the enforcement of the award."[74] But the initial proposal had no enforcement mechanism, was reliant on voluntary participation, and was jokingly referred to by Republican Julius Burrows on the floor as "entirely

64. Ibid., 22–23.
65. Ibid., 23.
66. Ibid., 85.
67. T. V. Powderly, "The Organization of Labor," *The North American Review* 135 (August 1882): 118–26.
68. Ibid., 123.
69. Senate Committee on Education and Labor, "Relations Between Labor and Capital," testimony (September 22, 1883), 2:805.
70. Ibid., 811.
71. *Congressional Record* (March 31, 1886), 2959–81.
72. "Investigation of Labor Troubles in Missouri, Arkansas, Kansas, Texas, and Illinois," House Committee on Existing Labor Troubles, *Congressional Record* (April 10, 1886), XI. Ibid., 17.
73. *Congressional Record* (March 31, 1886), 2979.
74. Ibid., 2959.

harmless."[75] Others worried about the precedent that would be established; Martin Foran, a Democrat from Ohio, was wary of giving arbitrators the power to act as judges and arms of the state. He therefore opposed all forms of compulsory arbitration on the premise that it could only work where both sides voluntarily agreed to participate.[76] Still others questioned the constitutionality of such tribunals, and others focused on the practicality of how exactly to get both labor and capital to agree to the compulsory aspect of arbitration as proposed. President Grover Cleveland's own proposal included a permanent commission that "would have the advantage of being a stable body, and its members, as they gained experience, would consistently improve in their ability to deal intelligently and usefully with the questions which might be submitted to them."[77] He also sought to assuage concerns by suggesting that the new Bureau of Labor have the authority to examine and implement arbitration procedures, rooting its constitutional authority in the provision that requires the government "to 'protect' each of the States 'against domestic violence.'"[78]

A bipartisan House voted overwhelmingly (199–30) to pass what would be become the Arbitration Act of 1888, which in the end provided for voluntary arbitration and ad hoc commissions for investigating the cause of railway labor disputes. This was a compromise with the railroad industry, which had opposed compulsory arbitration on the grounds that it constituted an unwarranted federal intrusion into their business and operations. The Senate affirmed without dissent the following year, but the bill reached President Cleveland just days before adjournment. As such, the House revisited and passed the bill again the following year, incorporating an additional request from Cleveland that gave the president the power to appoint members to the board when disturbances occurred in interstate commerce. Renewed efforts to include more compulsory language in the Senate, however, ultimately failed by a vote of 28–59.[79]

Labor remained mixed on both the law and the value of arbitration specifically. Some believed that, if nothing else, it could be a way to bring employers to the bargaining table; but leadership of the emerging American Federation of Labor (AFL) was more skeptical. As P. J. McGuire, founder of the United Brotherhood of Carpenters and Joiners in America and an early leader of the AFL argued, arbitration "smacked of the Elizabethan Age…. The powers that now direct the militia against strikers would then use the Board of Compulsory Arbitration."[80] The future president of the AFL, Samuel Gompers, also remained ambivalent about the possibility that arbitration would in fact give workers more power, believing that to do so, unions would need some other mechanism of power to ensure that they were truly the "equal" of employers.[81]

Nonetheless, in the 1890s and early 1900s the AFL worked with groups like the National Civic Federation (NCF), which was founded in 1900 to bring together representatives from big business, labor, and consumer advocates, in an attempt to (1) reform the process for resolving disputes and (2) provide a mechanism for the business community to try to convince labor of what it perceived to be their joint interests. The NCF—while dominated by business leaders from the outset—worked with union leaders to push for additional federal legislation that would establish *compulsory* arbitration. In response to the Pullman strike in 1894—a massive strike involving hundreds of thousands of railway workers that lasted for more than two months—the NCF also helped to establish the U.S. Strike Commission. The commission, which looked extensively at the potential of compulsory arbitration, concluded that it was "the more rational method" for preempting strikes and evening the playing field between labor and capital as it institutionalized the labor movement into the structure of American politics and policy.[82] During the hearings, labor leaders expressed a willingness to support this conception but retained their skepticism as to whether arbitration would produce truly fair agreements, especially in light of the general unwillingness of employers to participate. Additionally, given their persistently unfavorable treatment by the courts, labor leaders saw great value in promoting ways to enforce bargaining outside of the reach of judges. While labor leaders were suspicious of judicial intervention, they often turned to existing state-level arbitration commissions to intervene on their behalf to end strikes against obstructionist employers. As Gompers himself later put it, part of the appeal of labor arbitration was that disputes "should be settled around the table where discussion and judgment and truth and justice shall decide."[83]

In light of this continued resistance on the part of the courts, Congress continued a slow but steady accumulation of laws to enable arbitration and other

75. Ibid., 2960. Terence Powderly, the head of the Knights of Labor, preferred a private binding arbitration between the union and the railroad, with three members each from the union and the railroad, and the six then agreeing to pick a seventh member, believing the proposed congressional legislation to be an insufficient solution to the specific conflict. "Investigation of Labor Troubles in Missouri, Arkansas, Kansas, Texas, and Illinois," 17.

76. Ibid., 2962–63.

77. Ibid., April 23, 1886, p. 3761.

78. Ibid., 3761.

79. *Congressional Record* (April 18, 1888), 3099–3109.

80. Quoted in Fink, "American Labor Justice", 49–55, 53.

81. Ibid., 50.

82. U.S. Strike Commission, "Report on the Chicago Strike of June-July 1894," 53rd Congress, 3rd Session, Senate, Ex. Doc., 7 (December 10,1894), xxviii.

83. "Address of Samuel Gompers," *Advocate of the Peace* 59 (April 1897): 88.

forms of ADR statutorily. Four years after the Pullman strike, Congress passed the Erdman Act, which made arbitration available to interstate railroad companies and their employees when requested by both sides, as well as made it illegal for a company to prohibit a new employee from joining a union as part of the terms of their employment. Labor split over the legislation, with the AFL opposing it on the grounds that it detracted from union power and the agency of individual workers, while the railroad trades endorsed it on the belief that they would readily win disputes in such a forum.[84] While only one dispute was resolved under the Erdman Act in its first eight years, by the time Congress passed another piece of notable legislation—the Newlands Act in 1913—sixty-one railway labor disputes had been resolved under the law. The Newlands Act, driven by continued dissatisfaction on the part of both railroad owners and their employees, further promoted the growth of arbitration by creating a permanent arbitration board. The establishment of the Department of Labor (DOL) that same year was also a groundbreaking development for arbitration and ADR more broadly: the DOL was given the authority to act as a mediator for labor disputes and to appoint commissioners with the power to promote conciliation in order to establish more peaceful relationships in industry. At the urging of the DOL's new head, William B. Wilson, Congress established the United States Conciliation Service in 1917 to support the mediation of such disputes. Importantly, all of the ADR procedures established during this period remained voluntary, at times delimiting but not eradicating judicial review.[85]

World War I and the establishment of the War Labor Board marked another turning point for labor's position on arbitration. Until the war, labor largely sought to avoid judicial enforcement of any proposed collective bargaining process. This hesitance stemmed from concerns regarding both the hostile treatment that unions had received from courts—which, for example, did not hesitate to issue injunctions against peaceful strikes and often interpreted antitrust laws so as to make boycotts unlawful—as well as a general determination to keep government as a whole out of their bargaining processes.[86] This desire did not create any particular tension at the time, however; in the first decades of the twentieth century, courts still frequently refused to enforce arbitration decisions, defending their position with the then-familiar refrain that arbitration unconstitutionally "ousted" them of their authority. However, the cost for unions (who were beginning to implement "primitive" arbitration procedures) was that they could not turn to courts for the enforcement of provisions beneficial to them, and courts refused to compel parties to arbitrate. Even as early forms of grievance arbitration were introduced in the garment industries in the 1910s and 1920s, they were therefore slow to spread to others.

The War Labor Board, however, created an arbitration "infrastructure" that persisted after the war, with its staff becoming the first cadre of professional arbitrators in the United States. As a group, they subsequently lobbied for the adoption of arbitration to resolve disputes arising under collective bargaining agreements more broadly.[87] Business leaders, meanwhile, remained at least cautiously supportive of the use of arbitration in its early years and lobbied heavily on behalf of the Railway Labor Act in 1926, which established another new board of mediation. To avoid the violence and long-standing strikes that dominated the national news during the 1920s, the board worked to resolve claims by promoting mediation first and arbitration second, if mediation failed. By the 1930s, arbitration provisions began to appear frequently in federal legislation, supported at different times by both Republicans and Democrats. For example, Republican majorities passed the Norris-La Guardia Act in 1932, which expanded the availability of ADR procedures for labor conflicts and controversially prohibited federal courts from issuing injunctions against labor unions.

As a culmination of these efforts, Congress passed the NLRA in 1935, which granted 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." Section 1 of the law conveyed Congress's clear intent to create equality of bargaining power in the workplace between labor and management by protecting the right to unionize, engage in collective bargaining, and engage in other forms of peaceful worker association to address the terms and conditions of employment. To facilitate this, the law created the National Labor Relations Board (NLRB), consisting of a three-person panel that establishes policy and renders decisions on unfair labor charges and issues of union representation. The NLRB's members oversee the administrative law judges and arbitrators who decide these individual disputes as well as elections for union

84. Christopher Tomlins, *The State and the Unions: Labor Relations, Law, and the Organized Labor Movement in America, 1880–1960* (New York: Cambridge University Press, 1985), 85.

85. See generally Staszak, *No Day in Court.*

86. See Katherine W. V. Stone, "The Steelworkers Trilogy and the Evolution of Labor Arbitration" in *Labor Law Stories*, ed. Laura Cooper and Catherine Fisk (Saint Paul, MN: Foundation Press, 2005), 149–90.

87. Ibid., 9. See also James Atleson, *Labor and the Wartime State: The Continuing Impact of Labor Relations During World War II* (Champaign, IL: University of Illinois Press,1998), 97–103; Dennis R. Nolan and Roger I. Abrams, "American Labor Arbitration: The Maturing Years," *University of Florida Law Review* 35 (1983): 557, 564–69).

representation, require good-faith bargaining by both employers and employees, and enforce collective bargaining agreements. If either side fails to bargain in good faith or otherwise violates labor law by participating in illegal acts, the NLRB is authorized to prosecute and remedy the matter, whether through injunctions or mandating the enforcement of a collective bargaining agreement. Once collective bargaining agreements are signed, they are legally enforceable through arbitration.

Notably, however, the NLRA did not offer an explicit definition of arbitration itself, its use, or the mechanisms of its enforceability. Earlier drafts did include a more extensive description of arbitration procedures under Section 12 of the law, spelling out the NLRB's role in authorizing voluntary arbitration, supervising, and using arbitrators, as well as emphasizing the degree of deference given to arbitration decisions. Section 206(a) of the earlier drafts also gave the board the power to act as arbitrator in labor disputes and to enforce its decisions. Employers, however, were concerned that these early draft provisions gave employees too much leeway to ignore arbitration agreements, thereby legitimating labor strikes. Some pushed for stronger language mandating that labor be bound by arbitration decisions, and others pushed to remove Section 12 on the grounds that it gave too much power to the government to enforce decisions that neither side wished for.[88] Walter Gordon Merritt, an employer-side labor lawyer, emphasized his support for arbitration explicitly as part of a desire to keep the federal government out of employee-employer relationships. He considered arbitration "a solemn pact," and the statute, he said in the hearings, adopted language "which is used in so many arbitration statutes, whether for commercial arbitration or for all kinds of arbitration … arbitration has an important function to perform in connection with industrial disputes, and may be a very useful instrument in promoting industrial peace."[89] In response, William Green, president of the AFL, endorsed collective bargaining and the use of arbitration to settle disputes, but he opposed compulsory arbitration beyond what was voluntarily agreed upon in the collective bargaining agreement.[90]

But this turn toward labor arbitration remained underdeveloped in key ways for at least another decade. In response to the unprecedented number of labor strikes that occurred at the end of World War II, Congress passed Taft-Hartley in 1947, which amended the NLRA to provide for,among other things, federal court jurisdiction to enforce collective bargaining agreements. It also created the Federal Mediation and Conciliation Service (FMCS) to facilitate mediation between unions and employers. Further, Congress reenacted the FAA that same year without any substantive change, continuing on with the statute's purpose of granting courts the right to stay or dismiss pending lawsuits in favor of arbitration and to enforce awards where appropriate.

Taft-Hartley's provision for judicial enforcement, however, was controversial to both labor and the legal community. Section 301 of the law provided that "suits for violation of contracts between an employer and a labor organization… may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."[91] Organized labor opposed the provision, fearful that it would make it easier for corporations to sue unions for breach of contract. At the same time, progressives in the legal community who viewed collective bargaining under the NLRA as a system of "self-regulation" also opposed such substantial government intervention.[92] Further, even though the provision directly addressed the issue of judicial enforcement, courts nonetheless declined to enforce outcomes of labor-management arbitration. On the one hand, this was a continuation of the legal community's general hostility toward alternate forms of dispute resolution that excluded judges and lawyers. But on the other, it was also due to a lack of clarity as to what status unions themselves maintained under law. Specifically, federal courts divided over the question of whether unions—lacking any consistently recognized "legal personality" under the law—could enforce *all* collective bargaining provisions in court or only those that benefited the union as such (as opposed to the rights of individual employees). Courts began to work through this issue in the 1950s, spearheaded by efforts from the general counsel of the Congress of Industrial Organizations (CIO), Arthur Goldberg. The Supreme Court first granted unions the power to enforce the rights of individual members contained in collective bargaining agreements through courts in 1957.[93] Notably, those seeking judicial enforcement of labor-management arbitration argued for it by drawing a stark line between labor and commercial arbitration, arguing that "labor arbitration, unlike commercial arbitration, is not a substitute for litigation. It is a substitute for strife."[94] They further argued that collective bargaining agreements constituted a "contract of employment" for purposes of the FAA and were thus excluded from its terms. In so doing, advocates

88. Statement of William H. Davis, Chairman Special Committee on the Government and Labor of the Twentieth Century Fund to the Senate Committee on Education and Labor, National Labor Relations Board, pt. 3 (March 21, 1935), 717.

89. Ibid., 330 and 328.

90. Labor Disputes Act, House Committee on Labor (March 13, 1935), 234–35.

91. 29 U.S.C. § 185(a) (2002).

92. see Katherine V. W. Stone, "The Post-War Paradigm in American Labor Law," *Yale Law Journal* 90 (1981): 1509.

93. *Textile Workers v. Lincoln Mills*, 353 U.S. 547 (1957).

94. Ibid., Brief for Petitioner, 8.

differentiated between the two to avoid labor arbitration being subject to the same restrictive common law treatment of commercial arbitration.

Building on this decision, the Supreme Court decided three cases in 1960 in which they dramatically reversed their hostile position toward the legal validity of labor arbitration. The so-called *Steelworkers* trilogy[95] (all three cases came from the Steelworkers Union, represented by Goldberg) had the effect of creating a presumption in favor of disputes arising from collective bargaining, emphasizing the private nature of these grievance procedures, and significantly limiting the grounds on which courts could set aside arbitration decisions made pursuant to agreements. The Court established three new transformational doctrines in these cases: (1) that the arbitral forum, not the judiciary, would be the central institution for enforcing the outcomes of collective bargaining; (2) that arbitration agreements would be enforceable regardless of a court's view as to the merits of the underlying grievance; and (3) a general presumption of arbitrability. These decisions subsequently "gave labor arbitration a unique status within the legal order."[96] In the cases, the Court agreed with Goldberg's argument that parties who consent within their collective bargaining agreement to arbitrate grievances should be considered to have agreed to submit *all* claims to arbitration, and that therefore courts should be deferential to these agreements. This reasoning was premised on the idea that arbitration agreements were ultimately "an effort to erect a system of industrial self-government" that must be respected.[97]

By the mid-twentieth century arbitration was institutionalized as a key feature of both the New Deal state and labor law. But at its seeming height in the mid-twentieth century, progressive support for arbitration began to waver, and the subsequent divisions that would arise among liberals in both the political and legal communities opened the door for the conversion of the then-entrenched arbitration regime. Notably, conservative reformers in Congress began to mobilize, eventually succeeding in reconfiguring arbitration's infrastructure in the service of a new policy paradigm. In directing arbitration's use to new ends, they had two robust sets of institutional "rules" at their disposal through which to accomplish this shift: (1) the FAA, with its vague and mutable language, as well as its relative lack of a public enforcement mechanism, and (2) the Court's labor law jurisprudence, with its significant deference to arbitration outcomes. Reformers also benefited from a variety of resources invested in arbitration, including government organizations like the FMCS, a growing cadre of professional arbitrators, and politicians on both sides of the aisle lending their support for its expansion. I describe these processes of conversion below.

3. CONVERSION OF THE ARBITRATION REGIME

3.1. Legislative Conversion

In the years leading up to the civil rights era, the use of arbitration steadily expanded. This was facilitated by two partisan dynamics in Congress. The outpouring of laws that created both statutory rights against discrimination in the workplace and private rights of action to bring litigation to enforce those rights created a temporary confluence of interests supporting arbitration. First, conservatives dissatisfied with "judicial activism" began to promote arbitration as a form of litigation reform, and second, a substantial contingent of Democrats in Congress continued on in their support of arbitration, both as part of a movement to decrease the burden on the federal court system and animated by arbitration's enduring potential for offering legal resolution of disputes for disadvantaged litigants unlikely to have the resources to go to court. As I will describe, this confluence of interests went far in expanding the arbitration's reach further, particularly when it came to promoting its use by the federal government.

Notably, this expansion occurred even in the midst of growing concerns about arbitration's fairness. Even before the civil rights era, many New Deal policymakers became disenchanted with the administrative model of governance—of which they considered arbitration part—finding it too vulnerable to interest group capture. As the ABA Special Committee on Administrative Law argued at the time, 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."[98] Additionally, most unions considered the *Steelworker* cases "both a boon and liability for labor." By protecting the collective bargaining process from judicial and government intervention, the new doctrine of deference also had the effect of insulating and isolating labor policy from the public arena. Further, the civil rights work of the Warren Court ignited a new idealism among liberal and progressives that centered on the value of litigation. Prominent law professors of

95. *Steelworkers v. American Manufacturing Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). See too, Reuel Schiller, *Forging Rivals: Race, Class, Law, and the Collapse of Postwar Liberalism* (New York: Cambridge University Press, 2015), 140–43; Stone, "The Steelworkers Trilogy," 149–90; Tomlins, *The State and the Unions*, 321–22.

96. Katherine V. W. Stone, "Procedure, Substance, and Power: Collective Litigation and Arbitration under the Labor Law," *UCLA Law Review Discourse* 61, no. 164 (2013): 36–38.

97. *Warrior & Gulf*, 580.

98. "Report of the Special Committee on Administrative Law," *Annual Report of the ABA* 63 (1938): 331.

the era began to publicly embrace litigation as the most powerful way for disadvantaged groups to give voice to their legal and political grievances. This sentiment grew into a liberal canon celebrating the powers of justice through the litigation process that also frequently criticized arbitration as enabling private interests to dominate disadvantaged communities.[99]

Additionally, by the 1960s labor unions were no longer perceived as part of a social movement fighting for political and legal inclusion; rather, they were seen as an increasingly politically entrenched institution with the power to dominate arbitration, not just in relation to business, but also in relation to individual workers. Arbitration procedures, for instance, increasingly clashed with the rights of African American workers claiming discrimination against white-dominated unions.[100] William Gould, future chair of the NLRB, criticized the use of labor arbitration in the late 1960s as allowing unions and employers to effectively hide an array of discriminatory acts behind the walls of the private grievance procedure.[101] Together, these developments divided liberals and, for some, began to shift the tide of support away from arbitration and back toward litigation. This was especially true when constitutional rights were at issue, with the Supreme Court taking the position at the time that arbitration clauses could not prevent individuals from going to federal court to seek enforcement of their constitutional rights.

When it came to employment, many liberals in Congress shifted their focus toward creating statutory employment rights and litigating for their enforcement in court. Unlike earlier worker protection statutes like the Fair Labor Standards Act (FLSA), which created the right to a minimum wage, "time-and-a-half" overtime pay, and prohibitions against "oppressive child labor," the new statutes of the 1960s and 1970s focused largely on rights against discrimination on the basis of constitutionally and statutorily protected categories such as race, sex, age, or disability.[102] The Equal Pay Act, for example, amended the FLSA to prohibit employers from paying different wages based on sex where workers perform work requiring "equal skill, effort, and responsibility and performed under similar working conditions." Title VII of the CRA of 1964 perhaps went the furthest in prohibiting discrimination. The law, which applies to most employers engaged in interstate commerce, labor organizations, and employment agencies, prohibits discrimination on the basis of race, color, sex, religion, or national origin and makes it illegal for employers to discriminate based on these protected characteristics when it comes to the terms, conditions, and privileges of employment. The law also established the EEOC to enforce Title VII and a variety of subsequent workplace discrimination laws,[103] including the Age Discrimination in Employment Act (ADEA) of 1968, Section 501 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA) of 1990.[104]

A notable feature of these laws is that most contain provisions for "private enforcement": causes of action within statutes that give individuals the right to bring lawsuits in order to enforce their statutory rights through courts, often with the prospect of sizeable damages and attorney's fees as an incentive. A substantial literature has addressed the question of how and why Congress grew to rely on private enforcement instead of using the regulatory apparatus of the administrative state—as it did in creating the NLRB, for example.[105] But it is important to note that job discrimination lawsuits constitute the largest category of litigation in federal courts, next to

99. See, e.g., Richard L. Abel, *The Politics of Informal Justice* (New York: Academic Press, 1982); Robert M. Cover, "The Origins of Judicial Activism in the Protection of Minorities," *Yale Law Journal* 91, no. 7 (1982): 1287–1316; Owen Fiss, "Against Settlement," *Yale Law Journal* 93 (1984): 1073–90; Sally Engle Merry, "Disputing without Culture: Review Essay of Dispute Resolution," *Harvard Law Review* 100 (1987): 2057–73; Laura Nader, "Disputing without the Force of Law," *Yale Law Journal* 88 (1979): 998–1021.

100. Frymer, *Black and Blue*.

101. William B. Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," *University of Pennsylvania Law Review* 118 (1969): 40–68.

102. See, e.g., Anthony S. Chen, *The Fifth Freedom: Jobs, Politics, and Civil Rights in the United States, 1941–1972* (Princeton, NJ: Princeton University Press, 2009); Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935–1985," *American Political Science Review* 97, no. 3 (2003): 483–99; Sophia Z. Lee, *The Workplace Constitution from the New Deal to the New Right* (New York: Cambridge University Press, 2014); Schiller, *Forging Rivals*; John D. Skrentny, *The Minority Rights Revolution* (Cambridge, MA: Harvard University Press 2002).

103. See Skrentny, *The Minority Rights Revolution*.

104. Employment rights statutes continued to proliferate in the years after the CRA. The Pregnancy Discrimination Act (1978) and the Family Medical Leave Act (1993) provide rights against sex discrimination when it comes to pregnancy and childbirth as well as set forth requirements governing leave for pregnancy and related conditions, respectively. The Black Lung Benefits Act of 1973 prohibits discrimination against miners who suffer from the disease; the Vietnam Era Readjustment Act of 1974 requires affirmative action for disabled Vietnam veterans by federal contractors; the Bankruptcy Act of 1978 prohibits employment discrimination on the basis of bankruptcy or bad debts; the Immigration Reform and Control Act of 1986 prohibits employers with more than three employees from discriminating against anyone (except unauthorized immigrants) on the basis of national origin or citizenship; and the Genetic Information Nondiscrimination Act of 2008 bars employers from using individuals' genetic information when making hiring, firing, job placement, or promotion decisions.

105. See, e.g., Farhang, *The Litigation State*; Frymer, *Black and Blue*; Robert C. Lieberman, "Ideas, Institutions, and Political Order: Explaining Institutional Change, *American Political Science Review* 96, no. 4 (2002): 697–712.

prisoner petitions.[106] As such, even as the Supreme Court embraced arbitration in the early 1960s, and even in the context of continued legislative support for arbitration, this growth in employment rights primarily enforced by courts largely defined the politics and law of the post–civil rights era.

This had two effects when it came to arbitration. First, litigation reform was propelled onto the social and political agenda as a key issue item in debates over arbitration and its use. This was a response to the shift toward a more liberal judiciary that defended these rights, in the context of both the growing partisan claims about the pitfalls of so-called judicial activism and a relatively nonpartisan agenda geared toward easing the burdens upon the increasingly overworked legal system. While the conservative "tort reform" movement is a better-known story, in the absence of success in terms of delimiting these rights through outright in the 1970s and 1980s, the business community and its conservative allies in Congress began to view arbitration as a venue to which they could shift would-be legal disputes. For example, in 1976, Chief Justice Burger spoke in favor of arbitration at a conference addressing how to improve the efficacy of the court system. Without it, to his mind, "we have reached the point where our systems of justice … may literally break down before the end of the century."[107]

At the same time, businesses also began to mobilize in opposition to the rising litigation costs that they shouldered as a result of rights-based litigation on the part of non-unionized workers. For example, the Equal Employment Advisory Council was founded in 1976 to help its members "understand and manage their workplace compliance requirements and risks." The organization's members, including a variety of businesses, for-profit and nonprofit organizations, and educational institutions, all benefit from access to in-house counsel when confronted with legal challenges to their employment practices. This council would later go on to fight the EEOC's position against mandatory arbitration as part of larger tort reform agenda, which the business community came to view as a crucial effort. During the same time period, as Lauren Edelman has illustrated, employers began to utilize human resources departments to respond to changing civil rights and employment laws, as well as to manage conflicts in the workplace. In so doing, they at times subtly and at times overtly encouraged potential employee litigants to utilize ADR procedures internal to the company itself instead of litigation.[108]

Second, by the 1970s there was a clear divide among liberals as to the value of arbitration, with some claiming that it promoted a second-rate system for resolving disputes while others still supported it as an innovation allowing disadvantaged plaintiffs to have better access to justice. Members of the DOL worried about the decline of the utility of arbitration in the labor sector, which stemmed from a decline in support from union members themselves: "The grievance arbitration system—so long felt to be a bedrock of the U.S. labor relations system—is suffering from escalating costs, excessive delays and an erosion of faith in the process among workers."[109] A DOL survey of employers and union executives in 1972 found that a majority of employers supported arbitration while a majority of union leaders opposed it.[110] Union workers increasingly voiced that the process was too slow and not responsive to their concerns; additionally, both sides found it increasingly expensive. Further, arbitrators themselves struggled to handle issues arising with regard to racial discrimination: As an internal memo described, "the 'sleeper' in the house of arbitration, i.e., discrimination, surfaced at least five years ago, and it is bound to take on increasing significance."[111] The 1972 amendments to the CRA, which authorized the EEOC to sue in federal court, put additional stress on arbitrators, particularly when it came to the question of how to handle discrimination claims that came before them: As the DOL report summarized, "the problems will arise when the discrimination issue is raised directly as part of the charge brought before the arbitrator. Should he, and can he, as a matter within his purview, superimpose statutory law on

106. Farhang, *The Litigation State*, 1.

107. Alan W. Houseman, "Legal Services and Equal Justice for the Poor: Some Thoughts on Our Future," *NLADA Briefcase* 35, no. 2 (1978): 44–49, 56–64.

108. See Lauren Edelman, *Working Law: Courts, Corporations, and Symbolic Civil Rights* (Chicago: University of Chicago Press, 2016); Lauren Edelman, "Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law," *American Journal of Sociology* 97, no. 6 (May 1992): 1531–76; Lauren B. Edelman, Howard S. Erlanger, and John Lande, "Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace," *Law and Society Review* 27, no. 3 (1993): 497–534.

109. See, e.g., for the Under Secretary, October 10, 1972, Arbitration: Records of the Assistant Secretary of Labor for Policy, Evaluation, and Research, Michael H. Moskow, 1972–74, A1 17, RG 174 General Records of the Department of Labor, National Archives, College Park, MD; Arbitration: Current Issues, Office of Policy Development, ASPER, July 10, 1972, Records of the Assistant Secretary of Labor for Policy, Evaluation, and Research, Michael H. Moskow, 1972–74, A1 17, RG 174 General Records of the Department of Labor, National Archives, College Park, MD.

110. Correspondence from Michael H. Moskow to Harry C. Herman, October 17, 1972, Arbitration: Records of the Assistant Secretary of Labor for Policy, Evaluation, and Research, Michael H. Moskow, 1972–74, A1 17, RG 174 General Records of the Department of Labor, National Archives, College Park, MD; Arbitration: Current Issues, Office of Policy Development, ASPER, July 10, 1972, Records of the Assistant Secretary of Labor for Policy, Evaluation, and Research, Michael H. Moskow, 1972–74, A1 17, RG 174 General Records of the Department of Labor, National Archives, College Park, MD.

111. Correspondence from Michael H. Moskow to Harry C. Herman, October 17, 1972, 7–8.

parties to a private contract?"[112] Referencing the work of William Gould, the DOL memo suggested that arbitrators needed to be more responsive to African American workers in particular, noting that "there are grumblings among minority workers about white arbitrators—selected by white union officials and white management officials—determining the fate of minority groups. Women, too, can be expected to voice complaints about male domination of the process."[113] This was considered particularly problematic in light of the fact that African Americans and women made up less than 1 percent of arbitrators, and more than 60 percent of arbitrators were over the age of 55.[114]

In Congress, some liberals began to argue that arbitration was fundamentally flawed as well. For example, in hearings on the "State of the Judiciary and Access to Justice" in 1978, consumer rights activist Ralph Nader and Legal Services Corporation president Thomas Erlich took the position that arbitration was simply becoming the venue for the "lesser" legal disputes of the day, already pointing to its potential conversion by large corporations motivated primarily by protecting themselves from liability.[115] Erlich, for example, expressed the fear that arbitration proceedings were "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."[116] In a way, the liberals speaking in favor of arbitration at the same hearing legitimated Nader and Erlich's fears. For example, Attorney General Griffin Bell championed the use of ADR for cases where there was no "important" legal question at issue—a position with which Robert Bork, then a prominent conservative professor at Yale Law School, readily agreed.[117]

At the same time, however, other Democrats in Congress agreed with conservative colleagues who viewed arbitration as a potential mechanism for lessening the burden on the court system. For instance, when introducing the National Medical Malpractice Insurance and Arbitration Act of 1975, Senator Edward Kennedy criticized the current system of litigation as benefiting very few patients, making arbitration an obvious alternative. In turn, Democratic majorities in Congress passed new laws employing ADR practices to enforce rights and benefits for environmentalists, prisoners, and the elderly, among other groups. During the same time period, many public interest advocates also adopted a positive stance toward arbitration when it came to ensuring access to a dispute resolution forum for their groups. For example, Alan Houseman, the director of the Research Institute of Legal Services, argued that litigation was not helping solve the problems of the poor and thus advocates should pursue more nonadversarial means to serve populations that were still being neglected by their services. Arbitration was considered one such potential means.

But the use of arbitration grew further in the years after the rights revolution, despite this burgeoning internal divide in the Democratic Party, and driven by arbitration's bipartisan appeal. Prominent Democrats like Kennedy continued to promote legislation designed to encourage experimentation with nonbinding arbitration as an alternative to litigation,[118] particularly in response to an ABA report noting that two-thirds of Americans lacked access to courts.[119] Congress passed the Dispute Resolution Act in 1980, which created both an incentive program designed to encourage experimentation with arbitration as well as the Dispute Resolution Resource Center in the Department of Justice. Conservative support of the legislation was also likely inspired by prominent organizations in the business community that voiced their support for the bill; for example, Jeffry Pearlman of the U.S. Chamber of Commerce argued in the hearings that arbitration would go far in helping businesses resolve disputes in an "effective, expeditious, and inexpensive manner."[120] New specialties of arbitration and ADR developed, supported by the creation of courses and programs on conflict and dispute resolution in a variety of law schools. This expansion also relied heavily on funding from private groups and the proliferation of organizations that provided the resources to train arbitrators and mediators.[121] Notably, these funds often came from liberal groups. The Ford Foundation, for example, frequently funded liberal ventures in the 1970s that sought to experiment with arbitration, both in the area of employment and more broadly. The foundation also established the National Center for Dispute Settlement, which still operates as a prominent ADR firm today.[122]

Throughout this period of bipartisan support for ADR, however, liberal advocates of arbitration also unwittingly laid the groundwork for conservatives to

112. Ibid., 9.
113. Ibid., 8.
114. Ibid., 13.
115. "State of the Judiciary and Access to Justice Act," Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice, House of Representatives, 95th Congress, 1st Sess., June 20, 1977, p. 12.
116. Ibid., 47.
117. Ibid., 251.
118. "Court-Annexed Arbitration Act of 1978," Committee on the Judiciary, U.S. Senate, Report No. 95-1103 to Accompany S. 2253, 95th Congress, 2nd Sess., August 10, 1978.
119. "Access to Justice," Hearings before the Judiciary Committee, U.S. Senate, 96th Congress, 1st Sess., February 13 and 27, 1979, p. 1.
120. Ibid., 38.
121. Staszak, *No Day in Court*, 64–66.
122. Ford Foundation Grants, Bay Area Lawyers for the Arts, 1980–81, https://dimes.rockarch.org/xtf/view?docId=ead/FA732A/FA732A.xml;chunk.id=d17d1a88d2c3147f266da83c3aaa54e8;brand=default;query=bay%20area%20lawyers%20for%20the%20arts&doc.view=contents.

convert its use. For example, in the debate over a bill in 1979 to provide seed money to states to experiment with ADR programs, the president of the ABA, Shepherd Tate, contrasted the legal needs of the poor with those types of disputes that he thought should be handled without lawyers and judges. "Minor disputes," he argued, could be handled by "neighborhood justice centers and other techniques." The ABA also began to publicly embrace arbitration as a way to relieve overburdened dockets, also using the same language; notably, the name of the ABA's first committee on ADR was called the "Special Committee on Minor Disputes." As far as Tate was concerned, in his example, a "minor dispute" referred to a neighborhood noise disturbance;[123] but increasingly, beginning in the 1980s, conservatives in Congress used this language to divert other, arguably less minor, types of claims away from the courtroom.

At the time, both conservatives and liberals in Congress capitalized on this bipartisan consensus when it came to legislation that promoted arbitration in general as opposed to arbitration in any one policy area in particular. Their joint efforts primarily involved expanding the use of arbitration by the federal government. Congress unanimously passed both the Administrative Dispute Resolution Act (ADRA) and the Negotiated Rulemaking Act in 1990, which together gave federal agencies additional authority to use arbitration for resolving most administrative disputes and to use negotiation to facilitate consensus building in the rule-making process. In particular, the Democrat-sponsored ADRA sought "to authorize and encourage Federal agencies to use mediation, conciliation, arbitration, and other techniques for the prompt and informal resolution of disputes" and amended the Administrative Procedure Act and other laws to this end.[124] It also authorized the FMCS to assist federal agencies in this pursuit. Notably, while the act encouraged the use of arbitration, it specified not only that all parties must consent to its use, but also that consent to arbitrate could not be a condition of entering into a contract or obtaining a benefit. Similarly, Congress passed the Civil Justice Reform Act that same year, requiring district courts to implement a "civil justice expense and delay reduction plan," in which they were authorized to refer "appropriate cases to alternative dispute resolution (ADR) programs" as part.[125] The law was widely seen as bipartisan. In the Senate hearings, the chairman of the Judiciary Committee and the bill's main sponsor, Joe Biden, commented repeatedly on how striking it was that corporate lawyers, insurance companies, and consumers were all in support of the bill.[126] But as conservatives increasingly began to promote more controversial versions of ADR—specifically, legislation supporting not only voluntary but also mandatory arbitration—it became clear that Democrats and Republicans would part ways.

This burgeoning partisan divide was perhaps first evidenced when Congress passed the CRA of 1991. That this law would mark a critical turning point for the politics of arbitration is ironic, in that the legislation was designed to do quite the opposite. Among the amendments that it made to Title VII, the law expanded the private enforcement of rights in court by increasing opportunities and incentives for litigants to sue (and for lawyers to represent them) by increasing damages and attorney's fees. The passage of the law occurred in a complex political environment. At the same time that the ideologically conservative narrative of a "litigation crisis" was in full swing, civil rights groups and Democrats in Congress were criticizing both the former Reagan Administration for its hostility to litigation and the Clarence Thomas–led EEOC for its underenforcement of Title VII claims. Additionally, a resurgence of an emphasis on the right to litigation was arguably a direct rebuke on the part of liberals to the Senate Judiciary Committee's treatment of Anita Hill, as well as to five decisions rendered by a newly conservative Supreme Court two years prior, in which the Court severely constrained the enforcement of Title VII in Court. The law's passage also occurred in the direct aftermath of the Supreme Court's decision in *Gilmer v. Interstate/Johnson Corp.* that same year—itself a turning point for employment arbitration law, as I will describe—which upheld a mandatory arbitration clause in the face of a statutory rights claim for the first time.[127] So while the legislation arguably represented the apex of what Sean Farhang has called "the litigation state,"[128] it was simultaneously a moment of conversion in the history of private arbitration where Republicans successfully asserted a counter-narrative and movement.

In the legislative history and debates over the bill, Republicans and Democrats in Congress clashed over the latter's efforts to enact substantial changes in the incentive structure for civil rights litigation, as well as to effectively reverse a series of conservative Supreme Court decisions from 1989.[129] Subject to

123. "Access to Justice" (1979), 9.
124. P.L. 101-648 and 552, respectively.
125. P.L. 101-650.

126. "The Civil Justice Reform Act and Judicial Improvements Act of 1990," Hearings before the Committee on the Judiciary, U.S. Senate, 101st Congress, 2nd Sess. (March 6, 1990), 3.
127. *Gilmer v. Interstate/Johnson Corp.*, 500 U.S. 20 (1991).
128. See Farhang, *The Litigation State*, pp. 173–78. He discusses the Reagan Administration and EEOC treatment of Title VII.
129. See *Wards Cove Packing Co. v. Antonio*, 490 U.S. 642 (1989); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989); *Martin v. Wilks*, 490 U.S. 755 (1989); *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900 (1989); and *Independent Federation of Flight Attendants v. Zipes*, 491 U.S. 754 (1989).

the most debate was the Court's decision in *Wards Cove Company, Inc. v. Antonio*, in which a 5–4 majority determined that evidence of racial disparity in the workplace did not in and of itself necessitate a justification on the part the employer to avoid a disparate impact lawsuit under Title VII.[130] Prominently, Democrats sought amendments to the legislation, which included provisions for expansive compensatory and punitive damages, as well as for attorney's fees. This led the repeated assertion on the part of Republicans that the bill was primarily intended to "come to the rescue" of a "burgeoning sector of the legal industry [which] seemed to be faltering": namely, Title VII lawyers.[131] Republicans also fought the Democrats' efforts to "restore" Title VII litigation to its pre–*Wards Cove* days, arguing, for example, that their proposals would in effect require hiring "quotas" on the part of business and prompt even more litigation.

In response, Republicans raised arbitration as a possible alternative. Cathie Shattuck, a former EEOC commissioner who was appointed by Reagan, told House members that it was time to "take a look at alternative dispute resolution." Referencing that "Congress has passed a general bill already on that subject," she suggested that "maybe that's something we ought to talk about here. Maybe we ought to talk about arbitration. If the parties to a charge, the employer and employee, can agree to binding arbitration." This would have the added effect, she argued, of forcing the government to "just butt out" of employers' business altogether. She also found it "incredible that H.R. 1 chooses as the only solution an increase in available damages in an already overburdened and dysfunctional administrative and judicial system where even cases of marginal validity will no longer be settled or resolved without resort to the courts."[132] Some liberals countered that the litigation incentives in the bill would actually push employers to arbitrate: "The reality is right now there is no incentive on the part of employers to try and mediate or be willing to submit to arbitration."[133]

Republicans succeeded in adding Section 18 to the law, which "encourages the use of alternative means of dispute resolution" (including arbitration), "where appropriate and to the extent authorized by the law." However, in its discussion of the provision, members of the House Judiciary Committee emphasized that the use of arbitration under the law was intended to supplement, "not supplant," the other remedies provided in Title VII. As they summarized, "any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract, does not preclude the affected person from seeking relief under the enforcement provisions of Title VII."[134]

Despite its inclusion, Republicans on the committee criticized the provision as a half-hearted attempt to promote arbitration. Representative Henry Hyde complained that there were more than enough lawyers available to take on employment discrimination cases as it was, and that by incentivizing them further, "lawyers will retain the lion's share of the money that changes hand."[135] He also referenced the pitfalls of litigation and familiar arguments surrounding the need for litigation reform, arguing that "job applicants don't want lawsuits … they cannot wait years for the resolution of their claims, and it is unhealthy to allow their claims to linger." For Hyde and other Republicans on the committee, arbitration constituted an "inexpensive and speedy dispute resolution" mechanism that would be "more likely to serve these people's needs than is protracted litigation." As such, he criticized Section 18 as weak, an "empty promise" because it merely encouraged arbitration for resolving disputes under employment rights laws rather than mandating its use.[136]

In summary, in the aftermath of the civil rights era, a temporary confluence of interests in favor of arbitration between Democrats and Republicans in Congress allowed for its expansion, especially its use by the government. Along with this expansion came significant investment in the infrastructure for arbitration. Through statutes encouraging or requiring its use and expansions in the government's capacity to conduct arbitration to increased funding and investment in training and personnel, these bipartisan efforts further entrenched arbitration in important ways. By the 1990s, however, the reigning policy paradigm began to shift. To use the language of 1970s Democrats, the opportunity to divert so-called minor disputes away from traditional courts was clear to those conservatives in Congress focused on constricting frivolous litigation, especially in the aftermath of the 1991 CRA. As I will describe, the nature of this shift was not lost on the business community, who recognized that embracing arbitration would work in their favor, especially when it came to the possibility of avoiding litigation.

3.2. Private-Sector Conversion of Public Regulation

Ironically—given the law's focus on litigation—the CRA of 1991 was also the catalyst for private-sector conversion of arbitration. Immediately in the

130. *Wards Cove Packing Co.*

131. House Report 101-644, Part 2 on H.R. 4000, The Civil Rights Act of 1990, July 31, 1990, p. 72, citing Testimony of Professor Jeremy Rabkin, Hearings on H.R. 4000, pp. 409–10.

132. Ibid., 170.

133. Ibid., 195 (comments of Larry Daves, civil rights lawyer).

134. "Civil Rights Acts," House Reports 102-40, Part 2, 102nd Congress, 1st Sess., May 7, 1991, p. 41.

135. Ibid., 71–78.

136. Ibid.

aftermath of its passage, media outlets like the *New York Times* echoed Republican complaints, reporting a "rash" of lawsuits.[137] In fact—and as predicted by the law's detractors in Congress—employment discrimination cases in federal courts did spike in the years after the law's passage; a 1995 Government Accountability Office (GAO) report noted that litigation rates rose by 43 percent between 1991 and 1994, which they attributed to both the CRA and the ADA, which also established new legal grounds for employment-related complaints.[138] But litigation rates peaked as early as the late 1990s before beginning to drop. This was arguably in response to another by-product of the law *also* predicted by the *Times*, which soon began reporting on the efforts of employers to fight these new lawsuits by removing conflicts to arbitration.[139] Studies showed that, by the end of the century, a majority of private-sector employers were using some form of ADR with limited judicial review to handle employee disputes, though they varied as to the degree to which they found that employers used arbitration procedures specifically.[140] In a study of five large corporations that employed ADR in the early 1990s, the GAO found that most required the use of arbitration as a condition of employment, with highly limited judicial review. These studies also found that the employers who used arbitration reported doing so specifically because of concerns regarding litigation and the uncertainties of the jury system (which they perceived as pro-plaintiff), as well as the desire to avoid unionization efforts.[141] This shift toward private arbitration constituted a first wave of private-sector conversion.

The private arbitration clauses and processes that are the product of this conversion have several defining characteristics. First, in most cases, employers unilaterally design the contracts of employment that contain arbitration clauses. Some individual, nonunion contracts are in fact negotiated; but for the majority of employer-promulgated contracts, individuals enjoy nothing close to the process of collective bargaining that is mandated and overseen by the federal government for labor. As such, these contracts—and arbitration provisions within them—are essentially unregulated in their terms, solely defined by the employers that draft them. Second, once inside the process of arbitration, the system itself is often designed and operated by the party against which a complaint is brought. While employers often choose to contract with a third-party organization that provide arbitrators to resolve disputes for their company, they are not required to do so. Third, because judicial review of outcomes is highly limited, the decisions rendered in these private systems are final. Because there is no regulatory body expressly designated with this authority either, most assessments of the fairness of contracts or outcomes are carried out in the private sphere.

The outcomes of private-sector employment arbitration are unsurprising in light of these features. Workers have a lower success rate and receive less damages in arbitration than in litigation.[142] Specifically, employees are almost twice as likely to prevail in federal court than they are in mandatory arbitration, and they fare even better in state courts. Further, judges and juries award damages that are 150 percent greater than those received by sucessful employees in arbitration.[143] Private arbitration clearly favors employers, given their status as "repeat players"[144] in arbitration systems and given the lack of procedural rules and safeguards that govern litigation in a courtroom and attempt to level the playing field between individuals and large institutional defendants.[145] Private employment arbitration also appears to fall short in terms of providing a more accessible alternative to litigation; while employment arbitration claims have increased in recent years, rates are still far less than the projected number of filings in state and federal court.[146] Many employers and arbitration providers have made some strides to assuage these concerns; major corporations increasingly do contract with third-party organizations to carry out

137. Seth Faison Jr., "Rash of Suits Seen after Rights Act," *New York Times*, November 30, 1991, A1.

138. U.S. General Accounting Office, "Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace" (August 1997), 9, https://www.gao.gov/assets/230/224517.pdf.

139. Ibid.; Peter T. Kilborn, "Age Bias Case Could Limit Right of Workers to Sue," *New York Times*, March 25, 1991, A1; Barbara Presley Noble, "New Questions about Arbitration," *New York Times*, June 14, 1992, 112; Steven A. Holmes, "Some Employees Lose Right to Sue for Bias at Work," *New York Times*, March 18, 1994, A1.

140. See U.S. General Accounting Office, "Employment Discrimination: Most Private-Sector Employers Use Alternative Dispute Resolution," GAO/HEHS-95-150 (July 5, 1995), https://www.gao.gov/assets/230/221397.pdf; A. J. S. Colvin, *Adoption and Use of Dispute Resolution Procedures in the Nonunion Workplace* (Ithaca, NY: Cornell University ILR School, 2004); David Lewin, "Employee Voice and Mutual Gains," *LERA 60th Annual Proceedings* (2008): 61–83.

141. U.S. General Accounting Office, "Employment Discrimination."

142. Colvin, "An Empirical Study of Employment Arbitration."

143. Alexander Colvin and Kelly Pike, "The Impact of Case and Arbitrator Characteristics on Employment Arbitration Outcomes" (paper presented at the annual meeting of the National Academy of Arbitrators, Minneapolis, MN, June 2012), https://digitalcommons.ilr.cornell.edu/conference/22/.

144. On the "repeat player" effect, see Marc Galanter, "Do the 'Haves' Come Out Ahead? Speculations on the Limits of Legal Change," *Law and Society Review* 9 (1974): 95–160.

145. There are several studies illustrating the empirical validity of the repeat player effect in arbitration. The most recent include Chandrasekher and Horton, "Arbitration Nation"; David Horton and Andrea Cann Chandrasekher, "After the Revolution: An Empirical Study of Consumer Arbitration," *Georgetown Law Journal* 104 (2015): 57; Colvin, *The Growing Use of Mandatory Arbitration*; Alexander Colvin and Marc D. Gough, "Individual Employment Rights Arbitration in the United States: Actors and Outcomes," *Industrial and Labor Relations Review* 68, no. 5 (2015): 1019–42.

146. Cynthia L. Estlund, "The Black Hole of Mandatory Arbitration," *North Carolina Law Review* 96 (2018): 679.

their private arbitrations as opposed to running them internally by the company's own staff, and groups like the American Arbitration Association and other providers have implemented "Due Process Protocols" and other rules in recent years, agreeing to take on cases only after determining that the arbitration clause in question "substantially and materially complies" with the organization's standards. But even in light of these efforts, employment arbitration continues to be skewed to the advantage of the employer, suggesting that the private sector has converted arbitration to suit their interests.

Even in the context of this increased privatization, however, the government—and the executive branch specifically—retains some power to regulate employment arbitration. Presidents have occasionally done so through executive orders. For example, in 2016 President Obama issued an order banning the use of forced arbitration between government contractors and their workers and prohibited federal agencies from entering into certain contracts with companies that mandated arbitration for claims involving sexual assault or harassment. In the same year he banned forced arbitration agreements between nursing homes and their residents, and he prohibited schools that receive Title VI assistance from using forced arbitration clauses with their students.[147] Presidents have also utilized their administrative agencies (the EEOC in particular) to intervene in this private-sector conversion. From the outset, administrative agencies have been limited in their institutional capacity: Despite the parallels drawn by the Supreme Court, the EEOC lacks the robust enforcement capacity delegated to the NLRB. But the EEOC has nonetheless leveraged its capacity to weigh in on the private sector's use of arbitration, both through its power to litigate as well as pursuant to its implied powers to regulate through informal rule making. But here too, the partisan and institutional dynamics are not straightforward. While President Clinton strongly supported the use of arbitration for many employment claims, the EEOC eventually took a strong position against it from 1997 until 2019.

In the years directly following the passage of the CRA of 1991, both President Clinton and the EEOC worked to address the explosion of employment litigation cases by promoting and investing further in ADR. For his part, Clinton, along with Secretary of Labor Robert Reich and Secretary of Commerce Ronald Brown, formed the Dunlop Commission of 1994 to investigate enduring problems with and potential reforms for worker-management relations. Although much of the report focused on issues arising under the NLRA, it also addressed nonunionized workforces. The report noted the "steep rise in administrative regulation of the workplace … that impose(s) significant costs on employers and employees" and "the explosion of litigation under laws that rely in whole or in part on individual lawsuits for enforcement."[148] Further, the commission highlighted that litigation, in addition to its costliness and extensive burden on the judicial system, was neither well representing the needs of a diverse workforce nor resolving conflicts in a timely fashion.[149] Emphasizing that both the ADA and CRA of 1991 contained explicit encouragement of ADR, the commission detailed the advantages of ADR and arbitration for resolving employment conflicts. Consistent with most proponents of arbitration over time, the commission stressed its potential to be faster, cheaper, and less conflictual than litigation.

The commission's commitment to further investment in arbitration, however, was only where fairness in the process could be guaranteed. For example, they expressed concern "about the potential for abuse of ADR created by the imbalance of power between employer and employees" particularly when "the process is controlled unilaterally by employers, such as when employees are required to sign mandatory arbitration clauses as a condition of employment."[150] The commission argued that ADR programs needed to be voluntary and "meet specified standards of fairness" to be legitimate, which included ensuring that employees had multiple options for handling different types of disputes, the inclusion of workers in the establishment of the resolution systems, and the creation of "a foundation of workplace practices that stress respect for individual and collective rights and that engender a climate of trust at the workplace."[151] The commission also provided examples of companies that it thought employed arbitration for dubious reasons, noting that many large law firms established ADR directly after a $7 million verdict against a firm for sexual harassment by one of its partners.[152] Finally, in direct response to the *Gilmer* decision, the commission voiced its disapproval of the subsequent rise in the number of employers mandating private arbitration in their employment contracts, which served to waive the employees' rights to further pursuit of litigation.

In 1995, President Clinton issued Executive Order 12988, which, in addition to encouraging federal agencies to use ADR to resolve claims before moving to a trial, eliminated an express prohibition

147. Notably, all of these executive orders were reversed by President Trump in the early months of his administration.

148. U.S. Commission on the Future of Worker-Management Relations, *The Dunlop Commission of the Future of Worker-Management Relations, Final Report* (December 1, 1994), 49, https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1004&context=key_workplace.

149. Ibid., 50.

150. Ibid., 54.

151. Ibid., 53–58.

152. Ibid., 52.

in an earlier Bush administration order that constricted the use of binding arbitration.[153] Clinton's order largely mirrored the EEOC's early efforts to encourage ADR in the years after the CRA of 1991, which itself issued regulations in 1992 that promoted its use for discrimination complaints filed in federal court. Three years later, the agency also announced that it would change the way that it processed private-sector discrimination charges, moving to a system that categorized claims into different tracks with the goal of quickly removing cases likely to be frivolous. They also implemented a voluntary ADR program where, in specific cases, employees could work with a neutral mediator to try to settle discrimination disputes instead of proceeding through the commission's traditional investigative procedures.[154]

Both Clinton's order and the EEOC's proposed internal changes drew criticism from several rights advocacy groups. The Women's Legal Defense Fund, for example, took the position that "ADR is generally not appropriate in cases bearing on significant policy questions; cases that may have precedential values; class actions; and cases that may significantly affect persons or organizations who are not parties to the proceeding." They also made clear that ADR, when used, should be "fully voluntary" with "rights of appeal."[155] ADR, they argued, had "a strong potential for abuse in the EEO context because of the imbalance of power between employer and employee, and the resulting unfairness to employees who, voluntarily or otherwise, submit their disputes to ADR." Importantly, they premised their position on experience with the use of arbitration in the private sector, noting that "many employers have set up their own internal ADR systems in which the employer chooses the arbitrator and sets the ground rules," raising questions regarding the legitimacy of such processes. While they argued along with other concerned groups that "employment disputes can be disruptive, time-consuming, and costly," they nonetheless rejected "the notion that unrestricted private ADR is a panacea to the growth of EEO litigation."[156]

153. Office of General Counsel Guidance on Civil Justice Reform, Executive Order No. 12988, EEOC (February 7, 1996), https://www.eeoc.gov/eeoc/litigation/manual/3-1-a_eo_civil_justice_guidance.cfm. Bush's previous order was Executive Order 12778.

154. U.S. General Accounting Office, "Employment Discrimination"; Ibid., 4.

155. "Comments of the Women's Legal Defense Fund in Response to EEOC Request for Comments on the Use of Alternative Dispute Resolution," Women's Legal Defense Fund, September 20, 1993, Records of Commissioner Paul Miller 1993–2005, A1 31, RG 403 Equal Employment Opportunity Commission, National Archives, College Park, MD.

156. "Statement of the Women's Legal Defense Fund on Alternative Dispute Resolution," Women's Legal Defense Fund, February 9, 1995, Records of Commissioner Paul Miller 1993–2005, A1 31, RG 403 Equal Employment Opportunity Commission, National Archives, College Park, MD.

While the EEOC continued to further its own use of ADR broadly, announcing a program of mandatory mediation for federal employee cases before administrative judges in 1997, on the issue of mandatory arbitration in the *private* sector, the agency dramatically reversed course. The agency issued policy guidance that same year in which it took a strong position against the increasingly ubiquitous forced arbitration clauses used by private employers. Beginning with this shift in 1997, the agency opposed compulsory employment arbitration in two ways. First, it asserted that the signing of an arbitration agreement by an employer and employee does not affect the employee's right to file a charge of discrimination with the EEOC, nor the EEOC's right to investigate that charge and file suit in federal court. This effectively allows the EEOC to circumvent an arbitration agreement—or, at the least, to preserve its own authority and provide a day in court for the aggrieved employee—by litigating through the agency what the individual is not able to litigate on their own. As early as in the 1970s and as recently as in its 2002 decision in *EEOC v. Waffle House*,[157] the Supreme Court has been consistent in maintaining the EEOC's authority to litigate. In *Waffle House* specifically, the Court considered whether a mandatory arbitration agreement between an employer and an individual employee precluded the EEOC from pursuing the employee's claim in court. The majority held that the agency could in fact file a lawsuit against the employer and obtain individual relief despite the existence of the arbitration agreement. The Court based its decision on the fact that, because the EEOC is not a party to the arbitration agreement between the employer and employee, it retains its institutional authority to litigate on behalf of the plaintiff, even when the plaintiffs themselves cannot. As such, the agency maintained the authority to pursue all actions consistent with the statutory powers given to it in Title VII, including back pay, reinstatement, and compensatory and punitive damages. For example, the Obama administration was aggressive in suing large employers that used mandatory arbitration as a condition of employment, suing the company that owned Applebee's and Panera Bread and winning a federal district court case in Minnesota where the employer attempted to compel arbitration of an ADEA claim.[158]

Second, the agency also took a clear position against mandatory arbitration in its policy statements and guidance. Although it did not issue a formal rule or regulation in opposition to forced arbitration, in

157. 534 U.S. 279 (2002).

158. *McLeod v. General Mills*, 140 F.Supp.3d (D. Minn. 2015), in P. David Lopez, *U.S. Equal Employment Opportunity Commission, Office of General Counsel Fiscal Year 2016 Annual Report* (Washington, DC: EEOC), https://www.eeoc.gov/eeoc/litigation/reports/upload/16annrpt.pdf.

1997 the EEOC issued a statement that, while reaffirming its support for *voluntary* arbitration, criticized its mandatory use for employment discrimination claims. The statement noted that an increasing number of employers were requiring as a condition of employment that applicants and employees "give up their rights to pursue employment discrimination claims" and concluded that, while "not unmindful" of the case law (described below), mandatory arbitration agreements for discrimination claims should not be enforced.[159] Arguing that mandatory arbitration clauses must be situated within the context of the history and purpose of civil rights laws—widely understood as ensuring the equal rights guaranteed by the Fourteenth Amendment—EEOC Chairman Gilbert Casellas explained that mandatory arbitration clauses were a substitution of a "private dispute resolution system for the public justice system intended by Congress to govern the enforcement of the employment discrimination laws." Because mandatory arbitration in employment allows for little public accountability, he argued, its private nature both undermines deterrence and prevents the assessment of whether reform of employers' practices is needed. He considered this particularly problematic given the lack of a jury, the process of discovery, and highly limited opportunities for class actions. Casellas also noted that arbitration does not contribute to legal precedent, which further insulates arbitration outcomes from the public eye. As he concluded, "this leaves higher courts and Congress unable to act to correct errors in statutory interpretation," meaning "the risks for the vigorous enforcement of civil rights laws are profound." Finally, the EEOC argued that its own role is jeopardized in such a system because individuals could be unable to file complaints to their agency when bound by mandatory arbitration clauses.[160]

Because of this, the EEOC conflicted frequently with the Clinton Administration over the form and vigor with which to enforce civil rights policies in the workplace, and arbitration was often the center of these debates.[161] President Clinton continued to promote ADR and arbitration as a way to address the excesses of bureaucracy, even promoting a new policy of mandatory arbitration for government agencies engaged with the public.[162] As an example of this tension, Claire Gonzales of the EEOC complained to the White House about comments the president made in his State of the Union Address of 1998, in which he publicized the EEOC's "backlog of 60,000 complaints" and made clear that he thought the agency should use arbitration and other forms of ADR to remedy it.[163] Clinton's "New Civil Rights Enforcement Initiative" announced that year also proposed that a third of the EEOC's increased budget should be devoted to making a "dramatic expansion" in the agency's ADR program to allow as many as 70 percent of complaints received to go through mediation. This change would reduce the backlog, he publicly noted, from 64,000 to 28,000 cases by the year 2000.[164] More broadly, Clinton continually made clear that he considered arbitration, ADR, and "mandatory pre-complaint counseling" obvious reforms that the EEOC continued to resist, both at its own peril and to the detriment of individuals with employment claims.[165]

Pro-employer organizations also lobbied the government extensively for the EEOC to change its 1997 guidance. The Equal Employment Advisory Council, for example, provided an extensive analysis of what it called the agency's nomination of "problematic agency regulations" with regard to its "anti-arbitration guidance."[166] However, notwithstanding these efforts, the agency declined to update their policy in the early 2000s[167] Even during the George W. Bush administration, the EEOC continued to oppose mandatory arbitration agreements. As the general counsel's office reiterated in 2003, the agency would continue to "seek to remove barriers to employees' access to redress for discrimination, such as predispute, compulsory arbitration agreements that deny discrimination victims the process afforded in the federal courts. We file suit on behalf of individuals who otherwise would be compelled to bring their claims to an arbitrator

159. U.S. Equal Employment Opportunity Commission, *Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment* (2 EEOC Compliance Manual, BNA no. 915.002, July 10, 1997), pp. at 281–87, https://www.eeoc.gov/policy/docs/mandarb.html.

160. Ibid.

161. "Race-Race Initiative Policy-Civil Rights Enforcement [2]," in Elena Kagan's Domestic Policy Council Files, box 41, folder 12, Clinton Presidential Records: White House Staff and Office Files, 2009-1006-F.

162. "Can Federal Government Enter into Binding Arbitration," in Civil Justice Reform EO [2], Office of the Counsel to the President, 2009-1006-F, Clinton Presidential Records: White House Staff and Office Files.

163. Claire Gonzales to Sylvia M. Mathews/WHO/EOP, Thomas L. Freedman/ODP/EOP, "EEOC Funding Talking Point," January 29, 1998, and "Memorandum from Tom Freedman, Mary L. Smith to Elena Kagan, Re: EEOC Proposed Rule for Federal Agencies," January 6, 1998 in Civil Justice Reform EO [2], Office of the Counsel to the President, 2009-1006-F, Clinton Presidential Records: White House Staff and Office Files.

164. "New Civil Rights Enforcement Initiative," January 19, 1998, Civil Justice Reform EO [2], Office of the Counsel to the President, 2009-1006-F, Clinton Presidential Records: White House Staff and Office Files.

165. Memorandum: To Marvin Krislov from Alan M. Freeman, Re: Administration Proposals to Modify HR 2721: The Federal Employee Fairness Act of 1993, Domestic Policy Council Files, box 10, Clinton Presidential Records: White House Staff and Office Files, Clinton Presidential Records.

166. See, e.g., Equal Employment Advisory Council to John Morall, Office of Information and Regulatory Affairs, Office of Management and Budget, May 28, 2002, https://georgewbush-whitehouse.archives.gov/omb/inforeg/comments/comment2.pdf.

167. Ibid.

rather than a court."[168] The EEOC's position only changed in December 2019 when the President Trump–led agency rescinded and did not immediately replace the 1997 guidance. This change, the agency noted in a press release on December 16, was in response to the strengthening legal precedent favoring private arbitration. "In light of the Supreme Court's rulings," the agency announced, the 1997 policy statement "does not reflect current law" and "should not be relied upon by EEOC staff in investigations or litigation."[169]

In total, the private-sector conversion of arbitration has existed in tension with the administrative state, itself often divided on the extent to which arbitration should be used. As a continuation of long-standing support from Democrats for its use in certain contexts, President Clinton in particular extended the narrative of arbitration as litigation reform to include it as a potential reform for the problem of overburdened agencies like the EEOC as well. This led to continued investment in the infrastructure for arbitration and occurred alongside its increased use by employers. This paradigm created a tension with the EEOC itself, which drew a stark line between the federal government's embrace of "public" arbitration and arbitration in the private sector. While the agency is limited in terms of the institutional tools at its disposal for regulating private arbitration outright, in its litigative capacity it has maintained a role as providing a "substitute" for enforcement litigation when employees themselves are prohibited from filing lawsuits due to these clauses. However, as the Supreme Court began to dramatically expand the degree to which private employers could use arbitration, the locus of conversion once again shifted. As I describe below, in light of the Court's arbitration jurisprudence, it is unclear at best whether or not employers are meaningfully impacted by public regulation at all, given the insulation that the Court has provided the private sector in their use of mandatory arbitration.

3.3. Judicial Conversion

Beginning in the late twentieth century, the Supreme Court decided a number of cases that began to reshape the legal landscape of arbitration, and its most recent cases have inspired another wave of corporate experimentation with mandatory arbitration clauses. The Court has accomplished this in two primary ways, with many more far-reaching effects. First, the Court has engaged in what scholars have characterized as a "misappropriation" of labor law, wherein the Court equates collectively bargained contracts with employer-promulgated contracts. This "misplaced reliance on traditional labor law jurisprudence,"[170] which applies to the labor-management relationship as governed under federal labor law, has allowed employers to "cash in" on labor-management's reputation of fairness and voluntariness.[171] This trend is in many ways premised upon the Court's mid-twentieth century *Steelworkers* precedent that, as discussed, established the practice of strong judicial deference to labor arbitration. While the Court that decided the *Steelworkers* trilogy almost certainly did not intend for this deference to apply to the outcomes of employment arbitration—a form of arbitration not even in practice at the time—as a precedent, it proved ideal for conversion at the hands of an increasingly conservative Supreme Court arguably animated by an anti-litigation and pro-business vision.[172]

Second, the Court has given the FAA an increasingly prominent role in shaping the legalities of dispute resolution, applying it to a wide range of disputes arguably beyond what it was initially intended to do. In the process, since the 1980s the Court has determined that (1) the FAA preempts all state law that discourages or limits arbitration; (2) arbitration is a sufficient dispute resolution process for protecting most statutory rights, including major civil rights provisions, with dramatically limited judicial review of arbitration outcomes; (3) it has granted arbitrators—not judges—the authority to determine whether contractual arbitration provisions are valid or not; and (4) it has allowed corporations to prohibit class action lawsuits against themselves. They have also controversially expanded the reach of the law to allow companies to ban collective arbitration and compel the arbitration of individual employee disputes.[173] On the one hand, these decisions are consistent with the Court's broader efforts to reduce litigation in general, as well as with broader trends in labor jurisprudence that have shifted bargaining power away from individual employees and toward

168. U.S. Equal Employment Opportunity Commission, *Office of General Council Fiscal Year 2003 Annual Report*, https://www.eeoc.gov/eeoc/litigation/reports/03annrpt/.

169. "Recission of Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment," U.S. Equal Employment Opportunity Commission, December 16, 2019, https://www.eeoc.gov/wysk/recission-mandatory-binding-arbitration-employment-discrimination-disputes-condition

170. Comsti, "A Metamorphosis," 19.

171. See Arnold M. Zack, "Agreements to Arbitrate and the Waiver of Rights under Employment Law," in *Employment Dispute Resolution and Worker Rights in the Changing Workplace*, ed. Adrienne E. Eaton and Jeffrey H. Keefe (Ithaca, NY: Cornell University Press, 1999), 67–94.

172. For an extended discussion of the treatment of corporations by courts, see Jonathan H. Adler, ed., *Business and the Roberts Court* (New York: Oxford University Press, 2016); Adam Winkler, *We the Corporations: How American Business Won Their Civil Rights* (New York: Liveright, 2018).

173. It is important to note that the Court has also altered relevant aspects of contract law in order to accomplish these ends. These changes are more relevant to the law of commercial and consumer arbitration, but some—like doctrines governing "contracts of adhesion," for example—apply to contracts of employment as well.

employers.[174] But on the other, a variety of legal scholars have argued that these decisions, if taken at face value, reflect such a misinterpretation of the legislative and political history of arbitration to suggest that the Court's work might more accurately be viewed as a manifestation of an anti-litigation agenda specifically geared toward protecting strong institutional defendants from lawsuits.[175]

Three sections of the FAA are especially relevant to this controversial jurisprudence and its effects. First, some scholars argue that Section 1 of the FAA contains an "exclusionary clause" (which exempts seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce from its terms) that could be interpreted to exclude *all* contracts of employment from the scope of the law. The Court, however, has declined to take this position. Second, Section 2 of the law states that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[176] As I discussed, this section of the law is thought to reflect a consensus that, at a time when courts largely refused to enforce arbitration clauses as they did other contracts, Congress simply meant for arbitration contracts to receive the same treatment as other valid contracts. Third, Section 10 stipulates that, after an arbitrator rules on a case, a party is permitted to return to court for review.

From the bill's passage in 1925 until the 1980s, these sections of the FAA were interpreted in light of its legislative history to mean that arbitration must be voluntary and could be reviewed in court under certain conditions. Cases requiring an interpretation of the FAA were also rare during this period. By contrast, since the 2000s, there have been as many challenges to arbitration practices that require an interpretation of the FAA as there were in the first seventy-five years of the law.[177] With the modern expansion of arbitration, it is not particularly surprising that the courts would weigh in the contours and limits of its use, especially in seeking to balance the due process rights of individual litigants and the right to trial with arbitration's usefulness in terms of providing a more expedient dispute resolution process. But *requiring* potential employees to sign away their right to trial as a condition for taking a job raises questions as to what the FAA allows—or, more precisely, what courts *interpret* that the law requires. And as a general trend, since the 1980s, the Court has overwhelmingly presumed the validity of private arbitration agreements—a development that prompted even Justice Clarence Thomas to comment on the degree to which the Court had "expanded the reach and scope" of the FAA, "absent any indication Congress intended such a result."[178]

The Court began this process in 1983, establishing a "liberal federal policy favoring arbitration (*Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*)."[179] The next year the Court narrowed the circumstances under which a state court could invalidate an arbitration agreement (*Southland Corporation v. Keating*)[180] and in 1985 overruled an earlier line of cases that had excluded federal statutory claims from being compelled to arbitration. On the latter, in three cases known as Mitsubishi trilogy (most prominently, *Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*),[181] the Court approved the compulsory arbitration of statutory claims arising under antitrust, securities, and racketeering laws. As a result of the three cases, the Court created a presumption of arbitrability, concluding in *Soler* that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." The Court also made clear that, when called upon to interpret whether or not Congress intended in a given statute to *preclude* arbitration, it would have to be explicit: "having made the bargain to arbitrate," the Court concluded, "the parties should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."[182] As Richard Bales has argued, this presumption of arbitrability is based on two assumptions: (1) that an arbitration agreement does not involve a waiver of substantive rights and (2) that arbitrators are in fact capable of deciding complex statutory issues.[183] On the first, the *Mitsubishi* Court took the position that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than judicial forum. It trades the procedures and opportunities for review of the courtroom for the simplicity, informality, and expedition of arbitration."[184] On the second, the Court downplayed the idea that arbitrators may be biased, noting that arbitrators are "drawn from the legal as well as the business community," rendering fears about incompetence or bias insufficient for

174. For a larger discussion of the conservative turn of law in the workplace, see Lee, *The Workplace Constitution.*

175. See, e.g., Resnik, "Diffusing Disputes."

176. 9 U.S.C. § 2 (2012).

177. Gross, "Justice Scalia's Hat Trick," 123.

178. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), Thomas dissenting.

179. 460 U.S. 1 (1983).

180. 465 U.S. 1 (1984).

181. 473 U.S. 614 (1985).

182. Ibid., 628.

183. See, e.g., Richard A. Bales, *Compulsory Arbitration: The Grand Experiment in Employment* (Ithaca, NY: Cornell University Press 1997).

184. Ibid., 628.

supporting a presumption against arbitration. Both of these holdings departed significantly from prior precedent.

The *Mitsubishi* trilogy also marked an important juncture in equating modern arbitration contracts with the collectively bargained union contracts of the twentieth century. One of the precedents altered by *Soler*— the core of the Court's decision in *Alexander v. Gardner-Denver*[185]— involved a statutory claim that an employer argued was arbitrable pursuant to the terms of a collective bargaining agreement, as well as in terms of the *Steelworkers* trilogy presumption in favor of arbitrability. The legal claim in *Gardner-Denver,* however, was statutory; while Harrell Alexander, a drill operator, was a member of the United Steelworkers of America, the complaint that he filed in federal court was a Title VII racial discrimination claim. As such, the Court was faced not only with deciding whether or not Alexander had effectively given up his right to file such a claim in court (given that it was also subject to arbitration), but also whether and how it might distinguish statutory employment claims from labor arbitration.

The Court held that Alexander did *not* give up his Title VII discrimination rights by first pursuing a grievance through union arbitration. It provided several reasons why arbitration would be insufficient for resolving his Title VII claims. Labor arbitrators, they reasoned, do not have the authority to decide such cases, given that their authority stems from a collective bargaining agreement. As such, their authority "pertains primarily to the law of the shop, not of the land." The unanimous Court also determined that arbitration could not replace litigation because the fact-finding process in the former is not comparable to that governed by legal procedure; specifically, arbitrators are not required to give written decisions, and individuals do not have a say in shaping and presenting their grievances through a union. Six years after the decision, in *Barrentine v. Arkansas-Best Freight System, Inc*,[186] the Court further clarified that statutory workplace rights should be considered independent of the collective bargaining process and, as such, could not be waived by a union or employer. Even in his dissent to the *Barrentine* decision, Chief Justice Burger took a strong position with regard to the issue of private enforcement of employment discrimination laws: As he put it, "it would not comport with the congressional objectives behind a statute seeking to enforce civil rights protected by Title VII to allow the very forces that had practiced discrimination to contract away the right to enforce civil rights in the courts."[187] As such, in the early 1980s, arbitration agreements—whether the product of collective bargaining or individual, private contracts—could not be enforced if they precluded the litigation of a statutory civil rights claim.[188]

But despite these precedents and reasoning, in reversing its position in the *Mitsubishi* trilogy, the Court began an alternate process of equating labor and employment arbitration contracts. To this end, they also "recruited" the FAA and began to apply it to questions regarding employment arbitration. This came to the fore in *Gilmer v. Interstate/Johnson Lane Corp.* in 1991, a transformational moment in terms of the Court's employment arbitration jurisprudence. The case involved a 62-year-old who was fired by the company and subsequently filed a charge with the EEOC. Shortly thereafter he also filed a civil suit, alleging that the company had violated the ADEA by firing him because of his age. In reply, the company filed a motion to compel arbitration, given that Gilmer had signed an arbitration clause. The district court denied the motion, arguing that, under the Supreme Court's decision and reasoning in *Gardner-Denver,* Congress had intended to protect individuals' access to courts under the ADEA. In addition to adopting the *Gardner-Denver* rationale for preserving his right to pursue his statutory claim, Gilmer argued (in line with several amicus briefs filed in the case) that the "exclusionary clause" of the FAA made the law's provision inapplicable to his case.

Although the reigning view, as one commentator put it, was that "before 1991, no employment law practitioner would have thought it possible that courts would enforce an agreement requiring arbitration of statutory discrimination claims,"[189] the Court rejected his arguments. The majority argued instead that Gilmer failed to prove that the law specifically precluded arbitration of ADEA claims; in fact, by their logic, because Congress subjected ADEA claims to EEOC enforcement, the Court argued that it was clear that Congress did *not* in fact intend for all disputes under the law to be decided by the courts. Further, the Court determined that, because the arbitration clause was part of a securities registration application with the New York Stock Exchange that Gilmer had to sign before he could start his job (and not technically with his "employer"), the exclusionary clause in Section 1 of the FAA did not apply. The Court later reaffirmed this position in *14 Penn Plaza LLC v. Pyett*,[190] arguing that a provision in a collective bargaining agreement that clearly required union members to arbitrate ADEA claims was valid

185. 415 U.S. 36 (1974).
186. 450 U.S. 728 (1981).
187. Ibid., 950.

188. The Court also addressed this in another case in 1981 (*McDonald v. City of West Branch*, 466 U.S. 728), holding that a labor arbitrator's decision could not restrict an employee from litigating a wrongful discharge claim.

189. Michael Z. Green, "Retaliatory Employment Arbitration," *Berkeley Journal of Employment & Labor Law* 35, no. 1–2 (1994): 206–207.

190. 556 U.S. 247 (2009).

and enforceable as a matter of federal law. Notably, the Obama administration filed an amicus brief on behalf of the United States in the *Penn Plaza* case, arguing that the Court should have reached the opposite conclusion. "Although arbitration," the brief concludes, "indeed has many virtues, and an employee's decision to take advantage of its benefits must be respected, nothing in the general federal policy favoring arbitration compels the subjugation of an individual's decision whether to pursue arbitration to that of a union."[191]

Since *Gilmer*, the Court has repeatedly taken the position that substituting arbitration for litigation is simply a switch in what are otherwise equal dispute resolution forums, and have since "eagerly and aggressively expanded the FAA to favor forced arbitration of workplace disputes." *Gilmer*, coupled with the passage of the CRA of 1991 and the conservative backlash to it, set off an era of jurisprudence in which some argue the Court has "elevated corporate interests above the rights of individuals to have their day in court."[192] Most prominently, in *Circuit City Stores, Inc. v. Adams* in 2000, the Court explicitly shut the door on the "exclusionary clause" exception to the FAA. Taking the position that the FAA's exclusion of "contracts of employment" from its terms applied only to transportation workers, a 5–4 majority rejected the argument made on behalf of a sales counselor that her discrimination claim should be excluded from forced arbitration. As such, the Court made clear that arbitration agreements with most all categories of workers are in practice subject to the FAA, even when the agreement to arbitrate is contained in a contract of adhesion, or even in the employment application itself. In other employment-related cases, the Court has since also determined that, when an employee challenges whether an arbitration agreement is "unconscionable" under the FAA, it is the arbitrators—not judges—who have the authority to make this determination (*Rent-A-Center West, Inc., v. Jackson*[193]). They have also established that, even when an arbitrator incorrectly interprets an arbitration agreement, the "price" of agreeing to such a contract is that the decision nonetheless stands (*Oxford Health Plans v. Sutter*[194]).

In the aftermath of these decisions, another wave of corporations rushed to include mandatory arbitration clauses in their standard contracts,[195] a consequence perhaps foreseen in many of the amicus briefs filed in the three cases. Groups as diverse as the NAACP and NOW (National Organization for Women) Legal Defense Funds, the National Academy of Arbitrators, and even the George W. Bush Administration filed briefs in support of the respondents in these cases, arguing that "contracts of employment" should be excluded by the FAA. By contrast, the U.S. Chamber of Commerce's brief in *Rent-A-Center* (which exemplifies the corporate position in these cases) stressed the importance of requiring that arbitration agreements be enforced as written and "not altered to suit judicial policy preferences."[196]

But after reaching an "equilibrium" of sorts, in which corporations appeared to have fully "tested the boundaries of their ability to create a parallel procedural universe for consumer cases,"[197] the Court again opened new doors. In three cases involving arbitration broadly—*AT&T v. Concepcion*,[198] *CompuCredit v. Greenwood*,[199] and *American Express v. Italian Colors Restaurant*[200]—the Court sharply limited the arguments available to parties challenging the enforcement of arbitration clauses of *all* kinds. First, in *Concepcion*, 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, which are often considered essential by consumer rights advocates when the costs of arbitration might be too high for any one individual to bear. The case involved a group of customers who alleged that the contract they agreed to when signing up for mobile service contained a fraudulent provision under California law: a mandatory arbitration agreement that was required as part of the terms of service. A 5–4 majority held that the FAA preempts "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives,"[201] despite—as Justice Breyer argued in dissent—that nothing in the legislative history of the FAA or the act itself indicates the intention to compel arbitration to such an extent.

Second, the Court heard a challenge to CompuCredit, which marketed a subprime credit card to individuals with weak credit scores. A group of consumers filed suit, again in California, under the Credit Repair Organizations Act (CROA)—a federal consumer protection statute banning a variety of deceptive practices by credit repair organizations—contending that the promotional materials for the card were indeed deceptive. The Court's majority reversed the lower courts holdings, concluding that the provision of the CROA requiring credit repair organizations to notify customers that they "have a right to sue a credit repair organization that violates the Credit Repair Organization Act" does not reflect

191. Brief for the United States as Amicus Curiae Supporting Respondents, No. 07-581, 9.
192. Comsti, "A Metamorphosis," 13.
193. 561 U.S. 63 (2010).
194. 569 U.S. 564 (2013).
195. Horton and Chandrasekher, "After the Revolution," 67–68.
196. Brief of the Chamber of Commerce of the United States of America as Amicus Curiae Supporting Petitioner.
197. Horton and Chandrasekher, "After the Revolution," 70–71.
198. 563 U.S. 533 (2011).
199. 565 U.S. 95 (2012).
200. 570 U.S. 228 (2013).
201. *Concepcion*, 9.

congressional intent to preclude arbitration of claims arising under the act.[202]

Third and finally, in *Italian Colors*, several merchants brought suit against American Express, arguing that the agreement the company imposed on them violated federal antitrust law. As with the previous two cases, the merchants had signed an arbitration clause and a class action waiver. In response to defendant's motion to compel arbitration, they challenged the enforceability of the class action waiver, arguing that if they could not proceed as a class, they had no financially reasonable means of pursuing their antitrust claims, which require extensive discovery and are especially costly to litigate. The Court again overturned the lower court and denied plaintiffs' right to litigate, holding that the prohibitively high cost of individual litigation was not a sufficient reason for a court to overrule a clause forbidding class actions. Justice Kagan wrote for the dissenters, arguing that the very purpose of the FAA was to *facilitate* the resolution of disputes and that, by barring any means of sharing or lessening the costs of dispute resolution, the clause amounted to granting American Express immunity from potentially meritorious federal claims. The new "normal," as she describes, is that "the monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[203]

In aggregate, these three decisions establish that courts must enforce arbitration agreements unless (1) there is an explicit contrary congressional command; (2) the arbitration agreement expressly strips one party of the substantive right to pursue a federal statutory claim; or (3) a state-law contract defense invalidates the agreement—but only if that defense does not "discriminate" against arbitration and does not frustrate the purposes of the FAA as interpreted by the Court. Legal scholars have argued that the effect of these decisions is that "virtually no ground exists to challenge an unfair arbitration clause."[204] These developments have also led to widespread criticism that employers now use arbitration as a mechanism to force individuals to give up their right to go to court, with a goal toward pushing employees into a forum that is more hospitable to the defendant. While industry in general references any lingering bipartisan consensus around arbitration for support when challenged, these decisions also prompt concern that what are essentially one-sided contracts are now fully enforceable in court, including class action waivers and even provisions that delegate the question of arbitrability itself to the arbitrators.

The Court has since turned its attention to the legal relationship between mandatory arbitration agreements and prohibitions on class proceedings, with important effects for employment disputes. Perhaps the most controversial of the Court's decisions was *Epic Systems v. Lewis* in 2018, in which the Court was tasked with "harmonizing" the terms of the FAA with the NLRA. The plaintiff in the case sued the company on behalf of himself and similarly situated employees who claimed that they had been denied overtime wages. The company, which requires its employees to sign a contract stating that they will resolve any employment-based disputes through individual arbitration *and* waive their right to participate in class proceedings, moved to dismiss the case. The district and appeals courts denied the company's motion on the grounds that the clause was unenforceable because it violated the right of employees to engage in "concerted activities" as per the terms of the NLRA. The Supreme Court, however, held that the FAA supersedes the NLRA. Because, as Justice Neil Gorsuch wrote, the NLRA "does not mention class or arbitration procedures," the law cannot be read to displace the FAA.

While the Court gave workers an important victory in *New Prime Inc. v. Oliveira*,[205] finding that judges have the ultimate authority to determine whether the FAA applies to independent-contractor relationships, the Court followed with a decision in the same term reiterating more broadly that the FAA allows arbitrators and *not* judges to determine whether a claim to compel arbitration should be considered "wholly groundless" under the FAA or not.[206] Further, in *Lamps Plus, Inc. v. Varela* in 2019,[207] the 5–4 conservative majority relied heavily on its controversial *Epic Systems* precedent in deciding that workers cannot arbitrate as a class against a company unless their contracts specifically allow it. Groups like the American Association of Justice (AAJ, formerly the Association of Trial Lawyers of America) and Public Citizen have become regular supporters of respondents in these cases, with the AAJ stressing that courts should consider the language of arbitration agreements in light of standard contract principles before disallowing practices like classwide arbitration, and with Public Citizen taking the position that the FAA simply does not require the enforcement of arbitration provisions that infringe upon workers' statutory rights to engage in concerted activities. The U.S. Chamber of Commerce continues to appear regularly on the side of business in support of arbitration in these cases, reflective of both their sustained level of support and investment in the now-dominant private arbitration regime.

202. 15 U.S.C. § 1679c— Disclosures.
203. *Italian Colors*, 1.
204. Gross, "Justice Scalia's Hat Trick," 132.
205. 586 U.S. (2019).
206. *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 586 U.S. (2019).
207. 586 U.S. (2019).

However, in 2020 the *Lamps Plus* precedent "backfired spectacularly," as a *Vox* article put it, when a district court judge denied DoorDash's efforts to resist arbitrating over 5,000 employee claims brought individually (but near-simultaneously), at a cost of at least 10 million dollars to the company before any of the disputes are even resolved.[208] The company asked the court to stay the individual arbitrations until a pending class action suit was approved, an argument that the judge in the case called "irony upon irony."[209] "For decades," Judge William Alsup wrote, "the employer-side bar and their employer clients have forced arbitration clauses upon workers, thus taking away their right to go to court, and forced class-action waivers upon them too."[210] Given that, in the case, "the workers wish to enforce the very provisions forced on them," he noted that he would not allow the company's "hypocrisy" to be "blessed."[211]

It is clear that courts have played a critical role in the conversion of arbitration from the paradigm operative at its origins to that in place now. They have done so by leveraging their institutional authority to control legal rules. While courts were largely inactive for the majority of arbitration's history, it is unsurprising that they would come to play such a pivotal role in employment arbitration's development, especially given that it is an outgrowth of other forms of arbitration only tangentially related to it. Further, as the literature on private enforcement suggests, courts are likely to play a role in policy interpretation and enforcement when there is a lack of clear administrative capacity to do so. Given the FAA's lack of any delegation of authority for the public enforcement of its provisions, courts retain significant power in this area, as does the private sector. By simultaneously opening the door for and insulating corporate innovation with the terms of employment contracts, the Court has entrenched the use of arbitration in the private sector, insulating further private-sector conversion as well.

4. CONCLUSION: THE POLITICS OF PRIVATE DISPUTE RESOLUTION

The current politics of arbitration is reflective of this long process of conversion that has come to locate much of the activity surrounding the contours of arbitration in the private sector itself. Until 2019 Congress had not passed meaningful arbitration legislation since the late 1990s.[212] States are still working to make inroads back into the debate, whether by proposing state laws that prohibit mandatory arbitration in contracts relating to sex discrimination and harassment[213] or by using Private Attorneys General Acts to in effect sue corporations on behalf of employees otherwise bound by arbitration clauses.[214] As corporations have increasingly included mandatory arbitration provisions in their employment contracts, however, reform movements in the private sector have become prominent. In December 2017, after much media scrutiny, Microsoft ended its practice of requiring forced arbitration for employees making sexual harassment claims. Several prominent law firms have ended their forced arbitration requirements amid public controversy as well: Munger Tolles & Olsson, for example, created a media firestorm when it came to light that it was requiring its summer associates to sign mandatory arbitration agreements and confidentiality waivers specifically exempting them from Title VII protections, among others. Students have also begun to exert public pressure. For example, students at Harvard Law School launched the Pipeline Parity Project in 2019, which they describe as "a grassroots campaign of law students fighting to end forced arbitration, stop workplace discrimination, and unrig the legal system."[215] The organization, as well as workers from Google, prominently announced their support for the Forced Arbitration Injustice Repeal (FAIR) Act in Congress. The Senate Judiciary Committee heard testimony on the FAIR Act in April 2019, and the House passed it in September of the same year. This bill proposes a broad ban on private arbitration agreements, prohibiting their use in the areas of future employment, consumer, antitrust, or civil rights disputes. It also "prohibits agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint class, or collective action related to an employment, consumer, antitrust,

208. Ian Millhiser, "DoorDash's Anti-Worker Tactics Just Backfired Spectacularly," *Vox*, February 12, 2020, https://www.vox.com/2020/2/12/21133486/doordash-workers-10-million-forced-arbitration-class-action-supreme-court-backfired.

209. *Terrell Abernathy, et al., v. DoorDash Inc.*, United States District Court, Northern District of California, No. C 19-07545 WHA.

210. *Ibid.*, 7.

211. *Ibid.*, 8.

212. Democrats in Congress have proposed some version of an "Arbitration Fairness Act" in almost every session since 2001, to no avail.

213. For example, New York has enacted one bill and has two more currently in committee, all of which prohibit mandatory arbitration provisions in contracts relating to allegations of sexual harassment. South Carolina is currently considering the "Ending Forced Arbitration of Sexual Harassment Act of 2018," that provides "no predispute arbitration agreement is valid or enforceable if it requires arbitration of a sex discrimination dispute."

214. For example, see Rachel Deutsch, Rey Fuentes, and Tia Koonse, "California's Hero Labor Law: The Private Attorneys General Act Fights Wage Theft and Recovers Millions for Lawbreaking Corporations," Center for Popular Democracy, February 2020, https://populardemocracy.org/sites/default/files/PAGA%20Report_WEB.pdf.

215. Sejal Singh and Andre Manuel, "Harvard Law Students Are Taking on Forced Arbitration," *The Nation*, April 15, 2019.

or civil rights dispute."[216] The Google walkout workers have also gone so far as to set up a phone drive for individuals to call and lobby their members of Congress to vote in favor of the bill.

Because these controversial arbitration clauses did not become ubiquitous until the 2000s, however, the media often describes them as a modern phenomenon. Whether conveyed as a recent corporate innovation or the product of the Roberts Court that, as one headline put it, has "unleashed arbitration on American workers," these accounts provide a current snapshot of arbitration that detaches it from its history. But this conversion is not simply the product of a modern critical juncture, and understanding the consequences of arbitration, particularly how it contributes to inequality in the workplace, requires close attention to arbitration's development over more than a century. As I have argued, abstracting private arbitration from its development obscures the gradual processes of change through which this long-standing institution in American politics was developed and then converted to new ends. Examining employment arbitration through its institutional, political, and legal development makes clear the ways in which this institutional conversion was the product of multiple actors targeting multiple institutions over time. Complicating the work of early scholars of institutional conversion, I argue that examining institutional change as a fundamentally intercurrent process allows us to capture the context in which change often occurs in politics: that is, among institutions put into place for different purposes, developed along distinct temporal paths, and existing in tension with each other.

As I have described, in this case many of the institutions and actors who support arbitration have remained stable; but a substantial period of bipartisan support in Congress and a shift toward a conservative Supreme Court open to a "corporate rights" agenda played a central role in enabling conversion.[217] Further, while a variety of actors and institutions have remained stalwart in their arguments in support of arbitration—that arbitration is an *improvement* upon litigation—its foundational institutional orders were eventually co-opted by actors for whom "improvement" looks very different from the conception held by arbitration's supporters at its origins. The path to modern arbitration also necessitated the conversion of institutions and rules put into place for different purposes. This institutional conversion—of laws like the FAA and legal precedents involving other areas of arbitration—was made easier because of the resources that an enduring cohort of liberals supporting arbitration had invested in it.

Examining the nature of the changes to arbitration's underlying power arrangements, dominant policy paradigm, institutional rules, and institutional resources also allows for a more nuanced understanding of the processes of conversion in any one institution, given the unique institutional tools at its disposal. In this case, the dynamics of change in the political, private, and judicial spheres share several characteristics. The mutability of under-defined rules like those established by the FAA allowed for both the expansion and entrenchment of private arbitration as well as its conversion. Further, early and enduring investments in arbitration by each of these institutions made for an infrastructure and policy paradigm appealing to a diverse array of actors and institutions. Importantly, that appeal subsequently raised the barriers for overt arbitration reform, even as conservatives in Congress, on the Court, and in the private sector began to convert its use to new ends. While the mechanisms for enacting these changes vary from institution to institution—defined by their unique capacity and tools—the ability to engage in conversion appears to rest on these shared characteristics of the arbitration regime. This distinct constellation of both resource-based and path-dependent reform efforts therefore complicate our current understanding of the processes of institutional conversion and, substantively, also suggests that arbitration as a case study adds an important contribution to a long-standing interest in the relationship between public and private power in the American state.

216. S. 610, 116th Congress, 1st Sess., introduced February 28, 2019. Democrats in the House have also introduced a bill that would end forced arbitration of sexual harassment claims (H.E. 1443) and one that would end forced arbitration for victims of data breaches (H.R. 327).

217. Winkler discusses this agenda at length in *We the Corporations.*