YALE LAW & POLICY REVIEW

Arbitration as Wealth Transfer

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Introduction

Over the last few decades, the Supreme Court has steadily expanded the reach of forced arbitration clauses—clauses that companies embed in the fine print of standard-form contracts to deny consumers and workers the right to band together to sue those corporations in court. While the Court's decisions that set this trend in motion trace back to the 1980s, the real game changers have been more recent: 2010's *Rent-A-Center v. Jackson*, holding that arbitration clauses must be enforced even when they are part of an illegal contract;[1] 2011's *AT&T Mobility v. Concepcion*, granting companies the unfettered right to enforce clauses that ban class actions;[2] and 2013's *American Express Co. v. Italian Colors Restaurant*, requiring enforcement even when doing so has the practical effect of completely precluding redress under a law enacted by Congress.[3]

The ramifications of the Court's arbitration jurisprudence are now clear. As predicted, companies across sectors have modified their contracts with employees and consumers to include these terms, blocking access to courts should disputes arise.[4] Cases that previously would have been litigated and publicly rec-

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1. Rent-A-Center W., Inc. v. Jackson, 561 U.S. 63 (2010).
2. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).
3. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).
4. Myriam Gilles, *Killing Them with Kindness: Examining "Consumer-Friendly" Arbitration Clauses After* AT&T Mobility v. Concepcion, 88 NOTRE DAME L. REV. 825 (2012); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623 (2012); Jessica Silver-

orded are now either diverted to a private arbitrator or not brought at all. Practically, this means that businesses can sidestep swaths of law. In the words of one federal judge, this trend is "among the most profound shifts in our legal history."[5]

Despite the gravity of these changes, forced arbitration has attracted relatively little public attention until recently. One obstacle is that few Americans are even aware of the clauses that govern a growing number of contractual relationships in their lives.[6] Another is that arbitration—as a legal issue at the intersection of contract law, civil procedure, and federalism—can seem abstract and esoteric. Yet when the public *is* informed about this private system of justice, its opinion is clear: a poll of likely voters in the 2016 election found that a whopping 75% supported the right of bank customers to take complaints to court, rather than being forced into private arbitration.[7]

There is reason to think the issue has reached a turning point. Recognizing that forced arbitration now functions as a "legal lockout,"[8] government agen-

Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System,'* N.Y. TIMES (Nov. 1, 2015), http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [http://perma.cc/C5ZA-SNNQ]. One study found that most franchisors have *not* adopted forced arbitration clauses in the wake of *Concepcion*, but, as the authors acknowledge, these findings "necessarily are limited to franchise agreements and may not be generalizable to consumer and employment contracts." Peter B. Rutledge & Christopher R. Drahozal, *"Sticky" Arbitration Clauses? The Use of Arbitration Clauses After* Concepcion *and* Amex, 67 VAND. L. REV. 955, 956 (2014).

5. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere: Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [http://perma.cc/UXT3-TGZX].

6. In a 2014 Consumer Financial Protection Bureau (CFPB) survey of credit-card holders, for example, half of all respondents said they did not know whether they had the right to sue their credit card issuer in court, and more than one-third of those who were bound by forced-arbitration clauses still believed, incorrectly, that they could take the company to court. *Arbitration Study: Report to Congress, Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act § 1028(a)*, CONSUMER FIN. PROTECTION BUREAU § 3, at 19 (2015) [hereinafter CFPB Study], http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [http://perma.cc/32Q2-86SJ].

7. Ams. for Fin. Reform & Ctr. for Responsible Lending, *1,000 Likely 2016 National Voters*, LAKE RES. PARTNERS (2015), http://ourfinancialsecurity.org/wp-content/uploads/2015/07/Toplines.AFRCRL.public.070715.pdf [http://perma.cc/S4TQ-XBCE] (polling 2016 likely voters on Dodd-Frank Wall Street Reform and Consumer Protection Act and the activities of the CFPB).

8. Richard Cordray, Dir., Consumer Fin. Prot. Bureau, Prepared Remarks at the Field Hearing on Arbitration Clauses (May 5, 2016), http://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-cfpb-director-richard-cordray-field-hearing-arbitration-clauses/ [http://perma.cc/P29C-96FQ].

cies have been moving to prohibit or limit the use of these clauses in form contracts. In recent years, the Department of Agriculture has limited the ability of meat processing companies to force arbitration on poultry farmers,[9] the Department of Defense has prohibited lenders from including forced arbitration clauses in contracts with military service members,[10] and the Department of Transportation has disallowed airlines from mandating arbitration in disputes with passengers.[11] In the last year alone, the Centers for Medicare & Medicaid Services (CMS) moved to regulate the use of mandatory arbitration in nursing home contracts,[12] the Department of Education drafted a rule to end forced arbitration in college enrollment agreements,[13] and the Department of Labor finalized regulations requiring that retirement advisors allow clients to bring class action suits.[14] Perhaps most significantly, in May 2016 the Consumer Financial Protection Bureau (CFPB) proposed a rule to eliminate arbitration clauses that include class action bans.[15] Although the move falls short of banning forced arbitration in consumer finance entirely, it would mark a vital first step in restoring consumer rights in a major market—one where information asymmetries and the general imbalance of power are most severe. Critically, the CFPB's rule would also require companies to disclose arbitration outcomes, effectively creating a public record of how consumers fare.

These efforts have marked a crucial opening for reform. But they face challenges on two fronts. First, corporate interests are heavily attacking these rules,

9. Press Release, U.S. Dep't of Agric., USDA Implements Provisions from 2008 Farm Bill To Protect Livestock and Poultry Producers (Dec. 8, 2011), http://www.gipsa.usda.gov/laws/Farmbill/1208%2011%20%20GIPSA%20PRFinal.pdf [http://perma.cc/3QBH-UR8Y].

10. Press Release, U.S. Dep't of Def., Department of Defense Issues Final Military Lending Act Rule (July 21, 2015), http://www.defense.gov/News/News-Releases/News-Release-View/Article/612795/department-of-defense-issues-finalmilitary-lending-act-rule [http://perma.cc/43N8-352J].

11. 14 C.F.R. § 253.10 (2017).

12. Medicare and Medicaid Programs; Reform of Requirements for Long-Term Care Facilities, 80 Fed. Reg. 42167, 42241 (proposed July 16, 2015), http://www.federalregister.gov/articles/2015/07/16/2015-17207/medicare-and-medicaid-programs-reform-of-requirements-for-long-term-care-facilities#h-159 [http://perma.cc/5BQ2-YCWP].

13. Press Release, U.S. Dep't of Educ., U.S. Department of Education Takes Further Steps To Protect Students from Predatory Higher Education Institutions (Mar. 11, 2016), http://www.ed.gov/news/press-releases/us-department-education-takes-further-steps-protect-students-predatory-higher-education-institutions [http://perma.cc/AF26-2G7Z].

14. Vin Gurrieri, *DOL Says Fiduciary Rule Can Discourage Class Waivers*, LAW360 (Jan. 18, 2017, 5:11 PM), http://www.law360.com/articles/882115/dol-says-fiduciary-rule-can-discourage-class-waivers [http://perma.cc/64VE-6HPC].

15. Cordray, *supra* note 8.

marshaling resources both to weaken regulations directly and to mount challenges in court. Second, the Trump Administration may roll back regulations implemented by agencies under President Obama or fail to implement regulations that would have been promulgated. While the details of Trump's position on arbitration are still unknown, several moves by the Administration suggest that it may undo or stall efforts to curb forced arbitration.[16] Ensuring that these efforts withstand attack will require close public attention and strong pressure. As we saw with the Federal Communication Commission's net neutrality rules under the Obama Administration, forceful public engagement on a regulatory issue can be decisive, emboldening officials to adopt strong rules even in the face of heavy corporate lobbying and attack.[17]

Given the pressing need for public attention, this Essay offers a fresh way to understand and talk about forced arbitration: as a wealth transfer. It argues that the rise and prevalence of forced arbitration clauses should be understood as both an outcome of and contributor to economic inequality, and that the national conversation about economic inequality should therefore include the debate over forced arbitration. Given the extreme levels of inequality in the United States—with the richest 0.1% of the country now holding the same share of national wealth as the bottom 90%[18]—the connection between arbitration and inequality is worth exploring in depth. Here, we examine this connection in three areas: antitrust, consumer protection, and wage-and-hour law. More generally, this Essay seeks to draw attention to the distributive features and effects of civil procedure. While there is growing recognition that changes in areas of substantive law (banking law, for instance, or tax law) may contribute to inequality, less attention is paid to the role of procedural law. Those interested in

16. Given that the Administration has rolled out a generally deregulatory agenda, it is reasonable to expect that regulations limiting forced arbitration, too, will be a target. For example, the "Presidential Executive Order on Reducing Regulation and Controlling Regulatory Costs" requires that executive agencies promulgating a new regulation also identify at least two existing regulations to be repealed. Exec. Order No. 13771, 82 Fed. Reg. 9339 (Jan. 30, 2017). The Trump Justice Department's decision to reverse course and file a brief *against* the CFPB in litigation challenging its constitutionality also suggests that the Administration may not champion policies advancing consumer protection. *See* Deepak Gupta & Jonathan Taylor, *In Consumer Bureau Showdown, It's Trump DOJ versus . . . Trump's DOJ*, TAKE CARE BLOG (Apr. 12, 2017), http://takecareblog.com/blog/in-consumer-bureau-showdown-it-s-trump-s-doj-versus-trump-s-doj [http://perma.cc/T3LE-43L2].

17. Gautham Nagesh, *How HBO's John Oliver Helped Move the Needle on Net Neutrality*, WALL ST. J. (Feb. 5, 2015, 5:05 PM), http://blogs.wsj.com/washwire/2015/02/05/how-hbos-john-oliver-helped-move-the-needle-on-net-neutrality/ [http://perma.cc/8XMP-VTJE].

18. Emmanuel Saez & Gabriel Zucman, *Wealth Inequality in the United States Since 1913: Evidence from Capitalized Income Tax Data* (Nat'l Bureau of Econ. Research, Working Paper No. 20625, 2014), http://www.nber.org/papers/w20625.pdf [http://perma.cc/SC3S-VPVZ].

addressing extreme wealth distribution should recognize procedures—including arbitration—as both a site and source of inequality.

The connection between inequality and arbitration exists, on the one hand, because many industries today are highly consolidated.[19] Concentration at the firm level has handed a relatively small number of companies outsized influence over the contractual terms that govern most transactions. This same consolidation has further tilted the balance of power away from workers and consumers, rendering them largely captive to whatever contractual terms businesses choose to impose. On the other hand this connection also exists because, as this Essay sketches out, arbitration has regressive effects. By both suppressing claims and yielding outcomes less favorable to workers and consumers, arbitration most likely transfers wealth upwards.

We follow in a long line of scholarship that recognizes our legal system as a mechanism of transferring wealth.[20] Legal scholars Guido Calabresi and Richard Posner have discussed the distributive effects of tort law.[21] Building on this idea, the business community has created an entire movement premised on the idea that tort law indefensibly transfers wealth from small business owners to trial lawyers.[22] Although research estimating the actual effects of tort law on lo-

19. Editorial Bd., *How Mergers Damage the Economy*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/opinion/sunday/how-mergers-damage-the-economy.html [http://perma.cc/5ZLG-V6QF] ("In too many industries, [ ] competition just doesn't exist anymore."); Theo Francis & Ryan Knutson, *Wave of Megadeals Tests Antitrust Limits in the U.S.*, WALL ST. J. (Oct. 18, 2015), http://www.wsj.com/articles/wave-of-megadeals-tests-antitrust-limits-in-u-s-1445213306 [http://perma.cc/WHP3-MRG7] ("A growing number of industries in the U.S. are dominated by a shrinking number of companies."); Lina Khan & Sandeep Vaheesan, *How America Became Uncompetitive and Unequal*, WASH. POST (June 13, 2014), http://www.washingtonpost.com/opinions/how-america-became-uncompetitive-and-unequal/2014/06/13/a690ad94-ec00-11e3-b98c-72cef4a00499_story.html [http://perma.cc/9WAY-46GD]; Jason Furman & Peter Orszag, A Firm-Level Perspective on the Role of Rents in the Rise of Inequality (Oct. 16, 2015) (unpublished manuscript), http://obamawhitehouse.archives.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf [http://perma.cc/6DKY-8C3T].

20. This is not to suggest these scholars hold wealth distribution to be a primary aim of law; rather, they observe redistribution as an effect.

21. GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (1973); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

22. For example, the Heritage Foundation describes how a Texas Supreme Court decision invalidating a cap on medical malpractice damages spurred a host of lawsuits, resulting in "[t]he economic transfer of wealth from professionals and business owners to plaintiffs' lawyers." Joseph Nixon, *Ten Years of Tort Reform in Texas: A Review*, HERITAGE FOUND. 2 (July 26, 2013), http://thf_media.s3.amazonaws.com/2013/pdf/bg2830.pdf [http://perma.cc/V2UE-FAEU]. A video from the U.S. Chamber Institute for Legal Reform, an arm of the U.S. Chamber of

cal economies is limited, "[t]he risks of tort liability allegedly include the unjustified transfer of wealth and the deterrence of valuable economic activity."[23]

Scholars have similarly noted redistributive effects beyond tort law. When Congress passed the Copyright Term Extension Act—extending copyright protection on existing copyrightable material by twenty years—experts described the law as a wealth transfer from individual users to large, rights-holding companies.[24] Scholars have also argued that curbing unjust wealth transfers was a primary aim of the Sherman Antitrust Act.[25] Others have even identified legal uncertainty writ large as transferring wealth from poor to rich.[26]

This tradition is less developed in areas of procedural law. While the unequal effects of our civil procedure system on low-income and indigent litigants are acknowledged, rarely are changes to civil procedure itself framed as wealth transfers. Identifying the distributional effects of civil procedure not only clarifies the stakes of cases like *Concepcion*, but also may help draw public attention to issues that are by nature dry, obscure, and technical.

I. How We Got Here: Forced Arbitration's History in a Nutshell

Until the 1920s federal courts refused to enforce arbitration agreements. But in the early decades of the twentieth century, as the number of corporate transactions—and, by extension, disputes—grew, businesses wanted courts to give

Commerce, captures generally the perspective animating the tort reform movement:

> [T]oday we have become the global leader in excessive lawsuits, a distinction that costs our economy billions of dollars ($264 billion)—that's around $850 per year for every man, woman, and child in the country. Excessive litigation hurts everyone and hampers America's ability to compete in the global economy. Annually, litigation drains over $100 billion from small business owners, the majority of whom must pass this burden on to consumers in the form of higher prices, or to their employees as benefit cuts and hiring freezes.

What We Do, U.S. CHAMBER INST. FOR LEGAL REFORM, http://www.instituteforlegalreform.com/about-ilr/what-we-do [http://perma.cc/TL83-7VP3].

23. Frank B. Cross, *Tort Law and the American Economy*, 96 MINN. L. REV. 28 (2011).

24. Richard E. Epstein, *Congress's Copyright Giveaway*, WALL ST. J. (Dec. 21, 1998), http://www.wsj.com/articles/SB914020106725635500 [http://perma.cc/F5V3-BSYW] ("Removing these works from the public domain works a huge uncompensated wealth transfer from ordinary citizens to Disney, Time Warner and other holders, corporate and individual, of preexisting copyrighted material.").

25. Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982).

26. Uri Weiss, *The Regressive Effect of Legal Uncertainty* (Tel Aviv Univ. Law Faculty Papers, Working Paper No. 30, 2005), http://law.bepress.com/cgi/viewcontent.cgi?article=1030&context=taulwps [http://perma.cc/G9LM-AN8L].

arbitration agreements the force of law.[27] Arguing that arbitration would relieve congested courts, business interests lobbied Congress to let them set up private solutions that would be faster and cheaper than public courts. When officials expressed concern that arbitration would let "the powerful people . . . come in and take away the rights of the weaker ones," supporters of arbitration legislation assured them that the device would be used only between consenting merchants of roughly equal bargaining power, and not against workers or consumers.[28] In 1925, Congress passed the Federal Arbitration Act (FAA) with a unanimous vote.

For much of the twentieth century, arbitration largely worked as Congress had intended: to resolve the sorts of fact-based contractual disputes that arise between businesses in the course of routine transactions—concerning whether a party had complied with the terms of payment, for example, or delivered goods at the right place and the right time.[29] Federal statutory claims were categorically outside of the FAA's reach, as were all claims brought by workers and all claims brought in state court. The insertion of arbitration clauses into mass contracts with consumers or workers was unheard of.

Starting in the 1980s, however, the U.S. Supreme Court issued a series of decisions that would begin to steer us down an entirely new path. One key moment came in 1983, when the Court declared that the FAA reflected a "federal policy favoring arbitration."[30] The idea that Congress had intended arbitration as *preferable* to courts, rather than just as an alternative, was not founded in legislative history.[31] Still, the Court's language suggested as much, and future judges would lean on it as they razed the walls that had kept arbitration in its place.

Two successive decisions cemented what might have been a quirky deviation into a major turning point. In 1984, the Supreme Court heard a case brought in California by 7-Eleven franchisees against their parent company, Southland, which had included in their contracts a binding arbitration clause.[32] California outlawed these clauses, recognizing that franchisees usually lacked power to negotiate these terms. Yet Southland argued that its contract overrode state law. Drawing on the Court's interpretation from the previous year—that Congress had intended a "federal policy favoring arbitration"—a seven to two majority on the Supreme Court ruled for Southland, eroding the power of states to limit how companies use arbitration.

27. IMRE SZALAI, OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA (2013); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. U. L. REV. 99 (2006).

28. Moses, *supra* note 27, at 106–07.

29. *Id.* at 111.

30. Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983).

31. Moses, *supra* note 27, *passim*.

32. Southland Corp. v. Keating, 465 U.S. 1 (1984).

In a striking dissent, Justice Sandra Day O'Connor criticized the majority for ignoring legislative history. "Today's decision is unfaithful to congressional intent, unnecessary, and . . . inexplicable," she wrote. "Although arbitration is a worthy alternative to litigation, today's exercise in judicial revisionism goes too far."[33]

It would soon go even further. In 1985, the Supreme Court heard *Mitsubishi v. Soler Chrysler-Plymouth*, a case in which a car dealer had sued the Japanese firm for violating antitrust laws, and Mitsubishi had pushed to arbitrate.[34] The car dealer noted that the FAA allowed companies to use arbitration only to settle disputes about contracts they had written, not to interpret laws Congress had passed, like the Sherman Antitrust Act. A five-justice majority—continuing its recent pattern of pro-arbitration decisions—sided with Mitsubishi. Arbitrators could now rule on actual statutory law—civil rights, labor protections, as well as antitrust—despite being unaccountable to the public.

In a powerful dissent, Justice John Paul Stevens warned that there were great dangers in allowing "despotic decision-making," as he called it, to extend to law like antitrust. "[Arbitration] is simply unacceptable when every error may have devastating consequences for important businesses in our national economy, and may undermine their ability to compete in world markets," he wrote.[35]

In the span of these three decisions, the Supreme Court drastically enlarged the scope of arbitration. And against the backdrop of a movement claiming excessive lawsuits were strangling small businesses, courts would continue to expand the realms in which companies could compel arbitration. In the 1995 case *Allied-Bruce Terminix v. Dobson*, the Supreme Court permitted the use of arbitration clauses by companies in routine consumer contracts.[36] This prompted Justice O'Connor to remark that, "over the past decade, the Court has abandoned all pretense of ascertaining congressional intent with respect to the Federal Arbitration Act, building instead, case by case, an edifice of its own creation."[37] In 2001, the Court ruled against a group of Circuit City workers, holding that employers could use arbitration clauses in contracts with employees despite statutory language to the contrary.[38] In 2004, the Fifth Circuit ruled

33. *Id.* at 36 (O'Connor, J., dissenting).

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

35. *Id.* at 657.

36. Allied-Bruce Terminix Cos. v. Dobson, 513 U.S. 265 (1995).

37. *Id.* at 283 (O'Connor, J., concurring).

38. Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001). This decision is impossible to square with both the statutory text and legislative history. As one of the FAA's architects explained in 1923:

> It is not intended this shall be an act referring to labor disputes, at all. It is purely an act to give the merchants the right or the privilege of sitting

that arbitration clauses were enforceable against illiterate consumers;[39] a separate court ruled that they were enforceable even when a blind consumer had no knowledge of the agreement.[40]

Yet the real watershed came in 2011, in *AT&T Mobility v. Concepcion*. Vincent and Liza Concepcion had sued AT&T in federal court in California, alleging that the company had engaged in false advertising by claiming that their wireless plan included free cell phones—a practice that had shortchanged millions of consumers out of about thirty dollars each. When they tried to litigate as a class, AT&T pointed to the fine print in their contract, which included a class action ban.

The Concepcions pointed out that class action bans violated California law. Many state and federal courts had forbidden class action bans, on the grounds that individuals often had no practical way to make a claim unless they joined with other plaintiffs to share the cost of litigating. Allowing companies to eliminate this right in "take-it-or-leave-it" contracts would effectively let corporations violate laws with little risk of accountability.

The district court and the U.S. Court of Appeals for the Ninth Circuit both ruled for the Concepcions, holding that AT&T's terms were unconscionable and that nothing in the FAA preempted this arbitration-neutral rule of state law.[41] When the case reached the Supreme Court, eight state attorneys general, as well as civil rights organizations, consumer advocates, employee rights groups, and prominent law professors, weighed in, arguing that permitting class action bans would enable companies to evade entire realms of law. But the Supreme Court, in a five to four split, ruled that AT&T's contract was enforceable, opening the door for companies to ban class actions routinely in their fine print.

At this point, one limit on class action bans remained: if a ban eliminated the *only way* someone could bring a case, it would be unenforceable. But in 2013, the Supreme Court razed even this protection in a case pitting a group of small merchants—including Italian Colors, a family restaurant in Oakland, Cal-

> down and agreeing with each other as to what their damages are, if they want to do it. Now, that is all there is in this.

A Bill 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: Hearing on S. 4213 and S. 4214 Before a Subcomm. of the S. Comm. on the Judiciary, 67th Cong. 9–10 (1923) (statement W.H.H. Piatt, Chairman, Comm. of Commerce, Trade & Commercial Law, American Bar Association).

39. Wash. Mut. Fin. Grp., LLC v. Bailey, 364 F.3d 260, 264–66 (5th Cir. 2004).

40. Am. Gen. Fin. Servs., Inc. v. Griffin, 327 F. Supp. 2d 678, 683 (N.D. Miss. 2004).

41. Laster v. T-Mobile USA, Inc., No. 05CV1167DMS (AJB), 2008 WL 5216255, at *2 (S.D. Cal. Aug. 11, 2008), *aff'd sub nom.* Laster v. AT&T Mobility LLC, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.* AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).

ifornia—against American Express.[42] This time around, the same five-judge majority ruled that arbitration clauses containing class action bans were enforceable—*even when* it meant citizens had no way to "effectively vindicate" their rights and were left with no recourse.

II. How Forced Arbitration Transfers Wealth Upwards

Given the Court's decisions, forced arbitration clauses and class action bans are now a basic feature of form contracts. Amazon, Comcast, Wells Fargo, Ticketmaster, Dropbox, Goldman Sachs, P.F. Chang's, and Uber are just some of the many businesses that have modified their contracts with consumers or workers to include these terms.[43] A CFPB report studying the prevalence and effects of arbitration found over 88% of mobile wireless contracts and 99% of storefront payday loans are now subject to forced arbitration.[44] As of 2010, 27% of the non-unionized American workforce was estimated to be subject to forced arbitration.[45] While we are not aware of more recent figures, and more empirical work is necessary, it seems fair to assume that this share has increased in the wake of decisions legalizing class action bans alongside forced arbitration.

Existing inequality both reflects and facilitates the growing prevalence of forced arbitration clauses. As described above, scores of industries today are oligopolistic, dominated by a handful of players. This level of concentration has handed a relatively small number of firms outsized influence over the contractual terms that govern most transactions. For example, Comcast and Time-Warner together control at least 57% of the national broadband market, and around 63% of Americans live in areas where they can choose only between these two providers.[46] Some cities—including Boston and the Twin Cities—are

42. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013).

43. Gilles, *supra* note 4; Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration To Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309 (2015); Lina Khan, *Thrown Out of Court*, WASH. MONTHLY (June/July/Aug. 2014), http://www.washingtonmonthly.com/magazine/junejuly august_2014/features/thrown_out_of_court050661.php [http://perma.cc/49HR-PXNH].

44. CFPB Study, *supra* note 6, § 2, at 8.

45. *ADVOCACY: Forced Arbitration*, NAT'L EMP. LAW. ASS'N, http://www.nela.org/index.cfm [http://perma.cc/N2SD-5CJC].

46. Shalini Ramachandran, *New FCC Broadband Benchmark Lifts Comcast's Share to Nearly 60%*, WALL ST. J. (Jan. 29, 2015, 5:17 PM), http://blogs.wsj.com/corporate-intelligence/2015/01/29/comcast-bulks-up-on-broadband [http://perma.cc/7TY7-QC2G]. Others estimate their joint share could be as high as 75%. *See* William Conlow, *Quantifying Comcast's Monopoly Power*, TECHDIRT (Aug. 1, 2014, 3:33 PM), http://www.techdirt.com/articles/20140726/10180428015/quantifying-comcast-monopoly-power.shtml [http://perma.cc/CR2X-JEQX].

served by only one company, leaving residents with no choice at all.[47] One or two companies, as a result, now set the contractual terms for a significant share of U.S. broadband consumers. The same is increasingly true of local hospitals and commercial banks, to name a couple. Under such diminished competition, consumers have no bargaining power and largely sign contracts on a take-it-or-leave-it basis.

Moreover, there is reason to believe that arbitration does not just reflect existing inequality, but further perpetuates it. Our litigation system, through which significant sums of money change hands, is a giant wealth-transfer mechanism. To our knowledge, no studies have tallied or even estimated the total amount exchanged. One of the best snapshots available is a study by Brian Fitzpatrick, who examined all of the class action settlements that occurred in 2006 and 2007.[48] He found that district court judges approved 688 class action settlements over the two-year period, involving over $33 billion in awards. Securities matters made up the biggest share of the settlements, followed by labor and employment, consumer, employee benefits, civil rights, debt collection, antitrust, commercial, and other.

Because plaintiffs in securities class actions can span a host of groups—be it teachers unions whose savings are tied up in pension fund indexes or corporate managers whose salaries are largely paid through stock compensation—it is difficult to assess whether and how these suits redistribute in any one particular direction. With labor and employment, consumer, employee benefits, debt collection, and some antitrust cases, by contrast, it seems reasonable to assume that the sums won through these suits generally effect downward distribution.[49] Class action settlements comprise a small part of litigation outcomes as a whole, but, at minimum, Fitzpatrick's numbers suggest that the sums transferred through litigation in total are quite large.

47. Kate Cox, *Here's What the Lack of Broadband Competition Looks Like on a Map*, CONSUMERIST (Mar. 7, 2014, 5:00 PM), http://consumerist.com/2014/03/07/heres-what-lack-of-broadband-competition-looks-like-in-map-form [http://perma.cc/9PFC-YVGB].

48. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811 (2010).

49. Granted, it is likely that enforcement of these laws will not *always* transfer wealth from poor consumers and workers to rich executives and majority stockholders. At least some lawsuits will be brought by consumers or employees who are richer than at least some managers or stockholders. And, as arbitration proponents frequently point out, it is theoretically possible that the amounts saved by companies in the form of litigation and settlement costs will be passed on to consumers in the form of lower prices. We are aware of no empirical research that shows this to be the case. Notably, the empirical analysis that does exist suggests the obverse: that forced arbitration clauses do not lead to lower consumer prices. In its arbitration study, the CFPB found that companies forced to drop their arbitration provisions did not go on to raise prices, despite facing greater exposure to class action litigation risk. CFPB Study, *supra* note 6, § 10. On balance, therefore, we think the redistributive effects of these suits are progressive.

Below we explore how arbitration's wealth transfer effects play out in three different areas: wage-and-hour law, consumer law, and antitrust law.

A. *Wage Theft*

The growing prevalence of forced arbitration clauses in employee contracts significantly curbs workers' ability to hold their employers accountable for labor violations. For example, at a time when, according to federal and state officials, "more companies are violating wage laws than ever before,"[50] workers have found themselves increasingly unable to recover stolen wages from their employers.[51]

Wage theft occurs in several forms, and employers sometimes engage in multiple forms of violations simultaneously. Some employers pay workers less than the legally required minimum wage, fail to pay workers legally required rates for overtime work, or wrongfully deduct pay. In other cases, employers commit "off-the-clock" violations, requiring workers to come in early or stay late while failing to compensate them for that additional time. Laws against wage theft are massively underenforced,[52] which means that joining a collective lawsuit is frequently a worker's only means for rightful compensation. Forced arbitration clauses and class action bans block this vital path for redress, enabling employers to steal workers' wages with impunity.[53] Because wage theft is already regressive, practices that enable it, like forced arbitration clauses, transfer wealth upwards.

Experts estimate the sum of wages stolen nationally to be as high as $50 billion a year, "a transfer from low-income employees to business owners that worsens income inequality."[54] In Los Angeles, for example, low-wage workers

50. Steven Greenhouse, *More Workers Are Claiming 'Wage Theft,'* N.Y. TIMES (Aug. 31, 2014), http://www.nytimes.com/2014/09/01/business/more-workers-are-claiming-wage-theft.html [http://perma.cc/2869-BU3T].

51. Brady Meixell & Ross Eisenbrey, *An Epidemic of Wage Theft Is Costing Workers Hundreds of Millions of Dollars a Year*, ECON. POL'Y INST. (Sept. 11, 2014), http://www.epi.org/publication/epidemic-wage-theft-costing-workers-hundreds [http://perma.cc/98CQ-Z2CF].

52. *Winning Wage Justice: An Advocate's Guide to State and City Policies To Fight Wage Theft*, NAT'L EMP. L. PROJECT 17–18 (2011), http://www.nelp.org/content/uploads/2015/03/WinningWageJustice2011.pdf [http://perma.cc/3V4P-F86Z].

53. It is worth noting that some low-wage employers do not provide workers with contracts at all. These workers—usually the most vulnerable to wage theft—are therefore not directly affected by forced arbitration clauses and class action bans. The trend may still affect these workers in a broader sense, given that these contractual terms promote and normalize a general culture of impunity.

54. Meixell & Eisenbrey, *supra* note 51.

lose $26.2 million in wage theft violations every week, or $1.4 billion annually.[55] In New York, meanwhile, wage theft is estimated to cheat 2.1 million workers across the state out of a cumulative $3.2 billion in wages and benefits.[56] Nor is the phenomenon isolated to a handful of firms or industries. A 2009 study that surveyed more than 4,000 workers in low-wage industries found that 76% had been underpaid or not paid at all for their overtime hours.[57] The report found that wage theft is prevalent across sectors—including retail, restaurants and grocery stores, domestic work, manufacturing, construction, janitorial, security, dry cleaning, laundry, car washes, and nail salons.[58]

Through class action lawsuits, workers have recovered millions of dollars in unpaid wages from their employers. In 2009, for example, Walmart agreed to pay $40 million in unpaid wages as part of a settlement with thousands of former and current employees.[59] To resolve a class action dispute, Staples paid $42 million in back pay to its assistant store managers,[60] and Schneider Logistics paid $21 million to its workers.[61] In other recent examples, New Jersey truck drivers filed suit and recovered $2 million in back wages,[62] New York car wash workers $3.5 million,[63] and cheerleaders for the Oakland raiders $1.25 million.[64]

55. Ruth Milkman et al., *Wage Theft and Workplace Violations in Los Angeles: The Failure of Employment and Labor Law for Low-Wage Workers*, INST. FOR RES. ON LAB. & EMP. (2010), http://www.labor.ucla.edu/downloads/wage-theft-and-workplace-violations-in-los-angeles-2 [http://perma.cc/4KLW-TRUZ].

56. Aditi Sen, *By a Thousand Cuts: The Complex Face of Wage Theft in New York*, CTR. FOR POPULAR DEMOCRACY (2015), http://populardemocracy.org/sites/default/files/WageTheft%2011162015%20Web.pdf [http://perma.cc/5BSJ-KRQ9].

57. Annette Bernhardt et al., *Broken Laws, Unprotected Workers: Violations of Employment and Labor Laws in America's Cities*, NAT'L EMP. L. PROJECT (2009), http://nelp.3cdn.net/e470538bfa5a7e7a46_2um6br703.pdf [http://perma.cc/758G-CA5S].

58. *Id.*

59. Dave Copeland, *Wal-Mart Will Pay $40M to Workers*, BOSTON.COM (Dec. 3, 2009), http://www.boston.com/news/local/massachusetts/articles/2009/12/03/wal_mart_will_pay_40m_to_workers [http://perma.cc/NER2-XY2X].

60. Donna Goodison, *Staples To Pay $42M To Settle Wage Claims*, BOS. HERALD (Jan. 30, 2010), http://www.bostonherald.com/business/business_markets/2010/01/staples_pay_42m_settle_wage_claims [http://perma.cc/NFP9-RQ3H].

61. Carrillo v. Schneider Logistics, Inc., 823 F. Supp. 2d 1040 (C.D. Cal. 2011).

62. Erik Ortiz, *Raymour & Flanigan Drivers Get $2M for OT*, PRESS ATLANTIC CITY (July 8, 2009), http://www.pressofatlanticcity.com/business/article_394857c2-233c-517c-9dd2-fcf148daac8c.html [http://perma.cc/C5TR-TS33].

63. Libby Nelson, *Car Wash Chain To Pay $3.4 Million in Back Wages*, N.Y. TIMES (June 30, 2009), http://cityroom.blogs.nytimes.com/2009/06/30/car-wash-chain-will-pay-34-million-in-back-wages/ [http://perma.cc/Y7YV-GEBR].

64. Robin Abcarian, *Cheerleaders' Wage-Theft Lawsuit To Cost Oakland Raiders $1.25 Million*, L.A. TIMES (Sept. 4, 2014), http://www.latimes.com/local/abcarian/la-me-

Once a company introduces a forced arbitration clause with a class action ban, these suits vanish. A worker's only chance at recourse then is individual arbitration, which studies suggest disfavor workers. For example, a 2011 study of employment arbitration outcomes found that the employee win rate in arbitration was lower than employee win rates reported in employment litigation trials, and that both the median and mean award amounts were "substantially lower" than award amounts reported in employment litigation.[65] This in itself suggests that forced arbitration in the employee context transfers wealth upwards.

Yet comparing outcomes in litigation and arbitration actually underestimates the regressive effect, since it fails to capture individuals dissuaded from initiating action altogether. Scholars observe that this sort of "claim suppression" is a primary effect of forced arbitration and class action bans.[66] Although some commentators argue that arbitration offers employees a more accessible venue for redress than litigation,[67] "available empirical evidence now shows that mandatory employment arbitration is bringing about the opposite result—*eroding* rather than boosting employees' access to justice by suppressing employees' ability to file claims."[68] This evidence reveals that employees covered by forced arbitration provisions "almost never file arbitration claims."[69]

As a result, the class action recoveries workers obtained even a few years ago are increasingly out of reach. The claims of those who *do* file suit are usually dismissed, and fewer workers file suit at all.[70] Employers annually steal, and will

ra-raiders-settle-cheerleader-lawsuit-20140904-column.html [http://perma.cc/LHW4-DP48].

65. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1 (2011).

66. As David S. Schwartz writes, "[t]he compelling logic of what is commonly called 'mandatory arbitration' is that it is intended to suppress claims," and "[n]othing is more claim-suppressing than a ban on class actions, particularly in cases where the economics of disputing make pursuit of individual cases irrational." David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 240, 242 (2012); *see also* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) ("The result has been the mass production of arbitration clauses without a mass of arbitrations. Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so—rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights.").

67. *See, e.g.*, Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001).

68. Sternlight, *supra* note 43, at 1312.

69. *Id.*

70. *Id.*

continue to steal, billions of dollars from workers—yet arbitration clauses will keep workers from claiming any of it back. This interplay likely transfers wealth upwards.

B. Consumer Claims

Research shows that forced arbitration is widespread across consumer markets; both academics and journalists have documented its prevalence in industries ranging from nursing homes and online retail to auto dealers and cell phone providers. For insight into the effects of arbitration in consumer markets, we look to the CFPB's March 2015 study (the Report). The Report is based on filings with the American Arbitration Association (AAA), which administers the vast majority of consumer financial arbitration cases. Although the Report examines just one segment of the economy, it is by far the most comprehensive empirical study to date on outcomes in consumer arbitration.

The CFPB found that a large share of financial products and services are now subject to forced arbitration, including 44% of checking accounts, 83% of prepaid cards, 86% of private student loans, 88% of mobile wireless contracts, and 99% of storefront payday loans.[71] Over 85% of contracts with arbitration clauses include class action bans. Market concentration, meanwhile, magnifies the effects. For example, although only 16% of credit card issuers include arbitration provisions in their contracts, over 50% of credit card loans outstanding are subject to them.[72] Were it not for an antitrust settlement requiring certain credit card issuers to drop their arbitration provisions, the share of loans subject to arbitration would be 94%.[73]

This rise of forced arbitration eliminates what had been a key means of consumer redress. Between 2008 and 2012, 422 consumer financial class action settlements garnered more than $2 billion in cash relief for consumers and more than $600 million in in-kind relief.[74] These figures underestimate the consumer benefit generated by these class action suits, given that several settlements also required companies to change their business practices. As the CFPB notes, cases "seldom provided complete or even any quantification of the value of this kind of behavioral relief."[75] Nor does monetary relief capture the deterrence value of class action suits, the threat of which can serve as a powerful check on corporate wrongdoing.

So how do consumers fare under the new regime? Although various factors usually render it difficult to compare litigation and arbitration outcomes, the Report includes a case study that resembles a controlled-experiment compari-

71. CFPB Study, *supra* note 6, § 2, at 8.

72. *Id.* § 2, at 10.

73. *Id.* § 2, at 9–11.

74. *Id.* § 1, at 16.

75. *Id.*

son. The study examines outcomes in a multidistrict class action, filed against twenty-three banks for illegally charging consumers millions of dollars in excessive overdraft fees.[76] In total, debit cardholders reached eighteen settlements through the litigation, resulting in $1 billion in cash relief for over twenty-eight million consumers. Not all account holders were able to join the class, however, because nine of the twelve banks with arbitration clauses moved to enforce them. Five of the banks succeeded, getting their cases moved to arbitration, while four eventually chose to settle, giving individuals the chance to opt-out and arbitrate instead. As of February 2015, the CFPB could not verify that any of the consumers who had pursued claims outside of the class action litigation—either because they had chosen to opt out or because banks had forced them to arbitrate—received any relief at all.[77] In a class proceeding against one of the banks that had compelled arbitration, the arbitrator dismissed claimants' contract and tort claims, and consumers were awaiting an answer on their federal statutory claims.[78] Of the 242 opt-outs, no more than three consumers brought overdraft claims before the AAA.[79] Meanwhile, the twenty-eight million consumers who had secured settlements through litigation saw money transferred directly to their bank accounts.[80]

Because information on both the opt-outs and those forced to arbitrate is incomplete, we cannot say with total certainty that those who pursued arbitration received no money at all. The thirty-two consumers who won money awards from AAA arbitrators in 2010 and 2011 *could* have included victims of unfair overdraft fee practices. But even the most generous reading of these outcomes strongly suggests that arbitration is an inferior means of redress for consumers than is class action litigation. That a maximum of *three* of the 242 opt-outs moved to arbitrate, too, suggests that forced arbitration suppresses claims.[81]

76. *Id.* § 8, at 39–46 (discussing Barras v. Branch Banking & Tr. Co., 685 F.3d 1269 (11th Cir. 2012)).

77. Specifically, 173 consumers opted out of the settlement with Chase, thirty-four opted out of the settlement with M&I, and thirty-five opted out of the settlement with Compass Bank. *Id.* app. A, at 108–09.

78. *Id.* § 5, at 86–87.

79. "No more than three" because the CFPB does not know precisely whether the three opt-outs that did go on to file claims through arbitration had been involved in the overdraft litigation specifically, or some other class action suit. *Id.* app. A, at 104.

80. *Id.* § 8, at 40, 45–46.

81. Anecdotes suggest that defense lawyers recognize the suppressive effect of arbitration clauses. As a recent news story reported, "[lawyers believe] they may have found, in the words of one law firm, the 'silver bullet' for killing off legal challenges. In an industry podcast, two lawyers discussed the benefits of using arbitration to quash consumers' lawsuits. The tactic, they said, is emerging at an opportune time, given that debt collectors are being sued for violating federal law.

Moreover, arbitration seems to favor businesses over consumers not just relative to litigation, but in an absolute sense too: the CFPB found that, within arbitration, companies are far more successful than consumers. According to the Report, businesses won relief in 93% of the business-initiated cases in which arbitrators reached a decision on the merits. In the disputes that businesses won, they received ninety-eight cents for every dollar they had claimed; taking into account the disputes where they lost, they recovered ninety-one cents for every dollar claimed. In disputes initiated by consumers, by contrast, arbitrators provided relief to consumers in 27% of cases and awarded them an average of forty-seven cents for every dollar claimed. Among consumer-initiated disputes as a whole, consumers won an average of thirteen cents for every dollar they had claimed.[82] While a host of factors may account for the disparity in outcomes, it seems fair to conclude that businesses are satisfied with arbitrator decisions at higher rates than are consumers.

The distributive implications of forced arbitration in consumer finance seem clear. As more cases are diverted to arbitration, consumers will likely both win at lower rates and receive lower sums than they would through class action litigation. The cost of bilking consumers—be it by design or through negligence—will drop, given that consumers pursue claims through arbitration at far lower rates than they do through litigation, and those who do file arbitration claims seem to be less successful. Moreover, because arbitration proceedings are private, businesses shed the risk of reputational damage. So long as wrongful acts are sufficiently lucrative, firms can build in the occasional arbitration payment as a cost of business. As financial institutions can acquire greater sums from consumers with greater impunity, wealth is transferred upwards.

The distributive implications of forced consumer arbitration are especially pronounced given that the primary users of payday loans and prepaid cards—which include arbitration clauses at particularly high rates—are low-income consumers. This suggests that those most vulnerable to exploitation by financial institutions are those most likely to lack effective redress.

C. Antitrust

One area of law especially vulnerable to the preclusive effects of arbitration is antitrust. A primary example of this dynamic was at play in *Italian Colors*, the case in which a small business owner alleged that American Express was illegally

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The beauty of the clauses, the lawyers said, is that often the lawsuit 'simply goes away.'" Jessica Silver-Greenberg & Michael Corkery, *Sued over Old Debt, and Blocked from Suing Back*, N.Y. TIMES (Dec. 22, 2015), http://www.nytimes.com/2015/12/23/business/dealbook/sued-over-old-debt-and-blocked-from-suing-back.html [http://perma.cc/6B2A-YCLK].

82. These figures exclude cases in which consumers were disputing debts they were alleged to owe. Including outcomes in those disputes, consumers won some form of relief in 20% of cases and recovered an average of twelve cents for every dollar they claimed. CFPB Study, *supra* note 6, § 5, at 41–45.

abusing its market power. Troublingly, firms that possess monopoly power can enact a sort of "double punch" by imposing arbitration terms that insulate the abuse of that same power. As Justice Kagan warned in her dissent in that case, "[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."[83] In this way, "a company could use its monopoly power to protect its monopoly power, by coercing agreement to contractual terms eliminating its antitrust liability."[84]

In *Italian Colors*, American Express achieved just that, by coupling a forced arbitration clause with a class action ban. Because proving antitrust damages today requires costly economic analysis, private plaintiffs generally cannot bring suits unless they can split expenses, be it through joining as a class or sharing costs some other way. Since American Express had effectively prohibited all cost-sharing arrangements, upholding the arbitration clause would deprive the plaintiff of any economically viable way to pursue a claim. By ruling for American Express, the Court handed firms a tool to deflect private antitrust suits—a gift for monopolistic companies, who can use their market power to impose contractual terms that shield from liability abuses of that same market power.

Two consequences stand out: first, antitrust enforcement suffers as a whole, and second, this erosion of antitrust enforcement transfers wealth from low-income to high-income individuals.

Although the Court's holding enables firms to deflect only *private* suits, there is sound reason to think that a drop-off in private claims will injure enforcement as a whole. For one, private litigation has been a traditional mainstay of antitrust enforcement. Indeed, Congress even designed the antitrust statutes in order to promote private suits, not only creating a private right of action but also awarding private parties treble damages and injunctive relief. As the Court has noted, Congress created these private rights "not merely to provide private relief" but "to serve as well the high purpose of enforcing the antitrust laws."[85] Moreover, "Congress has expressed its belief that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."[86] Second, private and public enforcement often work in conjunction, as public officials draw on information revealed through private suits to build their own cases.[87] Anemic private enforcement undermines the antitrust statutes as a whole.[88]

83. Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304, 2313 (2013) (Kagan, J., dissenting).

84. *Id.* at 2314.

85. Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 130–31 (1969).

86. Minn. Mining & Mfg. Co. v. N.J. Wood Finishing Co., 381 U.S. 311, 318 (1965).

87. Joshua P. Davis & Robert H. Lande, *Defying Conventional Wisdom: The Case for Private Antitrust Enforcement*, 48 GA. L. REV. 1 (2013).

88. Einer Elhauge, *How* Italian Colors *Guts Private Antitrust Enforcement by Replacing It with Ineffective Forms of Arbitration*, 38 FORDHAM INT'L L.J. 771 (2015).

Weaker antitrust, in turn, exacerbates economic inequality, by enabling wealth transfers from consumers, workers, and small businesses to the executives and shareholders of large firms. While the connection between extreme market concentration and wealth distribution has been overlooked for decades, the current inequality crisis is drawing new attention to the ways in which undue market power transfers wealth upwards.[89]

Abuse of market power contributes to inequality in a number of ways. Most obviously, monopolistic and oligopolistic firms often hike consumer prices. For example, a host of studies documents how consolidation across the healthcare industry has enabled hospitals, health insurers, and pharmaceutical companies to charge consumers more for the same goods and services.[90] Businesses also use their dominance to suppress workers' wages. In 2006, for instance, around 20,000 registered nurses filed a class action suit alleging that hospitals in and around Detroit had colluded to keep their wages low. Three hospitals settled for more than a combined $48 million; litigation against a fourth is still pending. Similarly, in 2010, a group of high-tech companies—including Adobe, Apple, Google, Intel, Intui, and Pixar—were found to have squashed competition by agreeing not to poach or solicit each other's employees. Four of the firms ultimately settled a private suit for $415 million, providing relief to 64,000 software engineers. Lastly, firms with monopoly power can extract wealth from smaller businesses. *Italian Colors* originated in a suit brought by Alan Carlson, the owner of a family restaurant in Oakland, California, who alleged that American Express had been using its monopoly power in premium and corporate credit cards to force merchants to accept ordinary cards at much higher rates than what rivals charged. An economist analyzing the excess fees charged to the *Italian Colors* plaintiffs estimated that the company's tactics cost Carlson's restaurant nearly $500 a year—a transfer of income from his business to American Express.[91]

89. *See, e.g.*, ROBERT REICH, SAVING CAPITALISM: FOR THE MANY, NOT THE FEW (2015); David Dayen, *Bring Back Antitrust*, AM. PROSPECT (Nov. 9, 2015), http://prospect.org/article/bring-back-antitrust-0 [http://perma.cc/H84J-2X2U]; Khan & Vaheesan, *supra* note 19; Paul Krugman, *Challenging the Oligarchy*, N.Y. REV. BOOKS (Dec. 17, 2015), http://www.nybooks.com/articles/2015/12/17/robert-reich-challenging-oligarchy/ [http://perma.cc/A4GC-2TSB] (reviewing Robert Reich's *Saving Capitalism: For the Many, Not the Few*); Robert Reich, *The Political Roots of Widening Inequality*, AM. PROSPECT (Apr. 28, 2015), http://prospect.org/article/political-roots-widening-inequality [http://perma.cc/SVA4-V7QF]; Furman & Orszag, *supra* note 19.

90. Leemore Dafny et al., *More Insurers Lower Premiums: Evidence from Initial Pricing in the Health Insurance Marketplaces*, 1 Am. J. Health Econ. 53 (2015); Zack Cooper et al., *The Price Ain't Right? Hospital Prices and Health Spending on the Privately Insured* (Health Care Pricing Project, Dec. 2015) (unpublished manuscript), http://www.healthcarepricingproject.org/sites/default/files/pricing_variation_manuscript_0.pdf [http://perma.cc/J4KC-5K28].

91. Joint Appendix at 97, Am. Express Co. v. Italian Colors Rest., 133 S. Ct. 2304 (2013) (No. 12-133), http://guptawessler.com/wp-content/uploads/2012/05/12-133ja.pdf

Since forced arbitration clauses and class action bans tend to preclude private antitrust suits, the rise of arbitration will enable firms with monopolistic power to abuse that power with greater impunity. Insofar as anticompetitive behavior transfers income from consumers, workers, and small businesses to the owners and managers of larger firms, the expansion of arbitration will lead to regressive wealth distribution.

III. Looking Ahead

After decades of rampant growth in the reach of forced arbitration clauses, public interest advocates in recent years notched a few victories. Recognizing that forced arbitration clauses effectively shield powerful private interests from legal accountability, executive agencies under the Obama Administration worked to limit their use, in areas including poultry farming, air travel, higher education, investment advice, and elderly care. The most promising development, as noted above, was the CFPB's proposed rule to curb class action bans in consumer finance contracts.[92] The opportunity for President Obama to appoint a replacement for Justice Scalia—who had authored some of the key decisions expanding the purview of forced arbitration—also promised to break the five-to-four majority that had handed numerous victories to corporate interests, offering the Court a chance to shift course.

The election of President Trump is likely to undermine this progress. While the Trump Administration has yet to articulate a specific policy on forced arbi-

[http://perma.cc/97X6-LVF8]. While Carlson's complaint focused on the swipe fee costs incurred by merchants—and hence the transfer of wealth from small businesses to credit card companies—the swipe fee system more generally institutes a systemic wealth transfer from low-income to high-income consumers. This is because credit card use is strongly correlated with consumer income, and merchants pass on swipe fees in the form of higher retail prices to all customers. Cash buyers therefore end up subsidizing the cost of credit cards, while lacking access to the rewards and financial perks that credit card users enjoy. The Boston Federal Reserve estimates that the swipe fee system generates a yearly transfer of $1,282 from the average cash payer to the average card payer. Scott Schuh et al., *Who Gains and Who Loses from Credit Card Payments?: Theory and Calibrations* 3 (Fed. Reserve Bank of Bos., Working Paper No. 10-03, 2010), http://www.bostonfed.org/economic/ppdp/2010/ppdp1003.pdf [http://perma.cc/GN63-D7JF].

92. Notably, in addition to prohibiting these clauses outright, the rule would require firms to submit data on arbitration filings and awards in order to help the agency evaluate how arbitration clauses affect outcomes for individuals not pursuing group claims. Not on the table, for the moment, is any total ban on mandatory arbitration clauses or more surgical restrictions on features such as prospective waivers of federal statutory rights, clauses requiring excessive fees, or clauses requiring arbitration in distant venues. Given that the CFPB's purview is limited to consumer finance, even a complete ban on forced arbitration by the agency would fail to limit the use of arbitration in other consumer contexts, in employment, and in most antitrust cases.

tration, its initial actions signal support for a deregulatory agenda. In instances where agencies have already implemented regulations curbing forced arbitration, the Administration could roll them back. In cases where agencies had issued proposed rules but not final promulgations, the Administration could fail to deliver. The appointment of Justice Gorsuch, meanwhile, suggests that the Court's five-to-four majority supportive of forced arbitration will persist.

Some members of Congress in recent years have also moved to curb forced arbitration[93]—but these efforts, too, may now go the other way. In March, House Republicans passed a measure raising the bar on class action certification, requiring plaintiffs to show that each person in the class suffered "an injury of the same type and scope."[94] While the House has approved defendant-friendly amendments to the civil justice system in the past, the bills generally have stalled in the Senate. With a Republican president, the Senate may now be more likely to push these measures, further eroding access to courts.

It is important that public interest advocates put up a strong fight, publicize the efforts, and clearly articulate the stakes. The Obama Administration's efforts to curb forced arbitration were buoyed, in part, by public outrage. Top coverage by the *New York Times*, for example, thrust into public light the tangible costs and ramifications of forced arbitration, helping underscore the real stakes of what can otherwise seem esoteric.

We offer this Essay partly in an effort to facilitate that public engagement. Understanding the regressive effects of arbitration enables advocates to frame the problem not only as a deprivation of venerated procedural rights but also as a massive upwards wealth transfer—a useful hook, given that economic inequality tops many debates in policy and politics today. That the Trump Administration's policies routinely favor private (and, for the President's family, personal) enrichment at the public's expense, too, suggests that portraying forced arbitration as enabling an upwards wealth transfer is especially apt. We offer

93. The Arbitration Fairness Act, introduced in 2015, would amend the FAA to bar the enforcement of mandatory pre-dispute arbitration clauses in cases involving consumer rights, worker rights, civil rights, and antitrust—all categories, the proposed bill notes, in which individuals or potential classes of individuals now "have little or no meaningful choice whether to submit their claims to arbitration." Arbitration Fairness Act of 2015, H.R. 2087, 114th Cong. § 2(3) (2015). And, in February 2016, a bipartisan group of senators introduced a far broader bill, the Restoring Statutory Rights and Interests of the States Act. Concluding that *Concepcion* and *Italian Colors* have resulted "in millions of people in the United States being unable to vindicate their rights in State and Federal courts," this proposed legislation would amend the FAA to ban enforcement of pre-dispute arbitration clauses in cases involving any "individual or small business concern." Restoring Statutory Rights and Interests of the States Act of 2016, S. 2506, 114th Cong. §§ 2(a)(3), 3(a)(2).

94. Kimberly Kindy, *House GOP Quietly Advances Key Elements of Tort Reform*, WASH. POST (Mar. 9, 2017), http://www.washingtonpost.com/national/house-gop-quietly-advances-key-elements-of-tort-reform/2017/03/09/d52213b2-0414-11e7-b1e9-a05d3c21f7cf_story.html?utm_term=.5ef440b45507 [http://perma.cc/7KG2-NWB2].

this frame also to illustrate the more general point that the distributive effects of civil procedure deserve close and extensive examination. Though there is growing recognition that changes in substantive law and legal regimes helped usher in the extreme levels of inequality we see today, the role of procedure is understudied. That needs to change. As Congressman John Dingell once said, "I'll let you write the substance, you let me write the procedure, and I'll screw you every time."[95]

95. *Regulatory Reform Act: Hearing on H.R. 2327. Before the Subcomm. on Admin. Law and Governmental Regulations of the House Comm. on the Judiciary*, 98th Cong. 312 (1983) (statement of Rep. John Dingell).