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## Hurrah for the Consumer Financial Protection Bureau: Consumer Arbitration as a Poster Child for Regulation

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## KCON XI ESSAY

# HURRAH FOR THE CONSUMER FINANCIAL PROTECTION BUREAU: CONSUMER ARBITRATION AS A POSTER CHILD FOR REGULATION

JEAN R. STERNLIGHT\*

*I was reminded of Lochner reading some decisions of the Court concerning workers, consumers, credit card holders who signed agreements saying “if you have a dispute with us, you can bring it only in arbitration—not in court—and you cannot use the class action device. You must sue for your individual claim, which might be 30 dollars, and that’s it.” And that has also been described as tied to liberty of contract.<sup>1</sup>*

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1. Ruth Bader Ginsburg, Associate Justice of the Supreme Court of the U.S., *Lessons Learned from Louis D. Brandeis* (Jan. 28, 2016).

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## I. INTRODUCTION

The Consumer Financial Protection Bureau (CFPB) recently proposed a highly controversial regulation limiting companies' ability to use pre-dispute arbitration clauses to prevent financial consumers from participating in class actions.<sup>2</sup> At the same time, the new regulation also requires companies to be more transparent regarding consumer financial arbitration—mandating that they file arbitration clauses and arbitral results with the CFPB.<sup>3</sup> This Essay examines the propriety of CFPB's actions by placing them in the larger context of when it is ever appropriate for government entities to interfere with the “free” market.

In her remarks, quoted above, Justice Ginsburg suggested that the Supreme Court's recent arbitration decisions are analogous to the Supreme Court's much maligned *Lochner*<sup>4</sup> decision. That decision, of course, infamously found that the right to make a contract is part of the “liberty” protected by the Fourteenth Amendment, and further found that state protective legislation could be voided if it interfered with this freedom of contract.<sup>5</sup> Yet, while an enormous literature critiques *Lochner*<sup>6</sup> on various grounds,<sup>7</sup> its spirit of freedom of contract lives on in some contexts. Can

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2. Arbitration Agreements, 81 Fed. Reg. 32,830, 32,830 (May 24, 2016) (to be codified at 12 C.F.R. pt. 1040) [hereinafter Arbitration Agreements]. Note, at the time this Essay went to press, this regulation had not yet become final, but, rather, had only been proposed and put out for public comment.

3. *Id.*

4. *Lochner v. New York*, 198 U.S. 45 (1905), *abrogated by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), *and overruled by* *Day-Brite Lighting, Inc. v. State of Missouri*, 342 U.S. 421 (1952) *and* *Ferguson v. Skrupa*, 372 U.S. 726 (1963), *and*.

5. *Id.* at 64 (“[N]or shall any state deprive any person of life, liberty, or property . . .”).

6. As one author notes, “[a]lmost one hundred years after the Supreme Court decided *Lochner*, *Lochner* and its progeny remain the touchstone of judicial error.” David E. Bernstein, *Lochner's Legacy's Legacy*, 82 TEX. L. REV. 1, 2 (2003).

7. While everyone loves to hate *Lochner*, critics differ on whether the case stands for judicial activism, overvaluing preexisting property rights, or perhaps something else. See Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 874 (1987) (citations omitted). Professor Sunstein argues that while *Lochner* is often critiqued as being too activist, perhaps the more significant flaw in its

a CFPB regulation that constrains consumers' and companies' ability to enter certain arbitration clauses be justified?

Drawing on economic, psychological and philosophical considerations, this Essay considers whether consumers should be "free" to "agree" to contractually trade their opportunity to litigate in a class action for the opportunity to bring an arbitration claim against a company. The Essay suggests that by looking at the CFPB's regulation through these three lenses, one sees that the regulation is desirable—even a poster child—for the potential value of regulation when market forces are not sufficient to protect individual or public interests.

Section II of this Essay briefly describes the phenomenon of forced or mandatory consumer arbitration that has grown up in the United States over the past thirty years or so.<sup>8</sup> Section III then considers how commentators, Congress, and federal regulators have responded to this issue. This Section focuses particularly on the new proposed CFPB regulation of financial consumer arbitration. This regulation traces its lineage to a portion of the Dodd-Frank Wall Street Reform and Consumer Protection Act (The Dodd-Frank Act),<sup>9</sup> passed in the wake of the mortgage and other financial crises, in which Congress created the CFPB and ordered it to study and potentially regulate mandatory arbitration in the consumer financial setting.<sup>10</sup>

Finally, Section IV draws on economics, psychology, and philosophy to consider the desirability of the new CFPB regulation blocking companies from requiring consumers to relinquish their ability to participate in class actions. This Essay concludes that preventing such clauses is entirely

analysis is that it imposes a constitutional requirement of neutrality that seeks to preserve the existing distribution of wealth and entitlements. *Id.* at 875.

8. Sadly, the growth of this phenomenon largely parallels this author's time in legal academia. I was an early critic of mandatory arbitration, see Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996) [hereinafter *Panacea or Corporate Tool*], and have continued to critique the phenomenon throughout my career. See Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631, 1634 (2005) [hereinafter *Creeping Mandatory Arbitration*] (analyzing the phenomenon of arbitration growth); see also Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 WM. & MARY L. REV. 1, 6 (2000) [hereinafter *Mandatory Binding Arbitration Meets the Class Action*] (arguing against allowing companies to use arbitration as a shield from class action liability). Yet, despite my efforts and that of many others', forced arbitration is far more common today in both the consumer and employment setting than it was when I began my anti-mandatory arbitration crusade.

9. Dodd-Frank Wall Street Reform & Consumer Protection Act, Pub. L. No. 111-203, § 1028, 124 Stat. 1376, 2003-04 (2010) (codified at 12 U.S.C. § 5518).

10. CONSUMER FIN. PROT. BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) (2015), [hereinafter CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS].

consistent with protecting consumers' freedom, so long as freedom is defined in a meaningful way.

## II. COMPANIES' USE OF FORCED ARBITRATION IN THE CONSUMER SETTING

Once upon a time, arbitration was a dispute resolution process that was adopted knowingly and voluntarily by two or more businesses that preferred to resolve disputes outside of court.<sup>11</sup> Choosing arbitration over litigation for its expertise, speed, low-cost, privacy, informality, or other reasons, companies would enter pre-dispute agreements with one another to resolve future disputes through arbitration, rather than in court.<sup>12</sup> To ensure that these agreements would be enforced and supported by the courts, business interests prevailed upon Congress to pass the Federal Arbitration Act (FAA), which it did in 1925.<sup>13</sup> This Act required courts to enforce written arbitration agreements so long as they were not void on traditional contract grounds such as fraud, duress, or unconscionability.<sup>14</sup> For many years, the practice of commercial arbitration and enforcement of the FAA were not controversial.<sup>15</sup>

Gradually, however, this consensual business-to-business arbitration gave birth to a different creature, variously known as "mandatory,"<sup>16</sup> "compelled,"<sup>17</sup> "forced,"<sup>18</sup> or "cram-down"<sup>19</sup> arbitration. Companies in

11. See IMRE SZALAI, *OUTSOURCING JUSTICE: THE RISE OF MODERN ARBITRATION LAWS IN AMERICA* 41–42 (2013) (recounting early history of commercial arbitration in the United States, and passage of the Federal Arbitration Act (FAA)); see also IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* 83–120 (1992) (providing an excellent short history of the FAA); Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 43 (1999) (discussing early history of arbitration).

12. See, e.g., Brunet, *supra* note 11, at 41 (creating the term "folklore arbitration" to describe the orthodox view and expounding on the phenomena's characteristics).

13. Federal Arbitration Act, Pub. L. No. 68–401, 43 Stat. 883 (1925) (codified at 9 U.S.C. §2 (2012)).

14. Section 2 of the FAA provides in relevant part that written pre-dispute arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Federal Arbitration Act, 9 U.S.C. § 2 (2012). The Supreme Court has held that this clause, known as the "saving[s] clause," "permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability'". *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctors Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996)).

15. See generally *Panacea or Corporate Tool*, *supra* note 8, at 644–60 (discussing the Supreme Court's evolving interpretation of the FAA from 1925–1983); see also Martin H. Malin, *The Three Phases of the Supreme Court's Arbitration Jurisprudence: Empowering the Already-Empowered*, 17 NEV. L.J. 23 (2016).

16. *Creeping Mandatory Arbitration* *supra* note 8, at 1634 (providing history of the emergence of mandatory arbitration).

17. David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights*

a wide range of businesses have increasingly used small print contracts of adhesion, envelope stuffers, or online provisions to require consumers, employees, or others resolve future disputes through arbitration rather than in court.<sup>20</sup> These clauses are now widely used by banks and other lenders, credit card issuers, gyms, schools, medical providers, and many others.<sup>21</sup> As the FAA only requires that a clause be written, and not signed,<sup>22</sup> some companies have even used signage over the door to try to compel customers to arbitrate rather than litigate future disputes.<sup>23</sup>

Although many might have anticipated that courts would find a way to block this use of arbitration, instead the Supreme Court has interpreted the FAA broadly to facilitate companies' use of forced arbitration in both the

*Claims in an Age of Compelled Arbitration*, 1997 WISC. L. REV. 33, 38 (1997) (examining compelled arbitration in the context of arbitration's favored status).

18. Carmen Comsti, *A Metamorphosis: How Forced Arbitration Arrived in the Workplace*, 35 BERKELEY J. EMP. & LAB. L. 5, 6 (2014) ("Forced arbitration was transformed from a rarely used form of dispute resolution into a juggernaut that has changed the nature of statutory enforcement of worker protection laws in the United States.").

19. See, e.g., Carrie Menkel-Meadow, *Do the "Haves" Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 19, 39 (1999) (using the term "cram-down arbitration").

20. I chronicled some of these uses twenty years ago. See Jean R. Sternlight, *Rethinking the Constitutionality of the Supreme Court's Preference for Binding Arbitration: A Fresh Assessment of Jury Trial, Separation of Powers, and Due Process Concerns*, 72 TUL. L. REV. 1, 7-9 (1997) (compiling examples of arbitration provisions in both common and unique settings, including pest exterminations, physicians, and cereal boxes). Since that time the usage has only grown. A recent *New York Times* article observes that consumer contracts with Amazon, Netflix, Travelocity, eBay, and DIRECTV contain arbitration clauses, and that even an online site for adulterers, Ashley Madison, also requires customers to agree to arbitrate future disputes. 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?\\_r=0](http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0).

21. See, e.g., Christopher R. Leslie, *The Arbitration Bootstrap*, 94 TEX. L. REV. 265, 269-71 (2015) (discussing the expanding number of arbitration clauses). The CFPB's recent study discusses the prevalence of these clauses in the consumer financial context, focusing on use with credit cards, checking accounts, prepaid cards, payday loans, private student loans, and mobile wireless contracts. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 10. One study of the average consumer found, twenty years ago, that 35.4% of his or her consumer transactions would be covered by forced arbitration clauses. Linda J. Demaine & Deborah R. Hensler, "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience, 67 L. & CONTEMP. PROBS., Winter/Spring 2004, at 55, 62. Even the new craze Pokémon Go is imposing mandatory arbitration on its users. *Pokémon GO Terms of Service*, NIANTIC LABS, <https://www.nianticlabs.com/terms/pokemongo/en> (last updated July 1, 2016).

22. Federal Arbitration Act, 9 U.S.C. § 2 (2012).

23. Silver-Greenberg & Gebeloff, *supra* note 20 (noting that "[s]igns posted in a theater in Los Angeles and a hamburger joint in East Texas informed guests that, simply by walking in, they had agreed to arbitration").

consumer and employment contexts.<sup>24</sup> Interestingly, the Court has never directly discussed whether “mandatory” or “forced” arbitration is different from truly consensual arbitration, but rather has indirectly approved the use by treating all such arbitration the same.<sup>25</sup> It has repeatedly asserted in diverse contexts that “arbitration is a matter of contract”<sup>26</sup> and that arbitration agreements must be rigorously enforced according to their terms.<sup>27</sup> Indeed, the Court has not only accepted such arbitration as permissible under the FAA, but also stated that such arbitration is “favored,”<sup>28</sup> that state efforts to rein in such arbitration are largely

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24. Many academics have chronicled the development of Supreme Court case law in this area. For fairly recent comprehensive examples, see Leslie, *supra* note 21, at 268–69 (observing that the Court’s recent decisions in *Concepcion* and *Italian Colors* “operate to dismantle entire fields of law, including laws against fraud, deception, predatory conduct, antitrust violations, and employment discrimination”); David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 250 (2012) (“The broad pattern of Supreme Court decisions in this area has been one of confused decisions later gelling into clearly bad decisions.”); Margaret L. Moses, *Statutory Misconstruction: How the Supreme Court Created a Federal Arbitration Law Never Enacted by Congress*, 34 FLA. ST. L. REV. 99, 156 (2006) (“Despite concerns expressed by members of the 1925 Congress that arbitration not be imposed in a ‘take-it-or-leave-it’ context, the Supreme Court since the 1980s has created a statute which permits businesses to do exactly that.”); Martin H. Malin, *supra* note 15, at 39; see also *Panacea or Corporate Tool*, *supra* note 8, at 660–73 (examining the Supreme Court’s approach to forced arbitration as of the early 1990s).

25. The Court’s first decision implicitly accepting the use of forced arbitration was *Gilmer v. Interstate/Johnson Lane Corp.*, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In that case, the Court held that a manager of financial services who had been required to agree to arbitration by his stock exchange registration form had to arbitrate his age discrimination claim. *Id.* at 20. The Court treated Mr. Gilmer as having agreed to arbitrate his claims and found that a mere inequality of bargaining power was insufficient to set aside such agreement absent a showing of fraud or duress. *Id.* at 33. A few years later, in *Allied-Bruce Terminix Cos. v. Dobson*, the Court held that home owners were compelled to arbitrate their breach of contract claim against a termite extermination company where the clause had been contained in a small print contract of adhesion, even though state law purported to void such uses of compelled arbitration. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268–70 (1995).

26. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); see also *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 63 (2010) (referring to an arbitration clause signed by an employee as condition of employment).

27. See *Italian Colors Rest.*, 133 S. Ct. at 2309 (interpreting the FAA strictly); see also *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (“The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate.”). Professor Stephen Ware calls the Court’s current approach “very conservative,” observing that the Court has made arbitration clauses more enforceable than other contracts and allows the stripping of traditional appellate rights and the ability to participate in class actions. Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEGIS. 711, 748–51 (2016).

28. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (observing, in a case involving consumer phone contract, that section 2 of the FAA reflects a “liberal federal policy favoring arbitration,” (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983))); see also *Buckeye Check Cashing v. Cardegna*, 546 U.S. 440, 443 (2006) (finding arbitration

preempted,<sup>29</sup> and that even lower court findings voiding such clauses on contractual or statutory grounds must often be overturned.<sup>30</sup> These Supreme Court decisions have presumably encouraged companies to use forced arbitration even more broadly than before,<sup>31</sup> because companies have realized that their clauses are likely to withstand attack in courts,<sup>32</sup> and that states' attempts to preclude forced arbitration in the consumer context are quite likely to be struck down as preempted.<sup>33</sup>

In roughly the mid-1990s, some creative attorneys came up with the idea that companies might use forced arbitration provisions to insulate themselves from class actions they so despise.<sup>34</sup> Initially, companies linked arbitration and class actions by arguing that while the arbitration clause did not expressly mention class actions, arbitration and class actions were inherently contradictory in their terms.<sup>35</sup> Some courts bought this argument and found that arbitration clauses implicitly barred class actions,<sup>36</sup> but other courts, including ultimately a plurality of the Supreme

“favored” when imposed on consumers by payday lenders).

29. See *Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 681 (1996) (preempting a state law requiring arbitration provisions to appear in certain font size and on the first page of contract); see also *Allied-Bruce Terminix Cos.*, 513 U.S. at 274–75 (preventing an Alabama law that prohibited companies from imposing arbitration on a pre-dispute basis); *Perry v. Thomas*, 482 U.S. 483, 491–92 (1987) (holding preempted a provision of California Labor Law which stated that wage collection actions may be maintained without regard to existence of any private agreement to arbitrate).

30. See *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 463 (2015) (reversing a California appellate court decision that arbitral class action prohibition imposed on DIRECTV customers was void under California law); see also *Italian Colors Rest.*, 33 S. Ct. at 2309 (reversing lower court's holding that arbitral class action should be voided on ground that it would prevent restaurant owners from vindicating their rights under federal antitrust law); *Concepcion*, 563 U.S. at 351–52 (holding preempted a California state court decision finding an arbitral class action prohibition contained in a consumer's mobile phone contract to be unconscionable).

31. See *Mandatory Binding Arbitration Meets the Class Action*, *supra* note 8, at 5 (reviewing increasing use of arbitration clauses barring class actions).

32. See *Italian Colors Rest.*, 33 S. Ct. at 2309 (explaining “courts must rigorously enforce arbitration agreements according to their terms” (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985))).

33. See *Concepcion*, 563 U.S. at 352 (clarifying that the FAA preempts California's unconscionability rule affecting waivers of class arbitration in consumer contracts).

34. A recent *New York Times* story chronicles how banking attorney Alan Kaplinsky and others joined together to protect their clients from class actions. Silver-Greenberg & Gebeloff, *supra* note 20; see also *Mandatory Binding Arbitration Meets the Class Action*, *supra* note 8, at 5–6 (detailing industry efforts in the 1990s to use arbitration clauses to shield themselves from class actions).

35. Alan S. Kaplinsky, *Arbitration and Class Actions – A Contradiction in Terms*, 1113 PRACTISING L. INST. 619, 639 (1999) (arguing that arbitrable disputes may not proceed by way of class action in court or in arbitration unless the arbitration clause explicitly so provides).

36. See, e.g., *Champ v. Siegel Trading Co.*, 55 F.3d 269, 276–77 (7th Cir. 1995) (holding, in a consumer class action, that arbitral class action was proscribed where clause did not explicitly permit consolidation or class action). See generally *Mandatory Binding Arbitration Meets the Class Action*, *supra*



Court, found that arbitral class actions might be possible.<sup>37</sup> Companies responded by writing arbitration clauses that explicitly prohibited persons subject to the clause from bringing a class claim, or sometimes even a joined claim, against the company in either litigation or arbitration.<sup>38</sup>

Courts' responses to the express arbitral class action waivers imposed by companies have been mixed,<sup>39</sup> and also raise some fascinating issues regarding preemption, federalism, and deference to arbitrators. But, two recent U.S. Supreme Court cases make clear that, generally, absent new legislation or administrative regulations, companies will be permitted to use arbitration clauses to prevent consumers from bringing class actions in either arbitration or litigation.<sup>40</sup> In particular, the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*<sup>41</sup> greatly diminished consumers' ability to attack class action waivers in arbitration clauses as unconscionable or otherwise invalid as a matter of traditional contract law. The 5–4 decision written by the late Justice Scalia held the FAA preempted a California Supreme Court decision that voided the phone carrier's clause as unconscionable.<sup>42</sup> The Court reasoned that the standard used by the California court was applicable only to arbitration clauses, and not litigation, and therefore was proscribed by the FAA.<sup>43</sup> Two years

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note 8, at 53–78 (summarizing early case law on this issue).

37. *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 451–53 (2003) (finding, in plurality decision, that a silent arbitration clause contained in a home improvement loan contract did not foreclose the possibility of an arbitral class action); see *Mandatory Binding Arbitration Meets the Class Action*, *supra* note 8, at 17–18 (explaining “few cases deal with the questions that arise when class actions must be reconciled with binding arbitration”); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of ATT v. Concepcion*, 79 U. CHI. L. REV. 623, 629 (2012) (arguing that while some claims may survive, “most class cases will not survive the impending tsunami of class action waivers”).

38. The clause at issue in *AT&T Mobility LLC v. Concepcion* provided that any claims be brought in plaintiffs' “individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding.” *Concepcion*, 563 U.S. at 336. The relevant clause in *Italian Colors* stated “[t]here shall be no right or authority for any Claims to be arbitrated on a class action basis.” *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2306 (2013). The CFPB's study of the use of arbitration in the consumer financial context found that almost all the studied clauses prohibited consumers from participating in class actions. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 10, § 2.5.5, at 45–46.

39. See *Pendergast v. Sprint Nextel Corp.*, 691 F.3d 1224, 1234 (11th Cir. 2012) (“We need not decide whether the class action waiver here is unconscionable under Florida law . . . because to the extent Florida law would invalidate the class action waiver, it would still be preempted by the FAA.”).

40. See *Concepcion*, 563 U.S. at 353 (holding the FAA preempted a state judicial ruling); see also *Italian Colors Rest.*, 133 S. Ct. at 2309 (holding arbitration is “a matter of contract . . . [which] require[s] a court to reject [a] merchants' contractual waiver”).

41. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011).

42. *Id.* at 341–42.

43. *Id.* at 348–50. The Court also found “[c]lass arbitration, to the extent it is manufactured by

later, in *American Express Co. v. Italian Colors Restaurant*,<sup>44</sup> a 6–3 Court also undercut consumers’ potential argument that such clauses are unenforceable when they prevent claimants from vindicating federally protected statutory rights.<sup>45</sup> Specifically, the Court rejected a group of restaurant owners’ claim that the arbitral class waiver was invalid because it would block the restaurant owners from effectively vindicating their rights under federal antitrust law.<sup>46</sup> Instead, the clause was valid because, at least in theory, restaurants could pursue their antitrust claims individually.<sup>47</sup> While the actual case involved restaurant owners seeking to assert an antitrust claim against American Express, rather than a consumer claim, lower courts and commentators have not hesitated to apply the reasoning of the *Italian Colors* decision to block consumer attempts to void arbitral class waivers.<sup>48</sup> Indeed, quite a few lower courts have interpreted these decisions far more expansively than would have been necessary,<sup>49</sup> essentially giving companies carte blanche to insulate themselves from consumer financial class actions.

### III. POLICY RESPONSES TO THE GROWTH OF MANDATORY CONSUMER ARBITRATION

Responses to the growth of mandatory consumer arbitration clauses have been mixed among both commentators and legislators.<sup>50</sup> Consumer

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[court decision] rather than consensual,” is inconsistent with the FAA. *Id.* at 334 (2011).

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

45. The restaurant owners sought to build on an oft-cited footnote from the Court’s prior decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*. *Id.* at 2310. In *Mitsubishi Motors*, the Court stated arbitration clauses are enforceable only “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum,” and noted that if an arbitration clause “operated . . . as a prospective waiver of a party’s right to pursue statutory remedies” then the Court would condemn it. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth* 473 U.S. 614, 637 n.19 (1985).

46. *Id.* at 633–34.

47. *Italian Colors Rest.*, 133 S. Ct. at 2309–10.

48. For articles collecting some of these cases, see Imre Szalai, *More than Class Action Killers: The Impact of Concepcion and American Express on Employment Arbitration*, 35 *BERKELEY J. EMP. & LAB. L.* 31, 42 (2014) (“Many lower courts . . . have applied . . . fairness factors when reviewing the enforceability of an arbitration agreement in the employment context.”); Jean R. Sternlight, *Mandatory Binding Arbitration Clauses Prevent Consumers from Presenting Procedurally Difficult Claims*, 42 *SW. L. REV.* 87, 92 (2012) [hereinafter *Procedurally Difficult Claims*] (“[F]ederal courts [rejected customers’] attempts to use arbitration to secure the requested injunctive relief.”).

49. See Jean R. Sternlight, *Tsunami: AT&T Mobility v. Concepcion Impedes Access to Justice*, 90 *OR. L. REV.* 703, 707–17 (2012) (suggesting ways courts might have distinguished *Concepcion* decision).

50. See Press Release, Patrick Leahy, U.S. Senator, Leahy Unveils Legislation to Restore the Rights of Americans from Forced Arbitration, (Feb. 4, 2016),

groups have been sharply critical of companies' use of mandatory arbitration in the consumer context, as have many legal academics.<sup>51</sup> Such critics have been particularly tough on companies' use of arbitration to eliminate consumers' access to class actions.<sup>52</sup> On the other hand, the Chamber of Commerce and some academics have defended companies' use of forced arbitration as either acceptable or even praiseworthy.<sup>53</sup>

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[https://www.leahy.senate.gov/press/leahy-unveils-legislation-to\\_restore-the-rights-of-americans-from-forced-arbitration](https://www.leahy.senate.gov/press/leahy-unveils-legislation-to_restore-the-rights-of-americans-from-forced-arbitration) (quoting Leahy as chastising big business for “tip[ping] the scales” and “forcing consumers into private arbitration” which he insists denies them of Constitutional protections); Press Release, Al Franken, U.S. Senator, Franken, Blumenthal Introduce Legislation to Ensure Access to Justice for Telecommunications Consumers (Apr. 28, 2016), <https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-franken-introduce-legislation-to-ensure-access-to-justice-for-telecommunications-consumers> (quoting Senator Franken as stating, “Forced arbitration clauses are often buried in the fine print of agreements we sign each and every day—like cable, Internet, and cell phone contracts—and they strip away rights from the American consumer.”); Press Release, Jeff Sessions, U.S. Sen. Jeff Sessions, U.S. Senator, Introduces Consumer and Employee Arbitration Bill of Rights (Oct. 16, 2000), <http://www.sessions.senate.gov/public/index.cfm/news-release?ID=A756CFE0-7E9C-9AF9-7108-C66C91148A77> (qualifying the Senator’s position on arbitration as “believ[ing] the process is a valid alternative to resolving disputes in court at the cost of skyrocketing legal fees”).

51. See Zachary Gima et al., *Forced Arbitration: Unfair and Everywhere*, PUBLIC CITIZEN 1 (Sept. 14, 2009), <http://www.citizen.org/documents/UnfairAndEverywhere.pdf> (providing detailed research as to “whether [certain industries] impose binding arbitration on their customers” while also criticizing arbitration as “impos[ing] onerous costs on consumers, and provid[ing] extremely little opportunity for meaningful appeal”); see also Press Release, Nat’l Assoc. of Consumer Advocates & the Nat’l Consumer L. Ctr., National Association of Consumer Advocates and the National Consumer Law Center Support Reintroduction of Landmark Legislation to Restore Consumers, Workers, and Small Businesses’ Access to Justice (Apr. 30, 2015), <https://www.nclc.org/images/pdf/arbitration/pr-naca-nclc-arbitration-fairness-act-2015.pdf> (“[F]orced arbitration clauses prohibit individuals and small businesses from holding big banks and corporations accountable in court, even when corporations violate the law.”); *Panacea or Corporate Tool*, *supra* note 8, at 640–63 (sounding an early alarm that consumers and society-at-large should beware of mandatory arbitration clauses and courts’ upholding their validity, and exposing the misguided evolution of the Federal Arbitration Act); Schwartz, *supra* note 17, at 36 (decrying as a “monster” the combination of what he dubs the “authoritarian nature of adhesion contracts” with the “despotic nature of arbitral decision[-]making”).

52. See Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POLY. REV. 329, 330 (2015) (remaining optimistic that some “bright spots for consumers remain” despite “the legal landscape” in class actions “tilting radically towards the powerful”); see also Maureen A. Weston, *The Death of Class Arbitration After Concepcion?*, 60 KAN. L. REV. 767, 771 (2012) (condemning the *Concepcion* majority’s view of the FAA as “dated and deluded”); Gilles & Friedman, *supra* note 37, at 627 (calling the *Concepcion* decision a “*comp de grace*” to class actions brought by consumers).

53. See Press Release, U.S. Chamber of Commerce, U.S. Chamber Commends Supreme Court for Preserving Availability of Arbitration to Consumers and Businesses (June 19, 2013), <https://www.uschamber.com/press-release/us-chamber-commends-supreme-court-preserving-availability-arbitration-consumers-and> (praising the use of arbitration as more efficient than litigation in the tradition court system); see also Peter B. Rutledge, U.S. Chamber Institute for Legal Reform, *Arbitration—A Good Deal for Consumers*, 1–2, 31 (April 2008) <http://stmedia.startribune.com/>

In Congress, the primary bill introduced in an attempt to eradicate companies' use of mandatory arbitration in the consumer context is the Arbitration Fairness Act (AFA), proposed multiple times, most recently in April 2015.<sup>54</sup> If passed, this law would prevent companies from mandating the use of arbitration in either consumer or employment settings.<sup>55</sup> However, while the AFA seemed to have real possibility of passage in 2008, when the Democrats controlled the presidency and both houses of Congress, it did not even make it to a vote at that time and has made less progress since.<sup>56</sup>

Congress and various federal agencies have, however, tackled smaller pieces of the consumer arbitration phenomenon.<sup>57</sup> For example, in 2007

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documents/docload.pdf (attempting to dismantle the claims made in the Public Citizen publication and claiming that arbitration is less costly and overall better for consumers); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 252–54 (2006) (building a case to justify upholding mandatory arbitration clauses and calling them “socially desirable”); cf. Ware, *supra* note 27, at 724, 751 (asserting that the Supreme Court’s recent decisions go too far in that they allow companies to use arbitration to achieve ends, such as elimination of class actions, that would not be permitted in other contractual contexts).

54. Arbitration Fairness Act of 2015, S. 1133, 114th Cong. (1st Sess. 2015). A version of this Act was first introduced in 2007. Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (1st Sess. 2007); see also Restoring Statutory Rights and Interests of the States Act of 2016, S. 2506, 114th Cong. (2d Sess. 2016) (proposing to invalidate certain arbitration agreements that would mandate arbitration of claims regarding violations of federal or state law).

55. See S. 1133 (declaring in the findings that “[m]andatory arbitration undermines the development of public law”). Note that the precise text of the bill has changed over time. See, e.g., S. 1782 (proscribing forced arbitration of consumer, employment, franchise, and civil rights claims).

56. In 2009, although the Democrats controlled the White House and both Houses of Congress, the AFA still did not get reported out of the House Financial Services Committee, though it was chaired by supporter Representative Barney Frank. See George H. Friedman, *The Proposed Arbitration Fairness Act: Still a Well-Intended but Potentially Dangerous Overreaction to a Legitimate Concern*, ARB. RESOL. SERVS., INC., <https://www.arbresolutions.com/the-proposed-arbitration-fairness-act-still-a-well-intended-but-potentially-dangerous-overreaction-to-a-legitimate-concern/> (last visited Mar. 2, 2017) (explaining there were multiple failed attempts at “amend[ing] the FAA to limit or ban [the] use of mandatory arbitration on consumer contracts”). More recent bills similarly failed to make it to even a committee vote. See Arbitration Fairness Act of 2013, S. 878, 113th Cong. (1st Sess. 2013) (showing the only action on the Bill taken by the Senate Committee on the Judiciary, since its introduction on May 5, 2013, has been “Introduction and Referral” and “Committee Consideration”); S. 1133 (revealing the only action on the Bill has been “Introduction and Referral” by the Senate Committee on the Judiciary).

57. Congress has also regulated aspects of compelled arbitration outside the consumer setting. See Department of Defense Appropriations Act of 2010, Pub. L. No. 111–118, § 8116, 123 Stat. 3409, 3454–55 (codified as amended at 50 U.S.C. § 8102 (2012)) (prohibiting federal contractors who receive Department of Defense funds from requiring their employees or independent contractors to arbitrate certain claims); 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107–273, § 11028(a)(2), 116 Stat. 1758, 1835–36 (2002) (codified at 15 U.S.C. § 1226(a)(2) (2016)) (proscribing imposition of arbitration in motor vehicle franchise contracts); Food,

Congress adopted legislation that proscribes the use of mandatory arbitration with respect to loans to members of the military.<sup>58</sup> In the regulatory setting the Federal Trade Commission (FTC) has, since 1975, prohibited the use of forced arbitration in consumer warranty agreements covered by the Magnuson-Moss Warranty Act.<sup>59</sup> In 1992, the Securities and Exchange Commission (SEC) approved a rule issued by the Financial Industry Regulatory Authority (the self-regulatory body for the securities industry) that precludes securities dealers from using arbitration to block class actions.<sup>60</sup> Recently the Centers for Medicare and Medicaid Services (CMS) proposed a rule to limit the use of arbitration agreements in long term care facilities.<sup>61</sup> And, the Department of Education (DOE) recently commenced a negotiated rulemaking process to limit or regulate the use of arbitration agreements as a means of blocking group claims by students at for-profit colleges.<sup>62</sup>

Consistent with this targeted approach to regulating consumer arbitration, Congress addressed arbitration several times in the Dodd-Frank Act, passed in the aftermath of the financial crisis in 2010.<sup>63</sup> This

Conservation, and Energy Act of 2008, Pub. L. No. 110–234, § 11005, 122 Stat. 923, 1356–58 (codified at 7 U.S.C. § 197c (2016)) (restricting use of arbitration in livestock or poultry contracts).

58. See John Warner National Defense Authorization Act for Fiscal Year 2007, Pub. L. No. 109–364, § 670, 120 Stat. 2083, 2266–68 (codified as amended at 10 U.S.C. § 987 (2012)) (prohibiting use of arbitration clauses in loans to active service members and their families).

59. 16 C.F.R. § 703.5(j) (2016). After two appellate courts questioned the interpretation of this regulation, the FTC promulgated a final rule in 2015 to reaffirm its position that the Magnuson Moss Warranty Act proscribes the use of mandatory binding arbitration with respect to warranties. Final Action Concerning Review of the Interpretations of Magnuson-Moss Warranty Act, 80 Fed. Reg. 42,710, 42,719 (July 20, 2015).

60. See Order Approving Proposed Rule Change Relating to the Exclusion of Class Actions from Arbitration Proceedings, 57 Fed. Reg. 52,659–61 (Nov. 4, 1992) (ruling certain criteria must be met before a person can enforce an arbitration agreement over the subject of a certified class action against a person that is part of that certified class action suit).

61. Medicare and Medicaid Programs; Reform of Requirements for Long Term Care Facilities, 81 Fed. Reg. 68,688 (Oct. 4, 2016) (to be codified at 42 C.F.R. pts. 405, 431, 447, 482, 483, 485, 488, 489).

62. Press Release, U.S. Dept. of Educ., U.S. Dep't of Educ. Takes Further Steps to Protect Students from Predatory Higher Educ. Insts. (Mar. 11, 2016) <http://www.ed.gov/news/press-releases/education-department-proposes-new-regulations-protect-students-and-taxpayers-predatory-institutions>; see also Student Assistance General Provisions, 81 Fed. Reg. 38,9330, 38,9334–35 (June 16, 2016) (proposing to “[a]mend [Section] 685.300 to . . . prohibit the use of pre-dispute mandatory arbitration agreements by schools”); *Defenses to Repayment of Federal Student Loans: Public Hearing on Negotiated Rulemaking*, U.S. Dep't of Educ., Office of Postsecondary Educ., Transcript of Public Hearing at 6–7 (Sept. 16, 2015), <https://www2.ed.gov/policy/highered/reg/hearulemaking/2016/transcript-sfpubhearing-09162015.doc> (discussing the impact of mandatory arbitration on students and recent use of defenses by students against higher education institutions).

63. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376, 1376 (2010) (codified at 12 U.S.C. § 5301).

bill, intended to promote the financial stability of the country by reforming financial markets,<sup>64</sup> created the CFPB.<sup>65</sup> While arbitration was not a primary focus of the Act, section 1028(a) mandated that the CFPB study “the use of agreements providing for arbitration of any future dispute . . . in connection with the offering or providing of consumer financial products or services.”<sup>66</sup> Section 1028(b) of the Dodd-Frank Act further authorized the CFPB to issue regulations prohibiting use of arbitration or imposing conditions on its use, regarding “consumer financial product[s] or service[s] . . . if the Bureau finds that such a prohibition or imposition of conditions or limitations is in the public interest and for the protection of consumers.”<sup>67</sup> The Dodd-Frank Act also prohibited the use of forced arbitration in residential mortgage contracts,<sup>68</sup> authorized the SEC to issue rules prohibiting or regulating the use of arbitration by investment advisers,<sup>69</sup> and proscribed the use of forced arbitration in connection with some whistleblower proceedings.<sup>70</sup>

Pursuant to section 1028(a) of the Dodd-Frank Act,<sup>71</sup> the CFPB commenced to study the use of arbitration in the consumer financial context in 2012. After soliciting suggestions on how to conduct such a study,<sup>72</sup> receiving and incorporating ideas from many corners, and spending three years collecting and analyzing massive amounts of data, the CFPB produced a comprehensive and impressive report in March 2015.<sup>73</sup>

64. *Id.*

65. *Id.* at 1964 (codified at 12 U.S.C. § 5491).

66. *Id.* at 2003 (codified at 12 U.S.C. § 5518(a)).

67. *Id.* at 2004 (codified at 12 U.S.C. § 5518(b)).

68. *See id.* at 2151 (codified at 15 U.S.C. § 1639c(e)(1)) (“No residential mortgage loan . . . may include terms which require arbitration . . .”).

69. *Id.* at 1841 (codified at 15 U.S.C. § 80b-5(f)).

70. *Id.* at 1848 (codified at 18 U.S.C. § 1514A(e)).

71. *Id.* at 2003 (codified at 12 U.S.C. § 5518(a)).

72. Request for Information Regarding Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, 77 Fed. Reg. 25,148 (Apr. 27, 2012).

73. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 10. The Report was voluminous—ten sections and almost four hundred pages excluding appendices. *Id.* It examined the prevalence of pre-dispute arbitration clauses in the consumer financial sector, the typical features of such clauses, what consumers understand about dispute resolution, the types of claims brought in arbitration and how they are resolved, the types of claims brought in litigation and how they are resolved, consumers’ use of small claims courts, the value of class action settlements, the relationship between public enforcement and consumer financial class actions, and whether companies’ use of mandatory arbitration led to lower prices for consumers. *Id.* This Report was preceded by a Preliminary Report in late 2013. CONSUMER FINANCIAL PROTECTION BUREAU, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT (2013).

Many in the field enthusiastically welcomed the Report<sup>74</sup> because it is well recognized that there has been a dearth of solid empirical information regarding the impacts of mandatory consumer arbitration.<sup>75</sup> While studies have been conducted by a variety of organizations and academics, and many have been very useful,<sup>76</sup> those on both sides of the issue have repeatedly emphasized the need for more and better studies. It is well recognized by all sides that it is inherently difficult to study a private process.<sup>77</sup> The CFPB could not solve every research problem, but at least it could use its resources and authority to obtain information not previously made available, and without having to rely on outside funding.<sup>78</sup>

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74. See, e.g., Letter from Law Professors, to Office of the Exec. Sec'y, Consumer Fin. Prot. Bureau, 1, 2 (May 23, 2016) (on file with author) (calling the CFPB study "comprehensive and impressive" and noting the need for "more and better data-driven studies" with respect to mandatory arbitration). Some analysts, however, have critiqued the study. See Jason Scott Johnston & Todd Zywicki, *The Consumer Financial Protection Bureau's Arbitration Study: A Summary and Critique 2* (George Mason Univ. Sch. of Law, Working Paper No. 15-25, 2015), [http://www.law.gmu.edu/assets/files/publications/working\\_papers/LS1507.pdf](http://www.law.gmu.edu/assets/files/publications/working_papers/LS1507.pdf) (contending the study lacks pertinent data to analyze the efficacy of arbitration clauses). But while, as those authors suggest, more data is always desirable, this author believes that the CFPB's studies have more than adequately shown that class actions are helping consumers and the public in ways that a very small number of individual arbitrations are not.

75. See CARRIE MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 478–79 (2d ed. 2011) (discussing the challenges of empirical inquiry and noting that those who have done empirical work in the area "spend a great deal of time critiquing each others' conclusions and debating the burden of proof"); see also David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 62 (2015) (discussing challenge of answering "empirical questions about a system that does not lend itself to empirical inquiry").

76. There are many examples of helpful, recent studies. See 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, 2812 n.25 (2015) (studying data posted by the AAA under mandate of laws of various jurisdictions); see also Horton & Chandrasekher, *supra* note 75, at 63 (examining arbitration complaints filed by consumers with the American Arbitration Association between 2009 and 2013).

77. See Thomas J. Stipanowich, *The Third Arbitration Trilogy: Stolt-Nielsen, Rent-A-Center, Concepcion and the Future of American Arbitration*, 22 AM. REV. INT'L ARB. 323, 422–25 (2011) (complaining about the difficulty of obtaining "reliable data on largely private arbitration processes"). Neither companies nor arbitration providers have to open their files to interested researchers. *Id.* While some jurisdictions have required arbitration providers to supply certain data, researchers have often found the produced data to be sketchy. *Id.* Moreover, researchers cannot legitimately conclude that results obtained from one arbitration provider are predictive of what they might find in the files of another arbitration provider. *Id.* And, some studies have been critiqued based on being funded by an interested group. *Id.*

78. The CFPB has described various ways in which its study "drew in part upon data sources previously unavailable to researchers." *Arbitration Agreements*, *supra* note 2, at 32,840. Some of this information was provided voluntarily, and some of the information was procured by the Bureau from financial service providers by submitting orders pursuant to its market monitoring authority under the Dodd-Frank Act, Section 1022(c)(4). See *id.* (mentioning the CFPB used its "market

Four main CFPB conclusions are worth emphasizing. First, the CFPB's study reveals that the vast majority of consumers do not enter into arbitration agreements knowingly or consensually in any meaningful sense of those words.<sup>79</sup> Second, very few consumers actually bring arbitration claims pertaining to financial matters.<sup>80</sup> Third, CFPB found that the major impact of mandatory consumer arbitration in the financial setting is that it precludes consumers from participating in class actions that might be brought on their behalf and thereby brings value both to individual consumers and to society as a whole.<sup>81</sup> Specifically, it stated "that arbitration agreements have the effect of blocking a significant portion of class action claims that are filed and of suppressing the filing of others."<sup>82</sup> Fourth, the CFPB found that "the class action mechanism is a more effective means of providing relief to consumers for violations of law or contract affecting groups of consumers than other mechanisms available to consumers, such as individual formal adjudication (either through judicial or arbitral fora) or informal efforts to resolve disputes."<sup>83</sup>

Expanding on this a bit, the CFPB explained that whereas millions of financial consumers who are not subject to pre-dispute arbitration clauses receive benefits through class actions, only a minute portion of consumers covered by arbitration clauses actually choose to bring arbitration claims.<sup>84</sup> Specifically, the Report found that between 2010 and 2012, only a few hundred financial consumers filed arbitration claims with the American Arbitration Association (AAA), even though the AAA handles more consumer arbitration claims than any other arbitration provider.<sup>85</sup> Moreover, of the arbitration claims that were brought by individual consumers, most involved claims of over \$1,000. In other words, a miniscule number of consumers bring individual arbitrations to recover low-dollar claims.<sup>86</sup>

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monitoring" power to obtain certain information).

79. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 10, § 3.1, at 3–4.

80. *Id.* at §§ 5.2.1, 5.5.1, at 9, 19.

81. *Id.* at § 8.1, at 3–5.

82. Arbitration Agreements, *supra* note 2, at 32,859.

83. *Id.* Additionally, the Bureau found public enforcement is not a sufficient means to enforce consumer protection laws. *Id.* at 32,860.

84. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 10, § 5.5.1, at 19.

85. The CFPB Report, in sections 5.2.1 and 5.5.1 identified 1,847 AAA consumer arbitration disputes involving credit cards, checking accounts, payday loans, GPR prepaid cards, auto purchase loans, or private student loans, but it also noted that a substantial number of these disputes were filed by the company rather than the consumer and/or involved claims of unpaid consumer debts rather than affirmative claims brought by consumers. *Id.* at § 5.2.1, at 9; *Id.* at § 5.5.1, at 19.

86. The CFPB's study of six product markets found only approximately twenty-five claims per



Another way to summarize this aspect of the CFPB's results is that rather than encouraging and allowing more financial consumers to bring claims, forced arbitration clauses employed in the financial sector suppress claims consumers might otherwise have brought in class actions. It is easy to see why consumers are reluctant to bring claims individually. First, many individual claims against companies that provide consumer financial services and products are worth only small amounts of money. As Judge Posner put it, "The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30."<sup>87</sup> It simply is not worth a consumer's time or trouble, nor a lawyer's, to pursue a small claim. Second, it is difficult to obtain legal representation to bring low-value individual claims because consumers typically cannot afford to pay attorneys an hourly rate to represent them on such a claim, and attorneys cannot afford to handle these claims on a contingent fee basis.<sup>88</sup> Third, individual consumers may not be aware that a financial services company has harmed them or that the harm was unlawful. For example, a consumer might well not realize they were charged an improper interest rate or discriminated against on the basis of their race with respect to a loan rate.<sup>89</sup> By contrast, class proceedings are well designed to deal with each of these problems because they allow many small claims to be grouped together, make it easier for financial consumers to obtain representation, and allow financial consumers who may not realize they have been wronged to participate in a class action where their rights can be adjudicated.<sup>90</sup>

In other words, one of the harmful consequences of pre-dispute arbitration clauses containing class action waivers is that they suppress claims that consumers might otherwise bring. While it is true that fairly few consumers file individual claims to vindicate their legal rights, this is not necessarily because they lack valid claims; rather, most consumers are simply unaware that they have been harmed, unaware that the harm violates a law, or have decided that filing individual arbitration claims is not worth their time and expense.<sup>91</sup> Yet, from both an individual and

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year brought by consumers seeking affirmative relief of \$1,000 or less. *Id.* at § 5.2.1, at 9. Similarly, another study looking at a broader array of consumer arbitration claims found less than 4% of the claims were brought for \$1,000 or less. Horton & Chandrasekher, *supra* note 75, at 117.

87. *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

88. *Procedurally Difficult Claims*, *supra* note 48, at 109.

89. *Id.* at 112–13.

90. *Id.* at 119–20.

91. When consumers *are* aware of being wronged they may raise complaints internally with companies, file with a government agency, or seek protection from a credit card company if

societal standpoint, it can be important to allow such claims to be brought.

Nor is there reason to believe, as some have suggested, that consumers would bring more individual arbitration claims against financial service providers if only they were better educated about the purported virtues of arbitration. Rather, a consumer who was truly well informed about consumer arbitration would likely conclude that—given the financial and other costs of arbitration and the limited likelihood of success—it makes absolutely no sense to file an individual arbitration claim.<sup>92</sup> Thus, the CFPB concluded that if we want to ensure the enforcement of substantive laws protecting consumers, we need to preserve consumer class actions.<sup>93</sup>

Based on its study, the CFPB proposed regulation CFPB-2016-0020 on May 7, 2016.<sup>94</sup> This regulation “would prohibit providers from using a pre-dispute arbitration agreement to block consumer class actions in court and would require providers to insert language into their arbitration agreements reflecting this limitation.”<sup>95</sup> Because the Bureau found the evidence “inconclusive as to the relative efficacy and fairness of individual arbitration compared to individual litigation,”<sup>96</sup> it did not propose to prohibit companies’ imposition of pre-dispute arbitration clauses in the financial consumer context.<sup>97</sup> However, because the Bureau remains concerned about “the potential for consumer harm” if companies mandate individual arbitration,<sup>98</sup> it proposed to monitor the use of individual arbitration in the financial consumer setting.<sup>99</sup> Specifically, it “would require providers that use pre-dispute arbitration agreements to submit certain records relating to arbitral proceedings to the Bureau.”<sup>100</sup> The CFPB has stated an intent to publish redacted or aggregated versions of this information on its website.<sup>101</sup> This monitoring would provide greater

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appropriate, rather than engage in more difficult and expensive litigation or arbitration. *Id.* at 101–02.

92. *Id.* at 113–19.

93. Arbitration Agreements, *supra* note 2, at 32,858 (“The Bureau preliminarily finds, based on the results of the Study and its further analysis, that the class action procedure provides an important mechanism to remedy consumer harm.”).

94. *Id.* As noted earlier, this regulation has not been finalized by the CFPB.

95. *Id.* at 32,830.

96. *Id.* at 32,868.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 32,830. In particular, the proposed regulation would require regulated companies to provide to the CFPB two categories of information: (a) claims, clauses, and judgments (if any) relating to consumer arbitration filings and (b) any determinations by arbitrators or arbitration providers to the effect that a particular arbitration agreement does not comply with relevant fairness principles. *Id.* at 32,868.

101. *Id.* at 32,893.

transparency to the process while also allowing the Bureau to more fully consider, in the future, whether additional regulation might be desirable.<sup>102</sup>

#### IV. CONSIDERING JUSTIFICATION OF THE PROPOSED CFPB RULE

The remainder of this Essay will consider whether—in light of relevant economics, psychology, and political philosophy—the empirical findings made by the CFPB indeed justify the rule it has proposed. One way to think about whether the proposed regulation is justified is to consider whether, from an economic standpoint, market forces will adequately protect consumers such that there is no need for regulation. Or, are there any psychological principles at play that might lead us to either support or reject the need for regulation? Finally, what about principles of freedom—should the regulation be rejected to support consumers' purported freedom of contract and autonomy? The analysis below shows that the proposed CFPB rule is well justified using each of these three lenses.

##### A. Economics

###### 1. Absence of Perfect Competition

Advocates for the virtues of free markets and perfect competition might suggest that the CFPB regulation is either unnecessary or undesirable given the powerful forces of perfect competition. Such persons would suggest that regulation is unnecessary because market forces would ensure that any contractual provisions are vetted by all parties to ensure all maximize their wellbeing.<sup>103</sup> A number of commentators have noted that the Supreme Court and others often justify favorable treatment of arbitration by drawing on freedom of contract principles.<sup>104</sup> As a corollary to this

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102. *Id.* at 32,868.

103. See RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 76 (1995) (“[A]ll voluntary exchanges are positive-sum games for the participants. Exchange does not merely transfer physical or intangible assets. It increases human satisfaction by matching assets with the persons who value them most.”); Stephen J. Ware, *Consumer Arbitration As Exceptional Consumer Law (With a Contractualist Response to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 211 (1998) [hereinafter *Consumer Arbitration As Exceptional Consumer Law*] (observing that the “process of exchange is tremendously beneficial” because it “makes both parties to a contract better off than they were without the contract”); see also Amy J. Schmitz, *Remedy Realities in Business-to-Business Consumer Contracting*, 58 ARIZ. L. REV. 213, 217–18 (2016) (noting traditional contract doctrine counsels in favor of formalistic disclosure rules rather than substantive consumer protection in order to supposedly foster “an optimal allocation of resources”).

104. See J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J.

principle, the work of some free market advocates suggests that by regulating this consumer market, the CFPB will cause prices of consumer products and services to rise, potentially thereby hurting more consumers than it helps.<sup>105</sup>

So, let us briefly explore whether, in fact, principles of economics oppose the sort of market regulation imposed by the CFPB pursuant to the power afforded that agency by the Dodd-Frank Act.<sup>106</sup> That is, absent regulation, will the forces of the market and the so-called *invisible hand* ensure that market participants' interests are protected and their "utility" (i.e. happiness) is maximized? Economists have shown that in a theoretical world of "perfect competition," regulation is not needed because consumers will seek out the deals that are best for them, and

3052, 3070 (2015) (observing that the Supreme Court has established "a vision of arbitration as pure freedom of contract"); see also THOMAS E. CARBONNEAU, *THE LAW AND PRACTICE OF ARBITRATION* 49 (5th ed. 2014) (noting that "[f]reedom of contract is the primary legal concept that governs the law, practice, and regulation of arbitration in the vast majority of national jurisdictions, including the United States"); Steven W. Feldman, *Italian Colors and Freedom of Contract Under the Federal Arbitration Act: Has the Supreme Court Enabled Disappearing Claims and the Erosion of Substantive Law?*, 2016 MICH. ST. L. REV. 109, 109–10 (2016) (countering Professor Glover's attack on recent Supreme Court arbitration jurisprudence and, instead, defending the Supreme Court's reliance on freedom of contract principles while also recognizing that freedom of contract can be tempered by appropriate regulation).

105. See Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89, 89–90 (2001) (urging judicial regulation of arbitration raises consumer prices and may well not be justified, depending on benefits of that regulation); Stephen J. Ware, *Arbitration Under Assault: Trial Lawyers Lead the Charge*, CATO INST. (Apr. 18, 2002), <http://www.cato.org/pubs/pas/pa-433es.html> [hereinafter *Arbitration Under Assault*] (emphasizing that measures prohibiting mandatory arbitration would likely harm consumers by raising prices); see also CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 10, § 10, at 2 (observing that some commenters, particularly the Chamber of Commerce, asked the CFPB to "explore whether pre-dispute arbitration clauses lower the price of financial services to consumers[,] and citing literature regarding the potential "pass through" of company cost savings). However, Professor Ware has recently recognized that it is appropriate to regulate forced arbitration to prevent companies from using arbitration to eliminate class actions or to prevent appeals. See Ware, *supra* note 27, at 718 ("U.S. law generally does not routinely enforce adhesion contract terms 'waiving' . . . the right to be a part of a class action, [so] courts should not routinely enforce adhesive arbitration agreements trading away the right to be a part of a class action.").

106. Many others have broadly examined the application of economic analysis to form contracts. See FLORENCIA MAROTTA-WURGLER, *"Unfair Dispute Resolution Clauses: Much Ado About Nothing?"*, in *BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS* 45 (Omri Ben-Shahar, ed. 2007) (rationalizing dispute resolution clauses as necessary to keep sellers' costs down); Aditi Bagchi, *At the Limits of Adjudication: Standard Terms in Consumer Contract*, in *COMPARATIVE CONTRACT LAW* 446 (L. DiMatteo & M. Hogg, eds. 2015) ("The mechanism on which we rely to achieve efficient terms [in a contract] is the market."); Robert A. Hillman & Jeffrey J. Rachlinski, *Standard-Form Contracting in the Electronic Age*, 77 N.Y.U. L. REV. 429, 447 (2002) (suggesting consumers should trust boilerplate terms in contracts with competitive businesses because they properly "minimize the overall costs of the good or service").

companies that are treating consumers unfairly or harming them will be driven out of business.<sup>107</sup> The theory is beautiful—even compelling—but, the question is whether or when it exists in reality.<sup>108</sup>

The four generally recognized conditions for perfect competition are as follows:

- (1) There should be a sufficient number of small buyers and sellers such that no single buyer nor seller can influence the market price. No seller should produce a large percentage of the total market output;
- (2) The good or service produced should be homogeneous, so that no firm produces a unique product;
- (3) Entry and exit into the market should be very easy. No significant barriers to entry should exist such as licenses, economies of scale, high capital setup costs, or brand loyalty; and
- (4) All buyers and sellers should have very good access to relevant information such as prices, quality and characteristics of goods, and costs of production.<sup>109</sup>

The first three conditions all pertain to the sellers of financial goods and services, and it appears that they are rarely, if ever, fulfilled in the consumer financial sector. While the number of sellers varies substantially, depending on the particular financial product or service, it generally ranges from very few (mobile wireless phone providers)<sup>110</sup> to relatively few (banks and credit card providers).<sup>111</sup> Thus, condition one is not met.

107. “Moving beyond a single perfectly competitive market, economists have proven that an entire economy that consists *only* of perfectly competitive markets will have an efficient allocation of all resources without any government regulation.” NEVA GOODWIN, ET AL., MICROECONOMICS IN CONTEXT 351 (3d ed. 2014); *see also* ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 609 (8th ed. 2013) (discussing the economic efficiency of competitive markets and explaining that such a general equilibrium is a means of “illustrating the workings of Adam Smith’s famous *invisible hand*”).

108. *See* PINDYCK & RUBINFELD, *supra* note 107, at 625 (discussing markets may failure can caused by market power, incomplete information, externalities, and public goods).

109. WALTER NICHOLSON & CHRISTOPHER M. SNYDER, MICROECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS 449 (12th ed. 2016); PINDYCK & RUBINFELD, *supra* note 107, at 631 (8th ed. 2013); *see also* Jean R. Sternlight & Elizabeth J. Jensen, *Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse?*, 67 L. & CONTEMP. PROBS. 75, 93–94 (2004) (acknowledging the four generally recognizable conditions of perfect competition, but wondering whether “these conditions [are] likely to be met in the real world, where companies are mandating arbitration and eliminating class actions”).

110. James W. Brock, *Economic Concentration and Economic Power: John Flynn and a Quarter Century of Mergers*, 56 ANTITRUST BULL. 681, 701 (2011) (observing that AT&T and Verizon control 80% of local exchange revenues across the country).

111. *Id.* at 718–20 (discussing substantial recent consolidations in banking industry in recent years).

Similarly, while at first glance one might say that all credit cards, banks, or phone services are pretty much the same, these products and services are not entirely homogeneous, and thus the second condition is not met. Rather, companies try to distinguish their products based on interest rates, price, and other factors. Consumers do not easily exchange one bank or credit card provider or phone company for another.<sup>112</sup> This is not surprising because switching products and services is often costly for consumers, in terms of time, convenience, and sometimes substantial fees.<sup>113</sup> Finally, the third condition is not met because fields such as banking, lending, and telephone service are heavily regulated, and thus new companies cannot easily enter the field.<sup>114</sup>

Nor can it be realistically be claimed that the fourth condition of perfect competition is met. It is not true that all buyers of consumer financial products have very good access to information about the arbitration clauses often contained in consumer financial contracts.<sup>115</sup> While theoretical access may exist, to the extent consumers are provided with documents or access to websites containing the information, in reality the documents are often too long, too technical, or too buried for consumers to understand their provisions. Multiple studies, including the study done by the CFPB, have shown financial consumers do not focus on arbitration clauses and generally are not aware of what they mean.<sup>116</sup> Specifically, the

112. The Pew Charitable Trust surveyed banking consumers and found only 38% hypothetically said they would close their account if they had a problem with their bank. Susan Weinstock & Thaddeus King, *CFPB to Act on Banking Dispute Resolution: Proposal Would Protect Class-Action Rights*, PEW CHARITABLE TRUSTS (Feb. 16, 2016), <http://www.pewtrusts.org/en/research-and-analysis/analysis/2016/02/16/cfpb-to-act-on-banking-dispute-resolution>. Presumably the number of consumers who would actually switch is far lower, given the inevitable hassles of life.

113. Sternlight & Jensen, *supra* note 109, at 94.

114. *Id.* at 94–95.

115. Melvin A. Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 241 (1995) (“[T]he meaning and effect of the preprinted provisions will very often be inaccessible to laypersons . . . . Even if the terms are written clearly, however, the form taker usually will be unable fully to understand their effects, because . . . most consumers do not know their baseline rights.”). Further, it does not appear, as some have suggested, that a minority of educated consumers can protect their less educated peers. Schmitz, *supra* note 103, at 238.

116. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 10, § 3.1, at 3–4. These results are largely consistent with other studies. See Jeff Sovern et al., “Whimsy Little Contracts” with Unexpected Consequences: An Empirical Analysis of Consumer Understanding of Arbitration Agreements, 75 MD. L. REV. 1, 2–3 (2016) (reporting on findings from an empirical study exploring consumer awareness and understanding of arbitration clauses); see also *Banking on Arbitration: Big Banks, Consumers, and Checking Account Dispute Resolution*, PEW CHARITABLE TRUST, Nov. 2012, at 1, 1. [http://www.pewtrusts.org/~/media/assets/2012/11/27/pew\\_arbitration\\_report.pdf](http://www.pewtrusts.org/~/media/assets/2012/11/27/pew_arbitration_report.pdf) [hereinafter *Banking on Arbitration*] (noting that while “checking accounts are the cornerstone of household financial management[,] . . . consumers often are unaware of the terms of their checking account

CFPB found that less than 7% of consumers whose credit card agreements included arbitration provisions understood that they were precluded from suing the company in court should a dispute arise.<sup>117</sup>

Given the apparent absence of perfect competition in these industries, it is not too surprising to hear that in fact some companies collaborated with one another to impose arbitration on consumers. *The New York Times* described how, in 1999, banking attorney Alan Kaplinsky joined forces with attorneys at another banking firm to consider whether and how arbitration might be used to protect their clients from class actions.<sup>118</sup> The group sponsored multiple meetings that included representatives from companies such as Bank of America, Chase, Citigroup, Discover, Sears, Toyota, and General Electric. *The Times* reporters found that the group met more than a dozen times over the next three years in an effort to use explicit arbitral class action prohibitions “to kill class actions and send plaintiffs’ lawyers to the ‘employment lines.’”<sup>119</sup> By the end of this period, many of the companies had adopted arbitration clauses banning class actions.<sup>120</sup> This hardly has the ring of perfect competition in action.

When the conditions of perfect competition are not met, then regulation can be justified to protect consumers from the excesses of imperfect competition.<sup>121</sup> In particular, given the realities of consumer markets, including particularly the lack of information and the practical difficulty in switching products, it seems highly unlikely that the forces of perfect competition will ensure that the market protects all consumers, absent regulation.

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agreements” and specifically that many are unaware of account agreements restricting their right to go to court).

117. CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 10, § 3.1, at 3. These results are largely consistent with other studies. *See generally*, Sovern, *supra* note 116, at 2 (finding a “profound lack of understanding about the existence and effect of arbitration agreements among consumers”); *see also Banking on Arbitration*, *supra* note 116, at 1 (noting while “checking accounts are the cornerstone of household financial management . . . consumers often are unaware of the terms of their checking account agreements” and, that many are unaware of account agreements restricting their right to court to go to court).

118. Silver-Greenberg & Gebeloff, *supra* note 20. Mr. Kaplinsky, an attorney at the large Philadelphia law firm Ballard Spahr, also argued at about this time that arbitration and class actions were inherently inconsistent. *See* Kaplinsky, *supra* note 35, at 639 (urging arbitrable disputes may not proceed by way of class action, either in court or in arbitration, unless the arbitration agreement expressly allows for arbitration).

119. Silver-Greenberg & Gebeloff, *supra* note 20.

120. *Id.*

121. *See* Neil W. Averitt & Robert H. Lande, *Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law*, 10 LOY. CONSUMER L. REV. 44, 48–50 (1998) (scrutinizing the concepts of perfect competition and consumer choice, and concluding that interference with the market through legislation is necessary to ensure “consumer welfare”).

The same economics that oppose regulation in the presence of perfect competition instead justify regulation where, as here, the conditions for perfect competition do not exist. Some regulations, such as antitrust law, are used to directly prohibit monopolies or other forms of imperfect competition.<sup>122</sup> Other regulations, like those governing appropriate safety of consumer products, or marketing of medicines, or airplane safety, are designed to provide protection that an unregulated imperfect market would not provide.<sup>123</sup> In the consumer financial context, it appears that regulation is needed to prevent companies from taking advantage of consumers through class action prohibitions.

Some have argued that regulation of consumer arbitration will likely harm consumers by causing prices and interest rates to increase.<sup>124</sup> However, absent perfect competition, such regulation may well cause prices to drop or stay the same rather than rise.<sup>125</sup> Consistent with this analysis, the CFPB study showed that when companies in one consumer financial market were precluded from imposing binding arbitration on their customers, in fact those companies' prices did not rise.<sup>126</sup> In particular, CFPB examined a naturally occurring experiment of a sort where "certain credit card issuers agreed to remove pre-dispute arbitration clauses from their consumer credit card contracts for at least three and one-half years."<sup>127</sup> CFPB compared data from before and after that settlement and found no evidence that companies that had eliminated arbitration raised their prices any more than companies that did not eliminate arbitration provisions.<sup>128</sup>

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122. See generally RICHARD A. POSNER, *ANTITRUST LAW* (2d ed. 2001) (explaining antitrust laws preclude imperfect competition such as monopolies).

123. See GOODWIN, *supra* note 107, at 116–17 (observing that existence of market failures provide justification for market regulation); PINDYCK & RUBINFELD, *supra* note 107, at 667–84 (8th ed. 2013) (discussing various means of regulation designed to counter externalities); NICHOLSON & SNYDER, *supra* note 109, at 691–92 (discussing the system of taxation that could be used to correct market misallocations).

124. See, e.g., *Arbitration Under Assault*, *supra* note 105 (suggesting the price of doing business in America will rise).

125. See *id.* (stating analysis shows "[a]rbitration tends to reduce consumer prices"). That is, the regulation of a non-competitive market may enhance competition and, thus, cause prices to decrease. *Id.* Of course, minimizing prices is by no means the only goal of regulation. Providing safe and good products and services is important as well. *Id.*

126. See CONSUMER FIN. PROT. BUREAU, *REPORT TO CONGRESS*, *supra* note 10, § 10, at 5–6 (discussing a study of credit card issuers that removed arbitration clauses from consumer contracts and finding no evidence of increased prices).

127. *Id.* at § 10, at 5.

128. *Id.* at § 10, at 6 finding no evidence that such companies increased prices or reduced the amount of credit they offered to consumers).



In sum, where, as in the consumer financial markets, perfect competition is absent, regulation is easily justified.

## 2. Externalities

Economic theory also provides an additional justification for the work of the CFPB with respect to mandatory arbitration. Apart from the lack of perfect competition, regulation may also be appropriate to protect the interests of parties who are not direct participants in a transaction that nonetheless affects them. That is, two or more parties may enter into a relationship that also has an impact on others. Economists state “externalities occur because economic actors have effects on third parties that are not reflected in market transactions.”<sup>129</sup> Externalities can be either positive or negative, as third parties can be either benefited or harmed by the actions of others.<sup>130</sup> Thus, when a consumer buys a car that pollutes the environment, the pollution is a negative externality that affects many parties in addition to the buyer and seller of the car.<sup>131</sup> Yet, absent regulation, the full cost of pollution will not be incorporated into the price of the car.<sup>132</sup>

Like pollution, an arbitral class action prohibition can have a negative impact on persons not a party to the underlying consumer contract.<sup>133</sup> As has been discussed, our legal system relies on class actions, in part, to help enforce our laws and deter delinquent behavior.<sup>134</sup> Thus, if companies are able to use arbitral class action waivers to avoid being sued in class actions, such companies may more frequently violate laws regulating consumer financial transactions than they would have done had they feared being sued. Such delinquent behavior would harm not only consumers who are presently covered by the arbitration clauses but also future consumers or even others who might be indirectly impacted.<sup>135</sup>

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129. NICHOLSON & SNYDER, *supra* note 109, at 683.

130. “[E]xternalities are side effects, positive or negative, of a economic transaction that affect those not directly involved in the transaction.” GOODWIN, *supra* note 107, at 293.

131. In contrast, a group of friends who play music in the park for one another will create a positive externality for those nearby persons who appreciate their music.

132. NICHOLSON & SNYDER, *supra* note 109, at 715–16 (12th ed. 2016) (discussing pollution abatement as a form of externality).

133. See Wendy Netter Epstein, *Contract Theory and the Failures of Public-Private Contracting*, 34 CARDOZO L. REV. 2211, 2231 (2013) (“An externality is an effect that a transaction between one set of parties puts on other parties who were not a part of the deal.”).

134. See *Carnegie v. Household Int'l*, 376 F.3d 656, 661 (7th Cir. 2004) (explaining class actions allow more claimants and therefore are more likely to “yield substantial economics in litigation”).

135. See GOODWIN, *supra* note 107, at 261 (identifying externalities as “side effects” affecting unintended third parties).

For example, imagine a scenario in which a bank used an arbitral class action prohibition to prevent customers from using a class action to sue over racially discriminatory lending practices. Further, imagine that the bank then engaged in such discriminatory practices, that most borrowers were unaware they had been impacted, and that the few who did realize they had been discriminated against were unable to bring individual claims against the bank. In this event, the bank would have engaged in racially discriminatory behavior that would cause a detrimental impact not only on directly affected consumers but potentially on their families, friends, and the public at large, due to the growth of discrimination.<sup>136</sup>

In short, regulation can be justified to prevent or discourage the creation of negative externalities. Thus, to the extent that companies' imposition of mandatory arbitration clauses containing arbitral class action waivers harms non-parties to the transaction, regulation is justified.

### 3. Unequal Resources

Even a perfectly competitive market cannot ameliorate an unequal initial distribution of resources. Indeed, if we rely too heavily on free markets and allow the use of unregulated form contracts, we are likely to worsen these preexisting inequalities. Many decades ago, Professor Friedrich Kessler explained this well:

Society, when granting freedom of contract, does not guarantee that all members of the community will be able to make use of it to the same extent. On the contrary, the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege. . . . Freedom of contract enables enterprisers to legislate by contract and, what is even more important, to legislate in a substantially authoritarian manner without using the appearance of authoritarian forms. Standard contracts in particular could thus become effective instruments in the hands of powerful industrial and commercial overlords enabling them to impose a new feudal order of their own making upon a vast host of vassals.<sup>137</sup>

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136. Peggy Radin has also argued that the use of standard form contracts can result in another type of externality—democratic degradation. MARGARET JANE RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW* 33–52 (2013); see also W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 530 (1971) (critiquing standard form contracts as non-democratic).

137. Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943).

Putting this more concretely, the financial services companies that are using mandatory arbitration clauses to prevent customers from participating in collective actions are worsening the unequal distribution of resources in this country. Thus, we can justify regulation of the practice by looking to policies that favor a more equal distribution of societal resources, as well as by policies that favor protecting the public interest against externalities and policies that favor protecting individuals from market failures.

### B. *Psychology*

One can also consider the CFPB regulation through the lens of cognitive psychology. Even to the perhaps limited extent that consumer markets are competitive, consumers' psychology will often lead them to be exploited. As Oren Bar-Gill explains:

Competition, many believe, works to increase efficiency and protect consumers. But competition does not alleviate the behavioral market failure. It may even exacerbate it. . . . In a competitive market, sellers have no choice but to align contract design with the psychology of consumers. . . . Put bluntly, competition forces sellers to exploit the biases and misperceptions of their customers.<sup>138</sup>

In concrete terms, some have suggested that consumers should be "free" to choose contracts containing arbitration clauses, and even class action prohibitions, because the consumers may see such clauses as providing superior benefits such as lower prices.<sup>139</sup> However, the practical reality of the world is that few if any consumers actually make such knowing choices, nor can they be expected to do so. The insights of cognitive psychologists are in this sense another challenge to the economists' historical view of the world, because it turns out that the "rational actor" or "homo economicus" hypothesized by economists over many decades is a rare being indeed. The field of "behavioral economics" now blends both economic and psychological insights.<sup>140</sup>

At least three cognitive issues often prevent consumers from making fully informed rational decisions as to whether or not an arbitration clause

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138. OREN BAR-GILL, *SEDUCTION BY CONTRACT* 1, 2 (2012).

139. *Supra* text accompanying note 125.

140. See generally RICHARD H. THALER & L.J. GANSER, *MISBEHAVING: THE MAKING OF BEHAVIORAL ECONOMICS* (2016) (describing the blending of economic and psychological insights); CASS R. SUNSTEIN, *BEHAVIORAL LAW AND ECONOMICS* (2000) (discussing the concept of behavioral economics).

containing a class action waiver might serve their best interest: (1) consumers typically focus on only that information that seems the most salient; (2) consumers often fail to comprehend clauses contained in contracts; and (3) consumers tend to be affected by positive illusions that lead them to downplay the likelihood that a problem may arise and therefore, also downplay the importance of a dispute resolution clause. The discussion below addresses these issues both generally and also as applied to arbitral class action waivers in particular.

Overwhelmed with information in every aspect of their lives, consumers focus on only the most salient information—that which jumps out at them and seems urgently important.<sup>141</sup> When engaging in financial consumer transactions consumers will probably focus on price or maybe even interest rates, but it is completely unrealistic to think that consumers would or could invest the time to delve into the guts of a small print online contract to look at a dispute resolution clause that might change the process by which they might resolve future disputes.<sup>142</sup>

In light of this general phenomenon, it is unsurprising that consumers are not typically focused on dispute resolution provisions that might be contained in small print contracts, envelope stuffers, or online provisions, particularly where a signature is not necessarily required.<sup>143</sup> Based on a national telephonic survey of credit card holders, the CFPB determined that most consumers did not focus on dispute resolution clauses when choosing a credit card.<sup>144</sup> Rather, using a series of both open- and closed-ended survey questions, the Bureau found consumers were primarily concerned with rewards, interest rates, merchants' acceptance of the card, issuer reputation, and fees. Dispute resolution clauses were the least important concern in both the open- and closed-ended questioning surveys.<sup>145</sup> Another survey asked 648 consumers whether they were

141. See BAR-GILL, *supra* note 138, at 1 (“That no one reads the fine print is old news. That sellers hide one-sided terms in the fine print is not surprising.”).

142. See Sovern, *supra* note 116, at 15–19 (discussing literature showing consumers tend not to read fine print contracts); see also Russell Korobkin, *Bounded Rationality, Standard Form Contracts and Unconscionability*, 70 U. CHI. L. REV. 1203, 1206 (2003) (“Because buyers are boundedly rational rather than fully rational decision makers, when making purchasing decisions they take into account only a limited number of product attributes and ignore others.”); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1179 (1983) (opining that most consumers do not read contracts of adhesion).

143. *Supra* text accompanying note 23.

144. See CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 10, § 3.4.1, at 15 (discussing a study of credit card issuers that removed arbitration clauses from consumer contracts and determining the existence of an arbitration clause was of little concern to a consumer).

145. See *id.* (“No respondent mentioned dispute resolution.”).

covered by arbitration provisions, and found that 303 said they were not, and 244 did not know.<sup>146</sup> Yet, in reality, close to 90% of the consumers were covered by arbitration provisions.<sup>147</sup> While some who read these results may be tempted to blame consumers for failing to carefully read their contracts, cognitive psychologists have pointed out that in fact it is rational for consumers and others to expend their limited time wisely, which may well not include carefully reading every lengthy form contract imposed upon them by a merchant.<sup>148</sup>

Even assuming consumers were to read dispute resolution contracts contained in their consumer contracts, they likely would not understand the provisions.<sup>149</sup> General studies have shown that consumers typically lack the capacity to understand the complicated concepts set out in many consumer contracts.<sup>150</sup> In the arbitration context, in particular, the CFPB found that less than 7% of consumers whose credit card agreements included arbitration provisions understood that they were precluded from suing the company in court should a dispute arise.<sup>151</sup> Another study showed 668 consumers a typical credit card arbitration provision containing a class action waiver and then asked the consumers questions about the clause.<sup>152</sup> Less than 9% of the surveyed consumers recognized that the contractual clause contained an arbitration provision that would

146. Sovern, *supra* note 116, at 59–60.

147. *See id.* at 60 (claiming 89% of those surveyed were party to at least the arbitration agreement).

148. *See* Bagchi, *supra* note 106, at 8; *see also* Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1, 2 (2014) (observing that, in many circumstances, a majority of buyers do not read the fine print); Victoria S. Plaut & Robert P. Bartlett III, *Blind Consent? A Social Psychological Investigation of Non-Readership of Click-Through Agreements*, 36 L. & HUM. BEHAV. 293, 298 (2011) (reporting that 90% of surveyed consumers stated they did not read click-through agreements); Debra Pogrud Stark & Jessica M. Choplin, *A License to Deceive: Enforcing Contractual Myths Despite Consumer Psychological Realities*, 5 N.Y.U. J.L. & BUS. 617, 694–700 (2009) (reporting on consumers' acknowledged failure to read contracts in many contexts).

149. *See* Sovern, *supra* note 116, at 20–24 (discussing consumers' frequent lack of comprehension of contract terms); Debra Pogrud Stark & Jessica M. Choplin, *A Cognitive and Social Psychological Analysis of Disclosure Laws and Call for Mortgage Counseling to Prevent Predatory Lending*, 16 PSYCHOL. PUB. POLY & L. 85, 97–102 (2010) (examining numerous cognitive and social psychological factors that cause many disclosures to be ineffective).

150. Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL. REV. 233, 235 (2002) (drawing on a National Adult Literacy Survey to conclude that even those consumers who take the time to read contracts are still unlikely to understand them).

151. *See* CONSUMER FIN. PROT. BUREAU, REPORT TO CONGRESS, *supra* note 10, at § 3.4.3 at 18 (discussing a survey in which only 6.2% of respondents understood they would not have a right to sue but rather must arbitrate).

152. Sovern, *supra* note 116, at 4.

prevent them from bringing a claim in court, should they wish to do so.<sup>153</sup> And, with respect to arbitral class action waivers, the same study found that four times as many subjects thought the clause did not prevent them from participating in class actions as compared to the group who thought class actions were blocked, even though the class action waiver was printed twice in the contract, including once in italics and once in ALL CAPS.<sup>154</sup> Further, it is likely that the consumers in the study, who were provided a single contract and asked to read it, reviewed that contract far more thoroughly than a typical consumer reviews their contracts.<sup>155</sup>

Finally, even to the very limited extent consumers both focus on and understand an arbitration clause, they are highly unlikely to assess its importance correctly due to their positive illusions. In study after study cognitive psychologists have found that people tend to be overly optimistic about their future.<sup>156</sup> Thus, it can be anticipated that a consumer who is entering into a financial transaction will not be thinking about the fact that the company might try to discriminate or impose an unlawful term such that the consumer would possibly want to bring a legal claim. Because the consumer is not focused on possibly needing to bring a lawsuit against the company, the consumer will not place adequate emphasis on the need to ensure that she will be able to feasibly bring a claim against the company.

These psychological realities are a further justification for regulation. If consumers cannot be expected to focus on, understand, or properly

153. *Id.*

154. *Id.* at 2.

155. *Id.* at 33. Admittedly it is also possible that the survey group paid less attention to the contract than they would have in a real life situation because the contract and its terms would not directly affect them. *Id.*

156. See generally JENNIFER K. ROBBENOLT & JEAN R. STERNLIGHT, *PSYCHOLOGY FOR LAWYERS: UNDERSTANDING THE HUMAN FACTORS IN NEGOTIATION, LITIGATION, AND DECISION MAKING* 68–71 (2012) (examining how overconfidence in the future leads to insufficient preparation for negative events). This phenomenon is also demonstrated in a series of Prudential Insurance advertisements. These advertisements urge people to do a better job of saving for the future and buying insurance, emphasizing that people tend to be overly optimistic about events in their life, and that people tend to save less than they ought to in light of their actual needs. See *Prudential TV Spot*, “*The Prudential Dominoes Experiment*,” 1SPOT.TV (Dec. 2, 2015, 3:26 AM), <https://www.ispot.tv/ad/7Cj6/prudential-the-prudential-dominoes-experiment> (demonstrating the benefits that saving small amounts of money can have on retirement); *The Prudential Magnets Experiment*, YOUTUBE (Feb. 25, 2015), <https://www.youtube.com/watch?v=o3pFHPgH3oU> (depicting people’s tendency to think optimistically despite negative past experience). See also *Advertising Psychology—or an Advertising Psychologist*, AM. SCI.: A TEAM BLOG, <http://americanscience.blogspot.com/2013/02/advertising-psychologyor-advertising.html> (referring to the behavioral economics theory “temporal discounting” and how it explains why people do not plan for the future) (last visited Dec. 18, 2016).

evaluate dispute resolution clauses then it is appropriate for the government to step in to protect them from a potentially harmful practice.

### C. *Political Philosophy*

Critics of government regulation might see the concept of “autonomy” as their ultimate and irrefutable argument against CFPB regulation of consumers’ arbitration contracts. Recent Supreme Court jurisprudence has emphasized that “arbitration is a matter of contract,”<sup>157</sup> and that courts must “‘rigorously enforce’ arbitration agreements according to their terms.”<sup>158</sup> Multiple commentators have urged that this jurisprudence is based on the transcendent principle of party autonomy.<sup>159</sup> Those who accept such an argument might say individuals should be “free” to enter contracts of their own “choosing.”<sup>160</sup> However, in addition to the doubts cast on actual “choosing” by the economics and psychology, as briefly discussed above, it turns out that “freedom” or “autonomy” to enter contracts is not such a simple concept after all.

In a wonderful recent article, Professor Hiro Aragaki draws on political philosophy to “question whether the autonomy thesis points unproblematically in the direction of enforcing arbitration agreements with minimal regulation by the state.”<sup>161</sup> Aragaki shows that once one takes a serious look at autonomy, one sees it is a very complex concept that “can mean many different things and that, depending on the conception of autonomy to which one subscribes, autonomy might require not freedom of contract but rather freedom *from* contract.”<sup>162</sup> Yet, Aragaki notes, “Although philosophers have for a long time sought to understand the multiple and often conflicting ways of understanding autonomy, courts

157. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013).

158. *Id.* (quoting *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985)); *see also* Glover, *supra* note 104, at 3070 (stating the Supreme Court’s recent arbitration decisions demonstrate a “pure freedom of contract” perspective).

159. *See* Edward Brunet, *The Core Values of Arbitration*, in *ARBITRATION LAW IN AMERICA: A CRITICAL ASSESSMENT* 1, 5 (2006) (describing arbitration as an advantage for “self-governance” and customization); Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 NEV. L.J. 427, 430 (2007) (observing that arbitration law promotes party autonomy); Stephen J. Ware, *Vacating Legally-Erroneous Arbitration Awards*, 6 Y.B. ON ARB. & MEDIATION 56, 92 (2014) (asserting autonomy is arbitration’s “essential virtue”).

160. *See* Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485, 486 (1997) (asserting that arbitration serves purposes of private ordering and self-determination); *Consumer Arbitration As Exceptional Consumer Law*, *supra* note 103, 211 (“What is the benefit of being able to alienate rights? Perhaps a sufficient explanation is that it is essential to freedom or autonomy.”).

161. Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreement Promote “Autonomy”?*, 91 IND. L.J. 1143, 1146 (2016).

162. *Id.*

and commentators writing in the arbitration area have paid comparatively little attention to these nuances<sup>163</sup> and thus “have been led to overestimate the persuasiveness of the autonomy thesis in justifying the rigorous enforcement of arbitration agreements.”<sup>164</sup>

In brief, the political philosophers discussed by Aragaki and others have explained that autonomy can be viewed in either negative or positive terms.<sup>165</sup> Negative autonomy is basically the libertarian idea that one should be let alone—the absence of external coercion by the state or other private parties<sup>166</sup> and the idea of “Don’t Tread on Me.”<sup>167</sup> In contrast, positive liberty is a more complex and some would say robust concept. Political theorist Ian Carter defines “positive liberty” as “the possibility of acting—or the fact of acting—in such a way as to take control of one’s life and realize one’s fundamental purposes.”<sup>168</sup> Political philosopher Isaiah Berlin puts it as follows:

The “positive” sense of the word “liberty” derives from the wish on the part of the individual to be his own master. I wish my life and decisions to depend on myself, not on external forces of whatever kind. I wish to be the instrument of my own, not of other men’s acts of will. I wish to be a subject, not an object; to be moved by reasons, by conscious purposes, which are my own, not by causes which affect me, as it were, from outside.<sup>169</sup>

Professor Aragaki explains more simply that positive liberty is “a type of self-governance”<sup>170</sup> or “capacity for self-government.”<sup>171</sup>

163. *Id.*

164. *Id.* at 1145.

165. *See id.* at 1148 (drawing a distinction between negative and positive conceptions of liberty but also recognizing that this concept itself has been subject to “extensive criticism”). *See generally* ISAAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1990) (distinguishing negative and positive conceptions of liberty); *see also* Aragaki, *supra* note 161, at 1148 (drawing distinction between negative and positive conceptions of liberty but also recognizing that this concept itself has been subject to “extensive criticism”).

166. *See* F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 16–17 (1960) (defining liberty as absence of constraint and restraint); ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA*, at ix (1974) (arguing in favor of a minimalist state so as to maximize individual freedom and rights).

167. *See The Gadsden Flag*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Gadsden\\_flag](https://en.wikipedia.org/wiki/Gadsden_flag) (last updated Sept. 8, 2016, 11:48 PM) (describing the flag as a symbol of libertarian philosophy).

168. Ian Carter, *Positive and Negative Liberty*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 27, 2003), <http://plato.stanford.edu/entries/liberty-positive-negative>.

169. Isaiah Berlin, *Two Concepts of Liberty*, in *LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY* 166, 178 (Henry Hardy ed., 2002).

170. Aragaki, *supra* note 161, at 1146.

171. *Id.* at 1156.



While people undoubtedly differ regarding the concept or concepts of liberty we find most compelling, it is not clear that the CFPB's and Congress's efforts to regulate arbitration are inconsistent with *any* definition of liberty. As Professor Aragaki explains, "negative liberty presents at best an awkward justification for the rigorous enforcement of arbitration agreements."<sup>172</sup> In essence whereas negative liberty arguments are potentially powerful as arrayed against regulations that prohibit people from acting as they wish, regulations of arbitration do not have that character. Rather, the CFPB regulation does not prevent disputants from arbitrating but would only prevent a company from using the power of the state and courts to force an unwilling consumer into arbitration.<sup>173</sup>

As for positive liberty, Professor Aragaki finds that enforcing an arbitration agreement against an unwilling party can be seen as *consistent* with positive liberty, just as Odysseus' request to be tied to the mast can be seen as consistent with positive liberty.<sup>174</sup> In both instances someone potentially makes a decision to limit liberty to more consciously control his own fate. Significantly, the reality of arbitration, and particularly forced arbitration, is not consistent with the ambitious goals of positive liberty. Professor Aragaki points out that particularly in the context of adhesive arbitration contracts one can hardly say that individuals are making an informed reflective decision to enter into an arbitration agreement.<sup>175</sup> And, if entering such a contract does not promote positive liberty then using legislation or regulation to block such contracts is not inconsistent with positive liberty. Rather, because the proposed CFPB regulation blocks a pre-dispute arbitral agreement that prohibits class actions, but still leaves disputants free to devise arbitration to their liking after the dispute has arisen, it could even be argued that the CFPB regulation furthers rather than interferes with positive liberty.<sup>176</sup>

In short, when one reflects more deeply on the political philosophy of autonomy, one sees that interfering with companies' use of adhesive contracts to impose arbitral class action waivers on their consumers does

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172. *Id.* at 1162.

173. *See id.* at 1162–75 (observing that enforcing a contract against even a breaching party is not consistent with promoting that party's negative liberty).

174. *Id.* at 1182–83 (citing GERALD DWORIN, *THE THEORY AND PRACTICE OF AUTONOMY* 14–15 (1988)).

175. *Id.* at 1184–85.

176. Professor Aragaki makes a similar argument with respect to the proposed AFA, which would not categorically prohibit arbitration but rather require disputants to agree to arbitration post-dispute, at which time the parties that could make a more considered reflective judgment as to whether they wanted to arbitrate their dispute. *Id.* at 1186.

not, in any meaningful sense, interfere with consumers' liberty or autonomy. Rather, government's regulation of this practice can actually be seen as consistent with autonomy because in prohibiting companies from forcing consumers to give up certain rights, pre-dispute, the regulation leaves consumers free to knowingly and voluntarily accept arbitration, individual or otherwise, on a post-dispute basis.

## V. CONCLUSION

In raising the dreaded specter of *Lochner* in connection with the Supreme Court's decisions on forced arbitration, Justice Ginsburg has asked just the right question: Is it appropriate for courts to use purported principles of freedom and autonomy to prevent government from protecting consumers from the unfair aspects of arbitration that are forced upon them contractually by powerful companies? To the contrary, this Essay has shown that the CFPB's regulation proscribing financial companies from using forced arbitration to prevent consumers from participating in class actions is consistent with principles of economics, psychology, and political philosophy supporting autonomy. The concept of "liberty of contract" may work well in some contexts but certainly not in all. Where economic forces or the limits of human psychology prevent individuals from knowledgeably protecting their own self-interest, it is entirely appropriate for a government agency or legislative body to act to protect those interests. In this sense, financial consumers' circumstances make them a "poster child" for the benefits of regulation. Indeed, without wanting to get overly romantic about it, one might even say that the CFPB's regulation supports true freedom.

Once it is clear that regulation is appropriate, of course debate can be had regarding the content of that regulation. While reasonable people might differ over whether the particular regulation the CFPB came up with is perfect, or even very good, it is clear that the regulation is reasonable and well-supported by the CFPB's comprehensive study of how pre-dispute arbitration is being used in the consumer financial sector. More studies will undoubtedly be done, and the CFPB or other regulators may change the way that forced arbitration is being regulated in the financial sector. But, Congress and the CFPB have taken a great first step in this area by recognizing the need for regulation when individual consumers are not in a position to protect their own interests. Thus, hurrah for the CFPB! By acting to protect financial consumers, it has taken steps to serve the interests of justice.