

## INTRODUCTION

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In April 2017, the *Rutgers University Law Review* held a symposium entitled “Resolving the Arbitration Dispute in Today’s Legal Landscape” which examined a wide range of issues related to the law and practice of arbitration. The symposium came at an opportune time, as three broad trends were converging to move arbitration in new directions.

The first of these trends was the United States Supreme Court’s continued strong support for arbitration as a substitute for litigation in public courts. Since 1925, federal law has provided through the Federal Arbitration Act (FAA) that certain 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.”<sup>1</sup> But for many years, the FAA was interpreted in ways that limited the scope of arbitration.<sup>2</sup>

Beginning in the 1980s, the Supreme Court reinterpreted the FAA to apply in state court, preempt inconsistent state laws,<sup>3</sup> allow arbitration of statutory claims,<sup>4</sup> and allow arbitrators to define the

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1. United States (Federal) Arbitration Act § 2, Pub L. No. 68-401, 83 Stat. 883 (1925) (codified as 9 U.S.C. § 2) (recodified by Act of July 30, 1947, Pub. L. No. 80-282, 61 Stat. 669, 670 (1947)).

2. See David L. Noll, *Regulating Arbitration*, 105 CALIF. L. REV. 985, 994 (2017).

3. See *Southland Corp. v. Keating*, 465 U.S. 1, 17 (1984).

4. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 640 (1985); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 242 (1987).

scope of their own authority (so-called “arbitration about arbitration”).<sup>5</sup> The trend toward expansive judicial interpretation of the FAA continued in the second decade of the new millennium. In 2013, the Court held in *American Express v. Italian Colors Restaurant* that the fact that arbitration makes it prohibitively expensive to assert a federal statutory claim is irrelevant to the enforceability of an arbitration agreement.<sup>6</sup> In 2015, the Court ruled in *DIRECTV, Inc. v. Imburgia* that the FAA precluded California courts from interpreting a contract provision which specified that California law would govern disputes as referring *only* to California law.<sup>7</sup> California law, the Court held, also included the U.S. Supreme Court’s interpretations of the federal FAA, and the FAA precluded California courts from saying otherwise.<sup>8</sup> Three months before the symposium, the Supreme Court heard argument in an appeal from a pair of Kentucky Supreme Court decisions which held that a power of attorney only authorizes the representative to enter into an arbitration agreement if the document specifically authorizes the representative to waive the principal’s right to trial by jury.<sup>9</sup> In May 2017, the Court would hold in *Kindred Nursing Centers L.P. v. Clark* that the FAA preempted the Kentucky rule.<sup>10</sup>

The second development that framed the symposium was increased attention to the excesses of arbitration. A wave of law-and-economics scholarship in the 1990s and 2000s developed the policy case for arbitration, positing that the same market forces that push manufacturers to develop better toothpaste could be leveraged to improve the design of the civil justice system.<sup>11</sup> But as more companies mandated arbitration of legal disputes in their standard-form contracts, popular and scholarly writing highlighted arbitration’s negative effects on enforcement of federal and state law and the development of legal

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5. See *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 68–70 (2010); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006); David Horton, *Arbitration About Arbitration*, 70 STAN. L. REV. 363, 370–72 (2018).

6. 570 U.S. 228, 236–38 (2013).

7. 136 S. Ct. 463, 468–69 (2015).

8. *Id.* at 470–71.

9. See Transcript of Oral Argument at 3, *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421 (2017) (No. 16-32).

10. 137 S. Ct. 1421, 1426–27 (2017).

11. See, e.g., ERIN A. O’HARA & LARRY E. RIBSTEIN, *THE LAW MARKET* 86 (2009); Christopher R. Drahozal & Peter B. Rutledge, *Contract and Procedure*, 94 MARQ. L. REV. 1103 (2011); Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements— with Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 252–53 (2006).

precedent.<sup>12</sup> By 2015, a series of front page *New York Times* articles would report that the Supreme Court's re-interpretation of the FAA "was engineered by a Wall Street-led coalition of credit card companies and retailers" and "upended decades of jurisprudence put in place to protect consumers and employees."<sup>13</sup> A respected district judge quoted in that series described the growth of arbitration as "among the most profound shifts in our legal history."<sup>14</sup>

Responding to concerns about these effects, federal administrative agencies from the Centers for Medicaid and Medicare Services to NASA began to consider how arbitration affected programs they administer.<sup>15</sup> By the end of the Obama administration, some seventeen agencies had regulated the use of arbitration in particular domains or indicated that they were considering doing so. In the most visible and contentious example of agency arbitration regulation, the Consumer Financial Protection Bureau, a new agency created by the 2010 Dodd-Frank Act,<sup>16</sup> proposed to bar consumer financial companies from using arbitration clauses to block class actions filed in public courts and to require those companies to submit data about arbitrations they participated in to the

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12. See, e.g., ALEXANDER J.S. COLVIN, ECON. POLICY INST., *THE GROWING USE OF MANDATORY ARBITRATION: ACCESS TO THE COURTS IS NOW BARRED FOR MORE THAN 60 MILLION AMERICAN WORKERS* (2017); CONSUMER FIN. PROT. BUREAU, *ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT § 1028(a) 11-12* (2015); MARGARET RADIN, *BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 16* (2013); Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 *YALE L.J.* 2804 (2015).

13. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, A "Privatization of the Justice System,"* *N.Y. TIMES* (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html>. See also Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, *N.Y. TIMES* (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html>; Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture Is the Rule of Law*, *N.Y. TIMES* (Nov. 2, 2015), <https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html>.

14. Silver-Greenberg & Corkery, *supra* note 13.

15. See David L. Noll, *Arbitration Conflicts*, 103 *MINN. L. REV.* (forthcoming 2018) (manuscript at 14). See generally Daniel T. Deacon, *Agencies and Arbitration*, 117 *COLUM. L. REV.* 991, 991 (2017) (exploring "the roles that federal administrative agencies have begun to play in response to the rise of private arbitration" and "how agencies can partially address some of the concerns that scholars of regulation and civil procedure have noted regarding the rise of arbitration").

16. Dodd-Frank Wall Street Reform and Consumer Protection Act Title X, Pub L. 111-203, 124 Stat. 1376, 1955-2113 (2010).

Bureau to be included in a public database.<sup>17</sup> The Bureau's supporters described its arbitration rule as a necessary check against corporations' efforts to eliminate opportunities for collective redress.<sup>18</sup> Critics portrayed the rule as the work-product of a renegade agency that served only to enrich class action lawyers without delivering any benefits to consumers.<sup>19</sup>

The final development that set the stage for the symposium was the cacophonous 2016 election. Coming into office on a platform of renewed American greatness, Donald Trump promised a Ronald Reagan-esque rollback of federal regulatory burdens. His chief policy advisor spoke of "deconstruct[ing] . . . the administrative state."<sup>20</sup> The President of the U.S. Chamber of Commerce's Institute for Legal Reform, an anti-litigation lobby, opined in the days after the election that, "[w]e have an opportunity to change the course of actions that have been barreling down on us."<sup>21</sup> In short order, the new Republican Congress repealed a major arbitration regulation promulgated pursuant to an Executive Order issued by President Barack Obama.<sup>22</sup> When the Consumer Financial Protection Bureau released its final arbitration rule in July 2017, Congress repealed it too—albeit by the slimmest of margins.<sup>23</sup>

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17. Arbitration Agreements, 81 Fed. Reg. 32,829, 32,830 (proposed May 24, 2016) (to be codified at 12 C.F.R. pt. 1040).

18. See, e.g., Deepak Gupta & Lina Khan, *Arbitration as Wealth Transfer*, 35 YALE L. & POLY REV. 499, 501 (2017).

19. See, e.g., Letter from U.S. Senators Ben Sasse & Mike Lee to Vice President-Elect Michael Pence (Jan. 9, 2017) <https://www.sasse.senate.gov/public/index.cfm/2017/1/sasse-and-lee-to-trump-fire-cordray> (citing the arbitration rule as evidence that the CFPB is "radically opposed to the Trump Administration's pro-growth agenda" and is structured on the belief that "that government is unlimited and rights are dependent on the special dispensation of the experts who know better than the American people"); Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), <https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html>.

20. Jeremy W. Peters, *All Is on Track, Bannon Tells Conservatives*, N.Y. TIMES (Feb. 23, 2017), <https://www.nytimes.com/2017/02/23/us/politics/cpac-stephen-bannon-reince-priebus.html>.

21. See Alison Frankel, *Business Lobby Hopes Trump Undoes Regulation, Limits Litigation*, REUTERS (Nov. 9, 2016; 5:16 PM), <https://www.reuters.com/article/us-frankel-otc/business-lobby-hopes-trump-undoes-regulation-limits-litigation-idUSKBN1343MY>.

22. Act of March 27, 2017, Pub. L. No. 115-11, 131 Stat. 75 (2017) (disapproving arbitration regulations, published at 81 Fed. Reg. 58562 (Aug. 25, 2016) issued pursuant to President Obama's Fair Pay and Safe Workplaces Executive Order, Exec. Order No. 13,673 (July 31, 2014)).

23. Act of Nov. 1, 2017, Pub. L. No. 115-74, 131 Stat. 1243 (2017) (disapproving the CFPB arbitration rule, published at 82 Fed. Reg. 33210 (July 19, 2017)). See David L.

It was against the backdrop of these developments—some “anti” arbitration, some “pro” arbitration—that the symposium took up arbitration’s place in the current legal landscape. Panels covered the debate over the National Labor Relations Board’s (NLRB’s) holding in *D.R. Horton* and *Murphy Oil* that an employment agreement that requires individual arbitration of job-related claims violates section 7 of the National Labor Relations Act (NLRA);<sup>24</sup> the prospects for the Consumer Financial Protection Bureau’s arbitration rule;<sup>25</sup> the practice of arbitration and mediation in the greater New York City area; and FAA preemption in the context of nursing home arbitration.<sup>26</sup>

Three of the four articles that appear in this volume grow out of the symposium’s discussions of mandatory arbitration of employment disputes. Professors Timothy Glynn and Charles A. Sullivan’s article on *D.R. Horton* and *Murphy Oil* updates their analysis, first published in the *Alabama Law Review*, of the statutory basis for the Board’s decisions in those cases.<sup>27</sup> Glynn and Sullivan defend the Board’s conclusion that section 7 of the NLRA protects employees’ right to engage in collective dispute resolution to the extent permitted by generally applicable procedural law, and that an individual employment agreement that waives this right violates section 8 of the NLRA.<sup>28</sup> They explain how these conclusions follow not only from the NLRA but also from the Norris-LaGuardia Act, the 1932 statute that represents one of the federal government’s first interventions in the

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Noll, *Deregulating Arbitration*, 30 LOY. CONSUMER L. REV. 51, 59–61 (2017) (describing the vote on the repeal resolution).

24. See *D.R. Horton, Inc.*, 357 N.L.R.B. 2277, 2277 (2012) (holding that an individually negotiated employment agreement which mandates individual arbitration of legal disputes violates section 7 of the National Labor Relations Act), *enforcement denied*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 364 (5th Cir. 2013), *adhered to on reconsideration*, *Murphy Oil*, 361 N.L.R.B. No. 72 (2014), *enforcement denied*, *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted*, 137 S. Ct. 809 (2017).

25. See generally David L. Noll, *The Dangerous Consequences of Repealing the CFPB’s Arbitration Rule*, THE REGULATORY REVIEW (Nov. 6, 2017), <https://www.theregreview.org/2017/11/06/noll-repealing-arbitration-rule>.

26. See generally Noll, *supra* note 15, at manuscript at 2–3 (describing conflicts over arbitration restrictions in the Centers for Medicaid and Medicare Services’ Long-Term Care Rule, 81 Fed. Reg. 68,688 (Oct. 4, 2016) (final rule), *amendment proposed*, 82 Fed. Reg. 26649 (June 8, 2017)).

27. Timothy P. Glynn & Charles A. Sullivan, *Murphy Oil and Norris LaGuardia to the Rescue: Preserving Employee Rights to Concerted Dispute Resolution in an Era of Mandatory Individual Arbitration*, 70 RUTGERS U. L. REV. 401, 401–03 (2018). See also Charles A. Sullivan & Timothy P. Glynn, *Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution*, 64 ALA. L. REV. 1013, 1032 (2013).

28. Glynn & Sullivan, *supra* note 27, at 413–15, 414 n.75.

field of labor-management relations.<sup>29</sup> The Glynn/Sullivan view that Norris-LaGuardia bears on the enforceability of individual arbitration agreements has proved influential. When the Supreme Court heard a challenge to the Board's *Murphy Oil* rule in October 2017, Justice Ginsburg suggested that the employer's individual arbitration agreement "has all the same—the essential features of the 'yellow dog' contract" that "Norris-LaGuardia wanted to exclude."<sup>30</sup> Glynn and Sullivan conclude by examining whether the NLRB's view of the NLRA is consistent with the FAA's command that covered arbitration agreements are valid, enforceable, and irrevocable.<sup>31</sup> They contend that the Norris-LaGuardia Act's prohibition of collective action waivers falls within the FAA's savings clause, and, in any event, takes precedence over the FAA as a later-enacted statute.<sup>32</sup>

Professor Elizabeth C. Tippett and Bridget Schaaff's contribution to the symposium turns from the law governing the use of arbitration to the effects of recent changes in the Supreme Court's FAA jurisprudence.<sup>33</sup> Tippett and Schaaff study the effect of the Court's decisions in *AT&T Mobility v. Concepcion* and *American Express v. Italian Colors Restaurant*, which rejected two doctrines developed in state and lower federal courts that limited the use of arbitration to block class litigation and arbitration.<sup>34</sup> Studying sharing companies' use

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29. *Id.* at 414–15 (referring to Act of March 23, 1932, ch. 90, 47 Stat. 70 (codified at 29 U.S.C. § 101-115)). See generally WILLIAM E. FORBATH, LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT 158–60 (1991) (describing the Act's historical context).

30. See Transcript of Oral Argument at 11, *Epic Sys. Corp. v. Lewis*, Nos. 16-285, 16-300, 16-307 (U.S. argued Oct. 2, 2017).

31. Glynn & Sullivan, *supra* note 27, at 411–15.

32. *Id.* at 411–12.

33. Elizabeth C. Tippett & Bridget Schaaff, *How Concepcion and Italian Colors Affected Terms of Service Contracts in the Gig Economy*, 70 RUTGERS U. L. REV. 459, 460–64 (2018).

34. *Id.* *Italian Colors* considered the Second Circuit's holding that an agreement to arbitrate a federal statutory claim was not enforceable when it destroyed the only "economically feasible" means of asserting a federal statutory claim. *In re Am. Express Merchants' Litig.*, 667 F.3d 204, 212 (2d Cir. 2012). The Supreme Court held that, provided an arbitration agreement honored incentives for civil litigation that are expressly recognized by law, its effects on plaintiffs' economic incentives to assert federal statutory claims do not affect the agreement's enforceability under the FAA. *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013). At issue in *AT&T Mobility LLC v. Concepcion* was a decision of the California Supreme Court which held that an arbitration agreement was unenforceable when it barred class litigation and arbitration, and plaintiffs alleged that the agreement deprived consumers of a remedy for frauds that were too small to prosecute on an individual basis. 563 U.S. 333, 344 (2011) (abrogating *Discover Bank v. Superior Court*, 113 P.3d 1100, 1103 (Cal. 2005)). The Supreme Court

of arbitration in the periods before and after those two decisions, Tippet and Schaaff find a marked increase in the use of arbitration—invariably accompanied by contractual restrictions on class action litigation.<sup>35</sup> Tippet and Schaaff hypothesize that sharing companies' use of arbitration has been a serious obstacle to litigation seeking definitive judicial rulings on the employee or independent contractor status of workers who perform services using apps such as Uber, Lyft, and AirBnB.<sup>36</sup>

Continuing in the empirical vein, Professors Samuel Estreicher, Michael Heise, and David S. Sherwyn take up the question of what is known (and not known) about the trade-offs between litigation and arbitration of employment claims.<sup>37</sup> Surveying two decades of scholarship on how employees fare in these competing dispute resolution systems, Estreicher, Heise, and Sherwyn contend that virtually all scholarship suffers from a selection-effect problem that grows out of differences in the litigation and arbitration process.<sup>38</sup> Cases that are litigated and cases that are arbitrated both originate in real world disputes like hiring, firing, or the experience of workplace harassment. But the process from “problem” to “formal claim” differs in workplaces where disputes are addressed through public courts and administrative agencies and workplaces where employees are subject to a mandatory alternative dispute resolution program. Estreicher, Heise, and Sherwyn argue that, because of these differences, studies that simply compare filing data and outcomes in litigation and arbitration engage in “apples-and-oranges” comparisons.<sup>39</sup> They describe a new research project that will analyze data from American Arbitration Association proceedings and proceedings before the Equal Employment Opportunity Commission.<sup>40</sup> By tracking disputes from beginning to end, they hope to develop a more accurate picture of the trade-offs between litigation and arbitration and to overcome the selection-effect problems

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found, relying on a variant of preemption jurisprudence that is primarily used to prevent state interference in foreign affairs, that the FAA preempted the California Supreme Court's holding because that “rule” stood as an obstacle to the FAA's objective of “allow[ing] for efficient, streamlined procedures tailored to the type of dispute.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

35. Tippet & Schaaff, *supra* note 33, at 460–61.

36. *Id.* at 460–64, 480–82.

37. See Samuel Estreicher, Michael Heise & David S. Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 RUTGERS U. L. REV. 375, 375–76 (2018).

38. *Id.* at 394–97.

39. See *id.* at 389–90.

40. *Id.* at 397–400.

that that, in their view, “severely limit much of the existing literature.”<sup>41</sup>

The final article in this symposium highlights arbitration’s impacts on consumer markets and the enforcement of consumer protection laws.<sup>42</sup> In his case study of the Wells Fargo fake accounts scandal, Professor Jeff Sovern demonstrates how Wells Fargo invoked mandatory arbitration clauses in its consumer and credit card agreements as a defense against class actions seeking damages for Wells’ practice of opening new accounts and lines of credit for its customers without their authorization.<sup>43</sup> Wells eventually stopped relying on arbitration to defend class actions in the wake of pressure from federal and state regulators.<sup>44</sup> But Professor Sovern posits that the availability of the arbitration defense highlights broader problems with approaching dispute resolution procedure as a “product” that it is “regulated” through competitive dynamics.<sup>45</sup> Sovern explains that Wells’ choice of dispute resolution systems was not constrained by bargaining or competition; that the market appears not to have disciplined Wells for its massive compliance failure; and that mandatory arbitration deprived consumers of avenues for collective action that are crucial to private enforcement of state and federal consumer protection law.<sup>46</sup>

As the articles in this volume attest, arbitration and the law governing it are among the most important and contentious topics that the U.S. legal system currently faces. In convening a group of leading experts to weigh in on the place of arbitration in the modern legal landscape, the *Rutgers University Law Review* has done much to improve our understanding of these important topics.

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41. *Id.* at 400.

42. See Jeff Sovern, *Free-Market Failure: The Wells Fargo Arbitration Clause Example*, 70 RUTGERS U. L. REV. 417 (2018).

43. *Id.* at 418–24.

44. See *id.* at 422–24.

45. *Id.* at 426–30.

46. See *id.* at 431–58.