

2017

A HISTORICAL REFLECTION ON ARBITRATION AND THE CORPORATION AS AN OBJECT OF ECONOMIC GOVERNANCE

Eric George

Follow this and additional works at: <https://digitalcommons.law.wne.edu/lawreview>

Recommended Citation

Eric George, *A HISTORICAL REFLECTION ON ARBITRATION AND THE CORPORATION AS AN OBJECT OF ECONOMIC GOVERNANCE*, 39 W. New Eng. L. Rev. 557 (2017), <https://digitalcommons.law.wne.edu/lawreview/vol39/iss4/6>

This Symposium Article is brought to you for free and open access by the Law Review & Student Publications at Digital Commons @ Western New England University. It has been accepted for inclusion in Western New England Law Review by an authorized editor of Digital Commons @ Western New England University.

A HISTORICAL REFLECTION ON ARBITRATION AND THE
CORPORATION AS AN OBJECT OF ECONOMIC GOVERNANCE

*Eric George**

In recent decisions, the United States Supreme Court has reaffirmed its emphatic interpretation of the Federal Arbitration Act (FAA). In both AT&T Mobility LLC v. Concepcion and American Express Co. v. Italian Colors Restaurant, the Court ruled that the purpose of the FAA was not merely to reverse judicial hostility to arbitration by placing agreements to arbitrate on the same footing as other contracts, but to actively promote the use of arbitration on a national scale. In the pursuit of this agenda, the Court has shown that it is prepared to oppose measures that would make arbitration more sluggish and expensive, even if this means enforcing arbitral awards that might conflict with state law or public policy.

This Article argues that the Court's routinely invoked language of "costs," "expediency," and the need to protect the "freedom of contract" has the effect of concealing a transformation that is of broader political-economic importance—the creation of conditions that protect corporations from public interference. When corporations have the assurance that their arbitration agreements will, in all likelihood, be enforced, and furthermore, that their disputing activities will not be subject to public oversight, they gain a greater latitude to act without encountering public interference. In other words, they gain more power. In order to illustrate the dimensions of this shift, I identify parallels between the present-day arbitration regime and the arbitration movement that culminated in the creation of the FAA in the 1920s.

INTRODUCTION

This Article argues that the arbitration regime being fostered

* Eric George is a PhD candidate in the department of Political Science at York University in Toronto.

by the United States Supreme Court has disproportionately served the interests of corporate disputants. When the Supreme Court opposes measures that will jeopardize the “freedom of contract” and makes arbitration more expensive and sluggish, it is aligning itself with a laissez-faire vision of arbitration that was promoted by early twentieth century legal reformers, and culminated in the creation of the Federal Arbitration Act of 1925. According to proponents of this view, parties to arbitration agreements are autonomous, individual, self-regulating agents who should have the latitude and discretion to order their disputes free from the oversight of the state. From this vantage point, any law or policy that might interfere with the freedom of contract—itsself embodied in the arbitration agreement—would constitute a threat to the integrity of the arbitration system itself. The resuscitation of this 1920s vision is significant insofar as it serves to shield corporations from public scrutiny.

The ideological affinity between the present-day arbitration regime and that which emerged in the 1920s can be identified along two central axes. First, the Court’s belief that state interference in the arbitral process compromises the “freedom of contract” has its roots in a laissez-faire inspired conception of business “self-regulation”—itsself buttressed by a commitment to keeping private actors free from the intrusion of regulators and policymakers. Second, like the arbitration movement of the 1920s, the contemporary arbitration regime has been the target of an extensive corporate lobbying effort that seeks to ensure that the system is aligned with the interests of the business community. Such lobbying efforts often pledge to “honor parties’ agreements” or to keep arbitration cheap, fast, and flexible. In reality, they are ultimately opposed to greater public interference in the arbitration system, irrespective of whether such interference comes from judges, regulators, watchdog groups, journalists, or citizens. Public encroachment presents a threat to the values of speed, opacity, and finality upon which arbitration is modeled.¹

1. As Thomas Schultz points out, arbitrators are:
[P]eople . . . whose income, social status, intellectual recognition, or professional power, depends to a large extent, on the continued existence of arbitration as we have known it for the last few decades. For such people, arbitration must not change. They would fight tooth and nail to keep the arbitration system as it is, or similar to it, to protect it from

This Article proceeds in three main sections. The first section provides an overview of critical responses to the Supreme Court's rulings in *AT&T Mobility LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant*, I argue that the critiques of asymmetric bargaining power of the arbitration regime have overlooked a less visible, but nonetheless important form of power—the protection of corporations from public interference. The second section traces this form of business power back to the laissez-faire conception of arbitration that informed the early twentieth century arbitration movement. The third section shows how the FAA was the target of an extensive corporate lobbying effort that sought to promote the principles of business “self-governance” and private-ordering. The Article concludes with a reflection on the parallels between the 1920s arbitration reform movement and present-day efforts to limit public involvement in the arbitration system, and the way that such measures serve the interests of capital.

I. THE CONTEMPORARY BACKLASH AGAINST ARBITRATION

Arbitration is conventionally treated as a private, contractual, and non-adjudicative mechanism of dispute resolution that leads to a more efficient distribution of judicial resources. As a cheaper, faster, and more flexible surrogate to civil litigation, it is not only thought to be of benefit to the parties immediately involved in the dispute (the claimant and the respondent), but to produce a number of positive second-order effects for society as a whole.²

possibly destabilizing interferences.

THOMAS SCHULTZ, *TRANSNATIONAL LEGALITY: STATELESS LAW AND INTERNATIONAL ARBITRATION* 3 (2014).

2. The view that arbitration is efficiency promoting finds exponents in the areas of both domestic and international arbitration. As Walter Mattli and Thomas Dietz argue, for example, “The economic rationalist model further implies that organizational efficiency of arbitration forums is good not only for the contracting parties (by generating private gains), it also is good for the wider public.” Walter Mattli & Thomas Dietz, *Mapping and Assessing the Rise of International Commercial Arbitration in the Globalization Era: An Introduction*, in *INTERNATIONAL ARBITRATION AND GLOBAL GOVERNANCE: CONTENDING THEORIES AND EVIDENCE* 9 (2014). For a similar view, albeit, in the area of domestic arbitration, see Stephen Ware, *Is Adjudication a Public Good?: ‘Overcrowded Courts’ and the Private-Sector Alternative of Arbitration*, 14 *CARDOZO J. CONFLICT RESOL.* 899, 921 (2013). For an overview of the merits of privatizing dispute resolution services, see LARRY E. RIBSTEIN & ERIN A. O’HARA, *THE LAW MARKET* (2009).

Such effects include the decongestion of overcrowded court dockets, the creation of a more responsive market for adjudication services, and the placement of downward pressure on consumer prices by reducing legal costs.³ In addition to these material benefits, arbitration-friendly policies are thought to promote the value of private autonomy—the idea that individuals are best able to determine how they wish their disputes to be adjudicated.⁴ Under this general argumentative framework, the United States Supreme Court has spearheaded a distinctly pro-arbitration policy over the last forty years.⁵

However, amidst the acclaimed “arbitration revolution,” most visibly incarnate in the Supreme Court’s emphatic approach to arbitration and the massive expansion of the arbitration services sector, there have been a number of dissenting voices.⁶ One of the first and best-known critiques came almost as soon as the alternative dispute resolution (“ADR”) movement had begun. In his now well-known piece “Against Settlement,” Owen Fiss presented a series of criticisms against the increasingly emboldened

3. Gillian Hadfield identifies the state’s “inherent monopoly” over the provision of adjudication services as the primary contributor to the inefficiency of litigation. In her view, the state is “unresponsive to costs, reluctant to innovate, bureaucratic in its methods of collecting and processing information, shut off from entrepreneurial creativity and effort.” Gillian K. Hadfield, *Privatizing Commercial Law*, 24 REG. 40, 40 (2001). See also Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89 (2001) (suggesting that such businesses may pass on savings to consumers.).

4. As Thomas Carbonneau explains, “Parties in the marketplace should be at liberty to agree to any exchange to which they mutually consent and which complies with the minimal requisites of public policy.” Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 400 (2008). Hiro Aragaki places emphasis on the wide berth given to disputants to determine the terms by which the dispute will be arbitrated: “Unlike the one-size-fits-all approach of litigation, arbitration’s hallmark has been the wide scope of choice that it provides for parties to design a disputing procedure best suited to their needs and circumstances.” Hiro N. Aragaki, *Does Rigorously Enforcing Arbitration Agreements Promote Autonomy*, 91 IND. L.J. 1143, 1145 (2015).

5. For an overview of the Supreme Court’s support for arbitration, see Stephen L. Hayford, *Commercial Arbitration in the Supreme Court 1983-1995: A Sea Change*, 31 WAKE FOREST L. REV. 1 (1996).

6. Thomas Carbonneau characterizes the increased use of arbitration over the last forty years as a “revolution in law.” Thomas E. Carbonneau, *Revolution in Law through Arbitration, The Eighty-Fourth Cleveland-Marshall Fund Visiting Scholar Lecture*, 56 CLEVELAND ST. L. REV. 233 (2008).

proponents of arbitration.⁷ While the advocates of ADR had pledged their efforts to discovering faster and cheaper forms of litigation as a means of achieving procedural reform, Fiss argued that such endeavors overlooked the problem of power. At the heart of the reform movement was the assumption that disputes involved consenting individuals. Yet, in conceiving of parties as “individuals” or “neighbors,” Fiss argued that the proponents of ADR had turned a blind eye to the problem of organizational power and wealth of large-scale organizations like corporations, government agencies, or unions—all of whom had greater chances of winning legal disputes against weaker parties.⁸ In Fiss’ view, the administrators of private tribunals had fewer resources at their disposal than courts did to address imbalances of power between disputants, and were far less likely to yield just outcomes than public courts.⁹

We know in retrospect that the early critiques of ADR made by Fiss and others did little to slow down the extraordinary expansion of the arbitration system that developed over the subsequent decades.¹⁰ As the popularity of arbitration surged throughout the 1990s, even some of the more poignant criticisms of arbitration resounded faintly amidst what one commentator referred to as “the triumph of arbitration.”¹¹ Moreover, it became increasingly clear that the earlier progressive hopes for a more “human” and “dialogic” form of adjudication had been overtaken by a push for “alternatives to the high cost of litigation” from the corporate sector.¹² By 1991, Carrie Menkel-Meadow spoke of

7. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1983).

8. Fiss thought that the greatest potential for abuse arose from asymmetric bargaining scenarios. “In these cases, the distribution of financial resources, or the ability of one party to pass along its costs, will invariably infect the bargaining process, and the settlement will be at odds with a conception of justice that seeks to make the wealth of the parties irrelevant.” *Id.*

9. *Id.*

10. For early critiques of ADR, see, e.g., CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985); RICHARD HOFRICHTER, *NEIGHBORHOOD JUSTICE IN CAPITALIST SOCIETY: THE EXPANSION OF THE INFORMAL STATE* (1987); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668 (1986).

11. Thomas E. Carbonneau, *Arguments in Favor of the Triumph of Arbitration*, 10 CARDOZO J. CONFLICT RESOL. 395, 423 (2008).

12. The International Institute for Conflict Prevention (CPR) is an arbitration advocacy group that seeks to promote solutions to the high costs of litigation faced by

ADR “as a tale of social innovation co-opted.” A decade later, Bryant Garth described the private market for dispute resolution services as increasingly hierarchical and divided with one segment providing wealthy disputants “a-la-carte” arbitration services and the other “low-end justice for the rank and file.”¹³

It is only recently, however, that the critique of arbitration has come back into the public arena, and this time, much more forcefully than before. In response to the Supreme Court’s rulings in *AT&T Mobility LLC v. Concepcion*¹⁴ and *American Express Co. v. Italian Colors Restaurant*,¹⁵ an increasing number of scholars have argued that the Court’s pro-arbitration policy has enabled businesses to thwart lawsuits brought against them by consumers and employees.¹⁶ Critics have claimed that the Court’s willingness to enforce mandatory arbitration clauses, class-action waivers, and other fine-print arbitration agreements has served to deny consumers and employees access to the courts, while at the same time relieving business disputants of unwanted litigation—evidence of pro-business bias.¹⁷ These issues appear to have gained increasing public attention following a three-part 2015 *New York Times* investigation into the use of arbitration agreements in fine print contracts, and, more recently, in a *New York Review of Books* article by Justice Jed Rakoff of the Southern District Court

corporations. It counts a number of Fortune 500 listed firms amongst its corporate pledge signers. See *21st Century Pledge*, CPR (July 21, 2014), <https://www.cpradr.org/resource-center/adr-pledges/21st-century-pledge> [<https://perma.cc/JM6P-ZKGS>].

13. Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 928, 932 (2001).

14. 563 U.S. 333 (2011).

15. 133 S. Ct. 2304 (2013).

16. See for example, Hiro Aragaki, who argues the Supreme Court’s “pro-arbitration” policy has effectively negated state courts’ ability to review or overturn arbitral awards. Hiro N. Aragaki, *Arbitration’s Suspect Status*, 159 U. Pa. L. Rev. 1233, 1233 (2011). See also David Schwartz, who views mandatory arbitration agreements as a violation of the principle of consent. David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 Ind. L.J. 239, 244 (2012). Judith Resnik associates the privatization of adjudication, of which arbitration is an instance, with the evisceration of rights generally. 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 (2014).

17. See generally Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005).

of New York.¹⁸

What the new wave of criticism shares in common with the old is a heightened awareness of the potential abuses of corporate power in arbitration. It focuses on the way in which corporations have been able to use their superior wealth, organizational resources, and knowledge to gain strategic advantages over consumers and employees. Yet this focus on inequalities *between* disputants has the side effect of drawing attention away from a more general form of political-economic power engendered by the arbitration regime. That is, the way the Court's policy of deferring to arbitral awards shields commercial disputants from public interference. This policy is waged in the name of "cost," "expediency," and "the freedom of contract," but it has a more important effect that has not been paid sufficient attention: it alters the corporation as an object of governance. When corporations are assured that their disputes will not be publicized, and only in the narrowest of circumstances be subject to review, they gain greater latitude to act without encountering resistance from judges, lawmakers, or civil society—in other words, they gain more power.

We can learn much about how the present-day arbitration regime shields corporate actors from public interference in revisiting the arbitration movement that emerged in the 1920s. Not only did the period witness a surge of interest in arbitration, but it also offers the closest historical analogue to our current period of capitalism marked by the privatization of public services, corporate influence over the legislative process, belief in the self-executing power of markets, and organized anti-redistributionary sentiment. In the following section, I shall highlight the way that the Supreme Court's recent decisions can be seen as a revival of 1920s ideals of

18. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N. Y. TIMES: DEALBOOK (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 [<https://perma.cc/4ZHD-LWTW>]. As Justice Rakoff writes,

[C]ompanies have widely imposed mandatory arbitration clauses on their employees and customers, so as to deny them access to the courts, as well as to exclude them from exercising their constitutional right to a jury. In addition, since the *Concepcion* decision, most such clauses also forbid people with complaints to bring class action claims, even in arbitration.

Jed S., Rakoff, *Why You Won't Get Your Day in Court*, N.Y. REV. BOOKS, (Nov. 24, 2016), <http://www.nybooks.com/articles/2016/11/24/why-you-wont-get-your-day-in-court/> [<https://perma.cc/7KRG-KXQD>].

free enterprise and business “self-regulation.”

II. ARBITRATION AND THE IDEAL OF BUSINESS SELF-REGULATION

In this section, I claim that the Supreme Court’s policy of deferring to arbitral authority by “honoring parties expectations” resuscitates a laissez-faire-inspired ideal of arbitration that found its most cogent expression in the early twentieth century arbitration reform movement.¹⁹ Taken at face value, the Court’s pledge to keep arbitration cheap, fast, and flexible, and its defense of the “freedom of contract,” appear innocuous and devoid of ideological content. However, when we understand the broader historical context in which this discourse is embedded, the political-economic parameters of the Court’s pro-arbitration policy come into sharper relief.

Although periods of experimentation with arbitration in America can be traced as far back as the colonial period, the current fascination with arbitration and private alternatives to court finds its most compelling precedent in the early twentieth century arbitration reform movement.²⁰ The proponents of the 1920s arbitration reform movement were primarily interested in developing alternatives to what they perceived to be the excessive costs, delays, and rupture of business friendships that were associated with litigation in courts of law.²¹ Faced with anachronistic “judicial machinery” that had not kept pace with rapid advances in business organization, they vowed to devise

19. The Court’s deferential approach to arbitration is described by Stephen Ware as “rest[ing] on the premise that arbitration law is a part of contract law so courts must enforce agreements to arbitrate unless contract law provides a ground for denying enforcement.” Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law (with a Contractualist Reply to Carrington & Haagen)*, 29 MCGEORGE L. REV. 195, 195 (1997).

20. MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* 145–54 (1977).

21. Although figures in the movement were interested in developing private alternatives to the court for “the layman,” and did discuss the potential uses of arbitration in family court settings, the main focus was on devising cost-effective alternatives to business litigation. Amy J. Cohen, *Family, the Market, and ADR*, 2011 J. DISP. RESOL. 91 (2011).

inexpensive, speedy, and flexible forums of dispute resolution that were better suited to the realities of modern commerce.²² Thus, Charles Bernheimer could proclaim in 1926 that “[t]o litigate, the most wasteful procedure to which a business man can resort, means strife expense, annoyance and the rupture of business friendship, sapping the very lifeblood of commerce.”²³ By making the agreements to arbitrate “valid, enforceable, and irrevocable,” the Federal Arbitration Act (FAA) sought to overturn longstanding judicial antipathy to enforcing arbitration agreements, thereby facilitating commercial parties’ access to private tribunals.²⁴

While the proponents of arbitration reform focused mainly on rectifying problems of cost and delay, they were also committed to a broader regulatory framework that promoted private ordering *against* direct state interference in business affairs. In the words of Frances Kellor, Vice-President of the Arbitration Society of America, the choice to arbitrate was understood to be an expression of “the natural right of self-regulation,” “independence,” and “self-reliance” against state encroachment.²⁵ The idea that arbitration should remain free from state interference fit within a broader political-economic vision of *laissez-faire*, in which private ordering was preferred to the direct involvement of the Federal regulatory agencies.²⁶

22. William L. Ransom, *The Layman's Demand for Improved Judicial Machinery*, 73 ANNALS AM. ACAD. POL. & SOC. SCI. 132, 146 (1917) (“The difficulty is coming as to the *mechanics* of our judicial system, the suitability of present-day legal procedure as a modern device for the accomplishment of a basic end, the administration of prompt, impartial justice under law.”).

23. Charles L. Bernheimer, *The Advantages of Arbitration Procedure*, 124 ANNALS AM. ACAD. POL. & SOC. SCI. 98, 98 (1926).

24. Julius Henry Cohen, *The Law of Commercial Arbitration and the New York Statute*, 31 YALE L.J. 147, 160 (1921). As early as 1917, William Ransom could write that courts’ excessive technicality

naturally arouse the contempt of a business man . . . [driven] from the court house with the impression that he and other business men are sure to lose, no matter who wins the juridical verdict, if they have anything to do with “a game played under such rules”; they represent a kind of “trappings” and “red tape” which business men have long since rejected, in the conduct of other aspects of human relationship.

Ransom, *supra* note 22, at 149.

25. FRANCES A. KELLOR, AMERICAN ARBITRATION: ITS HISTORY, FUNCTIONS, AND ACHIEVEMENTS 121 (1999).

26. As Katherine Van Wezel Stone explains, “New capitalists rejected progressive models of government intervention in the economy, advocating instead a

It would not be until the onset of the Depression that the arbitration system would draw criticism for being a bastion of free-enterprise against the regulatory power of the state. In 1934, Thurman Arnold observed that “arbitration machinery has become a device to maintain the aloof position of courts and to isolate them from the technique of investigation and conference.”²⁷ In the same year, Phillip G. Phillips, observing the way arbitration delimited the judiciary’s ability to address economic problems of national importance, posed the question:

But what function have our courts in a nation dedicated to recovery by improvement of business conditions if it is not to adjudicate commercial controversies and thereby lay down rules of law which will assist in the recovery process? To strip them of this power would be collective *laissez-faire* of a most unusual type, a species of fanatical action one would expect in business anarchy and not in an industrial democracy based on a partnership between government and business.²⁸

In the order of “business anarchy” described by Phillips, corporations used arbitration as a means of avoiding public scrutiny and circumventing the regulatory oversight of the state.

III. THE FAA’S CORPORATE LOBBY

The claim that business has supported the formation of the FAA is, on its own, uncontroversial.²⁹ Historians have documented the activities of a number of business and trade associations that lobbied in favor of the Act through the New York Chamber of Commerce, the American Bar Association, and the Arbitration

vision of self-regulation of business through trade associations.” Katherine Van Wezel Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. REV. 931, 990 (1998).

27. Thurman W. Arnold, *Trial by Combat and the New Deal*, 47 HARV. L. REV. 913, 929 (1934).

28. Philip G. Phillips, *Commercial Arbitration Under the NRA*, 1 U. CHI. L. REV. 424, 439–40 (1934).

29. Indeed, the main spokespersons for the Act were representatives of private associations, not by elected officials, and the greater share of congressional testimony appears to have come from private interests. As Imre S. Szalai writes, “During the 1924 Hearings regarding the proposed legislation, virtually all of the written and oral testimony came from witnesses appearing on behalf of or at the request of commercial interests.” Imre S. Szalai, *Modern Arbitration Values and the First World War*, 49 AM. J. LEGAL HIST. 355, 380–81 (2007).

Society of America.³⁰ In characterizing such lobbying efforts as led by “merchants” and “traders,” historians have generally overlooked the degree to which lobbying efforts were supported by the ascendant force in the nation’s economy: large-scale, vertically integrated, limited liability corporations.³¹ Indeed, the period between 1910 and 1930 was characterized by extraordinary advancements in corporate organization, and saw the consolidation of a number of business giants, including: General Motors, Ford, General Electric, the Radio Corporation of America, Westinghouse, and the Sears Roebuck Corporation—many of which were part of lobbying efforts in support of commercial arbitration.³² This oversight is important for two reasons. First, it understates the role of elite actors in mobilizing for legal reform, making it seem like the FAA’s social basis of support was much wider and grassroots-led than it actually was.³³ Second, in overlooking corporate incentives to arbitrate, existing accounts of the FAA miss the importance of regulatory-avoidance strategies that were enabled by the emergent arbitration regime.

Business support for the FAA is commonly attributed to two driving forces. The first is the New York Chamber of Commerce’s Committee on Arbitration, which, led by Charles Bernheimer and Julius Cohen, spearheaded a massive lobbying campaign seeking to promote the use of arbitration amongst both business and the broader public.³⁴ The second is what Katherine Van Wezel Stone

30. See, e.g., IAN R. MACNEIL, *AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION* (1992); Van Wezel Stone, *supra* note 26, at 931.

31. See generally ALFRED D. CHANDLER JR., *THE VISIBLE HAND* (1993). According to Adolf Berle and Gardiner Means, the modern business corporation was unparalleled in terms of its economic power and ability to direct human affairs. ADOLF AUGUSTUS BERLE & GARDINER COIT MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1991).

32. AM. ARBITRATION ASS’N., *DECENNIAL REPORT OF THE AMERICAN ARBITRATION ASSOCIATION ON THE PROGRESS OF COMMERCIAL ARBITRATION: 1926–1936* (1936), <https://babel.hathitrust.org/cgi/pt?id=mdp.35112104315850;view=lup;seq=3> [<https://perma.cc/UX7C-RDWD>].

33. See, e.g., Frank D. Emerson, *History of Arbitration Practice and Law*, 19 CLEV. ST. L. REV. 155, 163 (1970) (describing the Arbitration Society of America as “representative of many groups of people from all walks of life, participating in a new concept of arbitration.”).

34. As Ian Macneil points out, during “Arbitration Week” in 1923, Charles L. Bernheimer “arranged a program in which more than fifty trade and commercial

identifies as the association movement, referring to the increasing national prominence of trade associations that arose under the corporatist economic policy harbored by Secretary of Commerce Herbert Hoover, who would later serve on the board of the American Arbitration Association (AAA).³⁵ Since many trade associations already had well-developed, privately administered systems of arbitration in place to resolve disputes amongst their members, they were naturally in favor of efforts to bolster the legitimacy and national profile of arbitration.

Mirroring the discourse of early twentieth-century arbitration reformers, scholars have spoken of “merchants,” “commercial interests,” “traders,” and the broader “business community” to describe the business interests that promoted arbitration during the 1920s. While there is a good deal of evidence to suggest that the FAA did attract the interest of numerous small businesses and merchants, this language tends to overlook cleavages of market power that existed *amongst* the FAA’s business following.

Scholars have overlooked the way in which support for both Bernheimer’s Committee on Arbitration and Moses Grossman’s Arbitration Society of America hailed from elements of the ascendant U.S. corporate sector. To gain a sense of the magnitude and scope of corporate backing for the FAA, it is instructive to observe the general membership of the New York Chamber of Commerce. Between 1910 and 1930, the period roughly coinciding with the height of the arbitration movement, the commodities traders that had dominated the Chamber’s membership in the mid-nineteenth century were increasingly eclipsed by directors of large-scale corporations. The Chamber’s 1922 annual report, for example, features chief executives from virtually every major sector of American business, including banking, insurance, rail, radio and telecommunications, oil and gas, retail, automotive, and textiles.³⁶ These include the leaders of some of largest industrialists in the United States, including Gerard Swope, President of General

organizations participated.” MACNEIL, *supra* note 30, at 38.

35. “The growth of commercial arbitration went hand in hand with the explosive growth of trade associations in the 1920s.” Van Wezel Stone, *supra* note 26, at 977–78.

36. See generally N.Y. CHAMBER OF COMMERCE, SIXTY FOURTH ANNUAL REPORT OF THE CORPORATION OF THE CHAMBER OF COMMERCE OF THE STATE OF NEW YORK FOR THE YEAR 1921–1922 34–70 (1922), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015067348808;view=1up;seq=5> [<https://perma.cc/6MG7-C5YB>].

Electric; Owen D. Young, Chairman of the Radio Corporation of America; Jules Bache, investment banker and majority shareholder of Dome Mines; and Charles M. Schwab, President of U.S. Steel.³⁷

On its own, the incidence of these corporate magnates amongst the Chamber's membership is nothing more than suggestive. It does not offer sufficient evidence to suggest that the FAA was necessarily any more "pro-corporate" than it favored "small business." For example, it is quite possible that elements of the Chamber's activity took a passive stance on the arbitration, and left organizing activities to the Chamber's Committee on Arbitration. Yet there is evidence that corporate sponsorship of the Act was more than just salutary or incidental, but in fact heavily enmeshed in the planning process.

Frances Kellor, who acted as Vice-President of the American Arbitration Society (which changed its name to the American Arbitration Association in 1926), wrote a largely promotional, but nevertheless informative history of the arbitration movement in 1948 entitled *American Arbitration, its History, Functions and Achievements*.³⁸ In the section "Builders of American Arbitration" she lists some of key business patrons of the Arbitration Society. These included: Julius Rosenwald, President of Sears Roebuck corporation; Felix S. Warburg, of the renowned European banking dynasty; and John D. Rockefeller of Standard Oil. Anson Burchard, Vice-President of General Electric, would later serve as the first president of the AAA, the result of the merger between Bernheimer's Arbitration Foundation and Moses Grossman's Arbitration Society of America.³⁹

By 1936, six years after the FAA was ratified by Calvin Coolidge, the AAA's board of directors included an even broader base of big-business support. They included the National City Bank of New York, the Metropolitan Trust Company, Goodyear

37. See generally *id.*; AM. ARBITRATION ASS'N, *supra* note 32.

38. See generally KELLOR, *supra* note 25.

39. See generally JOHN N. INGHAM, BIOGRAPHICAL DICTIONARY OF AMERICAN BUSINESS LEADERS (Greenwood Publ'g Grp., 1983). The American Arbitration Association was formed through a merger of Moses Grossman's Arbitration Society of America and Charles Bernheimer's Arbitration Foundation. IAN R. MACNEIL, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION 40 (Oxford Univ. Press 1992) MACNEIL, *supra* note 30, at 40.

Tire & Rubber Company, Metropolitan Insurance Company, and Western Electric.⁴⁰

The convergence of corporate giants in the arbitration movement—and the subsequent influence they exerted on its central institutions—should cast doubt on the still widely held view that the arbitration movement was, in the first instance, inspired by the values of progressivism. While the movement did enlist the contributions of social reformers like Roscoe Pound and saw business representatives speak of the importance of improving judicial machinery for “the layman,” such commitments seem to pale in comparison to the business forces that mobilized behind the FAA.⁴¹ Instead of juxtaposing two mutually exclusive visions of arbitration—one dedicated to laissez-faire, another to progressive reform—the more interesting question is how the business has been able to successfully frame its campaign of judicial privatization in such a way that has the appearance of benefiting the common good.

CONCLUSION

I have shown how the arbitration reform movement of the 1920s drew on an extensive basis of corporate support and demonstrated the way that it centered on laissez-faire-inspired notions of free-enterprise, individual autonomy, and reliance. It would be a mistake to understand such efforts as merely being occupied with the issues of “cost and delay.” Rather, I argue that proponents of arbitration reform were seeking to reorganize state power in such a way that bolstered businesses’ ability to act without encountering public interference. The significance of this project did not necessarily lie in allowing businesses to abuse their superior bargaining power over weaker disputants, but in realigning the regulatory power of the state in such a way that promoted private ordering. The critics of the Supreme Court’s decisions in *AT&T Mobility LLC v. Concepcion* and *American Express Co. v. Italian Colors Restaurant* have raised the spectre of corporate power in contractual arbitration. Where those critics could go much further,

40. See generally AM. ARBITRATION ASS’N, *supra* note 32.

41. It provides a forum admirably adapted for the settlement of the troubles of the small man or the poor man who cannot stand the stress and expense of protracted litigation. Bernheimer, *supra* note 23, at 99–100.

however, is in studying the less conspicuous modes through which business disputants have used arbitration to their own advantage. Those who hold hopes for more progressive or democratic uses of arbitration should take stock of the ongoing campaign of judicial privatization being waged by courts, corporations, and governments, and shed greater light on the strategies of regulatory avoidance in which they enable corporations to engage.