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COMBATING STRUCTURAL BIAS IN DISPUTE SYSTEM DESIGNS THAT USE ARBITRATION:
TRANSPARENCY, THE UNIVERSAL SANITIZER

By

Lisa Blomgren Amsler*

Employers and businesses adopt adhesive arbitration clauses as a means to manage the risk of litigation and perceived “runaway” jury awards.¹ Mandatory or adhesive arbitration describes the power of an economically stronger repeat player to impose an adhesive binding arbitration clause on the weaker, usually one-shot, player. Such agreements appear frequently as a condition of some economic relationship, most problematically employment, consumer purchases, or health care.² It is such a powerful tool for corporations to manage risk that they are building it into job application forms, personnel manuals, form contracts for employment, and the fine print of consumer contracts and warranties in the United States. Corporations have such vast economic power, and have so consolidated that power through mergers and acquisitions, that employees and consumers are generally unable to evade the arbitration clauses. These stick to them like the alien parasite that looked like a plastic pizza on Mr. Spock’s back in an episode of *Star Trek*.³ Employees and consumers may choose to refuse to enter into the economic relationship by refusing employment or seeking to purchase goods and services from other sources. However, this requires educating them about what to most Americans is an arcane area of law, and the consolidation is such that, in reality, these choices are few.

In this brave new world, how can we combat structural bias built into dispute system designs (“DSDs”) that include mandatory or adhesive arbitration clauses? This essay will explore transparency and disclosure as means to that end. First, it will discuss

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¹ Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, LAW & CONTEMP. PROBS. Winter/Spring 2004, at 221, 221–23 (arguing that repeat players that control the design of arbitration systems manage risk by shifting transaction costs to the one-shot player to reduce the settlement value of a case and discourage litigation).

² For a review of the literature, see Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 KAN. L. REV. 985 (2012); 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. 324 (2011).

³ Episode Number 29 at the end of *Star Trek*’s first season was entitled “Operation: Annihilate.” According to the Internet Movie Database, the plot line is:

The Enterprise traces a virus-like outbreak that seems to be traveling in a direct line across a planetary system. The next planet is home to Kirk’s brother Sam, his sister-in-law and their young son. The Enterprise arrives too late however for Sam. They find flying jellyfish-like creatures that attach themselves to humans. They take over the victims’ nervous system forcing them to bend to their will. Spock finds a weapon to use against the creatures but it leaves him hopelessly blind.

<http://www.imdb.com/title/tt0708441/> (last accessed June 21, 2014).

institutional analysis and DSD to examine indicia of structural bias. Second, it will rely on other excellent scholarship to review the current state of the law and instead focus on the relative lack of remedies available to employees and consumers from the courts, Congress, or the executive branch. Third, it examines scholarly proposals to address the gap in remedies. Finally, it explores the various ways employees and consumers might engage in self-help to promote transparency as a means to accountability for biased arbitration systems.

I. Exploring Structural Bias in Arbitration Systems

Nobel laureate Elinor Ostrom made major contributions to our understanding of human institutions.⁴ Her work, and the ‘Indiana School’s’ Institutional Analysis and Development (“IAD”) Framework, developed at Indiana University’s Workshop on Political Theory and Policy Analysis, provide a grammar and syntax to examine wide institutional diversity and how institutions govern our collective behavior.⁵ The field of DSD developed independently as an application of industrial relations concepts to broader practice, yet it can be better understood through the lens of Ostrom’s framework.

A. *Institutional Analysis and Development*

In the IAD framework, Ostrom identified an underlying set of universal building blocks for researching institutions and how they function arranged in layers.⁶ Most often, this framework will help researchers focus on the simplest unit of analysis — the action situation.⁷ Researchers analyze the situation, decide what assumptions to make about participants, predict outcomes, and test the predictions empirically.⁸ However, if the data do not support the predictions, it may be necessary to examine the deeper layers within which the action situation is embedded. For example, structures are nested; families, firms, communities, industries, states, nations, transnational alliances, and others are all

⁴ See generally ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (Cambridge University Press 1990). Portions of this discussion first appeared in Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 2-26 (2008-9).

⁵ See generally ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY (Princeton University Press 2005). The study of institutional design is the subject of literature in political science, economics, sociology, public affairs, and policy analysis.

⁶ *Id.* at 6. Ostrom defines a framework as the level of analysis necessary to identify the elements and relationships among those elements necessary to engage in institutional analysis, and which provides the most general set of variables that therefore should apply to all settings and institutions. *Id.* at 28.

⁷ Ostrom focuses on two holons in the action arena, which is defined as a unit of analysis in which participants (first holon) and the action situation (second holon) interact in ways affected by other outside variables and produce outcomes. Ostrom, *supra* note 2, at 13.

⁸ *Id.* at 7.

structures that can be viewed in isolation or as part of a larger whole.⁹ Ostrom borrowed from complex adaptive systems literature the concept of the holons — "nested subassemblies of part-whole units."¹⁰ To apply this concept to DSD, one might consider a court-connected mediation program as a holon nested within the structure of the court, which is nested in the judicial branch, which in turn is nested within the structure of the state or federal government.

To analyze an action situation, Ostrom uses seven categories of information:

- (1) the set of participants [single individuals or corporate actors],
- (2) the positions to be filled by participants,
- (3) the potential outcomes,
- (4) the set of allowable actions and the function that maps actions into realized outcomes [action-outcome linkages],
- (5) the control that an individual has in regards to this function,
- (6) the information available to participants about actions and outcomes and their linkages, and
- (7) costs and benefits – which serve as incentives and deterrents – assigned to actions and outcomes.¹¹

These are the common structural components that represent the building blocks for all institutions at their most general level.

One can readily see how we might use these categories of information to understand DSD. As an example of allowable actions, a mediation DSD affords more control over the outcome of the function of dispute resolution than an arbitration design, because the mediator has no power to decide a case. On the other hand, as an example of information availability, limited discovery in a DSD might afford participants significantly less information about actions and outcomes and their linkages.

Once a researcher understands the initial action arena, she will seek to understand the outside variables that are affecting it;¹² this is a two-stage process. First, the action arena now becomes a dependent variable subject to three categories of exogenous variables: "(1) the *rules* used by participants to order their relationships, (2) the attributes of the *biophysical world* that are acted upon in these arenas, and (3) the structure of the more general *community* within which any particular arena is placed."¹³ In the second stage of the analysis, the researcher will examine linkages between one action arena and others; either in sequence or at the same time.¹⁴ For example, in DSD, parties in

⁹ *Id.* at 11.

¹⁰ *Id.*

¹¹ *Id.* at 32. *See generally* Chapter 2, at 32-68. Ostrom explains how to operationalize these concepts using game theory to structure experiments in a laboratory in Chapter 3, at 69-98.

¹² *Id.* at 15.

¹³ *Id.* (emphasis in original). Lawyers focus on the rules, but for the strategic purpose of advancing the interests of their clients and as agents of participants in the action arena of the arbitration, administrative agency, court, or other forum.

mediation negotiate in the shadow of the civil justice system; the trial is an action arena that follows in sequence upon a failed civil or commercial mediation.

As lawyers, we tend to focus more on the rules than on the other two categories of variables.¹⁵ Ostrom's discussion of rules is central to understanding DSD. She defines rules for the purpose of Institutional Analysis and Development as "shared understandings by participants about enforced prescriptions concerning what actions (or outcomes) are required, prohibited, or permitted."¹⁶ She describes how rules can emerge through processes of democratic governance, or through groups of people who organize privately, such as corporations or membership associations, or within a family or work team.¹⁷ Rules can evolve as working rules that are a function of what individuals decide to do in practice. In other words, her concept of rules would encompass rules in DSD structures that governments create, those that parties mutually negotiate, and those that one corporate player imposes on a weaker party in an economic transaction.

Moreover, institutional analysis is aimed at all institutions — both those within an open, democratic society governed by the rule of law and also those in other systems where rules and attempts to enforce them exist, but people generally try to get away with noncompliance.¹⁸ Rules are also formulated in language, an imperfect and sometimes ambiguous tool, and hence they depend upon a generally shared understanding of meaning by humans who interpret and apply them in action situations. Thus, rules may or may not be predictable and may or may not produce stability in human action. Compliance with rules is a function of monitoring and enforcement.¹⁹

B. Dispute System Design

As a field, DSD is best understood as applied institutional design, or institutional design in practice. First, this section will sketch the evolution of DSD as a field. Second, it presents evolving catalogue of structural variables that researchers have used to compare designs in the field of alternative or appropriate dispute resolution ("ADR"). Third, it briefly describes the problem of control over DSD, which is a key factor in arbitration DSDs that contain structural bias. We can use institutional analysis to deepen our understanding of structural bias in DSD.

¹⁴ *Id.*

¹⁵ Ostrom also reports that her book focuses primarily on rules, which are of central interest to political science and policy analysts, of which she counts herself one. *Id.* at 29.

¹⁶ *Id.* at 18 (citations omitted). This is a "rule" in the sense of a regulation adopted by an authority. She describes three other possible definitions of rules from the literature of social science; specifically rules as instructions for successful strategies, or rules as precepts such as the Golden Rule, or rules as principles that can be true or false, such as the laws of physics.

¹⁷ *Id.* at 19.

¹⁸ *Id.* at 20. She describes this as rules-in-form being consistent, or inconsistent, with rules-in-practice.

¹⁹ *Id.* at 21.

DSD first emerged as a field in organizational conflict and workplace disputes. Historically, organizations reacted to conflict rather than planned how to manage it; they used existing administrative or judicial forums to address it.²⁰ Changes in the social contract and the rise and fall of unionism led to the concept of DSD, a term coined by Professors William Ury, Jeanne Brett, and Stephen Goldberg to describe the purposeful creation of an ADR program in an organization to manage conflict through a series of steps or options for process.²¹ They argued that dispute resolution processes can focus on interests, rights, or power,²² but that organizational conflict management systems will function better for the stakeholders if they focus primarily on interests. A healthy system should only use rights-based approaches (arbitration or litigation) as a fallback when disputants reached impasse; parties should not generally resort to power. Organizational DSDs can take a myriad of forms, including a multi-step procedure culminating in mediation and/or arbitration, ombudspersons²³ programs giving disputants many different process choices,²⁴ or simply a single step binding arbitration design. The field of dispute resolution broadly adapted the concept of DSD beyond organizations with employment conflict and courts to other legal and administrative contexts.

Elements of DSD include choices that create rules which become structures. Ostrom's framework can help identify the elements of DSD. Court-annexed and stand-alone ADR programs contain many distinct structural variables and/or choices that together form a DSD. These include, but are not limited to:²⁵

1. The sector or setting for the program (public, private, or nonprofit);
2. The overall dispute system design (integrated conflict management system, silo or stovepipe program, ombuds program, outside contractor);
3. The subject matter of the conflicts, disputes, or cases over which the system has jurisdiction;
4. The participants eligible or required to use the system;

²⁰ DAVID B. LIPSKY, ET AL., *EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS* 6 (Jossey-Bass Inc. 2003). They also observe that DSD may serve as a union avoidance strategy.

²¹ WILLIAM L. URY, ET AL., *GETTING DISPUTES RESOLVED: DESIGNING SYSTEMS TO CUT THE COST OF CONFLICT* 41-64 (1988).

²² *Id.* at 3-19. Recent experimental work empirically supports the emphasis on interests in DSD. See Jean Poitras & Aurelia Le Tareau, *Dispute Resolution Patterns and Organizational Dispute States*, 19 INT'L J. CONFLICT MGMT. 72, 84 (2008).

²³ Mary P. Rowe, *The Ombudsperson's Role in a Dispute Resolution System*, 7 NEGOT. J. 353 (1991).

²⁴ See generally, CATHY A. COSTANTINO & CHRISTINA SICKLES MERCHANT, *DESIGNING CONFLICT MANAGEMENT SYSTEMS: A GUIDE TO CREATING PRODUCTIVE AND HEALTHY ORGANIZATIONS* (Jossey-Bass 1996).

²⁵ Lisa Blomgren Bingham, *Designing Justice: Legal Institutions and Other Systems for Managing Conflict*, 24 OHIO ST. J. ON DISP. RESOL. 1, 12-14 (2008-2009).

5. The timing of the intervention (before the complaint is filed, immediately thereafter, after discovery or information gathering is complete, and on the eve of an administrative hearing or trial);
6. Whether the intervention is voluntary, opt out, or mandatory;
7. The nature of the intervention (training, facilitation, consensus-building, negotiated rulemaking, mediation, early neutral assessment or evaluation, summary jury trial, non-binding arbitration, binding arbitration) and its possible outcomes;
8. The sequence of interventions, if more than one;
9. Within intervention, the model of practice (if mediation, evaluative, facilitative or transformative; if arbitration, rights or interests, last-best offer, issue-by-issue or package, high-low, etc.);
10. The nature, training, qualifications, and demographics of the neutrals;
11. Who pays for the neutrals and the nature of their financial or professional incentive structure;
12. Who pays for the costs of administration, filing fees, hearing fees, hearing space;
13. The nature of any due process protections (right to counsel, discovery, location of process, availability of class actions, availability of written opinion or decision);
14. Structural support and institutionalization with respect to conflict management programs or efforts to implement; and
15. Control that disputants have as to process, outcome, and DSD. Is it both parties together, one party unilaterally, or a third party for them?²⁶

²⁶ The National Employment Arbitration Roundtable revised this list:

Structural Features

1. Location
2. Who initiates, how and when
3. Who chooses neutral
4. Notice
5. Information exchange/discovery
6. Formality, character of proceeding
7. Availability of aggregate claims
8. Decision standard
9. Available remedies and form of award
10. Access to counsel
11. Opportunity for access to other processes, appeal

Context

12. Type of employment dispute
13. Sector or setting (public, private, non-profit, hybrid)
14. Participants eligible or required to use

Administration of System

15. Stakeholder participation in design and redesign
16. Selection and characteristics of pool of neutrals
17. Payment of neutrals, administrative costs

Each is a structural element of the DSD that must be embodied in a contract, policy, guideline, regulation, statute, or other form of rule.

Ostrom argues that there are three related concepts: strategies, norms and rules: “[I]ndividuals adopt strategies in light of the norms they hold and within the rules of the situation within which they are interacting.”²⁷ Even when we limit our use of rules to regulation or prescription subject to enforcement, there are nevertheless many types of rules.²⁸ Arguing that we need to use simplified, broad, and general types or classes of rules to accumulate comparable research and advance the field of institutional design, Ostrom proposes seven kinds of rules: rules regarding positions, boundaries, choice, aggregation, information, payoff, and scope.²⁹

Applying Ostrom’s categories to arbitration, who is eligible to use arbitration is a position rule that defines the category of participants. What kinds of cases arbitration will cover is a boundary rule that defines the scope of the arbitrator’s power. Whether arbitration is voluntary, mandatory, or opt out is a choice rule because it defines what action or action set a participant/position has in relation to arbitration. Rules that limit the use of class actions in arbitration are aggregation rules that shape whether it is an affordable remedy. They interact with boundary rules to make individual pursuit of a claim in arbitration unaffordable and nullify public laws for fair credit or consumer protection.

DSDs that limit discovery have rules about what information participants can use in the DSD to persuade the arbitrator. DSDs can also limit the award or outcome of arbitration by shifting attorneys’ fees or arbitrator fees to the winner or loser; these are examples of payoff rules.

If we more systematically analyze and compare the implicit rule choices in arbitration DSDs, we can better understand the differences in outcomes. Rules define substantive rights in the system. The collective bargaining agreement’s requirement for just cause for discipline is a choice rule in Ostrom’s framework; it affects the assignment of particular action sets to positions. Under a just cause rule, the position of employer is

18. Mechanism for assessment, evaluation

Nancy Welsh, Thomas Stipanowich, Lisa Blomgren Bingham, and David Lipsky, *Materials from National Employment Arbitration Roundtable* (2012) (on file with author).

²⁷ Ostrom, *supra* note 5, at 175.

²⁸ *Id.* at 18. *See generally id.* at 186–215 for a description of different kinds of rules.

²⁹ *Id.* at 190. Ostrom provides very general definitions:

Position rules create positions (e.g. member of a legislature or a committee, voter, etc.). Boundary rules affect how individuals are assigned to or leave positions and how one situation is linked to other situations. Choice rules affect the assignment of particular action sets to positions. Aggregation rules affect the level of control that individual participants exercise at a linkage within or across situations. Information rules affect the level of information available in a situation about actions and the link between actions and outcome linkages. Payoff rules affect the benefits and costs assigned to outcomes given the actions chosen. Scope rules affect which outcomes must, must not, or may be affected within a domain.

Id.

no longer free to fire an employee at will, with or without cause, for no reason or any reason except those prohibited by law.³⁰ The employer has the burden of proving just cause for discipline, including notice, consistency in discipline, progressive discipline, and other elements. In the absence of a union, an employer can incorporate an at will employment decision standard into the arbitration design; this choice rule shifts the burden of proof to the employee from the employer as is the tradition in labor relations in a discipline case. To identify structural bias in an arbitration DSD, we need to compare these designs meaningfully and systematically through a careful study of the forms that Ostrom's various rules take.

Ostrom conducted research on institutions for managing conflict over common pool resources in environmental and other settings.³¹ She characterized robust institutions as ones that persist, are stable, and adapt to changing circumstances.³² Their designs include clearly defined boundaries of the resource, clearly defined rights of individuals who can take it, proportional equivalence between benefits and costs, collective choice arrangements, monitoring, graduated sanctions, conflict resolution mechanisms, minimal recognition of rights to organize, and enterprises in which appropriation, enforcement, monitoring, conflict resolution, and governance are nested in layers. Arbitration DSDs as institutions generally are subject to this set of principles, particularly collective choice arrangements, minimal recognition of the rights to organize, monitoring, and governance.

However, most of these are lacking in adhesive or mandatory arbitration DSDs. Collective choice arrangements are those in which people who are subject to the rules are included in the group who can make or change the rules.³³ Functionally, this is control over DSD.³⁴ Dispute systems vary across two separate dimensions of disputant control: control over the full DSD, or control within a given case using a specific process provided by that design. Control over DSD includes the power to make choices regarding the rules that create the design: for example, what cases, which process or sequence of processes, what due process rules, what discovery, and other structural aspects. Within a DSD, control over a given case can address process and/or outcome. In arbitration, one or more parties may give control over outcome to a third party to issue a binding decision.

³⁰ Martin H. Malin, *The Distributive and Corrective Justice Concerns in the Debate over Employment At-Will: Some Preliminary Thoughts*, 68 CHI.-KENT L. REV. 117, 145 (1992) ("Control over employment termination is a major determinant of workplace power. The debate over employment at-will focuses on the appropriate approach to the legal regulation of this power.").

³¹ Ostrom, *supra* note 5, at 258–80

³² She first described these in Ostrom, *supra* note 4.

³³ Ostrom, *supra* note 5, at 259.

³⁴ Lisa B. Bingham, *Control Over Dispute System Design and Mandatory Commercial Arbitration*, 67 LAW & CONTEMP. PROBS. 221 (2004) (arguing that control over dispute system design shifts the settlement value of cases in commercial mandatory arbitration); Lisa B. Bingham, *Self-Determination in Dispute System Design and Employment Arbitration*, 56 U. MIAMI L. REV. 873 (2002) (arguing that control over dispute system design changes outcomes in employment arbitration); Lisa B. Bingham, *Why Suppose? Let's Find Out: A Public Policy Research Program on Dispute Resolution*, 2002(1) J. OF DISP. RESOL. 101-126 (2002) (arguing that control over dispute system design makes a difference in mediation outcomes).

Structural bias in DSDs may depend on: (1) who is designing the system; (2) what their goals are, and (3) how they have exercised their power. DSDs generally fall into one of three categories: (1) a court, agency, or other third party designs it for the benefit of disputants (third party design); (2) two or more disputants subject to the system jointly design it (all disputants or parties design); and (3) a single disputant with stronger economic power designs it and imposes it on the other disputant (one party design).³⁵

For example, historically, the public civil justice system is the product of design by a third party: the judicial branch with funding from the legislative branch acting for the benefit of disputants.³⁶ These represent collective choice rules under a constitutional form of government in which voters elect legislators who provide appropriations for the judicial branch; the judicial branch acts under power from the collectively chosen constitution. There are at least minimal rights to organize in that court-connected DSDs allow people to have the representation or legal counsel of their choice, if they can afford it. Public interest litigants can participate. Moreover, there is monitoring in that government tracks and regulates its judicial and public agency systems.

Historically, private justice systems arose in the shadow of the public justice system, specifically, the courts and administrative agencies that are third party DSDs. For example, both or all parties negotiated DSD in their labor relations or commercial contracts. Labor relations DSDs entail their own collective choice rules in that national labor law provides a legal framework that allows for employees to form, join, and assist unions and act collectively. Participants have the right to self-organize. These collective action entities are nested within a constitutional government that provides through other collective choice rules a legal framework in labor law that enforces their agreements.³⁷ There is transparency through the union's right to information under labor law that allows collectively organized employees to monitor the results of their DSD over time; this is an information rule. Moreover, the disputants themselves can determine whether the costs and benefits of their system are in balance in that they can change their standing arbitrator panel, or their third party service provider, or determine to adopt a rule that shifts arbitrator fees to the losing party, which is a payoff rule in Ostrom's categories.

Another example of private justice systems with collective choice are in the diamond³⁸ and cotton³⁹ industries. These were robust in Ostrom's sense; they were enduring, stable, adaptive, participatory, characterized by collective choice rules. Both the diamond and cotton industries use a private democratic membership structure, subject

³⁵ *Id.*

³⁶ For publications evaluating ADR programs in a variety of federal courts, see the website of the Federal Judicial Center, *available at* <http://www.fjc.gov> (last visited June 21, 2014).

³⁷ PATRICK HARDIN, JOHN E. HIGGINS, JR., CHRISTOPHER T. HEXTER, JOHN T. NEIGHBOURS (eds.), *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT* (5th Ed. 2006).

³⁸ Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEG. STUD. 115 (1992).

³⁹ Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724 (2001).

to monitoring by that membership association, which is self-governing. Their membership both chose the design, adopted through their associations' constitutions and bylaws, and participated in the design either as disputants or decision-makers or arbitrators in their own private justice systems.

However, in adhesive arbitration, there is no collective choice; generally a single disputant with superior economic power has taken unilateral control over designing a dispute system for conflicts to which it is a party. Moreover, they impose DSDs that effectively restrict recourse to the public civil justice system through adhesive binding arbitration clauses.⁴⁰ These DSDs do not have meaningful collective choice rules within the holon that is the arbitration program.⁴¹ They are nested in a legal framework for arbitration in interstate commerce, specifically, the Federal Arbitration Act ("FAA"),⁴² which was adopted through collective choice rules in a constitutional form of government, namely our democracy. However, an individual's personal participation in collective choice at the level of national government is limited, and the FAA was enacted in 1925 before most people now alive were born.

There are limited or no rights to self-organization in the context of adhesive arbitration. The U.S. Supreme Court has determined that plans may preclude class action litigation or class arbitration.⁴³ Some plans prohibit the use of legal counsel, which might otherwise be considered a form of self-organization or freedom of association.⁴⁴ Ostrom's

⁴⁰ Scott Baker, *A Risk-Based Approach to Mandatory Arbitration*, 83 OR. L. REV. 861 (2004) (arguing that some employers use mandatory arbitration to manage risk, and that repeat players should pay more for the privilege); see also Alexander J.S. Colvin, *Institutional Pressures, Human Resource Strategies, and the Rise of Nonunion Dispute Resolution Procedures*, 56 IND. & LAB. REL. REV. 375 (2003) (finding that rising individual rights litigation and increased judicial deferral to nonunion arbitration are institutional factors leading to increased adoption of mandatory arbitration in the workplace); Alexander J.S. Colvin, *From Supreme Court to Shopfloor: Mandatory Arbitration and the Reconfiguration of Workplace Dispute Resolution*, 13 CORNELL J. L. & PUB. POL'Y 581 (2004); Stephan Landsman, *ADR and the Cost of Compulsion*, 57 STAN. L. REV. 1593, 1593 (2005) (arguing that risks of compelled ADR include the "likelihood that adhesion contract drafters will use arbitration clauses and related requirements to short-circuit existing legislation with newly drafted provisions protective of their special interests, that contract drafters will, in some cases, go even further and use their drafting power to squelch all claims, and that ADR providers will be sorely tempted to cast their lot with adhesion contract drafters in order to win and retain valuable business"); Jean R. Sternlight, *Creeping Mandatory Arbitration: Is it Just?*, 57 STAN. L. REV. 1631 (2005) (surveying the emergence of mandatory arbitration in lieu of civil litigation for employment and consumer claims and concluding that it is unjust).

⁴¹ In theory, there is consent to form contracts or adhesive arbitration clauses in personnel manuals because the prospective consumer or employee can walk away. However, as growing numbers of service providers and employers adopt these practices, there are no meaningful alternatives. Linda J. Demaine and Deborah R. Hensler, *"Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROBS. 55 (2004).

⁴² 9 U.S.C. §1, *et seq.* (2012) (enacted in 1925).

⁴³ *AT&T Mobility LLC v. Concepcion*, 563 U.S. 321 (2011).

⁴⁴ See *Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (holding that there is no first amendment right to freedom of association with legal counsel within an administrative proceeding established to support veterans seeking benefits for injuries).

categories are helpful in gaining clarity about the rules that establish adhesive arbitration designs.

C. Transparency and Research on Structural Bias in Arbitration DSDs

The Supreme Court has enforced adhesive arbitration on the theory that it is a mere substitution of forum, not a change in the substance of the remedy.⁴⁵ There are good reasons to believe this may not be true. Arbitration outcomes may differ systematically from litigation outcomes. Rigorous empirical research might answer this question. However, there are obstacles to that research due to rules that establish arbitration's confidentiality and the limited information about arbitration DSDs. These obstacles operate as barriers to controlling structural bias and improving arbitration.

There is limited transparency in adhesive arbitration because awards generally are confidential unless the parties mutually agree to their publication.⁴⁶ Even where states attempt to regulate arbitration to require reporting of outcomes, compliance and enforcement are problematic.⁴⁷ This is a DSD issue, because the system designers could provide for disclosure for purposes of monitoring and evaluation, a characteristic of robust institutions according to Ostrom's IAD framework.

Instead, most arbitration occurs under an agreement in which all parties agree to maintain the confidentiality of communications in the process and usually agree not to disclose its outcome. In adhesive arbitration clauses, confidentiality is imposed through a unilateral mandate possibly on an unwilling arbitration participant. Arbitration awards remain unpublished and confidential unless both parties agree to permit publication, which effectively gives employers or companies a veto over transparency. Scholars have observed how confidentiality of settlements in dispute resolution can undermine enforcement of rights under public law.⁴⁸

In order to obtain access to arbitration data from third party providers who maintain case files, researchers must agree to respect that confidentiality, must develop data collection plans in collaboration with the source, and generally must report results

⁴⁵ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). For a critique of current U.S. Supreme Court arbitration jurisprudence, see Michelle L. Caton, *Form over Fairness: How the Supreme Court's Misreading of the Federal Arbitration Act Has Left Consumers in the Lurch*, 21(2) GEO. MASON L. REV. 497 (2014).

⁴⁶ Much of the discussion that follows is adapted from Lisa Blomgren Bingham, *Evaluation Dispute Resolution Programs: Traps for the Unwary*, in LABOR AND EMPLOYMENT RELATIONS ASSOCIATION SERIES PROCEEDINGS OF THE 59TH ANNUAL MEETING, 104 (2007); also see David B. Lipsky, Ronald L. Seeber, Ariel C. Avgar, & Rocco M. Scanza, *Managing the Politics of Evaluation: Lessons from the Evaluation of ADR Programs*, in LABOR AND EMPLOYMENT RELATIONS ASSOCIATION SERIES PROCEEDINGS OF THE 59TH ANNUAL MEETING 116 (2007).

⁴⁷ Lisa Blomgren Bingham, Jean R. Sternlight, & John C. Healey, *Arbitration Data Disclosure in California: What We Have and What We Need*. Paper presented at the American Bar Association Section of Dispute Resolution Conference in Los Angeles, April 2005 (copy on file with author). Data were incomplete, thus precluding systematic analysis of outcomes.

⁴⁸ Elizabeth Wilkins, *Silent Workers, Disappearing Rights: Confidential Settlements and the Fair Labor Standards Act*, 34 BERKELEY J. OF EMP. & LAB. L. 109 (2013).

only in aggregated form. Common methods researchers have used include mail and telephone surveys to organizations regarding their dispute resolution plans or the neutral arbitrators involved, mail and telephone surveys with participants, experimental research in which neutrals answer questions regarding a hypothetical case, and less commonly, examination of archival case files where available.

These methods often present problems. Surveys may yield a low response rate because participants are reluctant to violate confidentiality or have no incentive to participate. There may be sample selection bias. Selection bias means that the people choose to participate or not for some systematic reason; for example, people who comment at public meetings tend to be higher income, better educated, and not minorities. People who end up in the research or evaluation data samples may not be comparable. Selection bias may occur when disputants have a choice of dispute resolution process, as in voluntary court-annexed programs that provide for mediation or nonbinding arbitration. Some disputants may prefer and self-select into a mediation DSD, while others choose small claims court; they may differ systematically. Moreover, under a mandatory adhesive arbitration DSD, all claims entailing a given corporation or organization must proceed to arbitration, unless the company waives it. Thus, it may be hard to compare that company's arbitration cases to cases found in an administrative agency or court docket, as that corporation or organization may have systematic practices but its cases may not end up in court.

Researchers rarely use random assignment, for example in nonbinding arbitration research on real cases in courts. If under the court's rules, disputants would otherwise have a choice, and researchers exclude them from one dispute resolution option, the disputants might not perceive it as fair. Therefore, a researcher may have samples of participants who use arbitration and others who do not, but these categories are not random. It is rarely possible to use a pilot site/control site method to structure a study, as this requires a company's consent, although this approach is certainly desirable in larger organizations. In order to use a before and after design, the researcher must become involved with an organization early in its development of a dispute resolution program, and collect data over a prolonged period of time.

Together, these problems operate to limit what researchers have learned about dispute resolution in general and arbitration DSDs in the private sector in particular. Public agencies and public sector employers are subject to freedom of information laws and may have more transparent systems.⁴⁹ There may be a limited duty for private companies to disclose toxic spills or exposure of workers to chemical hazards. However, no such legal framework generally opens the records of the private sector to researchers.

II. SOLVING THE PROBLEM OF STRUCTURAL BIAS IN ADHESIVE ARBITRATION DSDS

DSD refers to creating systems for preventing, managing, and resolving conflict through a sequence of steps or processes that ideally move from low cost to higher cost. In theory, system designers should first structure a system to address disputants' interests (basic human needs stemming from security, economic wellbeing, belonging,

⁴⁹ E.g., for research on FINRA, see David B. Lipsky, Ronald L. Seeber, and J. R. Lamare, *The Arbitration of Employment Disputes in the Securities Industry: A Study of FINRA Awards, 1986-2008*, 65(1) DISP. RESOL. J. 54 (2010).

recognition, and autonomy) through processes like negotiation and mediation. In theory, if the disputants reach impasse, system designers should next approach the dispute through processes that assesses disputants' legal or contractual rights, such as early neutral evaluation, fact-finding, advisory or binding arbitration, or litigation. Adhesive or mandatory arbitration DSDs generally do not follow this principle; they go straight to a binding, virtually unreviewable rights-based decision process.

DSD is an important concept because it focuses not on the individual case, but on its context. The inquiry is not what happens in a given hearing, but what is the system design for handling the stream of cases? We need details on the structure of the DSD for each arbitration case. Instead, much of the literature on arbitration focuses on motions to compel arbitration, rules and procedures in the hearing room, principles in case decisions, efforts to seek judicial review of awards (usually unsuccessfully), and data on how very few awards are overturned.

How do we solve the problem of structural bias in unilateral and adhesive or mandatory arbitration DSDs? Suggestions include judicial approaches to structural bias, legislative approaches to changing the FAA, and free market approaches to rating the fairness of arbitration programs. While all of these are creative and important suggestions, there is no evidence that any of these approaches has worked so far.

A. *Judicial Approaches to Structural Bias*

Structural bias has emerged as a constitutional issue in the history of procedural due process of law under the Fifth and Fourteenth Amendments. In the classic case *Gibson v. Berryhill*, Lee Optical Optometrists sued the Alabama Board of Optometry when the Board attempted to stop Lee optometrists from practicing.⁵⁰ The Alabama legislature had repealed a statute that allowed companies like Lee to employ optometrists. The Alabama Board of Optometry was a state administrative agency that regulated and licensed all optometrists. The state optometry association filed a complaint with the Board seeking to revoke Lee's employees' optometry licenses. Half of all optometrists in Alabama were in private practice, and the other half worked for companies like Lee. All of the members of the Board of Optometry were in private practice. The Supreme Court held that this structure violated due process of law, because the Board's members were biased in that they had a substantial pecuniary interest in the outcome of the case. By eliminating their competition for half the state market for optometry services, they stood to benefit by perhaps doubling the demand for their services. The state's structure for this public dispute system design yielded systemic structural bias that the Supreme Court struck down.

This is a laudable case precedent, but it applies only where there is state action. It is inapplicable to private uses of adhesive or mandatory arbitration. The Supreme Court ruled 5:4 in *AT&T v. Concepcion* that under the FAA companies may impose arbitration clauses on consumers that bar access to class actions. We experience déjà vu as we face a line of Supreme Court case law on arbitration under the FAA. It is as if we have returned from 2014 to 1914. Corporate America's freedom of contract, the old substantive due process of law U.S. Supreme Court creation, has risen again in the form of the FAA.⁵¹

⁵⁰ *Gibson v. Berryhill*, 411 U.S. 564 (1973).

The power of corporate America effectively to eviscerate public law on consumer protection and employment through adhesive arbitration has become a sacred corporate — almost constitutional — level right.

Professor Nancy Welsh suggests that the SCOTUS is in effect creating a national small claims apparatus through arbitration. Professor Nancy Welsh has suggested a creative approach for the courts by looking to the Employee Retirement Income Security Act (“ERISA”).⁵² Using the ERISA by analogy and borrowing from the ERISA cases, particularly *Metropolitan Life Insurance Co. v. Glenn* (“*MetLife*”),⁵³ she suggests courts might consider a fiduciary duty similar to the one employee benefit program administrators owe to beneficiaries.⁵⁴ Courts could exercise appropriate supervision to control arbitration’s potential for structural bias by imposing a similar fiduciary duty on the designers and supervisors of company arbitration plans. She suggests that the Supreme Court may be able to maintain a deferential standard of judicial review for arbitral awards, while also considering the severity of structural bias in the adhesive or mandatory pre-dispute arbitration context. She argues that if the severity of structural bias is named as a relevant factor for courts to consider, this opens the door for plaintiffs to demand discovery regarding all the indicators of structural bias. She points to the impact of discovery in ERISA cases and potentially in mandatory pre-dispute arbitration cases⁵⁵ and shows that discovery is one way to transparency.⁵⁶ Discovery could bring to light all the various design choices, or rules in Ostrom’s parlance, that have resulted in structural bias.

This approach could reveal structural bias in individual companies’ arbitration programs. Over time, it could build a body of case law that identifies particular system design choices as unacceptable indicia of structural bias. However, this approach requires years in which we have individual litigants with substantial resources willing to take such cases all the way to the U.S. Supreme Court. The reason adhesive arbitration has become such a popular and effective means for corporate America to manage risk is that few people have the financial resources or the will to take on such a challenge. This is particularly true given the worsening inequality of wealth in the United States (yet another, and consistent, indicator fostering our sense of *déjà vu*, that we are back to the good old substantive due process days of social Darwinism).

⁵¹ Paul D. Carrington & Paul Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331 (1997).

⁵² Nancy A. Welsh, *Mandatory Pre-dispute Arbitration, Structural Bias, and Incentivizing Procedural Safeguards*, 42 SW. L. REV. 187 (2012).

⁵³ 554 U.S. 105 (2008).

⁵⁴ *Id.* at 220 (observing “Glenn now entitles claimants to request discovery regarding the details of insurers’ and employers’ claims handling.”).

⁵⁵ *Id.* at 222 (“[T]he potential transparency and accountability offered by discovery into administrators’ claims processing, would at least create the potential to enhance the reality of, and a skeptical public’s perception of, the thoroughness and accuracy of decision-making in mandatory predispute arbitration.”).

⁵⁶ Nancy A. Welsh, *I Could Have Been a Contender: Summary Jury Trial as a Means to Overcome Iqbal’s Negative Effects upon Pre-Litigation Communication, Negotiation, and Early Consensual Dispute Resolution*, 114 PENN. ST. L. REV. 1149 (2010).

B. Congress and Legislation: The Arbitration Fairness Act and Consumer Financial Protection Board

Congress could solve this problem if it chose to, with a president's support, although this does not appear to be a priority for either the current Congress or current administration. Employers and manufacturers of consumer products can give themselves "get out of jail free" cards to escape liability under public law with adhesive or mandatory arbitration. It is precisely because the grounds for judicial review are already so limited, and because employees and consumers have few resources to pursue those grounds if acting alone, that companies can push the envelope to create skewed arbitration dispute system designs.

During the past twenty years, the major players in the field of arbitration have endeavored to use self-regulation to address abuses through voluntary protocols.⁵⁷ These protocols speak expressly to various indicia of structural bias that would be rules in Ostrom's parlance. The *Due Process Protocol on the Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship* requires employees have the rights to counsel, limited reasonable discovery, participation in selection of the arbitrator, a reasoned decision, and other elements traditionally associated with procedural due process of law. Some courts have cited this protocol as persuasive authority on the fairness of an arbitration process.⁵⁸ Moreover, there is evidence that when a third party provider enforces the Employment Protocol as to cases it administers, the pattern of arbitration outcomes changes in employees' favor compared to a pre-protocol case sample; in other words, self-regulation can make a difference.⁵⁹ However, protocols are not law; their effectiveness is constrained by the willingness of parties voluntarily to comply.

The better solution is to abandon the *laissez-faire* approach⁶⁰ embodied in the

⁵⁷ For example, see Am. Bar Ass'n, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship*, GP|SOLO, http://www.abanet.org/genpractice/magazine/1997/fall-bos/lab_emp.html (last visited June 21, 2014).

⁵⁸ For a review and assessment of the Employment Protocol, see Richard A. Bales, *The Employment Due Process Protocol at Ten: Twenty Unresolved Issues, and a Focus on Conflicts of Interest*, 21 OHIO ST. J. ON DISP. RESOL. 165, 184–96 (2005); Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 401–56 (2004); and Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363, 386–403 (2007). Professor Malin concludes that courts have abdicated their responsibility to police arbitration agreements for fairness, and that self-regulation in the form of the major third-party-provider agencies such as AAA and JAMS refusing to administer skewed programs can go some distance to filling the gap. Malin, *supra* at 403.

⁵⁹ Lisa B. Bingham and Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence That Self-Regulation Makes a Difference*, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA 303 (Samuel Estreicher & David Sherwyn eds., 2004).

⁶⁰ See Paul D. Carrington, *Self-Deregulation, the "National Policy" of the Supreme Court*, 3 NEV. L.J. 259, 264 (2003) (critiquing the Supreme Court's construction of the Federal Arbitration Act as permitting

Supreme Court’s arbitration jurisprudence since *Gilmer*.⁶¹ Clearly, the Supreme Court is not going to do this, so Congress is going to have to do it for them. One tool is amending the FAA. The Arbitration Fairness Act has been introduced and reintroduced. The 110th Congress considered a variety of proposals to reverse through legislation the Supreme Court’s dramatic expansion of the FAA’s preemptive effect. The Arbitration Fairness Act of 2007⁶² would have amended the Federal Arbitration Act to provide:

No pre-dispute arbitration agreement⁶³ shall be valid or enforceable if it requires arbitration of—

(1) an employment,⁶⁴ consumer,⁶⁵ or franchise dispute;⁶⁶ or

economic predators to contract out of the private system for law enforcement and “thereby exposing consumers, employees, small businesses, and other persons of limited economic bargaining power to a thousand wounds”).

⁶¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24–26 (1991) (enforcing an arbitration clause in a Securities and Exchange Commission registration form for an employment dispute on the theory that it was a change in forum not substance and federal policy supports arbitration).

⁶² H.R. 3010, 110th Cong. (2007). This bill contained findings including:

(1) The Federal Arbitration Act (now enacted as chapter 1 of title 9 of the United States Code) was intended to apply to disputes between commercial entities of generally similar sophistication and bargaining power.

(2) A series of United States Supreme Court decisions have changed the meaning of the Act so that it now extends to disputes between parties of greatly disparate economic power, such as consumer disputes and employment disputes. As a result, a large and rapidly growing number of corporations are requiring millions of consumers and employees to give up their right to have disputes resolved by a judge or jury, and instead submit their claims to binding arbitration.

(3) Most consumers and employees have little or no meaningful option whether to submit their claims to arbitration. Few people realize, or understand the importance of the deliberately fine print that strips them of rights; and because entire industries are adopting these clauses, people increasingly have no choice but to accept them. They must often give up their rights as a condition of having a job, getting necessary medical care, buying a car, opening a bank account, getting a credit card, and the like. Often times, they are not even aware that they have given up their rights.

Id. § 2(1)–(3).

⁶³ The bill defined “pre-dispute arbitration agreement” to mean “any agreement to arbitrate disputes that had not yet arisen at the time of the making of the agreement.” *Id.* § 3(6).

⁶⁴ The bill defined “employment dispute” as “a dispute between an employer and employee arising out of the relationship of employer and employee as defined by the Fair Labor Standards Act.” *Id.*

⁶⁵ The bill defined “consumer dispute” as “a dispute between a person other than an organization who seeks or acquires real or personal property, services, money, or credit for personal, family, or household purposes and the seller or provider of such property, services, money, or credit.” *Id.* § 3(4).

⁶⁶ The bill defined a “franchise dispute” as “a dispute between a franchisor and franchisee arising out of or

‘(2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power.’⁶⁷

This legislative approach would have amended the FAA to carve out exceptions from its coverage. Advocates of mandatory arbitration insist that eliminating pre-dispute arbitration clauses would sound the death knell for any reasonably inexpensive and prompt access to justice for employment disputes, primarily because lawyers will not agree to arbitration on behalf of their clients after the fact.⁶⁸ Legislative efforts to amend the FAA have met with stiff, and effective, resistance from the United States Chamber of Commerce. Senator Al Franken introduced a new version of the same bill, the Arbitration Fairness Act of 2013.⁶⁹ With a deadlocked Congress, the likelihood of passage of arbitration legislation is slim; it is a topic so arcane to the average voter that for an elected official to support it would likely not affect their re-election chances.

Another alternative would be a statutory post-dispute opt out provision. Both parties could enter into a pre-dispute arbitration agreement, but that agreement would specifically permit a party to opt out of arbitration once the dispute arises. The federal courts have substantial experience using “opt out” rules in their court-annexed ADR programs. Program evaluations conducted in collaboration with the Federal Judicial Center show a consistent pattern: participation rates in programs with an opt out clause are almost as high as participation rates in mandatory court ADR programs.⁷⁰

relating to contract or agreement by which—

(A) a franchisee is granted the right to engage in the business of offering, selling, or distributing goods or services under a marketing plan or system prescribed in substantial part by a franchisor;

(B) the operation of the franchisee's business pursuant to such plan or system is substantially associated with the franchisor's trademark, service mark, trade name, logotype, advertising, or other commercial symbol designating the franchisor or its affiliate; and

(C) the franchisee is required to pay, directly or indirectly, a franchise fee

Id. § 3(5).

⁶⁷ *Id.* § 4(4)(b).

⁶⁸ See, e.g., Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 314 (2003) (reporting that only six percent of all employment arbitration cases handled by the AAA arise out of post-dispute arbitration agreements); David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 7 (2003) (arguing that lawyers for employers will not agree to post-dispute arbitration).

⁶⁹ S.878 Arbitration Fairness Act of 2013 (113th Congress 2013-2014), introduced in Senate (05/07/2013), declares that no pre-dispute arbitration agreement shall be valid or enforceable if it requires arbitration of an employment, consumer, antitrust, or civil rights dispute, <http://beta.congress.gov/bill/113th-congress/senate-bill/878> (last accessed June 21, 2014).

⁷⁰ See DAVID RAUMA & CAROL KRAFKA, FEDERAL JUDICIAL CENTER, VOLUNTARY ARBITRATION IN EIGHT FEDERAL DISTRICT COURTS: AN EVALUATION 17 (1994), <http://purl.access.gpo.gov/GPO/LPS49863>

While there is no progress on the Arbitration Fairness Act, there is progress in the financial industry. The Consumer Financial Protection Bureau (“CFPB”) was a product of the Dodd-Frank Act and efforts to regulate the financial industry after the 2008 financial crisis.⁷¹ Dodd-Frank banned the use of mandatory arbitration in mortgage and home equity loan contracts.⁷² The CFPB adopted regulations to address banning mandatory arbitration clauses in mortgage documents.⁷³ CFPB’s mission includes undertaking a study of the use of mandatory or adhesive arbitration in credit card and consumer debt agreements.⁷⁴ It maintains a database of credit card agreements, some of which include arbitration clauses.⁷⁵ In a recent CFPB study, the agency found significant growth in use of adhesive arbitration.⁷⁶ Its research continues.

Instead of a post-dispute opt out, however, in credit card agreements in the CFPB database, there is evidence of movement in the direction of a pre-dispute opt out in contracts for consumer financial products as the corporate response to potential CFPB regulatory action. For example, the American Express Gold Card arbitration clause provides, “You may reject the arbitration provision by sending us written notice within 45 days after your first card purchase, or by February 15, 2013, whichever is later.”⁷⁷

(finding similar participation rates in three of the four voluntary courts with opt-out procedures to courts with mandatory referral); *see also* ELIZABETH PLAPINGER & DONNA STIENSTRA, ADR AND SETTLEMENT IN THE FEDERAL DISTRICT COURTS 6 (Federal Judicial Center 1996) (finding similar participation rates in ADR between opt-out programs and mandatory programs).

⁷¹ For a more detailed analysis of its genesis, *see* Todd Zywicki, *The Consumer Financial Protection Bureau: Savior or Menace?*, 81 GEO. WASH. L. REV. 856 (2013).

⁷² *Id.* at 907 (citing Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, sec. 1414(a), § 129C(e)(1), 124 Stat. 1376, 2151 (2010) (codified at 15 U.S.C. § 1639c(e)(1) (Supp. IV 2011))).

⁷³ Bureau of Consumer Financial Protection, 12 CFR Part 1026, Loan Originator Compensation Requirements Under the Truth in Lending Act (Regulation Z); Final Rule FEDERAL REGISTER, VOL. 78, NO. 32, p. 11280, *et seq.* (Feb. 15, 2013). The relevant mortgage language appears in §1026.36(h).

⁷⁴ Zywicki, *supra* note 71, at 907-908.

⁷⁵ Consumer Financial Protection Bureau Credit Card Database, <http://www.consumerfinance.gov/credit-cards/agreements/> (last accessed June 21, 2014).

⁷⁶ CFPB, *Arbitration Study Preliminary Results To Date* (Dec. 12, 2013) http://files.consumerfinance.gov/f/201312_cfpb_arbitration-study-preliminary-results.pdf (last accessed June 21, 2014) (on page 5, the report observes “[S]ection 1028(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Congress instructs the Consumer Financial Protection Bureau (the “Bureau”) to study the use of pre-dispute arbitration contract provisions in connection with the offering or providing of consumer financial products or services, and to provide a report to Congress on the same topic.”). On pages 19-22, the report indicates that larger banks and credit card issuers more often use arbitration clauses, and that the majority of loans outstanding thus have such clauses, even though they represent only 17% of the contracts. *Id.* at 22.

⁷⁷ *American Express Gold Card Agreement effective June 30, 2013*, CFPB Credit Card Agreement Database, <http://www.consumerfinance.gov/credit-cards/agreements/> (last accessed June 21, 2014). The more detailed Right to Reject Arbitration provides:

Given that the vast majority of card holders will likely neither read this fine print nor exercise the option to reject arbitration if they do, this may be a very effective tool for preserving the value of an arbitration DSD for managing corporate risk of liability.

In other words, given the current state of affairs, Congress is unlikely effectively to address the problem structural bias in adhesive or mandatory arbitration in the near future.

C. The Presidency: An Executive Order?

Where is President Franklin Roosevelt when we need him? In theory, President Obama could take a leadership position on mandatory arbitration.⁷⁸ He could sign an executive order prohibiting federal agencies from doing business with companies that use mandatory pre-dispute arbitration clauses, as President Roosevelt signed an executive order prohibiting federal agencies from doing business with companies that engaged in race discrimination.⁷⁹ The President is using executive order power to foster equal pay by prohibiting federal contractors from punishing employees for sharing salary information.⁸⁰ So far, there has been no executive order on adhesive or mandatory arbitration.⁸¹

Your Right to Reject Arbitration You may reject this Arbitration provision by sending a written rejection notice to us at: American Express, P.O. Box 981556, El Paso, TX 79908. Go to americanexpress.com/reject for a sample rejection notice. Your rejection notice must be mailed within 45 days after your first card purchase, or by December 19, 2012, whichever is later. Your rejection notice must state that you reject the Arbitration provision and include your name, address, Account number and personal signature. No one else may sign the rejection notice. If your rejection notice complies with these requirements, this Arbitration provision and any other arbitration provisions in the cardmember agreements for any other currently open American Express accounts you have will not apply to you, except for Corporate Card accounts and any claims subject to pending litigation or arbitration at the time you send your rejection notice. Rejection of this Arbitration provision will not affect your other rights or responsibilities under this Claims Resolution section or the Agreement. Rejecting this Arbitration provision will not affect your ability to use your card or any other benefit, product or service you may have with your Account. Continuation: This section will survive termination of your Account, voluntary payment of your Account balance, any legal proceeding to collect a debt, any bankruptcy and any sale of your Account (in the case of a sale, its terms will apply to the buyer of your Account). If any portion of this Claims Resolution section, except as otherwise provided in the Limitations on Arbitration subsection, is deemed invalid or unenforceable, it will not invalidate the remaining portions of this Claims Resolution section.

⁷⁸ Jeff Sovern, How the Obama Administration Can Unilaterally Strike a Blow Against Arbitration Clauses, Public Citizen (Feb. 3, 2014), <http://pubcit.typepad.com/clpblog/2014/02/how-the-obama-administration-can-unilaterally-strike-a-blow-against-arbitration-clauses.html> (last accessed June 21, 2014).

⁷⁹ *Id.*

⁸⁰ *See* <http://www.whitehouse.gov/the-press-office/2014/04/08/fact-sheet-expanding-opportunity-all-ensuring-equal-pay-women-and-promot> (last accessed June 21, 2014).

D. Other Promising Scholarly Proposals

Professor Thomas Stipanowich suggested a new analogue to the Good Housekeeping Seal of Approval in the form of an Arbitration Fairness Index.⁸² An independent entity using standards for measuring an arbitration DSD might rate it on fairness as a means to empower the market to address abuses. Professor Stipanowich suggests criteria for rating programs based on “each of twenty-three different program elements divided into five categories: (1) Meaningful Consent, Clarity, and Transparency; (2) Independent and Balanced Administration; (3) Quality and Suitability of Arbitrators; (4) Fair Hearings; and (5) Fair Outcomes.”⁸³ Corporations that got the Arbitration Fairness Index seal of approval might find a market advantage among consumers and potential employees. Companies that received negative ratings might experience public pressure. Employees and consumers could make more informed choices. By providing an external forum for dialogue about these DSDs, we might break the judicial logjam.

However, will corporations volunteer this information? Professor Stipanowich’s proposal requires that the rating agency receive substantial details about many elements of the arbitration DSD. These details are often absent from arbitration clauses in form applications or contracts. It is not until a case arises that the employee or consumer experiences the full details of a procedure. The proposal is a means for collective action, but the question is whether consumers have the requisite information for the rating board.

III. CONCLUSION: TRANSPARENCY TO REVEAL STRUCTURAL BIAS IN ARBITRATION DSDS

How do we get sufficient detail on arbitration DSDs to expose structural bias? We have Professor Welsh’s proposal for a creative new use of discovery, Professor Stipanowich’s proposal for an Arbitration Fairness Index administered by a third party, and the CFPB database and ongoing research. All of these strategies turn to transparency as a means to regulate corporate abuses in their unilateral design and imposition of structurally biased arbitration DSDs.

History teaches us that disclosure can be more effective than direct regulation in certain contexts. At different points in history, events prompted Congress to modify how it controls administrative agencies. Executive branch agencies must comply with the

⁸¹ A search of mandatory or adhesive arbitration turned up references to arbitration in bilateral investment treaties or public sector labor relations, and a reference to the Equal Employment Opportunity Commission’s review of its regulatory agenda, but no executive order, <http://search.whitehouse.gov/search?utf8=%E2%9C%93&query=mandatory+binding+arbitration&m=&affiliate=wh&filter=1&commit=Search> (last accessed June 21, 2014).

⁸² Thomas J. Stipanowich, *The Arbitration Fairness Index: Using a Public Rating System to Skirt the Legal Logjam and Promote Fairer and More Effective Arbitration of Employment and Consumer Disputes*, 60 KAN. L. REV. 985 (2012).

⁸³ *Id.* at 1030.

Administrative Procedure Act (“APA”),⁸⁴ Freedom of Information Act (“FOIA”),⁸⁵ Government in the Sunshine Act,⁸⁶ and the Federal Advisory Committee Act (“FACA”), all of which use transparency as a check on abuse of power.⁸⁷ History shows the APA fostered agency accountability by providing both transparency and participation in rulemaking; in effect, it limited the closed-room collaboration the Supreme Court rejected in *A.L.A. Schechter Poultry Corp. v. United States* (the famous and beloved Sick Chicken Case).⁸⁸

Disclosure was an effective regulatory tool in consumer finance; some argued disclosure in consumer credit for mortgages and loans was more effective than usury laws. Disclosure is a tool California used when it mandated third party disclosure of case outcomes in arbitration as a way to address the asymmetry of information about repeat player success in adhesive or mandatory arbitration. Employees may have the right to collective action even absent a union under labor law; perhaps a poster from the National Labor Relations Board (although its efforts to adopt regulations requiring posters have not been so effective of late).

Transparency can be a powerful tool for controlling the abuse of power.⁸⁹ With the evolution of government to governance has come a renewed emphasis on transparency and accountability to the public. Professors Archon Fung, Mary Graham, and David Weil examined targeted transparency as a policy tool in a variety of substantive areas, including financial disclosure, hazardous materials at the workplace, toxic substance releases, nutrition labeling, plant closures, hospital mistakes, restaurant hygiene, sex offender registries, and mortgage lending. In a clear and concise reframing of the literature, the authors provide models for understanding, assessing, designing, and improving the use of disclosure in as a policy tool. By envisioning the future of disclosure as decentralized, information technology-driven, dynamic and interactive “collaborative transparency,” they advanced the field.

The authors defined targeted transparency as having five essential characteristics: “[1] mandated public disclosure [2] by corporations or other private or public organizations [3] of standardized, comparable, and disaggregated information [4] regarding specific products or practices [5] to further a defined public purpose.”⁹⁰ In their vision, there are specified disclosers, a defined scope and information structure, and an enforcement mechanism. The authors describe the evolution of targeted transparency as ‘the third way’ in regulation; the first two are prescribed standards enforced by

⁸⁴ 5 U.S.C. §§ 551–559, 701–706 (2006).

⁸⁵ *Id.* § 552.

⁸⁶ *Id.* § 552b.

⁸⁷ *Id.* app. §§ 1–16.

⁸⁸ 295 U.S. 495 (1935).

⁸⁹ ARCHON FUNG, MARY GRAHAM, & DAVID WEIL, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* (Cambridge University Press 2007).

⁹⁰ *Id.* at 6.

inspections and penalties and economic incentives or disincentives to encourage the desired behavior. They persuasively argue that targeted transparency is not simply a subcategory of economic incentives, but rather a substantively different way to structure policy that relies on decentralized, bottom up action rather than centralized, top down enforcement. If structured well, these policies work effectively through a dynamic in which information users understand the new⁹¹ disclosures and use the information to make better choices; disclosers in turn observe the changed choices and respond by improving their practices or products in a way that fosters the intended public policy goal by reducing risks or improving services. The clearest and most entertaining example is the Los Angeles restaurant hygiene ordinance, through which inspectors give restaurants a letter grade of A, B, or C that they must post visible to customers on the sidewalk. Studies have shown that consumer response has reduced food-related hospitalizations and cause an improvement in restaurant cleanliness standards.

Are there other means to achieve transparency? One possibility that may deserve more exploration is the wisdom of the crowd, perhaps stimulated by the strategically timely whistleblower. The action of a single federal contractor, whistleblower Edward Snowden, revealed massive surveillance of all residents of the United States through the use of telephony, text, and email electronic records collected by the National Security Agency⁹² on a scale never before seen in U.S. history.⁹³ This has prompted Congress to conduct extensive public hearings and a spate of litigation on the question of whether the current administration has engaged in a wholesale violation of American's constitutional rights.⁹⁴ But for the disclosure by one whistleblower, there would likely have been no transparency volunteered by the administration or the National Security Administration regarding these activities. As a result of this disclosure, the wisdom of the crowd grows through public sharing of information in the media and on the Internet.⁹⁵

Perhaps a more benign example of the wisdom of the crowd is Galaxy Zoo, an experiment to see if people around the world on the internet would help a handful of scientists figure out what kind of galaxies they were looking at on satellite images. The result was a crowd-sourced evaluation and effort to classify all the photographed galaxies of the universe.⁹⁶ Galaxy Zoo is considered a good example of how systems can emerge

⁹¹ *Id.* at 58.

⁹² Ostensibly, data collection was authorized by The United States Foreign Intelligence Surveillance Court in *In Re Application of the Federal Bureau of Investigation for an Order Requiring the Production of Tangible Things From [REDACTED]*, Amended Memorandum Opinion, Docket No. BR 13-109 (Oct. 11, 2013).

⁹³ Klayman, et al. v. Obama, et al., Memorandum Opinion, Civil Action No. 13-0851 (RJL) (Federal District Court, District of Columbia, December 16, 2013) [Dkt. # 13 (No. 13-0851), # 10 (No. 13-0881)].

⁹⁴ For a collection of pending litigation, see the NSA Surveillance Lawsuit Tracker, <http://projects.propublica.org/graphics/surveillance-suits> (last accessed June 21, 2014).

⁹⁵ In addition to NSA Surveillance Lawsuit Tracker, for example, Glenn Greenwald has co-founded Firstlook, <https://firstlook.org/theintercept/about/> (last accessed June 21, 2014).

⁹⁶ Galaxy Zoo, www.galaxyzoo.org (last accessed June 21, 2014). From its website, Galaxy Zoo tells its own story: "The launch of this new version of Galaxy Zoo, the 4th, comes just a few weeks after the site's 5th birthday. It all started back in July 2007, with a data set made up of a million galaxies imaged by the

through spontaneous collaborative human interaction in the tradition of the Ostrom and Indiana School IAD framework.⁹⁷ Galaxy Zoo worked because it gave people recognition for their help. Parents and children acting as amateur astronomers stared into images of the night sky. They received credit on publications by the scientists. The incentives were sufficient to elicit the help of thousands of people.

What would it take to crowd source information about the details of adhesive or mandatory arbitration plans? Unlike Galaxy Zoo, this would ask people to volunteer information that, once people find themselves in the midst of an arbitration case, may be ‘classified’ (pun intended) as confidential by their employers or companies that sold goods or services. Like Galaxy Zoo trained people online to classify galaxies, could a website train people up on how to look for rules or steps or elements that indicate structural bias in the arbitration plan they find themselves subject to? Could it provide incentives for people to help classify arbitration DSDs? And if these incentives were sufficient, could this provide a mechanism for teaching employees and consumers how to make more informed choices?

Customers’ online reviews have proven useful for sellers like Amazon, or so dangerous to a company’s reputation, that companies must monitor the web to clean up their reputation.⁹⁸ Could we build a website that provided for customer reviews of company arbitration plans? This could provide indicia of arbitration fairness, but unlike the Arbitration Fairness Index proposed by Professor Stipanowich, it would not be a recognized ranking by an authoritative third party like Good Housekeeping or Consumer Reports; it would be crowd-sourced and the cumulative product of many people’s perceptions and experiences. It would be a means for collective action now that the Supreme Court has authorized companies to limit class actions in arbitration DSDs.

This approach requires civic-hacking.⁹⁹ It requires people to develop a website using open source code and make it available to the rest of us for free. It requires some truly creative person to come up with an incentive that will make others want to share what they know on the inside about how a given arbitration program truly works, in detail. It may be easier to create this for consumer products than it is for employment

Sloan Digital Sky Survey, who still provide some of the images in the site today. With so many galaxies, we’d assumed it would take years for visitors to the site to work through them all, but within 24 hours of launch we were stunned to be receiving almost 70,000 classifications an hour. In the end, more than 50 million classifications were received by the project during its first year, contributed by more than 150,000 people.”

⁹⁷ Michael J. Madison, The Commons at the Intersection of Peer Production, Citizen Science, and Big Data: Galaxy Zoo, presented Oct. 21, 2013 at the Ostrom Workshop on Political Theory and Policy Analysis, Indiana University, Bloomington, IN, http://www.indiana.edu/~video/stream/launchflash.html?folder=video&filename=Colloquia_20131021.m4 (last accessed June 21, 2014).

⁹⁸ E.g., Jayson Demers, “Your Guide To Customer Reviews For Organic Search Rankings In 2014,” *Forbes Magazine* (12/19/13), <http://www.forbes.com/sites/jaysondemers/2013/12/19/your-guide-to-customer-reviews-for-organic-search-rankings-in-2014/> (last June 21, 2014).

⁹⁹ Code For America uses Civic Hacking to challenge people to come together and use computer code to help solve public problems. See <http://www.codeforamerica.org/blog/category/civic-hacking-2/> (last accessed June 21, 2014).

arbitration, because it is closer to what consumers are accustomed to do when they rate products in reviews. There are a number of websites for rating your employer or boss.¹⁰⁰ What would it take to give people a useful tool for rating their employer's dispute resolution process in a way that might produce usable evidence in litigation?

In sum, what if we were able to use targeted disclosure as a means to address the abuses and structural bias in adhesive or mandatory arbitration programs? Perhaps we could boldly go where no Congress, President, or Court has gone before.

¹⁰⁰ See, e.g., <http://www.ratemycompanyusa.com/> (last accessed June 21, 2014); <http://www.employerscorecard.com/> (last accessed June 21, 2014); and <http://www.ebosswatch.com/> (last accessed June 21, 2014).