

An Alternative Approach to Mandatory Pre-dispute Arbitration

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The author benefitted from discussant and presenter comments on this article at the 2019 Huber Hurst Seminar at the University of Florida, yet all assertions and errors are the author's.

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While much has been written critiquing the Supreme Court's consistent support for, if not promotion of, mandatory arbitration, including the Court's enforcement of class arbitration waivers, this article offers a new idea. Rather than focusing primarily on attacking (or supporting) the Supreme Court's jurisprudence, this article proposes the volitional implementation of contractually required mediation before or in place of mandatory arbitration (or litigation).

This alternative is presented as a best practice to begin the end of the battle between the big businesses that appear to favor mandatory arbitration and the individuals and small businesses that often seem to find mandatory sole arbitration impractical and/or unjust. Finally, the article calls upon business to step up to the nudge of this best practice and volitionally include first step mediation contract positions.

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Introduction

The history defining current U.S. federal policy on the enforcement of mandatory pre-dispute arbitration clauses or contracts is characterized principally by (i) Congress passing the Federal Arbitration Act ("FAA") in 1925,³ and (ii) a series of U.S. Supreme Court decisions perpetually harkening back to the FAA and leading to the recent *Epic Systems*⁴ decision.⁵

Supreme Court jurisprudence enforcing mandatory pre-dispute arbitration has grown from early policy justification emphasizing the FAA directive to treat arbitration contracts like all contracts in reversing the prior disfavor of arbitration to the now seemingly incontestable defense of pre-dispute arbitration agreements in myriad form and context. Perhaps the most impactful step along the way was the Court's setting out of the separability doctrine - viewing arbitration provisions included in larger contracts as though those clauses are independent contracts themselves.⁶ More recently, the Court's impact has been forceful in declining to alter its jurisprudence when confronted with the impracticable consequences that class arbitration waivers have on consumer and small business claimants - disregarding the effective vindication doctrine, or the financial illogic of proceeding on a de minimis solo claim that similarly affects many others and is likely consequential only in the aggregate.⁷

Yet, even as the Supreme Court has continued to enforce mandatory arbitration in the face of challenges to employment agreements, consumer finance contracts, and broker-dealer or investment agreements, scholarly criticism of the Court's arbitration jurisprudence has only grown.⁸

³ 9 U.S.C. § § 1-16 (2012). *See* §2, A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

⁴ 54 U.S. ____ (2018).

⁵ G. Richard Shell, *The Role of Public Law in Private Dispute Resolution: Reflections on Shearson/American Express, Inc. v. McMahon*, 26 AM. BUS. L.J. 397, 399-407 (1998) (summary of FAA and early Supreme Court interpretation). Ian R. Macneil, AMERICAN ARBITRATION LAW: REFORMATION, NATIONALIZATION, INTERNATIONALIZATION (1992) (history of and prior to FAA).

⁶ *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967). The issue continues in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) (distinguishing its prior decision in *Wilko v. Swann*, 346 U.S.427 (1953));

⁷ *American Express v. Italian Colors Restaurant*, 570 U.S. 228 (2013).

⁸ *See generally* Judith Resnik, *Arbitration, Transparency, and Privatization: Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015) (pointing out all that is given up in procedure, public reviewability, appeal rights...when civil litigation is replaced with arbitration) [*Arbitration, Transparency, and Privatization*]; Judith Resnik, *Fairness in Numbers: A Comment on AT&T v. Conception, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 H.L.R. 78 (2011) (emphasizing due process and fairness concerns with class action waivers) [*Fairness in Numbers*]; J. Maria Glover, *Arbitration, Transparency, and*

This article responds to the increasingly prolific Supreme Court jurisprudence enforcing mandatory pre-dispute arbitration agreements⁹ and the growing body of scholarly criticism of that jurisprudence.¹⁰ Most recently, the U.S. Supreme Court continued its trend of robustly enforcing pre-dispute arbitration agreements in *Epic Systems Corp. v. Lewis*.¹¹ *Epic Systems* is only the latest decision in a now extensive body of Supreme Court precedent denying various challenges to mandatory arbitration, *infra* Section II.¹²

While many have written critiquing the Supreme Court's consistent support for, if not promotion of, mandatory sole arbitration, including the Court's enforcement of class arbitration waivers, this article offers a new idea. Rather than focusing primarily on attacking (or supporting) the Supreme Court's jurisprudence, this article proposes the volitional implementation of contractually required *mediation* (in no one form) before or in place of mandatory arbitration (or litigation). It proposes a best practice to nudge bigger businesses toward better treatment of consumers and small businesses, suggesting that this first step mediation may well work in the favor of bigger business as instrumental marketing even if not adopted for normative purposes.

Section I discusses the proliferation of mandatory pre-dispute arbitration in the contexts of employment, consumer finance, and broker-dealer agreements, relying on empirical studies. Section II seeks to distill the current Supreme Court jurisprudence on the topic and offers a chronology of important Supreme Court decisions on mandatory arbitration through *Epic Systems*. Section III, proposes making mediation, rather than mandatory arbitration, a first course of action for contractual dispute resolution. This proposal of first step mediation is to establish a best practice that will nudge the bigger businesses that appear to favor mandatory arbitration toward better treatment of the individual consumers and small businesses that often seem to find mandatory sole arbitration impractical or unjust. Finally, Section IV concludes that some version of this mediation proposal may be the most plausible way to fairly and justly attempt to resolve disputes about or governed by contracts, particularly in light of the continued Supreme Court

Privatization: Disappearing Claims and the Erosion of Substantive Law, 124 YALE L.J. 3052 (2015); Jean R. Sternlight and Elizabeth J. Jensen, *Mandatory Arbitration: Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse*, 67 Law & Contemp. Prob. 75 (2004); Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investment Contracts*, 11 N.Y.U. J. LAW & BUS. 793 (2011); Stephen J. Ware, *Paying the Price of Process: Judicial Regulation of Consumer Arbitration Agreements*, 2001 J. DISP. RESOL. 89 (2001).

⁹ Meaning agreements requiring arbitration of disputes and generally precluding any court involvement or review.

¹⁰ *Id.*

¹¹ 584 U.S. ___, 138 S. Ct. 1612 (2018).

¹² See Stephanie Greene & Christine Neylon O'Brien, *The NLRB v. the Courts: Showdown over the Right to Collective Action in the Workplace*, 52 AM. BUS. L.J. 75, 82-88 (2015) (discussing earlier arbitration precedent closely related to the Supreme Court's *Epic Systems* consolidated decision); see also, Christine Neylon O'Brien, *Will the Supreme Court Agree with the NLRB that the Pre-Dispute Employment Arbitration Provisions Containing Class and Collective Action Waivers in both Judicial and Arbitral Forums Violate the National Labor Relations Act – Whether There is an Opt-Out or Not?* 19 U. PA. J. BUS. L. 515, 535-541 (2017) (setting up key issues in heard by the Supreme Court in the *Epic Systems* case).

precedent on the topic and the commensurate hardening (albeit ineffective) scholarly opposition to the Supreme Court.

I. The Proliferation of Mandatory Pre-Dispute Arbitration

While certainly not voluminous, a body of empirical work has accumulated assessing just how ubiquitous mandatory pre-dispute arbitration clauses have become and how arbitration claims filed pursuant to them actually proceed. While the studies do not line up perfectly in the categories instrumental in this work, the data does enable one to draw basic conclusions in each of the employment, consumer finance, and broker-dealer contexts.

Though varied in exact data and in attention to narrower issues of consumer or employee win rates, award amounts, repeat player effects, class action bans, and arbitrator bias, among other topics, these studies appear to consistently indicate high rates of reliance (generally between 35% and upwards of 75% of contracts studied) on mandatory pre-dispute arbitration clauses in each of the employment, consumer finance, and broker-dealer fields.¹³ As further evidence of proliferation, the reader might simply consider how many form contracts he or she has entered into in paper or online recently and recall or examine how many of them contain pre-dispute arbitration provisions.

A. Employment

Several studies have focused on American Arbitration Association (AAA) data, the AAA being one of, if not the, primary facilitator of commercial arbitration. Earlier work examining repeat player effects in mandatory pre-dispute arbitration in the employment context undertaken by Lisa Bingham,¹⁴ has been enhanced (and criticized) in subsequent studies by Elizabeth Hill¹⁵ and Alexander Colvin.¹⁶ Bingham's work recognized a strong increase in employer use of mandatory arbitration in employment agreements in the early 1990s and proceeded to look at win rates of repeat player employers and repeat player plaintiff's lawyers.¹⁷ Bingham's focus on the repeat player effect stems from Marc Galanter's prior work really defining the repeat player

¹³ See Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases 2* (2005) [hereinafter E&Y Study]; Searle Civil Justice Institute, *Consumer Arbitration: Before the American Arbitration Association* (2009) [hereinafter Searle Study]; Michael Delikat & Morris M. Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights?*, 58 DISPUTE RESOLUTION JOURNAL 56 (2003); with one of the earliest studies regarding repeat players generally being Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974) (concerned with repeat players).] See also David Horton & Andrea Cann Chandraskher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 76-87 (2015) (discussion and critique of major studies).

¹⁴ Lisa Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 189-190 (1997) (interpreting the data to find less employee success against repeat player employers) and Lisa Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223, 235-240 (1998).

¹⁵ See Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 792-824 (2003) (focused only on employment disputes).

¹⁶ Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 3-20 (2011) (analyzing only AAA employment disputes in California).

¹⁷ Bingham (1997), *supra* note 13, at 190, 197-200.

effect.¹⁸ Hill cites still more dramatic increases in mandatory pre-dispute arbitration provisions among employers, noting a rate change of mandatory arbitration provisions in employment agreements from 19% to 62% during the late 1990s.¹⁹ In analyzing recently updated related data, Colvin has subsequently found that the frequency of mandatory pre-dispute arbitration provisions in employment agreements has more than doubled since the early 2000s to a present rate of over 55%.²⁰

Adding to Bingham, Hill, and Colvin's analyses of data on employment disputes in AAA arbitration is Lamar and Lipsky's study of employment disputes arbitrated via FINRA.^{21, 22} FINRA arbitration is the broker-dealer industry norm for resolution of disputes not only between customers and broker-dealers, but between brokers and broker-dealers.²³ The latter principally concerns employment disputes. Virtually all of these disputes are subject to FINRA arbitration, which Lamar and Lipsky find to be less biased and less subject to negative repercussions of the repeat player effect than the above cited studies outside FINRA.²⁴

Another study by Stuart Schwab and Randall Thomas has found that mandatory arbitration shows up often even in employment agreements with CEOs (in over 41% of examined contracts).²⁵ Moreover, work by Eisenberg, Miller, and Sherwin²⁶ provides more general assessment of mandatory arbitration, finding high rates in both employment and consumer finance contexts.

Clearly, mandatory pre-dispute arbitration provisions in the labor and employment context have become commonplace and are on the rise.

B. Consumer Finance

The consumer finance category offers the most recent and most robust data and analysis chiefly in the Congressionally ordered Consumer Finance Protection Bureau (CFPB) study.²⁷

¹⁸ Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 97-114 (1974).

¹⁹ Hill, *supra* note 14, at 779-780 (citing U.S. General Accounting Office, *Alternative Dispute Resolution: Employers' Experiences with ADR in the Workplace*, GAO/GGD-97-157, 2 (1997), available at <http://www.gao.gov/archive/1997/gg97157.pdf> (last accessed Mar. 26, 2003) (reporting that 19% of employers surveyed were using arbitration to resolve employment disputes)).

²⁰ Alexander J.S. Colvin, *The Growing use of Mandatory Arbitration*, Economic Policy Institute Report, April 6, 2018, 5-11.

²¹ Financial Industry Regulatory Authority, previously NASD. (The author has been a FINRA neutral since 2012 and while informed by this experience, is not generally relying on it for purposes of this article.)

²² J. Ryan Lamar & David B. Lipsky, *Employment Arbitration in the Securities Industry: Lessons Drawn from Recent Empirical Research*, 35 BERKELY J. EMP. & LAB. L. 113, 118-130 (2014).

²⁴ *Id.* at 120-125.

²⁵ Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 234 (2006).

²⁶ Theodore Eisenberg, Geoffrey P. Miller, & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871, 880-886 (2008).

²⁷ Consumer Fin. Prot. Bureau, *Arbitration Study, Report to Congress Pursuant to Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* (2015), 6-25 [hereinafter CFPB Study]. See *Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank)* § 1-1601, 12 U.S.C. §§ 5301-5641 (2013).

David Horton and Andrea Cann Chandrasekher's detailed and critical work²⁸ and work by Demaine and Hensler also show high rates of mandatory arbitration provisions in consumer finance contracts.²⁹

The CFPB study, reported to Congress in 2015, provides the most comprehensive data on the proliferation of mandatory pre-dispute arbitration agreements.³⁰ CFPB data on student loans, bank accounts, payday loans, prepaid cards, and mobile wireless subscriptions showed very high rates (between 83% and over 92%) of mandatory arbitration.³¹ The CFPB's still recent study on consumer finance arbitration, mandated by the Dodd-Frank Act³² in the wake of the 2008 financial tsunami, offers some useful data in understanding the reality of disputes in the field.³³ Not least meaningful is the CFPB Report's conclusion that upwards of 85% of consumers who entered into contracts with MPACs during the period studied, were unaware of having done so.³⁴

The same CFPB data shows a contrastingly lower rate (under 16%) of mandatory arbitration in credit card agreements.³⁵ This lower rate of mandatory arbitration in credit card agreements has been confirmed in studies by Drahozal and Rutledge.³⁶ Yet, for our purposes, this data shows very high rates of mandatory arbitration provisions in the general consumer finance category.

Eisenberg, Miller, and Sherman make the interesting observation that among corporations that include mandatory arbitration provisions in their consumer and employment contracts, few include arbitration clauses in their non-consumer corporate contracts; such as, supplier agreements and other material contracts disclosed in their SEC filings.³⁷ Myriad interpretations of the motivation for this can be proffered, and Eisenberg, Miller, and Sherman offer some.³⁸

Tangentially, Mark Budnitz³⁹ and Christopher Drahozal⁴⁰ have studied the costs of consumer finance arbitration, the study itself a testament to the high rates of mandatory pre-dispute arbitration in consumer contracts. Thus, overall, in the relatively broad consumer finance category, mandatory pre-dispute arbitration provisions have become ubiquitous.

²⁸ Horton and Cann Chandrasekher, *supra*, note 12, at 98-115.

²⁹ Linda J. Demaine & Deborah R. Hensler, *Mandatory Arbitration "Volunteering" to Arbitrate Through Predispute Arbitration Clauses: The Average Consumer's Experience*, 67 LAW & CONTEMP. PROB. 55, 58-72 (2004).

³⁰ CFPB Study, Section 2 at 6-25.

³¹ *Id.*

³² Dodd Frank § 1028(a).

³³ CFPB Study, Section 5 at 11-87.

³⁴ *Id.*

³⁵ *Id.* Section 2 at 6-11.

³⁶ Christopher R. Drahozal & Peter B. Rutledge, *Arbitration Clauses in Credit Card Agreements: An Empirical Study*, 9 J. EMPIRICAL LEGAL STUD. 536, 551-560 (2012) and Peter B. Rutledge & Christopher R. Drahozal, *Contract and Choice*, 2013 B.Y.U. L. REV. 1, 14-49 (2013).

³⁷ Eisenberg, Miller, & Sherman, *supra* note 25 at 886-887.

³⁸ *Id.*

³⁹ Mark E. Budnitz, *Mandatory Arbitration: The High Cost of Mandatory Consumer Arbitration*, 67 LAW & CONTEMP. PROB. 133, 135-143 (2004).

⁴⁰ Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. MICH. J.L. REFORM 813, 817-826 (2008).

C. Broker-Dealer

The vast majority of consumer and registered person employee disputes with brokers and broker-dealers are resolved by FINRA arbitration pursuant to FINRA Rule 12200.⁴¹ Importantly, though, FINRA rule 12204 provides that class action claims may not be arbitrated.⁴² Rather, FINRA directs class action claims to court.⁴³ This class claim exception exists as a way around the principal FINRA rule providing that a dispute must be resolved by arbitration if it is subject to a written agreement so requiring, or if a brokerage customer requests arbitration.⁴⁴ While arbitration of broker-dealer disputes can proceed under AAA, JAMS, or another arbitration forum, the vast

⁴¹ FINRA RULE 12200. Parties must arbitrate a dispute under the Code if:

- Arbitration under the Code is either:
 - (1) Required by a written agreement, or
 - (2) Requested by the customer;
- The dispute is between a customer and a member or associated person of a member; and
- The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company. *See* FINRA, Final Report and Recommendations of the FINRA Dispute Resolution Task Force, December 2014 and Barr, *Mandatory Arbitration in Consumer Finance and Investment Contracts*, *supra* note 7, at 800 (each referring to very high rates of mandatory arbitration provisions in broker dealer contracts, but neither offering actual data).

⁴² FINRA RULE 12204

(a) Class action claims may not be arbitrated under the Code.

(b) Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, unless the party bringing the claim files with FINRA one of the following:

- (1) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or
- (2) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

(c) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(d) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.

This paragraph does not otherwise affect the enforceability of any rights under this Code or any other agreement.

⁴³ This is an important distinction in FINRA arbitration and any other variety of arbitration discussed herein. These FINRA rules offer a good example of a way that at least some of the unsuccessful recent challenges to class waivers in arbitration clauses might be avoided or redressed.

⁴⁴ *Id.*

majority proceed through FINRA, the self-regulatory body overseen by the U.S. Securities and Exchange Commission (SEC).⁴⁵

Black and Gross have attributed the ubiquitous use of mandatory pre-dispute arbitration agreements in the securities industry to the Supreme Court's *McMahon*⁴⁶ decision.⁴⁷ Related work by Gross and Black surveying 25,000 investors demonstrates that investors perceive unfairness in mandatory broker-dealer arbitration, but speaks further simply as testament to the uniform use of written agreements requiring arbitration in the investment field.⁴⁸

For purposes of this article, the primary take away from these studies, in aggregate, is that mandatory pre-dispute arbitration clauses have become the norm in each of the employment, consumer finance, and investment arenas. Certainly, these studies do not arrive at a consensus as to the superiority of either arbitration or litigation. One should note, though, that the clear majority of the studies cited, *supra*, are critical of mandatory arbitration. Of course, the very existence of a large body of Supreme Court cases on the topic is further evidence that many contracts include mandatory arbitration provisions and that they have been repeatedly challenged.

II. The U.S. Supreme Court's *Epic Systems* Decision and its Precursors

A. The Long Lead-Up to *Epic Systems*

If the FAA was a watershed shifting federal legislative and court policy from general disfavor of arbitration to express endorsement, even promotion, of arbitration, subsequent Supreme Court interpretation of the FAA has been still more altering.⁴⁹ Both the jurisprudence enforcing, and the scholarly commentary opposing, Supreme Court enforcement of mandatory arbitration provisions has been consistent (post *Wilko*) across each of the employment, consumer finance, and investment categories.

The Court's earliest interpretation of the FAA was in the securities field, and in retrospect would belie the future of the Court's approach. Broadly, in *Wilko v. Swann*,⁵⁰ the Court refused to enforce a pre-dispute arbitration clause in a margin agreement between a brokerage firm and its customer, finding that Section 14 of the Securities Act of 1933⁵¹ effectively blocked a waiver of

⁴⁵ Jill I. Gross, *The Customer's Nonwaivable right to Choose Arbitration in the Securities Industry*, 10 BROOK. J. CORP. FIN. & COM. L. 383, 385-6, 395-401 (2016).

⁴⁶ *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987).

⁴⁷ Barbara Black & Jill I. Gross, *Making it up as they go Along: The Role of Law in Securities Arbitration*, 23 CARDOZO L. REV. 991, 991-5 (2002) (attributing the proliferation of mandatory pre-dispute arbitration provisions in the securities industry to *McMahon* and noting a 2000 GAO study and personal knowledge of commonplace use of mandatory pre-dispute arbitration provisions in the securities industry).

⁴⁸ Barbara Black & Jill I. Gross, *When Perception Changes Reality: An Empirical Study of Investors' Views of the Fairness of Securities Arbitration*, 2008 J. DISP. RES. 349, 357-361 (2008).

⁴⁹ See *Arbitration, Transparency, and Privatization*, *supra* note 7, at 2862-2874; Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U.L. REV. 255, 265-282 (1998).

⁵⁰ 346 U.S.427 (1953).

⁵¹ 15 U.S.C. § 77n (1994) ("Any condition, stipulation, or provision binding any person acquiring any security to waive compliance with any provision of this subchapter or of the rules, and regulations of the Commission shall be void.").

the right to bring a court action for a Section 12(2)⁵² fraud claim under the '33 Act, and trumped the FAA directive toward enforcement of arbitration agreements like all other contracts.⁵³

In *Wilko*, then, the Court found congressional intent in a federal law (the '33 Act) that made unwaivable the right to select a judicial forum to adjudicate disputes relating to a contract to be superior to another, earlier federal law, the FAA (1925). At the time of *Wilko* (1953), the FAA Section 2⁵⁴ requirement to treat agreements about arbitration as enforceable like any other contract, subject to defenses to enforceability as with any other contract, was still, more than 25 years after its passing, seen by the Court as a redress countering the prior federal disfavor of arbitration. It was, as yet, in no way a mandate to aggressively preference the FAA and arbitration agreement enforcement over other federal law or state law, whether substantive or procedural. Note that the '33 Act came eight years after the FAA and that the 1953 *Wilko* decision expressly considered distinctions between arbitral and judicial decision making.⁵⁵

Thirteen years after *Wilko*, in 1967, the Court jibed in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, creating the "separability doctrine," holding that the FAA controlled and required enforcement of an arbitration clause in a consulting agreement relating to the purchase and sale of a paint business.⁵⁶ One party sought to rely on a consulting agreement arbitration clause to resolve a dispute alleging fraud in the inducement to the consulting agreement.⁵⁷ The Court held that pursuant to Section 4 of the FAA, while arbitrators should not decide a fraud in the inducement claim relating specifically to an arbitration clause in itself, arbitrators should decide a fraud in the inducement claim as to the whole contract containing the clause.⁵⁸ In *Prima Paint*, the Court flipped to express no concern with arbitrators deciding "legal" issues and emphasized the freedom of contract to justify enforcement of whatever dispute resolution terms parties agreed to in a contract.⁵⁹

From *Prima Paint* to the present *Epic Systems* decision, the Court has consistently held its course counter to *Wilko*, tacking through repeated challenges to arbitration in each of the employment, consumer finance, and securities contexts.

The Court looked at another securities related case in 1974, *Scherk v. Alberto-Culver Co.*,⁶⁰ where it heard a claim in part reliant upon Section 10(b) of the Securities Exchange Act of 1934⁶¹ ('34 Act). Alberto Culver argued that the '34 Act precluded its dispute from arbitration pursuant

⁵² The Securities Act of 1933, 15 U.S.C. § 77l (1994).

⁵³ *Wilko*, 346 U.S. at 434-437.

⁵⁴ 9 U.S.C. § 2.

⁵⁵ *Wilko*, 346 U.S. at 435-37.

⁵⁶ *Prima Paint*, 388 U.S. at 402-404.

⁵⁷ *Id.* at 397-398.

⁵⁸ *Id.* at 404-407.

⁵⁹ *Id.* at 406.

⁶⁰ 417 U.S. 506 (1974).

⁶¹ 15 U. S. C. § 78j(b) (2012) and rule 10b-5, 17 CFR § 240.10b-5.

to Section 29⁶² of the '34 Act, analogous to Section 14 of the '33 Act at the heart of *Wilko*.⁶³ The *Scherk* case involved an international business transaction including a stock purchase governed in part by an agreement to arbitrate related disputes in France.⁶⁴ In finding that Section 29 did not prohibit a litigation waiver, the *Scherk* court relied primarily on the international nature of the transaction at issue in the case and held that the agreement to arbitrate was in effect a kind of forum selection clause that must be upheld to avoid interfering with and unsettling international commerce.⁶⁵ Thus, *Scherk* expanded the more pronounced pro-arbitration precedent of *Prima Paint* which had flipped *Wilko*. The *Scherk* court, essentially opposite the *Wilko* court, found the FAA directive supporting arbitration to be stronger than the policy behind the litigation waiver prohibition of Section 29 of the '34 Act. *Scherk* emphasized the established norm and import of arbitration for dispute resolution in international business, and broadened the enforcement of mandatory arbitration in the securities or investment field.

In 1983, with *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*⁶⁶ and in 1984 with *Southland Corp. v. Keating*⁶⁷, the Court respectively entertained challenges first to contractual arbitration between a hospital and a construction company and then to contractual arbitration between franchisees and a franchisor. In these decisions, the Court firmly established that the FAA and its decisions under the FAA constitute a body of federal substantive law on arbitration enforcement that preempts state law, full stop.⁶⁸ *Moses Cone* held that federal appellate court jurisdiction was proper to review a state district court action staying a federal district court action to compel arbitration under Section 4 of the FAA and proceeded to find arbitrable a contract dispute between the hospital and its contractor.⁶⁹ The *Southland* decision emphatically promoted arbitration and grounded this promotion in the legislative history of the FAA, casting aside the view that the character of the law concerning arbitration was procedural.⁷⁰ The *Southland* court held that under the Supremacy clause, Section 2 of the FAA controlled the question of arbitrability of a dispute between a franchisor and several franchisees, not the state law of California.⁷¹ Notably, *Southland* expressly left open the question of whether the FAA barred class arbitration – a question, of course, that was later to arise again.⁷²

In 1985, the Court addressed a challenge to mandatory arbitration for the third year in a row with *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*⁷³ In *Mitsubishi*, the Court

⁶² 15 U.S.C. § 78cc (a) (2012). "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

⁶³ *Scherk*, 417 U.S. at 513-519.

⁶⁴ *Id.* at 508.

⁶⁵ *Id.* at 515-19.

⁶⁶ 460 U.S. 1, 22 (1983).

⁶⁷ 465 U.S. 1 (1984).

⁶⁸ *Southland*, 465 U.S. at 12-13. See Margaret M. Harding, *The Clash Between Federal and State Arbitration Law and the Appropriateness of Arbitration as a Dispute Resolution Process*, 77 NEB. L. REV. 397, 468-477 (1998) (discussing the central issue in *Southland*).

⁶⁹ *Moses Cone*, 460 U.S. at 28-29.

⁷⁰ *Southland*, 465 U.S. at 13-14.

⁷¹ *Id.*

⁷² *Id.* at 16.

⁷³ 473 U.S. 614 (1985) (also addressing arbitrability of RICO claims).

found arbitrable a claim brought by a Swiss-Japanese joint venture automobile supplier against a Puerto Rican car dealership with whom it had a sales agreement.⁷⁴ In finding arbitrable the claim which arose in part under the Sherman Antitrust Act,⁷⁵ the Court looked to its precedent in *Scherk*, again noting the pro-arbitration context of international commerce.⁷⁶ Thus, with *Mitsubishi*, the purview of enforceable arbitration grew to explicitly incorporate arbitral decisions over federal statutory claims, *contra Wilko*.

In 1987, the Court returned to another securities industry arbitration challenge in *Shearson/Am. Express Inc. v. McMahon*.⁷⁷ Unlike the securities claims made in *Scherk*, the securities claims in *McMahon* involved a wholly domestic-contract based dispute between a brokerage customer and brokerage. In *McMahon*, the Court more comprehensively addressed the issue of whether Section 29(a) of the '34 Act indicated congressional intent regarding the waiver of litigation rights in the '34 Act that would trump the FAA – an argument again grounded in the then flipped *Wilko* reasoning regarding Section 14 of the '33 Act.⁷⁸ Distinguishing Section 14 of the '33 Act and Section 29 of the '34 Act based upon interpretation of legislative intent, the *McMahon* Court proceeded to enforce the mandatory arbitration provision in the consumer investment contract at issue.⁷⁹ Looking back to statements of policy embodied in the FAA and amplified in *Prima Paint*, *Scherk*, *Moses Cone*, *Southland*, and *Mitsubishi*, the Court seemed to catalogue its precedent, solidifying whole-hearted enforcement of mandatory pre-dispute arbitration provisions.⁸⁰ Pointedly, in *McMahon*, one can note the major shift in the character of challenges to arbitration from the earlier, mostly business-to-business challenges (stemming from the origins of arbitration as a primarily business to business, sophisticated commercial practice) to consumer versus business challenges.

In 1989, just two years after *McMahon*, the Court explicitly overturned *Wilko* in the '33 Act context in *Rodriguez de Quijas v. Shearson/American Express, Inc.*⁸¹ now stating that Section 14 of the '33 Act did **NOT** preclude waivers of litigation rights to Section 12(2) fraud claims.⁸² The *Rodriguez de Quijas* Court relied again on the Court's own expanding pro-arbitration precedent since *Wilko*, giving particular weight to *McMahon*.⁸³ Like *McMahon*, *Rodriguez de Quijas*, was again a consumer versus brokerage battle over an investment contract. The Court once again noted the “old judicial hostility to arbitration”, harkening back to the policy justifications for the FAA's passage back in 1925, and assessed the effect of its own precedent as constituting the erosion of that anti-arbitration view.⁸⁴

⁷⁴ *Id.* at 616-620.

⁷⁵ 15 U. S. C. § 1 *et seq.* (2012).

⁷⁶ *Mitsubishi*, 473 U.S. at 628-632.

⁷⁷ 482 U.S. 220 (1987).

⁷⁸ *Id.* at 228-231.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ 490 U.S. 477 (1989) (emphasis added).

⁸² *Id.* at 480-485.

⁸³ *Id.*

⁸⁴ *Id.* at 480.

In the 1991 *Gilmer v. Interstate/Johnson Lane Corp.* decision, the Court enforced mandatory pre-dispute arbitration of an Age Discrimination in Employment Act of 1967 (ADEA) claim pursuant to an agreement between a securities representative and a brokerage (which agreement was not characterized as an employment agreement), subject to New York Stock Exchange rules (prior to the establishment of FINRA).⁸⁵ Thus, the Court continued to strengthen the enforcement of mandatory pre-dispute arbitration even regarding a broadening array of statutory based claims.⁸⁶ Moreover, the Court robustly cast aside the unconscionability argument that the individual plaintiff in *Gilmer* stood no chance of equal bargaining power against the big corporation brokerage, in this instance the employee against the large employer.⁸⁷ *Gilmer*, then, straddles the categories of investment and employment and continues the Court's strong enforcement of arbitration in both of these categories of concern.

The attention of the Court turned to the class action component of mandatory pre-dispute arbitration in 2010 with *Stolt-Nielsen, S.A. v. AnimalFeeds International Corp.*⁸⁸ In *Stolt-Nielsen*, the Court interpreted the FAA and its precedent to find that an arbitration clause that does not explicitly provide for class arbitration, does not permit class arbitration.⁸⁹ The *Stolt-Nielsen* decision looked repeatedly to the Court's decade earlier decision in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*⁹⁰ reiterating that arbitration agreements should be read and enforced strictly according to their terms.⁹¹ The Court's reasoning appeared consistent with earlier freedom of contract based arguments – emphasizing that parties to a contract may consent to whatever terms they choose and those terms should be enforced.⁹²

In 2011, class arbitration moved further to the forefront of Supreme Court jurisprudence just a year after *Stolt-Nielsen*, in the quintessential consumer finance context of *AT&T Mobility LLC v. Concepcion*.⁹³ In *Concepcion*, consumers who had entered into cell phone contracts with AT&T sought to bring a class arbitration against AT&T. However, the arbitration clause at issue specifically required *individual* arbitration. The same clause entitled AT&T to make unilateral amendments to the controlling agreement. The Supreme Court reversed lower courts which had found the contract between AT&T and the Concepcions unconscionable. The lower courts, looking to California's *Discover Bank* rule, had found the terms of the AT&T agreement not offering class arbitration to be an unconscionable denial of consumer rights.⁹⁴ In reversing, the Court again grounded its decision in a freedom of contract analysis, looking back to the policies buttressing the FAA and its now increasingly voluminous Supreme Court precedent enforcing, if not promoting, mandatory pre-dispute arbitration. While referring to Section 2 of the FAA, stating that the FAA required the Court to put agreements about arbitration on the same footing as other

⁸⁵ 500 U.S. 20 (1991).

⁸⁶ *Id.* at 27-33.

⁸⁷ *Id.*

⁸⁸ 559 U.S. 662. (2010).

⁸⁹ *Id.* at 681-686.

⁹⁰ 489 U.S. 468 (1989).

⁹¹ *Id.* at 488-489.

⁹² *Id.*

⁹³ 563 U.S. 331 (2011).

⁹⁴ *Id.* at 341-344.

contracts, the Court wrestled with the FAA's Section 2 savings clause.⁹⁵ The Section 2 savings clause further provides that general defenses to contract must also be recognized and applied to agreements including arbitration clauses, but that such defenses do not include defenses unique to arbitration provisions alone. Ultimately, the *Concepcion* decision stands more as a testament to federal preemption of state law, even as it built the Court's enforcement of arbitration clauses crafted to preclude class arbitration and further undermined any real consideration by the Court of general unconscionability defenses based upon the unequal bargaining power between consumers like the *Concepcions* and large corporations like AT&T.

In 2012, the Court considered the issue of whether the FAA excluded employment agreements from its purview of enforcing arbitration clauses in *Circuit City Stores, Inc. v. Saint Clair Adams*.⁹⁶ The Court determined that the language at issue in Section 1 of the FAA⁹⁷ indicated the exclusion of employment agreements only concerning workers in the transportation field and not generally.⁹⁸ In so doing, the Court noted that the ninth circuit's more encompassing interpretation of the FAA's Section 1 was both incorrect and inconsistent with prior Supreme Court precedent.⁹⁹

The plight of consumers who entered into mandatory pre-dispute arbitration agreements again reached the Supreme Court just a year after *Concepcion* in the 2012 *CompuCredit Corp. v. Greenwood* decision.¹⁰⁰ In *CompuCredit*, the Court considered whether a non-waiver of litigation provision in the Credit Repair Organizations Act (CROA), which created a private right of action to pursue remedies via class action, constituted a contrary congressional command to the FAA.¹⁰¹ The *CompuCredit* Court held that the CROA provision did not constitute a contrary congressional command that would favor the CROA over the FAA directive of enforcing agreements to arbitrate.¹⁰² The Court emphasized that the CROA did not mention arbitration and so proceeded to enforce the consumer credit card agreement that mandated arbitration.¹⁰³

Another important case arising in the securities industry in 2012 and regarding mandatory pre-dispute arbitration that did *not* reach the U.S. Supreme Court, is *Dep't of Enforcement v. Charles Schwab & Co., Inc.*¹⁰⁴ *Schwab* concerned an investment contract between the brokerage and its customers requiring them to waive their rights to class arbitration and class civil litigation. In *Schwab*, the FINRA Board of Governors avoided the contrary congressional command precedent from the Supreme Court which had consistently held that the FAA trumped other legislation. The Board of Governors found FINRA Rule 12204¹⁰⁵ (prohibiting class arbitration and

⁹⁵ 9 U.S.C. § 2.

⁹⁶ 532 U.S. 105 (2001).

⁹⁷ "but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 U.S.C. § 1.

⁹⁸ *Circuit City*, 532 U.S. at 113-121.

⁹⁹ *Id.*

¹⁰⁰ 565 U.S. 95 (2012).

¹⁰¹ *Id.* at 95-117.

¹⁰² *Id.* at 99-104.

¹⁰³ *Id.* at 104.

¹⁰⁴ Disciplinary Proceeding No. 2011029760201 (FINRA Board of Governors April 24, 2014).

¹⁰⁵ *Supra* note 41.

permitting class civil litigation) enforceable notwithstanding the FAA and its Supreme Court interpretation.¹⁰⁶ The decision emphasized the policy behind the FINRA rule permitting or requiring class action only through the civil courts and noted that the very reason for the rule was to provide access to the courts that have "developed procedures and the expertise to manage class actions".¹⁰⁷ While the Board of Governors found that the FAA certainly applied to the FINRA Rule and the Schwab arbitration policy, unlike the Supreme Court, the Board of Governors also found that Section 15 of the '34 Act empowered FINRA to regulate arbitration in FINRA's forum. Then, in overturning a prior Hearing Panel decision on the case, the Board of Governors drew an analogy of FINRA with the CFPB finding that FINRA regulations have the force of law and that the SEC, and through it, FINRA, has congressional command via the '34 Act to make and enforce the rule permitting class civil litigation notwithstanding the Supreme Court interpretation of the FAA enforcing class waivers.¹⁰⁸

Class arbitration came before the Court again in 2013 with *American Express v. Italian Colors Restaurant*.¹⁰⁹ In *Italian Colors*, small business merchants accepting American Express cards for payment attempted to seek redress as a class.¹¹⁰ The mandatory pre-dispute arbitration clause the claimants had entered into with American Express contained an explicit prohibition of class arbitration.¹¹¹ The Court again found no contrary congressional command in other federal law (this time asserted to lie in antitrust laws) that would trump the FAA.¹¹² The Court eschewed concern for the illogic of small claimants bearing the burden of sole arbitration, holding that the cost of individual arbitration was no bar to enforcing contracts in which the parties agreed to it, even where the remedy sought was of less value than the cost to the sole claimant to arbitrate.¹¹³ Thus, the Court refused to recognize the asserted 'effective vindication' doctrine.¹¹⁴

Yet again, in 2015, the Court propounded its enforcement of class arbitration waivers against consumers in *DirecTV, Inc. v. Imburgia*.¹¹⁵ In *DirecTV* the Court again drove home federal preemption of the FAA over state law even where a contract expressly deferred legality of a class waiver to the law of the contracting consumer's state.¹¹⁶ Had the Court found that the state law reference controlled, under the California *Discover Bank* rule, the DirecTV class waiver would have been found unconscionable.¹¹⁷ However, once again the still expanding Supreme Court precedent on mandatory arbitration continued to strongly disfavor consumer challenges.

¹⁰⁶ Schwab, at 7.

¹⁰⁷ *Id.* at 14.

¹⁰⁸ *Id.* at 21. See Barbara Black & Jill I. Gross, *Investor Protection Meets the Federal Arbitration Act*, 1 STAN. J. COMPLEX LIT. 1, 44-48 (2012).

¹⁰⁹ 570 S. Ct. 228 (2013).

¹¹⁰ *Id.* at 231.

¹¹¹ *Id.* at 236-238.

¹¹² *Id.* at 233.

¹¹³ *Id.* at 235-36.

¹¹⁴ *Id.* See Jill I. Gross, *Justice Scalia's Hat Trick and the Supreme Court's Flawed Understanding of Twenty-First Century Arbitration*, 81 BROOKLYN L. REV. 111, 13-136 (2015).

¹¹⁵ 136 S. Ct. 463 (2015).

¹¹⁶ *Id.* at 466-67 (state law illegality of the class waiver would contractually invalidate the entire arbitration clause).

¹¹⁷ *Id.*

B. *Epic Systems*

Coming full circle, in June of 2018 the Court handed down its decision in *Epic Systems Corp. v. Lewis*.¹¹⁸ While the Court considered arguments more focused on the National Labor relations Act (NLRA), it again did not find in the NLRA a contrary congressional command superior to the FAA.¹¹⁹ The Court held that Section 7 of the NLRA¹²⁰, protecting the right of employees " ...to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" did not include in its protection class arbitration by employees who believed their employers were violating the Fair Labor Standards Act.¹²¹ Moreover, the Court reiterated its now well established position that the FAA requires enforcement of whatever arbitration provisions parties agree to in a contract.¹²² The Court held that the FAA savings clause defenses to contract generally, including illegality based upon the alleged blocking of concerted action protected by the NLRA, did not apply.¹²³

Writing for the majority in *Epic Systems*, Justice Gorsuch commented, "[y]ou might wonder if the balance Congress struck in 1925 between arbitration and litigation should be revisited in light of more contemporary developments. You might even ask if the [FAA] was good policy when enacted. But all the same you might find it difficult to see how to avoid the statute's application"¹²⁴ Once again, the Court looked backward to its own repeated recasting of the 1925 passage of the FAA only to justify the apparent implausibility of defenses to contract that might apply to arbitration provisions yet not be characterized as particular to defending arbitration provisions. Indeed, Gorsuch found the fatal flaw in the *Epic Systems* plaintiff's defense to contract argument under the FAA savings clause to lie in the failure to convince the majority that the defense applied to "any" contract, not specifically to the arbitration contract provision.¹²⁵

Thus, for over 50 years, the U.S. Supreme Court has constructed a solid and expansive jurisprudence strengthening the enforcement of mandatory pre-dispute arbitration provisions in each of the areas of employment, consumer finance, and investment contracts. As the Court has built the enforcement precedent, defenses to contract in each of these areas have further eroded; justified by the original policies given by Congress when passing the FAA back in 1925, freedom of contract, and the proclaimed superiority of the FAA over other federal (and state) legislation alleged to embody contrary congressional commands. In the 21st century, the Court has included in this project the enforcement of class action waivers and class arbitration prohibitions, most recently in the employment context with the *Epic Systems* Court's refusal to find concerted action protected under the NLRA.

¹¹⁸ 584 U.S. ___; 138 S. Ct. 1612 (2018).

¹¹⁹ See Neylon O'Brien, *supra* note 11, at 541-545 (2017) (setting up the NLRA arguments heard by the Court in the cases consolidated in the *Epic Systems* decision); see also Greene & Neylon O'Brien, *supra* note 11, at 96-98 (applying issues from the D.R. Horton decision to further section 7 NLRA claims).

¹²⁰ 29 U.S.C. §157.

¹²¹ 29 U.S.C. 216(b).

¹²² *Epic Systems*, 584 U.S. at ___; 138 S. Ct. at 1623-1624.

¹²³ *Id.*

¹²⁴ *Id.* at 1622.

¹²⁵ *Id.* at 1622-23.

C. Criticism of Supreme Court Arbitration Jurisprudence [and arbitration generally]

Epic Systems would appear to leave the law on enforcing mandatory pre-dispute arbitration well settled while leaving unheeded the scholarly criticism of both the Court's enforcement of arbitration contracts and its rejection of the many arguments for a parallel recognition of contract defenses under the FAA savings clause.¹²⁶ That scholarly criticism includes claims that the Court has falsely inflated the now well aged FAA policy directive (literally to put arbitration contracts on equal footing with other contracts) and flouted any concern for resulting social injustice disempowering consumers and small businesses.¹²⁷ Related to concerns of social injustice, the diminution of Constitutional rights, and excessive delegation, many have cried out that the entire civil litigation system is rapidly being replaced with a private, unreviewable dispute resolution system.¹²⁸

Notwithstanding the spirited criticism of the Supreme Court's pro-arbitration jurisprudence, there now would seem to be little chance of the Court reversing itself on its quite substantial precedent on precedent enforcing mandatory pre-dispute arbitration.¹²⁹ This reality leaves us with the central motivation for this article – contemplating a solution to the discord between the Court's jurisprudence on arbitration and the weighty, yet unembraced, scholarly criticism of it.

This article suggests that we consider volitional contractual mediation as an alternative. This proposal is, in a sense, a response to Justice Gorsuch's pondering in *Epic Systems*; indeed, we might wonder if that purported 1925 balance "should be revisited in light of more contemporary developments."¹³⁰

Parts I and II of this paper should make clear that much is wrong with arbitration. If intended to be a less costly, less time consuming, less complex, just alternative to civil litigation, present day arbitration in the big versus small contexts of employment, consumer finance, and investment contracts, is largely a failure. It has become ever more expensive, more time consuming, and more like the civil litigation it was intended to avoid. It has shifted from business to business to consumer and unlike civil litigation, it offers little or no chance of either appeal, public reviewability, or accountability, and it relies on often only summarily trained neutrals to make life altering decisions.¹³¹ Hence, some have proposed modifications to arbitration

¹²⁶ See for example, Stephen J. Ware, *The Politics of Arbitration Law and Centrist Proposals for Reform*, 53 HARV. J. ON LEG. 711, 738-740 (2016) (proposing alternative positions on enforcement and defense such as unconscionability).

¹²⁷ See *Arbitration, Transparency, and Privatization*, *supra* note 7, at 2894-2898 (2015) (pointing out all that is given up in procedure, public reviewability, appeal rights...when civil litigation is replaced with arbitration) and *Fairness in Numbers*, *supra* note 7 at 154-168 (2011) (emphasizing due process and fairness concerns with class action waivers).

¹²⁸ See *Fairness in Numbers*, *supra* note 7 at 160-168; and see Ware, *supra* note 125, at 739-740 (discussing 5 approaches to enforcing arbitration, arguing for a "centrist" position, and giving particular attention to the political alignment of justices on the Supreme Court as treatment of arbitration enforcement changed, particularly in the 2000s).

¹²⁹ *Supra*, Section II.

¹³⁰ *Epic Systems*, 584 U.S. at 6.

¹³¹ *Arbitration, Transparency, and Privatization*, *supra* note 7 at 2847-2860; Resnik, *Fairness in Numbers*, *supra* note 7 at 154-161.

practice.¹³² Perhaps motivated chiefly by the extremely narrow grounds for review of arbitration, legislators have attempted to work around the FAA and the Court's interpretation of it.¹³³ Indeed, a number of legislative attempts¹³⁴ have been made to counter the Court in our system of federal government where the three branches are always at play counterbalancing one another.^{135 136}

Critics have characterized the very nature of arbitration as undemocratic, pointing particularly to its questionable upholding of the legal values of equal protection and due process, yet holding out potential benefits of arbitration as part of a larger judicial system.¹³⁷ In looking at the increased prominence of arbitration in place of litigation and at arbitration's flaws, Jacqueline Nolan-Haley has recognized part of the critical problem concerning this work – the scholarly criticism of the Court's "favorable attitudes" toward arbitration in the consumer and employment settings.¹³⁸ "The Court has thrown the U.S. out of step with other advanced countries and made arbitration agreements a focus of criticism."¹³⁹ It would seem that the Court has spurred the growth of a form of dispute resolution that is on many accounts exacerbating conflict. Of course, civil litigation, though a Constitutional guarantee and though indisputably governed by doctrines of equal protection and due process, is hardly an ideal alternative. It is perhaps further ironic that the very concerns that drove the flight from court to arbitration have not been sufficiently diminished. Cost, time, complexity, and lawyerly gamesmanship, have come to plague arbitration itself.

¹³² See Glover, *supra* note 7, at 3055 (2015) (discussing the private contract character of arbitration); See also Charles W. Tyler, *Lawmaking in the Shadow of the Bargain: Contract Procedure as a Second-Best Alternative to Mandatory Arbitration*, 122 Yale L.J. 1560, 1582-1591 (2013) (proposing contractual "procedural optionality" in litigation as an alternative to arbitration) and Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L REV. 949 (2000) (proposing that state action is present in private civil arbitration and extrapolating the ramifications of applying constitutional norms to arbitration and dispute resolution generally).

¹³³ Michael H. Leroy, *Are Arbitrators Above the Law? The "Manifest Disregard of the Law" Standard*, 52 B.C. L. REV. 137, 183-186 (2011) (calling on the courts to enforce the manifest disregard of the law standard of review of arbitration decisions).

¹³⁴ Arbitration Fairness Act, H.R. 1020, 111th Congress (2009) (House bill); S. 931, 11th Congress (2009) (Senate bill).

¹³⁵ Most recently introduced in the House by Rep. David Cicilline as H 1396 and in the Senate by Sen. Leahy as S 550 in March 2017

First, this legislation would exempt from the FAA claims brought by individuals or small businesses arising from violations of federal or state law, the U.S. Constitution or a state constitution, and accordingly, would permit these claims to proceed in a court of law. (Arbitration is still an option if the parties voluntarily choose to arbitrate a dispute after it arises.) Second, the bill would allow federal and state courts to apply their respective jurisdictional laws concerning contract interpretation to find arbitration provisions unconscionable or unenforceable notwithstanding the FAA. Third, the bill would give to the courts, not arbitrators, the essential task of determining whether an arbitration agreement is enforceable in the first place.

¹³⁶ Arbitration Fairness Act of 2018 S. 2592, 115th Congress (2018) (Senate bill) and Restoring Statutory Rights and Interest of the States Act, S. 550, 115th Congress (2017); H.R. 1396, 115th Congress (2017) (House bill).

¹³⁷ See Richard C. Reuben, *Democracy and Dispute Resolution: The Problem of Arbitration*, 67 LAW & CONTEMP. PROBLEMS 279, 290-308 (2004) and David Horton, *Arbitration as Delegation*, 86 N.Y.U.L. REV. 437 (2011) (making the point that the Court's enforcement of mandatory arbitration effectively violated the non-delegation doctrine by delegating lawmaking to private organizations and people).

¹³⁸ Jacqueline Nolan-Haley, *Mediation: The New Arbitration*, 17 HARV. NEGOTIATION L. REV. 61, 67 (2012).

¹³⁹ Thomas J. Stipanowich, *The Pound Conferences Living the Dream of ADR: Reflections of Four Decades of the Quiet Revolution in Dispute Resolution*, 18 CARDOZO J. CONFLICT RESOL. 513, 536 (2017).

Moreover, the contract defense based arguments countering the Court's propensity to enforce mandatory pre-dispute arbitration provisions have left unequal bargaining power and the doctrine of unconscionability virtually meaningless in the arbitration context.¹⁴⁰ The extreme inequality of bargaining power evident in each of the contexts of employment, consumer finance, and securities industry related agreements has failed to move the Court in the many cases constituting the now solidified jurisprudence the Court has built to sustain and enhance mandatory arbitration.¹⁴¹

We are at an impasse in scholarly assessment of the Court's arbitration jurisprudence. We are at an impasse culturally, where unknowing, relatively powerless citizens enter into mandatory arbitration provisions routinely in order to conduct commonplace transactions in our consumer society. The only redress of the relatively powerless is often an economically irrational option to proceed with sole arbitration for de minimus individual wrongs that, in the aggregate, may yield tens or hundreds of millions of dollars for the wrong doer. Yet, routine waivers of class actions and class arbitration claims are now enforced. So the aggregate check on large scale wrongdoing affecting individuals in minimal ways, yet reaping quite sizeable unjust rewards, is dead. We need an alternative to the unacceptable stalemate that is our current milieu.

III. The Mediation Alternative to Arbitration

We should consider promoting contractual mediation as an alternative to the mandatory arbitration gridlock. Of course, the distinctions between arbitration and mediation are great. As critics have pointed out, *supra*, arbitration entails the practically unreviewable final decision by a neutral third party or panel. The arbitration process in many instances is very akin to litigation and involves an increasing amount of lawyering. Discovery may include multiple subpoenas for people or documents. Document production may include voluminous bates numbered troves of e-correspondence and material agreements. Witness lists may be akin to parades. In short, the brevity and simplicity of arbitration has yielded to lawyered formalities recreating civil litigation in a private, unreviewed world.

Mediation is not a process of adjudication. Parties to mediation only resolve their disputes volitionally, by coming to an agreement in some way aided by a neutral third party. The approach is one of self-determination, in great contrast to determination by a judge-like third party in arbitration. Variations of mediation may require court approval of agreements reached by the parties, varying levels of involvement by the mediator, emphasis on joint sessions or party separating caucuses and more. In its ideal form, the mediation process broadens the possibility of agreement addressing underlying issues in a dispute rather than focusing on narrow, legal conflicts determined by a judge-like arbitrator. Its hallmarks, are self-determination and fairness.

¹⁴⁰ See William Alan Nelson II, *Take it or Leave it: Unconscionability of Mandatory Pre-Dispute Arbitration Agreements in the Securities Industry*, 17 U. PA. J. BUS. L. 573 (2015); Sternlight & Jensen, *Mandatory Arbitration: Using Arbitration to Eliminate Consumer Class Actions: Efficient Business Practice or Unconscionable Abuse*, *supra* note 7 at 77-90 (2004); and Kenneth R. Davis, *The Arbitration Claws: Unconscionability in the Securities Industry*, 78 B.U.L. REV. 255, 278-298 (1998).

¹⁴¹ Barr, *supra* note 7 at 806.

Yet, any proposal to precede or replace arbitration with some version of mediation must recognize and address shortcomings of mediation that show up in differing versions of mediation.

A. Versions of Mediation

i. Approaches

Approaches neutral third parties employ in mediation and the contexts of mediation can vary quite substantially. Leonard Riskin's basic rubric for categorizing approaches to mediation is well settled in the field of alternative dispute resolution, though he has modified the rubric over time and cautions against overemphasizing it in any form.¹⁴² A commonly accepted modification of Riskin's original "grid" includes the fundamental distinction of the evaluative, facilitative, and also the transformative approach to mediation.¹⁴³ "Evaluative" references an approach where a neutral third party mediator offers an informed assessment and prediction regarding each party's position in the mediation.¹⁴⁴ "Facilitative" refers to an approach where the third party neutral mediator does not evaluate, but assists the parties in understanding one another's positions and interests, and aids their considering possible outcomes to their dispute.¹⁴⁵ In a "transformative" approach, the third party neutral mediator is concerned with empowering the parties in dispute to relate to one another and address, perhaps not even resolve, their conflict so that they may continue to be in relationship with one another, realize their impact on one another, and communicate further in the future.¹⁴⁶ Perhaps the greatest criticism of mediation lies in the overly aggressive use of the evaluative approach that can border on mediator coercion pushing parties toward settlement, *infra*. The transformative approach is probably the least understood and least knowingly employed. Hence, the facilitative approach, somewhat of a middle ground, would seem to offer a reasonable practice standard. Facilitative mediators are not as passive as transformative mediators, nor as proactive as evaluative mediators.

ii. Context

In assessing mediation as an alternative to mandatory arbitration or civil litigation, we should be mindful of context in addition to approach. Mediation is conducted in myriad contexts. One major growth area for mediation is court itself. Perhaps the most often cited study of court related mediation was conducted in Ohio nearly twenty years ago now.¹⁴⁷ Wissler's court-

¹⁴² See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 44-46 (1996); Leonard L. Riskin, *Replacing the Mediator Orientation Grids, Again: The New Grid System*, 23 ALTERNATIVES TO THE HIGH COST OF LITIG. 127, 129-131 (2005); Leonard L. Riskin, *Decision-Making in Mediation: The New Old Grid and the New Grid System*, 79 NOTRE DAME L. REV. 1, 5-13 (2003); Robert Rubinson, *Mediation Models and Comparative Dispute Resolution: of Grids and Gatekeepers: The Socioeconomics of Mediation*, 17 CARDOZO J. CONFLICT RESOL. 873, 878-882 (2016); Robert A. Baruch Bush & Joseph P. Folger, *THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT* (2005).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research*, 17 OHIO ST. J. ON DISP. RESOL. 641, 645-646 (2002). See also Roselle L. Wissler, *Representation in*

connected mediation data included roughly 1,000 civil cases assigned to mediation in Ohio state courts – primarily during a settlement week program.¹⁴⁸ Such settlement programs are common in many state courts and were instituted primarily in the attempt to clear court dockets. Similar to the author's own experience of mediating for state superior court in Rhode Island, 52% of the cases included in Wissler's data were personal injury claims from automobile accidents. This is one particularly narrow application of mediation. In practice, personal injury automobile accident suits are a voluminous niche involving many industry specialist plaintiff counsel bringing such cases as well as a large industry of insurance defense counsel battling against and settling such claims. The work of a mediator in this milieu is heavily skewed toward inducing settlement. The mediator's role in such cases is almost that of a broker shuttling offers between separate caucuses chiefly with plaintiff and defense counsel in an effort to settle cases while focused virtually exclusively on monetary damages, incited by courts' pushing to get such cases off the docket.¹⁴⁹ Direct communication between the parties, or even participation in joint sessions, in these situations is often minimal or entirely absent.

Yet, other versions of mediation can involve the most complex and high stakes conundrums involving many parties.¹⁵⁰ Private commercial mediation often involves much more than reaching agreement on monetary damages. It can open disputes to creative solutions addressing underlying business challenges that have manifested themselves in almost proxy-like legal battles. Complex cases, very unlike automobile accident settlements, can expand resolution of a narrow legal dispute into enhanced relationships addressing underlying business interests. Mediator roles in these complex cases can facilitate direct party listening and brainstorming that goes to the heart of mediation's best qualities of flexibility and self-determination.

Studies on mediation can be misleading in that their context – run of the mill auto accident cases in court connected mediation...can often determine or limit their associated mediation process. That is, conducting a transformative mediation in a court annexed auto accident case to many may seem counterintuitive.¹⁵¹ Indeed, whether court-connected mediation is a positive or

Mediation: What We Know from Empirical Research, 37 Fordham Urb. L.J. 419, 426-427 (2010) (discussing additional studies).

¹⁴⁸ Wissler, *supra* note 146, at 645.

¹⁴⁹ See Leonard L. Riskin & Nancy A. Welsh, *Is That All There Is?: The "Problem" in Court Ordered Mediation*, 15 GEO. MASON L. REV. 863, 874-876 (2008).

¹⁵⁰ Eric D. Green, *The Role of the Judge in the Twenty-first Century: Re-examining Mediator and Judicial Roles in Large, Complex Litigation: Lessons from Microsoft and Other Megacases*, 86 B.U. L.REV. 1171, 1180-1192 (2001) (describing a Microsoft mediation among others).

¹⁵¹ Elad Finklestein & Shahar Lifshitz, *Bargaining in the Shadow of the Mediator: A Communitarian Theory of Post-Mediation Contracts*, 25 OHIO ST. J. ON DISP. RESOL. 667, 674-677 (2010). *See contra* Jody B. Miller, *Mediating Commercial Cases in U.S. Municipal Courts: A Case for Transformative Mediation* 1 Op. J. in Comp. 1, 4 (2012) ("Transformative mediation is well suited for courts since it affords parties a forum to move out of the negative, deconstructive experience that led to the escalation of the conflict, providing them with the ability to articulate the experience and its relation to the claim before the court. The idea that commercial cases are best addressed with a focus on the dollar amount misunderstands why cases make their way to court in the first place: because conflict has become negative and destructive, affecting the way the parties relate to one another, and leaving them few if any other options to resolve it.").

negative development is the subject of spirited debate.¹⁵² Again, tremendous pressure to settle often exists and an intense cultural expectation of damages-focused caucused exchange underlies the court-connected setting. The reality of mediation is often determined by the distinctions between court-annexed mediation and private mediation¹⁵³

iii. Developments in Mediation

Regardless of its shortcomings, mediation is now intimately intertwined with the courts.¹⁵⁴ Early mediation in the United State grew largely out of the urban social unrest of the 1960s.¹⁵⁵ In its combination of labor and criminal law issues, this led to the formation of community mediation centers, connection with the criminal justice system, and then direct involvement with courts.¹⁵⁶ Early family court (divorce) mediation programs have expanded and civil programs have grown – again often in attempts to clear dockets. These court-connected programs have been much criticized for their emphasis on settlement and their lawyer focused process – much like settlement conferences.¹⁵⁷ Again, they are generally seen as heavily influenced by evaluation, if not coercion, from mediators incented to resolve cases with settlements.¹⁵⁸ Yet, alternative applications of mediation have also grown. So the tension between mediation as a relational, community based process separate from the courts and the court connected drive -toward self-determined settlement remains a challenge.

iv. Public Justice, Private Process

A primary flaw in mediation shared with arbitration is its private, confidential nature, closed off from public review and visible public justice.¹⁵⁹ Finklestein and Lifshitz have sought to address this with the proposal of a communitarian approach to mediation that would put a court affiliated mediator in position as a community representative in the mediation process.¹⁶⁰ While

¹⁵² Robert A. Baruch Bush, *Staying in Orbit or Breaking Free: The relationship of Mediation to the Courts over Four Decades*, 84 N.D. L.REV. 705, 706 (2008) 706, 9 (“...the current ambivalence about the relationship of mediation to the courts is only the latest phase of a four-decade-long tension in this "partnership" of two very different dispute resolution processes. From the earliest beginnings of the "modern mediation field" in the late 1960s to the present, the relationship of mediation to the courts has fluctuated between two orientations. In the first, mediation has been seen and has served as a faithful "servant" of the court system, performing functions vital to the courts and to effective judicial administration. In the second, mediation has been encouraged and has sought to "break free" and establish itself as a separate and distinct conflict resolution process, performing very different functions that are vital to society but unrelated to judicial administration per se. The cycling between these two orientations is driven by the very different potentials mediation offers as a social process, as viewed through different professional eyes. These different views explain why some today are gratified by what they see as mediation's success in finding a firm place in the court system, while others are discouraged by what they see as the court system "capturing" mediation and depriving it of its real social value.”)

¹⁵³ Robert Rubinson, *Mediation Models and Comparative Dispute Resolution: of Grids and Gatekeepers: The Socioeconomics of Mediation*, 17 CARDOZO J. CONFLICT RESOL. 873 (2016).

¹⁵⁴ Baruch Bush, *supra* note 151, at 706 (offering a history of mediation with an emphasis on the tension the court-connection has on conceptions of mediation).

¹⁵⁵ *Id.* at 709.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 731-733.

¹⁵⁸ *Id.*

¹⁵⁹ *Arbitration, Transparency, and Privatization, supra* note 7, at 2855-2883.

¹⁶⁰ Finklestein & Lifshitz, *supra* note 150, at 674-5.

this idea is a well-intentioned notion primarily meant to address concern for public justice, it raises a countervailing concern of converting mediation back into civil litigation or legalistic arbitration.¹⁶¹ Finklestein and Lifshitz' communitarian proposal would not only entail court approval of settlement contracts, but the public disclosure of post-mediation contracts, which may or may not help to resolve the public-private tension.¹⁶² The communitarian proposal also relies heavily on notions of informed consent as a cornerstone of procedural justice intended to address social psychology research emphasizing the import of disputant perception of procedure as fair.¹⁶³ Finklestein and Lifshitz acknowledge that their proposal undermines the confidential nature of mediation, yet deem the increased public review necessary and ultimately not worse than the disclosure consequences of post mediation contract litigation.¹⁶⁴

v. Procedural Justice and Fairness

A paramount concern with any variety of approaches to mediation must be procedural justice.¹⁶⁵ Nancy Welsh makes a strong case for the paramount import of procedural justice in court annexed mediation, calling attention to the close connection to constitutional rights recognized in civil litigation.¹⁶⁶ The role of lawyers in the process is a major factor in distinguishing court-annexed mediation from settlement conferences. Much of Welsh' focus is on the sense of fairness that parties to mediation derive from the process – centering the existence of due process on the perception of the parties. Process control and participation are essential elements of fairness in mediation.¹⁶⁷

¹⁶¹*Id.*

¹⁶² *Id.* at 692-694. *See contra*, Jacqueline Nolan-Haley, *The Merger of Law and Mediation: Lesson from Equity Jurisprudence and Roscoe Pound*, 6 CARODOZO J. OF CONFLICT RESOL. 57, 64-68 (2004) (looking at law's coopting of mediation as analogous to law's prior coopting of equity).

¹⁶³ *Id.* at 701; *see also*, Jacqueline Nolan-Haley, *Informed Consent in Mediation: A Guiding Principle for Truly Educated Decision Making*, 74 NOTRE DAME L. REV. 775, 787-793 (1999) (fleshing out informed consent as the distinguishing feature of mediation); and Lela P. Love & John W. Cooley, *The Intersection of evaluation by Mediators and Informed consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45, 48-52 (2000) (focusing on what mediators should tell disputants to fairly inform them in the mediation process).

¹⁶⁴ Finklestein & Lifshitz, *supra* note 150, at 708.

¹⁶⁵ *See* Nancy A. Welsh, *Stepping back Through the Looking Glass: Real Conversations with Real Disputants about Institutionalized Mediation and its Value*, 19 OHIO ST. J. ON DISP. RESOL. 573, 619-638 (2004) [hereinafter *Looking Glass*] and Nancy A. Welsh, *Making Deals in Court-Connected Mediation: What's Justice Got to do with it?*, 79 WASH. U. L. Q. 787, 817-846 (2001) [hereinafter *Making Deals*]. *See also*, E. Allan Lind & Tom R. Tyler, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) and John R. Allison, *A Process Value Analysis of Decision-maker Bias: The Case of Economic Conflicts of Interest*, 32 AM. BUS. L.J. 481, 485-490 (1995) (discussing constitutional and non-constitutional origins of process, though focused on bias).

¹⁶⁶ *Id.*

¹⁶⁷ Omer Shapira, *Conceptions and Perceptions of Fairness in Mediation*, 54 S. TEX. L. REV. 281, 284-285, 290 (2012). ("A careful reading of mediation literature and provisions in codes of conduct for mediators that refer to fairness considerations reveals two general meanings attached to fairness. First, a normative meaning of fairness, i.e., an understanding of fairness as a concept that describes a norm of behavior that ought to be followed; second, an understanding of fairness as a perception that describes an experience of fairness perceived by various people.").

Welsh draws on significant work by social psychologists pointing to the importance of parties' subjective perception of procedural fairness in dispute resolution.¹⁶⁸ It is the sense that the process of dispute resolution is fair that matters in giving the disputants the sense that justice has been done, almost independent of outcome.¹⁶⁹ Indeed, more than outcomes, procedure seems to determine disputants' sense of justice and commensurate satisfaction with the method of dispute resolution.¹⁷⁰ Note, however, that we should not conflate the perception of procedural fairness that Welsh refers to with the notion of normatively fair procedure in terms of accurate rule following.¹⁷¹

Social psychologists assessing procedural justice and fairness of dispute resolution, Lind and Tyler, consider Levanthal's theory of procedural justice which offers some objectively reasonable measures with which to judge qualitative fairness in dispute resolution.¹⁷² Those measures are the elements of consistency, bias suppression, accuracy of information, correctability, representativeness, ethicality.¹⁷³ Lind and Tyler sort through numerous studies to arrive at a conclusion that disputants' conception of fairness in dispute resolution is largely explained by the group value theory of procedural justice opposed to the self-interested model.¹⁷⁴ That is, people are more concerned with their treatment in the dispute resolution process as a function of their perception of its impact on their standing in society.¹⁷⁵ How people perceive their treatment compared to others – the relational context- may be determinative as to whether they feel a dispute resolution process has been fair.¹⁷⁶

Other factors that matter in disputants' perception of fairness are the disputants' sense that they have control over the process and that the process allows them to express themselves.¹⁷⁷ Indeed these points are particularly salient to one favoring mediation as mediation's essential volitional element and emphasis on being heard by and listening to opponents are so at the heart of the process.¹⁷⁸ An additional benefit that this research calls attention to is post-conflict relations – which are generally more positive in the mediation context than in arbitration. Presumably, again, this is due at least in part to the volitional nature of any mediation outcome. Yet, Lind and Tyler call for much more research on this after affect, perhaps even more so because of contrary work emphasizing the public benefits of civil litigation in our constitutional system.¹⁷⁹

¹⁶⁸ Welsh, *Looking Glass*, *supra* note 164, at 61-630; *see* Linda and Tyler, *supra* note 164 at 130.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* (This is notwithstanding that several studies have indicated that Americans have a propensity to prefer adversarial dispute resolution, selecting arbitration as a first choice method.)

¹⁷¹ *See* Shapira, *supra* note 166, at 300-301. (A perception and conception of procedural fairness are not necessarily the same for several reasons. One reason is that one could wrongly believe that he has been mistreated in violation of the rules even though this has not been the case.)

¹⁷² Lind and Tyler, *supra* note 164, at 132-132.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 230-240.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 100.

¹⁷⁸ *Id.* at 121-122.

¹⁷⁹ *Id.*

Further critiques of mediation point to flaws in its fundamental claim to self-determination.¹⁸⁰ Horror stories of mediator bias and influence have been told.¹⁸¹ Indeed, ample litigation arising over failed mediation has been cataloged.¹⁸² Moreover, much of the relational benefit of mediation appears to have been lost in the growing propensity of mediators to forego joint sessions and conduct mediations as go-betweens for parties in exclusive caucus formats.¹⁸³

While much of the literature addressing disputants' perception of fairness in dispute resolution focuses on participant perception, public perception matters also.¹⁸⁴ This, of course feeds back into the social justice critique shared with arbitration – the lack of public disclosure and reviewability.¹⁸⁵ Yet, the very experience of mediation can be seen to have public externalities.¹⁸⁶ In the transformative (party centered) approach to mediation, the very awareness of the interaction of the process is enhancing of civility and therefore, productive of positive public externalities.¹⁸⁷ Social justice refers to “achieving relative equality of conditions (not just opportunities) as between all groups or classes within the society.”¹⁸⁸ Another version of the justice critique asks, “is it sufficient...for the outcome to be acceptable to the parties or must those settlement terms match the requirements of some external standard of evaluation?”¹⁸⁹

¹⁸⁰James Coben, *Mediation's Dirty Little Secret: Straight Talk About Mediator Manipulation and Deception*, 2 J. ALTERNATIVE DISP. RESOL. EMP. 4, 4 (2000) (arguing that mediators engage in manipulation to foster settlement); Lela Love & Ellen Waldman, *The Hopes and Fears of All the Years: 30 Years Behind and the Road Ahead for the Widespread Use of Mediation*, 31 OHIO ST. J. ON DISP. RESOL. 123, 137-139 (2016).

¹⁸¹ *Id.*; see Ellen Waldman, *Story as Sermon and Seduction*, 34 Cardozo L. Rev., 2443 (2013).

¹⁸² James Coben & Peter Thompson, *Disputing Irony: A Systematic Look at Litigation about Mediation*, 11 HARVARD NEG. L. REV. 43, 49-57 (2006).

¹⁸³ Love & Waldman, *supra* note 178 at 138.

¹⁸⁴ Lind & Tyler, *supra* note 164, at 160; Omer Shapira, *supra* note 166, at 302-304.

¹⁸⁵ *Arbitration, Transparency, and Privatization*, *supra* note 7, at 2855-2883; Robert A. Baruch Bush & Joseph A. Folger, *Mediation and Social Justice: Risks and Opportunities*, 27 Ohio St. J. on Disp. Resol. 1, 3 (2012). (The criticism of mediation as inimical to the achievement of justice has taken two major forms, although both point to similar elements of the process as problematic. The first type of critique focuses on the "individuating" nature of the mediation process, in which every case is handled on its own unique terms. The second type of critique focuses on the informality of the process, both procedurally and substantively, and the absence of formal rules and outside scrutiny.)

¹⁸⁶ Baruch Bush & Folger, *supra* note 183 at 36 (quoting Bush & Folger, "Parties to mediation are affected in two ways by the process: in terms of their capacity for self-determination, and in terms of their capacity for consideration and respect for others. And that itself is the public value that mediation promotes. In other words, going through mediation [can be] a direct education . . . as to self-determination on the one hand and consideration for others on the other. . . . The experience of the mediation process . . . serves the public value of civic education in self-determination and respect for others. . . . In our contemporary society, citizens increasingly suffer from learned dependency-whether on experts, on institutions . . . or otherwise -and from mutual alienation and mistrust, especially along lines of race, gender and class. The resulting civic weakness and division threaten the very fabric of our society. Personal experiences that reinforce the civic [practices] of self-determination and mutual consideration are of enormous public value-and this is precisely what the process of [mediation] provides. This [strengthening of civility] is the public benefit . . . critical to discussions of the public value of mediation, by comparison to the formal legal process or other ADR processes.")

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 3.

¹⁸⁹ Joseph B. Stulberg, *Mediation and Justice: What Standards Govern?*, 6 Cardozo J. Conflict Resol. 213, 214, 227-8 (2005) (proposing, inter alia, six principles supporting mediation as procedurally just; voluntariness,

Concern for fairness is so palpable that it shows up strongly in similar research in politics with implications for public policy formation.¹⁹⁰ Again, the process, not simply the outcome matters.

vi. Legalization and Lawyers

The expansion of court connected mediation and the associated legalization of mediation has been prominently critiqued. Jacqueline Nolan-Haley has called attention to the commonalities of mediation with equity in her look back to Pound's lament of the legalization of equity – the American folding of equity into the general body of civil litigation despite its separate origins.¹⁹¹ She finds a similar legalization of today's versions of mediation.¹⁹² She notes mediation's “capacity to reorient the parties towards one another, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another.”¹⁹³ In criticizing the increasingly legalistic quality of mediation, Nolan-Haley appears to emphasize fairness and individualized, self-determined justice as the heart and soul of mediation.¹⁹⁴

“The wholesale integration of mediation into our civil procedure points toward a de facto merger of law and mediation. While less formal than the official merger of law and equity, it is nonetheless real. Perhaps more than any other ADR process, mediation has easily blended into the civil justice system and is greatly accepted.”¹⁹⁵ Indeed, Nolan-Haley asserts that mediation has become the normal end to litigation.¹⁹⁶ She describes the nature of court connected mediation as both public and private.¹⁹⁷ She advocates for separate and distinct mediation practice not so intertwined with civil litigation, calling for procedural justice through mediation that is not rule bound.¹⁹⁸ Not surprisingly, as agreements in mediation have become less voluntary, resulting from more coercive mediators pushing for settlement, challenges to agreements have risen.¹⁹⁹

Nolan-Haley has been further critical of developments with mediation which she describes as moving mediation toward arbitration.²⁰⁰ She argues that increased involvement of lawyers and resultant adversarial posturing, together with the expansion of the evaluative approach to mediation are particularly demonstrative of this shift.²⁰¹ She worries that as a consequence, the core mediation values of self-determination and individualized justice are being corrupted.²⁰²

inalienability of interests, publicity of outcomes, dignity and respect, informed decision-making, toleration of conflicting fundamental values.)

¹⁹⁰ Lind & Tyler, *supra* note 164, at 147-172.

¹⁹¹ Nolan-Haley, *supra* note 161, at 62-65.

¹⁹² *Id.*

¹⁹³ *Id.* at 64, (quoting Lon Fuller, *Mediation: Its Forms and Functions*, 44 CAL. L. REV. 305, 325 (1971)).

¹⁹⁴ *Id.* at 66.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 70-71.

¹⁹⁹ *Id.* at 87-89.

²⁰⁰ Jacqueline Nolan-Haley, *supra* note 137, at 63.

²⁰¹ *Id.*

²⁰² *Id.* at 65.

Indeed, in her survey of New York lawyer-mediators, Nolan-Haley found much to criticize about the influence of lawyers on mediation.²⁰³ She found that the lawyers have framed issues narrowly and legalistically, used adversarial tactics and inflammatory language, and employed other tactics not akin to party focused self-determination.²⁰⁴ Part of the problem she finds lies outside of lawyers in the adversarial nature of our very culture.²⁰⁵

Similarly, Nancy Welsh proposes modifications of present versions of mediation to restore its essential elements of self-determination and procedural justice.²⁰⁶ Much of Welsh' remedy lies in the training of mediators to address bias, develop trust, and promote self-reflection and fairness in the process.²⁰⁷ Welsh draws on a collection of scholarly work to conclude that a fair dispute resolution process includes the opportunity for disputants to express themselves, demonstration that the decision makers have heard the disputants, objective neutrality in the forum, and dignified treatment.²⁰⁸ She notes that systems having these features can be shams and can be fraught with inequality of social status, resulting in skewed experiences, diminishing the voice of those with low social status.²⁰⁹ Perhaps controversially, Welsh supports others' calls for mediators to take an active role in preventing unconscionable outcomes to mediation – giving mediators a duty to censor and alter agreed to outcomes.²¹⁰ This references the also controversial concept of mediators serving as power balancers – knowingly and actively offsetting the resource laden and powerful party to give the resource deprived and relatively less powerful party a stronger voice in the mediation process on the notion that this will more likely result in a fair outcome.²¹¹

Yet, while scholars have criticized the role of lawyers in mediation and blamed them for turning mediation into arbitration or litigation, others have seen them as a more positive instrumental resource.²¹² Jean Sternlight has noted that lawyer knowledge of processes and strategy in dispute resolution appears to be the most compelling benefit of counsel in a mediation context, though she points out additional benefits such the skills of legal argument and information gathering.²¹³ Sternlight makes the compelling point that it is those with the least resources who can benefit the most from lawyer representation in dispute resolution.²¹⁴ Perhaps the greatest impact of Sternlight's position derives from her assessing the mediation experience as it actually is and not as the ideal form it ought to be. In its present form, she argues persuasively, mediation can benefit from lawyers' skills.²¹⁵

²⁰³ *Id.* at 74-84.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 90.

²⁰⁶ Nancy A. Welsh, *Do You Believe in Magic?: Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. REV. 721, 721-722 (2017).

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 734.

²⁰⁹ *Id.* at 737-750.

²¹⁰ *Id.* at 760-761.

²¹¹ Bush & Folger, *supra* note 141, at 16-18.

²¹² Jean R. Sternlight, *Lawyerless Dispute Resolution: Rethinking a Paradigm*, 37 FORDHAM URB. L. J. 381, 383 -4 (2010).

²¹³ *Id.* at 405-410.

²¹⁴ *Id.* at 395-6.

²¹⁵ *Id.* at 417-18

vii. Diversity of Dispute Resolution Practices

Part of the challenge in assessing definitively what the challenges with current mediation practices are and how to modify and improve them to preempt or provide an alternative to mandatory arbitration is the very diversity of mediation practices, both court connected and otherwise.²¹⁶ Thomas Stipanowich has referenced his work with Ian Macneil and Richard Speidel in finding much opportunity in contractual provisions for managing disputes, including mediation and arbitration.²¹⁷ Stipanowich notes that some companies have found opportunities in implementing creative dispute resolution programs, holding open alternative dispute resolution processes beyond largely lawyer driven mediation and arbitration.²¹⁸ Diverse and innovative approaches to dispute resolution may include technology enabled approaches such as online communication and greatly enhanced data collection and access, and need not be limited to narrow versions of mediation and arbitration.²¹⁹ Stipanowich mentions a contrasting Chinese approach where adjudicator and mediator can switch hats, unlike most U.S. alternative dispute resolution models.²²⁰ Of course such innovations raise the already existing criticism of med-arb that characterize such combinations as continued legalization of mediation, *supra*.²²¹

Internationally, many see a trend toward mixed-mode dispute resolution, combining aspects of mediation, conciliation, arbitration, as well as mixing the roles of neutrals and adjudicators.²²² Such combinations involve variations on mediation attempts that if unsuccessful result in arbitration that may or not be constrained by offers made in mediation.²²³ Stipanowich sets out a taxonomy of approaches to adjudication and evaluation in an attempt to create a definitive international lexicon for varied combinations and innovations of dispute resolution.²²⁴ He calls for further work by his task force to conduct a multiphase study of these approaches to develop international guides and best practices for an increasingly complex array of alternative dispute resolution structures.²²⁵

B. Building the Mediation Alternative

²¹⁶ Stipanowich, *supra* note 138, at 521.

²¹⁷ *Id.*, at 538 (citing Ian R. Macneil et al. FEDERAL ARBITRATION LAW: AGREEMENTS, AWARDS & REMEDIES UNDER THE FEDERAL ARBITRATION ACT (1996)). *See also*, Christopher R. Drahozal & Erin O'Hara O'Connor, *Unbundling Procedure: Carve-Outs from Arbitration Clauses*, 66 FLA. L. REV. 1945 (2015) and Larry A. DiMatteo, *Questioning the Ubiquitousness, but not the Value, of Arbitration Carve-Outs*, FLA. L. REV. F. (2015) (each for discussion of related contractual provisions).

²¹⁸ *Id.* (Looking to the construction industry as an imperfect example.)

²¹⁹ *Id.* at 533-4; 546. (Mentioning online crowd community courts and the EU online platform for resolving online consumer contract disputes.)

²²⁰ *Id.*, *see also* Thomas J. Stipanowich & Zachary P. Ullrich, *Arbitration in Evolution: Current Practices and Perspectives of Experienced Commercial Arbitrators*, 25 AM. REV. INT'L ARB. 395 (2014) (for a related survey).

²²¹ *See generally* Brian A. Pappas, *Med-Arb and the Legalization of Alternative Dispute Resolution*, 20 HARV. NEGOTIATION L. REV. 157 (2015).

²²² Thomas J. Stipanowich & Véronique Fraser, CONFERENCE ISSUE: THE INTERNATIONAL TASK FORCE ON MIXED MODE DISPUTE RESOLUTION: EXPLORING THE INTERPLAY BETWEEN MEDIATION, EVALUATION AND ARBITRATION IN COMMERCIAL CASES, 40 Fordham Int'l L.J. 839 (2017).

²²³ *Id.* at 853.

²²⁴ *Id.* at 871-873.

²²⁵ *Id.* at 877-885.

The preceding challenges to mediation are real but are not so damning as to impede the suggestion that some attempt at mediation is a better means of dispute resolution than pure reliance on mandatory pre-dispute arbitration. Several of the flaws of arbitration are shared with mediation; most particularly the flaws of confidentiality, privacy, and lack of public review or public conception of justice. Additional flaws with mediation include its creep toward arbitration and legalization – especially in court connected contexts. Yet, even in the midst of all these flaws and criticisms, the winning attributes of self-determination, better actual and perceived procedural justice, and flexible, volitional resolution unconfined by rules based adjudication make it the better approach – even when unsuccessful at reaching negotiated outcomes. Second steps that do not result in agreement resolving disputes can follow mediation. Attention to mediation's challenges can help us to craft an alternative to mandatory pre-dispute arbitration that best addresses these important concerns.

Even if mediation does not satisfactorily solve the privatization of dispute resolution problem or the related public justice demand, it does in many of its forms offer an accessible, flexible means for parties in conflict to hear and be heard and to choose outcomes in a way that neither arbitration nor litigation in their rule driven legalism make possible. Mediation is at the very least, a best first attempt at resolving disputes.

Mediation's best hope is that it opens doors to full communication between parties in conflict, enabling them a fair, self-driven process to determine their own mutually acceptable outcomes. When most successful, mediation leads to win-win solutions addressing underlying interests that otherwise might be cloaked in limited, adversarial legal issues and arguments. While the adjudicative processes of litigation and arbitration can at most resolve those adversarial legal issues and arguments, mediation can do much more.

To some extent, mediation remains the wild west of dispute resolution. Yet, to harken back to the point Stipanowich makes, this is in part its value and appeal.²²⁶ If we are guided by best practices, why can we not experiment with creative contractual solutions to incorporate mediation as at least a first step in innovative, possibly combined, forms of dispute resolution to supplant mandatory arbitration? It is the most logical alternative to mandatory arbitration. Though imperfect, contractual mediation would offer low cost, speed, and simplicity, in addition to self-determination, flexibility, and fairness in process. It would mitigate against coercive entrapment in private adjudication decided by an unreviewed private judge and would allow for subsequent versions of dispute resolution in the event that it resulted in impasse.

A best version of the mediation alternative to mandatory pre-dispute arbitration must account for the challenges discussed, *supra*. That is, a best version would first incorporate the promotion of a facilitative approach to mediation, alleviating concerns of coercion in too aggressive evaluative approaches.²²⁷ Second, a best version of the mediation alternative would allow experimentation with court connected and court separated contractual arrangements.²²⁸ Third, the best version would allow for public awareness and education about mediation and create some component of public reviewability – perhaps with heavily redacted public disclosure of post

²²⁶ Stipanowich, *supra* note 138, at 538.

²²⁷ See section III A i, *supra*.

²²⁸ See section III A ii and iii, *supra*.

mediation agreements.²²⁹ Fourth, a best version would require paramount attention to procedural fairness and the perception of procedural fairness both by disputants and the public.²³⁰ Fifth, the best version must attend to the role of lawyers in mediation and work, through training, to control their involvement so that parties have active and meaningful participation in the process, even as advised and benefited by lawyers' experience, information providing, and advocacy skills.²³¹ Finally, the best mediation alternative (or at least precursor) to mandatory pre-dispute arbitration should allow for innovation and resist constraint by existing and preceding forms of mediation and combinations of mediation with other forms of dispute resolution.²³²

C. Volitional Mediation as a Best Practice

It should be clear from parts I and II of this work that the Court and the critics are at an impasse over mandatory arbitration and that alternative proposals are needed to move dispute resolution in the direction of greater fairness and justice, while still honoring the driving interests of simplicity and speed that first spurred the development of alternative dispute resolution in lieu of crowded civil court calendars, complex rules of procedure, and opaque lawyering.

In addition to the constraints of arbitration and its increasingly litigation-like legalism, the Supreme Court's effective refusal to recognize defenses to contractual mandatory pre-dispute arbitration under Article 2 of the FAA leaves critiques of injustice, particularly toward individual employees, individual consumers, and individual investors too credible and too disturbing to leave unheeded. Simply continuing to criticize (no matter how accurately and convincingly) the Supreme Court's firmly established precedent enforcing myriad versions of mandatory arbitration is not enough. Promoting the contractual requirement of mediation as at least a first step alternative to arbitration is a plausible, constructive modification of dispute resolution. While mediation as at least a first step will not cure all the ills of dispute resolution, it offers substantially more hope of fairness and would directly counter the problem of forced arbitration with mediation's inherently participatory process and volitional outcomes.

From a consumer perspective, much of the concern over due process in dispute resolution lies in preventing or redressing the systemic injustice of large businesses controlling many relatively very less powerful employees, consumers, and investors through mandatory pre-dispute arbitration contract clauses. This policy interest provides a compelling rationale for class action lawsuits or class action arbitration. Yet, present Supreme Court common law aggressively enforces mandatory pre-dispute class arbitration and general class waivers in relationships papered with adhesive contracts between large corporations and many uninformed employees, consumers, and investors.

i. FINRA Model

The discussion in part III B, *supra*, suggests the key considerations to account for in building a mediation alternative to mandatory pre-dispute arbitration. To get a better sense of how

²²⁹ See section II A iv, *supra*; see Finklestein & Lifshitz, *supra* note 150 at 686.

²³⁰ See section III A v, *supra*.

²³¹ See section III A vi, *supra*.

²³² See section III A vii, *supra*.

this alternative might work and look, we might consider the existing FINRA model.²³³ A variation of the present FINRA model provides a potential example for how a combined dispute resolution protocol including mediation as a first step might work. Though FINRA dispute resolution appears to focus on arbitration, FINRA actively promotes mediation to parties who file for arbitration and directs class claims to the civil courts. FINRA mediation can proceed either prior to or simultaneously with arbitration and results in the settlement of 4 out of 5 cases.²³⁴

If we simply made a first attempt at mediation a contractual obligation in employment, consumer finance, and investment contracts, we would provide a volitional opportunity for mutually agreed to outcomes without the rules based formality and legalization of arbitration or litigation. And, again, any outcome would be volitional, not the result of forced adjudication.

ii. Italian Model

One area of the world that has been embracing mediation is the European Union. EU Directive 2013/11/EU mandated EU member countries to create consumer alternative dispute resolution programs.²³⁵ Of course, a full survey of EU member countries on mediation practices is far beyond the scope of this article. Indeed, a comprehensive look at one country is beyond the scope of this article. However, a cursory look at one country may be instructive.

One of the most changeable of countries subject to EU directives on dispute resolution is Italy. With Legislative Decree no. 28/2010 passed in response to European Directive 2008/52/EC for cross border mediation, Italy implemented a compulsory initial mediation session upon court filing for certain civil causes of action, then made it volitional, and then again made mandatory an initial mediation session (with mandatory lawyer assistance) for those causes of action in the span of under ten years.²³⁶ The Italian experience has shown greatest success in the mandatory initial mediation sessions resulting in volitional agreements to resolve disputes by mediation.

²³³ 14104. Mediation under the Code

(a) Mediation under the Code is voluntary, and requires the written agreement of all parties. No party may be compelled to participate in a mediation or to settle a matter by FINRA, or by any mediator appointed to mediate a matter pursuant to the Code.

(b) If all parties agree, any matter that is eligible for arbitration under the Customer Code or Industry Code, or any part of any such matter, or any dispute related to such matter, including procedural issues, may be submitted for mediation under the Code.

(c) A matter is submitted to mediation when the Director receives an executed Submission Agreement from each party.

(d) The Director shall have the sole authority to determine if a matter is eligible to be submitted for mediation.

²³⁴ Initial Pre-Hearing Arbitrator's Script under FINRA Rule 12500. Initial Prehearing Conference ("F. Mediation: We want to remind the parties that FINRA Dispute Resolution has a successful, voluntary mediation program. Mediation is an informal process in which a mediator facilitates negotiations between disputing parties. The mediator's role is to help the parties find a mutually acceptable solution to the dispute. Parties who mediate at this forum resolve four out of every five cases."")

²³⁵ 2013/11/EU (4) Ensuring access to simple, efficient, fast and low-cost ways of resolving domestic and cross-border disputes which arise from sales or service contracts should benefit consumers and therefore boost their confidence in the market. That access should apply to online as well as offline transactions, and is particularly important when consumers shop across borders.

²³⁶ Guiseppe Conte, *The Italian Way of Mediation*, 6 Y.B. Arb. & Mediation, 180 (2014).

Another possible model for an alternative mediation approach might look like the Italian requirement of first session mediation for many civil claims – but in a manner less settlement driven than existing U.S. court-connected programs. These Italian mediations accounted for 90% of all mediations under the directive and showed a 50% success rate among them in reaching agreements resolving disputes.²³⁷ As a mandatory first session for certain civil claims has shown, on this model, volitional agreement resolving disputes would be likely to increase substantially and yield a 50% settlement rate.

Where mediation fails, second step arbitration or litigation might continue. Current U.S. court-connected mandatory mediation programs could be modified to better accommodate the challenges discussed in part III B, *supra*. Most particularly, less court driven pressure toward settlement and more training of mediators in a facilitative or transformative approach would help open the potential of mediation as at least a first step.

iii. Best Practice

Thus, this article proposes that a best practice in dispute resolution is to contractually require a first attempt at mediation prior to any mandatory arbitration. This best practice would be an easily accepted modification for individuals and small businesses in each of the employment, consumer finance, and investment contract fields. Large businesses would be incented to adopt this best practice as a consumer friendly marketing incentive. In the same way the sustainability promotion has an instrumental marketing benefit, publicly adopting first step mediation would offer big business consumer friendly marketing, attracting business by reason of less coercive, more consumer friendly first step mediation in the event of disputes. Large business might even fully fund mediation programs with independent third party mediators. In the current parlance, offering this best practice is a nudge toward the volitional contractual inclusion of mediation as a first step in dispute resolution in employment, consumer finance, and investment contracts. There is ample reason to believe such a nudge can work.²³⁸

A window into the plausibility of this best practice marketing incentive for business opened recently in the employment market for summer associates and first year attorneys.²³⁹ When a law professor or two called out law firms for requiring summer associates and first year associates to sign mandatory pre-dispute arbitration provisions (rather like the plaintiff(s) in *Morris v. Ernst & Young*²⁴⁰, consolidated in the *Epic Systems* case) law students also spoke up in protest and the firms responded by dropping the policy. On this notion, promoting firm sponsored mediation

²³⁷ Leonardo D'Urso, *Italy's Required Initial Mediation Session: Bridging the Gap Between Mandatory and Voluntary Mediation*, The Newsletter of the International Institute for Conflict Prevention & Resolution, Vol. 36 No. 4, April 2018, 1.

²³⁸ See generally Shala F. Ali, *Nudging Civil Justice: Examining Voluntary and Mandatory Court Mediation User Experience in Twelve Regions*, 19 Cardozo J. Conflict. Resol. 269 (2018) and Richard H. Thaler & Cass R. Sunstein, *Nudge* (2008).

²³⁹ Angela Morris, *Why 3 Biglaw Firms Ended Use of Mandatory Arbitration Clauses*, ABA Journal, June 2018, at ____; Aidan F. Ryan, *Harvard Law Students Push Major Firm to Drop Controversial Contract Provision*, The Harvard Crimson, November 6, 2018 at 7.

²⁴⁰ 834 F.3d 975, 989 (9th Cir. 2016).

programs and/or promoting the absence of mandatory arbitration agreements, could advance a firm's market position.

Employers or businesses that promote a consumer friendly best practice by offering mediation as at least a first step prior to mandatory arbitration, can appeal to the marketplace and benefit instrumentally -- notwithstanding any normative imperative to cease mandatory arbitration, which imperative was clearly felt at large law firms wanting to recruit law school students and graduates.

IV. Conclusion

Though this work is not yet offering one definitive prototype of a mediation alternative to mandatory arbitration, it is offering both the features to employ in this endeavor and the best practice of volitional contractual first step mediation as the beginnings of more developed models putting mediation first in dispute resolution. It is, in effect, a call for further innovation in developing mediation as a first step contractual solution to the impasse of the Supreme Court's hardened precedent enforcing mandatory arbitration and the scholarly criticism that the Court appears to have dismissed. Big business, step up to the nudge.