In the Shadow of Litigation: Arbitration and Medical Malpractice Reform

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Abstract Alongside the dramatic growth in the use of mandatory, binding arbitration in the United States, proposals to use arbitration in lieu of medical malpractice litigation have proliferated as a mechanism for providing a more efficient and less costly way to resolve disputes. However, these proposals have largely been divorced from an understanding of the history, politics, and law of arbitration, which comes with a significant cost. Although liberals developed arbitration with the goal of ensuring access to justice for those who struggled to find it in traditional courts, conservatives (both in Congress and in the private sector) began to promote it in the latter part of the 20th century as a way to keep what they considered "lesser" cases out of court and to better protect corporate and other powerful institutional defendants from litigation. This article examines this transition toward the use of private, mandatory, and binding arbitration through three periods of institutional change: partisan conversion, judicialization, and privatization. It argues that it is essential to situate malpractice reform proposals in the history, politics, and law of arbitration in practice, where partisan efforts have privatized arbitration with significant effects for equality under the law.

Keywords litigation, arbitration, medical malpractice, politics, health policy

Proposals to limit medical malpractice liability and litigation have become perennial features of debates about the cost of health care in the United States. Whether framed as a way to address the growth of "defensive medicine," to cut down on so-called frivolous litigation and excessive jury awards, to ease the burden of expensive liability insurance premiums and fear of litigation for physicians, or to better protect patient rights by establishing a more accurate and less adversarial system of dispute

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resolution, over the past three decades reformers have increasingly proposed alternatives to litigation as more efficient, less costly mechanisms to resolve malpractice claims. These proposals often employ various forms of alternative dispute resolution (ADR) procedures—including mediated settlements, "health court" tribunals, and binding arbitration—in an attempt to reform what has been described as a system of "inadequate deterrence, infuriated physicians, and excessive transaction costs" (Peters 2008: 234).

It is not surprising that proposals aiming to resolve malpractice disputes through alternative means have proliferated in recent decades. ADR has a long history in the United States, and its original impetus stemmed largely (a) from a desire to give more citizens better access to the legal process by making available a less expensive, less time consuming, and less adversarial dispute resolution process, and (b) as an attempt to ease the growing caseload and burden on the legal system that intensified dramatically with the "litigation explosion" of the 1950s and 1960s. Today, arbitration in particular is used widely in both the public and private sectors. Almost half of all federal agencies reported using some form of ADR in their internal dispute resolution systems by 1997, and this is even more pronounced in the private sector, where many employers and more than 75% of banks, cell phone carriers, and credit card companies include mandatory arbitration clauses in their contracts (see, e.g., Colvin 2011; Public Citizen 2009). While the use of arbitration and other administrative alternatives remains "relatively recent and not yet common" (DeVille 2007: 334) in medical malpractice, 9% of US physicians require that individuals sign such contracts in order to be seen, and in California about 10% of hospitals (responsible for 20% of hospital admissions in the state) require that patients forgo their right to bring malpractice disputes to court (see, e.g., DeVille 2007; Nieto and Hosel 2009). Importantly, private systems of predispute, binding arbitration through which individuals must bring their grievances are often entirely internal to businesses; they are designed and operated by the very entity against which individuals are making their claims. Perhaps unsurprisingly, current data—although piecemeal, because corporations and the organizations that manage arbitration proceedings are not typically required to report their outcomes—indicate an overwhelming corporate success rate.

While malpractice is an area of tort litigation that is arguably especially ripe for reform, proposals to expand the use of mandatory arbitration into this arena have thus far been largely divorced from an understanding of the history and politics of ADR (see, e.g., Brown 2010). This comes with a significant cost. Dating back centuries, the rise of arbitration practices in

the United States was led by progressives who hoped to ensure access to a fair hearing for those who struggled in traditional courts. Congress granted statutory recognition of arbitration contracts with the Federal Arbitration Act of 1925 (FAA), stipulating that such contracts must be upheld by courts. As I describe in this article, however, the nature of the contracts supported by the original act stands in stark contrast to the arbitration clauses of today, which conservatives began to promote in the latter part of the 20th century to keep what they considered "lesser" cases out of court and to better protect corporate and other powerful institutional defendants from what they consider frivolous litigation. As such, conservative support for arbitration escalated in the years after the Civil Rights Era, in the context of a general shift toward a more liberal judiciary and an outpouring of statutes that created new rights against employers. However, the changes in the structure of arbitration that reflect conservative and corporate interests largely came to form in the 2000s, in many ways facilitated by the Supreme Court's recent jurisprudence on the topic.

On the one hand, then, the modern-day conservative agenda in this realm seems overt; but on the other hand, this belies a bipartisan and long-standing consensus that built and supported arbitration. Any attempt to understand its current usage independent of its historical lineage obscures the process through which interested parties have utilized an institutional construct that was initially put into place for very different purposes. Specifically, businesses and their conservative allies in government have successfully co-opted the arbitration infrastructure to the disadvantage of the civil rights and consumer plaintiffs that it was meant to serve. This is also true in the realm of malpractice, where the available data suggest that institutional defendants, such as hospitals and managed care organizations, win an overwhelming percentage of decisions.

Here I argue that it is essential to situate debates about arbitration and its use in medical malpractice reform in the context of the institutional, political, and legal development of arbitration in the United States. Unlike health economists and policy scholars who have studied malpractice extensively in terms of its contribution to health care costs and its effectiveness, my aim is to add a political dimension to these conversations by bringing to bear the politics and legal controversies that have shaped, and continue to shape, the use of arbitration. Accordingly, I proceed by describing the contours of litigation reform in the area of malpractice before detailing the origins of arbitration and its early use. I then examine the expanding use of arbitration through three periods of institutional

change: (1) partisan conversion, (2) judicial entrenchment, and (3) privatization. Specifically, although initially a Progressive Era reform, liberals and progressives began to divide over the costs and benefits of arbitration's expansion during the Civil Rights Era. Republicans in Congress, meanwhile, began to pursue legislation that promoted expanding its use—but with very different goals in mind. Subsequently, in a series of roughly 20 decisions over the past three decades, the Supreme Court has interpreted the foundational legislation for arbitration so as to require binding arbitration more often than not—even in the face of state-level statutes that aim to limit its use and protect the legal process—thereby insulating it from public or government intervention and endorsing it as a private enterprise.

Analyzing this process of institutional, political, and legal development—particularly by examining what Jacob Hacker (2004) has termed the "subterranean" processes of institutional change—produces several arguments and observations regarding arbitration that carry implications for its use in place of malpractice litigation. First and most simply, there are many reasons to believe that arbitration will be used with more frequency in the malpractice context, particularly as these reform efforts are situated within a broader tort reform agenda that has long targeted malpractice. As such, patients are increasingly required to forgo access to the legal process and any chance of judicial review in order to access a growing array of goods and services, or even to be seen by a particular doctor or hospital. Second (as described above), the increased use of arbitration has been importantly influenced by an ideological divide between liberals and progressives that opened the door for a conservative "conversion" of arbitration. Third, this shift in partisan politics and law, enabled by the Supreme Court, has effectively "privatized" arbitration, with significant effects for equality under the law. Pursuing a lawsuit is a time-consuming and costly process, involving obtaining legal representation, liberal discovery and motion practices, the right to call on witnesses and to cross-examination, a written record, and the right to appeal and judicial review. But the same procedural mechanisms that slow the process (and prompt reform efforts) are also designed to put the plaintiff and defendant on equal footing, allowing individuals to make their best case in the context of what is often a dramatic power differential between plaintiff and defendant. Arbitration compromises these protections in an attempt to expedite the dispute resolution process, and the impact so far has been to privilege the defendant physicians, hospitals, and managed care organizations that are often the "repeat players." I seek to draw attention to this subterranean politics of institutional change.

Arbitration and Medical Malpractice Tort Reform

Proposals to use arbitration in lieu of malpractice tort litigation have proliferated in recent decades alongside debates over health care reform. Malpractice payments constituted 0.11% of overall health care costs in 2015, and medical liability premiums, 0.21%. The number of both liability payments and malpractice trials have declined in recent years,[1] but costs for patients continue to rise. A recent study estimates that each year between 210,000 and 440,000 patients suffer some kind of preventable error in hospitals that contributes to their death, making medical error the third leading cause of death in the United States (James 2013: 122; Makary and Daniel 2016). Underenforcement is also a pervasive problem: while a malpractice allegation is common in the professional life span of a doctor (a 75–99% risk; Studdert et al. 2006; Jena et al. 2011), only 2–3% of injured patients ever file a malpractice claim in court (Mello, Kachalia, and Studdert 2007).

Malpractice litigation is unique in a variety of ways that likely contribute to this underenforcement. First, while the average length of time for the resolution of tort lawsuits is 23 months, the average time between the occurrence of a medical injury and legal resolution is 5 years. This disproportionately lengthy process is often cited as impetus alone for significant reform (Studdert et al. 2006). Second, malpractice plaintiffs fare worse in front of juries than plaintiffs in other personal injury cases: while patients in personal injury trials win over 50% of the time, malpractice plaintiffs prevail much less, with studies citing a 19–30% success rate (Cohen 2004). Third, the success rate at trial is low despite the severity of the injuries at hand: over 90% of the cases that make it to trial allege that the conduct amounting to malpractice caused permanent injury or death—with death constituting a third of the total. Public Citizen (2014: 6) noted that, despite the rhetoric around malpractice and frivolous lawsuits, "the vast majority of medical malpractice payments compensate for injuries that no one would deem frivolous."[2]

Fourth, when malpractice lawsuits are resolved through the legal process, the damage awards are large; successful plaintiffs receive an average of about $485,000 per claim, with a median of $205,000 (Studdert et al. 2006). These figures double when a case is decided in court, rather than

1. The National Practitioner Data Bank, Bureau of Labor Statistics Consumer Price Index tracks these payments. For a discussion of the decline in malpractice trials, see Paik, Black, and Hyman 2013.

2. Public Citizen is a non profit consumer advocacy organization that regularly issues reports on these and other key malpractice statistics. My analysis of malpractice litigation since 1973 through Lexis Advance indicates approximately a 30% success rate for patients.

through settlement.[3] This is especially striking given that the average award in personal injury litigation is $31,000 (US Department of Justice 2005). However, few cases are resolved by a trial—7% of claims filed—and the large damage awards that tend to pervade the national headlines are rare (Jena et al. 2011). Finally, studies that have employed neutral physician reviewers to assess malpractice cases to judge the "validity" of trial outcomes have generated widespread consensus that the "right" cases win at trial. Specifically, these studies find that the stronger the plaintiff's evidence of negligence, the greater the likelihood of a verdict in their favor, and the larger the damage award (see, e.g., Peters 2007).

On the one hand, then, it appears that these are life-changing injuries that, when they are heard in court, tend to be resolved "accurately," leading some scholars to conclude "the malpractice system performs reasonably well in its function of separating claims without merit from those with merit and compensating the latter" (Studdert et al. 2006: 2031). On the other hand, it remains clear that medical malpractice is a complex legal issue in need of reform, as the vast majority of medical errors receive no type of hearing or compensation, meaning that the percentage of individuals who are compensated for their injuries is only a tiny fraction of victims of malpractice as a whole. Arbitration has been proposed as an alternative; but while it is undeniable that the current legal regime does a relatively poor job of protecting the rights and welfare of negligently injured patients, it is also unclear what impact arbitration has and would have. Some have argued, for example, that arbitration simply allows doctors, hospitals, and managed care organizations to create an "alternate procedural universe" wherein individual patients are categorically disadvantaged (Horton 2011: 460–61).

Data on who succeeds in other realms of arbitration are illuminative. For example, a Public Citizen (2007) study of consumer arbitration in California found that the National Arbitration Forum (NAF; a private, third-party entity employed largely by businesses to arbitrate their claims) handled more than 19,000 disputes involving credit card holders between 2004 and 2007, and they ruled against consumers and in favor of business 94% of the time. Further, in 16,065 of the 19,000 cases the arbitrator based the decision solely on documents provided by the company. In these cases, the consumer won exactly twice, with the NAF finding in favor of businesses a

3. Studies give a range in the amount collected as the result of a successful jury trial: while the Bureau of Justice Statistics numbers from 2005 give an average of $679,000, the 2006 Studdert et al. *NEJM* study gives an average of $799,000 (also reporting that the average amount awarded in a legal settlement is $462,000).

stunning 99.99% of the time. Individual consumers had legal representation in only 4% of the disputes, and in the 2,000 cases where the arbitrator actually did hold a hearing, the consumer still prevailed in only 1.4% of the cases (Public Citizen 2007; Committee on the Judiciary 2007). Other sources provide similar data on arbitration outcomes: a lawsuit filed by the city of San Francisco found that the NAF ruled in favor of businesses 99.8% of the time, and data provided in a class action lawsuit against First Bank USA (the nation's second largest issuer of credit cards) disclosed that the company won 99.6% of the disputes decided in their system of arbitration.[4] Individuals seem to fare slightly better in employment disputes: a study of 4,000 employment arbitration cases found that arbitrators found in favor of employees 21% of the time—significantly lower than rates of success in litigation proceedings—and award amounts were substantially lower as well (Colvin 2011). Arbitration, then, has thus far been an effective mechanism for shielding corporate and other institutional defendants from liability.

This disproportionate corporate success rate is likely enabled by two characteristics of private arbitration systems. First, as noted above, arbitration forums grant individuals only a diluted form of due process—in fact, procedural shortcuts like limited discovery are in many ways the very point of arbitration, or what makes it faster and more efficient (Clancy and Stein 2007). Further, while procedural devices like pretrial screening panels are used by 17 states, there is no such parallel when it comes to arbitration. Second, the arbitration systems in which such complaints are resolved are often designed and executed by the very entities against which claims are brought, facilitated by either nonprofit groups like the American Arbitration Association (AAA) or for-profit groups like the NAF, which businesses hire to provide arbitrators. This privatization in turn raises questions about the neutrality of the dispute resolution process and accuracy of outcomes, as repeat players are often better able to navigate the arbitration process and select arbitrators who will be favorable to their position (Galanter 1974). Further, arbitrators, whose livelihood depends on being selected for future arbitrations, may have an incentive to make decisions in favor of the repeat players that continue to employ them.

Recent studies have demonstrated the empirical validity of this repeat player effect in the context of consumer and employment arbitration,

4. See city attorneys' complaint, *People of the State of California v. National Arbitration Forum, Inc. et al.*, San Francisco Superior Court no. 473–569 (March 24, 2008) and *Michael A. Bownes v. First USA Bank, N.A. et al.*, Circuit Court of Montgomery, AL, civil action no. 99-2479-PR.

generating a robust consensus in the law literature that arbitration appears to be a less successful dispute resolution mechanism for would-be plaintiffs, especially when facing a repeat player. A study conducted by the Consumer Financial Protection Bureau (2015) found that 80% of consumer arbitrations involved what they characterized as a "heavy" repeat-playing company, confirming its asserted prevalence. Further, a study of 5,000 complaints filed by consumers with the AAA found both a business and business-arbitrator repeat player effect, wherein the individual consumer success rate dropped significantly when facing a repeat-player business and even more so when encountering the same repeat player more than once (Horton and Chandrasekher 2015). Studies involving employment arbitration have found similarly; for example, Alexander Colvin (2011) demonstrated that both employee win rates and award amounts are significantly lower when the employer is involved with multiple arbitrations. Additionally, he found a significant "repeat-employer-arbitrator pairing effect" wherein employees on average have lower win rates and receive smaller damage awards when the same arbitrator is involved in more than one case with the same employer.

While these patterns are clear, whether they translate to the malpractice arbitration context is less thoroughly demonstrated. This is partially due to a lack of comparable data. While the AAA has recently made available some of its data regarding its consumer and employment arbitrations, it left the business of malpractice arbitration in March 2002. However, Kaiser Permanente, which requires that all of its members in California sign such contracts, is required by state law to release the outcomes from their internal arbitration system. I discuss this at length below, but it is worth noting at the outset that, at approximately 4%, the patient success rate is comparable to or worse than that in consumer and employment arbitration, in a system both designed by Kaiser and where their hospitals are the repeat players in all malpractice arbitrations. Settlement rates in their arbitration system are around 40%, which is significantly lower than the settlement rate for malpractice liability litigation (typically reported at about 85–90%) and comparable to settlement rates in consumer and employment arbitration. It is also important to note that, in this system—as with the predispute, binding arbitration contracts heavily utilized by corporations and employers—patients are *required* to agree to arbitration to participate in the system. While courts have long been reluctant to enforce contractual waivers of liability in which hospitals require a waiver of liability before treatment (*Tunkl v. Regents of University of California*, 60 Cal. 2d, 1963), there is

no such corollary when required to sign these arbitration clauses except to forgo the opportunity altogether. Further, the diminishing availability of arbitrationless options when signing up for a credit card or cell phone, taking out a loan, taking a job, or to be seen by a particular hospital or physician might diminish some of the potential differences between individuals who choose to opt in or opt out. While there are limitations to extrapolating from the consumer/employment context to malpractice, the apparent similarities provide reason to explore whether similar trends and complications might manifest here.

Arbitration: In History and in Practice

Arbitration's Origins

While widespread use of arbitration—in which a nonjudicial, third-party actor facilitates a resolution outside of court—emerged as a broad trend during the New Deal and Civil Rights Eras, private businesses have increasingly opted to employ arbitration in recent decades (see, e.g., Eisenberg et al. 2008; Kessler 2012). Whether when signing up for a credit card or cell phone, agreeing to an employment contract, taking out a student loan, or asking to be seen by a particular doctor, individuals are required to sign these contracts as part of the terms of service. In so doing, they also sign away their right to resolve a complaint in court, regardless of the nature or severity of the harm, as well as the due process rights that go with it.

Modern support for arbitration exploded in the early 20th century, often coinciding with periods when courts were attacked as unwelcoming to certain litigants or types of cases. But the idea of using ADR to lessen the "delay, expense, and formality of a lawsuit" dates back even further, viewed by many state legislatures in the 1800s as a way to ease the growing caseload shouldered by the courts and to make dispute resolution easier for individuals by making it less adversarial (*True American* 1846).[5] ADR generally was thought to provide litigants the opportunity to participate more directly in a less adversarial process for resolving their disputes. Arbitration in particular has long been viewed as an effective mechanism for avoiding the problems of cost and delay that pervade civil litigation.

5. So-called courts of conciliation became a popular innovation by the mid-1800s, often praised as a remedy for "that unwieldy machinery of a jury trial" (see *National Intelligencer and Washington Advertiser* 1804:2) and for aiming "speedily to arrange those controversies that sometimes spring up between very honest and well meaning men, without the costs and delays attending upon a litigation in our courts" (see *Albany Argus* 1846:2).

This became increasingly important as the burden on the federal courts grew over the 20th century.

But while the arguments in favor of arbitration have been consistent, *who* has invoked them has changed considerably. Businesses were instrumental in the early days of ADR, as they saw arbitration as a cost-effective way of handling "daily" commercial disputes that was clearly preferable—as the chairman of the Arbitration Committee of the New York Chamber of Congress put it in 1924—to "costly, time-consuming and troublesome litigation" (Committee on the Judiciary 1923: 203). The legal community and judges during the Progressive Era were more skeptical, both fearful that arbitration threatened the authority of judges and concerned about whether professional arbitrators could assess disputes accurately. But the increase in caseloads during the industrial revolution and labor disputes between unionizing workers and the railroad industry kept arbitration on the agenda (see, e.g., Orren 1992; Schreiber 1971), and by the turn of the century half of the nation's state legislatures had created arbitration boards to handle a range of disputes. As the federal government and private sector continued to promote arbitration, the legal community began to cautiously accept it as a voluntary alternative to litigation,[6] and liberals in the Democratic Party viewed it as a way of responding to the crisis that expansive litigation was creating for overburdened dockets. This coalescence of interests prompted Congress to pass the FAA in 1925, which provided for judicial facilitation of private dispute resolution through contractually based arbitration and mandated that courts uphold and enforce arbitration agreements unless such agreements were produced as the result of corruption, fraud, or prejudice.

In the decades that followed, through executive orders and legislation like the Norris-La Guardia Act of 1932 and the National Labor Relations Act of 1935, congressional support for arbitration continued to grow. The FAA was reenacted in 1947 without any substantive change, and its purpose was understood as granting courts the right to stay or dismiss pending lawsuits in favor of arbitration and to enforce awards where appropriate. But at its seeming height in the mid-twentieth century, liberal support for arbitration began to waver. Many New Deal policy makers became disenchanted with the administrative model, finding it too vulnerable to interest

6. Federal agencies such as the Department of Labor employed ADR, and local chambers of commerce and groups like the National Civic Federation and the American Arbitration Association also promoted it. ADR was a central topic at the Pound Conference of 1916, which brought together lawyers and legal academics concerned that the current civil litigation system made it difficult for ordinary citizens with relatively minor, less profitable cases to find lawyers willing to represent them.

group capture. As the American Bar Association (ABA) Special Committee on Administrative Law (1938: 331) argued, unless "the bar takes upon itself to act, there is nothing to check the tendency of administrative bureaus to extend the scope of their operations indefinitely, even to the extent of supplanting our traditional judicial regime by an administrative regime." The Civil Rights Era's focus on those denied access to the political process reintroduced the value of traditional court proceedings and due process rights into the conversation, and this reinvigorated arbitration's detractors. Furthermore, prominent law professors publicly embraced litigation as the most powerful way for disadvantaged groups to achieve justice and criticized arbitration as dangerously enabling private interests to dominate disadvantaged communities (see, e.g., Abel 1982; Fiss 1984: 1089; Merry 1987: 2057; Nader 1979: 998). The Warren Court, however, supported arbitration, notably in a series of decisions in 1962 (the "Steelworker Trilogy") in which it established a presumption in its favor for disputes arising from collective bargaining agreements.

By the 1970s, then, there was a clear divide among liberals as to the value of arbitration, with some claiming it promoted a second-rate system for resolving disputes and others supporting it as an innovation that allowed disadvantaged plaintiffs to have better access to justice. At the same time that consumer rights activists like Ralph Nader and Legal Services Corporation president Thomas Erlich took the position that arbitration would simply become the venue for the "lesser" legal disputes of the day, Democratic majorities in Congress passed new laws employing ADR practices to enforce rights and benefits for environmentalists, prisoners, and the elderly. Further, many public interest advocates adopted a positive stance toward arbitration when it came to ensuring access to courts for their groups; for example, Alan Houseman (1978), the director of the Research Institute of Legal Services, argued at the time that litigation was not helping to solve the problems of the poor and that advocates needed to find more nonadversarial means to serve populations that were still being neglected by their services.

In total, the use of arbitration grew further in the years after the rights revolution. Notably, Congress passed the Dispute Resolution Act in 1980, which was characterized as an incentive program designed to encourage experimentation with arbitration, and new specialties of ADR developed. This expansion relied heavily on funding from private groups and organizations that provided the resources to train individuals. But even while prominent Democrats like Senator Edward Kennedy continued to promote legislation designed to encourage experimentation with ADR

and specifically nonbinding arbitration as an alternative to litigation (see, e.g., Committee on the Judiciary 1978), the concerns voiced by consumer and civil rights advocates continued to mount.

Arbitration and Medical Malpractice Reform

Throughout this busy period of expansion, the perceived need for medical malpractice litigation reform was propelled onto the social and political agenda as a key issue item in debates over arbitration and its use. Malpractice cases began to make national headlines in the 1960s, with media coverage initially very pro-plaintiff in nature; individual instances of patients winning large sums in tort cases against doctors and hospitals featured stories of egregious medical error and "corrupt" physicians, in many ways contributing to a burgeoning patient safety movement (*Los Angeles Times* 1964; *Wall Street Journal* 1965). In turn, patients began to demand opportunities for more informed consent, the right to refuse treatment, and the right to participate fully in their treatment plans. This prompted doctors to purchase malpractice insurance in the 1960s, fearing the rise of highly visible and costly lawsuits and bemoaning courts and judges for making it too difficult and costly to defend themselves before juries (Starr 1984).

By the mid-1970s, malpractice also became a political matter. Shortly after Mutual Insurance of Wausau, which provided coverage to approximately 30,000 doctors, terminated its coverage due to risks and liabilities growing out of proportion to the rest of their business, increases in premiums became a crisis across the country, with multiple state legislatures attempting reform. President Nixon (1971) referred to the "special problem" of malpractice litigation as "profound," criticizing it both for raising health costs and for creating a "climate of fear" among doctors, driving them to practice "defensive medicine" and compromising the quality of health care.

Nixon in turn established a Commission on Medical Malpractice within the US Department of Health, Education, and Welfare, which released a report in 1973 labeling malpractice a "complex of problems" that intersected health policy, litigation, insurance, and the relationship between doctors and patients. While the report cited the risk of a doctor facing a malpractice suit as small (1 in 100,000, though higher in the surgical subspecialties), rates had risen by 10% nationally in the 1970s, with a 20% rise in California and Texas. Overall, approximately 8,000 malpractice suits were filed in court in 1970; of those, 80% did not go to trial, and of those that did, plaintiffs won roughly 20% of the time. The commission reported that health care providers were most alarmed by the small

percent of cases that resulted in large settlements or awards, occasionally reaching $1 million. They also were concerned about the ability of juries to make decisions based on medical evidence as opposed to emotion or skepticism of the medical profession. The commission also noted further communities affected by the state of malpractice dispute resolution, including the legal profession, which had to take on a new area of complex tort litigation.

The commission itself was ambivalent about arbitration, noting the potential benefits and risks for both injured patients and physicians. On the one hand, because litigation was perceived as expensive, ineffective, and traumatic, the purported values of arbitration made it a clear alternative worthy of consideration. On the other hand, the commission expressed concern that arbitrators lacked the technical competence to protect the interests of patients *or* doctors. The commission also took a strong position when it came to the availability of judicial review, emphasizing that arbitration contracts should not remove one's right to trial in state court and that a patient's participation in arbitration must be voluntary. As the commission put it, it was "opposed in principle to any form of government activity which would induce or compel a health-care provider or a patient to agree to arbitrate disputes prior to the event which gives rise to the dispute" (US Department of Health, Education, and Welfare 1973: 92, 96–97).

As such, Democrats and Republicans at both the state and federal level continued to consider proposals to resolve malpractice disputes elsewhere. Given that most malpractice claims are filed in state courts, state governments took the lead, with 15 states having passed laws related to arbitration and malpractice today. The Michigan state legislature, for example, passed the Medical Malpractice Arbitration Act in 1975, establishing a voluntary arbitration system facilitated by a three-member arbitration board (comprised of an attorney, a health care provider, and a lay person). At the federal level, bipartisan support for arbitration also emerged by the early 1970s, with both Democrats and Republicans increasingly in agreement on the costs of litigation. But bills like the Health Maintenance Organization and Resources Act of 1972, which endorsed arbitration for malpractice to avoid lengthy litigation and escalating costs, were consistently stymied by resistance from the legal community. Lawyers regularly raised examples of cases of gross negligence and injury to dramatize the need for adequate legal representation and a trial in front of a jury of one's peers (Committee on Labor and Public Welfare 1975).[7] In introducing the National Medical

7. In Committee on Labor and Public Welfare (1975: 220, 244), the president-elect of the Association of Trial Lawyers of America (ATLA), Ward Wagner, described, for example, the death of a man whose dentist wrongly extracted all of his teeth in one sitting.

Malpractice Insurance and Arbitration Act of 1975, however, Senator Kennedy criticized the current system of litigation for benefiting very few patients. And while trial lawyers took the position that the problem of malpractice was both overblown and ultimately rooted in insurance company excesses, and not the costs of legal fees, the medical community argued that full-scale tort reform geared toward prohibiting lawyers from receiving high contingency fees was necessary to contain costs and preserve quality health care.[8]

In the end, bipartisan support in Congress was not enough to build a legislative consensus in light of strong and divisive lobbying efforts on the part of lawyers and doctors. This was even true in the case of proposals seeking the most widely accepted goals in the least invasive way possible; the Court-Annexed Arbitration Act of 1978, for example, proposed a system of compulsory, but nonbinding, arbitration as an alternative to conventional litigation for "smaller" disputes in an effort to reduce backlogs, decrease anxiety, and increase fairness (Committee on the Judiciary 1978). As this bipartisan support continued into the 1980s and 1990s, however, Congress was more successful when it focused on legislation aimed at promoting arbitration in general as opposed to malpractice in particular, arguably freeing itself from the lawyer-doctor divide. Notably, Congress unanimously passed the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act, both in 1990, which together gave federal agencies additional authority to use arbitration for resolving most administrative disputes and to use negotiation to facilitate consensus building in the rule-making process. But as conservatives increasingly began to promote more controversial versions of ADR—specifically, legislation supporting not only voluntary but also mandatory arbitration—it became clear that Democrats and Republicans were beginning to part ways.

The Shifting Ideology of Arbitration

Partisan Conversion

Throughout this period of bipartisan support for ADR, liberal advocates of arbitration unwittingly laid the groundwork for conservatives to co-opt it. In the debate over a bill in 1979 to provide seed money to states to experiment with ADR programs, for example, the president of the ABA, Shepherd Tate, contrasted the legal needs of the poor with those types of disputes that he thought should be handled without lawyers and judges.

8. Senator Kennedy's statements appear on 2, 104, 111, 130, and 207.

"Minor disputes," he argued, could be handled by "neighborhood justice centers and other techniques." For Tate, in this example minor disputes referred to a neighborhood noise disturbance (Committee on the Judiciary 1979: 9). But increasingly during the 1990s and 2000s, conservatives in Congress used this language to divert other, arguably less minor, types of claims away from the courtroom, and beginning in 1984 an increasingly conservative Supreme Court began to construct a jurisprudence that controversially enabled and insulated these developments.

Notwithstanding the passage of the sweeping legislation facilitating ADR in 1990, both Democrats and Republicans continued to bemoan a lack of progress at the federal level when it came to malpractice tort reform in particular (see, e.g., Committee on the Judiciary 1992). This was in part a response to a 1990 General Accounting Office (GAO) report that found that very few hospitals and health care providers participated in arbitration systems, even in states that had passed legislation empowering arbitration boards. The report focused on the state of Michigan in particular, citing that only 800 malpractice claims were handled via ADR systems between 1976 and 1979, compared to roughly 200,000 that were litigated. In its report, the GAO posited that neither doctors, hospitals, nor patients saw the purported economic benefits of such a program; doctors and hospitals appeared not to want to shoulder the startup costs of establishing an arbitration system internal to their practice (or of employing a third-party organization to do so), and patients did not choose arbitration either, believing that such panels would be inherently biased toward the defendant, especially where health care providers were among the arbitrators. Some state courts created further problems; in Pennsylvania, for instance, courts repeatedly overturned arbitration decisions on the grounds that arbitration procedures were simply not working quickly or effectively. Two decisions noted that three-quarters of the malpractice claims submitted to the required arbitration panels had yet to be resolved (*Heller v. Frankston*, 504 PA 528 [1984]; *Mattos v. Thompson*, 491 PA 385 [1990], at 386).

In the 1990s the goal of reforming malpractice quickly became entangled with the Clinton administration's proposed health care reform. President Clinton's bill included proposals to resolve malpractice disputes outside of courts through a mandatory but nonbinding process of ADR. In addition, his proposed Health Security Act contained general provisions geared toward curbing frivolous lawsuits but did not propose a hard cap on damages—a tort reform mechanism frequently employed by Republicans (H.R. 3600 and S. 1775, 103rd Cong., 1993).

Consumer rights advocates and Republicans in Congress split predictably on Clinton's plan. Advocates argued that the proposals were antipatient in nature, benefiting only the health care industry. While not entirely averse to arbitration, Laura Wittkin, executive director of the National Center for Patients' Rights, argued that defensible arbitration could be binding but must be entirely voluntary for the patient. She also argued that the specific forms of ADR proposed in Clinton's plan would make it harder for patients to win because of the length and cost of the process (Committee on the Judiciary 1994). Yet where Republicans were concerned, almost any move toward ADR was preferable to the expense of litigation, and the mandatory component of arbitration was not an issue. Senator Orrin Hatch argued for congressional intervention by noting not only that malpractice litigation was costly for patients and doctors alike, but also that it was an area of regulation left largely to the courts, resulting in decision making that was "incremental, often unpredictable, and always expensive" (Committee on the Judicairy 1994: 2). Strom Thurmond took this argument further, linking the need for malpractice reform to larger legal reforms, including limits on damages and attorney's fees. While malpractice reform failed with the Clinton health plan, Republicans included similar reform measures in their "common sense legal reform" agenda once gaining the majority in 1995. However, the only successful piece of their platform—the Common Sense Product Liability and Legal Reform Act of 1995, which limited noneconomic damages in health care liability to 250,000—was vetoed by Clinton (H.R. 1075, 104th Cong., 1995).

Republicans and Democrats did coalesce in passing one sweeping piece of legislation in 1998: a second Alternative Dispute Resolution Act (ADRA), as a follow-up to its 1990 legislation. Introduced by Republicans in both the House and the Senate, the ADRA passed by overwhelming bipartisan majorities and created a permanent role for ADR in the federal court system. Designed to "address the problem of the high caseloads burdening the federal courts" (H.R. Report 105–487, 1998: 5), the consequence of the law, however, was disputed. As initially proposed, groups like the ABA and the Judicial Conference of the United States opposed the statute because of the possibility that arbitration programs could be made mandatory (Committee on the Judiciary 1997a: 59; 1997b: 14). The law did leave open the possibility that federal district courts could choose to require litigants to participate in some form of ADR, but mandatory arbitration for constitutional and civil rights cases was later exempted. Importantly, this debate over mandatory arbitration that would not be subject to judicial review was the

crux of conservative "conversion" of arbitration. Liberals in the mid-20th century endorsed a voluntary, alternate option that potential litigants could choose of their own volition, but conservatives rode the wave of this support while also promoting mandatory arbitration to which individual litigants would be bound, with little chance for judicial review.

To use the language of 1970s Democrats, the opportunity to divert so-called minor disputes away from traditional courts was clear to those conservatives in Congress focused on constricting frivolous litigation. Republicans increasingly sought to require the use of arbitration and other ADR processes in a variety of policies, particularly malpractice. For example, as part of the effort to remedy the perceived onslaught of medical malpractice claims and to weed out frivolous lawsuits—a fixation for conservatives in the debate over how best to lower health care costs—Senator Lindsey Graham proposed legislation in 2009 to prohibit any malpractice lawsuit from being filed in state or federal court unless it was initially resolved in an ADR system (S. 2662, 111th Cong., November 2, 2009). This bill is just one example of a set of proposals by Republicans that aim to prohibit access to courts of law by requiring some form of ADR or to cap court awards by limiting the monetary damages available to plaintiffs. Some of these Republican-sponsored bills require mandatory arbitration that would effectively prohibit individuals from having a hearing in or review by a court—even in the case of civil rights and constitutional violations—and they are often proposed in tandem with legislation geared toward deincentivizing litigation in a variety of other ways as well. In total, 405 bills encouraging the use of ADR in medical malpractice have been proposed since 1981, with 365 from Republicans (see fig. 1).

It is important to note, however, that this conservative conversion and the structural changes to arbitration favoring repeat players that followed were critically facilitated not only by this enduring divide among liberals—or, perhaps more accurately, between Democrats and progressive consumer rights activists—but also by the Supreme Court's entrance into the debate. The number of pro-arbitration bills from Democrats in Congress had dropped in recent years, alongside a proliferation of bills geared toward protecting the legal process. The debate among liberals, however, has largely remained over a first-order concern as to whether arbitration serves as a justice enhancement or a second-rate dispute resolution system. The pervasiveness of this particular debate has arguably detracted from a discussion of more specific reform efforts addressing corporate capture. As such, it has been the Supreme Court's modern jurisprudence that has been most critical in insulating private arbitration from reform.

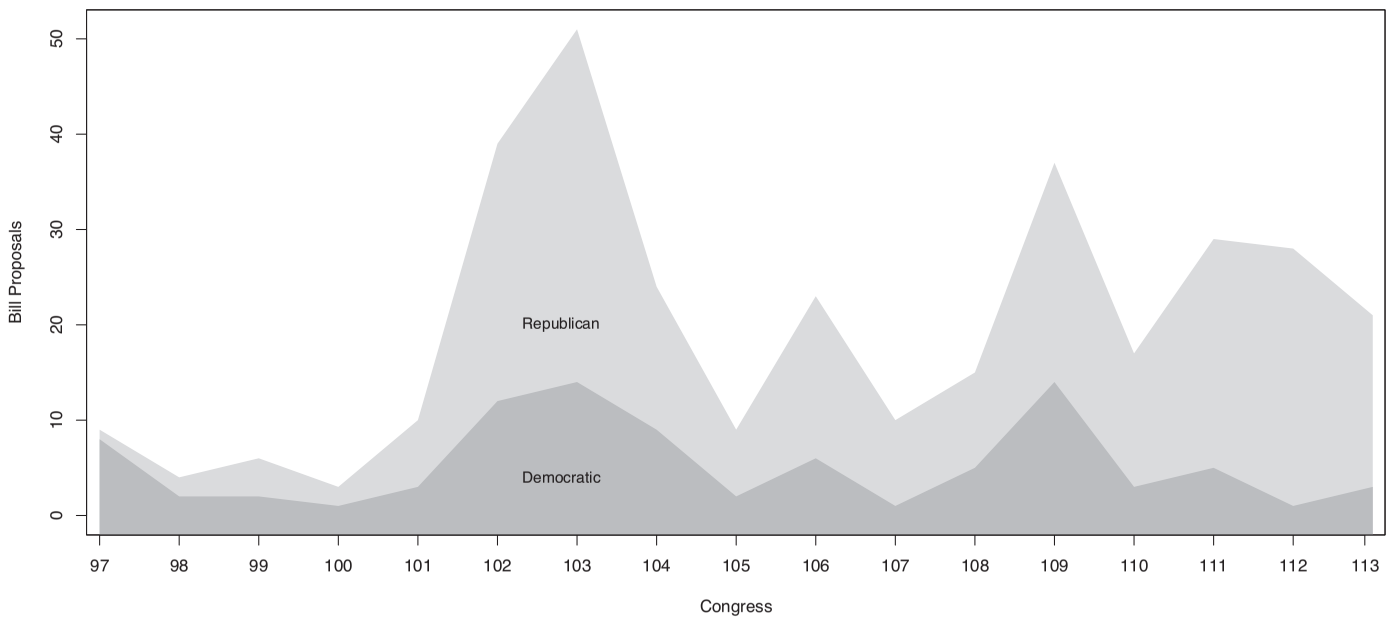

Figure 1 Counts of alternative dispute resolution and damage cap proposals over time by the party of the introducing member.

Judicial Entrenchment of Private Arbitration

Notwithstanding Senator Hatch's concern about the role that courts play in regulating the contours of arbitration, through a series of decisions in recent years a conservative Supreme Court has given the FAA an increasingly prominent role in shaping the legalities of dispute resolution, applying it to a wide range of disputes arguably beyond what it was initially intended to do. Two sections of the FAA are especially relevant to this later expansion and controversy. First, §2 of the law states that arbitration provisions "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract" (9 U.S.C. §2, 2012). At a time when courts largely refused to enforce arbitration clauses as they did other contracts—mainly, as a Senate report on the bill summarized, due to "the jealously of their rights as courts, coupled with the fear that if arbitration agreements were to prevail and be enforced, the courts would be ousted of much of their jurisdiction" (Senate, 68th Cong., 1st sess., report 536, May 14, 1924)—the FAA was meant to put arbitration agreements "upon the same footing as other contracts, where [they] belong" (House of Representatives, 68th Cong., 1st sess., January 9, 1924, at 1). Second, §10 of the law stipulates that, after an arbitrator rules on a case, a party is permitted to return to court for review. From the bill's passage in 1925 until the 1980s, these sections of the FAA were interpreted in light of the legislative history to mean that the use of arbitration was premised on consent. As arbitration's use expanded beyond the federal government to private entities like corporations and employers, however, more and more of them began to include predispute, mandatory, and binding arbitration clauses in their contracts. But *requiring* individual consumers or potential employees to sign away their right to trial as part of the terms of service for a product or as a condition for taking a job raises questions as to what the FAA allows—or, more precisely, what courts interpret that it requires. Further, as states began to express an interest in passing legislation protecting consumers from such contracts, questions arose as to whether states in fact have this discretion or whether this legislation is preempted by the FAA. Most recently, the courts have also begun to weigh in on the question of whether institutions can include provisions in their arbitration clauses that also prohibit class action lawsuits against them, as well as upholding contracts that bar employees from collective arbitration (see, e.g., *Epic Systems Corp. v. Jacob Lewis*, 584 U.S._TBD_[2018]).

With expansions in arbitration, it is not particularly surprising that the courts would weigh in the contours and limits of its use, especially in

seeking to balance the due process rights of individual litigants and the right to trial with arbitration's usefulness in terms of providing a more expedient dispute resolution process. Studies indicate that, since the 2000s, there have been as many challenges to arbitration practices that require an interpretation of the FAA as there were in the first 75 years under the law (Gross 2015: 123). What is surprising, however, has been the Supreme Court's substantive treatment of these issues. As a general trend, since the 1980s the court has overwhelmingly presumed the validity of private and federally instituted arbitration agreements—a development that prompted even Justice Clarence Thomas to comment on the degree to which the court had "expanded the reach and scope" of the FAA. The court began this process in 1984 by narrowing the circumstances under which a state court could invalidate arbitration agreements (*Southland Corporation v. Keating*, 465 U.S. 1 [1984]), continuing the next year by overruling an earlier line of cases that had previously excluded federal statutory claims from being compelled to arbitration (*Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 [1985]).

As scholars of the FAA have noted, the court has since taken the position—repeated verbatim in six of its decisions—that substituting arbitration for litigation is simply a switch in what are otherwise equal dispute resolution forums. In the aftermath of these decisions, corporations began to rush to include mandatory arbitration clauses in their standard contracts, and as their use became more widespread, "the fine print became a divisive issue" (Horton and Chandrasekher 2015: 67–68). As shown in table 1, the court subsequently issued decisions in which it clarified that arbitration is a sufficient dispute resolution process for protecting most statutory rights, including major civil rights provisions; it sharply limited judicial review of arbitration outcomes; it determined that the FAA preempts all state law with regard to arbitration; it granted arbitrators (and not judges) the authority to determine whether contractual arbitration provisions are valid or not; and it has allowed corporations to prohibit class action lawsuits against themselves. One might view these decisions as consistent with the court's larger effort to reduce litigation and adversarial legalism in general; but it is notable that a variety of legal scholars argue that these decisions reflect a puzzling misinterpretation of the legislative and political history of the FAA and suggest that the court's work is instead accurately viewed as a manifestation of a conservative, antilitigation agenda geared toward protecting strong institutional defendants from litigation (see, e.g., Resnik 2015).

Table 1 Major Supreme Court precedents involving arbitration and the Federal Arbitration Act of 1925 (FAA)

Decision	Year	Precedent
Southland v. Keating Corp.	1984	FAA preempts state law.
Gilmer v. Interstate/Johnson Lane Corp.	1995	Corporations can require arbitration of Age Discrimination and Employment Act claims.
Allied-Bruce Terminix v. Dobson	1995	FAA applies to all commerce disputes.
First Options of Chicago Inc. v. Kaplan	1995	Decision to arbitrate is not subject to independent review by the courts.
Doctor's Associates Corp. v. Casarotto	1996	FAA preempts any state law governing arbitration provisions.
Green Tree Financial Corp. v. Randolph	2000	Agreements between individuals and corporations are treated as fully bargained contracts.
Circuit City Stores v. Adams	2001	FAA applies to disputes between employers and employees, even where excluded in the text of the FAA.
Buckeye Check Cashing Inc. v. Cardegna	2006	Questions regarding the validity of a contract as a whole are decided by the arbitrator.
Preston v. Ferrer	2008	FAA preempts state laws declaring certain disputes must be resolved by state administrative agencies.
Hall Street Assoc. v. Mattel Inc.	2008	Even if parties agree on expanded judicial review, it cannot be expanded beyond FAA.
Rent-A-Center v. Jackson	2010	Court can review arbitration provisions but not the contract as a whole.
AT&T v. Concepcion	2011	FAA preempts states from conditioning enforcement of an arbitration agreement on the availability of classwide proceedings.
Marmet Health Care Ctr. v. Brown	2012	FAA arbitration provisions cover contracts dealing with malpractice, personal injury, and wrongful death.
CompuCredit v. Greenwood	2012	Entities can require arbitration even in the face of federal law.
American Express v. Italian Colors Restaurant	2013	Courts cannot invalidate arbitration clauses prohibiting class action lawsuits.
Epic Systems Corp. v. Lewis	2018	Agreements requiring individual arbitration are enforceable under FAA, even in light of the relevant provisions of the National Labor Relations Act.

Several of these cases involve matters of health or malpractice directly; in 2013, for example, the court ruled that the FAA does not allow courts to overrule an arbitrator decision—here involving the terms of a primary care physician agreement with a health insurance company—even if the arbitrator incorrectly interprets that agreement (*Oxford Health Plans LLC v. Sutter*, 569 U.S. 564 [2013]). In 2012 the court also held that the FAA requires a court to enforce agreements between parties to arbitrate, even in the case of personal injury or wrongful death claims. This case, *Marmet Health Care Center v. Brown* (565 U.S. 530 [2012]), brushes on the issue of malpractice, as the two consolidated cases involved individuals who died due to negligence in a nursing home. But after reaching an "equilibrium" of sorts, in which corporations appeared to have fully "tested the boundaries of their ability to create a parallel procedural universe for consumer cases" (Horton and Chandrasekher 2015: 70–71), the court opened new doors. In three cases involving arbitration broadly, *AT&T v. Concepcion* (563 U.S. 533 [2011]), *CompuCredit v. Greenwood* (132 S. Ct. 665 [2012]), and *American Express v. Italian Colors Restaurant* (570 U.S._TBD_[2013]), the court sharply limited the defenses available to parties challenging the enforcement of arbitration clauses of all kinds. As I describe further below, this "erasure" of a right to trial in court not only takes matters of arbitration out of the democratic process but also effectively outsources what was once a core government function to "unregulated providers whose rules are hard to find, process generally closed, and outcomes difficult to know" (Resnik 2015: 2809).

First, in *Concepcion*, the court addressed the issue of whether or not the FAA prevents states from conditioning the enforcement of an arbitration agreement on the availability of classwide arbitration procedures (considered essential by consumer rights advocates when the costs of arbitration might be too high for any one individual to bear). The case involved customers who brought a class action lawsuit against AT&T in California federal district court. The group of customers alleged that the contract they agreed to when signing up for mobile service contained a fraudulent provision under California law, namely a predispute arbitration agreement that was required as part of the terms of service. When challenged through litigation, the company moved to compel arbitration based on this questionable clause. The Supreme Court subsequently overruled a 9th Circuit decision that the arbitration clause, which required customers to waive their class action rights, was unconscionable on the basis of a California

common law rule. In reversing the lower court decision, a 5-4 majority held that the FAA does, in fact, preempt "state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" (9). In dissent, Justice Breyer argued that there is nothing in the legislative history of the FAA or the act itself that indicates the intention to compel arbitration to such an extent.

The next year, the court entertained a challenge to CompuCredit, which marketed a subprime credit card to individuals with weak credit scores. A group of consumers filed suit, again in California, under the Credit Repair Organizations Act (CROA)—a federal consumer protection statute barring a variety of deceptive practices by credit repair organizations—contending that the promotional materials for the card were indeed deceptive. The district and 9th Circuit courts denied the company's motion to compel arbitration, holding that "Congress intended claims arising under CROA to be non-arbitrable." But the court's majority reversed, concluding that the provision of the CROA requiring credit repair organizations to notify customers that they "have a right to sue a credit repair organization that violates the Credit Repair Organization Act" does not reflect congressional intent to preclude arbitration of claims arising under the act (15 U.S. Code Section 1679c—Disclosures). While the provision requires disclosure, Justice Scalia argued, it does not provide consumers with a right to bring an action in a court of law. In dissent, however, Justice Ginsburg noted that the CROA was clearly intended to protect vulnerable consumers likely to read the words "right to sue" as to mean the right to litigate in court.

Finally, in *Italian Colors*, several merchants brought suit against American Express in federal court, arguing that the agreement the company imposed on them violated federal antitrust law. As with the previous two cases, the merchants had signed an arbitration clause and a class action waiver; and in response to the defendant's motion to compel arbitration, they challenged the enforceability of the class action waiver, arguing that if they could not proceed as a class, they had no financially reasonable means of pursuing their antitrust claims, which require extensive discovery and are especially costly to litigate. Again, the court overturned the lower court and denied plaintiffs' right to litigate, holding that the prohibitively high cost of arbitration was not a sufficient reason for a court to overrule an arbitration clause forbidding class actions. Justice Kagan wrote for the dissenters, arguing that the very purpose of the FAA was to facilitate the resolution of disputes and that, by barring any means of sharing or

lessening the costs of dispute resolution, the clause amounted to granting American Express immunity from potentially meritorious federal claims. As she described the new "normal," "the monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse" (1).

In aggregate, these decisions establish that courts must enforce arbitration agreements unless (a) there is an explicit contrary congressional command, (b) the arbitration agreement expressly strips one party of the substantive right to pursue a federal statutory claim, or (c) a state law contract defense invalidates the agreement—but only if that defense does not discriminate against arbitration and does not frustrate the purposes of the FAA (as interpreted controversially by the court). Legal scholars have argued that the effect of these decisions is that "virtually no ground exists to challenge an unfair arbitration clause" (Gross 2015: 132). These developments have also led to widespread criticism that corporations now use arbitration as a mechanism to force individuals to give up their right to go to court and that arbitration agreements push individuals into a forum that is more hospitable to the defendant. While industry in general references the consensus around arbitration as preferable to litigation, these decisions also prompt concern that what are essentially one-sided contracts are now fully enforceable in court, including class action waivers and even provisions that delegate the question of arbitrability itself to the arbitrators. Additionally, it bears mention that, in light of the Supreme Court's 2018 decision in *Epic Systems*, the court also determined that arbitration agreements requiring individual arbitration (and barring collective processes) are enforceable under the FAA, regardless of the allowances provided within even a federal statute: the National Labor Relations Act of 1935.

What does this mean for arbitration in the case of medical malpractice? One important effect is that state-level laws prohibiting the use of mandatory, binding arbitration for malpractice (such as those in South Carolina and South Dakota) are considered preempted by the current interpretation of the FAA. This is important not only for what it means on the ground in any given state but also for what it indicates about the degree to which the law of arbitration is now insulated from the democratic process. Further, if the cumulative effect of these recent cases is to entrench arbitration as a private enterprise, the procedural protections that accompany state-sponsored processes are also lost. As one scholar summarized, in recent years businesses and corporations have realized that they have clear incentives to use arbitration clauses to shorten statutes of limitations, restrict discovery, require confidentiality, waive plaintiffs'

rights to recover a variety of remedies, and contract with private arbitrators who are sympathetic to their position as a business (Horton 2011). With considerable incentives to avoid malpractice litigation, it is unclear why physicians and others in the medical community wouldn't increasingly recognize the same.

Private Arbitration in Practice

These legal precedents in favor of predispute, mandatory, binding arbitration have in effect led to the "diffusion" of disputes, shifting the work of adjudication from traditional courts to third-party actors. In light of its long history, what is distinctive about this most recent expansion is its private nature. Dispute resolution today is often carried out in systems designed and operated by the party against which a complaint is brought, as part of the terms of service, and with little possibility of judicial review, regardless of the nature and severity of the claim. And given the state of jurisprudence in this arena, entities that consider such a system in their self-interest have legal carte blanche to use one. As the Supreme Court has largely insulated the law of arbitration from input even from elected officials, one could well argue that the jurisprudence governing arbitration makes a potential law mandating or constricting the use of arbitration in medical malpractice unnecessary, given that private actors employing systems of binding arbitration are largely protected from intervention. As such, we might expect that physicians and managed care organizations will continue to experiment with private arbitration, much as have other corporate entities.

In addition to the small success rate that individuals appear to have in arbitration, as well as the fact that there is little chance of judicial review of outcomes, there are a number of other reasons to question whether private arbitration will simply serve to entrench—or worsen—a system that compromises the legal rights of patients. For example, many of the cost-saving features that make arbitration an attractive alternative to litigation are premised on the assumption that a nonjudicial actor will rule fairly on a claim using a record that is often solely compiled by the defendant physician, and where the claimant is often denied legal representation and judicial review. But as the numbers from the recent study of consumer arbitration in California indicate, this assumption is likely "breathtakingly naïve" (Peters 2008: 267). Accuracy, in turn, is then likely to be additionally undermined by problems with repeat play, and this is true in two ways. First, repeat players are often better able to navigate the arbitration process and select arbitrators who will be favorable to their position. As described above, while

the repeat player effect has not yet been empirically examined in malpractice arbitration, studies of both consumer and employment arbitration confirm this effect, suggesting that it might pervade this realm as well. Second and related, arbitrators, whose livelihood depends on being selected for future arbitrations, may have an incentive to make decisions in favor of those employing them (Shieh 2014). This too has been documented in consumer and employment arbitration, and might be particularly problematic if true in the malpractice context, where a claim is probably a once-in-a-lifetime experience for an injured patient but likely not for the defendant.

It is also important to note that, in systems such as Kaiser's (described below), Kaiser hospitals are effectively the repeat player in every arbitration handled in their system. The susceptibility of arbitration to manipulation in the managed care context is therefore particularly acute, in that the company will most definitely be a repeat player, and health care organizations might well opt to design and manage their own internal arbitration systems, as opposed to contracting with an independent, third-party organization. Because there are no constraints, this means that an organization can choose to operate its dispute resolution system in a manner specifically designed to frustrate the claims of medical malpractice victims or to place obstacles in their path (Shieh 2014); and as is clear from the AAA data, even contracting with an independent, third-party organization does not necessarily guard against this.

While uptake in the area of malpractice is relatively new, some prominent examples inform a preliminary analysis of the costs for injured patients when corporate entities exercise this degree of discretion over their internal dispute resolution programs. Most famously, Kaiser Permanente, which insures roughly 7 million individuals in California, has required since the 1970s that its members resolve all disputes for claims related to medical malpractice through a mandatory, binding arbitration system. Members must sign an agreement in which they agree to resolve any dispute through an arbitration program designed and administered by the company. By the 1990s, however, Kaiser's system began to garner significant public attention as it became clear that the company regularly manipulated the system to its advantage. The most frequently used method (which became the subject of a landmark challenge to the system's legality) was to delay the selection of a neutral arbitrator, making it difficult to resolve a case in a timely fashion.

In 1997, the California Supreme Court heard a case later described as involving an issue of "concern to all consumers in managed care health plans which use binding arbitration to settle health care-related problems" (Nieto 1997: 1). The case was notable in that it was the first to address the

question of whether a court may take a case out of mandatory arbitration in the area of patient's rights, specifically where a health maintenance organization has engaged in fraud. The case involved Wilfredo Engalla, a Kaiser member who alleged that the Kaiser system misdiagnosed his lung cancer for five years, continually attributing his ongoing respiratory systems to colds and allergies and failing to perform even an x-ray until his malignant lung tumor had become inoperable. Engalla and his family filed for arbitration as required by Kaiser's service agreement, with his lawyer taking care to remind the company that his patient was terminally ill and so should take special care to comply with its contractual commitment to appoint a three-member panel of arbitrators within 60 days.

Kaiser, however, continued to delay the process, and despite repeated reminders from Engalla's lawyer, it took 144 days to sign off on the panel of arbitrators, finally doing so on the day before Engalla's death. Engalla's family, in turn, sued Kaiser in court, both for malpractice and for delaying the arbitration until the patient's death, arguably as an effort to eliminate the family's ability to recover the full amount of damages available due to Kaiser's misconduct. Specifically, if Engalla had been alive at the time of the arbitration decision, he and his family had the potential to recover $500,000 in liability; his death, however, reduced Kaiser's potential liability for noneconomic damages by half, which the family did not think was accidental. The court, which explicitly took note of the fact that procedures such as these are subject to manipulation in ways that can affect the substantive outcome of a dispute, did not think it was accidental either (*Engalla v. Permanente Medical Group, Inc.*, 938 P.2d 903, Cal. 1997, at 926). Kaiser moved to compel the family into arbitration, but the court refused.

In its decision, the court concluded that the company ran its system in an "adversarial" manner, engaging in a "course of nonresponse and delay and adding extracontractual conditions to the arbitration selection process" (921). Further, "there is evidence to support the Engalla's claims that Kaiser . . . misrepresented the speed of its arbitration program, a misrepresentation on which Engalla's employer relied by selecting Kaiser's health plan for its employees, and that the Engallas suffered delay in the resolution of its malpractice dispute as a result of that reliance, despite Engalla's own reasonable diligence" (862). The court also found that the organization violated its own contractual deadlines for appointing neutral arbitrators in 99% of all malpractice arbitrations, and in only 3% of cases were the arbitrators selected within 180 days. On average, it took 674 days for the appointment of arbitrators and 863 days for a dispute to reach a hearing in a Kaiser arbitration.

Faced with having their arbitration system disbanded, Kaiser responded by establishing an Office of the Independent Administrator (OIA), a third-party law office that oversees the Kaiser arbitration system and that describes itself as a "neutral, independent office" that is "not part of Kaiser" (Office of the Independent Administrator, n.d.). The OIA subsequently established a screening process for arbitrators and requires all parties to comply with a set of arbitration rules. The OIA is also required by California state law to disclose the outcomes of their arbitration proceedings (California Code, Code of Civil Procedure §1281.96). This provides data with which to assess other concerns with privatized dispute resolution in this area.

First, while malpractice plaintiffs have been found to prevail in 19–30% of litigation proceedings, the success rate in private malpractice arbitration appears to be significantly less. In analyzing the 8,779 "arbitration demands" reported to the California Department of Managed Health Care on or after January 1, 2003, I found that the consumer was the "prevailing party" in 356 cases. In only 4.06% of these arbitration proceedings, then, was the disposition in favor of the patient, who subsequently received a monetary award.[9] In this case, the success rate for injured patients appears similar to that for other areas of arbitration and, notably, far less than in the courtroom.

Second, it is unclear whether arbitration leads to smaller damage awards. This could no doubt be achieved, though controversially, by constructing a system that strictly limits the amount of damages available and awarding them based on a preset schedule (as some health policy proposals suggest),[10] or perhaps in states where noneconomic damages are capped by law. But by analyzing payouts in Kaiser's arbitrations as reported to California's Department of Managed Health Care in the years since the *Engalla* decision, arbitration awards are not substantially different than those awarded in the traditional legal process (as indicated in fig. 2). The average payout for cases decided in Kaiser's system of arbitration ranges from a low of $499,027 to a high of $2,282,547 (compared to an average of $485,000 in the legal process).

9. Data were compiled from those reported to Kaiser's Office of the Independent Administrator, available at www.oia-kaiserarb.com/pdfs/Ethics-Received.pdf. Individuals do receive partial relief in some cases (often alleviating the costs of their arbitration) while not "winning" on the merits, so to speak.

10. For example, a report from Common Good and the Robert Wood Johnson Foundation (titled "Resolving Medical Malpractice Cases in Health Courts—An Alternative to the Current Tort System," August 15, 2010, available at https://www.rwjf.org/content/dam/farm/reports/program_results_reports/2010/rwjf63703) proposed an ex ante schedule of "accelerated compensation events."

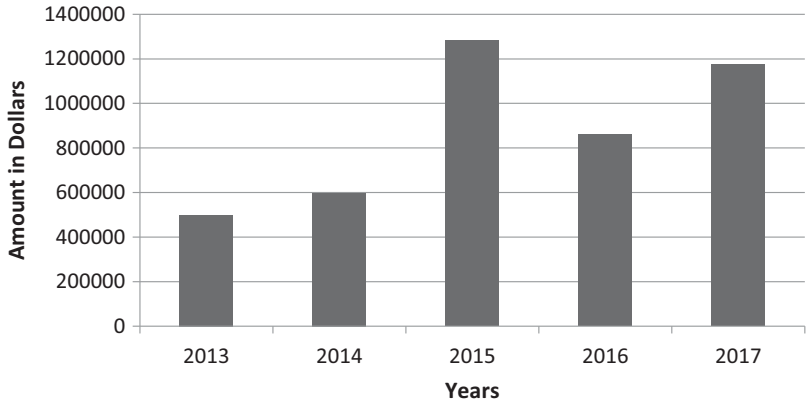

Figure 2 Kaiser arbitration awards.

Conclusion: The Politics of Private Dispute Resolution

Medical malpractice tort reform involves a variety of issues that will no doubt continue to garner scholarly attention, far beyond what is addressed here. The ongoing political, policy, administrative, and legal debates regarding its use ultimately stem from a need to balance the costs of litigation versus arbitration. A dispute resolution process that is biased against plaintiffs will likely exacerbate both patient injury and underenforcement, while one tilted against defendants could lead to large and arbitrary awards, as well as increased "defensive medicine" (as is often referenced in this debate). If arbitration is here to stay as a centerpiece of tort reform, the project becomes reducing transaction costs while not giving repeat players such an advantage.

From a political perspective, there is a question of whether or not Congress can provide meaningful reform to that end. Prior to taking his position as secretary of health and human services, then-representative Tom Price (R-GA) sponsored several bills in 2017 aimed at limiting health care providers' liability. These bills included proposing safe harbors from liability for physicians that adhere to clinical guidelines, a federal cap on noneconomic damages, and federalizing other tort reforms that have been widely adopted at the state level (see H.R. 2300, 2015; H.R. 277, 2017; and H.R. 1215, 2017). As described above, however, the Supreme Court has been the key institutional player when it comes to arbitration

in recent years, and it is unclear whether Congress—especially given both its liberal-conservative and liberal-progressive divides—can be effectual, except for overhauling the statutory basis for arbitration altogether. This seems unlikely.

From a policy perspective, there is further conversation to be had as to whether or not malpractice arbitration accomplishes the ends that it is meant to serve: decreasing costs and allowing disputes to be resolved in an expedient and fair way. For example, in addition to concerns around the patient success rate and damage awards, it has been argued that arbitration's unique structure of upfront costs may compromise its ability to deliver purported cost savings (Shieh 2014). In terms of concerns regarding arbitration's fairness, scholars have noted as problematic both the low rate at which hearings are held in arbitration and the low rate at which individuals work with legal counsel. This suggests that significant efforts might well be devoted to reforming the processes of arbitration itself.

Along these lines, from an administrative perspective, it is important to note that there are also proposals for dispute resolution systems and changes to malpractice liability that involve neither litigation nor arbitration. In terms of straightforward litigation reform, it has long been suggested that shifting to a system of strict liability could alleviate many of the problems with our negligence-based system without introducing the costs of arbitration. In terms of other alternatives, proposals ultimately exist on a spectrum. At one end are health courts that resemble traditional trial courts and provide opportunities for liberal discovery and motion practice; these proposals have been debated for about 40 years. At the other end are ADR processes that provide only minimal due process, which might be said to include arbitration in its current form. But notably, even the provision for "administrative health care tribunals" included among Price's proposals featured a highly restrictive version of due process, wherein special judges with health care experts would render decisions *before* patients are able to gather information through processes like discovery, substantially limiting the ability of patients to build their best case (Mello, Kachalia, and Studdert 2017). Somewhere between the two are proposals to use administrative processes where an individual would pursue adjudication through a state or federal agency, subject to the laws regulating formal adjudication (Peters 2008). The tradeoffs lie in the fact that the complexity of malpractice disputes likely requires many of the procedural protections that make litigation time-consuming in order for the outcomes to be fair—perhaps compromising

any cost-savings potential. But given that arbitration is not "inherently unfair, but that it can easily be made so," a discussion of additional alternatives and reforms seems worthwhile (Thornburg 2004: 262).

Finally, from a legal perspective, there is a question of whether "dispute diffusion" and privatization undermine the function of courts in a democratic system. As Judith Resnik (2015: 2816) has argued, "Courts offer the potential for egalitarian redistribution of authority, and the possibility of public oversight of legal authority." Private arbitration has the potential to undermine both. First, litigation's promise of procedural neutrality carries with it the ability to even the playing field when there is a substantial difference in power and resources between the two parties to a case. Jettisoning these protections in favor of a more streamlined system—particularly one with limited judicial review—could exacerbate inequality under the law. Second, and perhaps more important, the move toward private arbitration also sacrifices the possibility of public oversight of the legal process. Courts have to maintain records, render written decisions, and allow for public observation, and all of these things serve to open "paths to correct injustices, if popular will to do so exists" (Resnik 2015: 2816). The results of arbitration, by contrast, exist largely outside the public's purview, compromising the ability of judges to exercise judicial independence as well.

Here, however, I sought to bring questions of law and politics into these debates. There has been a bipartisan appeal to arbitration in the US historically, but this has clearly changed in recent years. To the extent that this support of arbitration persists, it has at times obscured a discussion of the costs that might come with forgoing litigation in favor of it. Further, it is clear that the consequences of using arbitration to respond to medical malpractice claims are more complicated than support from policy makers reflects. As I hope to have shown, the impetus for using arbitration has meaningfully shifted over time from a mechanism used to provide better access to a fair dispute resolution process to one that insulates powerful institutional defendants. It is, in effect, the privatization of a process that has historically been public and arguably more democratic. In light of these political and legal dynamics, there are considerable conversations to be had about arbitration in the context of litigation reform moving forward.

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