SMU | Dedman School of Law

SMU Law Review

Volume 70
Issue 4 *ADR Symposium Part 2 of 2*

Article 5

2017

The Lost Promise of Arbitration

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THE LOST PROMISE OF ARBITRATION

*Sarah Rudolph Cole**

ABSTRACT

This article disputes the notion that arbitration, a historically informal process, tends to disadvantage minority disputants or provide them with quick decisions tainted by prejudice. Responding to Richard Delgado's seminal work, Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution, *this article attempts to shed greater light on the benefits of modern arbitration for minority disputants. Although still capable of improvement, arbitration may well provide greater protections to minority disputants than does litigation. Since Delgado first wrote his article, the use of arbitration as a primary dispute resolution mechanism has increased dramatically, particularly among businesses and employers. As arbitration expanded, critics of the informal process worked to reform arbitration so that it provided sufficient protection to disputants who were compelled to use it. Modern arbitration provides a more formalized and structured process that resembles litigation, but continues to offer resolution more efficiently and cheaply. Assuming Delgado's premise—that formality matters in promoting equality in dispute resolution—arbitration's enhanced formalism suggests significant promise for reformers who seek to improve minorities' fair and effective representation in dispute resolution. This article opens the dialogue for further innovation by proposing impactful changes to the arbitration process. These reforms would include such improvements as mandatory reasoned opinion-writing and greater diversity in arbitrator appointments. In turn, these process-based reforms would enhance arbitration's formalism and thereby improve its protection for minority disputants and any other party likely to be at a disadvantage in a dispute resolution venue. This contemporary perspective on arbitration fosters a fair and equitable dispute resolution mechanism for those with less bargaining power than their opponents.*

* John W. Bricker Professor of Law, Moritz College of Law, The Ohio State University. This article is dedicated to my father, Wallace M. Rudolph, a long-time law professor and dean. I am grateful that he was able to read this article and, as always, provide me helpful feedback before he passed away in March 2017. Thank you also to Martha Chamallas and Douglas Cole for their useful comments and to my wonderful research assistant, Holly Cline.

I. INTRODUCTION

IN his seminal article, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*,[1] Richard Delgado and his co-authors posit that formal dispute resolution processes, like trials, offer a preferable forum for minority disputants, particularly in disputes involving an opponent[2] of higher status or power.[3] Delgado theorized that the formalism associated with the trial process reduces the risk that parties who hold prejudicial attitudes will act on them.[4] By contrast, in informal processes, an opponent of higher status or power is more likely to act on its prejudices, placing minority disputants at a greater disadvantage than they would experience in traditional litigation.[5] In drawing this conclusion, Delgado includes a wide variety of dispute

1. Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee & David Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

2. Delgado's primary concern appears to be the possibility that an opponent with higher status and power is more likely to act on his or her prejudices in an informal setting than a formal one. Yet the formality of the courtroom not only suppresses an opponent's willingness to act on his prejudices, but also decreases the likelihood that the neutral third party will act in a biased or prejudiced manner. *Id.* at 1374–75.

3. *Id.* at 1403 (arguing that to protect minorities, dispute resolution processes should be limited to disputes among parties with relatively similar status and power).

4. *Id.* at 1368–75.

5. *Id.* at 1402–03. Delgado cites the leftist critique of ADR, whose commentators conclude that informalism is problematic because it "(i) solidifies control by capital and the state; (ii) disadvantages 'weaker' parties; (iii) expands state control [over members of disadvantaged classes]; (iv) deflects energy away from collective action; and (v) promotes law without justice." *Id.* at 1391.

resolution processes within the category of "informal processes."[6] As defined by Delgado, the principal dispute resolution mechanisms are "arbitration, mediation, small claims courts, community justice centers, media complaint boards, and internal institutional grievance mechanisms."[7] He describes these processes, including arbitration, as a "loose collection of deformalized, decentralized procedures . . . offering speedy, non-intimidating, flexible justice for the common person, the litigant of modest means or one whose claim is so small it cannot be processed economically in court."[8] Delgado defines arbitration separately in the article only once, referring to it as a "process disputants have used for years in an effort to circumvent the court system's costly delays and congested dockets. In arbitration, disputants submit their disagreement to an impartial third party and agree to be bound by the arbitrator's decision, a decision that a court may enforce."[9]

While this definition of arbitration is largely accurate, Delgado's inclusion of arbitration in the array of informal dispute resolution processes may have, without justification, increased disputants' distrust and suspicion of the arbitration process. In this Article, I dispute the notion that arbitration is truly an informal process that tends to disadvantage minority disputants or provide them with a "quick, painless hearing that renders an adverse decision tainted by prejudice."[10] Arbitration, unlike mediation and negotiation, offers considerable promise to minority disputants facing a well-heeled opponent in a dispute. This is because arbitration has been—and continues to be—a structured process that, over the years since Delgado first wrote his article, has become increasingly formal. Even under Delgado's views about the import of informality, arbitration's formalism may make it a more attractive venue for minority and other disputants who might be at a disadvantage when confronted by an opponent of higher status than other informal dispute resolution mechanisms. That is not to say that there is no room for improvement. Assuming Delgado is correct that formality matters in promoting equality in dispute resolution, reformers could easily take steps to formalize arbitration even more, thereby improving its attractiveness as a venue for minority disputants vis-à-vis mediation or negotiation or even, for that matter, litigation. In this Article, I hope to shed greater light on the benefits of arbitration as a formalized process likely to offer considerable protection to minority disputants. In addition, I will address changes to the arbitration process, including mandatory reasoned opinion writing and greater diversity in arbitrator appointments, that could offer all disputants an opportunity to have their voices heard in a fair and effective forum.

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6. *Id*. at 1353.
7. *Id.*
8. *Id.* at 1360.
9. *Id.* at 1363.
10. *Id.* at 1402.

This Article proceeds as follows. First, I summarize Delgado's views on the values of formalism versus informalism in terms of protection of the minority disputant. Relying on that dichotomy, I will offer what I believe to be a more accurate picture of arbitration as a largely formal process and explain why arbitration's formalism offers virtually the same protections to minority disputants as does the traditional litigation process. Then, I will discuss potential reforms to the arbitration process that will provide greater formalism, and therefore protection, not only to the minority disputant but also to any party who is likely to be at a disadvantage in a dispute resolution venue. In this way, I hope to offer a rosier picture of the role of this form of dispute resolution in promoting equality—reconsidering arbitration's lost promise as a dispute resolution mechanism for those with less bargaining power than their opponents.

A. Formalism's Benefits for Minority Disputants

Delgado's 1985 article offered a critique of dispute resolution mechanisms that served to tamp down some of the initial enthusiasm for these informal processes.[11] Delgado certainly recognized some of the benefits of informal dispute resolution processes, including lower costs, lack of administrative complexity, greater accessibility, and capacity to allow parties to resolve their disputes more creatively than in litigation.[12] Yet, Delgado expressed concern about increasing the use of these processes, citing various social-psychological theories of prejudice that, he believed, would

11. *See id.* at 1361–67. Professor Frank E.A. Sander first articulated the "multi-door" courthouse concept at the 1976 Pound Conference convened by Chief Justice Warren Burger to address the problems faced by judges in the administration of justice and to call for the institutionalization of ADR within the United States legal system. *See* Frank E.A. Sander, Professor of Law, Harvard Univ., *Varieties of Dispute Processing*, Address at the National Conference on the Causes of Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), *in* 70 F.R.D. 79, 130–31 (1976); Warren E. Burger, Chief Justice, U.S. Supreme Court, *Agenda for 2000 A.D.—A Need for Systematic Anticipation*, Keynote Address at the National Conference on the Causes of Dissatisfaction with the Administration of Justice (Apr. 7–9, 1976), *in* 70 F.R.D. 79, 93–96 (1976) (suggesting alternatives to litigation); *see also* Warren E. Burger, Chief Justice, U.S. Supreme Court, *Isn't There a Better Way?*, Address at the American Bar Association Midyear Meeting (Jan. 24, 1982), *in* 68 A.B.A.J. 274, 276–81 (1982) (advocating assessment of alternatives to litigation). In his address, Professor Sander envisioned a court system that would screen incoming complaints and sort them based on criteria aimed at matching the case with the most appropriate form of resolution. Sander, *supra* at 130–32. In other words, litigation would be one option among many "dispute resolution" options, including mediation, arbitration, conciliation, and ombudspeople. *See id.*; *see generally* Larry Ray & Anne L. Clare, *The Multi-Door Courthouse Idea: Building the Courthouse of the Future . . . Today,* 1 Ohio St. J. on Disp. Resol. 7, 9, 16 (1985) (discussing implementation of Professor Sander's idea). "Subsequently, the ADR 'movement' began to take hold of the legal profession, leading to widespread court reform and the development within law schools of courses germane to the practice of ADR." Valerie A. Sanchez, *Back to the Future of ADR: Negotiating Justice and Human Needs*, 18 Ohio St. J. on Disp. Resol. 669, 680 (2003). Over the last thirty years, ADR processes have rapidly been incorporated into policies and procedures to resolve conflicts in lieu of traditional court proceedings. *See* Thomas J. Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternative Dispute Resolution"*, 1 J. of Empirical Legal Stud. 843, 843 (2004).

12. Delgado, *supra* note 1, at 1366–67.

be more likely to create problems in informal settings than in formal settings.[13]

According to Delgado's research, the risk of prejudice is greatest in situations where an in-group member confronts an out-group member.[14] In this context, an in-group member would be a member of the majority; an out-group member would be a member of a minority group.[15] These confrontations are particularly problematic when direct, rather than through intermediaries. Additional problematic factors include a lack of rules constraining conduct, a closed setting, and a view that "public values"[16] rather than private ones should predominate.[17] Delgado also viewed as problematic those situations where the dispute is personal rather than impersonal.[18] He also proffered the view that minority disputants feel greater comfort when they believe what they say and do will make a difference, where the results are predictable and can be traced to effort and merit.[19]

In Delgado's view, a dispute which pits a person of low status and power against a person of high status and power, in an informal process, with the characteristics described above, would be quite problematic and disadvantageous for the low-status disputant.[20] In such a setting, formal adjudication processes would be preferable.[21]

B. The Characteristics of Formal Adjudication

Delgado emphasizes that formal processes provide a more equal opportunity for the minority disputant.[22] But what constitutes the kind of formal process that is more likely to level the playing field for the disputant? Delgado identifies several characteristics that he and his co-authors believe result in a fairer forum for adjudicating minority disputants' claims.[23]

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13. *Id.* at 1380–84. Delgado suggests that "many factors—personal dynamics, scapegoating, economic dislocation, power disparities, socialization, and in-group/out-group cognitive categories—contribute to the development of prejudice." *Id.* at 1382. Delgado argues that the "American Creed[, which] emphasizes liberty, equality, and human worth—values that arise from the basic tenets of democratic and Judeo–Christian teachings," is contradicted by "the reality of class and race-based prejudice [that] exists on a societal level, where it affects the behavior of groups and institutions." *Id.* at 1383. Thus, people afflicted by prejudice resolve their inner conflict between the "American Creed" and prejudice in different ways, including: "(1) repression (denial); (2) defense (rationalization); (3) compromise (partial resolution); (4) integration (true resolution)." *Id.* at 1384.

14. *Id.* at 1381–82. "'In-group' is defined as 'any cluster of people who can use the term "we" with the same significance.' 'Out-group' refers to all others." *Id.* at 1381 n.161.

15. *Id.* at 1382.

16. *Id.* at 1383–84. The "public values" of equality and humanitarianism were first coined as the "American Creed" by Gunnar Myrdal. (citing Gunnar Myrdal, An American Dilemma 209 (1962)).

17. Delgado, *supra* note 1, at 1382–83.

18. *Id.* at 1385–86, 1402–03.

19. *Id.* at 1402.

20. *Id.* at 1402–03.

21. *Id.* at 1403.

22. *Id.*

23. *Id.* at 1368–75.

First and foremost, Delgado asserts that the judge's position as neutral arbiter offers significant protections to all litigants, including minority disputants.[24] According to Delgado, both internal and external constraints prevent a judge from exhibiting bias or prejudice.[25] Internal constraints include those emanating from the judge's professional position.[26] The judge is often appointed for a lengthy term and thus need not be politically responsive in decisions.[27] A judge also agrees to apply a system of rules, and rule application reduces bias.[28] In addition, the repetitive nature of the judge's caseload dissuades the judge from thinking about particular parties in a dispute. Instead, the judge can focus purely on the legal and factual issues presented.[29] The system of stare decisis also encourages consistent results.[30] Finally, Delgado notes, the competitive presentation of evidence, overseen by the judge, counteracts decision-making bias and "combats the natural human tendency to 'judge too swiftly in terms of the familiar that which is not yet fully known.'"[31]

Second, external constraints reduce the opportunity for judicial bias.[32] The Code of Judicial Conduct, for example, imposes limits on what a judge may or may not do. For example, citing the Code of Judicial Conduct, Delgado notes that a judge must disqualify herself when her impartiality is questioned or when she feels animus or prejudice toward a party.[33]

Next, Delgado notes the important role that rules of civil procedure and evidence play in ensuring a formal, unbiased, and unprejudiced forum for adjudicating disputes.[34] The Federal Rules of Civil Procedure, and their state counterparts, promote fairness and discourage prejudice.[35] They also serve to create a level playing field by ensuring that both par-

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24. *Id.* at 1368.
25. *Id.*
26. *Id.*
27. *Id.* at 1368 (citing Owen Fiss, *Foreword: The Forms of Justice, The Supreme Court 1978 Term*, 93 HARV. L. REV. 1, 14 (1979) (arguing that the federal judiciary is independent because of life tenure)). Of course, even federal judges are appointed through a political process that might tend to make them vulnerable to political bias. And, of course, many state court judges are elected, which creates a greater likelihood of bias than does appointment. Finally, considerable research suggests that judges are never truly as neutral as one might expect. *See generally* Jeffrey J. Rachlinski, Sheri Lynn Johnson, Andrew J. Wistrich & Chris Guthrie, *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009).
28. Delgado, *supra* note 1, at 1368.
29. *Id.*
30. *Id.* ("The doctrine of stare decisis is intended to produce consistent results in similar cases, and anomalous results can be subjected to appellate review.").
31. *Id.* at 1389. Delgado also explains that similar rules control jury prejudice. *Id.* at 1369. Voir dire and peremptory challenges, despite their potential for exploitation, generally help to reduce the number of jurors who are biased. Rules protecting juries from outside influence, such as sequestering or ordering the jury not to discuss the case with outsiders, also serve to reduce bias within the jury. *Id.* at 1369–70.
32. *Id.* at 1368.
33. *Id.* at 1368–69.
34. *Id.* at 1370–71.
35. *Id.* at 1371 (citing Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 364, 369 (1978)).

ties understand the process and that a trial reaches a resolution on the basis of merit rather than on a party's social or economic advantage.[36] Delgado focuses on several of these rules as particularly well-suited to reducing bias. For example, Delgado notes that the rules governing notice[37] and timely filing of pleadings help reduce bias by enabling defendants to eliminate frivolous suits early.[38] Conversely, the short plain statement requirement discourages groundless claims motivated by prejudice.[39] The requirement of an attorney's signature on all pleadings[40] is also likely to reduce prejudice because an attorney will only sign the papers if the attorney believes that the pleading is grounded in fact or law or, minimally, on a good faith argument for modification of the law.[41] Moreover, the parties are less likely to act in a prejudicial manner because they know the judge will see all of their pleadings and motions.[42] This principle applies equally to pretrial orders.[43] That the judge will see all of these pleadings and motions incentivizes parties to avoid drafting or filing documents based on spite or prejudice.[44]

The judge's obligation to state his or her findings of fact and conclusions of law further serves to reduce bias and prejudice.[45] The existence of an appellate review process encourages judges to find facts and law in an unbiased manner.[46] Evidentiary rules also reduce prejudice by limiting testimony to the issues that the parties present and excluding evidence designed primarily to inflame the court or jury or to induce prejudice in

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36. *Id.* at 1371 (citing Foman v. Davis, 371 U.S. 178, 181 (1962) ("It is too late in the day and entirely contrary to the Federal Rules of Civil Procedure for decisions on the merits to be avoided . . . ."). *Id.* (citing Conley v. Gibson, 355 U.S. 41, 48 (1957) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive . . . . [T]he purpose of pleading is to facilitate a proper decision on the merits.")).

37. *Id.* at 1371. Federal Rules of Civil Procedure 3, 4, 5, 6, and 8 provide notice to all parties, ensuring knowledge of the course of proceedings.

38. *Id.* (citing FED. R. CIV. P. 3–6, 8). "Rule 3 requires that a complaint be filed to begin the action. The suit thus becomes a matter of public record and the time of its commencement fixed." *See id.* at 1371 n.89 (citing FED. R. CIV. P. 3). "If the claim is stale and dredged up out of spite or class-based animosity, the defendant can use a statute of limitations defense to have it dismissed. The rules also require service of process within a short period." *Id.* (citing FED. R. CIV. P. 4(a) & 4(j)). "If service is not received, the court must dismiss." *Id.*

39. *Id.* at 1372.

40. FED. R. CIV. P. 11(a). Rule 11 requires that attorneys attest that papers are not filed to harass or achieve another improper purpose. FED. R. CIV. P. 11(b).

41. Delgado, *supra* note 1, at 1372 (discussing FED. R. CIV. P. 11).

42. *Id.*

43. *Id.* (citing FED. R. CIV. P. 16(c)(1), Advisory Committee Note); *see also* Seneca Nursing Home v. Sec'y of Soc. and Rehab. Servs., 604 F.2d 1309, 1314 (10th Cir. 1979) (stating that the purpose of the pretrial order is to simplify litigation). Rule 16 mandates a pretrial conference and order that serve to define litigable issues. FED. R. CIV. P. 16.

44. Delgado, *supra* note 1, at 1372–73.

45. *Id.* at 1373 (citing FED. R. CIV. P. 52). Rule 52 requires a court to issue an opinion, assuring that the decision will be exposed to public scrutiny. FED. R. CIV. P. 52.

46. Delgado, *supra* note 1, at 1373. Federal Rules of Civil Procedure 59 and 61 provide for a new trial if error impairs a substantial right of a party. FED. R. CIV. P. 59, 61.

some other way.[47]

Courtroom formalities also help reduce prejudice. The presence of the American flag, the judge's black robe, and other courtroom rituals emphasize that higher public values are encouraged.[48] At the same time, these formalities discourage people from acting on their biases and prejudices, as they would in an informal or intimate setting.[49] That "each party is represented by an attorney and has a prescribed time and manner for speaking, putting on evidence, and questioning the other side" also provides the structure needed to reduce bias and prejudice.[50] Procedural and evidentiary rules serve to keep parties separate and provide structure for interactions.[51] Attorneys address the trier of fact rather than each other.[52]

Why do these formalities work to reduce bias and limit prejudice? According to Delgado, the formal nature of the courtroom takes advantage of the human desire to conform.[53] The courtroom norms of fairness and neutrality create a behavioral standard that causes participants to reduce expressions of prejudice.[54] Moreover, the formality of communication in a courtroom avoids unstructured interactions that social psychologists have determined are more likely to encourage expressions of prejudice.[55] Finally, in the formal context, "prejudiced persons are [less] likely to act on their beliefs if the [formal courtroom] environment confronts them with [a] discrepancy between their professed ideals and their personal hostilities against out-groups."[56] In other words, if people realize that their beliefs are outside the norm, they will change, or at least suppress, their views.

Ultimately then, Delgado recommends that persons with low status and little power, when in conflict with persons of high status or power, should use an adjudicatory process.[57] This recommendation becomes even stronger "when the issue to be adjudicated touches a sensitive or

47. Delgado, *supra* note 1, at 1373–74; FED. R. EVID. 403; *see also* FED. R. EVID. 103 (stating that error occurs when evidence is erroneously admitted that injures a substantial right of a party).

48. Delgado, *supra* note 1, at 1388.

49. *Id.* (explaining that "formal adjudication avoids the unstructured, intimate interactions that, according to social scientists, foster prejudice.").

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.* at 1387–88, 1395 ("[P]rocedural formality recognizes inequality and attempts to compensate for it by making both parties conform to the same standards.") (internal quotation omitted).

54. *Id.* at 1387–88.

55. *Id.* at 1388.

56. *Id.* at 1387. Delgado posits that prejudice tends to be environmental. People will express prejudice more freely when the setting permits it, or, worse yet, encourages it. In other words, the venting that might take place in mediation would be more likely to be hostile or prejudiced toward minority groups because of a lack of safeguards in place to control such outbursts. In fact, in the mediation setting, venting is often encouraged, making more likely, according to Delgado, the articulation of prejudiced or hostile views. *Id.*

57. *Id.* at 1403–04.

intimate area of life" such as housing, inter-neighbor, or family disputes.[58] If dispute resolution is needed in this setting, rules governing the scope and confidentiality of the proceedings, discovery, and form of review are essential to ensuring that the minority disputant is not subject to intrusive or irrelevant (i.e., biased or prejudiced) inquiries.[59] In addition, in this context, the third-party neutral should be a professional who is acceptable to both sides, and both sides should be permitted to have an advocate or attorney present, if they so desire.[60]

Delgado's description of formalism is different than the kind of process offered in traditional arbitration. However, changes in the arbitration process over the last thirty years paint a more formal picture of the dispute resolution process. The next section will explore whether these changes offer sufficient protection to the party of low status and power so that he or she may feel comfortable utilizing the arbitration process.

II. WHAT DOES TRADITIONAL ARBITRATION LOOK LIKE?

As I mentioned at the outset, Delgado's article focuses primarily on the benefits and drawbacks of mediation and other non-binding processes for minority disputants rather than on arbitration.[61] Delgado's limited discussion of arbitration identified it as a speedy process that provides a binding result issued by an impartial third party, avoiding the delays and costs associated with the court system.[62] This description fits the definition of "traditional arbitration," the process typically used by repeat players to resolve disputes.

As originally envisioned and consistent with Delgado's description, arbitration was an informal, speedy, and flexible process that enabled a disputant to avoid slow court processes and achieve a final, binding result.[63] Merchants, in particular, preferred arbitration because they were interested in a system that would resolve disputes quickly and in a manner consistent with industry standards (to facilitate relationships among the parties).[64] "Traditional arbitration, unlike litigation, empowered . . . disputants to appoint a disinterested third party who was an expert in the industry to resolve the dispute in accordance with understood customary norms."[65] "Moreover, the arbitral system ensured finality, [viewed as] es-

58. *Id.* at 1403.
59. *Id.*
60. *Id.*
61. *See generally id.* at 1360–61.
62. *Id.* at 1363.
63. *See* Sarah Rudolph Cole, *Curbing the Runaway Arbitrator in Commercial Arbitration: Making Exceeding the Powers Count*, 68 ALA. L. REV. 179, 184 (2016). *See also* CPR COMMISSION ON THE FUTURE OF ARBITRATION, COMMERCIAL ARBITRATION AT ITS BEST: SUCCESSFUL STRATEGIES FOR BUSINESS USERS 173 (Thomas J. Stipanowich & Peter H. Kaskell eds., 2001) (explaining that traditional values of arbitration included speed, finality, and party autonomy).
64. Cole, *supra* note 63, at 186; Paul L. Sayre, *Development of Commercial Arbitration Law*, 37 YALE L.J. 595, 597–98 (1928).
65. Cole, *supra* note 63, at 186; Jeffrey W. Stempel, *Pitfalls of Public Policy: The Case of Arbitration Agreements*, 22 ST. MARY'S L.J. 259, 270 (1990).

sential to facilitating continuing relationships," because the parties agreed "to abide by the arbitrator's resolution of the claim."[66] Judicial review of arbitration awards was unwanted because the timetable for such review was inconsistent with the parties' need for immediate resolution.[67] Opinion writing was equally unnecessary because the principles the arbitrator applied were based on customs and norms that the parties generally understood.[68] Speed and efficiency of award issuance took precedence over accuracy and reasoning.[69]

Modern commercial arbitration, among repeat players like businesspeople, remains a flexible process. Parties may, and often do,[70] negotiate multiple aspects of the process, including the location of the hearing; the availability, types, and amount of discovery; the timetable of events; the

66. Cole, *supra* note 63, at 187; *see also* Randy Linda Sturman, *House of Judgment: Alternative Dispute Resolution in the Orthodox Jewish Community*, 36 CAL. W. L. REV. 417, 418 (2000) (recognizing that in Bet Din, a form of ADR that allows Jews to resolve disputes between themselves, parties must sign a contract stating that they agree to abide by the decision); Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 149 (1992) (noting that the diamond industry ensures obedience to arbitral awards through reputational sanctions).

67. *See* Edward Brunet, *Replacing Folklore Arbitration with a Contract Model of Arbitration*, 74 TUL. L. REV. 39, 45 (1999) ("In historic folklore arbitration, informal procedures dominated. There was little or no discovery. Evidence rules were inapplicable . . . .").

68. Martin Domke, Gabriel Wilner & Larry E. Edmonson, 2 DOMKE ON COM. ARB. § 34:7 (2016) ("[C]ommercial arbitration awards . . . are rarely accompanied by written opinions."). Likewise, today, commercial arbitrators are not legally bound to provide written substantive awards. *See* Bernhardt v. Polygraphic Co. of Am., 350 U.S. 198, 204 n.4 (1956) ("[A]rbitrators need not disclose the facts or reasons behind their award."); United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award."). The "no reasoned award" norm of American commercial arbitration is contrary to the practice in most other industrialized nations. In most countries, arbitrators are expected, and in many are required by law, to state their findings of fact and conclusions of law and reveal the manner in which the facts and the law lead to their determination of the disputes before them. *See* Martin Domke, *Arbitral Awards Without Written Opinions: Comparative Aspects of International Arbitration*, *in* XXTH CENTURY COMPARATIVE AND CONFLICTS LAW 249, 249–50 (Kurt H. Nadelmann et al. eds., 1961).

69. Indeed, the most commonly cited reason for the finality of arbitral awards is that arbitration is precisely what the parties bargained for. In exchange for a quicker, less expensive resolution of the dispute, the parties trade away some level of assurance that the correct result on the merits has been reached. *See, e.g.*, Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985); McIlroy v. PaineWebber, Inc., 989 F.2d 817, 819–20 (5th Cir. 1993); Moncharsh v. Heily & Blase, 832 P.2d 899, 903 (Cal. 1992).

70. My experience as a labor, employment, commercial, and securities arbitrator is that parties negotiate the amount and timing of discovery as well as the timetable of events, location of the hearing, and use of briefs. Parties typically have the applicable law identified in their arbitration agreements, so this issue may, at one time, have been negotiated but is not negotiated at the time the dispute arises. *See* Lisa B. Bingham, *Control Over Dispute-System Design and Mandatory Commercial Arbitration*, 67 L. & CONTEMP. PROBS. 221, 222 (2004); *see also* AM. ARBITRATION ASS'N (AAA), COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 10, 14 (Oct. 1, 2013), https://www.adr.org/sites/default/files/Commercial%20Rules.pdf [https://perma.cc/T8SJ-XYRL] [hereinafter AAA COMMERCIAL RULES] (Rule 1, Agreement of Parties; Rule 11, Fixing of Locale); JUDICIAL ARBITRATION AND MEDIATION SERVS. (JAMS), JAMS COMPREHENSIVE ARBITRATION RULES & PROCEDURE 7 (July 1, 2014), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2014.pdf [https://perma.cc/JJR8-N95S] [hereinafter JAMS RULES] (Rule 2, Party Self-Determination and Emergency Relief Procedures).

appropriateness of expert witnesses; and the use of pre- or post-hearing briefs. Yet parties tend to rely on institutional rules for many issues, including the size of the arbitral panel, the use of procedural rules or evidentiary standards, and whether or not attorneys will represent the parties.[71] These institutional rules reflect the default approach to arbitration—informality and efficiency.[72] Arbitration's flexibility also enables parties to exercise considerable control over arbitrator selection.[73] Thus, parties may select an arbitrator who is an expert in the field in which the dispute has arisen. Moreover, parties can and sometimes do select arbitrators who are not lawyers.

Arbitrations among repeat players typically follow a fairly predictable structure. Most arbitration hearings are confidential.[74] The arbitrator usually opens the arbitration with a recitation of ground rules, followed

71. My arbitral experience suggests that parties commonly adopt existing institutional rules from a provider organization, like AAA. These rules state that arbitration does not typically follow rules of procedure and evidence. Also, because the rules assign the number of arbitrators based on the amount of the claim, the size of the panel is not negotiated. Finally, parties typically permit the use of a representative and do not limit the type of representative a party may select.

72. For example, there is no formal analog in commercial arbitration to the pre-trial motion practice in traditional litigation. This characteristic of the process accounts for a substantial portion of the cost and time savings that can be realized in arbitration. Rule 10 of the AAA Commercial Arbitration Rules provides for pre-hearing proceedings, including a "preliminary hearing." However, Rule 10 does not expressly contemplate pre-hearing motions addressing the form and content of the pleadings, questions of proper parties and jurisdiction, or attempts to avoid a hearing by achieving dismissal as a matter of law or through an adjudication based on undisputed facts. *See* AAA COMMERCIAL RULES, *supra* note 70, at 14.

73. *See* Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 362–63 (1995) ("[I]n most instances, commercial arbitration proceeding[s] [are] governed by the rules of [a] neutral appointing authority," such as the AAA or JAMS, which are selected by disputants "to administer the arbitration tribunal and provide panels of neutrals from which arbitrators are selected."). Of course, the parties are free to devise their own mutually acceptable rules for the arbitration proceeding, select an arbitrator without the assistance of a neutral appointing authority, or both.

74. In Stolt-Nielsen S.A. v. Animalfeeds Int'l Corp., 559 U.S. 662, 685–86 (2010), "Justice Samuel Alito assumed that confidentiality is a natural and beneficial aspect of bilateral arbitration proceedings." Amy J. Schmitz, *Assuming Silence in Arbitration*, N.J. LAW. MAG., Apr. 2011, at 13. Although "[a]rbitration is private in that only the parties to the arbitration agreement, the arbitrators, witnesses, and others that the parties invite, may attend the proceedings," it does not receive any statutory confidentiality or secrecy protections. *Id.* However, parties often include confidentiality clauses in their arbitration agreements. *Id.*; *see also* Richard C. Reuben, *Constitutional Gravity: A Unitary Theory of Alternative Dispute Resolution and Public Civil Justice*, 47 UCLA L. REV. 949, 1086 (2000) ("Privacy can be an important consideration in the decision to waive full-blown trial rights in favor of the arbitral forum."); Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1214 (2007) (discussing distinctions between confidentiality and privacy in arbitration). *But see* Eagle v. Fred Martin Motor Co., 809 N.E.2d 1161, 1181 (Ohio Ct. App. 2004) (criticizing private arbitration proceedings because they "prevent the public from discovering . . . acts and practices" violative of consumer protection statutes); Kloss v. Edward D. Jones & Co., 54 P.3d 1, 8 (Mont. 2002) (asking whether arbitration proceedings "shrouded in secrecy . . . conceal illegal, oppressive or wrongful business practices").

by each party's opening statement.[75] Next, each party presents witnesses and other evidence. During the hearing, an arbitrator may ask questions of the witnesses and attorneys to clarify the evidence. Finally, the arbitrator hears closing statements. In most cases, the arbitrator allows the parties to submit post-hearing briefs that summarize each party's main arguments. The arbitrator then issues a written award, commonly with an accompanying opinion, within the time limit that the parties set. If the parties have not indicated when the award is due, arbitrators typically issue awards within a few weeks of the hearing.

When disputants think of arbitration, the process described above is likely what comes to mind.[76] Yet, the arbitration process has changed in the context of arbitrations among one-shot players like consumers and employees on the one hand, and repeat players, like businesses and employers, on the other.[77] As most readers know, businesses and employers dramatically increased their use of pre-dispute arbitration agreements in the 1980s and 1990s. Looking for less expensive and speedier methods for resolving disputes, these entities turned toward arbitration. The Supreme Court facilitated the move to arbitration by sanctioning agreements that mandated arbitration of the vast majority of statutory claims.[78] Not surprisingly, some of the businesses adopting arbitral processes overreached, attempting to bias the arbitration process heavily in their favor by, for example, skewing the arbitrator selection process,[79] choosing inconvenient locations for the arbitration,[80] or charging disputants excessive fees to participate in arbitration.[81] Courts and policy makers intervened, though, establishing parameters for businesses interested in using arbitration to resolve disputes with consumers and employees. In addition to ensuring fair arbitrator selection processes, courts and policy makers cir-

75. Arbitration ground rules focus on the arbitrator's personal preferences and the procedural rules that will govern the arbitration hearing. Among other issues, an arbitrator's ground rules might address introduction of documentary evidence, sequestration of witnesses, order of witness testimony, administration of witness oaths, time limitations on opening or closing statements, and length of hearing breaks. *See* JOHN W. COOLEY, THE ARBITRATOR'S HANDBOOK 79 (2d ed. 1998).

76. This generalized view of arbitration is not quite an accurate picture of the reality of domestic arbitration practice in the United States. In fact, even in the 1980s, arbitrators and arbitral institutions offered "a diverse range of arbitration products." W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1905 (2010).

77. Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 459 (acknowledging that arbitration has changed from the voluntary model to a "commercialized industry that is imposed upon consumers and employees").

78. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991) (acknowledging that an ADEA claim may be arbitrated).

79. Hooters of Am., Inc. v. Phillips, 173 F.3d 933, 938–39 (4th Cir. 1999).

80. Brower v. Gateway 2000, Inc., 676 N.Y.S.2d 569, 574–75 (N.Y. App. Div. 1998) (arbitration hearing location in Paris at the ICC Chamber of Commerce is both inconvenient and expensive and, therefore, unconscionable).

81. *Id.* at 571, 575 ($4,000 filing fee is excessive and therefore unconscionable); Myers v. Terminix Int'l Co., 697 N.E.2d 277, 280–81 (Ohio Ct. Com. Pl. 1998) (arbitration provision in service contract unenforceable because it would require payment of a $2,000 filing fee on a small claim).

cumscribed businesses' ability to require consumers and employees to pay administrative and arbitrator fees, curtail discovery, and bind only consumers and employees to arbitration, rather than both parties.[82] In addition, policy makers developed a "due process protocol" that one of the two major arbitrator providers ultimately adopted,[83] ensuring that arbitrators will be qualified in the subject matter over which they preside, be able to award whatever relief would be available to disputants in court, be impartial, reveal conflicts of interest, and be trained in the law, including procedural and remedial issues that might arise, relevant to those cases over which the arbitrator would preside.[84] Both major arbitration service providers authorize a party to request that the arbitrator hold a management conference prior to an arbitration hearing in a variety of cases. These management conferences, which are similar to a pretrial conference, review guidelines for discovery,[85] including interrogatories

82. *Hooters*, 173 F.3d at 940; Morrison v. Circuit City Stores, Inc., 317 F.3d 646, 675 (6th Cir. 2003).

83. The other provider, JAMS, has its own standards. *See* JUDICIAL ARBITRATION AND MEDIATION SERVS. (JAMS), JAMS POLICY ON EMPLOYMENT ARBITRATION MINIMUM STANDARDS OF PROCEDURAL FAIRNESS 2 (July 15, 2009), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Employment_Min_Stds-2009.pdf [https://perma.cc/G94L-MG5N] [hereinafter JAMS STANDARDS OF PROCEDURAL FAIRNESS]. Employers must follow this policy in order to have JAMS administer an arbitration on their behalf. The standards are similar to the AAA's Due Process Protocol. *See* AM. ARBITRATION ASS'N, CONSUMER DUE PROCESS PROTOCOL STATEMENT OF PRINCIPLES 1 (1998), https://adr.org/aaa/ShowPDF?doc=ADRSTG_005014 [https://perma.cc/YM4H-B7WZ] [hereinafter AAA's CONSUMER DUE PROCESS PROTOCOL]. JAMS asserts that it supports the application of the *Consumer Protocol*, and that its standards are consistent with the Protocol. For example, Standard 6 provides that the only fee an employee filing a claim in arbitration may be required to pay is the initial JAMS Case Management Fee. *See* JAMS STANDARDS OF PROCEDURAL FAIRNESS, *supra* at 4. After that, the employee is not responsible for paying the arbitrator. *Id.* According to the JAMS Standards, "[t]he only fee that an employee may be required to pay is JAMS's initial Case Management Fee. All other costs must be borne by the company, including any additional JAMS Case Management Fee and all professional fees for the arbitrator's services." *Id.* JAMS's Demand for Arbitration Form provides that for a two-party matter, the initial filing fee is $1,200. For matters involving three or more parties, the filing fee is $2,000. *See* JUDICIAL ARBITRATION AND MEDIATION SERVS., DEMAND FOR ARBITRATION FORM 1, https://www.jamsadr.com/files/Uploads/Documents/JAMS_Arbitration_Demand.pdf [https://perma.cc/2SGN-5LB6].

84. The first arbitration due process protocol, *Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, was created in 1995 by a task force of "individuals from diverse organizations involved in labor and employment law." *See* JOHN T. DUNLOP & ARNOLD M. ZACK, MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES, APPENDIX B, at 171–78 (1997). A study of the Consumer Protocol showed that AAA takes seriously its promise to ensure enforcement of the protocol's mandates. According to Professor Chris Drahozal and his co-author, Samantha Zyontz, a review of AAA's records revealed that AAA carefully vets business arbitration clauses for protocol compliance and takes seriously its threat not to administer cases in which the business fails to comply with the protocol. *See* Christopher R. Drahozal & Samantha Zyontz, *Private Regulation of Consumer Arbitration*, 79 TENN. L. REV. 289, 289–90 (2012).

85. AAA has an "initial discovery protocol" for employment arbitration cases. *See* AM. ARBITRATION ASS'N, AMERICAN ARBITRATION ASSOCIATION INITIAL DISCOVERY PROTOCOLS FOR EMPLOYMENT ARBITRATION CASES 1, https://community.adr.org/servlet/JiveServlet/previewBody/1164-102-1-1127/AAA_DiscoveryProtocols_Employment.pdf [https://perma.cc/4353-QF2N]. This protocol requires that both claimant and respondent produce "all communications between the parties (including other formal claims or

and depositions, timing for filing of motions and decisions on motions, and timing of the hearing and ultimate decision. It is common for businesses with relatively strict limits on discovery to relax those limitations during these management conferences with the arbitrator.[86]

Interestingly, many businesses went well beyond the requirements of the due process protocol in their pre-dispute arbitration agreements with consumers and employees. Some businesses require that arbitrators be lawyers as well as experts in the subject matter of the dispute over which they preside.[87] Many businesses reduce the fees a consumer or an employee will pay to file a demand for arbitration to a negligible amount and pay for the arbitrator fees themselves.[88] In addition, businesses typi-

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charges) concerning the factual allegations or claims at issue in the arbitration; [d]ocuments concerning the formation, terms and conditions, and termination of the employment relationship; [d]ocuments concerning any application for (and receipt of) unemployment benefits and/or disability benefits." *Id.* It also requires that respondent produce "[c]laimant's personnel file," including "performance evaluations and formal discipline . . . or write-ups; [d]ocuments relied on to make the employment decision(s) at issue; [r]elevant job descriptions, compensation and benefits documents, and workplace policies or guidelines." *Id.* at 2. It also requires a table of contents or index for any applicable employee handbook, documents concerning the investigation of any complaints "about or made by the claimant," and "[i]dentification of claimant's supervisor(s) and/or manager(s), other individual(s) involved in making the adverse action decision or with knowledge of the facts concerning the claims or defenses." *Id.*

86. *See generally* Neal M. Eiseman, John E. Bulman & R. Thomas Dunn, *Tale of Two Lawyers: How Arbitrators and Advocates Can Avoid the Dangerous Convergence of Arbitration and Litigation*, 14 CARDOZO J. CONFLICT RESOL. 683, 686–87 (2013); Radha Kulkarni, *Optimizing the Initial Arbitration Management Conference*, 38 L.A. LAW. 10 (2015). An arbitrator's power to require document production between the parties "can reside in: (i) the parties' agreement; (ii) the institutional arbitration rules governing the procedures, which either expressly authorize such discovery or place the scope of discovery in the discretion of the arbitrator; or (iii) applicable arbitration statutes, such as the Federal Arbitration Act (FAA)." Courts construe the FAA "to confer on arbitrators the power to compel the parties to exchange documents prior to the hearing." Philip D. O'Neill, *The Power of Arbitrators to Award Monetary Sanctions for Discovery Abuse*, 60 DISPUTE RESOL. J. 60, 62–63 (2005).

87. *See KBR Dispute Resolution Program Plan and Rules*, KBR, INC. 13 (2016), https://technicalstaffingresources.com/Onboarding/Dispute-Resolution-Plan-and-Rules.pdf [https://perma.cc/E7A5-S3JL] [hereinafter *KBR Dispute Resolution Program Plan and Rules*] (arbitrator must be a licensed attorney). AAA gives its employees the option to arbitrate employment disputes. Arbitrators must have at least ten years of employment law experience. *The Smart Solution*, AM. ARBITRATION ASS'N 6 (Feb. 1, 1998), https://www.adr.org/cs/idcplg?IdcService=GET_FILE&dDocName=ADRSTG_009801&RevisionSelectionMethod=LatestReleased [Perma link unavailable] [hereinafter *The Smart Solution*]. Uber's arbitration agreement requires that the arbitrator be an attorney licensed to practice in the location where the arbitration proceeding will be conducted or a retired federal or state judicial officer. *U.S. Terms of Use: Arbitration Agreement*, UBER 12 (Nov. 21, 2016), https://www.uber.com/legal/terms/us/ [https://perma.cc/DM7U-AQQD] [hereinafter *Uber Arbitration Agreement*]. Today, most arbitrators are lawyers or retired judges. *See* Charles J. Moxley Jr., *Selecting the Ideal Arbitrator*, 60 DISPUTE RESOL. J. 24, 27–28 (2005).

88. *KBR Dispute Resolution Plan and Rules*, *supra* note 87, at 12 (party pays $50 filing fee). AAA employees pay a $100 filing fee to participate in arbitration and are entitled to a one-time $1,000 reimbursement of the employee's or former employee's attorney's fees for mediation or arbitration of each matter. *The Smart Solution*, *supra* note 87, at 8–9. The AAA employee pays no arbitrator compensation, although may elect to pay up to one-half of the neutral's compensation and expenses. *Id.* at 9. Under Uber's arbitration agreement, parties pay their own representatives, but the party is not required to bear any type of fee or expense that it would not be required to bear if it had filed the action in a court of law.

cally provide the arbitrator with significant discretion to order necessary discovery and make evidentiary rulings during the arbitration process.[89]

Whether proceeding pursuant to institutional rules or their own arbitration agreement, most businesses continue to confer significant discretion on the arbitrators to run the hearing. Though prone to err on the side of admitting evidence, arbitrators carefully consider hearsay, relevancy, and duplicative testimony objections. Moreover, arbitrators routinely refer to the rules of evidence as guidelines to assist them in running the hearing. Although not held in a courtroom, arbitral hearings are quite formal, with opening statements, direct and cross-examination, and swearing in of witnesses, together with ruling on evidentiary objections.[90] In many ways, both substantively and procedurally, modern arbitration resembles a bench trial or a hearing before an administrative law judge.[91] Arbitrators also write reasoned opinions more frequently today than they did in the 1970s and 1980s.[92] These opinions look much like judicial opin-

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Uber Arbitration Agreement, *supra* note 87, at 16–17. Macy's arbitration agreement states that an employee filing a claim in arbitration will pay the cost of arbitration up to a "maximum of the least of one (1) day's base pay or One Hundred Twenty-Five Dollars ($125), whichever is less." *See* Sellers v. Macy's Retail Holdings, Inc., No. 2:12-CV-02496-SHL, 2014 WL 2826119, at *3 (W.D Tenn. June 15, 2014). Macy's plan also authorizes Macy's to reimburse an employee for legal consultation and representation during the arbitration process up to $2,500 during a rolling twelve-month period. *Id.* Under AAA Employment Arbitration Rules and Mediation Procedures, for disputes arising under employer promulgated plans, "[t]he employer shall pay the arbitrator's compensation unless the employee, post dispute, voluntarily elects to pay a portion of the arbitrator's compensation." AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 33 (Nov. 1, 2009), https://www.adr.org/sites/default/files/Employment%20Rules.pdf [https://perma.cc/CG8T-VMPP] [hereinafter AAA's EMPLOYMENT ARBITRATION RULES]. Employees pay a $200 non-refundable filing fee. The employer pays the arbitrator's expenses as well. *Id.* at 33, 35.

89. *KBR Dispute Resolution Plan and Rules*, *supra* note 87, at 15–17; *The Smart Solution*, *supra* note 87, at 7 (arbitrator has authority to order discovery); *Uber Arbitration Agreement*, *supra* note 87, at 14 (arbitrator has authority to order discovery).

90. *See, e.g.*, AAA's EMPLOYMENT ARBITRATION RULES, *supra* note 88, at 25 ("Witnesses for each party shall submit to direct and cross examination.").

91. *See, e.g.*, Gary McGowan, *Don't Call It a "Trial": What Litigators Should Know About Arbitration*, 52 THE HOUS. LAW. 12, 14 (July/Aug. 2014). Although often conducted in a hotel or office, an arbitration hearing "resembles a bench trial: opening statements, claimant's evidence, respondent's evidence, rebuttal evidence and closing arguments" are all given. *Id.* "Witnesses are sworn and give direct testimony subject to cross-examination." *Id.* "If either party wishes, the hearing will be transcribed." *Id.* However, unlike a bench trial, the "rules of evidence do not strictly apply (unless the parties agree otherwise). Generally, arbitrators view extensive use of objections as obstructive and/or time wasting. Moreover, they are reluctant to exclude evidence for fear of vacatur," as "'refusing to hear evidence pertinent and material to the controversy'" is one of the few grounds for vacating an award. *Id.* (citing 9 U.S.C. § 10 (2012)). A more relaxed approach to evidence is therefore deployed in arbitration hearings than would be seen during a bench trial or administrative hearing. "[A]ll documents are usually deemed admitted at the outset, unless there are serious questions about authenticity." McGowan, *supra* at 14. Hearsay rules are often relaxed, "[m]otions to strike experts will likely be denied," and "affidavits may be allowed [without] cross-examination." *Id.* However, some objections may find traction if the evidence is cumulative or redundant; completely irrelevant or not probative; contains too much hearsay or double hearsay; or if an attorney extensively asks leading questions to a friendly witness during direct on disputed subjects. *See id.*

92. KBR Rules require that the award be in writing and shall be a reasoned award that includes "a brief statement of the essential findings of fact and conclusions of law on which

ions. Moreover, arbitrators deciding legal issues often seek out "precedent," like court decisions or other arbitral opinions, to help guide their decision-making. Like judges, law-trained arbitrators prefer to decide cases consistent with the law and with other arbitrators' decisions.[93]

Prompted by judicial decision-making and policy reform, businesses and employers offer an arbitration procedure that is relatively inexpensive to the consumer or employee while providing reasonable discovery and an opportunity to file dispositive motions and respond to motions filed. Moreover, this reformed arbitration process enables consumers or employees to participate in a hearing that largely mirrors a trial (albeit with more limited application of evidentiary rules), and receive a final decision with findings of fact and conclusions of law.

The more formal arbitration process many repeat players use when implementing arbitration agreements with one-shot players may come close to satisfying the objections Delgado levied, and might still levy, against arbitration. Delgado does not rank by importance the various formalities available to minority disputants through the traditional litigation process. Thus, it is hard to predict whether Delgado, and other critics of dispute resolution, would approve of this new, more formal, arbitral process.

But, clearly, some of the major tenets essential to a formal process that Delgado identified in his 1985 article are now apparent in modern arbitration. Arbitrators typically apply relevant legal rules in their analysis of disputes, and arbitrators are experts in the field in which they arbitrate. Thus, their caseload is repetitive, which enables them, like judges, to avoid biases in a particular case. Precedent still does not bind arbitrators, but, unquestionably, arbitrators look to other arbitral decisions, as well as court decisions, to help guide their decision-making. Parties also present evidence in the same competitive fashion as do parties in litigation. In addition, although not enforceable by law, arbitrators must comply with codes of arbitral conduct which, in many states, fundamentally mirror the

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the award is based." *KBR Dispute Resolution Plan and Rules*, *supra* note 87, at 20. Uber's arbitration agreement states that the "[t]he Arbitrator will issue a decision or award in writing, stating the essential findings of fact and conclusions of law." *Uber Arbitration Agreement*, *supra* note 87. The Uber agreement also precludes the arbitrator from committing errors of law or legal reasoning, and states that the award may be vacated or corrected on appeal to a court of competent jurisdiction for any such error. *Id.* Macy's requires that if the employee's claim "arises under federal or state statutory law, the award should include findings of fact and conclusions of law." SOLUTIONS INSTORE at 14 (on file with author).

93. After examining arbitrators' citation practices in securities, labor, employment, and class action arbitration, Professor Mark C. Weidemaier found that arbitrators, particularly in employment and class action arbitration cases, "routinely" wrote lengthy, reasoned awards, spending considerable time analyzing the extant legal issues and extensively using precedent. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. REV. 1091, 1139 (2012) (outside of securities disputes, "arbitrators wrote reasonably lengthy decisions that were substantially devoted to legal analysis and that made ample use of precedent."). In addition, Professor Weidemaier found that, outside of labor arbitration, the "overwhelming majority" of awards cite judicial precedent. *Id.* at 1140. He found the similarity between arbitrators' opinions and judicial opinions "striking." *Id.*

Code of Judicial Conduct that binds judges.[94] Rules of evidence and procedure remain more relaxed in arbitration. But, procedural rules in particular have begun to play a larger role in the arbitral process. Many of the procedural rule benefits Delgado cites—notice, timely filing of pleadings, attorney's signature on pleadings—exist in arbitration. Thus, as in the courtroom, these rules may reduce the likelihood that arbitration could become a breeding ground for prejudice and bias. Finally, because their livelihood is on the line, and the arbitral providers insist on compliance with arbitrator codes of ethics, it seems unlikely that many arbitrators would ignore applicable ethical rules.

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94. For example, in some New York jurisdictions using small claims arbitrators, litigants must elect between trial by a judge or by an arbitrator. *See* Gerald Lebovits, *Small Claims Courts Offer Prompt Adjudication Based on Substantive Law*, 70 N.Y. ST. B. J. 6, 14–15 (1998). When arbitrating, the "experienced, qualified and carefully selected attorneys" are required to comply with the Code of Judicial Conduct and the Rules Governing Judicial Conduct. *Id.* However, arbitrators are not held to the ethical standards required of Article III federal judges, as articulated in 28 U.S.C. § 455 (2012) (governing the disqualification of a justice, judge, or magistrate judge). "Standards for disqualification in the AAA Commercial Arbitration Rules and the Code of Ethics for Arbitrators are not so stringent as those in the federal statutes on judges or in Canons 2 and 3(C) of the Code of Judicial Conduct for United States Judges and the ABA's Code of Judicial Conduct." MARTIN DOMKE, GABRIEL WILNER & LARRY E. EDMONSON, 1 DOMKE ON COMMERCIAL ARBITRATION § 5:4 (2016) (citing 28 U.S.C.A. § 455); AM. BAR ASS'N, ABA MODEL CODE OF JUDICIAL CONDUCT Canons 2, 3, subd. C. In his concurrence in *Commonwealth Coatings Corp. v. Cont'l Casualty Co.*, Justice White wrote:

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function. This does not mean the judiciary must overlook outright chicanery in giving effect to their awards; that would be an abdication of our responsibility. But it does mean that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial. I see no reason automatically to disqualify the best informed and most capable potential arbitrators.

393 U.S. 145, 150 (1968) (White, J. concurring) (citations omitted). "Since Justice White's vote was essential to a majority, his statement as to what the court was not deciding has been treated as authoritative." DOMKE, *supra* at § 5:4 (citing Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 682 (7th Cir. 1983)); *see also* David Allen Larson, *Conflicts of Interest and Disclosures: Are We Making a Mountain Out of a Molehill?*, 49 S. TEX. L. REV. 879, 879, 906 (2008) (arguing that "[e]xpress incorporation of judicial standards may create additional obligations for arbitrators" and examining the "numerous and varied" ethical standards governing conflicts of interest disclosure requirements for arbitrators, including the Federal Arbitration Act (FAA); Revised Uniform Arbitration Act (RUAA); AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes; and the National Arbitration Forum (NAF) Code of Conduct for Arbitrators). Professor Larson argues that "[j]udicial conduct codes expressly incorporated into an arbitral association's code of conduct may require disclosure and even disqualification in circumstances that would not be problematic under the arbitral code." Larson, *supra* at 907. "[W]hile professional associations are historically more active and prolific in generating standards, recent activities in the states (like California, Florida, and Minnesota) suggest that formal ethical rules or standards of conduct, analogized to Judicial Codes of Conduct, will come from legislatures and courts acting in their regulatory capacity." Carrie Menkel-Meadow, *Ethics Issues in Arbitration and Related Dispute Resolution Processes: What's Happening and What's Not*, 56 U. MIAMI L. REV. 949, 981 (2002).

But objections may remain. Traditional litigation, at least in federal court, offers decision makers who are appointed to lengthy terms and, thus, do not have to be politically responsive. Litigation provides more stringent rules of procedure and evidence, as well as the application of the principle of stare decisis and appellate review. In addition, courtrooms are open to the public (arbitral hearings are typically confidential), and the judge's robe and other formalities do not exist in arbitration.

The question is whether the increased formality of the arbitral process, achieved over the last thirty years of reform, is sufficient to create an environment in which a minority disputant would have both faith in the integrity of the arbitration process and, in fact, receive the justice all disputants deserve from an adjudicative process. With some additional effort to ensure the integrity of the arbitral process, I believe the arbitral process provides the kind of access to justice, together with a fair process, that might well serve both minority disputants and one-shot players alike.[95]

Multiple alterations to the arbitration process could bring arbitration even closer to the formal process Delgado envisioned as necessary to reduce biased behavior by disputants and neutrals. Changes to arbitration confidentiality, greater application of procedural and evidentiary rules,[96] more expansive discovery,[97] elimination of blanket immunity for arbitra-

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95. As Deborah Hensler noted in 1990, arbitration may provide greater due process than other settlement mechanisms and may, as a practical matter, be many litigants' only option because the litigation process is so slow and expensive. Deborah R. Hensler, *Court-Ordered Arbitration: An Alternative View*, 1990 UNIV. OF CHICAGO LEGAL FORUM 399, 399, 419 (1990), http://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1074&context=uclf [https://perma.cc/XR3V-LVT6].

96. Professor Stephen J. Ware noted that the procedures of bankruptcy litigation are very similar to those of arbitration. Stephen J. Ware, *Similarities Between Arbitration and Bankruptcy Litigation*, 11 NEV. L.J. 436, 436 (2011). For instance, like in arbitration, "[h]earings on contested matters in bankruptcy [litigation] tend to be faster and less elaborate than trials in ordinary civil litigation." *Id.* at 444. "Although the Federal Rules of Evidence apply to bankruptcy cases, 'most practitioners probably would agree that they are not strictly enforced because almost all matters are tried by the bankruptcy judge[,]' as opposed to a jury." *Id.* In arbitration, "most parties use 'off-the-rack' rules previously written by an arbitration organization like the American Arbitration Association (AAA)." *Id.* at 447. "In arbitration, as in bankruptcy contested matters, evidence is often introduced by affidavit or declaration, rather than oral presentation in open court." *Id.* at 450. Likewise, as in bankruptcy proceedings, the rules of evidence tend not to be strictly enforced in arbitration hearings, as arbitrators, like a bankruptcy judge or presiding bench trial judge, are generally better suited for evaluating the probative value of evidence than a jury would be. *See id.* at 450–52.

97. "Unlike litigation under the *Federal Rules of Civil Procedure*, discovery in arbitration can be very limited." W. Scott Simpson & Omer Kesikli, *The Contours of Arbitration Discovery*, 67 ALA. LAW. 280, 280 (2006). "Discovery devices such as interrogatories, requests for admissions and mental examinations are generally not employed in arbitration." *Id.* "Depositions of parties are common in arbitration, but depositions of nonparties are rare." On the other hand, in litigation, depositions of nonparties are extremely common. *Id.* "These discovery devices, although usually helpful in developing a case, can be very expensive." *Id.* (citing John C. Koski, *From Hide-And-Seek to Show-And-Tell: Evidentiary Disclosure Rules*, 17 AM. J. TRIAL ADVOC. 497 (1993) (noting that attorney's fees generated from discovery account for forty to sixty percent (40%–60%) of a law firm's profits); *see also* J.S. "Chris" Christie, Jr., *Preparing for and Prevailing at an Arbitration Hearing*, 32 AM. J. TRIAL ADVOC. 265, 266 (2008) ("The time required for an arbitration hearing is

tors,[98] expanded opinion writing, greater scrutiny of arbitrators,[99] diversity among the arbitrator corps, and broader judicial review,[100] especially when the disputants are one-shot players facing repeat players, are among the potential improvements possible.

In this article, however, I focus on only two possible changes to arbitration: mandating reasoned opinion writing and increasing diversity among the arbitrator corps. I am selecting these two ideas because they could be implemented quickly and at a relatively low cost. These changes would not require outside intervention—simply cooperation from the prospective parties, their lawyers, and the institutions providing arbitral services.

I recommend the adoption of a reasoned opinion writing requirement because it is already a virtual norm within arbitration[101] at this point. Despite adoption of this norm by institutional providers, the message

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generally less than for a trial in a court, especially a jury trial. As a consequence, arbitration litigation expenses are usually lower than court litigation expenses and arbitrations are usually completed more quickly than trials."); David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247, 1268 (2009) ("[L]imits on discovery (and to a lesser extent on pretrial motion practice) hold down the actual costs of arbitration relative to litigation.").

98. Maureen A. Weston, *Reexamining Arbitral Immunity in an Age of Mandatory and Professional Arbitration*, 88 MINN. L. REV. 449, 515 (2004) (recommending adoption of qualified immunity for arbitrators in part because the expanded use of consumer arbitration, where companies mandate arbitration as a condition of doing business, undermines the legitimacy of the arbitration process in the eyes of the public). Weston also suggests consideration of other possible changes, including requiring arbitrators to obtain certification or licensure. *Id.* at 512–13.

99. Deborah Hensler suggests that one way to guard against decisions that disadvantage women and minorities is to periodically publish lists of current arbitrators for public scrutiny. "To guard against awards that systematically disadvantage plaintiffs or defendants," Hensler recommended that courts be "instructed to publish statistical data on the distribution of arbitration awards on a regular basis." Hensler, *supra* note 95, at 419–20.

100. I am choosing not to focus on judicial review for two reasons. First, there is no question that enhanced judicial review would slow the arbitration process dramatically. Worse yet, the Supreme Court has struck down party demands for increased judicial review. *See* Hall St. Assocs., LLC v. Mattel, Inc. 552 U.S. 576, 585–86 (2008).

101. Labor and employment arbitration rules require writing a reasoned opinion and subsequent publication. *See* AAA's EMPLOYMENT ARBITRATION RULES, *supra* note 88, at 29 ("The award shall be in writing and shall be signed by a majority of the arbitrators and shall provide the written reasons for the award unless the parties agree otherwise. It shall be executed in the manner required by law."); JUDICIAL ARBITRATION AND MEDIATION SERVS., JAMS EMPLOYMENT ARBITRATION RULES & PROCEDURES 22–23 (July 1, 2014), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_employment_arbitration_rules-2014.pdf [https://perma.cc/2HY8-F82A] ("The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. The Award shall also contain a concise written statement of the reasons for the Award, stating the essential findings and conclusions on which the Award is based. The Parties may agree to any other form of Award, unless the Arbitration is based on an arbitration agreement that is required as a condition of employment."). AM. ARBITRATION ASS'N, CONSUMER ARBITRATION RULES 27, (Sept. 1, 2014), https://www.adr.org/sites/default/files/Consumer%20Rules.pdf [https://perma.cc/LWT6-DSPF] [hereinafter AAA CONSUMER ARBITRATION RULES] (Rule 43(a): "Any award shall be in writing and executed in the form and manner required by law;" Rule 43(b): "The award shall provide the concise written reasons for the decision unless the parties all agree otherwise. Any disagreements over the form of the award shall be decided by the arbitrator."); *see also infra* notes 146–148 and accompanying text (discussing increased availability and enhancements of written FINRA arbitration awards).

about the availability of these opinions is not well-known to the general public. Reasoned opinion writing, and subsequent publication of these opinions, is also a cheap fix to many perceived problems with arbitration. As discussed more fully below, because I believe it would be relatively easy to implement at low cost, it should be mandated in all institutional rules so that disputants, the public, and arbitration critics understand what is actually happening in arbitration. Accompanying the mandate of reasoned opinion writing with publication of decisions (already happening in AAA employment and labor arbitration decisions) would enhance the benefits of this requirement for minority and one-shot players, as more fully articulated below.

Less easy to achieve, but also providing considerable benefit to the one-shot or minority disputant, would be diversification of the arbitrator corps. I focus on this issue because I believe it has been largely overlooked by arbitration's critics and because few have offered concrete suggestions for change. I hope to offer such suggestions and identify ways in which the parties, their attorneys, and the institutions providing arbitral services can work together to make the arbitral forum both substantively and procedurally attractive to all disputants. Diversification would also provide assurance to litigants that potential arbitrators are not monolithic in their views about discrimination or other issues that typically arise in arbitration.

III. ARBITRATION OPINION WRITING: FORMALIZING ARBITRATION AT A (RELATIVELY) LOW COST

Although arbitration is undoubtedly more formal today than it was at any time in the past, additional procedural protections may be critical to ensuring an adequate forum for resolution of disputes involving minority parties and one-shot players. This section advocates enhancing the formality of the arbitral process by adopting a reasoned opinion and publication requirement in disputes involving one-shot and repeat players. Requiring arbitrators to write and publish reasoned opinions could provide the kind of protection traditional litigation presumably provides minority disputants for a relatively low cost and without some of the risks Delgado feared. An opinion writing and publication requirement in disputes involving one-shot and repeat players, included in provider organizations' due process protocols and/or rules, could create the structure necessary to reduce decision-maker prejudice, improve the quality of decision-making, enable more careful selection of unbiased arbitrators, and allow for greater adherence to earlier arbitral precedent, which also reduces bias in decision-making. Opinions may also provide a greater sense of resolution to the parties, who will now have a deeper understanding of the reasons they won or lost. Moreover, both the reasoned opinion and publication requirements might improve both the parties and the public's perception of arbitration as a fair and legitimate forum for

the resolution of disputes, which is particularly important to arbitration's critics, like Delgado.

As discussed earlier, arbitration is much closer to litigation in terms of providing structured decision-making than critics have suggested. If reasoned written and published opinions were required, the arbitral process might provide exactly the formal avenue for resolution that ensures protection of the rights of minority and other one-shot disputants. As it turns out, arbitrators engage in decision-making and opinion-writing processes (when they write opinions) that is remarkably similar to the process in which judges engage. Moreover, recent studies confirm long-held beliefs in the arbitral community that arbitrators are capable of understanding and applying precedent and can interpret legal rulings in a manner similar to judges.[102] If these studies are accurate, greater transparency in all types of arbitration, through the implementation of mandatory arbitrator opinion writing, could substantially improve the process itself as well as the public's and parties' perceptions of the process.

A. Published Reasoned Written Opinions Will Benefit the One-Shot Player

Judicial opinion writing serves three purposes. First, opinion writing improves judges' decision-making process by prompting them to consider critically and carefully the facts and law at issue in a particular decision. Second, the process, when opinions are published, generates precedent, so that future readers better understand what the rules of law are. Finally, opinion writing enhances the legitimacy of the decision in the eyes of both the parties and the public.

Arbitrators write opinions for similar reasons. In arbitration, as in litigation, opinion writing encourages the arbitrator to consider carefully her decision, ensuring that she has understood all the facts and arguments. Published arbitral opinions also legitimize the decision in the eyes of the parties and the public.[103] At the same time, an arbitral opinion writing

102. *See* Susan D. Franck, Anne van Aaken, James Freda, Chris Guthrie & Jeffrey J. Rachlinski, *Inside the Arbitrator's Mind*, 66 Emory L.J. 1115, 1137 (2017) [hereinafter *Inside the Arbitrator's Mind*]. Although the authors focus on international arbitration in this article, their findings would likely be duplicated in domestic arbitration. Through their research, the authors "found evidence that arbitrators, like judges, tended to make intuitive decisions and were influenced by well-known cognitive illusions like anchoring, framing, and the like." *Id.* "Where comparisons with judges were possible, [the authors] were generally unable to reliably distinguish between the responses of arbitrators and judges, suggesting the two groups performed comparably." *Id.* The authors "also found evidence that arbitrators, as a group, were unlikely to merely 'split the baby' between claimants and respondents." *Id.* The authors concluded that their "findings cast doubt on the bona fides of the normative narrative that international arbitrators should be stripped of jurisdiction and replaced by judges due to cognitive predisposition." *Id.*

103. "A well-reasoned opinion can contribute greatly to the acceptance of the award by the parties by persuading them that the arbitrator understands the case and that his award is basically sound." Frank Elkouri & Edna Asper Elkouri, How Arbitration Works 237 (3d ed. 1977). The Supreme Court offered support for this view: "Arbitrators have no obligation to the court to give their reasons for an award. . . . [A] well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying

requirement assists parties in arbitrator selection. Written, published arbitral opinions help parties in the selection process because an arbitrator's past opinions provide prospective parties with better information about a particular arbitrator's decision-making process and potential biases.[104] The following sections will attempt to define a reasoned written opinion as well as the potential benefits of requiring arbitrators to both write and publish their opinions.[105]

1. Reasoned Written Opinions

Like the term "arbitration," which is not defined in the Federal Arbitration Act, a "reasoned written opinion" may be somewhat in the eye of the beholder. Yet both commentators and practitioners generally agree on what constitutes a reasoned written opinion.[106] According to the academic literature, to be reasoned, an opinion should contain the following elements: First, the arbitrator should identify the issues in dispute. In doing so, the arbitrator should include relevant facts as well as the rules, customs, or legal principles the arbitrator intends to apply to the facts.[107] The goal underlying this requirement is that the parties reviewing the opinion will realize that the arbitrator understood the evidence presented at the hearing and was aware of the customs, rules, and laws applicable to this type of dispute. Second, the arbitrator should use the parties' post-hearing briefs and/or closing arguments, together with the evidence presented at the hearing, to identify and articulate the parties' contentions.[108] This section of the opinion, common in labor arbitration opin-

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the underlying agreement." United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960); *see also* Stephen L. Hayford, *A New Paradigm for Commercial Arbitration: Rethinking the Relationship Between Reasoned Awards and the Judicial Standards for Vacatur*, 66 GEO. WASH. L. REV. 443, 447 (1998) (maintaining that, in the long run, commercial arbitration cannot continue without reasoned opinions that provide transparency and the ability to assess the competency of arbitrators); Llewellyn Joseph Gibbons, *Private Law, Public "Justice": Another Look at Privacy, Arbitration, and Global E-Commerce*, 15 OHIO ST. J. ON DISP. RESOL. 769, 773 (2000) (well-reasoned opinions help to combat the ability of institutional repeat players to "arbitrator-shop" at the expense of a one-time consumer grievant); *see generally*, Roger I. Abrams, Frances E. Abrams & Dennis R. Nolan, *Arbitral Therapy*, 46 RUTGERS L. REV. 1751 (1994) (noting that, while losing parties may not agree with the decision, a reasoned opinion makes sure they understand the arbitrator considered their argument).

104. Elkouri emphasized that opinions may also serve an educational function because the arbitrator's opinion helps guide their future actions. ELKOURI & ELKORUI, *supra* note 103, at 268–69.

105. While more could be done to segregate the different types of decisions arbitrators can make into categories and mandate opinion writing only when absolutely necessary, this article focuses more generally on benefits and drawbacks of mandating opinion writing. *See, e.g.*, Chad M. Oldfather, *Writing, Cognition, and the Nature of the Judicial Function*, 96 GEO. L. J. 1283, 1317 (2008). Other issues, such as how often and when an arbitrator should write an opinion, might be left for another day.

106. Many institutional rules require that awards be reasoned but offer no guidance regarding the requirement. S.I. Strong, *The Reasons Behind Reasoned Arbitration Awards*, 34 ALTERNATIVES TO THE HIGH COST OF LIT. 81, 81 (2016).

107. Roger I. Abrams, *The Nature of the Arbitral Process: Substantive Decision-Making in Labor Arbitration*, 14 U.C. DAVIS L. REV. 551, 586 (1991).

108. *Id.*

ions, demonstrates that the arbitrator listened to the parties and understood their arguments. Next, the arbitrator must include a decision.[109] In this part of the opinion, the arbitrator clarifies the scope of the decision, interprets the evidence, resolves questions of fact, applies principles of law and custom, and explains why she accepted or rejected the parties' theories.[110] A final section articulates what the award is and what the consequences of that award are for each party.[111]

2. How the Published Reasoned Written Opinion Benefits the One-Shot Player and/or Minority Disputant

A published reasoned written opinion would improve the arbitration process, particularly in cases involving parties with unequal bargaining power. A published reasoned written opinion provides valuable information about an arbitrator's deliberations, her understanding of the facts, the rules or laws to be applied, and anything else that led her to her ultimate decision. The opinion offers valuable insight that may aid future disputants, as well as the parties to the dispute, in future arbitrator selection.[112] In addition, the published reasoned written opinion legitimizes the process by providing greater decision-making transparency to the parties, particularly the party with less bargaining power.[113] Published opin-

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109. *Id.*

110. In judicial opinions, providing reasons enables subsequent courts to follow precedent. Strong, *supra* note 106, at 85. While this is not a justification in the arbitral forum for a reasoned award, both in the international setting and, now, as domestic arbitration includes the interpretation of law, in the domestic setting, "[a]rbitral awards . . . are considered important forms of persuasive authority and have been said to reflect a type of 'soft precedent' in certain types of . . . matters (most notably those involving arbitral procedure . . .)." *Id.* at 86.

111. Abrams, *supra* note 107, at 587. Professor Strong cites various iterations contained in state statutes. For example, she cites a Pennsylvania statute that defines "a reasoned ruling as one that includes 'findings of fact and conclusions of law based upon the evidence as a whole . . . [and that] clearly and concisely states and explains the rationale for the decisions so that all can determine why and how a particular result was reached.'" Strong, *supra* note 106, at 84 (citing 77 PA. STAT. ANN. § 834 (West 2013)).

112. Professors Barbara Black and Jill Gross cited this reason, among others, as an appropriate justification for the introduction of explained decisions in securities arbitration. *See* Letter from Barbara Black, Professor and Director of Corporate Law Center, University of Cincinnati College of Law & Jill I. Gross, Professor and Director of Pace Investor Rights Clinic, Pace University School of Law, to Florence Harmon, Acting Secretary, Securities and Exchange Commission (2008), http://www.sec.gov/comments/sr-finra-2008-051/finra2008051-1.pdf [https://perma.cc/3QDQ-3CDJ]. The professors stated, "because explained awards will provide parties with some insight into how arbitrators resolve controversies, they may provide valuable information for parties to use when ranking and striking arbitrators during arbitrator selection in future cases." *Id.* at 3. The website Arbitrator Intelligence (arbitratorintelligence.org) is collecting published and unpublished international arbitration awards with the goal of providing helpful information about arbitrators' past decision-making. *See* ARBITRATOR INTELLIGENCE, http://www.arbitratorintelligence.org [https://perma.cc/FTL6-NW7K]. Arbitrator Intelligence's mission is "to promote transparency, accountability, and diversity in arbitrator appointments." *Id.*

113. Professors Black and Gross also identified the need for transparency in decision-making as a justification for the implementation of an explained decision requirement. Interestingly, the arbitration parties themselves, the customers, also stated that they would be more satisfied with securities arbitration outcomes if they had an explanation of the award. *See* JILL I. GROSS & BARBARA BLACK, PERCEPTIONS OF FAIRNESS OF SECURITIES

ion writing assists parties in developing confidence in arbitrators' abilities and helps them weed out incompetent or biased arbitrators. Moreover, a reasoned written opinion requirement encourages the arbitrator to increase her deliberation, thus, hopefully, improving the quality of the decision.[114] Writing the decision helps the arbitrator think through issues, avoid arbitrary decisions, and offer more fulsome explanations than an oral or limited written decision would.

B. Improving the Arbitrator Selection Process

One-shot players, typically perceived to be at a disadvantage in the arbitrator selection process, often resist arbitration because they suspect arbitrators will be biased in favor of the repeat player. This concern may be aggravated for minority disputants, who might be especially skeptical of the typical arbitrator panel, made up primarily of white men over the age of fifty. The introduction of reasoned written opinions to the arbitration process might allay parties' concerns about biased arbitrators or, alternatively, validate the concerns.[115] In the latter situation, a published reasoned opinion would help future parties avoid selecting a biased or prejudiced decision maker.[116]

Moreover, and, perhaps, more importantly, the greater understanding parties develop about arbitrator bias through the published reasoned written opinion aids future parties even more in arbitration than it would in litigation. After all, parties can choose their decision maker in arbitra-

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Arbitration: An Empirical Study 39 (Feb. 6, 2008) (Fifty-five percent (55%) of customers stated that they would be more satisfied with the outcome of their arbitration had they received an explanation of the award).

114. Most scholars focus on judges, rather than arbitrators, when discussing the benefits of deliberation. The principles underlying decision-making, though, would be unlikely to change whether the decision maker was an arbitrator or a judge. One author explained that in the process of writing an opinion, a judge must "clarify his thoughts as he reduces them to paper." Mary Kate Kearney, *The Propriety of Poetry in Judicial Opinions*, 12 Widener L.J. 597, 599 (2003). It is through the "process of reducing one's ideas to writing" that enables a decision maker to assess whether or not his reasoning is sound. *Id.* A judge, advising law clerks, stated that "[j]udges write opinions for many reasons: to help think through the issues; to explain to the parties, their counsel, and the appellate courts how and why the case was decided; to advance the law's development; to provide consistency by setting precedent; . . . and to convince a possibly unfavorable audience that the judge wrote a correct decision." Gerald Lebovits & Lucero Ramirez Hidalgo, *Advice to Law Clerks: How to Draft Your First Judicial Opinion*, 36 Westchester Bar J. 29, 29 (2009).

115. Professor Mark Weidemaier suggests that parties might even be willing to "pay for reasoned awards because they believe that arbitrators who must provide a written explanation are less likely to make careless or biased decisions." W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 Wm. & Mary L. Rev. 1895, 1919–20 (2010).

116. In labor arbitration, parties have considerable information, both from their own experience as well as from written decisions, about prospective arbitrators. As Chris Honeyman noted, the reasoned opinion in labor arbitration helps arbitrator selection because an arbitrator must explain her decision and "that this may affect future similar cases; thus whether or not a given arbitrator has a tendency to state things in too broad terms is a criterion they will take into account." Christopher Honeyman, *How to Find an Arbitrator*, CR Info., http://www.beyondintractability.org/coreknowledge/howto-find-arbitrator [https://perma.cc/SSR3-4LRY] (last updated Apr. 2013).

tion but are not afforded the same opportunity in litigation.[117] The published reasoned written opinion requirement would also help arbitrators who, like judges, are likely to be more consistent in their decision-making if they have a record of their decisions and deliberate before writing that decision. Arbitrators who decide a particular case one way on one occasion are likely to decide a similar case the same way on another day. Most arbitrators want to be consistent in the way they adjudicate disputes—not only does the writing of opinions reveal the way they make decisions, but it also aids them in future decisions by reminding them of the way they approached a particular problem in the past. Finally, arbitrators benefit from reading other arbitrators' opinions. Although not bound by precedent, arbitrators seek guidance from other arbitrators as to how an issue should be resolved.[118]

In addition, published reasoned written opinions provide useful information to parties and the market about the process of arbitration, together with information about an arbitrator's abilities. As Professor Weidemaier observed:

> Reasoned awards can communicate that the arbitrator possesses . . . [the] qualities [of diligence, expertise, and impartiality] and therefore enhance the arbitrator's legitimacy to future purchasers of arbitration services. Thus, a central feature of reasoned awards is that they serve to legitimize both the arbitrator (in general) and the arbitration (in particular) in the eyes of a number of important constituencies: the disputants themselves, external actors who may play a role in enforcing the award, and future purchasers of the arbitrator's services.[119]

Of course, at least some of this depends on whether the arbitrator's opinion is published. In labor arbitration, reasoned written opinions are routinely published.[120] Perhaps less well known is that since year 2000,

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117. In other words, biased judges might remain on the bench indefinitely, if appointed for life. A biased arbitrator, on the other hand, assuming her opinions are published and accessible, would be unlikely to be hired again.

118. This predisposition of arbitrators may come from their background in law. Most arbitrators today are lawyers. The popularity of the Elkouris' HOW ARBITRATION WORKS, ELKOURI & ELKOURI, *supra* note 103, considered the "bible" of labor arbitration, might also be explained by the predisposition of decision makers to decide cases similar to other decision makers faced with a similar set of facts, rules, and law.

119. Weidemaier, *supra* note 115, at 1919. Professor Stephen Hayford agreed: "in most cases . . . the only indicia of . . . arbitrator competencies are the manner in which the neutral conducts the hearing and the perceived correctness of the result reached." Stephen Hayford & Ralph Peeples, *Commercial Arbitration in Evolution: An Assessment and Call for Dialogue*, 10 OHIO ST. J. ON DISP. RESOL. 343, 403 (1995). *See also* Gibbons, *supra* note 103, at 772–73 (explaining that well-reasoned opinions help to combat the ability of institutional repeat players to "arbitrator-shop" at the expense of a one-time consumer grievant).

120. By rule, FINRA awards, AAA employment awards, and AAA class arbitration awards are made publicly available. *See Code of Arbitration Procedure for Customer Disputes*, FIN. INDUS. REGULATORY AUTH. (FINRA), Rule 12904(h), http://finra.complinet.com/en/display/display_plain.html?rbid=2403&element_id=4192&record_id=17038 [https://perma.cc/G5XN-HJ7D] ("All awards shall be made publicly available.") [hereinafter *FINRA Customer Disputes Code*]; AAA's EMPLOYMENT ARBITRATION RULES, *supra* note 88, at 29 ("An award issued under these rules shall be publicly available, on a cost basis.

the AAA has published over 2,000 reasoned written employment arbitration awards.[121] While it is true that the publication of reasoned written opinions partially undermines the "confidentiality" aspect of arbitration, the benefits of turning the opinion into a public good outweigh the costs to the disputants (if those disputants even care about whether the decision is published). The history of publication in labor arbitration and, more recently, in employment arbitration, suggests that opinion publication does little to deter parties from participating in the process. FINRA, which administers securities arbitration, has always published awards, but these awards historically failed to shed much light on the arbitrators' decision-making processes. FINRA recently changed its rules, tacitly acknowledging the importance of a published reasoned written opinion by offering such opinions to parties at no cost to them. This change, together with the extensive publication of employment and labor arbitration reasoned opinions, offers further support to the assertion that publication is inexpensive relative to the benefits achieved through publication.

1. Reasoned Written Opinions Enhance Accountability in the Decision-Making Process

Reasoned opinions help parties understand why they have won or lost in arbitration[122] and, also, may help the losing party accept an adverse award.[123] Availability of a reasoned opinion may also serve to strengthen

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The names of the parties and witnesses will not be publicly available, unless a party expressly agrees to have its name made public in the award."). In contrast, "most labor arbitration awards are unpublished, and awards that are submitted to the BNA for publication are published only if BNA decides the award is of sufficiently 'general interest.'" Weidemaier, *supra* note 93, at 1106. "Thus, labor awards are subject to several types of selection not present in the other arbitration regimes. First, the arbitrator must decide (with the parties' assent) to submit the award to the BNA. Second, the BNA must decide to publish the award. As a result, published BNA awards may not be representative of all labor arbitration awards." *Id.* at 1106–07. As Professor Weidemaier notes, some research reveals higher management win rates in published than in unpublished awards. *Id.* at 1107 (citations omitted).

121. *Id.* at 1127. Since at least 2009, when AAA amended its Employment Arbitration Rules and Mediation Procedures, Rule 39(b) has required that an "award issued under these rules shall be publicly available, on a cost basis. The names of the parties and witnesses will not be publicly available, unless a party expressly agrees to have its name made public in the award." AAA's EMPLOYMENT ARBITRATION RULES, *supra* note 88, at 29. LexisNexis advertised on the AAA website that it has a searchable database of over 2,000 employment arbitration decisions and over 8,500 labor arbitration decisions. *See generally LexisNexis for Labor & Employment*, LEXISNEXIS, https://www.lexisnexis.com/en-us/products/labor-employment-portfolio.page [https://perma.cc/PZ9W-F43V]. It would seem that most parties are already comfortable with the publication of arbitration decisions.

122. Even AAA concedes that parties sometimes want these decisions. Professor S.I. Strong offers this justification for the reasoned award: "a well-written and fully reasoned award may persuade the losing party that a decision is well-supported, even if the outcome is negative." Strong, *supra* note 106, at 86. "For disputants, reasoned decisions provide an explanation that can be used to guide future conduct and a sense, perhaps especially important to the losing party, that the adjudicatory process was a deliberate and fair one." Weidemaier, *supra* note 115, at 1917.

123. Professor Kaczmarek states that "[a]ll sides generally agree that a sound opinion contributes to the acceptance of an award by persuading the parties that the arbitrator thoughtfully considered the claim and came to a well-reasoned decision." Christopher B.

the parties' faith in the integrity of the arbitral process because the parties are able to see for themselves that the arbitrator considered the relevant facts, and, if applicable, legal rules.[124] In addition, when arbitrators draft reasoned awards, the parties may review the award to ensure that their facts and theories were heard and, hopefully, understood.[125]

Parties want explained decisions and greater transparency in decision-making. Professors Barbara Black and Jill Gross, who initially contended that written opinions, at least in the securities industry, were not a good idea, changed their minds following their empirical study revealing that customers wanted explanations of the arbitration awards and believed they would be more satisfied if they received such explanations.[126]

Publishing reasoned written opinions not only makes transparent the arbitration process but also may enhance the arbitrator's accountability. When a decision maker must write a reasoned opinion, she will analyze the facts and relevant principles more critically and will take more care in drafting her decision.[127] In addition, an arbitrator who must write a reasoned opinion will likely pay greater attention to evidence and argument presented at the hearing.[128] Knowing that others will read the opinion will also incentivize the arbitrator to reach her decision more carefully and deliberately.[129]

Kaczmarek, *Public Law Deserves Public Justice: Why Public Law Arbitrators Should Be Required to Issue Written, Publishable Opinions*, 4 EMP. RTS. & EMP. POL'Y J. 285, 297 (2000).

124. Thomas J. Stipanowich, *Reflections on the State and Future of Commercial Arbitration: Challenges, Opportunities, Proposals*, 25 AM. REV. INT'L ARB. 297, 327 (2014) (arbitrators want to follow the applicable law); Strong, *supra* note 106, at 87 ("[R]easoned awards . . . enhance the legitimacy of the arbitral process in the eyes of the arbitrators, the parties and the public by demonstrating the seriousness and integrity of the arbitral endeavor.").

125. *See* Martha I. Morgan, *The Constitutional Right to Know Why*, 17 HARV. C.R.-C.L. L. REV. 297, 299 (1982). Mark Weidemaier suggested that a benefit of a reasoned award is that parties will be more likely to view the award as legitimate and would comply voluntarily. Weidemaier, *supra* note 115, at 1918.

126. *See* Barbara Black, *The Irony of Securities Arbitration Today: Why Do Brokerage Firms Need Judicial Protection?*, 72 U. CIN. L. REV. 415, 450–51 (2003) (explained decisions are not useful); Gross & Black, *supra* note 113, at 39 (Fifty-five percent (55%) of customers stated that they would be more satisfied with the outcome of their arbitration had they received an explanation of the award).

127. *See* David M. Sanbonmatsu, Sharon A. Akimoto & Earlene Biggs, *Overestimating Causality: Attributional Effects of Confirmatory Processing*, 65 J. PERS. & SOC. PSYCHOL. 892, 896 (1993); *see generally* Philip E. Tetlock, Linda Skitka & Richard Boettger, *Social and Cognitive Strategies for Coping with Accountability: Conformity, Complexity, and Bolstering*, 57 J. PERS. & SOC. PSYCHOL. 632 (1989).

128. *See* Chris Guthrie, Jeffrey J. Rachlinski & Andrew Wistrich, *Blinking on the Bench: How Judges Decide Cases*, 93 CORNELL L. REV. 1, 36–37 (2007). According to the authors, "writing opinions could induce deliberation that otherwise would not occur . . . . [T]he discipline of opinion writing might enable well-meaning judges to overcome their intuitive, impressionistic reactions. The process of writing might challenge the judge to assess a decision more carefully, logically and deductively." *Id.* at 37. Applying these findings to arbitrators would likely yield similar results. Arbitrators tend, like trial judges, to develop intuitive reactions to evidence presented.

129. *See id.*; *see also Inside the Arbitrator's Mind*, *supra* note 102, at 1175 ("The process of opinion writing itself could also serve as a check on intuition and facilitate deliberation, leading to higher quality outcomes. In those instances where arbitrators are not required

2. Establishing Arbitrator Competence

One of the reasons Delgado offered for favoring formal processes is his belief that judges are "professionals," competent in adjudicating legal issues.[130] By contrast, historically, arbitrators were viewed as incapable of resolving non-contractual issues.[131] In the 1974 *Alexander v. Gardner-Denver* decision, the Supreme Court famously pronounced that arbitrators are experts in the "law of the shop, not the law of the land."[132] Unless the public and the parties to arbitration perceive arbitrators as capable of analyzing and deciding legal issues, it would be difficult to overcome the objections Delgado (and others) levied against arbitration as an effective forum for minority disputants with legal or statutory claims.

In fact, though, as arbitrators have increasingly adjudicated statutory claims and legal issues, the process for creating a roster of arbitrators changed so that greater experience in the law is virtually an essential requirement. Today, the vast majority of commercial, employment, and consumer arbitrators are legally trained and typically have fifteen or more years of legal practice in the area in which they specialize.[133] As the kinds of disputes in arbitration changed, courts, too, have altered their view of arbitrator competence. Between 1974 and today, the Court moved from treating arbitrators as competent only to adjudicate contract disputes to validating arbitral decisions involving a wide variety of statu-

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by governing rules to write opinions, parties could contract for opinions if so inclined. Parties also might mandate that tribunals include subsections in awards, follow prescribed checklists, or provide substantive reasoning of critical, replicable issues, if the parties believe they would benefit from a more detailed and precise explication of decision-making."). Moreover:

> [i]n arbitration, in contrast to litigation, parties can adopt procedural rules and structures to enhance adjudicative quality and minimize the risk of decision error. For example, parties can structure procedures to give arbitrators more time to devote to deliberation. Likewise, parties can draft arbitration agreements to inject additional procedural rigor to decrease risks of error from intuitive adjudication.

Id.

130. Delgado, *supra* note 1, at 1374. Delgado asserts that ADR decision makers are "rarely professional." *Id.*

131. At the time *Mitsubishi* and *Prima Paint* were decided, courts did not believe arbitrators were capable of resolving non-contractual issues. Thomas J. Stipanowich, *Arbitration: The New Litigation,* 2010 U. ILL. L. REV 1, 10 (2010) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 633 (1985) and Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395 (1967)).

132. Alexander v. Gardner-Denver Co., 415 U.S. 36, 57 (1974).

133. *See* Merit Ins. Co. v. Leatherby Ins. Co., 714 F.2d 673, 679 (1983) ("[P]eople who arbitrate do so because they prefer a tribunal knowledgeable about the subject matter of their dispute to a generalist court with its austere impartiality but limited knowledge of subject matter. 'The professional competence of the arbitrator is attractive to the businessman because a commercial dispute arises out of an environment that usually possesses its own folkways, mores, and technology. Most businessmen interviewed contended that commercial disputes should be considered within the framework of such an environment. No matter how determinedly judge and lawyer work to acquire an understanding of a given business or industry, they cannot hope to approximate the practical wisdom distilled from 30 or 40 years of experience.'" (quoting AMERICAN MANAGEMENT ASS'N, RESOLVING BUSINESS DISPUTES 51 (1965)).

tory claims.[134] By 2009, the Court declared that even labor arbitrators were competent to apply external law.[135]

Empirical evidence also supports the contention that arbitrators are as competent as judges in decision-making and use of precedent. In his article analyzing arbitrator use of precedent,[136] Professor Mark Weidemaier debunked the common wisdom that arbitrators neither follow nor make precedent. Examining arbitrators' citation practices in securities, labor, employment, and class action arbitration, Weidemaier found that arbitrators, particularly in employment and class action arbitration cases, "routinely" wrote lengthy, reasoned awards, spending considerable time analyzing legal issues and extensively using precedent.[137] While some of the cited precedent came from other arbitrators' opinions, the majority of cited precedent came from published judicial opinions. Professor Weidemaier concluded that the available evidence supported the theory that arbitrators and judges engage in similar types of decision-making and opinion-writing.[138]

Professor Chris Drahozal reviewed the existing empirical studies in 2006 and found that arbitrators, when surveyed, reveal the same philosophy about following the law when rendering a decision as do judges.[139] Drahozal reported that judicial reversal rates of arbitration awards, even when reviewed de novo, are remarkably similar to appellate court reversal rates for lower court decisions.[140] Thus, it would seem inappropriate

134. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that parties could agree to arbitrate Age Discrimination in Employment Claims). Following *Gilmer*, lower courts enforced agreements to arbitrate Civil Rights Act of 1991 claims, ADA claims, and other statutory claims. *See, e.g.*, EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742 (9th Cir. 2003) (Civil Rights Act of 1991 claims may be arbitrated); Stipanowich, *supra* note 131, at 10 ("[C]ourts vouchsafe to arbitrators the responsibility for . . . vindication of rights under civil statutory schemes . . . and . . . laws designed to protect employees and consumers.").

135. 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 268–69 (2009) ("An arbitrator's capacity to resolve complex questions of fact and law extends with equal force to discrimination claims brought under the ADEA.") (citing Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 231–32 (1987) (explaining that the Supreme Court of the United States has "'recognized that arbitral tribunals are readily capable of handling the factual and legal complexities of antitrust claims, notwithstanding the absence of judicial instruction and supervision' and that 'there is no reason to assume at the outset that arbitrators will not follow the law.'")); Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc., 473 U.S. 614, 634 (1985) ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.").

136. Professor Weidemaier reviewed over eight hundred arbitration opinions, evenly divided among securities, labor, class action, and employment cases. Weidemaier, *supra* note 93, at 1105.

137. *Id.* at 1095, 1139 (outside of securities disputes, "arbitrators wrote reasonably lengthy decisions that were substantially devoted to legal analysis and made ample use of precedent."). In addition, Professor Weidemaier found that, outside of labor arbitration, the "overwhelming majority" of awards cite judicial precedent. *Id*. at 1140. He found the similarity between arbitrators' opinions and judicial opinions "striking." *Id.*

138. *Id.* at 1193–94.

139. Christopher Drahozal, *Is Arbitration Lawless?*, 40 Loy. L.A. L. Rev. 187, 214 (2006).

140. *Id.*

to conclude that arbitrators understand the law any less than other potential decision makers.[141]

Professor Ariana Levinson's work also rejects the common wisdom that arbitrators, particularly in the unionized sector, are incapable of analyzing external or statutory law and explaining their application of law to facts in a well-reasoned opinion. In her study of 160 labor arbitration awards involving employment discrimination claims, Professor Levinson found that "[t]he majority of cases reach outcomes that appear defensible under the governing law, even if [the reader] does not agree with the outcome."[142] Professor Levinson concluded that a mandatory system in which labor arbitrators decide employment discrimination disputes, like the one at issue in *Pyett*, is just.[143]

Current empirical studies, together with a changing judicial perception of arbitrator competence, suggest that arbitrators are at least as capable, if not more capable, than judges at resolving legal and statutory claims. Although public perception of arbitrator competence may not have changed as dramatically as judicial perception, educational efforts to promote arbitration, rather than disparage it, might help inform prospective disputants about the benefits of the process. The efforts to utilize this process for lower value disputes would only be enhanced if the arbitrators wrote reasoned opinions. Nothing would increase faith in arbitrator competence more than witnessing that competence on the printed page.

C. Published Reasoned Written Opinions Are Possible

Unquestionably, the addition of a reasoned written opinion would enhance the integrity of the arbitral process, reduce the likelihood of biased or prejudiced decision-making, increase the predictability of arbitrator decisions, and assist parties in future arbitrator selection. But both minority disputants and one-shot players might object to the inclusion of this requirement if it increased costs of the arbitral process. Concerns regarding cost may be overblown, however. Arbitration jurisprudence strongly suggests that the party implementing the arbitration agreement may have

141. Drahozal also reported on a study, conducted by Patricia Greenfield, which reviewed 106 cases decided between 1980 and 1985 where at least one party had filed an unfair labor practice charge with the NLRB. *Id.* at 195. Greenfield found in her study that although half of the arbitrators cited external law in their opinions, most of the arbitrators' analysis of external law was cursory or conclusory. *Id.* at 195–96. Greenfield's study would seem to be of limited value given its age and focus on unfair labor practice charges. Further empirical studies, particularly of labor arbitration awards, would be helpful in assessing whether or not arbitrators follow the law, particularly when statutory discrimination claims are at issue.

142. Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment Discrimination Claims*, 46 U. Mich. J.L. Reform 789, 831 (2013). Of the 111 cases involving statutes, 71 (64%) cited legal authority other than a statute. *Id.* at 830. Thirteen cited EEOC regulations or guidelines, and "twenty-six cited other arbitration decisions." *Id.* Forty decisions cited the relevant statute but no legal authority. *Id.* at 831.

143. *Id.* at 858. Despite this conclusion, Professor Levinson nevertheless recommends increased procedural protections in arbitration, including access to greater discovery and recourse for arbitrators' clearly erroneous statements of law. *Id.*

an obligation to pay all costs and fees in excess of what a one-shot player would pay in court.[144] AAA and JAMS, the two most prominent arbitrator provider organizations, adopted employment and consumer due process protocols mandating that the business and/or employer pay for the arbitration process to the extent that its costs exceeds the cost of a trial.[145] If opinions were also mandated, arbitration costs would then include the time for the arbitrator to write the opinion.

Even if courts did not limit the consumer's obligation to what the consumer might pay in court, the costs of a written opinion are not as high as one might initially expect. Useful empirical evidence exists regarding the costs of adding the reasoned written opinion procedure. FINRA created a process called "explained decision."[146] Initially, the parties had to agree to request an explained decision, and it would cost the parties $400 (the rule states that arbitrators may allocate the cost).[147] In January 2017, FINRA offered further incentive to parties to request an explained deci-

144. *See* AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 351–52 (2011) (conditioning decision to enforce a class action waiver contained in a consumer arbitration agreement on the business's willingness to pay all or most of the consumer's costs and fees); Cole v. Burns Int'l Sec. Servs, 105 F.3d 1465, 1485 (D.C. Cir. 1997); Shankle v. B-G Maint. Mgmt. of Colo., Inc., 163 F.3d 1230, 1234–35 (10th Cir. 1999) (employee should not have to pay one-half of arbitrator's $250 per hour fee); Paladino v. Avnet Computer Tech., Inc., 134 F.3d 1054, 1062 (11th Cir. 1998) (employee should not have to pay $2,000 filing fee and one-half the arbitrator's fee); Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 894 (9th Cir. 2002) (requirement that an employee pay half the arbitrator's fee rendered the arbitration agreement unenforceable); Ball v. SFX Broad., Inc., 165 F. Supp. 2d 230, 240 (N.D.N.Y. 2001) (likelihood of significant arbitration costs, which would not be incurred in a judicial forum, rendered the arbitration agreement unenforceable).

145. AAA's consumer due process protocol, Principle 6, states that consumers should pay only "reasonable costs." *See* AAA's CONSUMER DUE PROCESS PROTOCOL, *supra* note 83, at 2. The full principle states, "Providers of goods and services should develop ADR programs which entail reasonable cost to Consumers based on the circumstances of the dispute, including, among other things, the size and nature of the claim, the nature of goods or services provided, and the ability of the Consumer to pay. In some cases, this may require the Provider to subsidize the process." *Id.* Although declining to set absolute guidelines, AAA, in its commentary to Principle 6, states, "[i]nIn some cases, the need to ensure reasonable costs for the Consumer will require the Provider of goods or services to subsidize the costs of ADR which is mandated by the agreement. Indeed, many companies today deem it appropriate to pay most or all of the costs of ADR procedures for claims and disputes involving individual employees." *Id.* at 18 (citing Mei L. Bickner, et al., *Developments in Employment Arbitration*, 52 DISP. RESOL. J. 8 (1997)). AAA's Employment Arbitration Rules and Mediation Procedures states that for disputes arising out of an employer-promulgated plan, "[t]he employer shall pay the arbitrator's compensation." AAA's EMPLOYMENT ARBITRATION RULES, *supra* note 88, at 33. Filing fees are capped at $200 when it is the employee filing a claim. *Id.*

146. *See FINRA Customer Disputes Code*, *supra* note 120.

147. *See id.* The following version of FINRA Rule 12904 applies to decisions after April 2, 2017:

> (g) Explained Decisions
> (1) This paragraph (g) applies only when all parties jointly request an explained decision.
> (2) An explained decision is a fact-based award stating the general reason(s) for the arbitrators' decision. Inclusion of legal authorities and damage calculations is not required.
> (3) Parties must make any request for an explained decision no later than the time for the prehearing exchange of documents and witness lists under Rule 12514(d).

sion, offering the option to them at no additional cost.[148]

The quantification of opinion costs provides claimants with a strong argument that the additional costs of the written opinion are relatively small compared to the accrued benefits of the new practice—greater accountability of arbitrators, claimants' increased belief in the fairness of the arbitral process, ability of claimants to change their future behavior to avoid additional legal difficulty, and ability of either party to present an effective appeal.

IV. DIVERSITY IN ARBITRATION

Delgado's seminal article critiquing dispute resolution as an alternative to the traditional judicial process does not address the importance of diversity among decision makers and facilitators as a basis for ensuring process integrity. Perhaps that is in part because Delgado believed that the formal structure of the American legal system reduces bias and prejudice to such a degree[149] that it is less important to have diverse judges.[150] Al-

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> (4) The chairperson of the panel will be responsible for writing the explained decision.
> (5) The chairperson will receive an additional honorarium of $400 for writing the explained decision, as required by this paragraph (g). The panel will allocate the cost of the chairperson's honorarium to the parties as part of the final award.

FINRA currently states that the parties will not be charged the $400 fee for the chair to write the opinion. *See id.*

148. *See Option for an Explained Decision at No Additional Cost*, FIN. INDUS. REGULATORY AUTH. (FINRA), https://www.finra.org/arbitration-and-mediation/option-explained-decision-no-additional-cost [https://perma.cc/AV6K-VGBS] ("Starting January 3, 2017, if the parties jointly request an explained decision, FINRA will waive the $400 fee to the parties for an explained decision. An explained decision is a fact-based award stating the general reason(s) for the arbitrators' decision. *See* Rules 12904(g) and 13904(g). Legal authorities and damage calculations are not required. Parties must make the joint request for an explained decision twenty days before the date of the first scheduled hearing. *See* Rules 12514(d) and 13514(d). The panel chairperson will write the explained decision and receive an additional honorarium of $400 for doing so. *See* Rules 12214(e) and 13214(e). Under Rules 12904(g) and 13904(g), the panel is permitted to allocate the cost of the chairperson's $400 honorarium for writing the explained decision to the parties as part of the final award. Under this initiative, however, if the parties jointly request an explained decision, the panel chairperson will receive the $400 honorarium for writing the explained decision but the parties will not be charged. View Regulatory Notice 09-16 to obtain more information about Explained Decisions."). As FINRA articulates it, "[a]n explained decision is a fact-based award stating the general reason(s) for the arbitrators' decision." *Regulatory Notice: Explained Arbitration Decisions*, FIN. INDUS. REGULATORY AUTH. (FINRA) (Mar. 2009), http://www.finra.org/sites/default/files/NoticeDocument/p118141.pdf [https://perma.cc/ZW9V-VGAG]. Legal authorities and damage calculations are not required. *Id.* Parties must make the joint request for an explained decision twenty days before the date of the first scheduled hearing. *Id.* The panel chairperson will write the explained decision and receive an additional honorarium of $400 for doing so." *Id.*

149. Delgado emphasized that the internal and external constraints of the American litigation system "are designed to keep a judge from exhibiting bias or prejudice." Delgado, *supra* note 1, at 1367. Perhaps this means that judges may be biased or prejudiced, but the rules preclude them from acting on their biases or prejudices. Thus, there is less of a need for diversity among judges.

150. Professor Gary Spitko, by contrast, suggests that cultural minorities sometimes fear traditional litigation processes because the legal system is dominated by "majority-culture personnel (most notably including judges and jurors)." E. Gary Spitko, *Gone but*

ternatively, Delgado may simply have avoided tackling the issue of the gender or race of the decision maker at the time he and his co-authors drafted the article. Whatever the reason, thirty years later, both minority disputants and one-shot players believe that the lack of diversity among arbitrators undermines the integrity of the arbitration process.[151] Given arbitration's already less formal structure, one method for enhancing its legitimacy among minority disputants, and one-shot players more generally, would be to ensure greater diversity among those empowered to make decisions.[152] Increasing diversity of neutral rosters will likely improve the public's perception of fairness and impartiality of the arbitration process.[153]

Critics of arbitration accurately observe that the arbitrator corps is not particularly diverse in composition, either by sex or by race.[154] Institu-

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Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration, 49 CASE W. RES. L. REV. 275, 275 (1999).

151. David Hoffman and Lamont Stallworth observed that "the lack of racial and ethnic diversity in the ranks of neutrals may cause society to lose confidence in the fairness of private dispute resolution, leading legislators, regulators and the courts to reverse the policies that now support ADR." David A. Hoffman & Lamont E. Stallworth, *Leveling the Playing Field for Workplace Neutrals: A Proposal for Achieving Racial and Ethnic Diversity*, 63 DISP. RESOL. J. 37, 39 (2008); *see* Theodore K. Cheng, *The Case for Bringing Diversity to the Selection of the ADR Neutrals*, N.J. ST. BAR ASS'N 2, http://nysbar.com/blogs/ResolutionRoundtable/The%20Case%20for%20Bringing%20Diversity%20to%20the%20Selection%20of%20ADR%20Neutrals%20(T%20%20Cheng).pdf [https://perma.cc/RG2F-RX47]; Beth Trent, Deborah Masucci & Timothy Lewis, *The Dismal State of Diversity: Mapping a Chart for Change*, 21 DISP. RESOL. MAG. 21, 21 (2014); Maria R. Volpe, Robert A. Baruch Bush, Gene A. Johnson Jr., Christopher M. Kwok, Janice Trudy-Jackson & Roberto Velez, *Barriers to Participation: Challenges Faced by Members of Underrepresented Racial and Ethnic Groups in Entering, Remaining, and Advancing in the ADR Field*, 35 FORDHAM URB. L. J. 119, 119–21 (2008); Stipanowich, *supra* note 124, at 377 ("[I]dentity and background of decision makers makes a difference and our growing understanding of the impact of these elements on process and product in dispute resolution must be communicated and translated into action.").

152. Commentators have observed that the diversity of the arbitrator corps has not kept up with the change in the diversity of the workforce. The lack of diversity among arbitrators undermines the credibility of the process because disputants do not believe that the arbitrators can identify with their reality as employees or consumers. Floyd Weatherspoon, *The Impact of the Growth and Use of ADR Processes on Minority Communities, Individual Rights, and Neutrals*, 39 CAP. U. L. REV. 789, 801 (2011) (white males comprise the vast majority of the arbitrator pool, especially in construction, labor, and commercial disputes); Sasha A. Carbone & Jeffrey T. Zaino, *Increasing Diversity Among Arbitrators: A Guideline to What the New Arbitrator and ADR Community Should Be Doing to Achieve This Goal*, N.Y. STATE BAR ASS'N J. 33, 33–34 (2012) (citing Gwynne A. Wilcox of Levy Ratner, P.C. in New York City).

153. Jennifer Coffman, *The American Arbitration Association's Commitment to Diversity*, 63 D.R.J. 31 (2008).

154. Ben Hancock, *A Look at ADR and Diversity; Older White Males Lead the Ranks of Neutrals*, 39 NAT'L L. J. 1, 1 (October 10, 2016) (stating that the arbitrator corp is "arguably the least diverse corner of the legal profession;" most arbitrators, especially in high stakes disputes, are older white males.); F. Peter Phillips, *It Remains a White Male Game*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Nov. 27, 2006), https://www.cpradr.org/news-publications/articles/2006-11-27-it-remains-a-white-male-game-nlj [https://perma.cc/4TAD-SAZL]; *see* Deborah Rothman, *Gender Diversity in Arbitrator Selection*, 18 NO. 3 DISP. RESOL. MAG. 22, 23 (2012); *see also* David H. Burt & Laura A. Kaster, *Why Bringing Diversity to ADR Is a Necessity*, INT'L INST. FOR CONFLICT PREVENTION & RESOL. (Sept. 30, 2013), https://www.cpradr.org/news-publications/articles/2013-09-30-why-bringing-di-

tional efforts to alter this dynamic have been largely ineffective.[155] Here, this article will review efforts to diversify the arbitrator corps and attempt to explain why these efforts have been relatively unsuccessful. This article will also suggest an alternative to the current, failed effort to diversify. If greater diversity among arbitrators might help minority and other disputants find arbitration an acceptable substitute forum, it is certainly worth the exploration.[156]

The dispute resolution community and the organizations providing neutral services agree that parties to arbitration should have the opportunity to select an arbitrator from a diverse roster of neutrals. In response, several arbitral organizations committed to increasing diversity among the arbitrators on their rosters. AAA, the largest neutral provider organization, states that part of its mission is the creation and maintenance of a diverse neutral roster.[157] In 2012, AAA reported that its Roster of Neutrals was twenty-three percent (23%) diverse for gender and race.[158] AAA also established a one-year fellowship for newer dispute resolution professionals from historically underrepresented groups. This program, the A. Leon Higginbotham Jr. Fellows Program, is intended "to provide training, mentorship and networking opportunities to up and coming diverse alternative dispute resolution professionals who have historically not been included in meaningful participation in the field of alternative dispute resolution."[159] JAMS also touts its commitment to diversity. According to its website, it "outpace[s] The AmLaw 250 with an overall composition of 22% female and 9% persons of color among our distin-

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versity-to-adr-is-a-necessity-acc [Perma link unavailable]. FINRA arbitrators are not diverse either: "There are 6,383 arbitrators, according to FINRA. PIABA's analysis of disclosure reports for 5,375 past and current securities arbitrators from as far back as 1991 found that 80 percent of arbitrators were male. PIABA also analyzed 2,118 disclosure reports it had complied [sic] from 2013–14. Of those, the average age was 66 and more than 78 percent were men." Suzanne Barlyn, *Wall Street Arbitrators' Lack of Diversity is Harmful: Group*, REUTERS (Oct. 7, 2014, 9:41 AM), http://www.reuters.com/article/us-finra-arbitration-idUSKCN0HW1EM20141007 [https://perma.cc/52V8-7PEH]. The College of Commercial Arbitrators, a group of experienced arbitrators, has little gender diversity. Fifteen percent (15%) of CCA arbitrators are women. Stipanowich, *supra* note 124, at 363–64 (Of the 234 members, 36 are female).

155. F. Peter Phillips, *Diversity in ADR: More Difficult to Accomplish Than First Thought*, 15 NO. 3 DISP. RESOL. MAG. 14, 14 (2009).

156. To ensure public acceptance of arbitration as an appropriate substitute for litigation, arbitrators should be representative of the individual litigants who appear in front of them. *See* Burt & Kaster, *supra* note 154; Weatherspoon, *supra* note 152, at 801 ("The lack of diversity [among] neutrals raises suspicions among minorities who must use the ADR process to resolve their dispute.").

157. The AAA's Diversity Committee's Mission states that: "The mission of the AAA Diversity Committee is to promote the inclusion of those individuals who historically have been excluded from meaningful and active participation in the alternative dispute resolution (ADR) field." *Diversity Initiatives*, AM. ARBITRATION ASS'N, https://www.adr.org/diversityinitiatives [https://perma.cc/KD4W-3L3N].

158. Carbone & Zaino, *supra* note 152, at 34.

159. *AAA Higginbotham Fellows Program*, AM. ARBITRATION ASS'N, https://www.adr.org/HiggibothamFellowsProgram [https://perma.cc/K8VP-BP6A].

guished panelists."[160] JAMS encourages the businesses with whom it works to consider using gender and racially diverse neutrals, track usage of diverse neutrals, and encourage outside counsel to "consider diversity in their selection of ADR professionals."[161] CPR, another major provider of dispute resolution services, created a "diversity pledge." Signatories to this pledge confirm their belief in the importance of diversity and inclusion among neutrals and actively support selecting diverse arbitrators and mediators in matters in which they are involved. It also asks that other parties to disputes include "qualified diverse neutrals among any list" of neutrals they propose to the signatories.[162] More recently, acknowledging that the only path to diversity in dispute resolution is ensuring that diverse candidates are selected as arbitrators, CPR, together with FINRA and the Leadership Council on Legal Diversity, launched a program intended to train diverse candidates to become mediators and arbitrators.[163] The program, which began in a pilot form in 2016, provides diverse participants the opportunity to develop neutral skills and gain access to professional dispute resolution opportunities through, "(a) formal training in mediation and arbitration skills and practical observational experience; (b) mentoring by skilled neutrals; and (c) networking opportunities within CPR's commercial dispute resolution community via attendance at these organization's events at no cost or at a discount."[164]

For each of these organizations, the focus seems to be on diversifying the arbitration roster and, at the same time, encouraging clients to commit to selecting arbitrators who are diverse. Commentators offer additional suggestions to the major providers, encouraging them to offer training and mentoring to female or minority arbitrators.[165] They also recommend that minority or female arbitrators, if interested in being selected, should do pro bono or reduced fee work and speak or teach for the lawyers and business people who might ultimately be responsible for selecting arbitrators.[166] While all of these suggestions are useful, they do not seem sufficient to overcome the major obstacle facing any prospective arbitrator on a roster—being selected. The commitment to diversifying the roster and offering mentoring, training, and networking,

160. *Diversity*, JUDICIAL ARBITRATION AND MEDIATION SERVS., http://www.jamsadr.com/diversity/ [https://perma.cc/W4YX-LAJL].

161. *Id.*

162. Burt & Kaster, *supra* note 154.

163. *CPR, LCLD & FINRA Program Aims for Actual Selection, Not Just Training, of Diverse Neutrals*, INT'L INST. FOR CONFLICT PREVENTION & RESOLUTION (CPR) (Sept. 14, 2017), https://blog.cpradr.org/ [https://perma.cc/2GYB-VQ6G]. In 2016, the program trained six participants. In 2017, five participants are enrolled. *Id*.

164. *Id*.

165. *See* Rothman, *supra* note 154, at 26; Carbone & Zaino, *supra* note 152, at 34–35; Gina Viola Brown & Andrea K. Schneider, *Gender Differences in Dispute Resolution Practice: Report on the ABA Section of Dispute Resolution Practice Snapshot Survey*, MARQ. UNIV. LAW SCHOOL LEGAL STUDIES RESEARCH PAPER NO. 14-04, at 21 (Jan. 31, 2014) (clients and lawyers should use presumption in favor of selecting a gender diverse neutral on multi-member panels).

166. Carbone & Zaino, *supra* note 152, at 35.

admirable as it is, is unlikely to change *who* is selected to be an arbitrator.[167]

Neither are entreaties that businesses select arbitrators from diverse backgrounds likely to change selection outcomes. It is odd that businesses, who long ago committed to ensuring diversity in their business and hiring practices,[168] often abandon that commitment when selecting neutrals.[169] Institutional expression of a commitment to the selection of qualified neutrals does not seem to translate into the selection of diverse neutrals.[170] So, it would seem unlikely that leaving the selection process to the businesses will result in increased diversity among selected neutrals.[171] Even with lists that include diverse neutrals, businesses seem to default to arbitrators with whom they are familiar or who look like them.[172] This approach results predominantly in the selection of older, white male arbitrators, since these arbitrators have been around the longest and likely have the most experience and name recognition.[173] So, how can diversity among selected neutrals be achieved?

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167. Deborah Rothman explained that women arbitrators are rarely selected because women are not well-represented among major litigation partners and in-house counsel, those most likely to select arbitrators. Rothman, *supra* note 154, at 24. Also working against women arbitrators is that most major law firms keep records and information about arbitrators they have previously selected. Because a lawyer does not want to be blamed for picking an arbitrator who others are unfamiliar with, new arbitrators, like many women and minorities, are often overlooked. *Id.* at 24–25. Rothman also suggests that implicit bias may prevent well-qualified women from being selected as arbitrators. *Id.* at 25.

168. Theodore K. Cheng has noted that corporations, and their legal departments, have committed to diversity, often requesting that proposals for legal work include diversity among those who are anticipated to work on the matter. Cheng, *supra* note 151, at 2. *See also* Weatherspoon, *supra* note 152, at 803 ("Even when highly experienced minority neutrals gain placement on ADR rosters, they rarely are scheduled to serve.").

169. *See* Burt & Kaster, *supra* note 114. Cheng observes this phenomenon as well, noting that "corporations persist in pursuing an outdated approach to the selection of diverse neutrals," often outsourcing selection, together with the drafting of dispute resolution clauses, to outside counsel. *See* Cheng, *supra* note 151, at 2.

170. Twenty-two percent (22%) of JAMS mediators and arbitrators selected for cases are diverse by gender. Chris Poole, *Why Diversity Matters in ADR*, JAMS ADR BLOG (July 18, 2012), http://www.jamsadr.com/blog/2012/why-diversity-matters-in-adr [https://perma.cc/T8CU-UX5F] (data contained within linked presentation).

171. Chris Poole, *Talking Diversity: An Important Topic for ADR*, JAMS ADR BLOG (July 14, 2011), https://www.jamsadr.com/blog/2011/talking-diversity-an-important-topic-for-adr [https://perma.cc/S4SU-VH4D] ("[T]he problem [with arbitrator selection] stems from the fact that attorneys are typically most comfortable recommending to clients . . . [an] arbitrator they have previously worked with."). Poole also raised the issue of supply. *Id.* Fewer minorities and women appear on JAMS rosters because JAMS draws most of its arbitrators from judges and senior partners at law firms with ADR experience, and those groups are underrepresented in those careers. *Id.*

172. Hancock, *supra* note 154, at 1 (quoting an arbitrator on the JAMS roster who said that "attorneys [are driven] to select not only neutrals who are retired judges or former litigators with established track records . . . but individuals who share their background [and are] 'a mirror image of themselves.'").

173. Lawyers in law firms or in-house counsel control the disputes in arbitration. Because these "gatekeepers" are disproportionately white, "they tend to appoint someone like themselves, someone white, a lawyer, and usually male." Hoffman & Stallworth, *supra* note 151, at 37, 41. Prejudice, together with concern about the quality of minority and female neutrals may also be an issue. Weatherspoon, *supra* note 152, at 802–03.

Concerns about the lack of diversity in the arbitrator corps may have the greatest impact on minority disputants in cases where they face more powerful and experienced opponents—for example, in consumer and employment disputes. Two possible solutions might address the lack of diversity among arbitrators in these kinds of cases. First, arbitral institutions, like AAA, might consider expanding their rules to permit direct appointment of arbitrators in certain kinds of cases.[174] AAA has already moved in that direction. Since 2014, AAA's consumer arbitration rules authorize AAA to appoint an arbitrator from its national roster in disputes involving a claim of $10,000 or less rather than allow the parties to select the arbitrator using the traditional striking process.[175] Although AAA follows the parties' selection process, most parties incorporate AAA's rules into their contracts rather than create their own selection process.[176] Because AAA has made strides in increasing the diversity of

174. JAMS rules simply assure consumers that they will have "a reasonable opportunity to participate in the process of choosing the arbitrator(s)." *JAMS Policy on Consumer Arbitrations Pursuant to Pre-Dispute Clauses Minimum Standards of Procedural Fairness*, Judicial Arbitration and Mediation Servs. (July 15, 2009), https://www.jamsadr.com/consumer-minimum-standards/ [https://perma.cc/6W74-A4NZ]. The AAA's new rules differ from the approach taken in traditional arbitration. In traditional arbitration, an arbitral institution provides a list of three or more arbitrators to the parties. The parties alternately strike names until one arbitrator remains. This arbitrator is appointed to hear the case. This process does not typically result in the appointment of an arbitrator from a diverse background because the more experienced party will strike arbitrators with whom it is unfamiliar. As a result, the appointed arbitrator is more likely to be an experienced, well-known arbitrator. In the United States, the typical experienced, well-known arbitrator is an older, white male.

175. Under AAA Consumer Arbitration Rule 16, this appointment process is a default rule. If the parties identify another approach to selection, AAA will follow that approach. In addition, the rule enables either party to object to an arbitrator's appointment. *AAA Consumer Arbitration Rules*, *supra* note 101, at 18 (Rule 16, Appointment from National Roster). Prior to 2014, AAA appointed an arbitrator if the parties failed to identify a different process for arbitrator selection but did not indicate which roster AAA would use to appoint the arbitrator. *See Consumer-Related Disputes Supplementary Procedures*, AM. ARBITRATION ASS'N, at 9 (Sept. 15, 2005), https://www.adr.org/sites/default/files/Consumer-Related%20Disputes%20Supplementary%20Procedures%20Sep%2015%2C%202005.pdf [https://perma.cc/L567-5TWG].

176. *See Consumer Clause Registry*, AM. ARBITRATION ASS'N, https://www.adr.org/simplefileandpay/faces/oracle/webcenter/portalapp/pages/clauseRegistry.jspx?_afrLoop=233189466242335&_afrWindowMode=0&_afrWindowId=null#!%40%40%3F_afrWindowId%3Dnull%26_afrLoop%3D233189466242335%26_afrWindowMode%3D0%26_adf.ctrl-state%3D19p6rw3kok_4 [https://perma.cc/TD6L-3CJC] [hereinafter "*AAA Consumer Clause Registry*"]. Since 2014, AAA mandates that any business wishing to use AAA arbitrators and administrative services pay a fee to have their consumer arbitration clause reviewed by AAA. Once AAA reviews the clause and finds that its content is consistent with AAA rules and the Due Process Protocol, the clause is included in the Consumer Clause Registry. *See id.* Three hundred thirty-nine (339) companies have their clauses included in the Registry. *Id.* AAA will not administer any arbitration for a company whose arbitration clause is not compliant with AAA's minimum standards for due process. *Id.* A review of the Consumer Clause Registry demonstrates that most businesses allow AAA to appoint the arbitrator in consumer disputes. For example, 1st Franklin Financial Corporation permits the AAA to appoint the arbitrator. *See id*; *see also* Alternative Dispute Resolution (Arbitration) Agreement for 1st Franklin Financial Corporation, https://www.adr.org/simplefileandpay/docopenservlet?DocID=19084419——NYV-PMPRODUCM26151627—No—Y%20&&%20MainContentId=NYV-PMPRODUCM26151627%20&&%20NewFlag=No&_afrLoop=758204488433367 [https://perma.cc/7XXQ-4HNX].

its arbitrator roster and most entities who use AAA opt in to AAA's default rules, one would expect to see greater diversity among the arbitrators actually appointed to cases. Unfortunately, though, the reach of this rule is limited because a $10,000 demand is a relatively low value claim and the rules authorizing AAA to appoint the arbitrator are limited to consumer disputes.[177] In an employment dispute, by contrast, AAA will follow the traditional process for arbitrator selection. AAA sends out a roster of arbitrators, diverse by gender and race.[178] Next, the parties rank these arbitrators in order of preference. Then, AAA appoints the arbitrator with the highest composite ranking.[179] This process provides no guarantee that a diverse arbitrator will be chosen. One way to improve diversity among arbitrators selected to hear cases would be for AAA, and other major arbitral institutions like JAMS and CPR, to adopt AAA's approach to arbitrator appointment for low value cases, but increase the threshold demand associated with arbitrator appointment to, for example, $100,000 claims. The institutional providers could also expand this direct arbitrator appointment program to include employment cases. Parties could still opt out of the arbitrator appointment rule but, if they failed to do so, would be much more likely to see an arbitrator of a different gender or race presiding over their dispute.

Another possible solution to the lack of diversity among arbitrators would be to create a greater number of permanent panels of arbitrators reflecting the diversity of the population at large.[180] Permanent panels are already a staple of labor arbitration in both the public and private sectors.[181] Each side, union and management, identifies potential arbitra-

177. In an extensive study of consumer arbitration cases, Professor David Horton found that only twenty-four percent (24%) of AAA consumer claims involved demands for $10,000 or less. *See* David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 92 (2015) (mean demand was $143,962). An earlier study, conducted by Searle, found that the mean demand was $46,131 with thirty-one percent (31%) of claimants making a claim for $10,000 or less. *Id.* Note that not all the businesses limit AAA's power to appoint to claims of $10,000 or less. *See AAA Consumer Clause Registry*, *supra* note 176. For example, 1st Franklin Financial Corporation does not identify a claim limit. *See id.*; *see also* Alternative Dispute Resolution (Arbitration) Agreement, *supra* note 176.

178. *See* AAA's EMPLOYMENT ARBITRATION RULES, *supra* note 88, at 20 ("Number, Qualifications and Appointment of Neutral Arbitrators").

179. *Id.* (Rule 12(c) (i–iii)).

180. As David Hoffman has noted, permanent panels are one of the three types of workplace dispute resolution. The other two approaches involve the use of an independent organization, like AAA or JAMS, to supply a list of prospective arbitrators. A third approach is to select arbitrators ad hoc as cases arise. Hoffman & Stallworth, *supra* note 151, at 38. In labor and employment disputes, parties may "agree on a single individual to serve as a permanent umpire to handle all arbitration disputes or a permanent panel of arbitrators from whom they will select an individual to hear a particular matter." Timothy J. Heinsz, *Judicial Review of Labor Arbitration Awards: The Enterprise Wheel Goes Around and Around*, 52 MO. L. REV. 243, 298 n.161 (1987) (permanent panel of arbitrators used frequently in labor arbitration).

181. The American Federation of Government Employees and the Social Security Administration, for example, maintain a permanent panel of arbitrators. FMCS notes on its website that some collective bargaining agreements require creation of a panel of arbitrators. *Arbitration & Notice Processing*, FEDERAL MEDIATION & CONCILIATION SERVICE,

tors. Both sides vet the arbitrators and, if they are acceptable to both sides, randomly assign (or assign by rotation) the panel arbitrators to arbitrations as disputes arise, typically over a period of time, such as the life of the collective bargaining agreement.[182] Because both union and management are committed to creation of a diverse panel, parties are much more likely to see women or minority arbitrators than they would if the panel were created by a private arbitral organization. Other institutions utilize permanent panels for certain kinds of cases, usually those that are less complex. As in the labor-management context, the permanent panel arbitrators are assigned on a rotating basis to cases, and both sides must agree that an arbitrator may become a member of a permanent panel.[183] Arbitrator panels create greater diversity in arbitrator selection, as opposed to the current approach in most consumer and employment cases, which focuses only on diversification of arbitrator rosters.

Establishing a permanent panel of arbitrators to enhance diversity among arbitrators handling employment disputes is not a new idea. In 2008, David Hoffman and Lamont Stallworth recommended the creation of national and regional arbitrator panels as a way to improve the diversity of arbitrator rosters. But their article focused primarily on the question of how to improve recruitment, selection, and mentoring of minority dispute resolution professionals. The authors identified two programs designed to achieve these goals: Access ADR and a National Consortium of Minority Workplace Neutrals.[184] While there is no doubt that increasing the number of minority dispute resolution professionals is a laudable goal, these organizations have not been terribly successful because they exist separate and apart from the mainstream dispute resolution providers.[185] To change the nature of arbitrator rosters that parties actually use—and, more importantly, the arbitrators they select—businesses, consumer and employee groups, along with the dispute resolution providers, must work together to achieve the same goal. Resources providing access to minority or gender-diverse neutrals are a mere starting point. Only if permanent panels of diverse neutrals are created by the arbitral institutions, together with support from businesses and input from employees,

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https://www.fmcs.gov/aboutus/agency-departments/arbitration-services-notice-processing/ [https://perma.cc/MU2C-C5DZ]. Charles A. Borell, *How Unions Can Improve Their Success Rate in Labor Arbitration*, 61 DISP. RESOL. J. 28, 31 (2006) (permanent panels common in labor arbitration); Stephen L. Hayford, *The Coming Third Era of Labor Arbitration*, 48 ARB. J. 8, 9 (1993) (large numbers of permanent panels in labor arbitration); Heinsz, *supra* note 180, at 298.

182. In the unionized context, the parties might create a permanent panel of arbitrators to adjudicate grievances during the life of the collective bargaining agreement. Another approach is to create a list of arbitrators, one of whom must decide the dispute. Permanent panels may be used in complex commercial construction projects, too, where speedy resolution is essential. Ariana R. Levinson, *What the Awards Tell Us About Labor Arbitration of Employment-Discrimination Claims*, 46 U. MICH. J.L. REFORM 789, 859 n.148 (2013).

183. *See* Carbone & Zaino, *supra* note 152, at 37 (describing permanent panels).

184. Hoffman & Stallworth, *supra* note 151, at 43.

185. I could find no evidence that either of these organizations still exist in a search of the Internet in 2016.

consumers, and the entities that advocate on their behalf, might we experience the kind of diversity among arbitrators that will make the arbitration process more acceptable to minority disputants.

But how can we ensure that consumer or employee advocacy groups, or groups created by plaintiffs' lawyers, can stand in the place of the union to propose inclusion of arbitrators from diverse backgrounds on arbitrator panels and play a role in their selection? Bill Gould, former Chair of the NLRB and an experienced arbitrator, suggested that employees' representatives, in particular, could be in a position to identify arbitrators for rosterspanels and, later, for selection. He believed that, post-*Gilmer*, "the plaintiffs' bar in most major cities is able to act as an adequate surrogate for organized labor. That is to say, counsel, like union representatives, will pass information about their experience and judgments about particular arbitrators to one another just as employers do in both settings."[186] A recent study of AAA consumer arbitration cases suggests that this may be happening, at least in consumer arbitration. In a study of over 5,000 consumer complaints filed with AAA between 2009 and 2013, the authors found that "repeat-playing plaintiffs' lawyers" may have "growing clout" in the arbitrator selection process.[187] These lawyers could work with AAA and business counsel to establish a more diverse panel of arbitrators who could then be assigned randomly to cases. Even if a rosterpanel were not possible, one would hope that the growing influence of repeat-playing plaintiffs' lawyers will serve to ensure selection of arbitrators with more diverse backgrounds, as lawyers will likely work to

186. William B. Gould IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 659 (2006) (expressing concern that an employee who cannot afford counsel might have difficulty selecting an arbitrator because he or she would be unlikely to have access to the resources necessary to make a knowledgeable choice). *But see* Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. OF LEGAL STUDIES 1, 31 (2011). In this article, Colvin found that repeat player employers had an advantage in arbitration involving employees. One of the reasons for a repeat player advantage, Colvin concluded, was that the "plaintiff attorney bar" was not able "to play a substitute role as a repeat player on behalf of employees in employer arbitration akin to the role played by unions in labor arbitration." *Id.* Colvin speculated that plaintiff attorneys might be able to play this role if the time came when there were a "sufficient number of plaintiff attorneys experienced in employment arbitration accessible to employees to be able to counteract employer advantages in this area." *Id.*

187. *See generally* Horton & Chandrasekher, *supra* note 177. Horton's research debunks the belief that arbitral bias against the one-shot players is prevalent. According to Horton's research, there is "little proof that private judges are prejudiced against consumers. In fact, our research goes further and casts doubt on existing evidence of arbitral bias." *Id.* at 120–21. There is also some doubt as to the continued existence of the repeat player influence in arbitration. *See id.* at 121. According to Horton, repeat players do not have as much control over the arbitration process as they did in the past. *Id.* 1,279 different arbitrators (in part because of the AAA arbitrator appointment process) presided over 4,839 arbitrations. *Id.* at 91, 121. Thus, the authors concluded that "companies no longer have much control over the identity of the private judge." *Id.* at 121. Although Horton did not study the identity of the arbitrators, one might also imagine that more minority and female arbitrators presided over these arbitrations, given that so many different arbitrators were assigned to resolve disputes.

select arbitrators who they believe to share experiences and beliefs similar to their clients.

Organized plaintiffs' lawyers and increased use of direct arbitrator appointment and arbitrator panels may well lead to increased diversity among arbitrators actually appointed to hear consumer and employment disputes. If increasing diversity among arbitrators is integral to ensuring the procedural integrity of the arbitration process, then arbitral organizations should push businesses to draft arbitration clauses that authorize arbitrator appointment or permanent panels. As long as arbitral organizations are committed to maintaining diverse rosters of arbitrators, this approach will ensure that a much larger percentage of arbitrators from diverse backgrounds are appointed to hear cases, rather than simply languish on the arbitrator rosters, never to be chosen.

V. CONCLUSION

Arbitration is a structured process that, in the past twenty years has become increasingly formal to address perceived inequities among parties who participate in it, particularly one-shot players facing repeat players. These improvements to arbitration, including reduced filing and arbitrator fees and greater due process, rebut the assertion that the arbitration process disadvantages minority or one-shot disputants. And the beauty of arbitration is that its structure is amenable to additional reform that might address perceived and real threats to justice that may emanate from an informal forum. Among other reforms, the addition of a published reasoned written opinion and diversification of the arbitrator corps might ultimately make arbitration a preferable forum for minority and one-shot disputants given its already low cost and efficient resolution process. Although arbitration is not a "baby," having been around since biblical times, it should nevertheless not be thrown out with the bathwater, for it has the potential to provide minority disputants, particularly those facing a well-heeled opponent, the ability to access and, perhaps, obtain justice, an objective rarely achieved by those with few resources in a traditional courtroom.[188]

188. Stipanowich, *supra* note 131, at 37 (noting that the litigation forum does not provide a level playing field for those with limited resources; time and cost are considerable, and the ideal of justice is rarely met).