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Privity 2.0 May Be Even Better for Tort Defendants

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PRIVITY 2.0 MAY BE EVEN BETTER FOR TORT DEFENDANTS

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INTRODUCTION

When American courts determined that the tort duty of care exists independent of privity, a significant shelter from personal injury liability suffered a mortal wound.¹ Decades of American case law decided before *MacPherson v. Buick Motor Co.*,² the game-changing precedent on point, had once followed English cases that relied on a distant agreement to deliver immunity.³ Remote dealings functioned to cut off obligations to persons who had no reason to know that other people's contracts stood in their way.⁴

Only limited exceptions lessened the impact of the privity rule, which declared that as long as a tort defendant was in a contractual relation with anyone regarding the source of risk, it owed no duty of care to a nonprivity plaintiff.⁵ The source of risk in *MacPherson* was an automobile that the defendant manufacturer had sold to a retailer. Judge Benjamin Cardozo, author of this decision, went on to describe re-envisioning of duty stretched beyond the boundaries of privity as an "assault" that case law had been pushing on a "citadel."⁶

1. DAVID W. PECK, DECISION AT LAW 69 (1961) (noting the extraordinary impact that this shift made on "industry").

2. 111 N.E. 1050 (N.Y. 1916).

3. These decisions never explained the immunity they decreed. One explanation of the English stance of no obligation in tort when a defendant was in privity of contract with someone other than the plaintiff attributes it to "rules of pleading that did not clearly delineate between duties imposed by law and duties created by the will of the parties." Mark P. Gergen, *Privity*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 481, 491 (Andrew S. Gold et al. eds., 2020).

4. The path that puts privity at a beginning and reaches *MacPherson* at its end won its most famous study in EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 9-20 (1949).

5. On exceptions to this rule, see *infra* notes 16, 37-40 and accompanying text.

6. *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931).

A few decades after *MacPherson*—as counted in common law time, a very fast move⁷—the figurative citadel lay in ruins.⁸ Courts throughout the United States welcomed tort claims by plaintiffs who had never entered into any of the defendants' contracts that applied to the condition or conduct about which they complained. Contract law, in a parallel development, grew similarly liberal when it extended protections of product warranties to nonparties.⁹ Today, the fall of privity as a barrier now means that whenever anyone engages in an activity that imposes a risk of physical injury on another, this actor must proceed with reasonable care. Failure of reasonable care is actionable negligence when it causes physical injury—indubitably, uncontroversially. Errant defendants can no longer find refuge in their pre-*MacPherson* fortress.

If you identify with the role of defendant, you have reason to miss your good old days. Privity of yore treated you well. Numerous doctrines still in force favor defendants, but few of them go as far as privity once did to wipe claims from the docket.¹⁰ Because privity wreaks oblivion by killing the duty element of the negligence *prima facie* case, a defendant can dispatch a complaint cheaply before trial. Most of the other tort rules that aid defendants give opportunities to jurors, whose predilections are relatively hard to know in advance. Judges are, or appear, more predictable and they hold the privity lever.¹¹

You, Defendant, would like to regain the certainty of your old shelter. Can you? Maybe. Pro-plaintiff shifts in tort law have been known to recede.¹² And privity as a barrier to redress for plaintiffs retains quite a bit of strength, especially in *MacPherson's* home state of New York: there and elsewhere, courts apply it outside personal injury.¹³

7. See KUNAL M. PARKER, *COMMON LAW, HISTORY, AND DEMOCRACY IN AMERICA, 1790-1900: LEGAL THOUGHT BEFORE MODERNISM* 41 (2011).

8. See William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 793-94 (1966). But see James A. Henderson, Jr., *MacPherson v. Buick Motor Company: Simplifying the Facts While Reshaping the Law*, in TORTS STORIES 41, 65 (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (claiming, in express disagreement with Prosser, that "privity died a relatively slow death").

9. See Jennifer Camero, *Two Too Many: Third Party Beneficiaries of Warranties Under the Uniform Commercial Code*, 86 ST. JOHN'S L. REV. 1, 4-12 (2012) (reviewing this development).

10. See generally Jef De Mot & Alex Stein, *Talking Points*, 2015 U. ILL. L. REV. 1259 (2015) (examining pro-defendant tort and contract doctrines).

11. For an expert examination of this belief, see Valerie P. Hans & Theodore Eisenberg, *The Predictability of Juries*, 60 DEPAUL L. REV. 375 (2011).

12. In the 1980s, for example, the California Supreme Court moved away from expansions of duty, proximate cause, and strict products liability that it had been writing into case law for decades. See Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience with "New" Torts*, 49 DE PAUL L. REV. 455, 471-84 (1999). California courts never returned to their midcentury tort expansionism.

13. Gergen, *supra* note 3, at 494-96.

This particular iteration of privity looks like a poor bet to return, however. It never received a convincing exposition in case law,¹⁴ and nobody seems to want it back.

Pre-1916 privity as doctrine had indulged heedlessness of perils worth caring about. Take the complaint of Donald MacPherson, which alleged that a Buick Runabout had a flaw that a consumer could not have detected by inspection.¹⁵ MacPherson was headed to lose unless he could seize the best exception to privity, a characterization of the injurious product as “inherently dangerous;”¹⁶ the larger rule barred his claim. Swaddled in the privity blanket, an auto manufacturer like Buick could with impunity endanger nonprivity customers (a group to which Mr. MacPherson belonged), passengers, and unfortunates on the road that it met by accident, so to speak. The only persons to whom it owed a duty of care with respect to risks of product mismanufacture were those who had bought automobiles from it; Buick sold cars only to dealers. Cardozo noted when he ruled against this defendant that the privity rule was willing to give tort damages to pretty much the only persons who would not suffer them.¹⁷

Human beings and entities roaming loose like off-leash dogs to carry on as they please without regard for the risks they create doesn’t feel like good old days for most of us. As a stance for the law, it seems primitive, antisocial, and ill-suited to a large population.¹⁸ Yet how idyllic, if you identify with the role of a defendant, to be safe from what plaintiffs’ lawyers and jurors can do to you.

What you want is a retreat from liability that does not rest on premises too embarrassing to embrace. Pretending that a business and its customers are strangers to each other,¹⁹ whimpering that a duty of

14. See *supra* note 3.

15. A distinguished products liability scholar doubts the truth of this claim and contends that under the *MacPherson* facts a contemporary court would be right to give Buick judgment as a matter of law. See Henderson, *supra* note 8, at 45-48, 52. Using this complaint to destroy the privity barrier obliged Judge Cardozo “to conjure what amount[ed] to hypothetical fact patterns.” *Id.* at 70. Still, Professor Henderson approved of what Cardozo did. *Id.* at 70-71.

16. Anita Bernstein, *The Reciprocal of MacPherson v. Buick Motor Company*, 9 J. TORT L. 5, 8-9, 12 (2016).

17. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

18. *Id.* at 1053 (“Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day.”).

19. This Article proceeds on the premise that most retreats from personal injury liability will be achieved or attempted by businesses, but an individual can follow this path. See Imre S. Szalai, *The Consent Amendment: Restoring Meaningful Consent and Respect for Human Dignity in America’s Civil Justice System*, 24 VA. J. SOC. POL’Y & L. 195, 198 n.16 (2017) (reporting a practice of the actor Charlie Sheen to opt out of tort liability in his home, and a ruling by a California court that relegated to arbitration a visitor’s claim against Sheen for sexual battery); see also *infra* Section IV.A.1 (describing how Amtrak, an entity in some respects different from a business, has elected to keep personal injury claims against it out of court).

care to foreseeable plaintiffs would bring no end of hell to pay,²⁰ and insisting that garden-variety carelessness is too much to guard against all sound like what Grant Gilmore, reflecting in 1952 on privity overreach by the banking sector, called “carrying a good joke too far.”²¹ Exemption from reasonable care without sounding over-the-top absurd—ah, wouldn’t it be lovely.

It’s here. Privity reinvigorated in the current century comes with a few tradeoffs, to be sure. It does not have the pre-*MacPherson* sweeping power to vaporize an unwanted complaint, especially one alleging physical injury, but in some respects it is more useful for entities that line up on Team Defendant. If pre-*MacPherson* privity had been a citadel looming large and fierce on the horizon, twenty-first century privity is an electric fence. Or, to continue down the lane of metaphor, the contemporary version of privity, called Privity 2.0 in this Article, is software code slipped into a machine at the apparent initiative, but without any conscious acceptance, of the person who gets blocked by this barrier.²²

Affecting an air of liberal enlightenment, Privity 2.0 acknowledges that duty of care is the norm and tort immunity the exception. Of course a person or business engaged in an activity that risks physical injury when done carelessly owes care to foreseeable plaintiffs. Of course injured persons may seek damages in court. Right to jury trial? Of course. Does a plaintiff need a contractual relation with the defendant to bring a tort action? Of course not! American tort law celebrated the *MacPherson* centenary years ago.²³ This revision of duty understands human beings to have an entitlement to integrity—integrity of their bodies very much included—and a correlative right to tort redress when they suffer a wrong. Instead of casting injured persons as strangers to the defendant, invisible to it and unworthy of its regard, Privity 2.0 celebrates their freedom by purporting to honor the deals they made.

Privity back in the day had told injured individuals they lacked a credential necessary for relief. They weren’t good enough to deserve ordinary care. Because rich people have always enjoyed an enlarged share of contract rights and remedies comparable to the enlarged

20. *Winterbottom v. Wright*, 152 Eng. Rep. 402, 405 (Ex. 1842) (stating that without a privity barrier, “the most absurd and outrageous consequences, to which [the judge-author] can see no limit, would ensue”).

21. Grant Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 *YALE L.J.* 364, 375 (1952).

22. For other examples of “2.0” as a metaphor meaning approximately “new and more forceful than predecessors,” see Ellen S. Podgor, *Corporate Criminal Liability 2.0*, 46 *STETSON L. REV.* 1 (2016); Nancy Kinnally, *Pro Bono 2.0: The New Age of Pro Bono*, *FLA. B.J.*, May 2018, at 8; Dawn Reiss, *Traveling 2.0*, *ABA J.*, July 2017, at 39.

23. The *Journal of Tort Law* observed this anniversary with a symposium in 2016.

share of cash they also enjoy, the application of privity that defeated nineteenth-century plaintiffs pushed the same button that makes people feel ashamed of being poor.

Twenty-first century privity, the spelled-out kind, dishes out no humiliation to anyone for lacking wealth. Quite the contrary. It celebrates the strength of ordinary persons to read at a high level, exercise choice, negotiate, and focus on their interests. Aided by the insights of microeconomics—a discipline that had no overt influence on law in the old privity era—privity as revived can even say why it isn't necessarily perverse to renounce one's remedies.²⁴ From here, as Part I explains, today's courts reach the same end as pre-*MacPherson* privity by different means when they say with a straight face that plaintiffs lack tort redress because they volunteered to give it away.

Borrowing a term brought to the dispute-resolution literature by Jean Sternlight, I'll call the people who eventually ripen into frustrated plaintiffs "little guys."²⁵ These individuals get thrown into the sorry state of Privity 2.0 when they manifest acceptance of conditions that repeat-player entities impose on them.²⁶ Impositions can take away almost anything the little guy ostensibly agreed to forfeit.²⁷

What do repeat players want to take away from little guys? Top on the list of conditions to impose is an overt barrier to the courts. Although Sternlight used her synonym for vulnerable individuals to mean employees, franchisees, and financially injured consumers,²⁸ little guys also include the focus of this Article: people who suffer personal

24. In theory, consumers will pay less for a product or service whose dangerousness they cannot denounce in court, and a prospective employee neutered out of the plaintiff role will be more attractive to an employer. Cf. James Kwak, *The Curse of Econ 101*, ATLANTIC (Jan. 14, 2017), <https://www.theatlantic.com/business/archive/2017/01/economism-and-the-minimum-wage/513155/> [<https://perma.cc/RYT7-TYGL>] (characterizing a view that the minimum wage and the employment rate are inversely related as an example of "economism"—the misleading application of basic lessons from Economics 101 to real-world problems). For a more positive view of gains that imposed arbitration has delivered to consumers, see Sarah R. Cole & Kristen M. Blankley, *Empirical Research on Consumer Arbitration: What the Data Reveals*, 113 PENN ST. L. REV. 1051, 1064-66 (2009), reporting on a set of results that included consumers as defendants.

25. Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 637 (1996). Decisional law on arbitration occasionally speaks of "the little guy." See *Nagrampa v. MailCoups, Inc.*, 469 F.3d 1257, 1312 (9th Cir. 2006) (Kozinski, J., dissenting); *United States v. Aegerion Pharms., Inc.*, 280 F. Supp. 3d 217, 225 (D. Mass. 2017).

26. For criticism of the view that arbitration unjustly burdens vulnerable individuals, see Stephen J. Ware, *The Centrist Case for Enforcing Adhesive Arbitration Agreements*, 23 HARV. NEGOT. L. REV. 29 (2017). Professor Ware points out that the familiar home mortgage is not characterized as forced or mandatory even though prospective buyers will not get the loans they need without putting up their most valuable asset as collateral. *Id.* at 44-45.

27. See generally Robert L. Oakley, *Fairness in Electronic Contracting: Minimum Standards for Non-Negotiated Contracts*, 42 HOUS. L. REV. 1041 (2005) (observing that although the law does not define the term "contract of adhesion," indicia of a power gap in contracting include absence of negotiation, preparation of the agreement in a standard form, and a take-it-or-leave-it presentation).

28. See Sternlight, *supra* note 25, at 637.

injury. Eliminating civil recourse for these persons returns a business most closely to its pre-*MacPherson* idyll of not having to bother complying with duties mandated in case law.

Repeat players have chosen two routes to this destination. The first is to present little guys with a waiver of liability that they seldom even read, let alone negotiate.²⁹ Alternatively, they impose on little guys nonjudicial dispute resolution. Forced arbitration is the imposition of theirs that will occupy this Article.³⁰ By mandating arbitration as the sole means to redress little guys' grievances, repeat players spare themselves much of the downside of being tort defendants, a concatenation that extends beyond having to pay out money.³¹

Closely related to barring little guys from the courts is forcing them to renounce collaboration and cooperation among themselves,³² a maneuver that can make proceeding in court impossible.³³ *Should I ever complain about what happens to me in the future*, says the weaker party to the contract, *I will do so alone*.³⁴ An entity might also want to tie little guys' shoelaces together with provisions like shortened times to complain, a venue located someplace inconvenient for the little guy and convenient for the repeat player, more power for the repeat player to choose and influence those who resolve disputes, and dispute resolution procedures that leverage gaps in wealth.³⁵ But closing the courthouse door and preventing injured persons from uniting in litigation are at the heart of Privity 2.0. Taken together, as the federal judge William Young remarked in an interview about the rise of forced arbitration coupled with successful attacks on class actions, they provide that "business has a good chance of opting out of the legal system altogether and misbehaving without reproach."³⁶

29. See generally Ryan Martins et al., *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265 (2020).

30. This Article uses the adjective "forced" to modify this use of arbitration written into form contracts before disputes arise, mindful of the view that arbitration should not be perceived as forced when the person pressed into it can refuse it by refusing the whole transaction. See *supra* note 26.

31. See David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 60-61 (1997) (reviewing these consequences).

32. See Hila Keren, *Divided and Conquered: The Neoliberal Roots and Emotional Consequences of the Arbitration Revolution*, 72 FLA. L. REV. 575, 579 (2020) (describing the rise of forced arbitration as an "assault on all forms of collective actions"). Writings on the issue often refer to class actions, but the waivers that repeat players impose are not limited to aggregations that pursue or achieve designation as formally certified classes.

33. See *infra* notes 166-67 and accompanying text.

34. See Frank Blechschmidt, Comment, *All Alone in Arbitration: AT&T Mobility v. Concepcion and the Substantive Impact of Class Action Waivers*, 160 U. PA. L. REV. 541 (2012).

35. See generally *infra* Part III (reviewing examples of impositions that favor repeat players).

36. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), <https://www.nytimes.com/>

“Opting out of the legal system altogether” through these twinned constraints goes further than privity in its original form. Recall the old escape hatch available before Cardozo wrote his famous decision: Lapses that “put human life in imminent danger” could deliver redress to nonprivity plaintiffs.³⁷ Articulated by the New York Court of Appeals in 1852, the imminent-danger exception was significant on the ground, supporting numerous wins for plaintiffs before *MacPherson*³⁸—including, notably, a win that Donald MacPherson himself enjoyed in 1912.³⁹ Buick must have felt entitled to beat MacPherson in New York’s highest tribunal,⁴⁰ but it had to work as a litigant for that result: pre-1916 privity, differing from the 2.0 version of privity that occupies this Article, never permitted a repeat player to opt out of the legal system altogether.

An extensive literature has for decades been sounding an alarm about these twinned constraints imposed by repeat players on weaker individuals.⁴¹ This Article enlarges that literature in two broad respects. First, it addresses claims of personal injury,⁴² a category now almost entirely absent amid writings that focus primarily on financial loss to consumers and secondarily on employment.⁴³ Claims about hurt human bodies not yet as frustrated by the Privity 2.0 barrier as these other two categories have been, I hope here to address a locus of worrisome vulnerability before more harm ensues.

The other enlargement I offer here complicates the binary of Courts Good, Arbitration Bad. Along with other writers who address alternative dispute resolution imposed through a type of contract that

2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html [https://perma.cc/22FK-4BNP]; see also J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3059 (contending that the Supreme Court has encouraged “private parties drafting arbitration contracts to do so in a way that allowed them to reduce or even eliminate their obligations under substantive law”); Schwartz, *supra* note 31, at 53 (calling pre-dispute arbitration clauses “corporate self-deregulation”).

37. *Thomas v. Winchester*, 6 N.Y. 397, 409 (1852).

38. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1052 (N.Y. 1916) (reviewing New York cases that “evinced a more liberal spirit”).

39. *MacPherson v. Buick Motor Co.*, 153 A.D. 474, 477-79 (3d Dep’t 1912).

40. Bernstein, *supra* note 16, at 12-14.

41. See Thomas E. Carbonneau, *Arbitral Justice: The Demise of Due Process in American Law*, 70 TUL. L. REV. 1945 (1996); Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. ILL. L. REV. 371 (2016); Carrie Menkel-Meadow, *Do the “Haves” Come Out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. DISP. RES. 19 (1999).

42. Elizabeth G. Thornburg, *Contracting with Tortfeasors: Mandatory Arbitration Clauses and Personal Injury Claims*, 67 L. & CONTEMP. PROBS. 253, 254 (2004) (“Less well known is the tort law chapter of this [forced arbitration] story”); Martins et al., *supra* note 29, at 1300 (citing to two articles).

43. See Alexander J.S. Colvin, *The Metastasization of Mandatory Arbitration*, 94 CHI.-KENT L. REV. 3, 3-4 (2019) (“Much attention has focused on the use of mandatory arbitration agreements in consumer contracts, such as consumer financial contracts [and] cell-phone contracts There is less awareness of the use of mandatory arbitration agreements in employment contracts”).

precludes negotiation and even understanding of its terms, I credit the American judiciary for safeguards it continues to offer all sides of a dispute, poorer parties in particular. But the pro-courts scholarship that this Article joins has always had trial-level litigation in mind. Up at the apex of the appellate pyramid, the United States Supreme Court has been weakening the power of judge-made law.

It does so by continuing to read the Federal Arbitration Act (FAA) to compel enforcement of one-sided terms. Because this powerful statute contains no definition of the word arbitration,⁴⁴ the alternative that repeat players impose on little guys need not meet any criteria provisioned by Congress to qualify for pro-defendant shelter.⁴⁵ Arbitration really is “opting out of the legal system altogether” when a forum may proceed unchecked as it pleases, and the uninterrupted stream of FAA decisions that has flowed from the Supreme Court since the mid-1980s has thus far put no constraints on what repeat players may impose on little guys.⁴⁶ If there’s a repeat-player Privity 2.0 grab more aggressive than what the contemporary Court will tolerate, we haven’t seen it.

As for “misbehaving without reproach,” the record reviewed in Part II indicates that this pattern not only is in place but has potential to expand. The Supreme Court, which for the most part stays away from personal injury law, has undone tort recourse elsewhere: its preemption decisions snuffed out whole categories of claims for harm to human bodies.⁴⁷ Say what one will about the Court’s preemption jurisprudence, it has provoked attention and debate.⁴⁸ Privity 2.0 as judge-led thwarting of redress for personal injury lies under the radar.

With Part II having covered the What of Privity 2.0 as a development whose impact on personal injury law has been underexplored,

44. Niall Mackay Roberts, *Definitional Avoidance: Arbitration’s Common-Law Meaning and the Federal Arbitration Act*, 49 U.C. DAVIS L. REV. 1547, 1559 (2016).

45. Dicta in a major arbitration decision by the Supreme Court says that hypothetical examples of alternative dispute resolution would be “not arbitration,” see *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 351 (2011), but courts do not use that label.

46. See Richard A. Nagareda, *The Litigation-Arbitration Dichotomy Meets the Class Action*, 86 NOTRE DAME L. REV. 1069, 1092 (2011) (“As to the types of claims that may be allocated to arbitration, the modern Court has never yet met an arbitration clause that it didn’t like. This was not always so in the Court’s FAA decisions.”). When the Court issued a rare FAA decision in favor of a little guy, *New Prime v. Oliveira*, 139 S. Ct. 532, 543-44 (2019), it did so without having “met an arbitration clause that it didn’t like.” Instead, the Court held that an exception written into the FAA applied to this dispute. See *infra* Section II.A.1; Erik Encarnacion, *Discrimination, Mandatory Arbitration, and Courts*, 108 GEO. L.J. 855, 861 (2020).

47. Here I use “preemption” to reference the force of statutes other than the Federal Arbitration Act. See generally Thomas H. Sosnowski, *Narrowing the Field: The Case Against Implied Field Preemption of State Product Liability Law*, 88 N.Y.U. L. REV. 2286 (2013) (noting that this non-FAA jurisprudence has lessened tort liability for harms attributed to drugs, medical devices, automobiles, and aviation).

48. See Michael P. Moreland, *Preemption as Inverse Negligence Per Se*, 88 NOTRE DAME L. REV. 1249, 1252 (2013) (reviewing the literature).

the next Part moves to the Why. Repeat players who identify with the role of defendant have good reasons to like the contract terms they can impose on little guys better than litigation. In addition to reviewing familiar material about the dangers of secrecy, informality, and repeat-player advantages in practice, Part III pays attention to asymmetry: impositions for thee and opportunity for me. Just because a little guy can't complain in court doesn't mean a repeat player can't. Repeat players who extinguished unity for their little-guy adversaries have put it to good use for themselves.⁴⁹ These advantages, exploited effectively against consumers and employees, are just as useful when they ward off personal injury liability.

Next comes the Who and the Where, presented in Part IV with a sector-by-sector look at Privity 2.0 as shelter from personal injury liability that entities can install before claims against them arise. Observers may expect Privity 2.0 to keep expanding until the Supreme Court changes its view of the Federal Arbitration Act,⁵⁰ a development nowhere on the horizon. Writing prohibitions of adjudication and aggregation into contracts with little guys is a low-cost investment in personal injury immunity.⁵¹

In contrast to the pre-*MacPherson* era, when an entity would want to characterize a plaintiff as unendowed with the privity ticket he needed, businesses that anticipate becoming defendants today do well to dish out privity of contract almost every chance they get. Tort has used the term "bystander" to describe a negligence plaintiff who stands in a doctrinally weaker position than her "direct" counterpart,⁵² but with Privity 2.0 accessible to his adversaries, a little guy fares better under the once-inferior label. Bystander status is the best hope for recourse against an entity that can take advantage of Privity 2.0. Repeat players want promiscuous intimacy with lower-ranked strangers.⁵³

They can learn from one another how to achieve this imposition. My review of sectors where Privity 2.0 is positioned to expand starts with

49. See *infra* Section III.D.1.

50. Cf. Gilles, *supra* note 41, at 413 (inviting a "thought experiment" in which "every company" that might profit from immunity "were to write arbitration clauses and class action bans into all of its standard form contracts").

51. Writing simple waivers, see *supra* note 29 and accompanying text, is even cheaper. Repeat players need not identify the arbitration providers they favor, plan their arbitration strategy, or even spend much time drafting the terse promise that a waiver expresses. The chief upside of choosing alternative dispute resolution over waiver is the prestige that the Federal Arbitration Act continues to enjoy, most notably in the Supreme Court. See *infra* Part II.

52. Anita Bernstein, *A Feminist Perspective: Private Law as Unjust Enrichment*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 195, 197 (Andrew S. Gold et al. eds., 2020).

53. Cf. David Horton, *Infinite Arbitration Clauses*, 168 U. PA. L. REV. 633, 639-40 (2020) (identifying a trend in forced arbitration to stretch into all possible disputes and seek to bind all persons who have a connection to a contract). Privity means intimacy: it shares etymology with "privacy" and "privy," the old euphemism for a latrine.

transportation. Another Who that profits from Privity 2.0 is the nursing home sector, winner of two Supreme Court decisions forcing into arbitration personal injury claims that attributed the deaths of elderly residents to negligence.⁵⁴ Because failures of due care here are more varied than the simpler crashes one finds in transportation, Privity 2.0 as practiced by nursing homes can inspire a wider range of followers. Entities that sell or furnish vulnerable individuals a place to sleep—hospitals, hotels, colleges, boarding schools, rehabilitation facilities, halfway houses—may want to learn from nursing homes how to keep negligence actions out of court. Organizations identified as religious have in common with nursing homes the rendering of succor. Nursing homes provide services that overlap with medical care, and so can serve also as role models to steer medical malpractice claims away from precedent and publication.

“Using Privity 2.0 to Opt Out of Personal Injury Liability: Role Models for Defendants,” the title of Part IV, identifies Privity 2.0 as a condition that holds power in both the present and the future. Right now, entities are erasing their duty of care with respect to risk of physical injury. A few of them—Amtrak, Tesla, and the nursing home sector—have broken new ground in the undoing of their duty of care. These businesses not only practice Privity 2.0, they exemplify it. Followers whose operations generate comparable risks of personal injury can be expected to learn from these role models how to enlarge their shelter from the law.

I. PRIVACY THEN, PRIVACY NOW

A. *Then: The Presence of a Contract Disadvantages an Injured Person (For No Apparent Reason)*

“The privity requirement,” a phrase rife in scholarship about pre-*MacPherson* personal injury doctrine,⁵⁵ presents nineteenth-century privity as a necessary condition for a successful claim. To recover for physical harm back then, according to these writings, a plaintiff must have been in a contractual relation with the defendant. Calling privity a doctrinal requirement is simultaneously accurate and misleading. It’s accurate in that it identifies a barrier, misleading when it implies that plaintiffs can succeed when they have the right credential.

Although the 1842 decision of *Winterbottom v. Wright* includes a scolding that if Mr. Winterbottom had wanted the law to protect him

54. *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1429-30 (2017); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012).

55. See Christopher Beglinger, Note, *A Broken Theory: The Malfunction Theory of Strict Products Liability and the Need for a New Doctrine in the Field of Surgical Robotics*, 104 MINN. L. REV. 1041, 1047-48 (2019); James L. Huffman, *People-Made Law: Spontaneous Order, Change, and the Common Law*, 11 J.L. ECON. & POL’Y 179, 190-91 (2015); Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 MARQ. L. REV. 555, 561 (2014).

from the risk of injury he should have “made himself a party to the contract,”⁵⁶ the road ostensibly available in that case did not exist. Old Privity never believed that a defeated plaintiff could have fended off his loss in court by doing something different. Instead, like negligence generally since the nineteenth century, Old Privity put the repeat-player defendant’s vantage point front and center.⁵⁷

Persons and entities that can become defendants, as an early twenty-first century Supreme Court decision once observed, want “to know what the stakes are in choosing one course of action or another,”⁵⁸ and Old Privity gave them what they wanted. It offered to any defendant that could write a contract the security of knowing that this document delimited its obligations to the world.⁵⁹ Ease and security for businesses came at the expense of prospective plaintiffs, of course.⁶⁰ American courts found this condition rock solid until *MacPherson* wounded it mortally in 1916. As scholars have observed about Cardozo’s work in *MacPherson*, one genius of this decision is how inevitable and natural its analysis and result appear.⁶¹ Its air of inevitability not only changed the law but pushed into oblivion the rationales for defendant-comfort that had supported Old Privity.

B. Now: The Presence of a Contract Disadvantages an Injured Person (Expressly, by Apparent Agreement)

Privity 2.0 has two traits in common with Old Privity: the centrality of contract, and the bottom line that injured persons cannot reach a jury. It differs from Old Privity in how it uses the presence of a contract to kill a claim. Pre-*MacPherson* decisional law had defeated plaintiffs by ruling that the presence of a contract expresses the duty of care and makes redress available only to hypothetical parties to that agreement.⁶² Contracts that impose Privity 2.0 achieve this result

56. See Benjamin C. Zipursky & John C.P. Goldberg, *The Myths of MacPherson*, 9 J. TORT L. 91, 99 (2016) (quoting *Winterbottom v. Wright*, 152 Eng. Rep. 402, 405 (Ex. 1842)).

57. See Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 CHI.-KENT L. REV. 735, 742 (2002) (citations omitted).

58. *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008) (referring to what Justice Holmes’s “bad man” wants to hear).

59. See Robert L. Rabin, *The Pervasive Role of Uncertainty in Tort Law: Rights and Remedies*, 60 DEPAUL L. REV. 431, 432 (2011) (quoting OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 111 (1881)) (“[A]ny legal standard must, in theory, be capable of being known. When a man has to pay damages, he is supposed to have broken the law, and he is further supposed to have known what the law was.”).

60. Anita Bernstein, *The 2x2 Matrix of Tort Reform’s Distributions*, 60 DEPAUL L. REV. 273, 274 (2011).

61. See G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 120 (1980) (referencing *MacPherson* as an example of Cardozo’s “making his exercises of power inconspicuous” and “giving his innovations in common law subjects the appearance of doctrinal continuity”); RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 109 (1990); Zipursky & Goldberg, *supra* note 56.

62. See generally Martins et al., *supra* note 29 (describing this history).

differently. Their combination of shelter for defendants and danger for plaintiffs spells out in so many words, rather than establishes by omission in the tacit mode of Old Privity, the immunity that repeat players want.

In the early and middle decades of the twentieth century, nationwide acceptance of *MacPherson* forced repeat players to switch tactics if they were going to keep persons they expected to injure out of court. What their new tactics could be, the decision certainly did not say. Cardozo's famously stony summary of what he had ruled—"We have put the source of the obligation where it ought to be. We have put its source in the law"⁶³—told Team Defendant that it had little hope of effective self-help. Aided by sociolegal change, the sector eventually rallied. Four developments laid a foundation to support the contract-based shelter for repeat players that occupies this Article. I review the four here in approximate chronological order.

The first development is the rise of Contract in contrast to Status, a notion that received famous expression in a treatise by the English jurist Henry Maine. Maine published *Ancient Law* in 1861, more than fifty years before the *MacPherson* decision, but his claim that "the movement of the progressive societies" proceeds from Status to Contract gained prominence in the twentieth century.⁶⁴ An old era of Status had situated individual identity in families, tribes, and religious hierarchies, Maine explained. "Individuals could create rights and obligations with one another," went one paraphrase of the transition, "regardless of who they were."⁶⁵ The new era of Contract set people free to negotiate their own deals.⁶⁶

A related sociolegal development elevated transparency and the rendering of factual material as better than enlightened or benevolent command. Still influential, this view maintains that whenever individuals can reach information necessary to guide their decisions, the law ought to hold them to terms they accepted. A person's path might appear imprudent or self-destructive, but absent fraud or coercion—conditions almost never presumed to be present—the courts should respect adult choosers by enforcing their choices, goes the notion.⁶⁷ And

63. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916).

64. Katharina Isabel Schmidt, *Henry Maine's "Modern Law": From Status to Contract and Back Again?*, 65 AM. J. COMP. L. 145, 147 (2017).

65. *Id.*

66. Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 553 (1933) (contending that Maine's from-Status-to-Contract aphorism expresses "not only a historical generalization but also a judgment of sound policy").

67. See David Birks, *How Wrong is Paternalism?*, 15 J. MORAL PHIL. 136, 137 (2018) (attributing this view to John Stuart Mill and a half-dozen late twentieth-century scholars); Jennifer Nadler, *Unconscionability, Freedom, and the Portrait of a Lady*, 27 YALE J.L. & HUMANS. 213, 213 (2015) (observing that critics of unconscionability protest that this doctrine "rescues responsible agents from the consequences of their own mistakes").

so American law strains not to notice which party had more power when an ostensibly voluntary transaction goes bad;⁶⁸ poor people are not a constitutionally suspect class;⁶⁹ securities regulation uses disclosure to investors rather than constraints on issuers or managers to achieve its goals;⁷⁰ and reformers pursue financial literacy education for consumers more assiduously than they advocate transfers of wealth, even though they should know that this education does not work.⁷¹

Third, the late twentieth century brought so-called clickwrap agreements and other electronic dissemination of form contracts. Consumers encounter clickwrap when they press a button to accept software or proceed with an internet transaction.⁷² A 2008 review of judicial decisions about clickwrap concluded that although numerous consumers have contended that they did not intend to accept a particular term, “the courts have unanimously found that clicking is a valid way to manifest assent.”⁷³

The last of the four sociolegal developments emerged concurrently with clickwrap, or shortly thereafter. It recoils from any generalization that a group of people needs protection in the form of having its choices curbed. Writers have identified, and continue to decry, a “white savior complex” that thinks of disadvantaged groups as less than fit to manage their lives.⁷⁴ Psychologists researching the phenomenon of stereotype threat found that members of disadvantaged groups suffer harm

68. Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 199 (2005); Max Helveston & Michael Jacobs, *The Incoherent Role of Bargaining Power in Contract Law*, 49 WAKE FOREST L. REV. 1017, 1021 (2014).

69. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 L. & CONTEMP. PROBS. 109, 112 (2009) (calling the Supreme Court’s refusal to apply suspect-class scrutiny to socioeconomic class “miserly”).

70. Ann M. Lipton, *Reviving Reliance*, 86 FORDHAM L. REV. 91, 98 (2017) (observing that federal securities law chooses to require disclosure rather than “governance standards on managers”).

71. Lauren Willis has made an extended case for skepticism about this version of faith in transparency. See Lauren E. Willis, *The Financial Education Fallacy*, 101 AM. ECON. REV. 429 (2011); Lauren E. Willis, *Evidence and Ideology in Assessing the Effectiveness of Financial Literacy Education*, 46 SAN DIEGO L. REV. 415 (2009); Lauren E. Willis, *Against Financial Literacy Education*, 94 IOWA L. REV. 197 (2008).

72. See Nathan J. Davis, Note, *Presumed Assent: The Judicial Acceptance of Clickwrap*, 22 BERKELEY TECH. L.J. 577, 577-78 (2007).

73. *Id.* at 579; see also Opinion, *What Happens When You Click ‘Agree’?*, N.Y. TIMES (Jan. 23, 2021), <https://www.nytimes.com/2021/01/23/opinion/sunday/online-terms-of-service.html> [https://perma.cc/YJ88-3CLS] (“The root problem is that consumers are simply outgunned.”).

74. See, e.g., Yusuf Jailani, *The Struggle of the Veiled Woman: ‘White Savior Complex’ and Rising Islamophobia Create a Two-Fold Plight*, 37 HARVARD INT’L REV. 51-54 (2016) (arguing against a French ban on the hijab and burqa on the ground that the decision to wear a veil is empowering); Michael Buckler, *Peace Corps’ Complicated Relationship with the ‘White Savior’ Complex*, HILL (Jul. 29, 2019, 7:00 AM), <https://thehill.com/opinion/>

when they are reminded about beliefs that cast them as intellectually inferior⁷⁵: a stereotype thus inflicts harm on populations not only when others (mis)use the belief to (mis)understand them but when they think about themselves. Unless one believes that weaker people need rescue from above, a signed form contract starts to look in this perspective respectful of what adults decided they want. Advocates can defend this contract as a force against condescension, implicit (or explicit) bias, and ignorant paternalism.

II. HOW THE SUPREME COURT'S "LIBERAL FEDERAL POLICY FAVORING ARBITRATION" UNDERLIES PRIVACY 2.0

In 1983, the Supreme Court identified a federal policy favoring arbitration that crushes attempts by weaker parties to escape it.⁷⁶ This ostensible federal policy comes from a sentence in the Federal Arbitration Act that declares agreements to arbitrate in "a transaction involving commerce" to be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." Decades of one-sided decisions have ensued since this proclamation. Some of these precedents privatize assertions of rights codified in federal statutes, taking these claims out of the place in public law that Congress gave them. Others function to undo consumer protections that states enact or recognize.

A. *The "Liberal Federal Policy Favoring Arbitration" Outranks Federal Statutory Rights and Remedies on Matters of Public Interest*

Arbitration is not public in two distinct senses. First, providers of it are hired privately for a particular dispute or set of disputes: as Erik Encarnacion has argued, these persons do not serve as "authoritative representatives of the political community" because they cannot speak for the government or any democratically constituted body.⁷⁷ In addition, arbitrators conduct proceedings in secret and only sometimes publish what they decide.⁷⁸ Although the work they do fails Professor Encarnacion's criteria for being public, these hirelings get to issue final rulings on disputes that Congress has deemed of importance to the American public.

civil-rights/454413-peace-corpss-complicated-relationship-with-the-white-savior-complex/[https://perma.cc/ZT9Z-Q97U] ("[C]ommunities [to which Peace Corps volunteer] are complex organisms teeming with talent and grit that don't need saving. These communities struggle not because of a shortage of Westerners but because of a lack of political power.").

75. See Anita Bernstein, *What's Wrong with Stereotyping?*, 55 ARIZ. L. REV. 655, 668-69 (2013) (reviewing the work of Claude Steele and others).

76. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 2 (1983).

77. See Encarnacion, *supra* note 46, at 861.

78. *Id.*

1. Claims of Employment Discrimination and Violation of the Fair Labor Standards Act (with the Federal Arbitration Act Provision that Appears to Exempt "Contracts of Employment" Mostly Airbrushed Out)

In a 5-4 decision foundational to *Privity 2.0*, the Supreme Court issued its interpretation of an exception in the Federal Arbitration Act.⁷⁹ Seamen and railroad employees being two of many worker categories, the phrase it parsed—"nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce"⁸⁰—could be read to read that the FAA has nothing to say about employment contracts of all workers engaged in foreign or interstate commerce. In other words, "nothing herein contained" in the statute covers seamen and railroad employees, and the statute's enthusiasm for arbitration does not burden "any other class of workers" either. The Ninth Circuit in *Circuit City* took this view and ruled in favor of Saint Clair Adams, who had signed an employment application that contained an arbitration clause.⁸¹ Reversing the appellate court and relegating Adams to arbitration, the Court ruled that the FAA exception applied only to "contracts of employment of transportation workers."⁸²

This move by the Court constituted a volte-face. In 1974, a unanimous decision written by the conservative Lewis Powell had ruled that an employee who lost his workplace dispute in an arbitration provisioned by collective bargaining could go to court afterwards with a Title VII claim.⁸³ *Alexander v. Gardner-Darver Co.* refused to regard the dispute as involving only the plaintiff and the singular employer that he accused of race discrimination. "Congress gave private individuals a significant role in the enforcement process of Title VII," the Court observed, and "the private litigant [who] not only redresses his own injury . . . also vindicates the important congressional policy against discriminatory employment practices."⁸⁴

79. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001).

80. *Id.* at 127.

81. *Circuit City Stores, Inc. v. Adams*, 194 F.3d 1070, 1071-72 (9th Cir. 1999).

82. *Circuit City Stores*, 532 U.S. at 119. Even in this crabbed construction, the FAA exception proved meaningful to the Court in *New Prime Inc. v. Oliveira*, 139 S. Ct. 532 (2019). A trucking company contended that because the agreement it had drafted to cover the work of Dominic Olivera as a driver cast him as an independent contractor, the "contracts of employment" exception did not apply. In a unanimous decision, the Court rejected that contention and concluded that "Congress used the term 'contracts of employment' in a broad sense to capture any contract for the performance of work by workers." *Id.* at 541. Mr. Oliveira had also won at trial and on appeal, *see id.*, enjoying an extraordinary triumph for a little guy in the *Privity 2.0* era.

83. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); Anita Bernstein, *Diversity May Be Justified*, 64 HASTINGS L.J. 201, 216 n.83 (2012) (calling Powell an "extraordinarily conservative lawyer and judge," his *Roe v. Wade*-influenced reputation for moderation notwithstanding).

84. *Alexander*, 415 U.S. at 45.

The Court back in 1974 had no use for the posture shared by both the trial and appellate court that letting an employee try again in court when his employer would have been stuck with a loss at arbitration wrongly gives the plaintiff “two strings to his bow when the employer has only one.”⁸⁵ The two-strings argument, Justice Powell wrote, fails “for the simple reason that Title VII does not provide employers with a cause of action against employees. An employer cannot be the victim of discriminatory employment practices.”⁸⁶ As for arbitration as a source of redress for this claim, Powell had a few kind words—he praised it as “efficient, inexpensive, and expeditious”—before concluding that despite its virtues, “arbitration [is] a less appropriate forum for final resolution of Title VII issues than the federal courts.”⁸⁷

Alexander falls on one side of the Privity 2.0 line that the Court declared in 1983. Once a “liberal federal policy favoring arbitration” got discovered by *Moses H. Cone Memorial Hospital*, the concerns Powell expressed about arbitration in *Alexander* were superseded. The year 1983 lands halfway between *Alexander* and the decision that undid it, *Gilmer v. Interstate/Johnson Lane Corp.*⁸⁸ *Gilmer* did not overrule *Alexander*: instead, it distinguished the collectively bargained agreement that had imposed arbitration on Harrall Alexander from the promise to take his future complaints to arbitration that Robert Gilmer had signed as an individual employee. Both men contended their employers had discriminated against them in violation of federal civil rights laws. Alexander could take his accusation to court. Gilmer could not, apparently because he lived under the aforementioned “liberal federal policy.”

Splitting 5-4, the Court in 2018 took another anti-public turn when it upheld forced arbitration of claims brought under the National Labor Relations Act of 1935 (NLRA),⁸⁹ a statute Congress enacted during the Depression to protect collective action by employees taken to counter unfair practices. Standing up against employers together with peers rather than alone was at the heart of the NLRA.⁹⁰ To the Court, however, the Federal Arbitration Act and its “liberal federal policy” of unwanted arbitration outranked the statute’s support for united resistance, and so it decided to impose isolation on an aggrieved worker.

85. *Id.* at 54.

86. *Id.*

87. *Id.* at 58.

88. 500 U.S. 20 (1991).

89. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612 (2018).

90. See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (observing that before workers could join forces in labor organizations, “a single employee was helpless in dealing with an employer”); John R. Runyan & Mami Kato, *What Every Employment Lawyer Needs to Know About the National Labor Relations Act*, 92 MICH. B.J. 34 (2013) (identifying “employees’ right to band together in efforts to collectively improve their working conditions” as the statute’s “fundamental protection”).

Many decisions by the Supreme Court that interpret the FAA to favor repeat players display harmony among the Justices;⁹¹ not this one. Justice Ginsburg chose to read from the bench a trenchant dissent: “The court today holds enforceable these arm-twisted, take-it-or-leave-it contracts—including the provisions requiring employees to litigate wage and hours claims only one-by-one Federal labor law does not countenance such isolation of employees.”⁹² Now it does.

2. *Claims Under the Securities Laws*

Similar to its 180° between *Alexander* of 1974 and *Gilmer* of 1991 on the issue of forced arbitration for employees, on the issue of forced arbitration of securities claims, the Supreme Court once ruled in favor of a plaintiff who resisted arbitration and then later, in a decision issued after it found a “liberal federal policy favoring arbitration” in 1983, ruled for a defendant. Statutory claims in this category rest on the securities statutes of 1933 and 1934, both of which provide a right of action by investors following losses attributable to unauthorized or fraudulently induced investments.⁹³ The securities-law parallel to *Alexander*, the pre-1983 decision that allowed a plaintiff to take his employment discrimination to the federal courts, is *Wilko v. Swan*,⁹⁴ which held that the Securities Act of 1933 provided a right to a federal forum that an investor could not waive.

Wilko also resembled *Alexander* in that the Court acknowledged the value of arbitration before concluding that a larger public interest outweighed that benefit. It took note of countervailing considerations: “Recognizing the advantages that prior agreements for arbitration may provide for the solution of commercial controversies,” wrote the Court in its concluding sentence, “we decide that the intention of Congress concerning the sale of securities is better carried out by holding invalid such an agreement for arbitration of issues arising under the Act.”⁹⁵

Non-waivable access to the courts for securities claims endured a few decades but could not withstand the aforementioned liberal federal policy. First, the Court distinguished *Wilko*, ruling in *Shearson/American Express v. McMahon* that the right to a federal forum, notwithstanding an arbitration agreement that *Wilko* found, exists

91. See *infra* notes 116-19 and accompanying text.

92. See Robert Barnes, *Supreme Court Rules That Companies Can Require Workers to Accept Individual Arbitration*, WASH. POST (May 21, 2018, 11:22 AM), https://www.washingtonpost.com/politics/courts_law/supreme-court-rules-that-companies-can-force-workers-into-individual-arbitration/2018/05/21/09a3a968-5cfa-11e8-a4a4-c070ef53f315_story.html [https://perma.cc/GJF4-BNPC].

93. See *Cyan, Inc. v. Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1066 (2018) (noting that both statutes provide a private right of action).

94. 346 U.S. 427, 434-35 (1953).

95. *Id.* at 438.

only when “arbitration is inadequate to protect the substantive rights at issue.”⁹⁶ With “judicial mistrust of the arbitral process” now allayed, investors no longer need *Wilko*’s rescue from arbitration, the Court concluded.⁹⁷ Two years later came a flat-out overruling of *Wilko*.⁹⁸

Lest investors with a fraud claim think that a different federal statute, the Racketeer Influenced and Corrupt Organizations Act (RICO),⁹⁹ will serve them better as a non-waivable ticket to relief in federal court, the Court used *Shearson / American Express v. McMahon* to dispatch that hope. A married couple who had agreed in advance to arbitrate their disputes with a brokerage alleged in a federal action that the account representative had, with the brokerage’s knowledge, not only violated Section 10b(5) of the Securities Exchange Act but also RICO “by engaging in fraudulent, excessive trading on respondents’ accounts and by making false statements and omitting material facts.”¹⁰⁰

The trial court in *McMahon* ruled that the 10b(5) action was subject to arbitration but, because of “important federal policies inherent in the enforcement of RICO by the federal courts,” the RICO claim was not.¹⁰¹ The appellate court agreed with the district court about RICO, declaring that complaints brought under this statute are “not merely a private matter.” It also reversed on the 10b(5) claim, citing the still-alive *Wilko v. Swan*; according to the Second Circuit, both of these statutory claims by the McMahons could not be forced into arbitration.¹⁰² In its reversal, the Supreme Court staked out a maximally pro-arbitration stance by removing the federal forum for RICO that both lower courts had made available to injured investors who had signed an agreement to arbitrate.

3. Antitrust Claims

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,¹⁰³ decided a short two years after the finding of an ostensibly liberal federal policy that forces arbitration on an unwilling party, appears moderate and evenhanded. The little guy of this case was an automobile distributor, not a consumer, and the agreement to arbitrate covered transnational business disputes, a category that even foes and skeptics tend to think

96. 482 U.S. 220, 228-29 (1987).

97. *Id.* at 221.

98. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

99. 18 U.S.C. § 1961.

100. *McMahon*, 482 U.S. at 223.

101. *Id.* at 224 (quoting *McMahon v. Shearson/Am. Express Inc.*, 618 F. Supp. 384, 387 (S.D.N.Y. 1985)).

102. *Id.* at 224-25 (quoting *McMahon v. Shearson/Am. Express Inc.*, 788 F.2d 94, 98 (2d Cir. 1986)).

103. 473 U.S. 614 (1985).

can justifiably be pushed into arbitration unwanted by one disputant.¹⁰⁴ But *Mitsubishi* as precedent now forces arbitration of a subset of claims brought under the Sherman Act and other trade-regulation statutes.

Justice Blackmun added a dictum to his opinion for the Court—"so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum"¹⁰⁵—that sounds encouraging to the little-guy side of antitrust disputes. The idea in this phrase, which a later Supreme Court opinion called "the 'effective vindication' exception,"¹⁰⁶ went on to support wins for plaintiffs in the lower courts.¹⁰⁷ To date, however, the Supreme Court has never used the absence of effective vindication in the arbitral forum as a reason to invalidate an arbitration agreement.¹⁰⁸

* * *

Judicial activism marshalled against enforcement of public rights in court surveyed in the last section might be defended as the necessary resolution of a conflict between federal statutes. On the one hand, a law like the Securities Exchange Act or the Fair Labor Standards Act provides a federal forum for a set of grievances; on the other hand, the Federal Arbitration Act (arguably) thwarts redress under that statute. With one statute granting a remedy in federal courts and another laying down a "liberal federal policy favoring arbitration" that blocks access to those courts, only one of these postures can win and both are written into federal law. The other stance of the Court favoring forced arbitration, to which I now turn, is harder to defend in a system that assigns limited powers to the national government.

B. The "Liberal Federal Policy Favoring Arbitration" Preempts Consumer Protections Enacted or Recognized by the States

The Court started its undoing of state-level protections when it relied on the FAA to force arbitration on a party to a contract governed

104. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 362 (2011) (Breyer, J., dissenting) (speculating that Congress in enacting the FAA "thought that arbitration would be used primarily where merchants sought to resolve disputes of fact, not law, under the customs of their industries"); Donna M. Bates, Note, *A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?*, 27 *FORDHAM INT'L L.J.* 823, 885 (2004) (contending that although arbitration "is an effective and reasonable alternative for business parties seeking to resolve disputes, especially in the cross-border or international context," it should not be imposed on consumers).

105. *Mitsubishi*, 473 U.S. at 637.

106. *Am. Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235 (2013). The phrase seems not to have caught on in the lower courts.

107. Colby J. Byrd, *Vindicating the Effective Vindication Exception: Protecting Federal Statutory Rights in the Employment Context*, 70 *OKLA. L. REV.* 761 (2018) (reviewing decisional law not limited to the author's "employment context").

108. *Id.* at 766 n.46 (noting decisions that made reference to this exception, all of them wins for defendants).

by New York law,¹⁰⁹ refusing to sever an arbitration provision in it even though the plaintiff had claimed that it “would not have made any contract at all” but for the defendant’s fraud.¹¹⁰ Next came *Moses H. Cone Memorial Hospital*, source of the ostensible liberal federal policy favoring arbitration, in 1983; there the Court stated that federal law governs the issue of arbitrability “in either state or federal court.”¹¹¹ A year later came *Southland Corp. v. Keating*,¹¹² “the Court’s very first FAA preemption case,”¹¹³ which imposed arbitration on a plaintiff by ruling overtly that the Federal Arbitration Act displaced a state statute that preserved access to the courts.

Staunch objections to the *Southland Corp. v. Keating* holding have come from two conservative Justices. Sandra Day O’Connor spoke up first, in a dissent: “Although arbitration is a worthy alternative to litigation, [the *Southland Corp.*] exercise in judicial revisionism goes too far.”¹¹⁴ Clarence Thomas picked up this torch. In *Kindred Nursing Centers Ltd. Partnership v. Clark*,¹¹⁵ Justice Thomas provided a string-cite of a half-dozen dissents of his, all of which express his “view that the Federal Arbitration Act . . . does not apply to proceedings in state courts.”¹¹⁶

This federalism-flavored resistance within the Supreme Court to forced arbitration has remained limited to dissents. Opinions for the Court consistently read the Federal Arbitration Act to override what states provision in their statutes or judicial decisions to keep courts accessible. In the statute category, Montana had codified a mild-looking requirement that any contract with a mandatory arbitration clause include that provision on the first page of the contract in underlined capital letters. A decision written by Ruth Bader Ginsburg, signed by all her colleagues on the Court except Justice Thomas, struck down this law.¹¹⁷

In 2011, when the Court ruled that the Federal Arbitration Act preempted California decisional law on unconscionability, it was divided rather than united; but again Privity 2.0 sheltered a repeat player from the reckoning that state law had tried to impose.¹¹⁸ One year later, the Court crushed a “public policy” stance against forced arbitration more decisively than it had dispatched unconscionability

109. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

110. *Id.* at 408 (Black, J., dissenting).

111. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

112. 465 U.S. 1 (1984).

113. Jill Gross, *AT&T Mobility and FAA Over-Preemption*, 4 Y.B. ARB. & MEDITATION 25, 32 (2012).

114. *Southland Corp.*, 465 U.S. at 36 (O’Connor, J., dissenting).

115. 137 S. Ct. 1421 (2017).

116. *Id.* at 1429 (Thomas, J., dissenting).

117. *Doctor’s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 682-83 (1996).

118. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011).

used toward the same end in California. Its reversal of an anti-arbitration decision by the Supreme Court of West Virginia ensued without briefs or oral argument in a terse, unanimous per curiam opinion.¹¹⁹

Like their counterparts in West Virginia, judges in Kentucky had tried to limit arbitration forced on nursing home patients.¹²⁰ They crafted a rule that if an individual had moved into a nursing home with the help of an agent using a power of attorney, the agreement to arbitrate signed by the agent was invalid unless the power of attorney specifically provided that the agent had authority to agree to waive rights of adjudication. To the Court, this Kentucky rule discriminated against arbitration;¹²¹ it had to be invalidated as contrary to the FAA.

Exactly how the FAA prevents states from strengthening consumer protection by regulating forced arbitration remains underexplained. The statute does not expressly preempt contrary state law. Nor was it written to build or elaborate on any provision in the Constitution in the mode of the Voting Rights Act or the Religious Freedom Restoration Act, which means that when states limit arbitration they do not trammel on a constitutional right. That leaves only “a sub-species of ‘conflict preemption’ known as ‘obstacle preemption.’”¹²² Obstacle preemption applies when Congress has a goal that states may not thwart in their statutes or judicial decisions. Imposing arbitration on unwilling disputants could be this goal.

The trouble with this rationale for a consistent record of crushing even mild state stances against arbitration is a savings clause in the statute¹²³; the Federal Arbitration Act specifically permits courts to invalidate arbitration agreements on “such grounds as exist at law or in equity for the revocation of any contract.”¹²⁴ West Virginia had made such grounds available in *Marmet Health Care Center*, a “public policy” rationale, to no avail. The California example in *AT&T Mobility LLC v. Concepcion*, unconscionability, is arguably stronger than what West

119. *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 532 (2012); see also Ronald Mann, *Opinion Analysis: Court Rebukes West Virginia Court Over Arbitration Stance*, SCOTUSBLOG (Feb. 22, 2012, 9:21 AM), <https://www.scotusblog.com/2012/02/opinion-analysis-court-rebukes-west-virginia-court-over-arbitration-stance> [<https://perma.cc/P7VR-XAYY>] (finding “temerity” in the reversed decision and observing that “[t]he problem for the West Virginia court is that the tack it chose to adopt was not the difficult one of explaining how its rule is consistent with the Supreme Court’s decisions, but the hopeless one of arguing that the Supreme Court’s decisions are incorrect”).

120. *Extendicare Homes, Inc. v. Whisman*, 478 S.W.3d 306, 355 (Ky. 2015).

121. *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1426 (2017).

122. Gross, *supra* note 113, at 27; see also Richard Frankel, *Corporate Hostility to Arbitration*, 50 SETON HALL L. REV. 707, 715 (2020) (classifying the type of preemption that courts apply to the FAA as “‘implied conflict preemption’ or ‘implied obstacle preemption’”).

123. Gross, *supra* note 113, at 36.

124. 9 U.S.C. § 2.

Virginia chose because it has a longer history in the common law. When it ruled for repeat players both times, the Supreme Court neutered an important savings clause.

III. THE JOYS OF PRIVACY 2.0 FOR DEFENDANTS

With access to Privity 2.0 well ensconced by Supreme Court decisional law,¹²⁵ businesses that wish to fend off personal injury liability have an option they may wish to exploit. This Part reviews reasons for them to choose this strategy. It starts with familiar defendant-favoring conditions—among them secrecy, informality, partisan advantage—and builds to a more novel conclusion: what Privity 2.0 imposes on vulnerable individuals is not alternative dispute resolution, a phrase that implies regularity or conditions that are reliably present, but the undoing of law.

A. Secrecy

Confidentiality clauses inserted into arbitration agreements can silence injured persons from revealing the facts that underlie their dispute.¹²⁶ Even when the agreement omits this kind of clause,¹²⁷ proceedings available to complainants are less transparent than adjudication.¹²⁸ Arbitrators trade on the privacy they sell. Parties might, by skipping a confidentiality clause, retain their freedom to say what they like about the dispute,¹²⁹ but the arbitrator promises confidentiality about the proceeding.¹³⁰

In contrast to public courthouses, the locus of an arbitration is hidden from public view; in addition, this space may not be entered by nonparties unless the arbitrator grants permission to them as visitors.¹³¹ Arbitration offers no open docket, meaning that the public and

125. See *supra* Part II.

126. See Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Y.B. ARB. & MEDIATION 28, 29, 48 (2015).

127. Observers disagree on the prevalence of confidentiality clauses in arbitration agreements. See *id.* at 42-43 (adverting to claims that such clauses are “standard” and “on the increase” while a report from the Consumer Financial Protection Bureau found that they were rare in consumer financial services contracts); *id.* at 44 (noting an absence of empirical data on this issue with respect to other types of consumer contracts and employment contracts).

128. See Judith Resnik, *A2J/A2K: Access to Justice, Access to Knowledge, and Economic Inequalities in Open Courts and Arbitrations*, 96 N.C. L. REV. 605, 627-29 (2018).

129. This freedom to speak about one’s dispute is limited by the power of an arbitrator to “bind the participants with a confidentiality order and sanction them for disclosures in violation of such order.” Laurie Kratky Doré, *Public Courts Versus Private Justice: It’s Time to Let Some Sun Shine in on Alternative Dispute Resolution*, 81 CHI.-KENT L. REV. 463, 483-84 (2006).

130. See Scott D. Marrs & Joseph W. Hance III, *Arbitration Confidentiality: What You Thought You Knew Could Hurt You*, 77 TEX. BAR J. 152, 152-53 (2014) (reviewing the policies of “the three largest arbitration forums in the United States”).

131. Doré, *supra* note 129, at 484-85.

the media do not learn about the filing of a claim or the existence of a dispute.¹³² Rulings have been published more in recent years than in the past, but readers will find them opaque: “much of the actual rationale for the decision is hidden inside the arbitrator’s head,”¹³³ and parties’ names are typically redacted from what the public can see.¹³⁴

B. Informality

“Informality” here means flexibility about law and rules that could in theory favor anyone but that in operation benefits one side of the little guy/repeat player divide. Courts defer to arbitrators not only with respect to an outcome but also decisions that arbitrators make before and during the arbitration proceeding. The premise that both repeat player and little guy chose this alternative forum permits considerable deviation from what adjudication would give the weaker disputant. *Volenti non fit injuria*.¹³⁵

In contrast to trial judges, whose rulings can be revisited and undone by appellate courts, arbitrators make decisions out of the reach of judicial review. Their control over the end starts with the beginning of their engagement. It is they, not judges, who determine whether a particular dispute falls within the arbitration agreement that brought the parties to them.¹³⁶ Should provisions in the agreement be invalidated, arbitrators retain decisionmaking powers allotted to them in the undisturbed remainder of the contract.¹³⁷ When the proceeding starts, they decide which side goes first.¹³⁸

Party-initiated discovery occurs between the launch of arbitration and the issuance of the arbitrator’s decision. Arbitrators proceed on discovery mostly as they please; guidances like the Financial Industry Regulatory Authority Discovery Guide,¹³⁹ for example, steer them only lightly. In one of its early Privity 2.0 decisions, the Supreme Court told an individual who complained about crabbed discovery to take comfort

132. *Id.* at 484.

133. Cynthia Estlund, *The Black Hole of Mandatory Arbitration*, 96 N.C. L. REV. 679, 680 (2018). As a habitu   of the Lexis and Westlaw AAA databases, I can attest to the opacity of what is published there.

134. Drahozal, *supra* note 126, at 40-41.

135. “To the willing, there is no injury.” See *supra* Section I.B. (reviewing the rise of a view that individuals who acquiesce in contracts prepared by repeat players are volunteers).

136. *Rent-a-Center, W., Inc. v. Jackson*, 561 U.S. 63 (2010).

137. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006).

138. *Presenting Your Case in Arbitration*, AM. ARB. ASS’N, https://adr.org/sites/default/files/document_repository/Presentating_your_case_in_Arbitration.pdf [<https://perma.cc/CB85-MSXL>] (last visited July 26, 2022). This single-page document also says that the arbitrator will declare the hearing closed when “the parties have completed presenting their claims and defenses”—but maybe sooner than that, if “the arbitrator decides there is enough information to make a decision.” *Id.*

139. FIN. INDUS. REGUL. AUTH., DISCOVERY GUIDE (2011), <https://www.finra.org/sites/default/files/ArbMed/p123494.pdf> [<https://perma.cc/V7Z6-V368J>].

from knowing that “arbitrators are not bound by the rules of evidence,” which the Court called “an important counterweight to the reduced discovery.”¹⁴⁰ In other words, don’t resent one deprivation, lucky you, because you have the “important counterweight” of lacking something else. Silence about discovery in the Federal Arbitration Act makes arbitrators freer than judges to characterize their discovery rulings as consistent with fairness or interpretation of the arbitration contract, or both. Imbalances of power worsen the discovery-perils of arbitration for personal injury claimants more than they harm consumers who seek redress for financial claims.¹⁴¹

Like discovery in particular, arbitration procedures in general are what the parties say they are. Virtually anything familiar from civil procedure unwanted to the drafter of the contract can disappear, and does.¹⁴² “The record of the arbitration proceedings is not as complete” as what exists in adjudication, wrote Justice Louis Powell in a unanimous Supreme Court opinion of the pre-Privity 2.0 era; “the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable.”¹⁴³ Elizabeth Thornburg updates and expands on this recitation:

[An arbitration contract] can eliminate live testimony, in-person hearings, and cross-examination of witnesses. It can limit the number or type of expert witnesses. It can withhold from the arbitrator the power to compel the attendance of unwilling witnesses. It can shift the burden of proof. And it can impose a time limit on the presentation of evidence.¹⁴⁴

Flexibility in arbitration has its virtues, to be sure. One expert in civil procedure who had decades of experience as a federal magistrate judge before he moved into arbitration has praised the informal conference room in contrast to the formal courtroom as an environment that nurtures a good result: “Informality invites liberation of mind, liberation from preoccupation with *how to frame* communications (questions or answers). Liberated from preoccupation with *how to*

140. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 31 (1991).

141. Thornburg, *supra* note 42, at 263 (noting the centrality of discovery to personal injury claims, which often include complex disagreements on matters of fact that need information to be resolved).

142. See Carboneau, *supra* note 41, at 1959 (characterizing the arbitration contract as usurping the place of “regulatory authority and normative law”).

143. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57-58 (1974).

144. Thornburg, *supra* note 42, at 262 n.49 (citing Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1253 n.65 (2001)).

speak, lawyers and witnesses can focus on *what* they want to say.¹⁴⁵ Perhaps, but freedom from constraint and oppressive ritual would be even freer if a disputant could exit all that liberty in a conference room by walking out the door.

C. *Advantage in Dealings with Arbitrators*

Whereas judges get paid the same regardless of how many disputes they resolve and may not accept money from disputants for a task they do, arbitrators earn their dispute-resolution income from customers whose business they win in a competitive market.¹⁴⁶ Exhortations that providers of goods and services do well when they focus on retaining the customers they already have are familiar to the point of cliché.¹⁴⁷ The cliché holds force here: Disputants who can choose to come back for another arbitration engagement are more valuable to the arbitrator's bottom line than ones who are unlikely to return.¹⁴⁸

Whether bias in favor of customers they hope will return influences arbitrators to rule for repeat players and against little guys cannot be learned only by looking at outcomes, because little-guy losers might have deserved to lose.¹⁴⁹ Evidence is in, however. The first major empirical work on point examined records of American Arbitration Association (AAA) employment arbitrations attentive to whether individual employers were parties in more than one arbitration. Lisa Bingham concluded that employees fared worse in employment arbitrations against repeat-player employers.¹⁵⁰ More recently, a review of

145. Wayne D. Brazil, *When "Getting It Right" Is What Matters Most, Arbitrations Are Better than Trials*, 18 CARDOZO J. CONFLICT RESOL. 277, 280 (2017).

146. Richard M. Alderman, *Pre-Dispute Mandatory Arbitration in Consumer Contracts: A Call for Reform*, 38 HOUS. L. REV. 1237, 1256 (2001).

147. See, e.g., Richard White, *Five Tips for Retaining Customers*, FORBES (Aug. 23, 2013, 9:00 AM), <https://www.forbes.com/sites/theyec/2013/08/23/five-tips-for-retaining-customers/#3aa4e3f6694a> [<https://perma.cc/PC62-PPUL>] (referring to "[t]he path to customer retention nirvana").

148. This disparity would be eased if more individuals with relevant experience could offer arbitration services and compete with peers on price. Evidence suggests that lawyers (and not only lawyers) want to be arbitrators but are kept out of this market by the gate-keeping practices of commercial arbitrators. See PUBLIC CITIZEN, *THE COSTS OF ARBITRATION* 75 (2002) [hereinafter *COSTS*]; see also *id.* at 32 (observing that both individual arbitrators and the AAA charge less for arbitrations involving unions than they charge for those involving non-union employees, suggesting that repeat players pay lower prices for arbitration).

149. See Alderman, *supra* note 146, at 1257 & n.88 (citing Caroline E. Mayer, *Win Some, Lose Rarely? Arbitration Forum's Rulings Called One-Sided*, WASH. POST, Mar. 1, 2000, at E1) (noting Mayer's news story about banks in arbitration against consumers and adding that "most of the cases that went to arbitration involved default in payment, to which there is no defense, and a high success rate should be expected").

150. Andrea Cann Chandrasekher & David Horton, *Arbitration Nation: Data from Four Providers*, 107 CALIF. L. REV. 1, 19-20 (2019) (citing Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997); Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGEORGE L. REV. 223 (1998)).

more than 40,000 arbitrations in three categories—consumer, employment, and malpractice claims in the Kaiser medical arbitration system—confirmed that repeat players do indeed prevail more often than one-shot participants.¹⁵¹

Entities enjoy other advantages in dealing with arbitrators beyond their repeat-player status. A major advantage for them is being richer than their adversaries. Monetary costs are easier to bear for the party with more money. In one of its Privity 2.0 decisions, the Supreme Court recognized that the cost of arbitration might be high enough to prevent an individual “from effectively vindicating her federal statutory rights,” but ruled against the individual and in favor of her adversary, a lender, because it deemed this risk “too speculative.”¹⁵² Unlike litigation, which a plaintiff can launch by paying a modest filing fee, arbitration requires disputants to pay one sum up front and then a daily fee, which can be hefty, to the arbitrator.¹⁵³ Richer parties also have spare cash to get rid of an arbitrator whom they regret having accepted through the technique of retaining the arbitrator’s partner to create a conflict of interest.¹⁵⁴

A second advantage that entities enjoy in arbitration is the comfort of knowing the arbitrator will likely be, in the words of Michael Z. Green, “old, white, and male.”¹⁵⁵ That demographic is especially favorable for the employer side in workplace disputes, and it may not be a coincidence that employers impose mandatory arbitration on low-paid workforces more often than they impose it on the well-paid.¹⁵⁶ “Old, white, and male” describes much of the judiciary too,¹⁵⁷ but non-diversity among decisionmakers is more severe in arbitration.¹⁵⁸ After a filing by the entertainment mogul Jay-Z in a New York court “placed a celebrity spotlight on . . . [this] perennial problem” in 2018,¹⁵⁹ assurances from the provider in question that more diversity would come sufficed for Jay-Z to withdraw his motion to stop arbitration.¹⁶⁰

151. Chandrasekher & Horton, *supra* note 150, at 9.

152. Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79, 91, 93 (2000).

153. Alderman, *supra* note 146, at 1250.

154. See COSTS, *supra* note 148, at 54 (reporting an occurrence of this practice).

155. Michael Z. Green, *Arbitrarily Selecting Black Arbitrators*, 88 FORDHAM L. REV. 2255, 2261 (2020); accord Pat K. Chew, *Comparing the Effects of Judges' Gender and Arbitrators' Gender in Sex Discrimination Cases and Why It Matters*, 32 OHIO ST. J. ON DISP. RESOL. 195, 208 (2017) (noting that employment arbitrators who decide sex discrimination claims are much likelier than complainants to be male).

156. Green, *supra* note 155, at 2261.

157. See CIARA TORRES-SPELLISCY ET AL., BRENNAN CTR. FOR JUST., IMPROVING JUDICIAL DIVERSITY 1-2 (2d ed. 2010), https://www.brennancenter.org/sites/default/files/legacy/Improving_Judicial_Diversity_2010.pdf [<https://perma.cc/E6EX-EKT8>].

158. Laura A. Kaster & Theodore K. Cheng, *The Lack of Diversity in ADR—and the Current Beneath*, BENCHER, Mar./Apr. 2017, at 13.

159. Green, *supra* note 155, at 2255.

160. *Id.* at 2258.

Jay-Z had challenged the AAA to increase diversity among its arbitrators. When recruiting new personnel to its ranks, another industry leader, JAMS, looks for two categories that white men occupy out of proportion to their share of the population: retired judges and law firm partners.¹⁶¹ The diversity gap gets bigger after parties make their choice of who will do the arbitration. Unlike litigants in court, disputants in arbitration are not stuck with an assigned judge; they select an arbitrator from a provider's roster, and for this work they prefer white men.¹⁶² Being preferred by customers gives white male arbitrators a track record. Their résumés in turn enable them to make a living in arbitration, while well-qualified arbitrators who look more like little guys (of any gender) fall off the active lists.

D. Impositions for Thee and Not for Me

1. Isolation for Individuals, Unity and Fellowship for Business

Until *American Express Co. v. Italian Colors Restaurant*,¹⁶³ the Supreme Court's Privity 2.0 results consistently favored Goliath but could be defended as not entirely bad for David. True, David might prefer to keep rules of evidence, entitlements to discovery, a right to appeal, and other conditions that only adjudication gives him: but even David would have to agree that these opportunities add delays that a swifter and less formal route to redress could avoid. Two years before it decided *Italian Colors*, the Court could say with apparent sincerity that making class arbitration available to injured consumers would get in the way of a good goal, "facilitat[ing] streamlined proceedings."¹⁶⁴ The fraud claim in *AT&T Mobility LLC v. Concepcion* was worth \$30.22 per phone customer.¹⁶⁵ Scant reward for a prevailing plaintiff, but cheap enough to assert alone.

Sherman Act and Clayton Act violations alleged by merchants against American Express were different. An expert report—something just as necessary for arbitration as adjudication of antitrust

161. Hannah Hayes, *Where Are the Women Arbitrators? The Battle to Diversify ADR*, AM. BAR ASS'N (Mar. 1, 2018), <https://www.americanbar.org/groups/diversity/women/publications/perspectives/2018/winter/where-are-women-arbitrators-battle-diversify-adr/> [https://perma.cc/Z9SV-FJS4].

162. *Id.* (quoting an AAA regional vice president, "[b]ut ultimately the parties choose, and . . . especially in high-dollar commercial disputes . . . they think the client might be more comfortable with the traditional white male arbitrator"); see also Sarah Rudolph Cole, *The Lost Promise of Arbitration*, 70 SMU L. REV. 849, 883-84 (2017) (observing that the commitment of arbitration organizations "to diversifying the roster and offering mentoring, training, and networking, admirable as it is, is unlikely to change *who* is selected to be an arbitrator").

163. 570 U.S. 228 (2013).

164. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

165. *Id.* at 365 (Breyer, J., dissenting).

claims—would cost almost a million dollars; each individual merchant's claim, statutory trebling included, was worth less than \$40,000.¹⁶⁶ By upholding the prohibition on class arbitration that American Express wrote into a contract, the Court told Italian Colors Restaurant that it could never vindicate its antitrust rights.¹⁶⁷ Privity 2.0 decisions by the Supreme Court before 2013 had disadvantaged little guys but left their claims alive for an arbitrator to resolve; *Italian Colors* snuffed out redress in arbitration too.¹⁶⁸

It gets better, so to speak. *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, decided in 2010,¹⁶⁹ remains obscure in Supreme Court case law interpreting the Federal Arbitration Act, perhaps because neither *Stolt-Nielsen* nor *AnimalFeeds* was a vulnerable individual squared off against a repeat-player business. This decision deserves attention for the bold assertion made by its author, Justice Samuel Alito, that “class-action arbitration” is in effect an oxymoron.¹⁷⁰ This bit of dicta in place, repeat players have fended off aggregation even after they had omitted its prohibition from the arbitration contract they wrote.¹⁷¹ Courts interpret arbitration agreements to bar little-guy unity regardless of whether repeat-player drafters installed that isolating condition.¹⁷²

Repeat-player unity, by contrast, has thrived. Entities have worked collaboratively toward their shared endeavor of defeating little-guy claims in general and aggregation of little-guy claims in particular. In one potent 1990s initiative, ten banks got together to fend off class arbitrations of credit card disputes.¹⁷³ Making their approval of their own

166. Glover, *supra* note 36, at 3071.

167. See Matt Summers, Note, *Rebuilding Antitrust Amidst Forced Arbitration*, 56 HARV. C.R.-C.L. L. REV. 449, 459 (2021) (“Dividing those claims into individualized arbitrations is like dividing a centipede into 100 smaller units and still expecting it to crawl.”).

168. See *Italian Colors*, 570 U.S. at 240 (Kagan, J., dissenting) (“The monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse.”).

169. 559 U.S. 662 (2010).

170. See *id.* at 685-87. Justice Alito cited nothing to support his contention that class actions and arbitration are incompatible. Keren, *supra* note 32, at 594-95.

171. *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), strengthened this pattern. Several lower court decisions newer than *Lamps Plus* have read arbitration contracts silent on the issue to prohibit aggregation. See *Am. Inst. for Foreign Study, Inc. v. Fernandez-Jimenez*, 468 F. Supp. 3d 414 (D. Mass. 2020); *Robinson v. Home Owners Mgmt. Enters. Inc.*, 590 S.W.3d 518 (Tex. 2019); *Grant v. Chevrolet*, 847 S.E.2d 806 (S.C. Ct. App. 2020). But see *Garner v. Inter-State Oil Co.*, 265 Cal. Rptr. 3d 384, 389 (2020) (interpreting an arbitration agreement that was “not a model of clarity” not to prohibit a class action).

172. Keren, *supra* note 32, at 593 (calling this line of case law the “interpretation cases,” in contrast to the “waiver cases” where entities barred class actions in the arbitration agreement).

173. KATHERINE V.W. STONE & ALEXANDER J.S. COLVIN, ECON. POL’Y INST., *THE ARBITRATION EPIDEMIC: MANDATORY ARBITRATION DEPRIVES WORKERS AND CONSUMERS OF THEIR RIGHTS* 4 (2015), <https://files.epi.org/2015/arbitration-epidemic.pdf> [<https://perma.cc/B3XN-BEMH>].

collective action clear by calling themselves “the Arbitration Coalition,” the group shared ideas on how to crush unity of their little-guy adversaries and financed the preparation of Supreme Court amicus briefs.¹⁷⁴ John Roberts participated in the effort as a lawyer for Discover Bank. When this initiative against little-guy unity bore fruit in the form of *AT&T Mobility LLC v. Concepcion* and *Italian Colors*, Roberts was chief justice of the Supreme Court.¹⁷⁵

Another well-funded locus of togetherness among arbitration’s repeat players works hard as a lobbyist to ward off unity among little guys: “To listen to the U.S. Chamber of Commerce,” writes Joanna Schwartz, “one would think that class actions are the most significant scourge on business ever conjured up by man.”¹⁷⁶ Amicus briefs filed in all Supreme Court cases involving classes of individuals pursuing redress from corporate defendants show that the Chamber of Commerce can be counted on to oppose little-guy solidarity in litigation as well as arbitration.¹⁷⁷ This entity embodies unity for corporate America. Its website declares that it is “the world’s largest business organization representing companies of all sizes across every sector of the economy.”¹⁷⁸ Spending more money than anyone else to influence Congress,¹⁷⁹ it brings divergent business participants together on the Privity 2.0 team.

2. *Alternative Dispute Resolution for Individuals, Litigation Options for Business*

Lack of access to the courts is a Privity 2.0 condition that imposers like to dish out but not to take. They write one-way arbitration clauses that keep judicial recourse open to themselves and unavailable to the little guys who sign their contracts.¹⁸⁰ When they draft pre-dispute agreements to arbitrate, they are free to include carve-out exceptions that preserve any litigation options they do not wish to foreclose.¹⁸¹

174. *Id.*

175. Silver-Greenberg & Gebeloff, *supra* note 36.

176. Joanna C. Schwartz, *The Cost of Suing Business*, 65 DE PAUL L. REV. 655, 655 (2016).

177. *Id.* at 659-62 (reviewing arguments made in amicus briefs).

178. U.S. CHAMBER OF COM., JOIN THE U.S. CHAMBER, <https://www.uschamber.com/members/join-chamber> [<https://perma.cc/2QZR-6882>] (last visited July 26, 2022).

179. ALYSSA KATZ, *THE INFLUENCE MACHINE: THE U.S. CHAMBER OF COMMERCE AND THE CORPORATE CAPTURE OF AMERICAN LIFE* 164 (2015).

180. COSTS, *supra* note 148, at 3.

181. Frankel, *supra* note 122, at 711. When an agreement between a repeat player and a little guy forces arbitration of some disputes and forbids unwanted arbitration of others, courts honor both the mandating and the forbidding written into the contract. When state lawmakers permit mandatory arbitration of some disputes and forbid unwanted arbitration of others, they can expect their choice to be struck down as contrary to the Federal Arbitration Act. *Id.* at 708-13.

Case law reports that forced-arbitration winners known for defeating weaker adversaries in the Supreme Court said no to the bounteous “benefits of private dispute resolution,” among them “lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes,”¹⁸² and litigated complaints in court when the complaints were theirs.¹⁸³ One sector of American business felt so strongly about avoiding unwanted arbitration that it took on the uphill challenge of pushing for shelter in Congress, where it fared well¹⁸⁴; unlike employees, consumers, and little guys generally, automobile dealers are safe from mandatory arbitration imposed on them through pre-dispute clauses in contracts that repeat players like to draft.¹⁸⁵

Repeat players inclined in hindsight to prefer litigation over arbitration have more power than displeased little guys to push their way into a fresh start in court. Consider for example the dispute between Pamela Prescott, a teacher and principal, and Northlake Christian School, her employer.¹⁸⁶ Prescott filed an action in federal court after trying to learn—at first without litigation, and without result—why Northlake had fired her abruptly and what it had said about her to thwart her search for another job. Invoking what it had imposed on Prescott as a condition of employment, Northlake moved successfully to compel Christian mediation and arbitration.

The arbitrator, who heard this dispute under the auspices of an entity called Peacemaker Ministries, rejected some of Prescott’s claims but faulted Northlake for failing to provide feedback to her before the termination. This lapse by Northlake violated the teachings of Jesus

182. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 685 (2010).

183. For pairings where in the first case a repeat player persuaded the Supreme Court to thwart judicial redress for a little guy and in the second chose litigation to assert its interests, compare *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235 (2012) with *American Express Co. v. Pan American Express Int’l, Ltd.*, 509 F. Supp. 348 (E.D. Pa. 1981), *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 105 (2001), with *Circuit City Stores, Inc. v. Muss*, 543 N.Y.S. 2d 147 (N.Y. App. Div. 1989), and *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) with *AT&T Mobility Servs., LLC v. Vill. of Corrales*, 80 F. Supp. 3d 1267 (D.N.M. 2014). Lamps Plus, a business that wrote mandatory arbitration into contracts with its employees, see *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407, 1410 (2019), took a copyright infringement claim to the California courts. *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1142 (9th Cir. 2003).

184. Jim Henry, *Dealers’ Big Win; NADA Led the Fight Against Mandatory Arbitration in Franchise Agreements*, AUTOMOTIVE NEWS (Jan. 23, 2017), <https://www.autonews.com/article/20170122/NADA100/301239992/nada-led-the-fight-against-mandatory-arbitration-in-franchise-agreements> [<https://perma.cc/3QH3-C29S>].

185. This protective legislation applies to franchise agreements between dealers and manufacturers. Motor Vehicle Franchise Contract Arbitration Fairness Act, 15 U.S.C. § 1226(a)(2).

186. Michael Corkery & Jessica Silver-Greenberg, *In Religious Arbitration, Scripture is the Rule of Law*, N.Y. TIMES (Nov. 2, 2015), <https://www.nytimes.com/2015/11/03/business/dealbook/in-religious-arbitration-scripture-is-the-rule-of-law.html> [<https://perma.cc/4FQ7-ZYQT>].

as recounted in Matthew 18:15, ruled the arbitrator. He awarded Prescott \$157,000.¹⁸⁷ Sourer now on the joys of arbitration, Northlake fought Prescott through the federal courts for four years, insisting that the Peacemaker Ministries award was contrary to state law. It stopped litigating only when the United States Supreme Court denied certiorari.¹⁸⁸ Although her adversary lost in the end, Prescott lost too: she spent all but \$8,000 of her award to defend it.¹⁸⁹

E. "Opting Out of the Legal System Altogether"¹⁹⁰

The Privity 2.0 maneuver of imposing arbitration on a pre-dispute basis exemplifies retreat from law in at least three senses.

1. A Statutory No-Law Zone

The phrase "alternative dispute resolution," a broad category that includes the Privity 2.0 favorite of arbitration, necessarily sets up a contrast with adjudication. Something that is an alternative to something else cannot be that same thing. But just what *is* arbitration, other than not-adjudication or the absence of government and judicial procedure? Does it have any defining characteristics? As was mentioned, the Federal Arbitration Act contains no definition of arbitration;¹⁹¹ Congress has added rewrites to the statute over the years but never filled this gap.¹⁹²

Willing participants do no harm when they reconcile their differences by any peaceful means they like. Flip a coin, read the Tarot or incense smoke, wave wands, ask a Magic 8 Ball, petition their deity to intervene: when an alternative form of dispute resolution is otherwise lawful and nobody objects, "opting out of the legal system altogether" does and should proceed. The Privity 2.0 battleground, however, is strewn with objecting. Agreements to arbitrate that entities prepare before disputes arise and present to individuals on a take it or leave it basis have provoked considerable resistance.

Expressions of this resistance in court shed some light on how unlike court adjudication a proceeding called an arbitration may be. Resistance can occur either before or after the proceeding. The "before" category of resistance, in which a court listens to disputants in the

187. *Id.*

188. See *Northlake Christian Sch. v. Prescott*, 546 U.S. 1075 (2005).

189. *Corkery & Silver-Greenberg*, *supra* note 186.

190. This quote comes from Judge William Young. See *Silver-Greenberg & Gebeloff*, *supra* note 36 and accompanying text.

191. See *Roberts*, *supra* note 44 and accompanying text.

192. See THOMAS E. CARBONNEAU, TOWARD A NEW FEDERAL LAW ON ARBITRATION 22, 89 (2014) (noting multiple "recent amendments" to the statute and adding that with respect to arbitration, the Supreme Court has been "exercising legislative authority" while Congress "was willingly abandoning its functions and relinquishing its power").

form of hearing their motions to stay arbitration or in response to motions to compel it,¹⁹³ provides relatively little information about what suffices as good-enough arbitration because resisters cannot describe in detail an experience they have not yet had.

The “after” category, featuring complaints about what occurred in a proceeding labeled arbitration, is informative on whether repeat players are indeed “opting out of the legal system altogether.” Dispute resolution rests on the assertion of grievances.¹⁹⁴ Disputants are free to accept the outcome of the process they chose—which they may label arbitration if they like, even if it rested on tea leaves or chicken entrails—and unless they speak about their experience, we will never know about it. Courts enter only when a party to the proceeding declines to cooperate with this outcome. On such an occasion, the disputant wishing to have the result enforced must seek a judicial order to confirm the arbitration award. Decisional law siding with the unwilling participant tells the public which departures from law and procedural justice went too far. This corpus is scant.

The FAA comes closest to answering the question of *Just what is arbitration?* by reciting limited grounds for courts to vacate what arbitrators decide.¹⁹⁵ Section 10(a)(1) of the FAA identifies “corruption, fraud, or undue means” as among these grounds; in subsection (2), the ground is “evident partiality or corruption in the arbitrators.”¹⁹⁶ The adjective “evident” modifying “partiality or corruption” in the FAA implies tolerance of partiality and corruption hidden enough not to be “evident,” especially for judge-readers inclined to put up hurdles to proving this category of accusation.¹⁹⁷

By advert[ing] to arbitrators’ “misconduct,” “misbehavior,” “exceed[ing] their powers,” and “refusing to hear evidence pertinent and material to the controversy” as grounds for refusing to enforce an award,¹⁹⁸ concluding subsections (3) and (4) appear more open-ended. But this language in the statute does not free vulnerable disputants from arbitrations they don’t want.¹⁹⁹ The Supreme Court has gone out of its way to say that courts should apply these options to vacate an

193. 9 U.S.C. § 4; UNIF. ARB. ACT § 7 (revised 2000).

194. Bernstein, *supra* note 52, *passim*; Anita Bernstein, *Complaints*, 32 MCGEORGE L. REV. 37, 38 (2000).

195. Its parallel statute adopted in some states, the Revised Uniform Arbitration Act, follows a similar path. See UNIF. ARB. ACT. § 23 (revised 2000).

196. 9 U.S.C. § 10(a)(1)-(2).

197. See generally PETER J. HENNING, *THE PROSECUTION AND DEFENSE OF PUBLIC CORRUPTION: THE LAW AND LEGAL STRATEGIES* (2020) (reviewing pro-defendant decisional law on federal bribery and corruption crimes).

198. 9 U.S.C. § 10.

199. I draw this conclusion after reading judicial decisions that cite § 10 of the Federal Arbitration Act and § 23 of the Revised Uniform Arbitration Act. The harvest of 157 cases yielded not one in which a court ruled in favor of an individual seeking to vacate an award favoring a business. I thank Megan Feeney for her assistance in this compilation.

award stringently rather than liberally.²⁰⁰ Grounds for judicial review of an arbitrator's decision, a federal appellate court concluded, have to be "among the narrowest known at law because . . . full scrutiny of such awards would frustrate the purpose of having arbitration at all."²⁰¹

2. *Decisionmakers Without Law*

With arbitration law lacking both explicit statutory minimum conditions and judicial decisions that patrol its boundaries, the characteristics of arbitrators become especially salient. Their identities and backgrounds could provide insight into this opaque legal instrument. When one looks at arbitrators, as this Article has had occasion to do, one finds homogeneity and more opacity.²⁰²

Litigation does not necessarily deliver diversity in its population of state-actor deciders,²⁰³ but it contains safeguards against invidious discrimination and injustice that are absent in arbitration: Judges must pass through either an election or vetting by state actors before they rule on anything, and they can be disciplined or removed from office when they fail to comply with public, transparent standards of conduct.²⁰⁴ Neither entry into the ranks of arbitrators nor thriving once there demands this much compliance with the rule of law, as this Article's look at two leading providers, AAA and JAMS, has shown.²⁰⁵

JAMS, which calls itself the world's largest arbitration provider, stands out as conspicuously untransparent in an already opaque sector. At its founding its name stood for Judicial Arbitration and Mediation Services. Now JAMS is a for-profit company the letters in whose name stand for nothing.²⁰⁶ Exactly who owns it and what kind of stake an arbitrator can have in its profits, JAMS declines to say.²⁰⁷

This alternative to adjudication features deciders who, unlike their adjudication counterparts, exercise their power out of public view. One

200. *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 568 (2013) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995)) ("Under the FAA, courts may vacate an arbitrator's decision 'only in very unusual circumstances.'").

201. *Three S Del., Inc. v. DataQuick Info. Sys., Inc.*, 492 F.3d 520, 527 (4th Cir. 2007) (quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co.*, 142 F.3d 188, 193 (4th Cir. 1998)).

202. See Sarah Rudolph Cole, *Everyone Wants Arbitrator Diversity, But How Can It Be Achieved?*, 39 ALTS. TO HIGH COST LITIG. NEWSL. 137, 143 (Oct. 2021) (noting that diversity is exceptionally scarce in the ranks of arbitrators).

203. See *supra* note 157 and accompanying text.

204. Chew, *supra* note 155, at 204.

205. See *supra* notes 155-162 and accompanying text.

206. Joshua Karton, *International Arbitration as Comparative Law in Action*, 2020 J. DISP. RESOL. 293, 297-98, 298 n.26 (2020).

207. See *Neutrality*, JAMS, <https://www.jamsadr.com/neutrality> [<https://perma.cc/CA45-UPC9>] (last visited July 26, 2022); see also *Monster Energy Co. v. City Beverages*, 940 F.3d 1140 (9th Cir. 2019) (vacating an arbitration award on the ground that the arbitrator did not disclose that he had an ownership stake in JAMS).

2014 study tried to learn who does this work by asking a cohort of plaintiff attorneys to name the service that had handled their most recent arbitration.²⁰⁸ The answer from half the respondents was AAA and next biggest was JAMS, at twenty percent. The remaining thirty percent of arbitrations divided equally between small providers adding up to fifteen percent and the other fifteen percent done with no administering agency.²⁰⁹ Flawed though AAA and JAMS may be, both entities publish guidelines and best practices that a little guy can look up. If the study's percentages apply to arbitration as a whole, then almost a third of arbitrations are governed by hard-to-find rules—or perhaps no rule other than Justice is the Interest of the Stronger.²¹⁰

One more sense in which arbitration constitutes “opting out of the legal system altogether” is indifference to public law values and the public interest to which “the legal system” pays attention. Civil liability distributes cash damages more often than any other remedy,²¹¹ but it also offers equitable or forward-looking relief that benefits more than the litigants named in a caption. The remedies of arbitration, unlike those of litigation, reach only parties who pay arbitrators under conditions of privacy, confidentiality, and secrecy. By publishing no precedents, heeding no impacts on non-parties harmed by the conduct that a participant complains about, and revealing no information about wrongs or rights,²¹² this mode of dispute resolution increases the isolation of members of the public even when repeat players have omitted bans on aggregation from the agreements they impose.

3. *Not Even Arbitration*

The Church of Scientology, which has decreed that its members must submit all disputes they have with the church to intra-Scientology arbitration,²¹³ does not actually participate in this form of dispute resolution, according to a 2015 news analysis.²¹⁴ This conclusion rested on six decades of Scientology records and an interview with a lawyer for the church.²¹⁵ Referring to a claim by a former member

208. STONE & COLVIN, *supra* note 173, at 17 (describing research by Colvin and another colleague).

209. *Id.* at 17-18.

210. See Alvin C. Harrell & Kurt Eggert, *Chapman University Presents Consumer Law Symposium on Responsibility and Reform*, 58 CONSUMER FIN. L.Q. REP. 214, 219 (2004) (relating this passage from Plato to the rights of consumers).

211. Anita Bernstein, *Tort as Yet Another Locus of Gender Injustice in the Distribution of Money*, in RESEARCH HANDBOOK ON PRIVATE LAW THEORY 303, 304 (Hanoch Dagan & Benjamin C. Zipursky eds., 2020).

212. See Myriam Gilles, *Individualized Injunctions and No-Modification Terms: Challenging “Anti-Reform” Provisions in Arbitration Clauses*, 69 U. MIAMI L. REV. 469, 471-72 (2015).

213. See *infra* note 297 and accompanying text.

214. Corkery & Silver-Greenberg, *supra* note 186.

215. *Id.*

named Luis Garcia, the news reporters wrote that “Mr. Garcia’s may be the first” Scientology arbitration.²¹⁶ This church, to which we will return,²¹⁷ is unusual in many ways, but its Not Even Arbitration approach to arbitration is commonplace.

Telling little guys in general, not just Scientology members in particular, to abandon civil recourse reliably lessens their volume of complaints.²¹⁸ Entities that impose this condition do not so much steer complaints from a courtroom to a conference room as cause complaints to vanish. As an examination of American Arbitration Association employment arbitration data informed Cynthia Estlund, when employees have to take their disputes to arbitration they simply don’t show up. This consequence of forced arbitration amounts to the “outright disappearance of claims” and “employers’ . . . nullification of employee rights and protections.”²¹⁹ Prohibiting unity among disputants achieves a similar elimination of redress as impossible to pursue whenever the cost of arbitration exceeds the maximum recovery that each disputant can obtain in isolation.²²⁰

216. *Id.* The unlikely event took place in October 2017 at what an anti-Scientology blog called “a farce” and a “kangaroo court.” See Tony Ortega, *Garcias Decry Scientology Kangaroo ‘Arbitration’ and Ask Judge to Reinstate Fraud Lawsuit*, UNDERGROUND BUNKER (Jan. 20, 2018), <https://tonyortega.org/2018/01/20/garcias-decry-scientology-kangaroo-arbitration-and-ask-judge-to-reinstate-fraud-lawsuit/> [<https://perma.cc/V9QZ-KUEL>]. A panel of Scientologists awarded Garcia and his wife \$18,495.36, a small fraction of a claim totaling almost a million dollars. *Id.*; Phil Lord, *Case Comment: Garcia v Church of Scientology Flag Service Organization*, 86 ARBITRATION 211, 214 (2020). A federal court upheld this result, see *Garcia v. Church of Scientology Flag Serv. Org.*, 2018 U.S. Dist. LEXIS 119099, *2 (M.D. Fla. 2018), provoking outcry on another blog with the same Not Even Arbitration protest: “In the history of scientology, there had never been a SINGLE arbitration carried out pursuant to the agreements they have people sign, so they conjured up something and told the Judge he had to accept it” Mike Rinder, *Concerning Scientology ‘Religious Arbitration,’ SOMETHING CAN BE DONE ABOUT IT* (Jan. 30, 2020), <https://www.mikerindersblog.org/concerning-scientology-religious-arbitration/> [<https://perma.cc/8GKW-EFKN>].

217. See *infra* notes 296-98 and accompanying text.

218. Scholars have found an association between the imposition of mandatory arbitration and a drop in little-guy protest: most persons relegated to arbitration neither go to court nor pursue the alternative dispute resolution that repeat players permit them. See Estlund, *supra* note 133, at 705-06; Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804, 2932-33 (2015).

219. Estlund, *supra* note 133, at 682, 709.

220. See *supra* notes 163-67 and accompanying text. “So the reality is that virtually no one is going,” concluded a New York Times reporter asked to opine on the prohibition of class actions from her vantage point on the forced-arbitration beat. Fresh Air, *Have We Lost A Constitutional Right In The Fine Print?*, NAT’L PUB. RADIO, (Nov. 15, 2015, 2:33 PM), <https://www.npr.org/2015/11/12/455749456/have-we-lost-a-constitutional-right-in-the-fine-print> [<https://perma.cc/H5D6-3QK5>].

IV. USING PRIVITY 2.0 TO OPT OUT OF PERSONAL INJURY LIABILITY: ROLE MODELS FOR DEFENDANTS

In 2014, General Foods, maker of breakfast cereals and similar foodstuffs like pancake mix, decided to deliver forced arbitration to consumers who interacted with the company on social media.²²¹ A reporter contacted a critic of the practice for comment. Her quote reflected on the present and future of forced arbitration:

“Although this is the first case I’ve seen of a food company moving in this direction, others will follow—why wouldn’t you?” said Julia Duncan, director of federal programs and an arbitration expert at the American Association for Justice, a trade group representing plaintiff trial lawyers. “It’s essentially trying to protect the company from all accountability, even when it lies, or say, an employee deliberately adds broken glass to a product.”²²²

“[O]thers will follow—why wouldn’t you?” paired with the characterization of forced arbitration as “essentially trying to protect [a] company from all accountability,” occupies this Part, which examines Privity 2.0 as an option pioneered by first movers that has the potential to become stronger. Businesses in a position to impose take-it-or-leave-it contracts on individuals who could in the future assert personal injury claims against them will want to consider telling these individuals to renounce redress in court before a dispute arises. Most of the examples of forced arbitration gathered here are in use. They form a foundation that can support extensions of Privity 2.0.

A. *The Transportation Sector*

Vehicular transport has loomed large on the common law of torts for centuries. From the horse-drawn carriage that collapsed on Mr. Winterbottom of *Winterbottom v. Wright* in 1840 to the autonomous vehicles whose collisions started to fill a nascent jurisprudence about liability in the last decade,²²³ conveyances that move people and cargo occupy the center of personal injury law. Providers of transportation machines and services qualify to be called repeat players in tort.

As the first cohort in American history to regard itself as a personal-injury defendant as long as it remained in business, the nineteenth-

221. Stephanie Strom, *When ‘Liking’ a Brand Online Voids the Right to Sue*, N.Y. TIMES (Apr. 16, 2014), <https://www.nytimes.com/2014/04/17/business/when-liking-a-brand-online-voids-the-right-to-sue.html> [<https://perma.cc/3DLK-PZXH>].

222. *Id.*

223. *Winterbottom v. Wright*, 152 Eng. Rep. 402 (Ex. 1842); Lance Eliot, *Tesla Lawsuit Over Autopilot-Engaged Pedestrian Death Could Disrupt Automated Driving Progress*, FORBES (May 16, 2020, 11:31 AM), <https://www.forbes.com/sites/lanceeliot/2020/05/16/lawsuit-against-tesla-for-autopilot-engaged-pedestrian-death-could-disrupt-full-self-driving-progress/?sh=42d4204771f4> [<https://perma.cc/N55T-E5PR>] (noting a growing yet still small number of personal injury claims).

century railroad industry took positions in response to personal injury claims that engraved singular preoccupations into the law of negligence.²²⁴ Automobiles became comparably significant in the next century of tort.²²⁵ So long as the transportation business maintains its influence on the law of personal injury, observers can expect its expansions of Privity 2.0 to have influence beyond transportation. Three sub-sectors of this industry offer examples of where the tentacles of Privity 2.0 can reach: public transport (which includes what is left of railroads); automobiles (still important to personal injury law after a heyday in decades past); and the twenty-first century taxi.

1. Public Transport

The American national passenger railroad made a claim for Privity 2.0 leadership in January 2019. Mindful of derailments in 2015 and 2017 for which it paid out multimillion-dollar settlements,²²⁶ Amtrak announced a position on forced arbitration of passengers' claims that came across to observers as exceptionally aggressive.²²⁷ Although members of Congress responded defensively in March 2020 by introducing legislation labeled the Ending Passenger Rail Forced Arbitration Act,²²⁸ Amtrak's foray into Privity 2.0 looks likely to stick. Attempts to gain shelter from unwanted arbitration by statute rarely succeed.²²⁹

Later in 2020, Amtrak received more encouragement of its Privity 2.0 ambitions: the federal district court of the District of Columbia dismissed an action that two persons who occasionally used this railroad

224. See Bernstein, *supra* note 57, at 742 (identifying as central among these preoccupations the association of responsibility with fault).

225. See generally Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293 (2018) (documenting influences of automobile collisions both within and beyond tort, including insurance law and no-fault compensation).

226. Luz Lazo, *Lawmakers Want to End Amtrak's Forced Arbitration Policy, Calling It 'Anti-Consumer' and 'Unfair,'* WASH. POST (Mar. 5, 2020, 2:41 PM), <https://www.washingtonpost.com/nation/2020/03/05/lawmakers-want-end-amtraks-forced-arbitration-policy-calling-it-anti-consumer-unfair/> [<https://perma.cc/7CK4-BFC8>].

227. See *Terms and Conditions*, AMTRAK, <https://www.amtrak.com/terms-and-conditions.html#arbitrationAgreement> [<https://perma.cc/EFN2-NQP7>] (last updated May 20, 2022) ("This Arbitration Agreement is intended to be as broad as legally permissible . . ."); Sam Mintz, *Amtrak's New Ticket Rules Won't Let Passengers Sue in a Crash*, POLITICO (Nov. 8, 2019, 5:35 PM), <https://www.politico.com/news/2019/11/08/amtrak-crash-sue-068175> [<https://perma.cc/FLT3-DM9F>] (adverting to "a clause the passenger rail line quietly added to its ticket purchases," and quoting an observation that unlike most expressions of forced arbitration, the one Amtrak chose recites in detail the categories of claims included in its rejection of judicial recourse).

228. H.R. 6101, 116th Cong. (2d Sess. 2020).

229. See *supra* note 185 and accompanying text (noting an exception, the Motor Vehicle Franchise Contract Arbitration Fairness Act).

to travel filed to stop this imposition.²³⁰ The court reasoned that because these individuals lacked (or at best did not yet have) a claim that Amtrak could try to force into arbitration, the claim failed on standing.²³¹

Public transport as a subsector of transportation extending beyond Amtrak sits pretty in Privity 2.0 because repeat players can block access to the courts for an especially large fraction of potential claimants. Providers in the transportation sector who offer access to private automobiles can thwart their customers through the contracts they write but cannot impose constraints on an outsider to those transactions. From their vantage point, potential plaintiffs dismayingly immune to Privity 2.0 efforts include pedestrians, drivers and passengers injured while riding in other vehicles, and companions in a car they didn't rent or buy (or an Uber or Lyft they didn't hail).²³² Persons injured by public transport vehicles are less likely to land in this fortunate status of bystander; most people at risk of harm from accidents like the Amtrak derailments will be passengers who bought tickets containing terms of service that repeat players drafted.

This promise for the sector suggests that Amtrak's bold move will inspire further Privity 2.0 developments beyond passenger trains. The U.S. Department of Transportation insists on one major exception—airlines may not impose mandatory arbitration on their passengers²³³—but as a general rule, businesses that carry persons from one point to another may also transport their personal injury claims out of court. According to one critic of the mandatory arbitration that Amtrak adopted, several subsectors of the transportation sector—bus companies, ride-sharing businesses, leisure cruises—routinely impose arbitration on their passenger-customers.²³⁴

Such providers of transport can feel even freer than Amtrak to act contrarily to the interests of the vulnerable American public because Amtrak is at least in some respects a governmental entity rather than an autonomous private corporation.²³⁵ The private nature of arbitration means that these ventures into Privity 2.0 will escape the occasional attention Amtrak receives from Congress as its funder and the Department of Transportation as its largest stockholder.²³⁶ Left alone

230. *Weissman v. Nat'l R.R. Passenger Corp.*, No. 20-cv-28 (TJK), 2020 WL 4432251 (D.D.C. July 31, 2020).

231. *Id.* at *1-3 (citing arbitration decisions from the Fourth and Eleventh Circuits).

232. Agnieszka A. McPeak, *Regulating Ridesharing Platforms Through Tort Law*, 39 U. HAW. L. REV. 357, 391-92 (2017).

233. 14 C.F.R. § 253.10 (2020).

234. Mintz, *supra* note 227.

235. See *Dept. of Transp. v. Ass'n of Am. Railroads*, 575 U.S. 43, 46 (2015), a unanimous decision.

236. See BEN GOLDMAN, CONG. RSCH. SERV., R45942, ISSUES IN THE REAUTHORIZATION OF AMTRAK 1 (2021).

with respect to the physical injuries it causes, the category now labeled public transportation can shed inconvenient “public” conditions like transparency and accountability and replace them with private concealment.

2. *Automobiles (Bought and Rented, with Attention to One Leader)*

No business exemplifies Privity 2.0 more than the electric vehicle manufacturer Tesla, spinner of an exquisite twist on privity in its original state. This corporation has attained notoriety as a repeat-player arbitration enthusiast, but to date most arbitration-denunciations of Tesla have focused on employment discrimination.²³⁷ Tesla deserves comparable attention for what it has achieved to destroy duties of care owed to customers with respect to the condition of their new cars.

So far, most of these complaints have focused on deception about the true value of Tesla automobiles and unpredictable acceleration, with relatively few claims for physical-personal injury.²³⁸ It seems possible that the high pile of automobile-injured bodies is destined to shrink to trivial size. Technology has already been making automobiles safer for decades, and this trajectory of progress may get a lot better as software continues to supersede frail human control at the wheel.²³⁹ But as long as automobiles are still dangerous, judicial redress for physical harm attributable to manufacturer negligence ought to remain in place. Personal injury liability should be replaced *after* it becomes obsolete, not while it continues to generate information about risky conditions.²⁴⁰

To appreciate what Tesla has achieved to fend off personal injury liability, recall Donald MacPherson and Buick Motor Company, the plaintiff consumer and defendant automobile manufacturer yoked together since 1916 in American tort history. Because MacPherson had

237. In September 2020, a shareholder made the unusual choice to appear at Tesla’s annual meeting calling for a report on the company’s use of mandatory arbitration of race discrimination and sexual harassment claims brought by Tesla employees, who number more than 60,000. Dana Hull, *An Activist Investor Crusades Against Forced Arbitration at Tesla*, BLOOMBERG NEWS (Sept. 9, 2020, 6:00 AM), <https://www.bloomberg.com/news/articles/2020-09-09/tesla-is-under-pressure-to-end-arbitration-for-racism-claims> [<https://perma.cc/3NUJ-5SEQ>].

238. Not zero, however. See *Wiseman v. Tesla, Inc.*, No. CV 17-04798-JFW (AGR), 2017 WL 7058142 (C.D. Cal. Sept. 12, 2017) (ordering into arbitration a claim where a plaintiff suffered what his lawyer called “minor injuries” attributable to the braking system of his Model X); see also *Tesla \$2.3 Billion Class Action Lawsuit Over Dangerous Braking System*, MARGARIAN LAW FIRM (Jun. 29, 2017), <https://www.margarianlaw.com/tesla--class-action-lawsuit/> [<https://perma.cc/F32U-W4KM>].

239. Guy Seidman & Aviv Gaon, *A Future Without Human Driving*, 18 GEO. J.L. & PUB. POL’Y 503, 514 (2020).

240. See Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2501 (2013) (“In the absence of products liability there is likely to be overconsumption of risky products and an excessive tendency on the part of producers to choose designs with hidden risks.”).

bought his Runabout from a dealer who had bought it from Buick,²⁴¹ this dealer was in privity of contract with both Buick and MacPherson. Buick and MacPherson were never in privity of contract with each other.

Decades of decisional law in place when *MacPherson* reached the courts had held that a manufacturer's duty of care with respect to the risks of its products rested on that relation. In the famed decision by Judge Cardozo with which this Article began, the New York Court of Appeals extinguished a venerable rule. Once *MacPherson* took hold, automobile manufacturers lost the shelter of what became regarded in hindsight as a citadel.²⁴² Now they could be hauled into court for breaching a duty whose origin, said *MacPherson*, was "in the law."

Today, a century later, Tesla uses privity of contract to regain the refuge that Buick and its peer businesses enjoyed until *MacPherson* took it away from them in 1916. Deviating from what prevails in the contemporary American automobile retail market, this carmaker sells its product directly to individuals.²⁴³ No intermediary between it and customers exists in the mode of Close Bros., the Schenectady, New York business that purchased the fateful Runabout from Buick and sold it to MacPherson.²⁴⁴ Buy a new Tesla and you are in privity with an automobile manufacturer, a condition Cardozo thought was impossible for any potential personal-injury plaintiff to achieve.²⁴⁵

When Old Privity was in flower, privity was where one wanted to be—and a destination one could almost never reach—if one wanted a duty of care. Enter into privity of contract with Tesla now, and the duty of care recognized by *MacPherson* disappears. Tesla takes away our day in court and gives us arbitration in its place. We agree to forfeit adjudication when we buy our new car.

Reviewing the record of Tesla as an arbitration-imposer shows Privity 2.0's promise for the automobile sector and beyond. My simple Westlaw search—written to be maximally broad: published and unpublished cases, state and federal—that looked for two words in the same decision, "arbitration" and "Tesla," yielded only two disputes over arbitrability in which plaintiffs did not lose, and both are anomalous. One addresses an employment discrimination claim brought by a plaintiff who had joined Tesla as a temp and never accepted its written offer, complete with arbitration clause, of a permanent job.²⁴⁶ In the

241. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

242. See *supra* notes 7-8 and accompanying text.

243. Cynthia Barmore, *Tesla Unplugged: Automobile Franchise Laws and the Threat to the Electric Vehicle Market*, 18 VA. J.L. & TECH. 185, 189 (2014).

244. Henderson, *supra* note 8, at 42.

245. See *supra* note 17 and accompanying text.

246. *Vaughn v. Tesla, Inc.*, No. A154753, 2019 WL 2181391, at *1 (Cal. Ct. App. May 21, 2019). Few employees work for a company long enough to be discriminated against without having said yes to a job offer.

other non-loss for plaintiffs, a claim for negligence and fraud, a married couple contended somewhat improbably that they had managed to forgo the usual online purchase and bought their Model S over the telephone.²⁴⁷ The other thirty-four cases containing “Tesla” and “arbitration” either lacked a disagreement about arbitrability or ruled in favor of Tesla.²⁴⁸

Tesla is of interest to this Article for a level of influence larger than its scant presence on the road.²⁴⁹ At the time that I write, it leads the automobile business in one major indicator: A year after an October 2020 news story reported that its worth in the stock market was more than that of Toyota plus Ford plus General Motors plus Fiat Chrysler plus Volkswagen plus Honda,²⁵⁰ Tesla ascended into the “elite club” of a trillion dollars in market capitalization.²⁵¹ This eye-popping ratio of stock value to vehicles sold presumably cannot last,²⁵² but it suggests that the importance of Tesla lies in its future. Investors seem to think so. The company’s two biggest claims to fame—electric cars and autonomous-driving technology—are both expected to grow in the

247. *Nager v. Tesla Motors, Inc.*, No. 19-2382-JAR, 2019 WL 4168808, at *1 (D. Kan. Sept. 3, 2019). No way, said Tesla: “[P]laintiffs must have agreed electronically to the Agreement [somewhere], either through their online order on the Tesla website or by ordering through a Tesla representative.” *Id.* “Plaintiffs have demonstrated through their affidavits and exhibits that there is a genuine issue of disputed fact as to whether they ever agreed—electronically or otherwise—to arbitrate this dispute,” wrote the Magistrate Judge, ordering expedited discovery to learn the answer to that question. *Id.* at *4.

248. See, e.g., *Lambert v. Tesla, Inc.*, 923 F.3d 1246 (9th Cir. 2019) (ordering arbitration of a § 1981 claim); *Godhart v. Tesla, Inc.*, No. 2:19-cv-01541-JAD-VCF, 2020 WL 2992414, at *1 (D. Nev. June 4, 2020) (ordering arbitration of claims for disability discrimination and retaliation); *Nguyen v. Tesla, Inc.*, No. 8:19-cv-01422-JLS-JDE, 2020 WL 2114937, at *1, *6 (C.D. Cal. Apr. 6, 2020) (ordering arbitration of warranty and consumer protection claims); *Nguyen v. Tesla, Inc.*, No. 8:19-cv-01422-JLS-JDE, 2020 WL 4530426, at *1 (C.D. Cal. July 24, 2020) (denying motion to reconsider the first *Nguyen* decision); *Balan v. Tesla Motors, Inc.*, No. C19-67 MJP, 2019 WL 2635903, at *5 (W.D. Wash. June 6, 2019) (ordering arbitration of most, not quite all, of plaintiff’s defamation claim); *Hansen v. Musk*, No. 3:19-cv-00413-LRH-WGC, 2020 WL 4004800, at *1 (D. Nev. July 15, 2020) (ordering arbitration of whistleblower and contract-interference claims).

The Tesla takeaway is that although Privy 2.0 rarely fails repeat players, it can fail in rare cases where the little guys can show that they did not agree to mandatory arbitration as a contract condition. Owen Diaz, a plaintiff who won a multimillion-dollar jury verdict in 2021 for racial harassment he experienced at Tesla, was employed by a different company and so did not have to accept arbitration to work at the Fremont manufacturing plant. Niraj Chokshi, *Jury Orders Tesla to Pay \$137 Million to a Former Worker Over Racist Treatment*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/10/04/business/tesla-racism-lawsuit.html> [<https://perma.cc/2AZ4-RVPG>].

249. Russ Mitchell, *Tesla Sets Sales Record, But Still Lags Growth Expectations*, L.A. TIMES (Oct. 2, 2020, 8:36 AM), <https://www.latimes.com/business/story/2020-10-02/tesla-reports-q3-deliveries-record> [<https://perma.cc/QPX5-ARVA>].

250. *Id.*

251. Jessica Mathews, *Tesla Joins Elite Club as Its Market Cap Passes \$1 Trillion for the First Time*, FORTUNE (Oct. 25, 2021, 5:53 PM), <https://fortune.com/2021/10/25/tesla-market-cap-passes-1-trillion-first-time-apple-microsoft-facebook-amazon-alphabet/> [<https://perma.cc/K5NT-SHZ4>].

252. See Jeff Schwartz, *De Facto Shareholder Primacy*, 79 MD. L. REV. 652, 665-66 (2020) (noting the truism that stock prices change over time).

coming decades,²⁵³ and its customers have shown their extraordinary loyalty to the brand.²⁵⁴ Privity 2.0 leadership by this company probably punches above the weight of its sales figures.

As the automobile sector moves slowly toward its holy grail of Level 5 autonomous driving, where all that a transported human being does is set her destination,²⁵⁵ Privity 2.0 joins the ride. In 2018, ten members of the United States Senate wrote to manufacturers of autonomous vehicles expressing concern about recourse for harm caused by or attributed to this technology.²⁵⁶ The Senators' letter noted that autonomous vehicles are expected to reach drivers not through sales at dealerships but via ridesharing systems—an ideal vector to spread Privity 2.0, for two reasons. First, this channel connects automobile manufacturers directly to their customers, a condition that only Tesla enjoys today. Second, ridesharing systems communicate with customers by a click-through agreement conveyed on a phone app, a source of rights-defeating intimacy that the clicking customer typically cannot fend off.²⁵⁷

Ridesharing systems have the quality of temporary duration in common with automobile rental, where Privity 2.0 holds considerable sway. Industry leader Hertz prevailed in a personal-injury arbitration dispute in California, a jurisdiction relatively inclined to side with little guys on this issue, even though the court was willing to credit the plaintiff's assertion that he had not seen the Hertz folder jacket that recited the condition of mandatory arbitration until after he signed the rental agreement.²⁵⁸ These businesses can, and at least sometimes do, choose to omit personal injury from their mandatory-arbitration categories that they recite in rental contracts,²⁵⁹ but they are free to make a contrary choice.

253. See Aniruddh Mohan et al., *Trade-offs Between Automation and Light Vehicle Electrification*, 5 NATURE ENERGY 543 (July 2020).

254. Blake Morgan, *10 Customer Experience Lessons from Tesla*, FORBES (Feb. 6, 2019, 4:03 PM), <https://www.forbes.com/sites/blakemorgan/2019/02/06/10-customer-experience-lessons-from-tesla/?sh=4dee5a4a6347> [<https://perma.cc/NLR8-G7YA>] (“Most relationships with companies are transactional, however when it comes to Tesla owners and their cars, something is different.”).

255. Tracy Hresko Pearl, *Fast & Furious: The Misregulation of Driverless Cars*, 73 N.Y.U. ANN. SURV. AM. L. 19, 29 (2017).

256. Letter from U.S. Senate to Dara Khosrowshahi, Chief Executive Officer, Uber Technologies, Inc. (Mar. 22, 2018), <https://www.blumenthal.senate.gov/imo/media/doc/2018.03.22%20Letter%20to%20AV%20Mfrs%20re%20Forced%20Arbitration.pdf> [<https://perma.cc/Q3SX-HVLB>].

257. *Id.*

258. *Lucas v. Hertz*, 875 F. Supp. 2d 991, 999 (N.D. Cal. 2012).

259. See, e.g., *Terms and Conditions*, DOLLAR CAR RENTAL, <https://www.dollar.com/Express/Enroll/TermsAndConditions.aspx> [<https://perma.cc/UDU8-QVZW>] (last visited July 26, 2022). Although Hertz does not publish its terms and conditions online, I recall signing a Hertz contract in the summer of 2020 that imposed arbitration on me but exempted whatever personal injury or property damage claims I might bring from this imposition.

3. *The Twenty-First Century Taxi*

Gloomy prospects for the old-time taxi sector, a condition well underway before the onset of a pandemic in 2020,²⁶⁰ have a comparably alarming parallel for passengers who want access to the courts should they experience a physical injury while riding. Similar in this respect to Tesla, which achieved privity of contract by bypassing retail intermediaries,²⁶¹ the twenty-first century taxi business communicates directly with its customers and imposes terms of service on them by electronic means.²⁶²

Also similar to Tesla, the two leading providers of ride hailing acquired a reputation for overplaying their forced-arbitration hand.²⁶³ Uber, by far the bigger of the two—it had seventy percent of the market share in December 2020²⁶⁴—decided in 2018 to stop requiring arbitration of passengers' claims for sexual harassment by drivers. Shortly after Uber's announcement, Lyft followed suit.²⁶⁵ Both twenty-first taxi companies still include arbitration in the agreements they tell passengers to click on, however, and their terms of service apply arbitration to physical injury claims.

One analysis of a failed attempt by Uber to impose arbitration on a claimant who experienced a physical injury while riding in a twenty-first century taxi found paths for forced arbitration to succeed in the future. The Philadelphia Court of Common Pleas ruled in *Kemenosh v. Uber Technologies* that Uber had not communicated to the passenger-plaintiff an offer to arbitrate.²⁶⁶ By pointing out what Uber had not done, the court indicated what it could have done for a different result.

The first idea in *Kemenosh*: Require the customer to open a hyperlink when she signs up. Alternatively, require her to click on a box saying she'd read and agreed to terms of service. Even encouraging her

260. Nicu Calcea, *Uber and Lyft Are Cutting Even Further into the Taxi Market During the Pandemic*, CITY MONITOR (July 12, 2022, 8:11 AM), <https://citymonitor.ai/transport/uber-lyft-rides-during-coronavirus-pandemic-taxi-data-5232> [<https://perma.cc/7CMB-WRVJ>].

261. See *supra* Section IV.A.2.

262. Calling businesses like Uber and Lyft the twenty-first century taxi seems to me more accurate than what news stories still favor, "ride-hailing app," a phrase I never hear in conversation. On the superseding of taxis that riders contact by hailing them in the street or speaking to dispatchers on the telephone, see Calcea, *supra* note 260.

263. See generally Carissa Laughlin, Comment, *Arbitration Clause Issues in Sharing Economy Contracts*, 2017 J. DISP. RES. 197 (reporting that Uber and Lyft have enjoyed considerable, though not total, success in their efforts to force both passengers and drivers into unwanted arbitration).

264. Janine Perri, *Uber vs. Lyft: Who's Tops in the Battle of U.S. Rideshare Companies*, BLOOMBERG SECOND MEASURE (June 15, 2022), <https://secondmeasure.com/datapoints/rideshare-industry-overview/> [<https://perma.cc/6P95-3BSJ>].

265. Daisuke Wakayabashi, *Uber Eliminates Forced Arbitration for Sexual Misconduct Claims*, N.Y. TIMES (May 15, 2018), <https://www.nytimes.com/2018/05/15/technology/uber-sex-misconduct.html> [<https://perma.cc/5CX7-3D6X>].

266. *Kemenosh v. Uber Techs., Inc.*, No. 181102703, 2020 WL 254634, at *1 (Pa. Ct. Com. Pl. Jan. 3, 2020).

in writing to read those terms would have strengthened Uber's posture, wrote the court.²⁶⁷ Imposing Privity 2.0 seems straightforward for prospective defendants of the twenty-first century taxi industry. Taxi defendants of the prior century would have valued this shelter from judicial recourse.²⁶⁸

B. Nursing Homes: Current Shelter and a Blueprint for More

The Supreme Court decisions that extended shelter from personal injury law to nursing home defendants rested on the Federal Arbitration Act alone,²⁶⁹ although other legislation addresses nursing homes,²⁷⁰ none of it played a part in this case law. The broad nature of this immunity suggests that other service businesses can profitably take the same Privity 2.0 path to lessen their liability for activities they have in common with the nursing home sector. Consider the furnishing of four broad categories of service: health care, rehabilitation and instruction, a place for individuals to sleep, and psychological or emotional succor. These activities engaged in by nursing homes overlap respectively with what gets rendered by medical providers, schools, non-possessory residences, and religious institutions. To consider the wide swath of Privity 2.0 over the human life span, let's start with education, or schools.

267. Cliff Rieders, *Hyperlink Hype? Judge Rejects Uber's Bid to Arbitrate*, LEGAL INTELLIGENCER (ONLINE) (Jan. 16, 2020). A recent decision that also ruled against Uber on mandatory arbitration, not a personal injury action as was *Kemenosh*, continues *Kemenosh's* willingness to accept hypothetical notice as sufficient to give this entity the shelter of Privity 2.0. *Kauders v. Uber Techs., Inc.*, 159 N.E.3d 1033, 1051-52 (Mass. 2021) (observing that "certain of the terms and conditions may literally require an individual user to sign his or her life away, as Uber may not be liable if something happened to the user during one of the rides," and this signing-away of human life is apparently enforceable as long as "it reasonably focused the user on the terms and conditions").

268. Some of these defendants won, *e.g.*, *Córdas v. Peerless Transp. Corp. Co.*, 27 N.Y.S.2d 198 (City Ct. N.Y. 1941), and some lost, *e.g.*, *Rhone v. Try Me Cab Co.*, 65 F.2d 834 (D.C. Cir. 1933).

269. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421 (2017); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012).

270. *See, e.g.*, Social Security Act Amendments of 1950, Pub. L. No. 734 (authorizing direct payments to institutions); Federal Nursing Home Reform Act (1987) (codified at 42 U.S.C. § 1395i-3) (establishing federal standards); *Myers v. Heritage Enters., Inc.*, 820 N.E.2d 604 (Ill. App. 2004) (interpreting the Nursing Home Care Act, an Illinois statute that provides tort remedies for violations of residents' rights); *see also* Kieran Walshe, *Regulating U.S. Nursing Homes: Are We Learning from Experience?*, 20 HEALTH AFF. 128, 128 (2001) (referencing a "complex regulatory system of state licensure and federal certification").

1. Schools

"Education," begins an article about nursing homes in a gerontology journal, "is not only important to young people but also a lifelong process."²⁷¹ The authors support their advocacy of what they call empowerment of nursing home residents by comparing educational interventions in this environment to schooling. Providers can empower these elderly persons by learning from education, their review concluded.²⁷² The Privity 2.0 application inverts this idea to set up nursing homes as leaders,²⁷³ schools as their followers.

Negligence by and around schools can cause an array of physical injuries. Buildings and grounds are places where persons slip and fall. School-associated sports and recreation deliver risks along with salubrious exercise and education. Institutional food makes an occasional eater ill. Dangers like these are of course older than the late twentieth-century development of Privity 2.0.²⁷⁴ Having lived long with tort liability to students and visitors, do schools have more reason to fend it off by contract in the current century? Mindful of modern improvements on the safety front—better protective gear in athletics, for example, and ubiquitous surveillance by mobile phones and closed-circuit cameras—that lessen the physical injuries that tort redresses, I think the answer is yes.

Privity 2.0 can shield schools from obligations of vigilance that the law has grown more willing to impose on them. Bullying and harassment by peers, sexual predation by teachers and coaches, food allergies severe enough to cause death, emotional distress severe enough for the same risk, and toys or equipment that threaten safety all existed when Cardozo wrote *MacPherson v. Buick Motor Co.* in 1916. Seen through the lens of school responsibility, however, these dangers look new-ish and prompt prospective defendants to consider Privity 2.0 for self-protection. Schools are especially able to shelter themselves from tort in this fashion when they are private rather than public.

At the K-12 level, the relatively new "enrollment agreement" can help to ward off tort claims. Schools draft these contracts to address their interests vis-à-vis tuition-paying parents. Tuition collection is

271. Daniela Schoberer et al., *Educational Interventions to Empower Nursing Home Residents: A Systematic Literature Review*, 11 CLIN. INTERVENTIONS AGING 1351, 1351 (2016).

272. *Id.* at 1359-62.

273. See *supra* notes 119-21 (reporting the sector's victories in Supreme Court decisions that upheld the forced arbitration of personal injury claims).

274. The old chestnut *Vosburg v. Putney*, 50 N.W. 403 (Wis. 1891), a mainstay of Torts casebooks, involved a physical injury that occurred in a high school classroom. *Id.* at 404.

among the issues that these contracts mention,²⁷⁵ but schools can and do insert Privity 2.0 in the form of mandatory arbitration into a later paragraph.²⁷⁶ Enrollment agreements have kept personal injury claims out of the courts.²⁷⁷

Higher education has displayed the Privity 2.0 twins of forced arbitration and class-action bans most visibly in claims of fraud and misrepresentation rather than personal injury. A regulation promulgated in November 2016 by the U.S. Department of Education that prohibited lenders from imposing arbitration terms on student borrowers did not last long after the election that month²⁷⁸: as of 2020, lenders who demand arbitration and forbid class actions need only “make a plain language disclosure of those requirements.”²⁷⁹ Educational institutions have fared well in decisional law here, winning dismissals of fraud actions that courts deemed covered by agreements to arbitrate.²⁸⁰

Opportunities similar to those available in the K-12 enrollment agreement remain on the personal injury front. Institutions can tell college students to accept mandatory arbitration should they be injured in an array of ways: physical-plant security lapses, failures to protect from campus predators, falls from (and, more notoriously,

275. Robert Kennedy, *Understanding Enrollment Agreements*, PRIV. SCH. REV. (Jan. 5, 2021), <https://www.privateschoolreview.com/blog/understanding-enrollment-agreements> [https://perma.cc/S7TK-RXSY].

276. At the end of a post on browsewrap, a separate issue, a law firm website encouraged school administrators to insert mandatory arbitration provisions into their enrollment agreements. See Max Sank & Stacy L. Velloff, *District Court Judge Issues Preliminary Injunction Enjoining the State from Prohibiting Mandatory Arbitration Agreements*, LCW (Feb. 3, 2020), <https://www.lcwlegal.com/news/district-court-judge-issues-preliminary-injunction-enjoining-the-state-from-prohibiting-mandatory-arbitration-agreements-ab-51/> [https://perma.cc/JKD9-B8P4]. I speculate that progressive rhetoric up top—diversity, tolerance, and gender inclusion yes; bigotry and bullying no—could lull parents into missing the waiver of tort remedies when they sign.

277. *Dagnan v. St. John's Mil. Sch.*, No. 16-2246-CM, 2016 U.S. Dist. LEXIS 177303 (D. Kan. 2016) (upholding mandatory arbitration of a claim for injuries resulting from a sexual assault by a peer); *D.C. v. Harvard-Westlake*, 98 Cal. Rptr. 3d 300 (Cal. App. 2009) (relying on an enrollment agreement to send to arbitration claims of intentional torts and negligence); see also PUBLIC JUSTICE, JURY VERDICTS AND SETTLEMENTS IN K-12 BULLYING & HARASSMENT CASES 42 (2020) (reporting that arbitration generated an award of \$370,000 for the student in *Dagnan*).

278. Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75,926-01 (Nov. 1, 2016).

279. Student Assistance General Provisions, Federal Family Education Loan Program, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49,788-90 (Sept. 23, 2019).

280. *Ferguson v. Corinthian Colls., Inc.*, 733 F.3d 928, 930 (9th Cir. 2013); *Crewe v. Rich Dad Educ., LLC*, 884 F. Supp. 2d 60, 65 (S.D.N.Y. 2012); *Wilson v. Career Educ. Corp.*, No. 4:11-CV-1583-RWS, 2011 WL 6012172 (E.D. Mo. Dec. 2, 2011).

assaults in) fraternity houses, and negligence in the provision of mental health services, for example. The spread of coronavirus that reached university campuses in March 2020 enlarged this familiar list of risks to students.²⁸¹

2. *Places to Sleep*

In contrast to schools, which share the functions of nursing homes that take place during the day—instruction, recreation, social interchange—short-term or nonpossessory lodgings have a different resemblance to nursing homes: they offer a place to retreat, sleep, and store personal possessions. All types of lodging can consider the imposition of Privity 2.0 on any guest or visitor within reach of their contracts. Some of them—including single-room occupancy hotels, halfway houses, and in-patient rehabilitation centers—have in common with nursing homes the trait of lodgers' frailty or vulnerability.

Privity 2.0, like other shifts to 2.0, aligns with the psychology of a newcomer or disruptor: for the category of shelter in the form of lodging, the new-economy counterpart to Uber (and to a lesser degree Tesla)²⁸² is Airbnb, a publicly traded corporation that envisions itself as sharing rather than selling a service.²⁸³ Like Uber and Tesla, this business turns up in case law on forced arbitration and class action bans for the most part at a distance from personal injury.²⁸⁴ One judicial decision, *Selden v. Airbnb, Inc.*,²⁸⁵ an employment discrimination case, gives detailed attention to the company's entitlement to keep aggrieved guests out of court.

Gregory Selden, an African American man, told the D.C. federal court that he had signed up with Airbnb shortly before he found a listing in Philadelphia that met his needs. His Airbnb profile included a headshot photo. When Selden wrote to express interest in the accommodation, the host wrote back saying it was not available. Suspecting that race discrimination played a role in this rejection, Selden set up two fictitious Airbnb profiles, using pictures of white men for both, and had these personae ask about the same offering. Both fake profiles got

281. See generally Peter H. Huang & Debra S. Austin, *Unsafe at Any Campus: Don't Let Colleges Become the Next Cruise Ships, Nursing Homes, and Food Processing Plants*, 96 IND. L.J. SUPP. 25 (2020).

282. See *supra* Section IV.A.2.

283. *What Is Airbnb and How Does It Work?*, AIRBNB, <https://www.airbnb.com/help/article/2503/what-is-airbnb-and-how-does-it-work> [<https://perma.cc/7ADG-3RWW>] (last visited July 26, 2022) (providing Airbnb's self-description); see also Laughlin, *supra* note 263, at 205-06 (describing Airbnb as an arbitration participant).

284. See, e.g., *Plazza v. Airbnb, Inc.*, 289 F. Supp. 3d 537, 560 (S.D.N.Y. 2018) (sending to arbitration a claim of fraud); *Dunbar v. Airbnb, Inc.*, No. CV 19-00648 JMS-WRP, 2020 WL 1550236, at *7 (D. Haw. Apr. 1, 2020) (granting a motion by Airbnb to compel arbitration of a defamation claim).

285. *Selden v. Airbnb, Inc.*, No. 16-CV-00933 (CRC), 2016 WL 6476934 (D.D.C. Nov. 1, 2016).

yes answers from the host. The trial judge granted Airbnb's motion to compel arbitration of Selden's complaint. This result "might seem inequitable to some," wrote the court, but to redress this wrong Selden needed to engage "with the appropriate regulators or with Congress."²⁸⁶

Airbnb likely has less exposure to personal injury claims than what its competitors in the old school hotel business face. Injuries that fill negligence actions against hotels—slips and falls, collisions with equipment or furnishings, and attacks by persons whom the lodging failed to bar from entry or monitor while inside—have to be rarer in settings that contain much less common space, fewer individual rental units, and fewer customers and employees.²⁸⁷ And so the traditional lodging sector may have more to gain from Privity 2.0.

The hotel industry, should it wish to write forced arbitration routinely into its agreements with leisure and business travel guests, can feel encouraged by successes of Privity 2.0 in the category of adventure tourism. One travel company successfully imposed arbitration on a father who brought a wrongful death action in court after hyenas dragged his eleven-year-old son from a safari tent and mauled the child fatally; the father's ex-wife had signed the agreement to arbitrate.²⁸⁸ Federal trial and appellate courts in New York dismissed a claim for personal injuries arising out of a cycling tour in the Loire Valley on the ground that the tour company, Backroads, had written the trip contract to compel arbitration of disputes "involving any subject matter whatsoever."²⁸⁹

As for arbitration forced on vulnerable short-term lodgers, Teen Challenge, a program offering residential treatment for substance abuse, fits this non-possessory residence category as well as the one ahead of us next, religious entities.²⁹⁰ Nicklaus Ellison, a nineteen-year-old man, enrolled in a Teen Challenge substance-abuse residential program. He signed several Teen Challenge documents that included an agreement to arbitrate disputes consistent with biblical principles.²⁹¹ After several tumultuous months that included dismissals from the program followed by reinstatements, the young man died

286. *Id.* at *2.

287. In addition, injured guests might be less inclined to file claims when the provider of their lodging is a human being with whom they have at least exchanged text messages and may have met in person. See Valerie P. Hans & M. David Ermann, *Responses to Corporate Versus Individual Wrongdoing*, 13 L. & HUM. BEH. 151, 158 (1989) (reporting a study that found conduct was deemed worse by factfinders when the wrongdoer was a corporation rather than a human person).

288. *Global Travel Mktg., Inc. v. Shea*, 908 So. 2d 392 (Fla. 2005).

289. *Milgrim v. Backroads, Inc.*, 142 F. Supp. 2d 471, 473 (S.D.N.Y. 2001), *aff'd*, 91 F. App'x 702 (2d Cir. 2002).

290. See *infra* Section IV.B.3.

291. *Corkery & Silver-Greenberg*, *supra* note 186.

of a drug overdose. His mother, acting as personal representative of his estate, sought not to be bound by the arbitration agreement she had not signed and that she claimed was contrary to her conscience.²⁹²

A Florida appellate court ordered Ellison's mother to take to arbitration her wrongful death claim against the residential treatment program. Like it or not, the court ruled, her son's choice committed her to dispute resolution principles found in the books of Matthew and First Corinthians, and procedural rules provisioned by the Association of Christian Conciliation Services.²⁹³ Another Florida appellate decision enforced an agreement to arbitrate a claim for wrongful death inside a rehabilitation center. The decedent, whose formal education stopped after the fourth grade, had when she was ninety-two and suffering from confusion and memory loss signed the center's admission contract that provided for mandatory arbitration.²⁹⁴ Both of these lower-court results align with Privity 2.0 wins for the nursing home sector in the Supreme Court.

3. *Religious Entities*

Nursing homes offer prospective residents comfort and security in an environment that tries or purports to make "customers feel truly cared for and valued" in contrast to "neglected or mistreated."²⁹⁵ Outside as well as inside the United States, the sector tends to be discussed and studied with reference to failures rather than successes on this front.²⁹⁶ Individuals take up residence in nursing homes nonetheless, presumably because this move makes them (or their family members) better off.

In noting that American religious entities and institutions trade in comfort and security to a counterpart of nursing-home residents—members, parishioners, adherents, extended communities—I hope not to be misunderstood. I intend no disparagement of these entities, nor any comment on the truth *vel non* of what they preach or believe. Participants in religious organizations are as far as I know no frailer, weaker, or more vulnerable than adults who live outside residential

292. *Spivey v. Teen Challenge of Fla., Inc.*, 122 So. 3d 986, 988 (Fla. Dist. Ct. App. 2013).

293. *Id.* at 988, 991-94.

294. *Spring Lake NC, LLC v. Holloway*, 110 So. 3d 916, 917 (Fla. Dist. Ct. App. 2013).

295. J. Nathan Laurence & Bita A. Kash, *Marketing in the Long-Term Care Continuum*, 27 HEALTH MKTG. Q. 145, 151 (2010).

296. Elisabeth Honinx et al., *Dying in Long-Term Care Facilities in Europe: The PACE Epidemiological Study of Deceased Residents in Six Countries*, 19 BMC PUB. HEALTH 1199 (2019); Karen Spilsbury et al., *The Relationship Between Nurse Staffing and Quality of Care in Nursing Homes: A Systematic Review*, 48 INT'L J. NURSING STUD. 732, 732 (2011).

institutions. Moreover, I accept that participation in religion delivers psychological comfort and other manifestations of well-being, not just a promise or sales pitch; evidence supports this association.²⁹⁷

Consistent with the rest of this Part, my interest in what nursing homes and religious entities have in common focuses on Privity 2.0 role models. If nursing homes can keep their little guys' personal injury actions out of court, one would expect religious entities to enjoy similar power. Maybe more: The First Amendment offers these entities shelter from liability for personal injury that nursing homes do not share.²⁹⁸ A U.S. Department of Justice directive to federal agencies sets forth "twenty principles" aimed at strengthening what it calls religious liberty.²⁹⁹ While a few of these principles focus on individual believers, most protect religion at the institutional level. Nursing homes and religious institutions, in sum, are different in most respects but similarly situated within Privity 2.0.

One religious institution has received attention for its insistence on keeping tort claims brought against it out of court. In *Bixler v. Church of Scientology International*, four plaintiffs alleged that a church member, actor Danny Masterson, had committed an array of assaults and threats. The complaint sought damages from Masterson and other defendants including the Church of Scientology for stalking, invasion of privacy, intentional infliction of emotional distress, and loss of consortium.³⁰⁰ The church responded with a motion contending that as "a condition for participating in Scientology services," the plaintiffs had agreed in writing to "ecclesiastical arbitration."³⁰¹ In this motion, filed in 2020, the church hewed to its decades-long litigation posture that complaints asserted by members against it must be resolved by religious arbitration, no matter that complainants said that they had left Scientology long ago or had never joined this religion voluntarily.³⁰²

Although the public record on point is scant, arbitration of a religious nature gets imposed on persons who seek redress for physical

297. Daniel Mochon et al., *Who Benefits from Religion?*, 101 SOC. INDICATORS RES. 1, 2-3 (2011).

298. See, e.g., *Pleasant Glade Assembly of God v. Schubert*, 264 S.W.3d 1, 12-13 (Tex. 2008) (interpreting a claim for battery as requiring the court to parse the theology of "laying of hands" and dismissing it on that basis); *Murphy v. I.S.K. Con. of New England, Inc.*, 571 N.E.2d 340, 342 (Mass. 1991) (reversing a judgment that approved a jury verdict of \$610,000 for multiple tort claims on the ground that it violated the defendant's religious liberty).

299. Federal Law Protections for Religious Liberty, 82 Fed. Reg. 49,668 (Oct. 26, 2017).

300. *Bixler v. Church of Scientology Int'l*, No. 19STCV29458 (Sup. Ct. L.A. Cnty. Aug. 22, 2019). The complaint is available at https://www.scribd.com/document/449476082/Bixler-et-al-v-Scientology-First-Amended-Complaint#from_embed [<https://perma.cc/3FYW-CRYC>].

301. Notice of Motion and Motion to Compel Religious Arbitration and for Stay of Litigation as to Plaintiffs Carnell Bixler, Bixler Zavala, and Jane Doe #1; Memorandum of Point and Authorities in Support Thereof at 8, 13, *Bixler v. Church of Scientology Int'l*, No. 19STCV29458 (Sup. Ct. L.A. Cnty. Mar. 26, 2020).

302. Corkery & Silver-Greenberg, *supra* note 186.

injuries extends to other religions beyond Scientology. A law review article about arbitration as a barrier against students' claims imposed by religious schools goes lightly on Scientology, focusing on "Christian, Jewish, and Islamic arbitral tribunals" for its analysis.³⁰³ One example from real-life litigation is the wrongful death claim brought against the Christian program Teen Challenge, an illustration that falls under both the "religious entities" and "shelter in the form of lodging" categories of this section.³⁰⁴

4. Medical Providers

Like nursing homes, physicians and hospitals offer services aimed at enhancing health for individuals who come to them under conditions of physical weakness or vulnerability. Commonalities like these suggest that medical malpractice might inspire prospective defendants to emulate the sector that has fared so well with Privity 2.0 and impose arbitration on patients. A few choose that path.³⁰⁵

For the most part, however, even though they can write forced arbitration into the familiar papers that new patients sign, medical providers seem to prefer to take their chances in court. Observers have concluded that they make this choice for the good reason that defendants fare exceptionally well in medical malpractice litigation.³⁰⁶ In order to be worth imposing, arbitration must yield what appear to be better expected outcomes than litigation before a hospital or doctor will want to force it on patients.

Here Privity 2.0, though not yet used much now in relation to how many events it could cover, is a prospect on the horizon for repeat players to consider. The Affordable Care Act continues to enlarge the number of encounters between patients and physicians by paying for more of these medical attentions, prompting a lawyer-physician to speculate that more care furnished by providers combined with less continuity

303. Raquel Muniz, *Religious Arbitration in Primary and Secondary Schools: A Cost-Benefit Analysis Model*, 19 RUTGERS J.L. & RELIGION 1, 4 (2017); *id.* at 5 n.18 (citing one successful imposition of arbitration by the Church of Scientology).

304. See *supra* notes 291-93 and accompanying text.

305. Well before the mid-1980s shift in the Supreme Court that embraced arbitration, California responded to a perceived medical malpractice crisis, by enacting a statute that permitted medical providers to impose arbitration on patients. Paul F. Arentz, *Defining "Professional Negligence" After Central Pathology Service Medical Clinic v. Superior Court: Should California's Medical Injury Compensation Reform Act Cover Intentional Torts?*, 30 CAL. W. L. REV. 221, 221-22 (1994) (examining the 1975 enactment); see also Chandrasekher & Horton, *supra* note 150, at 26-28 (noting the authors' choice to include Kaiser Permanente, the nation's largest managed care entity, in their empirical study of major arbitration providers).

306. The RAND report that reached this conclusion, see John E. Rolph et al., *Binding Arbitration is Not Frequently Used to Resolve Health Care Disputes*, RAND (1999), is now twenty-three years old but the data favoring medical-malpractice defendants remains in place. See Michael J. Saks & Stephan Landsman, *The Paradoxes of Defensive Medicine*, 30 HEALTH MATRIX 25, 70-71 (2020).

in the doctor-patient relationship will generate more claims of medical malpractice.³⁰⁷ The extraordinary increase in morbidity and mortality that a deadly virus and its sequelae brought to the United States in early 2020 continues to generate occasions for intervention, some of which go wrong. Whether more contacts between providers and patients, the downturn in American health, and medical malpractice reforms that could result from developments like these will change the relative merits of arbitration and litigation for defendants remains to be seen.

Should arbitration start to look attractive to the sector, providers can take pointed comfort from the success of nursing homes among the personal-injury defendants that profit from Privity 2.0. Residents who suffer injury in this setting are among the littlest of little guys. They left their homes because they were too infirm to care for themselves. Only rarely can they negotiate their living conditions before they move in; they go on to have even less power after they arrive. The physical frailty they came with typically worsens during their residency while their wealth declines.³⁰⁸ And yet the United States Supreme Court regards their privity of contract with institutions they name as defendants as sufficient to kill their tort claims. If nursing home residents are deemed robust enough to be held to what they or their family members signed at a stressful time, then medical malpractice plaintiffs can expect no more solicitude from the courts.³⁰⁹

C. *One More Locus for Privity 2.0 Growth*

The expansion of electronic delivery of one-sided terms of service has caused Privity 2.0 to flower. Any entity that can relay its preferred understanding of an arrangement and then gain prompt assent or the silence that courts will interpret as acceptance is well placed to say that its adversary agreed to the conditions stated in its recitation. Courts have agreed with repeat players that brief contact with verbiage on a screen put plaintiffs into an unwanted state of privity.³¹⁰

307. Darryl S. Weiman, *The Affordable Care Act and Medical Malpractice Reform*, HUFFINGTON POST (June 5, 2017), https://www.huffpost.com/entry/the-affordable-care-act-a_b_10035394 [<https://perma.cc/MF4E-CH4G>].

308. *See generally* Sidney D. Watson, *From Almshouses to Nursing Homes and Community Care: Lessons from Medicaid's History*, 26 GA. ST. L. REV. 937 (2010) (arguing that physical and financial disadvantage worsened or unallayed by moving into a nursing home rests on misunderstanding of federal health care funding).

309. The West Virginia Supreme Court tried to install some such solicitude for nursing home residents and got slapped down by the Supreme Court. *See* Mann, *supra* note 119.

310. *See* Meyer v. Uber Techs., Inc., 868 F.3d 66, 78 (2d Cir. 2017); Hancock v. AT&T Co., 701 F.3d 1248, 1257-58 (10th Cir. 2012), *cert. denied*, 569 U.S. 943 (2013); Hubbert v. Dell Corp., 835 N.E.2d 113, 121-22 (Ill. App. Ct. 2005).

Since 2020, readers of this Article will have heard the oft-repeated news that an extraordinary pandemic offers opportunity.³¹¹ This generalization applies to Privity 2.0 leadership and followership. Consistent with an older tort-reform posture that it's good to keep injured persons out of court, political figures have pushed Congress to codify tort immunity for employers against claims by employees seeking redress for COVID-19 exposure at their workplace.³¹² Regardless of how these efforts fare, expansionists can take advantage of pandemic conditions to pursue personal injury immunity using Privity 2.0's signature trait of stealth, in contrast to the debate that legislation provokes.

How exactly Privity 2.0 pandemic opportunity can proceed depends on variables to come—COVID-19 and its successor viruses will evolve, get worse, and disappear; protocols and practices become a new normal then fade—but the idea is to exploit the ubiquity of electronically delivered contracts, this time wrapping them in a health rationale. Vendors who restrict access to bounded spaces like theaters, sports arenas, amusement parks, concert halls, trade shows, members-only political rallies, and convention centers are free to demand the downloading of an app and an obedient click as conditions for entry. Should demands related to vaccination status or other health checks at the door of ticketless venues like bars and restaurants become installable, the rise of this laissez-passer could accustom patrons to accepting more of these conditions without protest, perhaps without even noticing. Waivers of recourse on which entrants tap Accept or Agree can cover more than the ostensible reason for this condition of entry.

CONCLUSION

Generations of lawyers in the United States continue to be educated in the correctness of a decision announced just over a century ago: A tort duty of care exists independent of any contract that a defendant may have made or eschewed, declared Benjamin Cardozo.³¹³ The old common law rule called privity collapsed under the weight of reasoning by the nation's greatest common law judge. What courts do, however, they can undo. Judges have quietly rebuilt the privity shelter that *MacPherson v. Buick Motor Co.* knocked down.

311. See Bishal Gyawali et al., *Covid-19 Pandemic—An Opportunity to Reduce and Eliminate Low-Value Practices in Oncology?* 6 JAMA ONCOLOGY 1693, 1694 (2020); Jeroen Kraaijenbrink, *The Bright Side of Covid-19: Seven Opportunities of the Current Pandemic*, FORBES (Mar. 23, 2020, 6:00 AM), <https://www.forbes.com/sites/jeroenkraaijenbrink/2020/03/23/the-bright-side-of-corona-seven-opportunities-of-the-current-pandemic/?sh=532b4624785c> [<https://perma.cc/BV42-2MWJ>].

312. *Congress Battles Over Liability Shields for Businesses During the COVID-19 Pandemic*, A.B.A. J. (Aug. 1, 2020, 12:10 AM), <https://www.abajournal.com/magazine/article/congress-battles-over-liability-shields-for-businesses-during-the-covid-19-pandemic> [<https://perma.cc/4SHC-XX9G>].

313. *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1051 (N.Y. 1916).

The path back to privity reported in this Article has escaped attention because it started at a remove from tort. In 1983, the United States Supreme Court found an ostensibly “liberal federal policy” that cuts off access to courts at the election of repeat players,³¹⁴ and in the ensuing decades the Court widened and deepened this shelter. Today’s Court interprets one federal statute to say that contracts can take away redress that Congress wrote into other statutes.³¹⁵

Securities, labor and employment, and antitrust rights and remedies necessarily dwindle when wrongs that a national legislature has deemed categorically significant enough to deserve attention from federal judges can get disappeared by an opaque, one-sided private contract. Alongside its kneecapping of federal statutes, the Court has also determined that the Federal Arbitration Act preempts state-level initiatives—legislation and decisional law alike—that try to limit the reach of arbitration written into form contracts before disputes arise.³¹⁶ Little of its decisional law engages directly with tort, but the Court has made it clear that its “liberal federal policy” permits repeat players to destroy personal injury claims too.³¹⁷

What makes this reach insidious is how far it travels and penetrates without being seen.³¹⁸ Privity of contract in its pre-*MacPherson* form was indefensible,³¹⁹ but it did not hide. Transparent enough to lawyers and judges (though not to injured persons), it functioned as a judge-made fence that sited large numbers of injured persons beyond the perimeter of a duty of care. In contrast, the barrier that this Article calls Privity 2.0 works by fencing people in. Not by courts and their public rules of procedure, which do their work in the light, but at the hidden initiative of private actors.

To call the reach of Privity 2.0 “insidious” is to gesture at cards that in this Article lie face up on the table: If *MacPherson v. Buick Motor Co.* came out right, then the undoing of it is a turn in the law that warrants resistance. And so this Article has taken a stance against Privity 2.0. That stance overlaps with other efforts that focus on opposition to forced arbitration and prohibitions of class actions. This landscape manifests complementary strengths of cohesion and decentralization.

314. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

315. *See supra* Section II.A.

316. *See supra* Section II.B.

317. The Court has twice approved forced arbitration for claims of physical injury suffered by elderly residents in nursing homes. *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 137 S. Ct. 1421, 1425 (2017); *Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530 (2012). All five claims in the two cases, which consolidated separate actions in Kentucky and West Virginia respectively, were for wrongful death; all five decedents were admitted to these institutions aided by relatives’ powers of attorney. Little guys don’t get littler than the frail elderly who need help from caregivers to move into their final residences.

318. *See generally* Horton, *supra* note 53.

319. *See* Gergen, *supra* note 3.

Embodying the cohesion response to forced arbitration is a bill introduced in Congress every year since 2007. The House of Representatives passed the Forced Arbitration Injustice Repeal Act for the first time since 2019.³²⁰ Its sponsors consider its odds in the Senate long but not impossible.³²¹ In its current incarnation the FAIR Act says nothing about personal injury law, but by barring pre-dispute agreements that impose arbitration of future employment, consumer, antitrust, or civil rights claims and prohibits agreements that “interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action” related to these categories of disputes,³²² it prohibits two strategies that are central to Privity 2.0. Enacted in 2022, the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 focuses on one subset of forced arbitration.³²³ This statute shows the cohesion response to a legal category that fits more closely with personal injury than does antitrust or consumer law. Bipartisan support behind it—it was advanced to the full Senate unanimously by the Senate Judiciary Committee in November 2021³²⁴—may mean that it has better prospects of enactment than the FAIR Act.

On the decentralized front, individuals and entities work against forced arbitration and restrictions on unity for vulnerable complainants. Electronic technology, an instrument that regularly imposes Privity 2.0 on the unwilling,³²⁵ also supports resistance to it: for example, one nonprofit publishes online a list of products saying whether customers can buy them without having to accede to mandatory arbitration.³²⁶ Social media served up first the problem and then the solution in 2014 when General Mills tried to force arbitration on consumers who interacted with it on Facebook; successful resistance arose on

320. Forced Arbitration Injury Repair Act (FAIR Act), H.R. 1423, 116th Cong. (2019-2020).

321. Telephone interview with Jacqui Kappler, Chief of Staff, Rep. Hank Johnson (Jan. 26, 2021).

322. H.R. 1423 § 2.

323. Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, Pub. L. No. 117-90, 136 Stat. 26 (2022); Amy B. Wang & Eugene Scott, *Biden Signs Bill Ending Forced Arbitration in Sexual Assault, Harassment Cases*, WASH. POST (Mar. 3, 2022, 1:38 PM), <https://www.washingtonpost.com/politics/2022/03/03/biden-signs-new-law-ending-forced-arbitration-sex-assault-harassment/> [https://perma.cc/JXC5-AS6K].

324. Douglas Wigdor, *Senate Committee Takes Aim at Forced Arbitration of Sexual Harassment Disputes*, FORBES (Nov. 15, 2021, 3:07 PM), <https://www.forbes.com/sites/douglas-wigdor/2021/11/15/senate-committee-takes-aim-at-forced-arbitration-of-sexual-harassment-disputes/?sh=55c6e13d17c5> [https://perma.cc/6KGU-HBM8].

325. See *supra* notes 72-73 and accompanying text.

326. Scott Medintz, *Forced Arbitration: A Clause for Concern*, CONSUMER REPS. (Jan. 30, 2020), <https://www.consumerreports.org/mandatory-binding-arbitration/forced-arbitration-clause-for-concern/#brands> [https://perma.cc/R7U4-P8PA].

screens across the country.³²⁷ Writers have since the 1990s been making a decentralized case against forced arbitration in legal scholarship,³²⁸ a project strengthened rather than weakened by occasional disagreement of interest.³²⁹ The most significant category of decentralized opposition is occasional decisional law that reads agreements prepared by repeat players to exclude rather than mandate instances of arbitration that these businesses seek to impose.³³⁰

Pluralism, diversity, and heterogeneity are controversial values in some respects,³³¹ but readers will agree that the addition of a vantage point into a decentralized conversation about experience enlarges what it joins. Separate fields of law touched by forced arbitration contribute separate perspectives to this debate. Consider consumer law and employment law, two fields in which individuals are now told to accept arbitration more often than not. Imposing arbitration on consumers—persons who experience loss of money or other deprivation in the goods and services that they buy—engages, *inter alia*, the law of telecommunications, banking, privacy, debtor-creditor, and products liability. Imposing arbitration as a sole source of redress for employees interferes not only with statutory labor and employment law but retaliation against whistleblowers, invasion of privacy (again), and

327. See Strom, *supra* note 221; Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL'Y REV. 329, 348-49 (2015) (reporting abandonment of the initiative by General Mills following consumer opposition on social media).

328. See Carboneau, *supra* note 41 and accompanying text. For more recent contributions that offer solutions, as well as documentation of the problem, see, e.g., Chandrasekher & Horton, *supra* note 150, at 61-65 (proposing an "arbitration multiplier" to augment progressive awards); Sam Cleveland, Note, *A Blueprint for States to Solve the Mandatory Arbitration Problem While Avoiding FAA Preemption*, 104 MINN. L. REV. 2515, 2549-50 (2020) (encouraging states to reform contract doctrines to benefit employees and consumers while taking care to apply these doctrines to contracts outside of arbitration); Emma Silberstein, Note, *Class Arbitration Waivers Cannot Be Found Unconscionable: A Pervasive and Common "Mis-Conception"*, 116 NW. U. L. REV. 875, 909-10 (2021) (arguing that a robust understanding of unconscionability can invalidate class arbitration waivers in contracts).

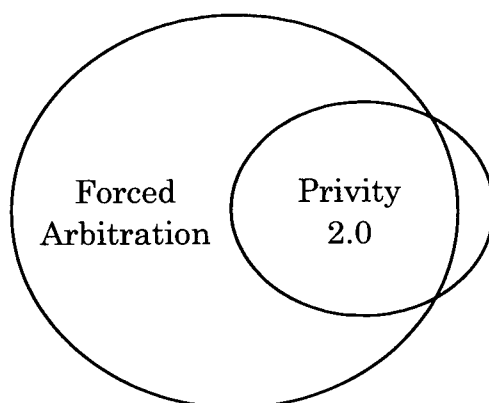
329. See Ware, *supra* note 26, at 32; Brazil, *supra* note 145, at 278.

330. A diverse array of courts have issued decisions against forced arbitration. See *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938 (1995) (ruling in favor of an individual on the question of arbitrability of a provision); *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019) (providing another exception to the general rule of forced arbitration in the Supreme Court); *Carrillo v. ROICOM USA, LLC*, 486 F. Supp. 3d 1052 (W.D. Tex. 2020) (ruling in favor of an employee on the ground of procedural unconscionability); *supra* notes 266-67 and accompanying text (discussing a decision by the Philadelphia Court of Common Pleas). Especially pertinent to Privity 2.0 is *Doe v. Hallmark Partners, LP*, 227 So. 3d 1052 (Miss. 2017), an action seeking redress for severe physical injuries, where the Supreme Court of Mississippi held that a tenant's agreement to arbitrate claims related to "occupancy and leasing" did not force into arbitration her claims against her landlord for negligent security in the apartment parking lot. *Id.* at 1057-58.

331. See generally WILLIAM A. GALSTON, *LIBERAL PLURALISM: THE IMPLICATIONS OF VALUE PLURALISM FOR POLITICAL THEORY AND PRACTICE* (2002) (defending pluralism in political theory while acknowledging its controversies).

breaches of contract. A Venn diagram with forced arbitration in one circle thus can be drawn, *mutatis mutandis*, for any category of legal claim that repeat players succeed in fending off.

Privity 2.0, a term that this Article has coined to reference the destruction of judicial redress for personal injury, occupies the smaller circle in this Venn diagram, but not all of Privity 2.0 lies in the bigger space of forced arbitration:



Imposing arbitration is a powerful move for Privity 2.0 but not its only move. The slice of its circle outside Forced Arbitration in this diagram includes a tactic. Repeat players can extinguish out their duty of care not only by making arbitration the sole dispute resolution mechanism available to what this Article called little guys, but also by pressing consumers to agree in a waiver to renounce every legal remedy.³³²

In addition to including a tactic that resembles forced arbitration but is different, personal injury brings substantive priorities to the wider debate about forced arbitration. Of particular import, I think, is the role of knowledge in the resolution of this type of dispute. More than other fields that get relegated to forced arbitration, negligence law entrusts decisionmaking to lay persons. In the United States, reasonable care, or breach of duty, is a quintessential jury question.³³³ Jurors receive direction from the almost equally unexalted trial judge

332. See Martins et al., *supra* note 29, at 1267-68 (describing the Waiver Society project, an initiative that gathers specimens of this technique). The distinction between the two is meaningful. Privity 2.0 rests on, and harnesses itself to, decisional law that celebrates extrajudicial dispute resolution as an affirmative good. Scattering waivers over its transactions is cheaper for Team Defendant, and preemptive of more liability; being connected to judicial approval makes Privity 2.0 abler to deliver additional returns on this investment.

333. Mark P. Gergen, *The Jury's Role in Determining Normative Issues in the Common Law*, 68 *FORDHAM L. REV.* 407, 430-32 (1999) (examining the line between duty in negligence law, an issue assigned to judges, and breach, assigned to juries).

who explains state law governing the claim. But while it empowers the non-specialist, this field of law never honors ignorance. Negligence law esteems knowledge and generates more of it.

Litigants win or lose based on what they know, or can learn, about matters of fact. Arbitration, which permits discovery only to the extent that repeat players tolerate it in their contracts,³³⁴ cuts off knowledge before it can accrue. By taking away access to the courts from injured persons, Privity 2.0 diminishes what litigants and factfinders can understand.

Knowledge becomes more imperiled by the losses to decisional law that Privity 2.0 occasions. “To study torts,” as two prominent scholars describe their expertise, “is to learn what sort of conduct our legal system defines as wrongfully injurious toward another such that, when committed, the victim is entitled to exact something from the wrongdoer.”³³⁵ Especially because so little of it can be looked up in regulations or statutory codes, this field of law needs to know what injured persons complain about and how they fared when they protested.

Personal injury law evolves gradually but is never static, and so knowing what it provides today does not assure knowing the same thing tomorrow. This Article has shown the urgency of change in a slow-moving field by contrasting two types of privity. This doctrine in its original iteration, now undone by the courts, deprived hurt persons of redress for breach of the tort duty of care. Its successor continues that deprivation and adds the extra harm of concealing what private actors direct the law to provide for their own gain. Privity 2.0 too ought to be undone.

334. See Thornburg, *supra* note 42 and accompanying text.

335. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 919 (2010).

