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The Corporation as Courthouse

Yale Journal on Regulation

Rory Van Loo[†]

Despite the considerable attention paid to mandatory arbitration, few consumer disputes ever reach arbitration. By contrast, institutions such as Apple's customer service department handle hundreds of millions of disputes annually. This Article argues that understanding businesses' internal dispute processes is crucial to diagnosing consumers' procedural needs. Moreover, businesses' internal processes interact with a larger system of private actors. These actors include ratings websites that mete out reputational sanctions. The system also includes other corporations linked to the transaction, such as when American Express adjudicates a contested sale between a shopper and Home Depot. This vast private order offers promise to advance societal dispute resolution goals by providing large-scale redress and preserving relationships in ways that more formal institutions cannot. At the same time, businesses closely guard their internal processes as trade secrets. Out of public view, they are pushing the bounds of dispute resolution by, for example, considering factors such as a customer's social network in deciding how to handle a complaint. If public intervention is needed, courts are at best only part of the solution. Instead, the frontier of consumer dispute resolution lies beyond arbitration and class actions in agency supervision of collaborative negotiations between consumers and corporations.

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Introduction

A vigorous debate is underway about privatization through mandatory arbitration. One group thinks that it is an efficient mode of dispute resolution.¹ Another group believes that access to courts—particularly to aggregate litigation—is essential, and that corporations use mandatory arbitration to “erase” consumer rights.² Although these discussions provide valuable insights, arbitrators rarely handle consumer disputes. By way of illustration, the American Arbitration Association—the leading non-profit provider of arbitration—adjudicates fewer than 1,500 consumer cases annually.³ In

1. See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (“The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”).

2. See, e.g., 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, 2811, 2893 (2015).

3. See David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 91 (2015) (finding 1,075 consumer cases annually are decided by the AAA). Companies also rarely use contract terms to customize public dispute resolution processes. See David A. Hoffman, *Whither Bespoke Procedure?*, 2014 U. ILL. L. REV. 389, 394 (2014) (“[E]ven in circumstances where we would expect them to, parties almost never use contract terms to vary their post-dispute procedural contests.”).

contrast, the online marketplace eBay alone internally handles 60 million disputes each year between buyers and sellers.⁴ Comcast's customer service department has over a million customer touch points *each day*.⁵ The main institutional actor in the private consumer legal system is not the arbitration tribunal, but the consumer-facing corporation.⁶

Although legal scholars have written thousands of pages about arbitration in recent years, they have largely ignored businesses' internal processes for resolving consumer disputes.⁷ Yet these unexamined processes are pushing the bounds of dispute resolution beyond anything seen in courts or arbitration. The result sometimes conflicts with traditional notions of justice. For example, Bank of America recently developed big data software that considers the wealth of family members in deciding how to handle a customer's request for a fee waiver.⁸ At the same time, new internal business processes are advancing societal goals in numerous ways, such as by making it ever more possible to obtain low-cost redress that preserves the relationship between the parties. Rolled out over hundreds of millions of disputes each year, the design of companies' internal processes can influence efficiency, the distribution of wealth, and fairness on a massive scale.

This Article's main aim is to contribute an institutional account of how companies resolve the most common type of consumer dispute—small-value transactional disputes of a few hundred dollars or less.⁹ Scholars have produced

4. See Louis F. Del Duca et al., *Ebay's De Facto Low Value High Volume Resolution Process: Lessons and Best Practices for ODR Systems Designers*, 6 Y.B. ON ARB. & MEDIATION 204, 205 (2014) (reporting sixty million disputes handled by eBay annually).

5. David Segal, *When a Company Doesn't Sound Like a Broken Record*, N.Y. TIMES, Oct. 11, 2014, at B5.

6. Scholars have made a related broader point, arguing without quantifying the issue that there is a need to pay greater attention to organizations' internal processes for handling a variety of disputes, such as those between employee and employer, citizen and government, and consumer and business. See, e.g., Laura Nader, *Disputing Without the Force of Law*, 88 YALE L.J. 998, 999-1000 (1979) (noting that scholars seldom focus on complaints by citizens to corporations and government bureaucracies).

7. Existing proposals for public intervention—which mostly focus on providing greater access to public courts, or regulating arbitration—do not speak to the question of how to shape corporations' internal processes. These proposals often assume that “businesses can escape all accountability for causing small harms if they can escape class actions.” See Brian T. Fitzpatrick, *The End of Class Actions?*, 57 ARIZ. L. REV. 161, 166 (2015). See also Resnik, *supra* note 2, at 2921 (exploring ways to allow public court review of arbitration); Nader, *supra* note 6, at 1000 (concluding “access to the legal system is crucial if extralegal processes are ever to provide effective relief for consumer and citizen complaints.”).

8. See U.S. Patent No. 7797212 (filed Oct 31, 2006), <http://www.google.com/patents/US7797212> (describing Bank of America's automated refund tool).

9. The average consumer transaction is for less than \$100. See FED. RESERVE, 2013 FEDERAL RESERVE PAYMENTS STUDY (Dec. 19, 2013), https://www.frb services.org/files/communications/pdf/research/2013_payments_study_summary.pdf, at Exhibit 2 (estimating the average transaction value in 2012 at \$94 for credit cards and \$39 for debit cards); Barbara Bennett et al., *Cash Continues To Play a Key Role in Consumer Spending: Evidence from the Diary of Consumer Payment Choice*, FED. RES. BANK OF S.F. (April 2014), <http://www.frb sf.org/cash/publications/fed-notes/2014/april/cash-consumer-spending-payment-diary> (reporting the average amount of a cash consumer transaction as \$21). Disputes are more likely to be

in-depth institutional analyses of related internal corporate dispute resolution, such as in employment proceedings¹⁰ and tort settlement.¹¹ The literature lacks anything similar for small-value transactional disputes. For these, unlike in contexts typically studied, the corporation is the closest thing to a courthouse that most consumers will encounter—although just how close depends on the context.¹²

Scholars have produced analyses valuable to this project. For example, they have discussed how the ultimate outcome of the consumer-business dispute often deviates from the contract.¹³ This particular feature fits into a broader contract law theory of the customer service department as a site of displaced bargaining about the less salient terms of adhesive contracts—a kind of modern “analog to the village market . . . adapted to the needs of a mass-contracting age.”¹⁴ Instead of inefficiently requiring the vast majority of parties

initiated for higher transaction values, but even so the typical amount in dispute is low. For example, eBay’s 60 million annual disputes are for an average of \$70 to \$100 in value. *See* Del Duca et al., *supra* note 4, at 205. This is only slightly higher than the estimated average transaction at eBay of about \$55 in 2013. *See* Sumit Roy, *Average Selling Price of Merchandise on eBay*, ONLINE MARKETING TRENDS (March 2011), <http://www.onlinemarketing-trends.com/2011/03/average-selling-price-of-merchandise-on.html>. Myriam Gilles and Gary Friedman have in an analogous context asserted that consumer cases include those in banking and insurance, but exclude “employment, antitrust, and securities actions, and virtually all mass tort class actions.” *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 104 n.5 (2006).

10. *See, e.g.*, Lauren B. Edelman & Mark C. Suchman, *When the “Haves” Hold Court: Speculations on the Organizational Internalization of Law*, 33 L. & SOC’Y REV. 941, 944 (1999) (focusing on employment law in discussing how organizations internalize legal disputes).

11. *See, e.g.*, Nora Freeman Engstrom, *Sunlight and Settlement Mills*, 86 N.Y.U. L. REV. 805, 805 (2011); Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. 129, 130 (2015).

12. The metaphor of the corporation as courthouse fits better with some of its dispute resolution roles than others. For example, the processes in which one business is adjudicating a dispute between another business and a consumer more closely approximates a public trial than does the customer service department handling a complaint. However, even in the customer service department, business designers aim to create the perception of procedural justice and a neutral decision maker. Thus, analyses traditionally reserved for institutions such as public courts may be more relevant than commonly assumed. *See infra* Part I.

13. *See* Lisa Bernstein & Hagay Volovksy, *Comment on the Work of Florencia Marotta-Wurgler: Not What You Wanted To Know: The Real Deal and the Paper Deal in Consumer Contracts*, 11 JERUSALEM REV. L. STUD. 1-4 (forthcoming, 2016) (arguing for greater attention to the substantive deal consumers actually get rather than focusing solely on the terms of the contract, which companies often ignore in the “real deal”); Florencia Marotta-Wurgler, *Are ‘Pay Now, Terms Later’ Contracts Worse for Buyers? Evidence from Software License Agreements*, 38 J. LEGAL STUD. 309, 309 (2009) (finding that software publishers who reveal dispute resolution terms later offer no more one-sided terms than those who reveal the terms in advance); Nader, *supra* note 6, at 1012-14 (describing the consumer complaint process as manipulating consumers but generally giving persistent consumers what they request); Amy J. Schmitz, *Access to Consumer Remedies in the Squeaky Wheel System*, 39 PEPP. L. REV. 279 (2012) (concluding that corporations who violate the law use their customer service departments to appease consumers who complain for the strategic purpose of being able to continue violating other consumers’ rights); Jason Scott Johnston, *The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers*, 104 MICH. L. REV. 857, 865 (2006) (concluding corporations’ cooperation with consumers who complain can be viewed as efficient).

14. *See* DANIEL MARKOVITS, CONTRACT LAW AND LEGAL METHODS 1316-19 (2012) (describing customer service department interactions with consumers over contractual matters as

who will never have a dispute to negotiate about each term before the initial transaction is completed, these processes theoretically allow consumers and corporations to negotiate about those terms only as necessary when a dispute arises.¹⁵

This Article builds on that literature to describe a more comprehensive dispute system for consumers.¹⁶ In this largely private order, the corporation plays three key dispute resolution roles. The first is the customer service department handling disputes about its own products. The literature has not only failed to grasp the scale of this institution, but has yet to identify important design features. For example, corporations are increasingly finding ways to associate their customer service departments with components of procedural justice that legal scholars have long identified as important for legitimacy elsewhere, such as for law enforcement. These include ensuring people feel like they have a voice, are treated with respect, and have their disputes handled by a trustworthy decision maker.¹⁷

The second main dispute resolution role is largely absent from the literature: when the corporation serves as a judge for disputes between its own consumers and independent, third-party sellers. These *network trials* have exploded in recent years due to both financial and online intermediation. In the financial context, between fifty million and one hundred million times each year credit card companies such as American Express adjudicate disputes between a consumer and the merchant who sold the product, such as Home Depot or Walmart.¹⁸ Also, Internet companies such as eBay, Amazon, and Uber increasingly adjudicate disputes between buyers and sellers or between drivers and passengers.¹⁹ Because this form of adjudication involves an

“displaced bargaining”). In a related strand of scholarship about business deals, Stewart Macaulay and others have argued that the contract often does not reflect the actual terms of an agreement. *See, e.g.,* Stewart Macaulay, *An Empirical View of Contract*, 1985 WIS. L. REV. 465, 467 (1985).

15. *See* Johnston, *supra* note 13, at 865. According to this view, courts should approach customer service department interactions as negotiations about what the contract terms should be rather than disputes about what the contract terms are. *See* MARKOVITS, *supra* note 14, at 1319.

16. A system can be seen as a series of interlocking processes. *See* NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* 3 (2013).

17. *See infra* section I.B.2. These elements have been found to matter more than substantive outcomes for peoples’ perception of authorities’ legitimacy in other legal contexts, such as in criminal law. *See* TOM TYLER, *WHY PEOPLE OBEY THE LAW* (2006).

18. *See, e.g.,* SUMIT SOOD & JOSEPH PINIPE, WIPRO, *CARD DISPUTES AND CHARGEBACKS* 5, <https://www.wipro.com/documents/card-disputes-and-chargebacks.pdf> (describing a chargeback band between .05 and .1 percent of all transactions as “a conservative range.”). A chargeback rate of .05% to .1% would amount to 50 million to 100 million chargebacks requested annually. *See* FED. RES. SYSTEM, *THE 2013 FEDERAL RESERVE PAYMENTS STUDY*, at Exhibits 4, 8, 10, (Dec. 19, 2013), https://www.frbservices.org/files/communications/pdf/research/2013_payments_study_summary.pdf (estimating 122.8 billion noncash payments in 2012, excluding wire transfers and checks, the vast majority of which are consumer transactions). A large portion of these are fraud-related (unauthorized use of credit card). *See id.*

19. *See supra* note 4; Colin Rule, *Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution*,

intermediary with an interest in preserving the relationship with both sides, it raises a distinct set of questions from those raised by arbitration and the traditional customer service department.²⁰

The corporation plays a third key dispute resolution role as a reputation-based enforcement mechanism. Legal scholars have in a number of contexts, such as among diamond merchants or Shasta County cattle ranchers, documented how reputation sanctions enable the establishment of private orders.²¹ In those contexts, any party who violates a norm suffers such harmful reputational damage from gossip networks or other social ties that transgressions rarely occur, and more formal enforcement mechanisms are seldom used.²² The literature lacks any such systems analysis for consumer disputes, which are assumed to work differently due to a larger sophistication imbalance between consumers and corporations, and due to more distant relationships, which make reputation-based sanctions less powerful.²³ However, in the consumer context information websites are filling the enforcement role that gossip networks and social ties play in commerce between businesses. When dissatisfied, consumers today can reach large audiences through outlets such as Twitter, Facebook, Yelp, and Ripoff Report.²⁴

34 U. ARK. LITTLE ROCK L. REV. 767, 767 (2012) (describing eBay and PayPal's online dispute system).

20. See *infra* section I.C.

21. See Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions*, 99 MICH. L. REV. 1724, 1762 (2001) (“[T]o fully understand the reasons that the industry has found it advantageous to opt out of the legal system, it is useful to consider how the system as a whole is structured to create the conditions under which cooperative contracting relationships are most likely to arise and endure.”) [hereinafter Bernstein, *Cotton Industry*]; Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115, 126 (1992) (examining the “dispute resolution system in the diamond industry. . .”) [hereinafter Bernstein, *Diamond Industry*]; Lisa Bernstein, *Beyond Relational Contracts: Social Capital and Network Governance in Procurement Contracts*, 7 J. LEGAL ANALYSIS (Winter 2015) (concluding that large industrial buyers have “structured their relationships with their suppliers in ways that are designed . . . to make the legal system largely irrelevant to their interactions.”) [hereinafter Bernstein, *Procurement Contracts*]; Robert Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623, 677 (1986) (finding that when wandering cattle damage land, ranchers and farmers neglect the remedies provided by trespass law and instead resolve disputes in accordance with neighborliness.). But see Barak Richman, *An Autopsy of Cooperation: Diamond Dealers and the Limits of Trust-Based Exchange*, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2764470 (unpublished manuscript) (documenting a breakdown of trust in the diamond industry).

22. See, e.g., Bernstein, *Cotton Industry*, *supra* note 21, at 1724-25, 1751-52 (discussing the importance of information intermediaries, trade associations, gossip networks, and social ties in the cotton industry).

23. See, e.g., Schmitz, *supra* note 13, at 283 (contrasting the balanced sophistication in business-to-business contexts with consumers' lack of understanding in consumer contexts). Some scholars have recognized the potential for reputation websites to improve markets and protect consumers. See, e.g., Lior Jacob Strahilevitz, *Reputation Nation: Law in an Era of Ubiquitous Personal Information*, 102 NW. U. L. REV. 1667, 1709 (2008) (“Imagine if every plumber, every manufactured product . . . and every taxi driver was rated . . .”). However, scholars have understudied the link to the private consumer legal system.

24. See *infra* section I.C.

Thus, to understand privatized dispute resolution, it is important to go beyond individual mechanisms such as arbitration. The corporation's various roles—including as site of contractual renegotiation, network judge, and reputation enforcer—provide the backbone for a private consumer dispute system. Because the literature lacks a comprehensive account of this system's features, it necessarily lacks a comprehensive assessment of its promises and pitfalls. The more promising aspects are low-cost access to redress, direct accountability, and collaborative dispute resolution. Its pitfalls include a lack of transparency, the potential to exacerbate inequality, and susceptibility to market failures.

These promises and pitfalls raise the question of what reforms, if any, are needed. Existing proposals to reform consumer dispute resolution focus on arbitration or courts. This Article's analysis indicates an important possibility is missing from those conversations: administrative agency regulation of businesses' dispute functions. Unlike most proposals, this approach emphasizes consumer-facing companies as the core institutional actors, and then asks how best to improve them. Companies must continue to play a central dispute resolution role because it would simply be impractical for courts or arbitrators to handle hundreds of millions of small value contractual consumer disputes annually—and particularly at the low costs at which dispute resolution becomes feasible for small-value claims.²⁵

The inevitability of mass internal corporate dispute resolution distinguishes this Article's focus from much of the rich literature arguing either for alternative dispute resolution or “against settlement.”²⁶ Those conversations largely address contexts in which cases would otherwise be handled in courts, which raises distinct issues such as the erosion of the substantive law.²⁷ For small-value contractual disputes, consumers and corporations rarely bargain in the shadow of the law in the first place.²⁸ Instead, they largely bargain in the shadow of norms.²⁹

25. See *infra* section III.A. The best hope for courts or arbitration-like entities handling small-value contractual disputes would be through some form of online dispute resolution. See, e.g., Schmitz, *supra* note 19, at 325 (calling on policy makers to create an online dispute resolution processes for consumer claims). By introducing an additional intermediary, online dispute resolution would still risk undermining some important features of the existing system, such as the greater efficiency possible by not introducing an additional third party.

26. See, e.g., Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing against those who seek to promote settlement over adjudication).

27. See J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3052 (2015) (arguing that the rise of arbitration has deprived the legal system of cases crucial for developing the law).

28. Although the law has a small impact on most small value contractual disputes, the analysis varies by industry. Both the law and intermediary dispute resolution institutions may play a more important role in shaping consumer-business disputes in some industries, such as insurance. See Shaubin Tatesh, *Rule-Intermediaries in Action: How State and Business Stakeholders Influence the Meaning of Consumer Rights in Regulatory Governance Arrangements*, 37 L. & POL'Y 1 (2015). The shadow of the law metaphor comes from Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the*

Another key component of this policy implication is that the consumer agency plays the central public role. Instead of using the blunt instrument of public courts, agencies can leverage economic expertise and industry-specific knowledge to tailor intervention. They can also do so more efficiently. Agencies are thus best situated to address the current system's pitfalls while preserving its benefits.

The Article proceeds in four parts. Part I draws on new and existing empirical data to explain the major design features of business-consumer dispute processes.³⁰ These features include cooperative settlement, procedural justice, tailored outcomes, and procedural experimentalism. Part II examines the promises and pitfalls of the corporation as courthouse, many of which vary by market. Part III then assesses the current public backdrop for the private consumer legal system. Consumer agencies play the most important public role, and they have significant benefits compared to courts. Yet heavy reliance on regulation also brings risks. Part IV discusses policy implications. Because corporations' dispute processes are so important to consumer justice, yet so little is known about how decisions are made, regulators should stay informed about those processes. Also, given that regulatory inadequacies and market failures are perhaps unavoidable in some industries, society might benefit from tailored class actions that become available only when other mechanisms fail—a kind of “sunrise class action.”³¹

I. Overview of the Corporation as Courthouse

Corporations are increasingly assuming roles associated with courthouses. They design procedures and shape the de facto substantive rules governing the vast majority of consumer disputes. In many instances they adjudicate these disputes as third parties. Just as Frank Sander articulated a public multi-door courthouse with litigation as one of many paths to dispute resolution, the web

Shadow of the Law: The Case of Divorce, 88 YALE L.J. 950, 997 (1979) (concluding that legal entitlements substantially affect negotiated outcomes).

29. These norms are enforced by market mechanisms, including reputation-based sanctions. *See infra* Part I.D. & II.A.4. This does not mean the law is irrelevant. The law and the possibility that regulators might enforce it can still influence businesses' conduct. *See infra* Part III.A.

30. New information was gained from interviews, patents filed by companies documenting their dispute processes, and complaints filed by consumers on the Internet. Thirty-seven interviews were conducted of current and former employees in consumer corporations, federal consumer agencies, consulting firms, and private sector dispute resolution professionals. The interviewees were selected using snowball sampling. This method may lead to interviews reflecting unrepresentative views. Also, as with any interview, these sources are susceptible to limited memory and any number of biases. Actual initials are used when permission was given, and initials are used to preserve confidentiality. Additional sources include online consumer reviews, empirical studies of complaint departments, court documents of cases related to complaint handling, and interviews reported in the media.

31. *See* text accompanying note 329.

of consumer corporations also offer many paths.³² This Part provides an institutional analysis of these overlooked internal processes that account for such a large part of everyday consumer justice.

A. The Marketplace for Dispute Resolution

Executives pay close attention to the law when designing products and services, and strive to write adhesive contracts in their favor.³³ However, once a consumer calls to complain, the corporation assumes that the consumer has no credible legal claim.³⁴ From that point on, complaint decisions are made based on maximizing profit (or minimizing loss).³⁵ Thus, the design and execution of corporations' internal complaint systems are largely disconnected from legal rights.

In many markets, this corporate profit analysis is driving a business paradigm shift toward building dispute processes that satisfy customers. Customer satisfaction has long been linked to financial performance.³⁶ Many scholars have also concluded that how a company handles its complaints influences overall customer satisfaction.³⁷ This indirect support suggesting that effective complaint handling is profitable has in recent years led to findings that a firm's complaint handling directly predicts profitability and stock performance.³⁸ Although it is difficult to isolate why effective complaint-handling might be so profitable, the research suggests that retaining customers and promoting word of mouth are both important.³⁹

32. See, e.g., Robert C. Bordone, *Fitting the Ethics to the Forum: A Proposal for Process-Enabling Ethical Codes*, 21 OHIO ST. J. ON DISP. RESOL. 1 (2005) (discussing Frank Sander's proposal of a multi-door courthouse, which includes conciliation, mediation and arbitration among other options). The metaphor of the corporation as courthouse has a similarly expansive view of what a courthouse may offer to society.

33. See, e.g., Florencia Marotta-Wurgler & Robert Taylor, *Set in Stone? Change and Innovation in Consumer Standard-Form Contracts*, 88 N.Y.U. L. REV. 240, 240 (2013) (empirically finding that the average software contract became more pro-seller between 2003 and 2010).

34. Interview with N.B. (June 12, 2015) (former customer service executive of large bank describing approach to handling customer complaints).

35. See, e.g., Merlin Stone, *Literature Review on Complaints Management*, 18 J. DATABASE MARKETING & CUSTOMER STRATEGY MGMT. 108, 117 (2011).

36. See Xueming Luo and Christian Homburg, *Satisfaction, Complaint, and the Stock Value Gap*, 72 J. MARKETING. 29, 29 (2013) (reviewing the literature suggesting customer satisfaction is linked to companies' cash flows, the ratio of market value to replacement value of assets, and excess stock return).

37. See, e.g., Christian Homburg & Andreas Furst, *How Organizational Complaint Handling Drives Customer Loyalty: An Analysis of the Mechanistic and the Organic Approach*, 69 J. MARKETING, 95, 96-97 (2005); Stone, *supra* note 35, at 113 (concluding it is not the original service failure that most determines overall dissatisfaction, but how the company handles the dispute once the failure has arisen).

38. See, e.g., Homburg & Furst, *supra* note 37, at 95 (citing studies indicating that the return on investment for complaint management can be above 100%); Luo & Homburg, *supra* note 36, at 41 ("A direct implication of our study is that though retaining satisfied customers is critical, handling complaining customers may help even more in optimizing firms' stock value.").

39. See Stone, *supra* note 35, at 112-13 (discussing data suggesting poor service and handling of problems explains half of customer switching to competitors and noting customers respond

This literature has led a chorus of academics and consultants to urge businesses to increase profits by improving their complaint-handling processes. McKinsey & Co., which advises many of the world's largest consumer corporations, has broadly concluded that its clients financially benefit from prioritizing customers' problems over what seem to be the immediate sales interests of the firm.⁴⁰ Businesses are changing their behavior accordingly.⁴¹ eBay, a rare company that has shared the results of such changed behavior publicly, found that effective dispute resolution drove repeat customer business.⁴²

The strong empirical case for designing internal grievance processes, and the evidence of large-scale monetary investment in those processes, contradicts what millions of consumers experience every day: complaining to a corporation is often frustrating.⁴³ Sixty-eight percent of households experienced customer rage in a recent one-year period.⁴⁴ While some dissatisfaction is inevitable, the consensus among academics and industry experts is that companies often do a poor job of resolving disputes.⁴⁵ By some measures, companies do not resolve disputes effectively half of the time.⁴⁶

How are these two perspectives reconciled? Some commentators have concluded that companies design dispute processes to ensure that consumers must work hard to obtain redress, such as by purposefully institutionalizing delays, or constructing "good-cop bad-cop" routines.⁴⁷ To be sure, in certain

to dissatisfaction with complaint handling by negative word-of-mouth); Mohammad Faryabi et al., *The Relationship Continuity Model and Customer Loyalty in The Banking Industry: A Case Study of the Maskan Bank of Iran*, 14 J. RELATIONSHIP MARKETING 37 (2015) (using a hierarchical regression model to conclude customer continuity is related to conflict resolution).

40. Marc Beaujean et al., *The 'Moment of Truth' in Customer Service*, MCKINSEY Q., Feb. 2006 (finding that after a positive dispute resolution experience 85 percent of consumers spent more at the company, while after a negative experience 70 percent spent less). See also Luo & Homburg, *supra* note 36, at 42 (recommending based on empirical research that companies establish "[a] companywide financial and strategic environment" that promotes consumer satisfaction in complaint handling).

41. Christine Crandell, *Customer Experience: Is It The Chicken or Egg?*, FORBES (Jan. 21, 2013), <http://www.forbes.com/sites/christinecrandell/2013/01/21/customer-experience-is-it-the-chicken-or-egg/> ("Companies are starting to see the light. They are embracing [customer experience as a competitive differentiator].")

42. See Rule, *supra* note 19, at 767 ("These results . . . offer hard evidence of economic benefits that can be gleaned from . . . effective redress processes.").

43. See DEBBIE FREEMAN, *New Customer-Rage Study Out for Holiday Shopping Season*, ARIZ. ST. U., (Nov. 26, 2013), <https://wpcarey.asu.edu/news-releases/2013-11-26/new-customer-rage-study-out-holiday-shopping-season> (finding widespread customer "rage").

44. See *id.*

45. Homburg & Furst, *supra* note 37, at 95 (reviewing the literature and concluding that "[t]here is ample evidence that many companies do not handle complaints effectively.").

46. See Hooman Estelami, *Competitive and Procedural Determinants of Delight and Disappointment in Consumer Complaint Outcomes*, 2 J. SERV. RES. 285, 287 (2000).

47. See, e.g., Schmitz, *supra* note 13, at 289.

industries, such as concentrated cable and Internet markets that leave consumers few options, customer satisfaction may matter less.⁴⁸

However, the purposeful creation of frustrating or unfair complaint processes is likely exaggerated. Quite often dissatisfaction with complaint handling may simply be due to two underappreciated factors: the propriety of the company's actions or corporate incompetence. Consumers sometimes complain about practices that are not only legal, but conform to most consumers' sense of fairness.⁴⁹ The existence of frustrated consumers does not always mean that there has been improper complaint handling.

Incompetence in corporations begins with inept profitability analyses of complaint management.⁵⁰ A focus on short-term revenues, rather than on the lifetime value of the customer, causes many firms to underemphasize the solving of customers' problems.⁵¹ Modern corporations are so large, and dispute resolution is so complicated, that creating effective processes can require a level of skill and resources akin to launching a new brand.⁵² While the costs associated with dispute resolution—such as for employee salaries, information technologies, and consumer refunds—are immediate budget line items, the revenues from customer retention and avoiding negative word-of-mouth are blended into general revenues over a longer time horizon.⁵³ The benefits of dispute resolution are thus less salient than the costs. This complicates internal advocacy efforts by customer service professionals—who are only one of many internal-to-the-firm interest groups—to obtain the necessary leadership buy-in.

Moreover, even when executives are fully aware, designing dispute systems is challenging.⁵⁴ And even if the design is flawless, complaint handling requires subtle front-line and managerial interpersonal skills and support that are not readily found or taught.⁵⁵ Like any product launch, despite the

48. A monopolist does, however, have an incentive to maximize value to consumers in order to get the greatest surplus from which to extract monopoly rent. *See infra* Part II.B.4.

49. *See, e.g.*, Katherine Porter, *The Complaint Conundrum: Thoughts on the CFPB Complaint Mechanism*, 7 BROOK. J. CORP. FIN. & COM. L. 57, 78 (2012) ("Dissatisfied consumers can be widespread in lawful industries . . .").

50. *See* Torben Hansen et al., *Managing Consumer Complaints: Differences and Similarities Among Heterogeneous Retailers*, 38 INT'L J. RETAIL & DISTRIBUTION MGMT. 6, 9 (2010).

51. Beaujean et al., *supra* note 40.

52. *See* Hansen et al., *supra* note 50, at 9.

53. *See* Don Charlett et al., *How Damaging Is Negative Word of Mouth?*, 6 MARKETING BULL. 42 (1995) (concluding managers underestimate the costs of negative word-of-mouth).

54. *See* Stone, *supra* note 35, at 113-14 ("Even the best service organizations will find it hard to provide highly effective recoveries for every service failure.").

55. Beaujean et al., *supra* note 40 (discussing how one bank found that an important driver of its underperforming branches was frontline employees' ineffective problem-solving); Hansen et al., *supra* note 50, at 9; Christine James, *Confessions of a Fortune 500 Customer Service Rep*,

organization's best efforts, dispute resolution initiatives may fall short of their targets.

It is thus important to divorce incompetence from intention. If companies are in the midst of a paradigm shift with respect to complaint resolution, corporations would be expected to head toward more consumer-friendly systems as awareness grows and as they undertake the often slow and difficult task of organizational change.⁵⁶ A review of the systems being designed inside corporations, discussed in the following section, suggests this shift is occurring in many markets.

B. Design Features of Internal Processes

The strong empirical link between complaint resolution and profits has prompted companies to invest increasingly in resolving disputes.⁵⁷ Although practices inevitably vary across industries and institutions,⁵⁸ it is possible to identify some general features.

1. Settlement over Adjudication

As in business-to-business private legal systems,⁵⁹ few consumer disputes are ever litigated or ever involve lawyers. Corporations instead handle disputes through settlement. Settlement is preferable to formal adjudication—such as arbitration or litigation—because it leads to higher satisfaction and costs less.⁶⁰

Companies promote settlement both substantively and procedurally. Substantively, companies facilitate settlement by negotiating the contractual relationship rather than by attempting to enforce their contractual rights.⁶¹ In a

-service-rep-christine-james (quoting a Fortune 500 customer service representative as saying some representatives “[c]are but they are in the minority If you want to cancel I will try to save you, but only because it’s my job.”).

56. Competition would be expected to “provide a stimulus to improve the quality of judicial services offered.” See Jens Dammann & Henry Hansmann, *Globalizing Commercial Litigation*, 94 CORNELL L. REV. 1, 12 (2008) (proposing in an analogous context “a global market for judicial services in contract litigation.”).

57. See, e.g., Crandell, *supra* note 41 (noting that companies are becoming aware that improving customers’ experiences pays off).

58. See Hansen et al., *supra* note 50, at 6.

59. See, e.g., Bernstein, *Diamond Industry*, *supra* note 21, at 115.

60. The average up-front costs to consumers are about \$100 for claims of less than \$10,000. See Rule, *supra* note 19, at 776 (concluding buyers were more likely to shop after reaching a less favorable but amicable settlement than when they won a full refund through eBay’s adjudication); Christopher R. Drahozal & Samantha Zyontz, *An Empirical Study of AAA Consumer Arbitration*, 25 OHIO ST. J. ON DISP. RESOL. 843, 843 (2010) (finding average costs to consumers of \$100 in arbitration). More broadly, the law also encourages settlement in commercial contexts. The Uniform Commercial Code, for example, promotes settlements and compromise. See Macaulay, *supra* note 14, at 469.

61. Daniel Markovits has argued customer service departments are better theorized as a negotiation-based rather than adjudication-based model of customer service. See MARKOVITS, *supra* note 14, at 1317-1320.

variety of industries, businesses regularly ignore their strong legal position and make concessions to which the consumer is not legally entitled.⁶² Every Hampton Inn employee can grant one free stay per complaint, while the Ritz-Carlton permits every employee to spend \$2,000 to satisfy a guest.⁶³ Close to nine out of ten consumers who asked their credit card company for a fee waiver after a late payment received it, even though the issuer is contractually entitled to collect.⁶⁴

Procedurally, corporations promote settlement by seeking to enable the consumer to complain easily through a variety of channels. Consumers have numerous direct entry points: calling, chatting online, emailing executives, or visiting a physical branch. In recent years, companies have expanded consumers' ease of access to the settlement process by developing social media departments. Resolution specialists in these departments monitor various websites such as Twitter and Yelp, and directly reach out to discontented consumers.⁶⁵

Wherever the consumer interfaces—whether in the legal department, the corporation's ombud, or elsewhere—the overriding goal is to turn the complaint into a collaborative discussion. For example, after purchasing an item from Amazon, if a disgruntled consumer clicks on one star out of five, instead of that negative rating being submitted immediately, a link appears saying, “Please click here to contact the seller to resolve any problems with your order before leaving feedback.”⁶⁶ Amazon also reminds the consumer of the possibility of simply returning the item.⁶⁷ Using similar automated processes, eBay resolves 90% of submitted disputes without ever involving any

62. See Johnston, *supra* note 13, at 865 (“Typically, the firm’s standard-form terms set out clear and unconditional consumer obligations but allow firm discretion that is exercised by a supervisory (and sometimes lower level) employee who is given the authority and discretion to forgive.”); U.S. Patent No. 7,797,212 (filed Oct 31, 2006), <http://www.google.com/patents/US7797212> (“[b]anks and other financial institutions must occasionally bend or break the rules for imposing fees against account holders in the name of customer relations.”).

63. See *Why Stay at Hampton?*, HAMPTON INN, <http://hamptoninn3.hilton.com/en/about/index.html>; *100% Hampton Inn Satisfaction Guarantee: The Definitive Thread*, FLYERTALK, <http://www.flyertalk.com/forum/hilton-hilton-hhonors/465783-100-hampton-inn-satisfaction-guarantee-definitive-thread-20.html> (numerous Hampton Inn guests posting anecdotes of being immediately offered free stays by the employee at the front desk); Robert Reiss, *How Ritz-Carlton Stays at the Top*, FORBES (Oct. 30, 2009), <http://www.forbes.com/2009/10/30/simon-cooper-ritz-leadership-ceonetwork-hotels.html> (explaining Ritz-Carlton’s policy).

64. See Martin Merzer, *Poll: Asking for Better Credit Card Terms Pays Off*, CREDITCARDS (Sept. 24, 2014), <http://www.creditcards.com/credit-card-news/poll-ask-better-terms.php>.

65. See, e.g., Flavio Martins, *Companies Using Social Media Customer Service Effectively for Customer Retention and Loyalty*, WINTHECUSTOMER (July 4, 2014), <http://winthecustomer.com/effective-social-media-customer-service>.

66. See AMAZON, <https://www.amazon.com> (last visited Feb 9, 2016) (clicking on “Your Account,” then “Your Orders,” then “Leave seller feedback,” then the icon for one star out of five).

67. See *id.*

of its employees, by electronically facilitating a discussion between buyer and seller.⁶⁸

Again, this emphasis on settlement is particularly striking because in a great number of these incidences, consumers would not have any credible threat to sue.⁶⁹ Consumers and corporations are, through the complaint process, often determining what the terms of the contract should be even though arguably a contract is already in place.⁷⁰ Thus, whereas privatization in mass torts is dominated by the settlement mill,⁷¹ in mass contracts the corporation is perhaps closer to a renegotiation mill.

2. Procedural Justice

As companies increasingly understand the relationship between profit and complaint handling, they are moving their internal processes toward some measures of procedural justice. Promoting a perception of procedural justice is profitable because unjust procedures risk angering even otherwise highly satisfied customers.⁷² Building off the seminal work of Tom Tyler, scholars have found that while the substantive *outcome* matters, the *process* is equally, if not more, important to consumers in their perceptions of justice.⁷³ Even when a company provides relief such as money or store credit, consumers may view the experience unfavorably if they perceive the process as unfair.⁷⁴

More specifically, scholars have identified five main contributors to consumers' perception of procedural justice, and thus to their overall satisfaction and loyalty to the company: voice, respect, speed, trustworthiness, and neutrality.⁷⁵

68. See Sarah Kessler, *Ebay Spinoff Modria Is Judge Judy for Cyber Shoppers*, FASTCOMPANY (Feb. 5, 2013), <http://www.fastcompany.com/3005402/ebay-spinoff-modria-judge-judy-cyber-shoppers>.

69. See *supra* section I.A; *supra* note 49.

70. The empirics thus lend support to Daniel Markovits's theoretical account of customer service departments as sites of negotiation rather than adjudication. See MARKOVITS, *supra* note 14, at 1320.

71. Cf. Engstrom, *supra* note 11 (describing law firms as tort settlement mills).

72. See Homburg & Furst, *supra* note 37, at 108; Tor Wallin Andreassen, *Antecedents to Satisfaction with Service Recovery*, 34 J. EUROPEAN MARKETING. (2000) 168-71 ("The findings from the present study illustrate the importance of . . . an ability to create a perception of fairness in the outcome of the complaint.").

73. See, e.g., Hansen et al., *supra* note 50, at 10 (reviewing the literature on consumers' perception of process and concluding procedure may be more important than substantive outcomes); Andreassen, *supra* note 72, at 168-71 (concluding based on a reflective measurement model that for consumers to be satisfied with the resolution, the complaint resolution process must be perceived as fair); see TYLER, *supra* note 17 (establishing the importance of procedural justice in the law).

74. See Stone, *supra* note 35, at 112.

75. See Andreassen, *supra* note 72, at 168-70 (discussing empirical evidence indicating the importance of consumers being able to express their grievances and a speedy resolution); Carl L. Saxby et al., *Measuring Consumer Perceptions of Procedural Justice in a Complaint Context*, 34 J. CONSUMER AFF. 204, 214 (2000) (reviewing the literature on procedural justice in consumer disputes and concluding consumers care about two-way communications, decision makers' trustworthiness, and the extent to which their grievance is understood); Stone, *supra* note 35, at 112 (reviewing empirical

First, companies increasingly employ communication tools that make consumers feel like they have a *voice*. The Royal Bank of Scotland sums up many companies' philosophies, saying in its charter's complaint resolution section, "We are committed to listening."⁷⁶ Customer service employees are trained to listen well by asking questions, acknowledging frustrations, and paraphrasing what was heard.⁷⁷ Even online forms such as Amazon's provide an opportunity for consumers to voice their concerns, with question headings such as "Tell us more about your issue."⁷⁸

Second, companies have attempted to institutionalize good *treatment* of disputants. To accomplish this goal, they even provide customer service representatives with training in emotional intelligence.⁷⁹ Studies of the rent-to-own business—historically viewed as one of the most problematic industries by many consumer advocates—suggest people are overall satisfied with their treatment.⁸⁰ One found that most consumers who were late on a payment rated how they were treated as either "good" or "very good," with only 15% rating their treatment as "poor" or "very poor."⁸¹

Third, companies generally prioritize *speed*. A slow response, even when otherwise effective, is harmful to the company's relationship with the consumer.⁸² Consequently, companies will typically promise a resolution within a set number of days, rather than months.⁸³

research showing that how the customer is treated throughout the process—the person's dignity—is important to consumers' perception of the overall legitimacy of the process).

76. See *We Are Committed to Listening*, ROYAL BANK OF SCOTLAND, <https://www.rbs.co.uk/secure/global/customer-charter/default.asp>; Robert Johnston & Sandy Mehra, *Best-Practice Complaint Management*, 16 ACAD. MGMT. EXECUTIVE 145, 145 (2002) (concluding best practice complaint resolution involves soliciting, listening to, and resolving complaints).

77. Beaujean et al., *supra* note 40, at 68.

78. See *supra* note 66.

79. Beaujean et al., *supra* note 40, at 64.

80. See, e.g., Federal Trade Commission, *Prepared Statement of the Federal Trade Commission on Rent-to-Own Transactions Before the House Financial Services Committee Financial Institutions and Consumer Credit Subcommittee*, at 6, (July 26, 2011), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-rent-to-own-transactions/110726renttoowntestimony.pdf. The rent-to-own industry is the subject of one of the most famous consumer protection cases, *Williams v. Walker-Thomas Furniture*, 350 F.2d 445 (D.C. Cir. 1965). See Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor"*, 102 GEO. L.J. 1383 (2014).

81. James M. Lacko et al., *Customer Experience with Rent-to-Own Transactions*, 21 J. PUB. POL'Y & MARKETING 126, 133 (2002).

82. Gadi Benmark & Dan Singer, *Turn Customer Care Into "Social Care" to Break Away from the Competition*, HARV. BUS. REV. (Dec. 19, 2012), <https://hbr.org/2012/12/turn-customer-care-into-social>.

83. See *eBay Guarantee*, EBAY, <http://pages.ebay.com/ebay-money-back-guarantee/> (assuring a resolution within 30 days); *Handling Customer Disputes*, AMAZON, <https://payments.amazon.com/help/201212320> (noting that if a customer files a dispute the seller "must respond within 5 business days with the requested information."). Companies do, however, take greatly varying amounts of time to respond to consumer complaints. See Ian Ayres et al., *Skeletons in the Database: An Early Analysis of the CFPB's Consumer Complaints*, 19 FORDHAM J. CORP. & FIN. L. 343, 345-46 (2014) ("[B]ank of America, Citibank, and PNC Bank were all significantly less timely in responding to complaints than the average financial institution.").

Fourth, corporations' willingness to concede what may not be contractually required likely builds the consumer's *trust*.⁸⁴ Corporations build trust in other ways, including joint problem solving during the dispute resolution process and incorporating norms of flexibility.⁸⁵

Finally, corporations advance perceptions of *neutrality* most clearly when the corporation is a third-party adjudicator in the hundreds of millions of network trials.⁸⁶ Yet even in more bilateral negotiations, such as the customer service context, effective explanations can advance perceptions of neutrality.⁸⁷ When deciding against the consumer, companies typically offer explanations.⁸⁸ They use neutral language implying they are on the same side as the consumer, such as saying "One alternative for you could be . . ." or "I can't do that because . . ." instead of "You can't."⁸⁹ Also, between 2003 and 2010, software end-user license agreements increasingly included provisions explaining consumers' state and federal rights, although such provisions are not required by law.⁹⁰ It is possible a consumer looking at such a contract provision after the dispute arose would see the explanation of their rights as a sign that the corporation is acting more neutrally, in accordance with more balanced principles of fairness, rather than merely trying to gain an advantage in an adversarial manner. Although some elements of neutrality are clearly missing,⁹¹ and the topic is in need of further study, corporations' clauses and general approach illustrate ways in which they may advance perceptions of neutrality, and thus of procedural justice.

84. See Hansen et al., *supra* note 50, at 10-11 ("[c]ompensation may serve to re-establish the potential decrease in confidence that the consumer may attach to the retailer as a consequence of the perceived loss."); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 LAW & SOC. INQUIRY 473 (2008) (finding trust matters even in bilateral negotiations).

85. See Bernstein, *Procurement Contracts*, *supra* note 21 (summarizing the literature on how trust may emerge in business relationships).

86. See *infra* section I.C.

87. See TYLER, *supra* note 17, at 516.

88. See Angela Littwin, *Why Process Complaints? Then and Now*, 87 TEMP. L. REV. 895, 944 (2015) (reporting that companies close with an explanation about three-fourths of the complaints received by the Consumer Financial Protection Bureau from consumers, though noting that these complaints may not be representative).

89. See Kristin Robertson, *Saying No: How to Deliver Bad News to a Customer*, KR CONSULTING (Apr. 2014) <http://www.krconsulting.com/saying-no-how-to-deliver-bad-news-to-a-customer>.

90. See Marotta-Wurgler & Taylor, *supra* note 33, at 258 (finding that between 2003 and 2010 "[t]he probability that a EULA informs consumers of their state and federal law rights rose by 5.7%").

91. For example, transparency and a lack of bias contribute to perceptions of neutrality. See TOM TYLER & RICK TRINKNER, *LEGAL SOCIALIZATION IN AN ERA OF MISTRUST: FOSTERING THE POPULAR LEGITIMACY OF THE LAW* (manuscript at 23) (forthcoming). While consumers may not be able to see corporations' biased decisions because of the lack of transparency, corporations' internal processes do a poorer job of offering those components of neutrality. See *infra* section II.B.

3. Procedural Experimentalism

Businesses learn and change through procedural experimentalism.⁹² Most immediately, because the financial stakes are so high, it is best practice for corporations to assess how well they resolve disputes and adjust accordingly. Moreover, companies increasingly view complaints as sources of information about how to improve their core business and thereby *prevent* disputes. Corporations have thus developed the type of dynamic feedback loop between disputes and policymaking to which the public system aspires.

Improving dispute resolution begins with collecting and analyzing information. Companies solicit feedback through ubiquitous post-dispute satisfaction surveys. They study whether consumers continue to patronize the business after disputes.⁹³ Analysts also quantify how complaint processes contribute to the company's bottom line.⁹⁴

Companies then adjust their behavior in response. Employee compensation often depends on how well the individual and the company resolve complaints.⁹⁵ Businesses also regularly innovate complaint processes based on analytics. Call center managers test ways of communicating a problem resolution, and then compare which one produced the highest customer satisfaction.⁹⁶ More boldly, they experiment with entirely new dispute mechanisms. eBay, for example, developed crowd-sourcing adjudication in which a jury of randomly selected buyers and sellers issues the final judgment on a dispute.⁹⁷

Complaint departments also feed what they learn into other parts of the organization to *prevent* disputes.⁹⁸ If the complaint process indicates that certain contract clauses or sales practices lead to a high volume of complaints, executives are increasingly pressured to reengineer the product or practices when doing so might increase profits due to fewer complaints.⁹⁹ For example,

92. See, e.g., Stone, *supra* note 35, at 115 ("Service recovery is not just a 'damage-control' mechanism affecting the 'shop floor' level, but part of a company's strategic planning to ensure that its offerings are continuously improved."). Cf. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (identifying democratic experimentalism in the governmental context).

93. See Rule, *supra* note 19, at 771.

94. See Benmark & Singer, *supra* note 82.

95. See Stone, *supra* note 35, at 115-16 (mentioning companies linking employee salaries to individual customer service metrics, and to how well the company measures up to competitors in terms of complaint resolution).

96. Rob Markey & Fred Reichheld, *From Feedback to Action*, BAIN INSIGHTS (Sept. 21, 2012), <http://www.bain.com/publications/articles/from-feedback-to-action.aspx>.

97. Anjanette H. Raymond & Abbey Stemler, *Trusting Strangers: Dispute Resolution in the Crowd*, 16 CARDOZO J. CONFLICT RESOL. 357, 382 (discussing eBay and Alibaba's use of users to form panels or "community courts" to decide cases).

98. See, e.g., Stone, *supra* note 35, at 110 (concluding that the data collected in handling customer disputes "[m]ust be fed back to policy makers whose performance partly depends on these data.").

99. See Markey & Reichheld, *supra* note 96.

JetBlue's complaint department heard from a disgruntled passenger who had been charged an additional bike fee even though the bike folded up into a suitcase—a seemingly unjust rule. Less than twenty-four hours later, JetBlue had updated its policy to no longer charge extra for fold-up bikes.¹⁰⁰

Many companies also seek dispute information even when the customer has not reached out directly.¹⁰¹ Barclays Bank, for example, proactively asks consumers to submit complaints through leaflets and posters in its branches, and on statements mailed to customers.¹⁰² Similarly, companies ranging from Wells Fargo to Pizza Hut monitor social networks not for individual issues but for broader opportunities to improve customer satisfaction.¹⁰³

Of course, there are limits on how much a company will adjust its policies. Individual cases are handled with precedent in mind. As the head of JetBlue's customer service has stated, "It's really easy to want to jump to the rescue when we see a customer expressing concern . . . But we always try to think about the long-term implications as well."¹⁰⁴ Overall, however, corporations are increasingly developing feedback loops that enable aggrieved consumers to influence dispute resolution policy. And surveys suggest satisfaction with customer service is overall improving.¹⁰⁵

4. Tailored Outcomes and Automated Decisions

Corporate complaint processing is now often highly automated.¹⁰⁶ This automation can significantly reduce the costs of dispute resolution.¹⁰⁷ Perhaps more importantly from a dispute design perspective, it enables tailored decisionmaking.

When a consumer reaches out about a dispute, computer algorithms typically analyze all relevant internal and external information available to estimate two main variables: behavior and net worth.¹⁰⁸ The behavioral analysis

100. See *A Day in the Life: Social Media*, *JetBlue Blue Tales Blog*, JETBLUE (Jan. 19, 2012), <http://blog.jetblue.com/index.php/2012/01/19/a-day-in-the-life-social-media>.

101. See Johnston & Mehra, *supra* note 76, at 147-49.

102. See *id.*

103. See, e.g., Martins, *supra* note 65.

104. See *A Day in the Life*, *supra* note 100.

105. See 'Your Call Is Important to Us' Or Is It?, CONSUMER REPORTS (Sept. 2015) (citing data from the Better Business Bureau suggesting fewer complaints, including in nine of the ten most troublesome industries, and offering original survey data suggesting fewer consumers were agitated compared to 2011).

106. See, e.g., U.S. Patent No. 20,050,192,884 (filed May 3, 2005), <https://www.google.com/patents/US20050192884> (describing a system in which "[a] processor handles the chargeback inquiry so the merchant does not need to respond to chargeback inquiry requests.>").

107. The leading provider of automated dispute systems, Modria, has stated that up to 90% of cases are resolved through technology alone. See *How It Works*, MODRIA, <http://modria.com/how-it-works> (last visited April 24, 2015).

108. See Julie Weed, *For Uber, Airbnb and Other Companies, Customer Ratings Go Both Ways*, N.Y. TIMES, Dec. 1, 2014, (examining companies' collection of data about consumers in various industries).

considers the consumer's past behavior, such as the number of prior complaints.¹⁰⁹ This helps to deter return abuse. It also predicts the likely response for that particular consumer if the request is granted or denied. Companies scientifically test how consumers respond to different levels of redress, using all predictive variables available. This tells them the likelihood of losing similar customers in the future if full, partial, or no concession is made.¹¹⁰ Companies are also integrating into their business decisions means of assessing a consumer's online social influence over peers, such as the number of Twitter followers or Facebook friends.¹¹¹ Incorporation of such practices into dispute resolution is in its early phases.¹¹²

Algorithms merge these behavioral analyses with an estimate of the consumer's buying power. This helps predict, based on internal data and external information such as the consumer's e-commerce purchasing history at various companies, how profitable a consumer is likely to be.¹¹³ As Bank of America's patent on its automated complaint handling software explains, the server may consider information such as the "profitability of the account" and "external factors, such as the personal relatives of the customers who are also account holders at the bank."¹¹⁴

This sophisticated and instantaneous analysis often decides much of what happens for a given dispute. When a consumer inputs account information into the online form or interactive phone menu, the algorithm may route the call to a particular department.¹¹⁵ This routing is aimed at saving phone time by better fitting the company's expertise to the dispute. It also determines whether the caller is routed to an elite complaint handling department—with an internal

109. See U.S. Patent No. 7,797,212, *supra* note 62 (describing a Bank of America refund tool that considers, among other factors, "[p]rior fees and refunds associated with the account.").

110. Telephone Interview with N.B. (June 12, 2015).

111. See, e.g., Nate Cullerton, *Behavioral Credit Scoring*, 101 GEO. L.J. 807, 816 (2013).

112. Telephone Interview with S.N. (May 28, 2015).

113. See Natasha Singer, *Secret E-Scores Chart Consumers' Buying Power*, N.Y. TIMES, Aug. 18, 2012, at BU1; Telephone Interview with N.B. (June 12, 2015).

114. See U.S. Patent No. 7,797,212, *supra* note 62; Thomas Reeves, LINKEDIN, <https://www.linkedin.com/pub/thomas-reeves/6/715/853> (last visited February 8, 2016) (former Bank of America employee describing responsibilities as including "Approved staff submissions for client refunds according to bank policy using Refund Request Tool."). Discussion of the use of family members' wealth to decide remedies is absent from the literature and thus it is difficult to know how broadly representative this example is. However, the use of such information is part of a more general phenomenon of companies using a variety of personal data to discriminate among consumers, and the use of information for deciding remedies is one of many applications. See Amy J. Schmitz, *Secret Consumer Scores and Segmentations: Separating "Haves" from "Have-Nots"*, 2014 MICH. ST. L. REV. 1411, 1420 (2014) (highlighting companies broad use of information about family and social networks and implying, but not stating, such information could be used for deciding remedies).

115. See, e.g., Jen Wieczner, *10 Things Customer-Service Reps Won't Tell You*, MARKET WATCH (Jan. 17, 2012), <http://www.marketwatch.com/story/10-things-customerservice-reps-wont-say-1326819855640> (describing how Bank of America has twenty customer service phone numbers that enables it to route customers to the employee best situated to deal with a particular complaint).

name such as Executive Customer Relations—or is relegated to an “overflow” call center, without the customer knowing.¹¹⁶

These automated systems also increasingly administer the complaint.¹¹⁷ A simple version of this is the case of JPMorgan Chase, which recently implemented an algorithm that would automatically refund any online fee refund request under \$50 without any human involvement.¹¹⁸ Likewise, large retail chains use software to monitor item returns and deny requests that they deem problematic, leaving the employee operating the cash register powerless to override.¹¹⁹ More generally, one of the principal goals of automated decision making is to reduce employee discretion, and thereby reduce inconsistency and emotionally driven decisions.¹²⁰

A noteworthy feature of these tailored decisions is that consumers are typically unaware of the decision-making process. They rarely know that their income, or their families’ income, was factored into the decision of whether to provide relief. Nor are they likely aware that a computer made the decision to deny a refund, and not the person on the phone or a human sender of the refund email.

If firms’ internal processes are the courts of the future, judicial decisions are increasingly based on consumers’ characteristics rather than simply on the facts of the case, and the judges of the future are increasingly digital.

C. The Corporation as Third-Party Adjudicator

When settlement processes fail and the parties continue to pursue their grievances, the dispute may proceed to adjudication. The most common form of adjudication puts the consumer-facing corporation in a third-party role between buyer and seller. This is a form of network trial, because the adjudicating company originally connected the disputing parties, either

116. See Singer, *supra* note 113 (reporting that electronic customer scores “can determine whether a customer is routed promptly to an attentive service agent or relegated to an overflow call center.”).

117. See U.S. Patent No. 20,120,185,400 (filed Jan. 13, 2011), <http://www.google.com/patents/US20120185400> (describing a software program that grants or denies fee refunds without any employee involvement necessary).

118. Interview with J.E. (May 22, 2015) (current J.P. Morgan Chase employee describing system). Because the program prompted too large a number of consumers to request refunds, the bank subsequently updated the program to make it somewhat more difficult for consumers to obtain refunds. See *id.* See also Sood & Pinipe, *supra* note 18, at 7 (describing financial institutions deciding not to investigate to maintain customer satisfaction or because the amount disputed is too small).

119. See Ariana Eunjung Cha, *Some Shoppers Find Fewer Happy Returns*, WASH. POST, Nov. 7, 2004, at A1.

120. See U.S. Patent No. 7,797,212 (filed Oct 31, 2006), <http://www.google.com/patents/US7797212> (explaining that an automated customer service tool benefits Bank of America by reducing reliance on employee discretion).

financially or digitally. Network trials are fast-growing and already account for hundreds of millions of disputes annually.¹²¹

eBay's approach is illustrative of many online companies' roles as dispute intermediaries between buyers and sellers. eBay built a Resolution Center to handle its over sixty million annual disputes.¹²² This system uses software to ask for information, such as the details of the dispute and the buyer's preferred outcome.¹²³ The system then encourages the participants to message each other directly. If direct communication fails, the issue is escalated to the Resolution Center, a member of which makes a decision on the case.¹²⁴

After making a final decision, online intermediaries mostly limit their remedies to a refund for the consumer.¹²⁵ Failure to comply leads to suspension from the online community, which is a powerful enforcement mechanism for large sellers who often rely on sites such as Amazon and eBay for a substantial portion of their revenues.¹²⁶

The growth of financial intermediation has also increasingly put financial institutions in an adjudicatory role between buyers and sellers. When consumers purchase goods or services with a credit card, federal law requires credit card issuers such as American Express in many instances to refund the consumer's purchase if it is disputed.¹²⁷ The issuer must then investigate the consumer's dispute by collecting the appropriate information. This is called a chargeback, because the amount disputed is taken out of the seller's account. Newer financial intermediaries such as PayPal offer similar chargeback functions.¹²⁸ To enforce the verdict, in addition to community expulsion the intermediary company can freeze or automatically deduct funds in accounts.¹²⁹

121. See *supra* note 18 (calculating that a range of fifty million to one hundred million chargebacks annually would be a "conservative range."). eBay alone handles sixty million disputes annually. See *supra* note 4. Yet eBay is only one of many large companies that play such a role.

122. See Del Duca et al., *supra* note 4, at 205 (reporting sixty million disputes handled by eBay annually).

123. See *id.* at 206-07.

124. See *id.*

125. See *id.* at 206.

126. See *Buyer Support Program*, AMAZON, <https://payments.amazon.com/sdui/sdui/about?nodeId=6025> ("Any seller that fails to cooperate in good faith to resolve a buyer's complaint may have its account privileges restricted or terminated."); Amy Martinez, *Amazon Sellers Complain of Tied-up Payments, Account Shutdowns*, SEATTLE TIMES, Nov. 17, 2012.

127. Chargebacks were required starting in 1968 with the passage of the Truth in Lending Act. See Raymond & Stemler, *supra* note 94, at 379.

128. Both PayPal and credit card companies first attempt to encourage the parties to communicate directly before ultimately rendering a verdict on the case if necessary. See Raymond & Stemler, *supra* note 127, at 380 (describing PayPal as "providing for chargebacks when necessary" and concluding that as a result "[o]utcomes of the dispute resolution process are easily and simply enforced via the payment mechanism.").

129. See, e.g., AMAZON PAYMENTS, *supra* note 126 ("[A]mazon Payments may place a hold on funds in a seller's account if the seller does not respond timely to a dispute or does not honor a commitment made to resolve a dispute within a reasonable amount of time.").

In both these contexts, the intermediary does receive a cut of whatever sale is being disputed, and this small fraction of the dispute would potentially be refunded if the corporation decides in favor of the consumer. The third-party company also wants to encourage consumers to continue using its services. Thus, it is not a completely disinterested party. Yet the intermediary is a neutral party in that it did not directly participate in the disputed incident.

These processes are in need of greater study to draw strong conclusions. However, preliminary evidence indicates that they work for buyers and sellers.¹³⁰ Consumers rarely complain about chargebacks.¹³¹ eBay found that consumers who went through its internal adjudication were significantly more likely to shop at the website in the future than customers who did not go through any dispute process or who went through an outside dispute resolution mechanism.¹³²

At a basic level, though, it is important to understand that these adjudicatory processes are fundamentally different from arbitration and from the traditional customer service department. Whereas scholars worry about anti-consumer arbitrator bias because corporations bring arbitrators business,¹³³ the corporate intermediary's business depends on those millions of consumers it is adjudicating. Also, arbitrators and public judges engage in qualitatively similar decisionmaking and apply the law to cases.¹³⁴ In contrast, intermediary corporations' decision makers follow internal company guidelines and are usually not lawyers.¹³⁵ And unlike customer service departments, which are consumers' opposing party, intermediary corporations are usually separate legal entities from consumers' opposing parties.¹³⁶

130. See, e.g., Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 691 (2000) ("Although good empirical data is lacking, it appears that the [chargeback] system satisfies both consumers and merchants.").

131. See Del Duca et al., *supra* note 4, at 208 (noting consumers rarely complain about chargebacks).

132. See Rule, *supra* note 19, at 774 (finding consumers were more likely to shop at eBay after having their disputes resolved through the company's resolution center, but when consumers chose instead to dispute through the credit card chargeback system, buyers were no more likely to use the website than if a dispute had never occurred). The methodology used does not allow for causality to be conclusively established.

133. See, e.g., William W. Park, *Arbitrator Bias*, 12 TRANSNAT'L DISPUTE MGMT., (2015), <http://www.transnational-dispute-management.com/article.asp?key=2265> ("No one with a dog in the fight should judge the competition. . . . Consequently, few tasks present the vital urgency of establishing standards for evaluating the independence and impartiality of arbitrators.")

134. See W. Mark C. Weidemaier, *Judging Lite: How Arbitrators Make and Use Precedent*, 90 N.C. L. REV. 1091, 1091 (2012).

135. In the tort context, the settlement of disputes by non-lawyers in "settlement mills" raises questions about the unauthorized practice of law. See Engstrom, *supra* note 11, at 841.

136. The legal relationship is, however, somewhat muddled. See, e.g., Brishen Rogers, *The Social Costs of Uber*, 85 U. CHI. L. REV. DIALOGUE 85 (2015) (discussing open questions about whether Uber drivers are employees).

D. The Corporation as Reputation-Based Enforcement Mechanism

Reputation-based sanctions and network governance have served crucial functions in business-to-business private legal systems such as in the diamond, cotton, and grain industries.¹³⁷ Similarly, rural neighbors in some parts of the country resort to negative gossip as the most common first step to enforce breached norms regarding trespass of cattle.¹³⁸ In those systems, both informal mechanisms, such as gossip, and formal mechanisms, such as information bureaus, play important roles.¹³⁹ The consumer legal system is evolving toward a similar reliance on reputation-based governance mechanisms.

Consumer markets' informal reputation mechanisms come not from close-knit gossip networks but through a variety of websites designed for consumer reviews, such as Yelp, as well as more general purpose websites—such as Facebook, Twitter, and YouTube—that consumers nonetheless widely use to give feedback about companies.

Individual disputes handled badly can also go viral. When United Airlines baggage handlers broke David Carroll's guitar, the musician spent nine months attempting to convince customer representatives to fix the instrument. After what he described as repeated indifference, he recorded and posted a music video on YouTube—"United Breaks Guitars"—that received over 15 million views.¹⁴⁰ United ultimately not only offered to pay for damages, but also improved its agents' ability to escalate claims internally.¹⁴¹ Numerous other complaints, such as one customer's video of a three-hour failed attempt to cancel Comcast cable services, have reached millions of viewers.¹⁴²

Consumers also use these sites for direct advocacy about specific dispute resolution policies. For example, when retailers such as Best Buy, Macy's, and Toys "R" Us introduced a restocking fee of up to 15% for returned items, backlashes on Twitter and Facebook helped prompt companies retracting those

137. See Bernstein, *Private Ordering*, *supra* note 21, at 1.

138. See Ellickson, *supra* note 21, at 677.

139. See Bernstein, *Cotton Industry*, *supra* note 21, at 1745 (describing the cotton industry's successful efforts to make "reputation-based nonlegal sanctions (like negative gossip, which may lead to refusal to deal) an important force in the industry."); Bernstein, *Diamond Industry*, *supra* note 21, at 121-22 (detailing the use of reputation bonds in the diamond industry).

140. See *United Breaks Guitars*, YOUTUBE, <https://www.youtube.com/watch?v=5YGc4zQqozo>.

141. See Brett Snyder, *United Aggressively Responds to "United Breaks Guitars Part 2"*, CBS MONEY WATCH (Aug. 4, 2009), <http://www.cbsnews.com/news/united-aggressively-responds-to-united-breaks-guitars-part-2>.

142. See, e.g., *Comcast Left Me on Hold for 3+ Hours—Until It Closed*, CNN MONEY (Aug. 15, 2014), <http://money.cnn.com/2014/08/15/technology/comcast-three-hour-hold> (describing how photographer Aaron Spain videoed himself on hold for over three hours, until after Comcast had closed, and before long had over one million hits); *Comcast Service Disconnection*, SOUNDCLOUD <https://soundcloud.com/ryan-block-10/comcastic-service> (last visited February 9, 2016) (sharing an audio recording of a customer's attempt to cancel Comcast services, which received over 6 million hits).

policies.¹⁴³ Similarly, in 2014, General Mills announced that those who bought its products or used its social media were agreeing to settle disputes in arbitration. A social media outcry ensued, and within days the company retracted the policy.¹⁴⁴

More formal private mechanisms for feedback have also developed. These sites are specifically designed to aggregate reputational information, typically into something like a five-star rating system. Some, such as Ripoff Report, take an antagonistic approach seemingly geared toward shaming the company into defending itself publicly.¹⁴⁵ Others, such as Yelp, are more neutral.¹⁴⁶

The array of reputational websites matter mostly because they can influence consumers' decisions. According to one recent survey, almost 70% of consumers rely on online reviews before purchasing a product, and that number is growing.¹⁴⁷ Yelp is one of the most visited sites in the United States and is used by almost one hundred million Americans, or about one in three.¹⁴⁸ The Better Business Bureau's ratings website has over ten million visits each month.¹⁴⁹ Also, consumers trust online reviews—particularly those conveying negative information.¹⁵⁰

The mere fact that reputation websites influence consumers suggests that rationally acting corporations would pay attention to the sites. Further evidence of these websites' influence comes from the behavior of consumer companies, which have developed groups to manage and monitor social media complaints.¹⁵¹ The fact that individual complaints can go viral or lead to online reviews that permanently damage a company's reputation forces companies to take extra caution with individual consumer disputes—assuming companies cannot distinguish consumers who will complain. It also influences how executives design dispute resolution processes.

143. See Miguel Bustillo, *Retailers Loosen Up on Returns—Tough Policies of Recent Years Spurred Consumer Complaints and Often Became Impediment to Sales*, WALL ST. J., Dec 27, 2010, at B.1.

144. See Stephanie Strom, *General Mills Reverses Its Policy on Consumers' Right to Sue*, N.Y. TIMES, Apr. 20, 2014, at A.17.

145. See RIPOFF REPORT, <http://www.ripoffreport.com>.

146. See YELP, www.yelp.com.

147. See Ashlee Kieler, *Nearly 70% Of Consumers Rely On Online Reviews Before Making A Purchase*, CONSUMERIST (June 3, 2015), <http://consumerist.com/2015/06/03/nearly-70-of-consumers-rely-on-online-reviews-before-making-a-purchase>.

148. See *How Popular Is Yelp.com?*, ALEXA, <http://www.alexa.com/siteinfo/yelp.com> (listing Yelp as the 32nd most visited U.S. website) (last visited February 9, 2016); *Yelp Network*, QUANTCAST, <https://www.quantcast.com/yelp.com> (estimating monthly U.S. unique Yelp visitors at 107.7 million) (last visited February 9, 2016).

149. See *How Popular Is bbb.org?*, ALEXA, <http://www.alexa.com/siteinfo/bbb.org> (last visited Feb. 8, 2016).

150. See *Why Ratings and Reviews Suck and How To Save Them*, SOCIAL MEDIA TODAY, <http://www.socialmediatoday.com/content/why-ratings-and-reviews-suck-and-how-save-them-0> (Feb. 13, 2012) (discussing the high trust consumers place in online reviews); Luo & Homburg, *supra* note 36, at 31-32 (discussing empirical research suggesting that negative information has a stronger effect on buyers than positive feedback).

151. See, e.g., Martins, *supra* note 65.

The extent to which reputation-based sanctions enable a private ordering will vary by industry and over time.¹⁵² Overall, however, reputation websites thus provide a market-monitoring mechanism for problematic dispute resolution practices within corporations. Although few consumers ever consider any particular dispute resolution practice or clause *ex ante*, if a clause violates norms of fairness, it could negatively impact online reputation scores through the ratings of those subjected to it *ex post*. The simple aggregate reputation score of, say, two out of five stars enables consumers who would not even think to look at the details of lengthy contracts to nonetheless incorporate the implications of those contracts into their purchase decisions.¹⁵³

II. Promises and Pitfalls of the Corporation as Courthouse

Existing institutional analyses of privatized dispute resolution have mostly compared arbitration to the courts. However, the key dichotomy is not between arbitration and courts—which have been shown to be similar based on many important metrics such as application of legal precedent—but rather between those formal mechanisms and more informal ones such as corporations’ internal processes.¹⁵⁴ This shift in perspective reveals a distinct set of promises and pitfalls in privatized dispute resolution.

A. *The Promise of the Corporation as Courthouse*

1. Low-cost Access to Redress

If the literature is correct that litigants ultimately “want [dispute resolution] routes that are quick, cheap, and relatively stress-free,”¹⁵⁵ the corporation as courthouse may deliver on what matters most to consumers. Consumers can initiate the customer service process in a few seconds by tweeting, or in a few minutes by calling or chatting online. They can similarly start a network trial by filling out a quick dispute form on the Web.¹⁵⁶ Although public courts are becoming increasingly automated, initiating a case in the public legal system requires navigating a dizzying set of procedures and filling

152. See Richman, *supra* note 21 (concluding that a shift in the structure of the diamond industry weakened reputation-based sanctions that had once sustained cooperation); Florencia Marotta-Wurgler, *Will Increased Disclosure Help? Evaluating the Recommendations of the ALI’s “Principles of the Law of Software Contracts,”* 78 U. CHI. L. REV. 165, 184 (2011) (finding that in the software industry few consumers consult online reviews before making purchases).

153. This is so because most consumers will not read through all of the reviews, and instead will look at the aggregate score.

154. On the similarity of decision making by courts and arbitrators, see, e.g., Weidemaier, *supra* note 134, at 1091.

155. See Engstrom, *supra* note 11, at 836 (quoting HAZEL GENN ET AL., PATHS TO JUSTICE: WHAT PEOPLE DO AND THINK ABOUT GOING TO LAW 254–55 (1999)).

156. See, e.g., Nick Clements (@npclements), TWITTER (June 5, 2015, 8:47 AM EST), <https://twitter.com/npclements/status/606849904070283264> (reporting a successful chargeback case through J.P. Morgan Chase taking less than five minutes).

out complicated forms. Additionally, court processes typically require appearing in person at least once, if not multiple times. Finally, corporations' dispute processes are free, whereas even small claims courts have prohibitive fees for most small-value complaints.¹⁵⁷ These factors, and what is known about network trials, indicate that private processes increase the likelihood that consumers will pursue claims.¹⁵⁸

Once the dispute process is initiated, customer service calls can also lead to settlements in minutes, and network trials typically take a few hours or days.¹⁵⁹ By contrast, small claims and arbitration cases take months.¹⁶⁰

The private system likely provides further savings to consumers, corporations, and government in three main ways. First, both consumers and corporations avoid lawyers' fees because settlement-oriented market forces, rather than adjudicatory legal devices, provide the principal mechanism for governance. Second, the private system is more sophisticated at avoiding non-meritorious claims. The public legal system cares about frivolous lawsuits, but has done a poor job of preventing them.¹⁶¹ By contrast, companies invest in advanced software systems to deter frivolous complaints. Bad-faith returns may cost goods retailers alone up to an estimated fifteen billion dollars annually.¹⁶² This provides strong economic incentives to companies to prevent such abuse. Third, corporations lower costs through highly automated dispute resolution processes.¹⁶³ These broad savings on dispute resolution would be expected to advance consumer welfare, such as by lowering prices.¹⁶⁴

157. See CONSUMER FIN. PROTECTION BUREAU, *Arbitration Study*, at section 4.3 (2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf (finding small claims fees of \$63 to \$112 in Philadelphia Municipal Courts).

158. See Nancy A. Welsh & David B. Lipsky, "Moving the Ball Forward" in *Consumer and Employment Dispute Resolution*, DISP. RESOL. MAG., Spring 2013, at 16 (mentioning a Federal Trade Commission study finding that chargeback availability is correlated with higher incidence of consumer claims).

159. See, e.g., Del Duca et al., *supra* note 4, at 208 (reporting that eBay's adjudication delivers verdicts within forty-eight hours).

160. See Horton & Chandrasekher, *supra* note 3, at 81, 101 (finding contractual cases take 21.5 months between complaint and resolution in state courts and estimating the average consumer arbitration at six to eight months).

161. See, e.g., Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1313-14 (2002) (adopting thirty percent as the hypothetical figure for the percent of class action cases filed that are frivolous and calling for reforms that would deny certification).

162. See Cha, *supra* note 119.

163. See Maurits Barendrecht & Christopher Honeyman, *Dispute Resolution: Existing Business Models and Looming Disruptions*, DISP. RESOL. MAG., Spring 2014, at 20-21 (describing gradual adoption by many public courts of online dispute mechanisms); *supra* Section I.B.4. (discussing highly automated corporate dispute processes).

164. The relationship between mandatory arbitration and lower prices is debated. But overall, in competitive markets, industry-wide savings would be expected to result in lower prices. See Orley Ashenfelter et al., *Identifying the Firm-Specific Cost Pass-Through Rate*, at 14-15 (F.T.C., Working Paper No. 217, 1998), <http://www.ftc.gov/reports/identifying-firm-specific-cost-pass-through-rate>.

2. Greater Value for Those Who Complain

Corporate processes have the potential to provide effective substantive outcomes for many consumers. At a broad level, because of the cost savings and removal of lawyers' fees, it is theoretically possible that corporations could pay *less* overall for dispute resolution while paying consumers *more* in settlements. The data do not exist to draw firm conclusions on this matter. However, corporations do probably provide more substantive redress for those who actually complain.

Corporations arguably provide more substantive redress simply by providing greater access to redress. Most consumers for small-value transaction-based disputes would never bring a case in court or in arbitration, but do complain to corporations and obtain redress. While the substantive results will vary, even legal scholars highly critical of corporations' complaint handling acknowledge that when consumers push, they often get what they want.¹⁶⁵

Putting aside the issue of access, even some consumers who would have brought individual lawsuits or been part of class actions fare better in the corporation as courthouse. This follows from the fact that customer service departments—as well as network trials such as those run by Uber and American Express—regularly grant consumers' requests even if no legal claim exists.¹⁶⁶ In addition, the majority of online chargebacks are not even disputed by merchants.¹⁶⁷ Finally, assuming that consumers weigh substantive outcomes in their overall satisfaction, it can be inferred that those who enter network trials do well substantively: Consumers rarely complain about chargebacks, and eBay found that consumers gave the company even more business after going through its adjudication process.¹⁶⁸ Although more studies of outcomes are needed, the available data provide little evidence that network trials offer less redress than courts or arbitrators.¹⁶⁹ And because consumers pay no court, arbitration, or legal fees, they keep all of whatever award is granted.

165. See, e.g., Nader, *supra* note 13, at 1012.

166. See *supra* Section I.B.1 (discussing customer service departments); Interview with M.H. (July 25, 2015) (stating that American Express grants chargeback requests to most valuable customers even when it does not recover from the merchant); Interview with J.B. (July 26, 2015) (stating that Uber regularly grants complaining consumers' requests even if they have no legal claim).

167. See Tom Cain, *Risky Business: Best Practices for Managing Cardholder Dispute and Chargeback Processes in Challenging Times*, TSYS MANAGED SERVICES 4 (2012), http://tsys.com/Assets/TSYS/downloads/wp_risky-business-best-practices-for-dispute-and-chargeback.pdf (citing an industry study finding that if e-commerce merchants challenge thirty-five to forty percent of chargebacks it is a "high percentage").

168. See Rule, *supra* note 19.

169. See *infra* Section II.B.3 (discussing the distributional implications of corporate complaint systems).

3. Direct Accountability

A frequent and powerful criticism of privatized dispute resolution is that it lacks accountability. This critique identifies an important shortcoming. However, unlike arbitration, the broader private consumer legal system offers strong informal accountability mechanisms.¹⁷⁰

One primary concern about accountability in arbitration is the absence of an appeals process. By contrast, corporations' internal dispute processes offer several avenues for appeal. Consumers denied redress by a customer service representative can appeal to higher authorities within the organization, even sometimes obtaining redress by writing directly to the CEO.¹⁷¹ Third-party corporations also provide appeals. Consumers who are turned away by the customer service department can later obtain redress after bringing their case to reputation websites or to the intermediary credit card company.¹⁷²

While the frequency and success rate of most of these appeals processes remain understudied, compared to more formal appeals processes they are easier to initiate and appear to be widely used.¹⁷³ Moreover, these appeals processes have staying power. One hotel recently invoked a clause making guests pay \$500 for every negative review left online. When word spread, its Yelp rating quickly plummeted to one star out of five, and the hotel ended the policy.¹⁷⁴

The appeals themselves, and often consumer complaints, are also to some extent held accountable. Amazon reviewers can rate reviews as unhelpful, thus lessening their visibility.¹⁷⁵ When Harvard Business School Professor Ben Edelman aggressively complained to a small business about being overcharged by four dollars on a Chinese food takeout order, asking for treble damages based on Massachusetts consumer protection statutes, he was forced to apologize after a strong Internet backlash.¹⁷⁶

170. It is also possible that privatization increases more formal political accountability in some contexts. See Jack M. Beerman, *Administrative Law-Like Obligations on Private[ized] Entities*, 49 UCLA L. REV. 1717 (2002).

171. See, e.g., Paul Michael, *How I Got Two CEOs To Listen to My Complaints*, WISEBREAD, <http://www.wisebread.com/how-i-got-two-ceos-to-listen-to-my-complaints> (explaining how one customer obtained redress for separate disputes by contacting the CEOs of Firestone and Deluxe Rentacar); Wieczner, *supra* note 115 (mentioning how, after customer service turned her away, one Apple customer wrote a complaint letter to then-CEO Steve Jobs and received a new iPod).

172. See *supra* Section I.C. & I.D.

173. See *supra* Section II.A.1 for a discussion of the ease of access of corporate dispute resolution mechanisms, of which appeals are a subset. Also, consumers collectively use third-party reputation websites and credit card companies hundreds of millions of times annually, suggesting they are often used for appeals. See *supra* Sections I.C. & I.D.

174. See, e.g., Jackie Huba, *Lessons From the Hotel That Fines Customers \$500 For Negative Online Reviews*, FORBES, Aug. 4, 2014, at 13.

175. See, e.g., James Grimmelman, *The Virtues of Moderation*, 17 YALE J.L. & TECH. 42, 60 (2015).

176. See Elizabeth Barber, *A Harvard Professor Launched an Epic Rant Over an Extra \$4 on his Chinese Takeout Bill*, TIME, Dec. 10, 2014.

Despite some self-governance of consumer behavior, appeals in the informal system often favor the consumer. Once the corporation grants a refund, it would be unusual for the corporation to appeal. In contrast, judicial appeals can benefit either the corporation or the consumer, and likely favor the party with more resources.¹⁷⁷ Thus, since criticism about a lack of appeal is often based on concern about consumers' rights, this concern is mitigated in the private consumer legal system by the fact that informal appeals are disproportionately available to the consumer.

Moving beyond the issue of appeals, in some ways private dispute processes offer more accountability than do courts.¹⁷⁸ As discussed above, corporations monitor the satisfaction levels of customers after the complaint is resolved. They update their substantive and procedural policies regularly in a dynamic feedback loop. They experiment with and innovate their procedures in response to customer feedback.¹⁷⁹

No remotely commensurate feedback mechanism, innovation, or process oversight exists in courthouses. Litigants cannot choose among courthouses or judges to the same extent that they can among corporations.¹⁸⁰ Nor is loyalty particularly valued; indeed, given the backlog in most courts, it is almost institutionally advantageous to overburdened court employees if consumers decide not to bring future suits as a result of bad experiences. This means that consumers have little opportunity to influence public courts through exit, voice and loyalty.¹⁸¹ With the exception of elected judges in some jurisdictions, courts are largely insulated from direct accountability to their constituents.

It is true that consumer disputes are mostly resolved without a formal judicial appeals process and thus lack a key accountability mechanism available in public courts. However, the private consumer legal system can offer strong accountability through informal appeals and direct responsiveness to consumers' interests.¹⁸²

177. See, e.g., Donald R. Songer et al., *Do the "Haves" Come out Ahead over Time? Applying Galanter's Framework to Decisions of the U.S. Courts of Appeals, 1925-1988*, 33 L. & SOC'Y REV. 811, 830 (1999) (finding advantages for parties with greater resources, but noting further research is needed).

178. See, e.g., Susan Sturm & Howard Gadlin, *Conflict Resolution and Systemic Change*, 2007 J. DISP. RESOL. 1, 4 (2007) (arguing more generally that organizational alternative dispute resolution processes can provide forms of accountability "from the linkage of individual and systemic conflict resolution.").

179. See *supra* Section I.B.3.

180. The main exception is the occasional forum shopping for more sophisticated litigants in high-value disputes.

181. Cf. ALBERT HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970) (discussing the role of exit, voice, and loyalty in organizations). If the organization in question is the piece of litigation, rather than the court, consumers do have recourse to exit, voice, and loyalty.

182. In this regard, consumer corporations have brought a form of voice and self-governance that scholars have advocated more broadly for corporations. See, e.g., ROGERS ET AL., *supra* note 16, at 132 (advocating a collaborative approach to dispute systems design); Katharina Pistor, *Multinational Corporations as Regulators and Central Planners: Implications for Citizens' Voice in CORPORATIONS AND CITIZENSHIP*, 246 (Greg Urban, ed., U. Penn. Press, 2014) (arguing for "Bringing voice and principles of self-governance into the [multinational corporation] space. . .").

4. Truth, Justice, and Community

Society has interests in its dispute system that go beyond those that can be monetized.¹⁸³ Perhaps the most prominent among these are truth, justice, and community. The private consumer dispute system, in some regards, advances these ideals.

Promoting truth and justice is the most prominent justification for the adversary legal system.¹⁸⁴ Scholars have often challenged the adversary system's ability to deliver on this promise.¹⁸⁵ Given unequal representation in the courts, "a system of adjudication that truly promoted truth and justice in dispute resolution would permit far less adversary assertiveness than the current system allows."¹⁸⁶ These concerns carry additional weight in the contractual consumer context due to the strong resource imbalance between consumers and corporations. Moreover, because concentrated business groups can heavily influence the legislative process,¹⁸⁷ even a system that flawlessly applied the law could produce unjust outcomes.

The corporation as courthouse offers an alternative. Contract law can be seen as embodying an ideal of collaboration that is at the heart of modern economic and political institutions.¹⁸⁸ As such, contracts are more than instruments for wealth generation and reflect, in a certain sense, norms of community and an essential component of coexistence.¹⁸⁹ In a mass-contracting age, customer service departments serve as the principal site for negotiations between consumers and corporations. They consequently offer, as Daniel Markovits puts it, "potential to function as sites of social solidarity—as analogs to the village market."¹⁹⁰

This Article's analysis suggests that corporations are moving towards that vision, not only through their customer service departments but more broadly in their various court-like roles. This is so even if it makes no sense that the corporation would intrinsically value community or norms of collaboration. Instead, those norms are brought into the system in two main ways. Most

183. See ROGERS ET AL., *supra* note 16, at 201 (discussing a broader set of goals and interests in dispute systems).

184. See Daniel Markovits, *Arbitration's Arbitrage: Social Solidarity at the Nexus of Adjudication and Contract*, 59 DEPAUL L. REV. 431, 449 (2010) (describing the most prominent justification of the adversary system as the argument that "adjudication tracks truth and justice.").

185. See, e.g., Catherine Albiston, *The Dark Side of Litigation as a Social Movement Strategy*, 96 IOWA L. REV. BULL. 61, 74-77 (2011); Markovits, *supra* note 184, at 449-51 (arguing that the adversary system does not ensure truth and justice).

186. See Markovits, *supra* note 184, at 450.

187. See, e.g., Daniel A. Farber, *Positive Theory As Normative Critique*, 68 S. CAL. L. REV. 1565, 1570 (1995).

188. Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417, 1421 (2004). Scholars have often interpreted contract law as embodying moral principles such as freedom, harm, and welfare. See *id.*

189. It follows that there may be moral reasons for enforcing contracts. See Markovits, *supra* note 188, at 1422.

190. See MARKOVITS, *supra* note 14, at 1321.

significantly, because corporations are increasingly attempting to provide what consumers value in dispute resolution,¹⁹¹ those processes would be expected to evolve toward procedures that reflect community norms. Additionally, employees must ultimately exercise discretion in a great number of dispute resolution cases. Employees' social norms influence how they exercise that discretion, such as whether they comply with company policies.¹⁹²

It should thus not be surprising that the corporation as courthouse increasingly operates under principles of justice and collaboration. Elements of procedural justice such as skilled listening, respectful treatment, and trustworthiness create a sense of connectedness that promotes ongoing relations.¹⁹³ This would explain the counter-intuitive finding that following well-handled internal disputes, consumers give the company more business than before, even when consumers' requests are denied.¹⁹⁴ This is true not only in the customer service negotiation, but when the corporation acts as network judge.¹⁹⁵

The centrality of community can also be seen in language and sanctions. The use of expulsion from the online community as an enforcement mechanism underscores this relational dimension.¹⁹⁶ Amazon even explicitly states above its complaint form "Thank you for reporting a community rules violation."¹⁹⁷ Reputation-based sanctions also enable more collaborative relations in consumer markets just as they do in other commercial contexts—including among diamond merchants, cotton traders, and lobster trappers.¹⁹⁸ Feedback left on websites or tweets are a form of expression to other community members about the transgression of a shared norm.

Thus, consumers and corporations resolve disputes mostly in relation to norms, rather than laws. The private consumer legal system has the potential to buttresses collaborative relations that antagonistic public court processes sever. While this discussion should not be taken to argue that a privatized system is

191. See *supra* Sections I.A. and I.B.

192. See Sijun Wang et al., *Employees' Decision Making in the Face of Customers' Fuzzy Return Requests*, 76 J. MARKETING 69, 80 (2012).

193. See *supra* Section I.B.2.

194. See Stone, *supra* note 35, at 112-13.

195. See, e.g., Rule, *supra* note 19, at 772 (discussing eBay's internal study that concluded consumers used eBay more after dispute resolution). Because these conclusions rely on companies' internal studies they may reflect biased results.

196. See AMAZON, *supra* note 126 ("Any seller that fails to cooperate in good faith to resolve a buyer's complaint may have its account privileges restricted or terminated."). Cf. Bernstein, *Cotton Industry*, *supra* note 21, at 1737-38 (discussing how a cotton merchant's failure to abide by trade association extralegal enforcement mechanisms would result in expulsion from the industry's primary trade association); Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach-Potential, Problems, and a Proposal*, 3 HARV. NEGOT. L. REV. 175, 178 (1998) (arguing for dispute resolution adapted to the customs, norms, and rules of online communities).

197. See *Contact Us*, AMAZON, <http://www.amazon.com/gp/help/reports/contact-us>.

198. See *supra* Section I.D.; JAMES M. ACHESON, *THE LOBSTER GANGS OF MAINE* (1988).

normatively superior,¹⁹⁹ the private dispute system does not obviously fail to advance society's non-monetary interests any more than the public court system does. Each at its best has a claim on legitimacy.²⁰⁰ Paradoxically, profit-motivated corporations often design dispute processes that enshrine community values.

B. The Pitfalls of the Corporation as Courthouse

1. Lack of Transparency

Scholars have often criticized the lack of transparency in arbitration.²⁰¹ Even though legal cases rarely go to trial, when they do they become public record.²⁰² Arbitral decisions usually do not.²⁰³ However, even arbitration is considerably more transparent than corporations' internal dispute processes.²⁰⁴

As a start, arbitrators commonly post their basic procedures online.²⁰⁵ Arbitrators also apply the law to the facts presented at trial, and do not consider extrinsic factors such as the consumer's profitability to the company.²⁰⁶ In contrast, the consumer corporation's procedures and *criteria* for making a decision are kept confidential. They may consider factors well beyond the law, without the consumer knowing.

199. Indeed, scholars have argued the larger move away from trials erodes important clarification of legal norms. See David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2622–23 (1995).

200. From a normative perspective, Lawrence Solum has argued that “a core right of participation is essential for the legitimacy of adjudication.” Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 274 (2004). As discussed above, the nature of participation in the corporation as courthouse is different from, but not immediately inferior to, that in public courts. See *supra* Section II.A.1.

201. See, e.g., Glover, *supra* note 27, at 3052 (“[p]rivate parties can exercise [] quasi-lawmaking power almost entirely outside of public view, through rarely read and little-understood provisions in contracts of adhesion subject to scant public scrutiny or regulatory oversight.”).

202. Most consumer cases entering the public courthouse are settled and thus may not become public record. See CONSUMER FIN. PROTECTION BUREAU, *Consumer Financial Protection Bureau Study Finds That Arbitration Agreements Limit Relief for Consumers* 2–3, http://files.consumerfinance.gov/f/201503_cfpb_factsheet_arbitration-study.pdf (finding that of 3,462 individual lawsuits only two went to trial). Settlements create their own challenges in terms of transparency and ongoing judicial involvement. See, e.g., Fiss, *supra* note 26, at 1082; Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927 (2006) (concluding that invisible settlements make discrimination in the workplace itself invisible).

203. However, several states require arbitrators to release case data publicly. See Resnik, *supra* note 2, at 2897.

204. Scholars have highlighted transparency concerns in the context of the mass settlement of torts. See Engstrom, *supra* note 11.

205. See, e.g., *Consumer Arbitration Rules*, AMERICAN ARBITRATION ASSOCIATION, <https://www.adr.org/aaa/faces/aoe/gc/consumer> (Jan. 1, 2016).

206. See, e.g., Weidemaier, *supra* note 134, at 1091 (empirically concluding there is little evidence that “arbitrators and judges engage in qualitatively different kinds of decision-making or opinion-writing.”).

2. Procedural Inequality and Discrimination

Corporations' highly tailored dispute processes violate a fundamental principle of the legal system: like cases should be treated alike.²⁰⁷ Among other reasons why procedural inconsistency might be problematic, it raises distributional concerns.

Studies have for decades found that wealthier and better-educated consumers are more likely to complain to corporations and are more successful when they do than are low-income consumers.²⁰⁸ However, the same is true in the judicial system.²⁰⁹ A key difference is that public courts and arbitral tribunals are designed for procedural equality, while corporations' internal processes are designed to discriminate.

Companies create unequal procedures for like cases based on factors such as how much the consumer can spend and the worth of the consumer's personal ties.²¹⁰ This means that corporations might deliberately treat two consumers with equal wealth and the same exact dispute differently based on the family or neighborhood in which the consumers were raised. This adds another layer of economic inequality onto those already present in courts, arbitration, and the traditional customer service department.²¹¹

These dynamics intersect in complicated ways with racial discrimination. Corporations' push toward automated dispute resolution offers greater decision-making uniformity.²¹² Automation offers promise to improve distributional outcomes by removing errors and bias introduced by frontline human decision makers. This could increase access to justice for some groups, such as blacks, who are less likely to enter the civil justice system because they believe—as empirical studies indicate—that they are subjected to judicial

207. William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1868 (2002) ("Our procedural systems rest upon the idea that adversarial litigants in a single case should be accorded equivalent procedural opportunities and upon the proposition that like cases should be processed according to like procedural rules.").

208. See Nader, *supra* note 13; Merzer, *supra* note 64, at 3 (finding wealthier and more educated consumers are more likely to ask for a refund, and wealthier consumers are more likely to have their request granted). Cf. Daniela Caruso, *The Baby and the Bath Water: The American Critique of European Contract Law*, 61 AM. J. CORP. L. 479, 498-99 (discussing the private law resistance to considering distributional concerns).

209. See, e.g., Fiss, *supra* note 26, at 1076 (critiquing disparate outcomes that result from unequal resources among litigants in private settlement processes); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974); Eloise Pasachoff, *Special Education, Poverty, and The Limits of Private Enforcement*, 86 NOTRE DAME L. REV. 1413, 1459 (2011) (concluding that private enforcement mechanisms in special education promote inequality).

210. See *supra* Section I.B.4.

211. Some commentators have argued arbitration also leads to inconsistency, though that inconsistency is not *purposeful*. See Kenneth S. Abraham & J.W. Montgomery, *The Lawlessness of Arbitration*, 9 CONN. INS. L.J. 355 (2003) (arguing the lack of precedent in arbitration leads to inconsistent rulings). But see Weidemaier, *supra* note 134 (concluding arbitrators use precedent).

212. U.S. Patent No. 7797212, *supra* note 62 ("[l]eaving fee refund decisions up to individual employees often creates inconsistency in the overall refund policy of a business.")

bias.²¹³ By relying on computer algorithms, the corporation may thus avoid some forms of racial discrimination ingrained in minds.

However, if those algorithms provide less redress to consumers with smaller savings and lower-income social networks, upward mobility is more difficult for all. To the extent these algorithms are viewed more as a component of price discrimination, with those paying higher prices receiving better service, this differential treatment is more familiar than the analogy to courts would imply. However, the resulting private dispute system risks exacerbating socio-economic inequality in subtle ways, and thus at the very least is worth recognizing as a potential pitfall of the system. Also, because historically disadvantaged minorities are more likely to be low-income, the corporations' dispute processes may also overall contribute to racial economic inequality.

3. Inadequate Aggregation Mechanisms

The small amount in controversy may not justify the time required for a consumer to complain about or arbitrate a lawful claim. Consumer corporations sometimes offer their own internal aggregation mechanisms in response to recognized mass harms, and private sector third parties offer some promise for aggregation, but these mechanisms are inadequate. This means that even when faced with readily available individual complaint processes, large numbers of consumers would never obtain redress in the private legal system without the existing public backdrop.²¹⁴

Private actors have created aggregation mechanisms both inside and outside the consumer corporation. Private dispute resolution firms that receive many complaints drive the aggregation mechanisms lying outside the corporation. They then either reach out to consumer companies to obtain redress, in a form of collective or automated bargaining, or file a large number of arbitration claims.²¹⁵ One startup exemplifying the potential future of private sector aggregation, David, asks consumers to provide account information and a description of the problem. It then brings typically small-value disputes to large telecommunications companies (presumably, Goliaths) such as Comcast,

213. See, e.g., Richard R.W. Brooks & Haekyung Jeon-Slaughter, *Race, Income, and Perceptions of the U.S. Court System*, 19 BEHAV. SCI. & L. 249, 249 (2001) (finding higher-income blacks are more skeptical they will be treated equally in the courts, especially in civil cases); Sara Sternberg Greene, *Race, Class, and Access to Civil Justice* (working paper) (concluding blacks' expectations of bias in the civil legal system can prevent them from seeking justice); Jerry Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1124, 1131 (2012) (summarizing evidence of systematic racial bias in the court system). Cf. Rory Van Loo, *A Tale of Two Debtors: Bankruptcy Disparities by Race*, 72 ALB. L. REV. 231, 231 (2009) (finding that blacks obtain worse results in bankruptcy courts and are subject to more motions to dismiss).

214. For a discussion of public mechanisms for aggregate redress, see *infra* Section III.A.2.

215. See Horton & Chandrasekher, *supra* note 3, at 394 (sharing evidence of plaintiff-side firms filing ghost class actions in arbitration tribunals).

AT&T, Verizon, and Time Warner.²¹⁶ The company collects a small fee—thirty percent—only if the dispute is resolved.²¹⁷

Another aggregation mechanism outside the firm comes from consumers organizing through social media.²¹⁸ Consumers have, for example, set up Facebook sites to share information as to how to proceed in arbitration or how to navigate a company’s customer service process.²¹⁹ This avenue is becoming more possible with increasingly automated online dispute processes within corporations.

Like class actions, these external aggregation mechanisms require little time to participate. However, they cannot amass plaintiffs who do not opt in.²²⁰ It is also unclear whether these mechanisms could provide redress at scale even if they could involve most consumers—the corporation could simply refuse to cooperate. Thus, in their current forms, from a design perspective, external aggregate mechanisms are less powerful than class actions at their best.²²¹

Internally coordinated claim aggregation occurs when the company organizes its own mass payout structure.²²² It may do this after recognizing that it has delivered problematic products, or after consumers take to social media and complaint venues with sufficient force. But one of the main incentives for such a program may be the threat of regulatory enforcement or class actions.²²³ Under Rule 23(b)(3), which requires a class action to be “superior to other available methods for fairly and efficiently adjudicating the controversy,” many courts have rejected class action suits when the corporation has already set up its internal payout system.²²⁴ There is so far little evidence that internal aggregation is viable independent of public mechanisms.

216. See DAVID, www.senddavid.com. A related model can be found at Measured Up, which brings consumer complaints to large “partner” companies including Verizon, Walmart, and American Express with the goal of resolving disputes. See <http://www.measuredup.com>.

217. See DAVID, *id.*

218. See generally Jeremy R. McClane, *Class Action in the Age of Twitter: A Dispute Systems Approach*, 19 HARV. NEGOT. L. REV. 213, 245-46 (2014) (discussing how social media provides consumers with an alternative to class actions).

219. See *id.*

220. See Horton & Chandrasekher, *supra* note 3, at 94-95 (“[U]nlike traditional class action attorneys, who frequently represent thousands of plaintiffs, arbitration entrepreneurs string together a few dozen consumers at most.”).

221. Granted, courts have similar challenges certifying classes because of the difficulty of knowing the identities and similarity of stories for what are usually large groups of consumers. See, e.g., Andrew Bradt, “*Much to Gain and Nothing to Lose*” *Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 ARK. L. REV. 767, 767 (2006) (describing the question of whether to certify a class action as “a troubling problem for both courts and commentators”).

222. See Jaime Dodge, *Disaggregative Mechanisms: Mass-Claims Resolution Without Class Actions*, 63 EMORY L.J. 1253, 1255 (2014).

223. See Remus & Zimmerman, *supra* note 11.

224. See Eric P. Voight, *A Company’s Voluntary Refund Program for Consumers Can Be a Fair and Efficient Alternative to a Class Action*, 31 REV. LITIG. 617, 620-21 (2012) (mentioning nine district courts that have denied class action relief due to corporations’ self-initiated refund policies).

4. Susceptibility to Market Failures

A dispute system designed and governed largely by market forces rises and falls with the level of competition in the underlying market. In particular, breakdowns related to three areas may pose challenges to the private consumer legal system: market concentration, behavioral economics, and information asymmetries.

Although even monopolists have financial incentives to provide customer service, the literature suggests that companies invest less in dispute resolution in less concentrated markets.²²⁵ The “Ma Bell” telephone monopoly that lasted until 1984 provides a well-documented historic example of this relationship, marked as it was by low customer service.²²⁶ Today, three out of every four homes have only one option for high-speed Internet services, and consumers in many parts of the country have few choices for cable.²²⁷ A Senate Commerce Committee investigation found that the absence of competition in the cable industry led to “abominable” customer service.²²⁸ The leading providers of cable and Internet, Comcast and Time Warner, have the lowest customer satisfaction among companies in America.²²⁹ In concentrated markets, companies may worry less about their reputation or losing consumers following poor dispute resolution because consumers have few (if any) other choices.

Another category of market failure relates to consumer behavioral biases and sophistication deficits. Consumers are rarely represented by counsel during small-value dispute processes. Corporations’ customer service settlement procedures, on the other hand, are designed by sophisticated lawyers and business analysts. The corporation may thereby be able to exploit consumers’ cognitive biases, perhaps through a process perceived as fair, to leave them

225. See, e.g., Hansen et al., *supra* note 50, at 9, 12 (“[i]nvestment in complaint management is most effective in competitive markets. . . .”); Claes Fornell & Birger Wernerfelt, *A Model for Customer Complaint Management*, 7 *MARKETING SCI.* 287, 296 (1988) (finding that “complaint management is more effective the greater the number of competitors. . . .”).

226. See, e.g., Robert D. Atkinson, *The Role of Competition in a National Broadband Policy*, 7 *J. TELECOMM. & HIGH TECH. L.* 1, 10 (2009) (mentioning the poor customer service associated with the “Ma Bell” monopoly).

227. See FEDERAL COMMUNICATIONS COMMISSION, PREPARED REMARKS OF FCC CHAIRMAN TOM WHEELER: “THE FACTS AND FUTURE OF BROADBAND COMPETITION” 4 (Sept. 4, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-329161A1.pdf; Eduardo Porter, *Concentrated Markets Take Big Toll on Economy*, *N.Y. TIMES*, May 27, 2014, at B1 (discussing the concentrated nature of the cable industry).

228. See Michael D. Blanchard, *Regulated Industries—Statutory Construction of Section 541(a) of the Cable Television Consumer Protection and Competition Act of 1992: A Presumption in Favor of Practical Reason*, 18 *W. NEW ENG. L. REV.* 437, 447 (1996).

229. See Polly Mosendz, *Comcast and Time Warner Are the Most Hated Companies in America*, *THE WIRE*, (May 20, 2014) <http://www.thewire.com/technology/2014/05/comcast-and-time-warner-are-the-most-hated-companies-in-america/371295/>; Press Release, Leichtman Research Group, Major Pay-TV Providers Added About 10,000 Subscribers in 1Q 2015 (2015), <http://www.leichtmanresearch.com/press/051415release.html> (listing Comcast and Time Warner as the leading cable companies by market share); Sig Ueland, *20 Top Internet Service Providers*, *PRACTICALECOMMERCE*, (Dec. 12, 2011), <http://www.practicalecommerce.com/articles/3225-20-Top-Internet-Service-Providers> (listing Comcast as the top provider of Internet and Time Warner as third).

satisfied with an outcome that gives them less than that which the law, or negotiations in good faith, would provide. This is particularly concerning given consumer corporations' growing sophistication in incorporating behavioral economics into their business strategy.²³⁰

Finally, there is the possibility of informational market failures. Information intermediaries such as reputation-based websites aim to address these shortcomings. However, like diamond traders, consumers and companies have opportunistically sought to influence reputational mechanisms.²³¹ Between 2010 and 2013, the percent of companies with social media programs increased from twelve percent to fifty-nine percent.²³² Though these programs are mostly ethical, they can sometimes take an unethical turn. Employees have been caught posting positive reviews of their employers' products without disclosing their employment status.²³³ And some companies hire "fake review mills" to leave favorable comments.²³⁴

In response, corporations have developed mechanisms for policing reputation institutions. Websites such as Yelp develop software to monitor suspicious activity, such as repeat reviews from the same computer.²³⁵ Amazon.com mines the personal data of reviewers and removes the review if they know the author.²³⁶ In one case, the retailer repeatedly removed one son's five-star reviews of his mother's book, and warns that it will "vigorously prosecute any attempted manipulation of reviews by suspending or terminating accounts, withholding remittances, and pursuing civil and criminal penalties."²³⁷ eBay implemented a feedback appeals process for certain types of sales, such as automobile transactions, that were particularly ripe for buyer

230. See Rory Van Loo, *Helping Buyers Beware: The Need for Supervision of Big Retail*, 163 U. PA. L. REV. 1311 (2015).

231. See Bernstein, *Diamond Industry*, *supra* note 21, at 157 (concluding that diamond industry transactors manipulate the role of reputation institutions because of their influence).

232. ABERDEEN GROUP, SOCIAL CUSTOMER CARE: SECRETS TO BUILD A WINNING STRATEGY (Feb. 16, 2016), <http://www.aberdeen.com/research/8578/ra-social-customer-service/content.aspx> ("[a]doption of social customer care programs increased by approximately five-fold between 2010 and 2013 (12% in 2010 vs. 59% in 2013).").

233. See Mary Pilon, *A Fake Amazon Reviewer Confesses*, WALL ST. J. BLOG (July 9, 2009), <http://blogs.wsj.com/wallet/2009/07/09/delonghis-strange-brew-tracking-down-fake-amazon-raves> (mentioning employees posting positive reviews of their employers' products).

234. See David Streitfeld, *In a Race to Out-Rave, 5-Star Web Reviews Go for \$5*, N.Y. TIMES, Aug. 19, 2011 (reporting on social brand management companies, also known as fake review mills, that offer services such as writing customer reviews).

235. See generally Kaitlin A. Dohse, *Fabricating Feedback: Blurring the Line Between Brand Management and Bogus Reviews*, 13 U. ILL. J.L. TECH. & POL'Y 363, 363 (2013).

236. See Chris Morran, *Amazon Is Data Mining Reviewers' Personal Relationships*, CONSUMERIST, July 6, 2015, at <https://consumerist.com/2015/07/06/amazon-is-data-mining-reviewers-personal-relationships>.

237. See *Anti-Manipulation Policy for Customer Reviews*, AMAZON, http://www.amazon.com/gp/help/customer/display.html/ref=help_search_1-1?ie=UTF8&nodeId=201749630&qid=1431546060&sr=1-1; Dohse, *supra* note 235, at 377 (describing how an author's son had the five-star review of his mother's book repeatedly removed).

exploitation of sellers.²³⁸ However, as the example of the hotel that tried to fine a guest \$500 for leaving a negative online review illustrates, the websites themselves may not be able to do anything against some strategies.²³⁹ It is questionable whether the private sector alone can succeed in preventing misinformation on its websites without public support.

Finally, there is a collective action problem with network governance. Only about four percent of unhappy consumers complain.²⁴⁰ If this number is too small to matter to companies or to ratings, reputation-based sanctions will not work.²⁴¹ Furthermore, information asymmetries may arise when consumers do not consult ratings, as in the case of software.²⁴²

The risk is that these market failures undermine all of the potential advantages of private ordering. Rather than offering low-cost access to redress, consumers are made to pay in subtle ways, such as by spending excessive time complaining or by having deserved redress denied. Reputation-based sanctions no longer hold consumers accountable because information available is inaccurate. The perception of procedural justice is used to mask what is, in fact, an absence of meaningful participation. In short, when markets fail, the risk is that the private consumer legal system fails with it.

III. The Public Backdrop for the Private Consumer Legal System

The above discussion raises the question of what procedural public interventions are needed. This Part assesses the existing public backdrop and concludes that it is unlikely to address many of the corporate courthouse's main pitfalls. However, the current emphasis on regulation over courts, and direct oversight of the most problematic industries, is sensible from a dispute systems design perspective.

A. The Current Regulatory Architecture

Although consumer dispute resolution largely unfolds without reference to the law or courts, public institutions still overall play a meaningful role. Agencies are the most significant public actor. Secondarily, private lawsuits offer some redress mostly through class actions, as individual suits even in

238. See, e.g., Colin Rule & Harpreet Singh, *ODR and Online Reputation Systems: Maintaining Trust and Accuracy Through Effective Redress*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE* 163 (Mohamed S. Abdel Wahab et al. eds., 2013) (describing buyer exploitation of used car sellers by threatening to leave negative reviews).

239. See *supra* note 174.

240. See Jerry Plymire, *Complaints as Opportunities*, 5 J. SERVS. MARKETING 61 (1991).

241. Those four percent could comprise most of the reviewing population, in which case companies will care more than that small number suggests, assuming it is impossible for companies to distinguish that four percent. See *infra* Part IV.A.

242. See Marotta-Wurgler, *supra* note 152, at 184 (finding consumers rarely consult ratings for software purchases).

small claims cases amount to a small fraction of consumer contractual disputes handled by companies.²⁴³

1. Direct Agency Oversight

A patchwork of state and federal legislation provides for direct agency involvement in corporate dispute processes in many industries. Legislatures have focused this oversight on industries with high concentration or cause for concern about behavioral economics-related practices—such as airline, cable, and finance.²⁴⁴ This indicates the potential for the legislative process, relying on agencies, to respond when markets fail to produce sufficient dispute resolution.

Federal legislation tasks airlines with maintaining certain minimum customer service standards, including “ensuring responsiveness to consumer problems” and “handling ‘bumped’ passengers with fairness and consistency in the case of over-sales.”²⁴⁵ The statute relies on a self-monitoring approach, in which the airlines keep customer service records available for audit by the Department of Transportation (DOT).²⁴⁶ For example, the DOT recently fined Delta \$375,000 when a review of internal complaint data revealed that the airline had regularly bumped passengers without first seeking volunteers and without offering compensation.²⁴⁷

Federal laws also require financial institutions to resolve disputes promptly, maintain accurate complaint records, and have systems to correct any legal violations causing complaints.²⁴⁸ Bank examiners from the Consumer Financial Protection Bureau (CFPB) regularly collect data about the complaint process at a very abstracted level, such as the time for dispute resolution, to ensure that banks are complying with these specific laws.²⁴⁹

In the case of the cable industry, Congress required the Federal Communications Commission (FCC) to “establish standards by which cable operators may fulfill their customer service requirements.”²⁵⁰ The FCC

243. See *Arbitration Study*, *supra* note 157, at §1 p. 15, §7 pp. 10-12 (finding only 870 cases filed by consumers against credit card issuers in districts representing approximately one-fifth of the United States). Most arbitration provisions contain small claims carve-outs. See *id.* at 1.4.6.

244. See Porter, *supra* note 227 (describing concentration in airline and cable industries).

245. 14 C.F.R. § 259.5(b) (2011).

246. See *id.* § 259.5(c).

247. See *Delta Fined for Treatment of Passengers It Had Bumped*, N.Y. TIMES, June 26, 2013, <http://www.nytimes.com/2013/06/27/business/delta-air-lines-fined-for-mishandling-bumped-passengers.html>.

248. CONSUMER FIN. PROTECTION BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL 12 (Oct. 2012); Telephone Interview with M.L. (June 8, 2015).

249. See Telephone Interview with M.L. (June 8, 2015).

250. 47 U.S.C. § 552(b). The enumerated requirements include standards governing “refunds” and “telephone availability.” See *id.*

responded by issuing detailed standards such as requiring the cable company to issue refunds within 30 days or in the next billing cycle.²⁵¹

The health insurance sector in some regards has the most far-reaching oversight. The Affordable Care Act ensures not only an internal process by which patients can appeal insurer plan decisions, but also establishes an external body to which the patient can appeal final internal decisions. This external process is run by a private contractor and overseen by the Department of Health and Human Services.²⁵²

Overall, most agencies have taken a minimum standards approach to their delegated authority to oversee customer service. This floor for customer service typically covers concrete issues such as the time taken to resolve disputes. However, they do not speak to the process by which disputes are resolved. Furthermore, many industries have no such federal standards for customer service, and states have filled the gaps only in very limited contexts.²⁵³

2. Filling the Aggregation Gap: Agencies and Class Actions

The importance of providing aggregate redress has often led reformers to conclude that without class actions companies will not be held accountable for small harms. However, these analyses typically focus on the dichotomy between courts and arbitration, while leaving out a more important mechanism for aggregate redress: the administrative agency.²⁵⁴

Courts play an increasingly limited role in aggregating small-value contractual disputes between consumers and companies due to the rise of mandatory arbitration. Nonetheless, they still do provide relief. For example, a recent CFPB study found consumers obtained \$370 million annually through all federal class actions for major consumer financial products such as credit cards, bank accounts, and mortgages.²⁵⁵

251. See *Customer Service Standards*, FED. COMM. COMM'N (April 2, 2012), <https://www.fcc.gov/media/customer-service-standards>. The agency did not provide any standards related to the process by which refunds are decided.

252. See, e.g., CENTERS FOR MEDICARE AND MEDICAID SERVICES, HHS-ADMINISTERED FEDERAL EXTERNAL REVIEW PROCESS FOR HEALTH INSURANCE COVERAGE, <https://www.cms.gov/CCIIO/Programs-and-Initiatives/Consumer-Support-and-Information/csg-ext-appeals-facts.html>. Congress has also mandated internal claims procedures for ERISA disputes. See 29 C.F.R. §§ 2560.503-1 (1999).

253. For example, California and New York mandate that issuers of pre-paid calling cards offer complaint-handling services. See Mark E. Budnitz et al., *Deceptive Claims for Prepaid Telephone Cards and the Need for Regulation*, 19 LOY. CONSUMER L. REV. 1, 25 (2006).

254. See, e.g., CFPB, *supra* note 202 (analyzing aggregate redress without considering how much relief is provided by agencies); See CONSUMER FIN. PROTECTION BUREAU, CFPB STUDY FINDS THAT ARBITRATION AGREEMENTS LIMIT RELIEF FOR CONSUMERS (March 10, 2015), <http://www.consumerfinance.gov/newsroom/cfpb-study-finds-that-arbitration-agreements-limit-relief-for-consumers> (concluding based on study of class actions that mandatory arbitration is problematic).

255. See CFPB, *supra* note 202, at 2-3 (listing total arbitration awards during the three-year period as \$400,000, and for class actions as \$1.1 billion).

Because over the same period consumers received \$133,000 annually in arbitration awards, or less than one-tenth the amount from class actions, the CFPB concluded that mandatory arbitration clauses limit consumer relief.²⁵⁶ This conclusion—a version of which is common in the legal literature—overlooks the role of consumer agencies in providing aggregate redress.²⁵⁷ Indeed, the CFPB’s enforcement lawyers alone have brought about \$2.5 billion annually in monetary relief to consumers, or more than six times the amount from class actions.²⁵⁸ Other agencies and state attorneys general also obtain billions in awards for consumers annually in the financial sector.²⁵⁹ Consequently, in industries with active regulatory agencies, strong deterrence can be obtained without class actions. As one former mid-level manager of a multi-billion dollar company put it, “A class action for \$10 million dollars is no big deal—we could pay them off without batting an eye. But the risk of regulators coming down on us makes people nervous.”²⁶⁰

Thus, the current public backdrop provides large amounts of aggregate redress and strong deterrence mostly through regulation, and secondarily (and decreasingly)²⁶¹ through class actions. Moreover, at least in the consumer context, reliance on regulation rather than class actions is theoretically preferable from a systems design perspective. Although regulation has substantial limitations,²⁶² it is overall preferable because it can advance society’s interests in aggregate dispute resolution at lower cost and greater effectiveness.

In terms of costs, with litigation, both consumers and corporations spend considerable resources on lawyers’ fees. By way of illustration, the CFPB in its study found that about eighteen percent of settlement awards went to

256. See CFPB STUDY FINDS THAT ARBITRATION AGREEMENTS LIMIT RELIEF FOR CONSUMERS, *supra* note 254.

257. See, e.g., CFPB, *supra* note 202 (studying the question of whether class actions are needed without considering the role of agencies in providing aggregate relief); Fitzpatrick, *supra* note 7, at 161 (concluding class actions are needed without considering agency relief). Nowhere in the CFPB’s report is there any consideration of the aggregate relief provided by agencies.

258. See CONSUMER FIN. PROTECTION BUREAU, ENFORCING CONSUMER PROTECTION LAWS (2015), http://files.consumerfinance.gov/f/201507_cfpb_enforcing-consumer-protection-laws.pdf (reporting CFPB enforcement actions obtained \$10 billion in relief between 2011 and 2015).

259. See, e.g., Christina Rexrode & Andrew Grossman, *BoFA Accord Ends a Long Legal Drama*, WALL ST. J., Aug. 22, 2014, at C.1 (discussing a Department of Justice settlement requiring Bank of America to pay seven billion dollars to consumers). Cf. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 499-500 (2012) (describing the similar role of state attorney general aggregate litigation and private class actions).

260. Telephone Interview with L.B. (Aug. 5, 2015). Of course, a regime could be constructed in which class actions caused more fear than regulation.

261. See, e.g., Fitzpatrick, *supra* note 7, at 161 (“I still see every reason to believe that businesses will eventually be able to eliminate virtually all class actions that are brought against them. . .”).

262. See *infra* Section III.B.

attorneys.²⁶³ By contrast, the CFPB enforcement group's salaries amount to roughly two percent of the awards it obtains for consumers.²⁶⁴ Also, plaintiff-side lawyers have financial self-interest in bringing bad faith claims against deep-pocketed companies.²⁶⁵ Granted, reputational interests and institutional financial incentives may also cause regulators to over-reach.²⁶⁶ However, research suggests that regulatory employees' financial self-interests lead to under-enforcement in some industries, which may help secure lucrative business jobs later.²⁶⁷ Thus, resolving disputes through regulation rather than class actions reduces costs from frivolous lawsuits. While lower costs are beneficial for many reasons, corporations likely pass on some of these savings to consumers in the form of lower prices.²⁶⁸

Regulation as an aggregate mechanism also advances other societal interests such as truth, justice and community norms. Courts are institutionally ill-equipped for the economic analyses involved in transactional consumer disputes.²⁶⁹ Instead, they rely on heuristics such as inferring compliance from the defendant's institutional structure.²⁷⁰ Regulators, by contrast, have deep economic expertise and familiarity with consumer markets.²⁷¹ Decisions by a more competent regulatory decision maker advance society's interest in accuracy and in avoiding injustices such as haphazard class action awards.

At its best, the administrative agency can also promote procedural justice, autonomy, and collaborative relations. The ideal for regulators is for companies

263. See CONSUMER FIN. PROTECTION BUREAU, *supra* note 153 at 17.

264. The CFPB has obtained \$2.5 billion annually in relief for consumers from enforcement actions. See *supra* note 258. CFPB enforcement attorneys cost taxpayers about \$45 million annually, if it is assumed that they use a proportional amount of agency resources. See CONSUMER FIN. PROTECTION BUREAU, PROGRAM SUMMARY BY BUDGET ACTIVITY (2012), <http://files.consumerfinance.gov/f/2012/02/budget-in-brief.pdf> (reporting a projected CFPB budget of \$448 million); Email from AV (Aug. 10, 2015) (stating enforcement makes up ten percent of the agency's employees). The two percent figure is calculated as $(448 \times .1) / 2,500 = .02$.

265. See, e.g., Bone & Evans, *supra* note 161, at 1314 (estimating thirty percent of class action filings are frivolous); Susan P. Koniak, *Feasting While the Widow Weeps*: Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045 (1995) (criticizing plaintiff attorneys for advancing their own interests over those of class members). Bad-faith suits are not specific to class actions. See Joanna C. Schwartz, *The Cost of Suing Business*, 65 DEPAUL L. REV. (forthcoming 2016).

266. See Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 854 (2014) (arguing reputational and institutional monetary incentives may drive regulators to seek excessive monetary awards).

267. See, e.g., Severin Borenstein et al., *Career Concerns, Inaction and Market Inefficiency: Evidence from Utility Regulation*, 60 J. INDUSTRIAL ECON. 220 (2012) (concluding the data are consistent with career prospects discouraging regulators from warranted regulatory actions).

268. See *supra* note 164.

269. See, e.g., Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 74 (2008) (arguing courts lack the institutional competence to monitor fast-changing consumer markets).

270. See Lauren Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888, 888 (2011) (describing courts' tendency to defer to institutional structure to infer nondiscrimination).

271. The FTC, for example, has a Bureau of Economics with seventy Ph.D.-level economists. See Matthew A. Edwards, *The FTC And New Paternalism*, 60 ADMIN. L. REV. 323, 353 (2008).

to self-regulate, although this goal is often overlooked.²⁷² Self-regulation means that the corporation analyzes the legality of its own actions and arranges aggregate payouts to consumers when it identifies violations, rather than requiring public courts or agencies to compel such action.²⁷³ To this end, regulators often develop ongoing relationships with regulated companies. Such close ties are concerning because of the potential for capture.²⁷⁴ But they also likely enable dispute resolution that is less alienating than adversarial court proceedings. Ongoing relations enable regulators to correct and prevent harmful practices outside the formal legal process—without ever bringing an enforcement action.²⁷⁵ They simply tell the company that it needs to fix the practice and compensate consumers, potentially allowing the corporation to manage its own aggregate payout plan.²⁷⁶ If designed well, this approach can promote autonomy and procedural justice for the corporation and its employees.

Moreover, when regulators encourage corporations to provide refunds, the result would presumably be to strengthen the relationship between the corporation and consumer. Whereas class actions are alienating and enable plaintiff-side lawyers to control much of the communications with the consumers, with regulatory intervention the corporation often administers the payouts and serves as the sole source of contact with the consumer.²⁷⁷ The corporation's continued ownership of the refund relationship can build trust and relations between consumers and corporations. Cooperative regulation thus offers the promise to strengthen the type of collaborative relations and solidarity that some scholars have argued are at the heart of contract law, and of the economy.²⁷⁸

272. See, e.g., Jean Braucher & Angela Littwin, *Examination as a Method of Consumer Protection*, 87 TEMP. L. REV. 807, 808 (2015) (highlighting the goal of self-regulation in the CFPB); Saule T. Omarova, *Wall Street as Community of Fate: Toward Financial Industry Self-Regulation*, 159 U. PA. L. REV. 411, 413 (2011) (arguing that “[o]ne key and currently overlooked potential mechanism for controlling and minimizing systemic financial risk is industry-wide self-regulation.”).

273. This concept is related to but distinct from self-regulatory organizations (SROs), which are third-party private entities that sometimes serve to regulate industries. See, e.g., Stavros Gadinis & Howell E. Jackson, *Markets As Regulators: A Survey*, 80 S. CAL. L. REV. 1239 (2007) (surveying SROs in securities regulation).

274. See, e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 16-18 (2010).

275. See Van Loo, *supra* note 230 (discussing consumer agencies' ability to collect information outside the legal process more efficiently).

276. See, e.g., Remus & Zimmerman, *supra* note 11, at 133.

277. See, e.g., Deborah Hensler, *Justice for the Masses? Aggregate Litigation & Its Alternatives*, DAEDALUS, Summer 2014, at 81 (“grumbling on websites devoted to specific mass litigations suggest [plaintiffs in mass torts] are often unhappy and distrustful of their own lawyers, the defendants, and the courts.”).

278. See *supra* Section II.A.4 (discussing Markovits's theory of contract law and relations between corporations and consumers).

Of course, the choice between regulation and class actions as aggregate mechanisms is not binary—the two could play a complementary role.²⁷⁹ Courts also provide advantages that regulators do not, such as a resistance to capture and a potentially more powerful symbolic effect.²⁸⁰ The broader point here is one that is often omitted from discussions on procedural privatization: even under a mandatory arbitration regime, consumers currently have access to aggregate redress through the consumer agency. Furthermore, if regulation is functioning effectively, reliance on regulation rather than class actions may lower enforcement costs and overall be better for consumers.

3. Regulators and Complaints

Like rural residents whose land has been trespassed by cattle,²⁸¹ after direct negotiations fail consumers sometimes contact public officials directly. Agencies receive hundreds of thousands of complaints from consumers each year.²⁸² Regulatory complaint processing serves two main functions with respect to the corporation as courthouse: to provide an alternative remedy and to influence how corporations handle complaints.

One purpose of regulatory consumer complaint mechanisms may be to offer a “remedial tool to make up for shortcomings in the courts.”²⁸³ Given that the corporation is the *de facto* courthouse for most consumer contractual disputes, regulatory complaint processing also can make up for shortcomings in corporations’ internal dispute processes.²⁸⁴ For example, the CFPB takes a proactive role by forwarding complaints to companies and following up to see how those complaints were resolved.²⁸⁵ A recent analysis found that following the launch of the CFPB’s complaint department, consumers gradually disputed financial companies’ responses less, which is consistent with consumers viewing those responses as more satisfactory.²⁸⁶ Anecdotally, consumers have

279. One potential justification for class actions is that they spur regulators to act. Increased regulation can result from litigation. *See* Fleming, *supra* note 80 (chronicling how *Williams v. Walker-Thomas Furniture Co.* led to consumer protection legal reform). However, greater market monitoring may be obtainable at lower costs simply by regulators hiring more examiners, or monitoring more consumer complaints. *See infra* Part IV.B.

280. *See infra* Section III.B (considering the implications of capture).

281. *See* Ellickson, *supra* note 21, at 679 (describing how ranchette owners sometimes respond to an incident by contacting a public official such as a county supervisor or animal control officer). They may take this step either because direct negotiation proves inadequate, or out of a belief that it will get better results. *See id.*

282. *See, e.g.,* Littwin, *supra* note 88, at fig.4 (analyzing over three hundred thousand complaints in the CFPB database over a recent two-year period).

283. *See* Porter, *supra* note 49, at 77.

284. *Cf.* Littwin, *supra* note 88, (analyzing the CFPB’s complaint process as “a forum for resolving consumer issues that might not otherwise be addressed.”).

285. *See* Porter, *supra* note 49, at 67 (describing how complaints are flagged for investigation if the financial institution does not close the complaint in a timely manner); Ayres et al., *supra* note 83, at 368-69 (finding significant variations in banks’ speed of processing complaints).

286. *See* Littwin, *supra* note 88, at 922, fig.1. The study did not allow for causality to be determined.

noted faster responses when the CFPB forwards complaints.²⁸⁷ Furthermore, many banks process complaints from the CFPB in an executive customer service group that provides more attentive complaint handling.²⁸⁸ Regulatory complaints may thus trigger an alternative path to redress within financial institutions, providing relief to tens of thousands of consumers each year.²⁸⁹ Regulatory complaints are another overlooked appeal mechanism outside the courts.

The second main procedural function of regulatory complaints is to more generally influence corporations' complaint processes even for consumers who do not complain.²⁹⁰ Using advanced software—such as the Federal Trade Commission (FTC)'s Consumer Sentinel—agencies analyze these complaints to identify trends and highlight areas for further investigation and possibly regulatory action.²⁹¹ For example, unlike the FTC, the CFPB posts complaint data online.²⁹² Approximately eighty-five percent of complaints submitted to the CFPB are first submitted directly to the company but left unresolved.²⁹³ Consequently, financial institutions improve their complaint handling to make unwanted regulatory and public attention less likely. For example, after the CFPB public database initially revealed large discrepancies among banks, some institutions revamped their customer service departments and tied executive compensation to the bank's performance in that database relative to their peers.²⁹⁴

287. See, e.g., CONSUMER FIN. PROTECTION BUREAU, CONSUMER RESPONSE ANNUAL REPORT 1 (2014), http://files.consumerfinance.gov/f/201503_cfpb_consumer-response-annual-report-2014.pdf (quoting a consumer noting faster resolution for complaints forwarded by the agency).

288. See Wieczner, *supra* note 115.

289. See Littwin, *supra* note 88, at 904, 913 (describing the consumer regulatory complaint process as providing access to justice and finding that about one in five of 174,095 complaints forwarded by the CFPB in a recent two-year period resulted in relief). It is unknown how many of these would have obtained relief otherwise, but eighty-five percent of those in the database had previously asked for relief directly to the company, and the average consumer had asked three times. See Interview with S.N. (May 28, 2015). Taking eighty-five percent of one in five consumers out of the 174,095 would amount to about thirty thousand consumers.

290. Ayres et al., *supra* note 83, at 369 (concluding that companies should heed the early results of the CFPB's complaints database and "[s]trive to improve their response processes for all consumers.")

291. See FEDERAL TRADE COMM'N, *AT&T to Pay \$80 Million to FTC for Consumer Refunds in Mobile Cramming Case* (Oct. 8, 2014), <https://www.ftc.gov/news-events/press-releases/2014/10/att-pay-80-million-ftc-consumer-refunds-mobile-cramming-case> (describing Consumer Sentinel as "a secure, online database available to more than 2,000 civil and criminal law enforcement agencies in the U.S. and abroad."); CONSUMER FIN. PROTECTION BUREAU, CFPB SUPERVISION AND EXAMINATION MANUAL, at Overview 7 (2012), http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf (describing how a high volume of complaints may result in a targeted examination); Littwin, *supra* note 88, at 925 (concluding the CFPB uses complaint data for regulation).

292. See Littwin, *supra* note 88, at 895.

293. Telephone Interview with S.N. (May 28, 2015); Littwin, *supra* note 88, at 922 (noting the average consumer went to the company three times before submitting a CFPB complaint).

294. See CONSUMER RESPONSE ANNUAL REPORT, *supra* note 287 ("Many companies are adapting to [the CFPB's focus on complaints] to become more directly responsive to consumer concerns."); Ayres et al., *supra* note 83 (finding discrepancies among banks in the public database);

Regulatory complaints offer several other benefits from a systems perspective. They make it more likely that regulators will identify market failures related to concentrated industries, since such market failures—more than for those related to behavioral economics and information asymmetries—would be expected to still generate complaints. By posting complaints online, regulators also offer an information intermediary that may be difficult to co-opt with misinformation. Finally, regulatory complaints give consumers a voice in the regulatory process. By providing another avenue for consumers to feel heard, regulators may contribute to the consumer legal system’s legitimacy and make consumers more likely to engage in value-maximizing economic transactions.²⁹⁵

B. Limitations of the Current Regulatory Architecture

The public backdrop for the private consumer legal system has three main categories of limitations. First, its main actor, the consumer regulator, lacks the information it needs to address certain pitfalls of the corporation as courthouse. Second, it is unclear whether the system is adequately preserving reputation intermediaries. Third, because the public backdrop relies so heavily on regulation, it is vulnerable to the limitations inherent in that institution, such as capture.

Agencies are inadequately informed above all because they rely mostly on regulatory complaints or vague aggregate company reports for information about how corporations make dispute resolution decisions.²⁹⁶ Regulators do not collect information from corporations to analyze their decision-making criteria. Instead, regulators mostly only check that the company is complying with the specific requirements of the law, which have remained static for years.²⁹⁷ This means that problematic dispute resolution practices about which consumers are unaware—such as the use of familial wealth—would go undetected by regulators unless they became public knowledge. Furthermore, agencies pay almost no attention to functions outside the customer service department, such as the corporation’s role in handling hundreds of millions of disputes in network trials.²⁹⁸

Telephone Interview with S.N. (May 28, 2015) (stating that companies have arranged compensation to reflect performance in the CFPB’s public complaint database).

295. Cf. TYLER, *supra* note 17 (finding empirical evidence that voice is an important component of perceptions of legitimacy). The lack of a voice is also theorized as an obstacle to collaborative contractual relations. See MARKOVITS, *supra* note 14, at 1422-23.

296. See *supra* Sections III.A.1, III.A.2.

297. See *supra* Section III.A.1.

298. Telephone Interview with M.L. (June 8, 2015) (stating that the CFPB does not look at chargebacks). The FTC, the primary regulator of online intermediary companies such as Airbnb and Amazon, does not regularly collect information about companies’ complaint processes. Cf. Van Loo, *supra* note 230, at 1381 (describing the FTC’s general lack of collection of private information from companies).

Second, public actors pay inadequate attention to reputation websites. As mentioned above, it is likely that reputation websites themselves will prove unable to police sellers' efforts to provide misinformation.²⁹⁹ Because agencies pay almost no attention to reputation websites, courts are currently the only option. Amazon, despite its substantial internal efforts to police reviews, is currently suing numerous websites that post fake reviews, such as the incautiously named BuyAmazonReviews.com.³⁰⁰ Fake reviews can be fought on legal grounds including consumer protection statutes preventing unfair and deceptive practices, and unfair competition.³⁰¹ However, sellers' fast-changing, innovative efforts to avoid the limits of the law raise questions about courts' ability to keep up. For example, instead of directly instructing writers to write favorable reviews, sellers ask hired writers not to provide feedback unless they will provide five-star reviews.³⁰² It is unclear whether the law is set to prevent these and other practices such as the hotel's contract clause requiring the consumer to pay five hundred dollars for leaving a negative review online.³⁰³ Moreover, no entity is regularly inquiring into how Amazon, Yelp, and other companies may be influencing their internal ratings systems for profit without consumers' knowledge, rather than simply policing reviews of products sold by third parties.³⁰⁴

Finally, a system that relies so heavily on regulation for its public dispute resolution faces institutional limits of the agency. These limits include the risk of over- or under-enforcement. Furthermore, agencies can become under-resourced or captured, depriving consumer markets of their primary public dispute resolution actor.

IV. Policy Considerations

This Article's main purpose is to illuminate the institutions that govern the vast majority of consumer disputes. Nonetheless, a discussion of reforms is merited given the preliminary evidence of pitfalls in the private order and limitations in its public backdrop. Also, legal scholars, legislators, and agencies

299. See *supra* Section II.B.4.

300. See George Anderson, *Amazon Lawsuit Takes on Fake Reviewers*, FORBES, April 13, 2015.

301. See *id.*; Dohse, *supra* note 235.

302. See Streitfeld, *supra* note 234.

303. See *supra* note 174. However, California has passed anti-gag legislation, and there are signs federal legislators may pass similar legislation. See Chris Morran, *Complain All You Want, California! State Outlaws Silly Non-Disparagement Clauses*, CONSUMERIST (Sept. 10, 2014) <http://consumerist.com/2014/09/10/complain-all-you-want-california-state-outlaws-silly-non-disparagement-clauses>.

304. Although regulators have been slow to enter this arena, the FTC has said that online writers such as bloggers must disclose any conflict of interest, such as having received a free product. See Stephanie Schwab, *Disclosures for Bloggers and Brands*, SOCIAL MEDIA EXPLORER (Apr. 24, 2013), <http://www.socialmediaexplorer.com/social-media-marketing/disclosures-for-bloggers-and-brands>.

have paid intense attention in recent years to the question of how to improve consumer dispute resolution. Yet those conversations have rarely considered consumer-facing corporations' internal processes. This Part considers how a reform analysis might proceed in light of a broader perspective on private ordering.

As a threshold matter, any proposal for improving consumer dispute resolution should be assessed by how it would interact with the existing private and public actors. To have as *substantial* an impact as possible, it would need to affect the institutional heart of the consumer legal system—the corporation's internal dispute institutions. To have a net *positive* impact, it would need to improve on the current regulatory architecture. At its best, the web of corporations in their interlocking courthouse roles currently provides a strong framework for dispute resolution. Competitive forces are in some markets driving the corporation toward providing more collaborative, low-cost, and responsive access to justice. The current regulatory architecture demonstrates a strong preference for allowing the private order to flourish largely unchecked. When public intervention is needed to resolve small-value consumer disputes, the preferred mechanism is currently public enforcement actions rather than private lawsuits.

In light of the existing system's strengths and limitations, several principles would help gauge whether a proposed regulatory architecture might overall improve the system. First, public intervention should rely on the economic incentives of firms as much as possible. This reliance would mean defaulting whenever possible to private ordering and its mainstays: business self-governance, adjudication by other firms, and reputation-based enforcement. A heavy reliance on private ordering is unavoidable because small-value consumer disputes cannot cover the costs of expensive resolution processes. The more the firm acts to improve dispute resolution on its own, without involving a public sector third party, the less the regulatory regime will cost, and the greater the potential for good faith contractual renegotiation that might otherwise prove unadministrable. A corollary to this principle is that any regulatory architecture must be dynamic—able to adjust as the private sector improves or worsens its dispute resolution in accordance with procedural experimentalism.

Second, the new regime would ideally provide regular visibility into businesses' internal operations, because they change rapidly and lack transparency. The idea would be to remove the blind spots of reputation-based sanctions rather than to replace them. Third, the regulatory architecture should prioritize public decision makers with general economic expertise and textured industry knowledge. Relevant background will help decision makers discern the complex interplay between market failures and justice. Finally, it would be preferable to minimize the risks of over-reliance on the administrative agency in light of the potential for capture and poor performance.

The discussion below offers several concrete policy ideas that meet these general criteria. These ideas include (1) ensuring informed administrative agencies that understand companies' internal dispute processes, (2) leveraging the informational power of complaints, and (3) sunrise class actions. The list is not meant to be exhaustive or final. Indeed, other public reforms such as online dispute resolution linked to public courts may yet prove promising. Instead, the reform ideas below are offered because they have potential to improve the existing regulatory architecture in ways that existing proposals do not, and they serve to illustrate the kind of recommendations that flow from a more holistic systems analysis of consumer disputes. The end state would ideally not be more regulation, but more sophisticated regulation tailored to the private ordering in place.

A. Regulatory Supervision

Agencies have the statutory authority to play a larger role in addressing the pitfalls of the private consumer legal system. The two main consumer agencies, the FTC and the CFPB, have the ability to collect information that would enable them to determine how companies decide on disputes, as part of their larger information collection authority for consumer protection purposes.³⁰⁵ Yet they and other agencies rarely do so.³⁰⁶ If agencies were to collect the information necessary to identify problematic dispute resolution practices, they would have many options for taking action. In some instances, agencies may conclude no action is necessary because markets are sufficiently moving corporations in the right direction.³⁰⁷ If not, agencies could promulgate rules, inform consumers, informally ask corporations to self-monitor, open a legal case,³⁰⁸ or lobby Congress for new industry standards.³⁰⁹ The most

305. This authority comes from their broader information collection authority. *See The FTC's Annual Line-of-Business Reporting Program*, 1975 DUKE L.J. 389, 394-96 (1975) (describing how courts have interpreted the FTC's information collection powers expansively, including for the collection of non-public information from firms); Braucher & Littwin, *supra* note 272, at 19 (explaining the CFPB's "broad information-gathering capabilities").

306. The closest to this is the DOT's auditing of complaint data to ensure airlines seek volunteers before bumping passengers. *See supra* Section III.A.1. The CFPB's examination arm does not inquire into how banks resolve complaints, but does look into the timeliness of complaint resolution and expects processes that enable banks to identify legal violations unearthed through the complaint process. Telephone Interview with M.L. (June 8, 2015).

307. *See supra* Section I.A.

308. Cases might be brought on a number of legal grounds, including unfair and deceptive acts and the doctrine of good faith. *See* MARKOVITS, *supra* note 14, at 1321 (mentioning the possibility of courts conceiving of customer service in accordance with contract principles analogous to the duty of good faith in performance); Eric G. Anderson, *Good Faith in the Enforcement of Contracts*, 73 IOWA L. REV. 299, 301 (1988) (noting that the doctrine of good faith "[a]ccounts for many cases in which courts have, or should have, declined to enforce an express contractual condition and illustrates that a number of decisions in which courts have cited public policy reasons for refusing to enforce a contract can be justified more satisfactorily by a good faith doctrine that respects, rather than trumps, freedom of contract."); Van Loo, *supra* note 230, at 1373-74 (explaining how federal agency powers to regulate unfair acts is broad and would likely apply to behaviorally based practices).

immediate question is whether and how agencies should use their information collection authority.

The most appropriate mechanism for such information collection is through supervision powers rather than enforcement powers. Despite the implications of heavy-handedness implicit in the name, supervision can be a particularly light regulatory mechanism by which non-lawyer examiners collect information periodically outside the legal process to enable informed decisionmaking.³¹⁰ Supervision is a form of “responsive regulation” aimed at self-monitoring.³¹¹ Indeed, the current minimal regulatory structure for complaints in the airline industry, which relies on self-monitoring and retention of reports that the DOT can audit, is a form of supervision.³¹² Greater supervision of complaint handling could involve as little as having one non-lawyer regulatory employee conduct two-hour interviews with a few companies in an industry each year to determine how the companies’ dispute algorithms work. Or it could involve more regular randomized spot check collection of data, such as internal decision trees used by customer service. Any such preliminary data collection could then form the basis for deciding whether further supervision or other action is warranted.

Regardless of the specific type and quantity of information collection, the larger point is that the FTC and the CFPB could use their supervisory powers periodically to stay up-to-date on how corporations adjudicate consumer disputes in various industries, ideally in partnership with other agencies such as the DOT and FCC.³¹³ Because widespread frequent supervision of diverse industries is impractical and unnecessary, supervisory efforts should target problematic industries and the most valuable information. Signs that an industry is potentially more problematic include higher consumer costs of

309. J. Maria Glover has proposed Federal Rules of Civil Settlement that would align pretrial settlements more closely with the law. See J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1713 (2012). An analogous idea could be developed for even non-lawyers handling consumer disputes regardless of whether a trial is feasible. Alternatively, ethics standards could be developed for those who design dispute resolution systems. See Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What We Should (Not) Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195, 198 (2009) (discussing the possibility of a “separate set of ethics standards or guidelines for those who design ‘systems’ of dispute resolution for institutions. . .”).

310. One reason why supervision is sometimes associated with heavy regulation is that its deployment in the financial sector involves regular on-site examinations and collection of large volumes of financial information from institutions, a process often seen by banks as oppressive. See Julie A. Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 WASH. U. L. REV. 1101 (2015) (describing financial sector regulatory supervision and identifying significant contributors to dissatisfaction with examinations). See also Van Loo, *supra* note 230 (proposing a light-touch supervision model for consumer goods in contrast to the heavier model in consumer finance).

311. See IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE*, 101-05 (1992).

312. See 14 C.F.R. § 259.5(c) (2011).

313. See *id.*

switching between competitors, a lack of continuing relationships, and high market concentration.³¹⁴

The idea of supervising complaint processes requires further development, and the costs of such a program would need to be weighed carefully. For example, even minimal supervision involves costs, and it would be counterproductive if corporations responded by halting collection of complaint data. However, given the size of most large consumer corporations, the expenses of complying with a light-touch supervisory program would likely be minimal. Moreover, informed regulators make it possible to address the pitfalls of the corporate courthouse without more costly involvement of public courts.

B. Leveraging the Informational Power of Complaints

Given the many ways that businesses aim to undermine consumer complaints, reputation-based sanctions might need public support. Although legislative action could prove useful, such as a non-confidentiality law limiting companies' ability to put gag orders on consumers,³¹⁵ this section explores two possible non-legislative improvements to reputation-based sanctions that are within regulators' current mandate: (1) digitally monitoring a larger universe of private sector complaint data, and (2) enhanced regulatory complaint processing.

Regulators could potentially integrate data from a variety of websites, such as Yelp, Amazon, and Google, to develop a form of meta-complaint intelligence about the complaint universe. A larger-scale version of this complaint network would also draw on corporations' internal complaint data—such as American Airlines' or Citibank's—if possible to do so without great expense to the corporation and while protecting the privacy of consumers. Regardless of which sources it linked to, this meta-complaint database could be used, first, to improve the informational power of regulators' complaint analysis software. Regulatory complaints constitute a tiny fraction of complaints submitted to companies—perhaps one complaint is submitted to regulators for every two hundred or more submitted to companies.³¹⁶ The CFPB, FTC, and FCC already have sophisticated software for analyzing their own complaints for trends.³¹⁷ They could presumably use that software to identify concerning complaint trends more rapidly, and thus provide better aggregate redress in the absence of class actions. For example, metrics such as

314. See *supra* Section II.B.4.

315. See Huba, *supra* note 174.

316. Telephone Interview with S.N. (May 28, 2015).

317. See *supra* note 291.

post-complaint attrition rate and complaint rate per transaction could flag the need for heightened supervision when compared with industry peers.³¹⁸

Second, such a complaint network might become capable of flagging suspicious complaint behavior across intermediary platforms. For example, software with textual analysis could identify similar complaint language submitted from various IP addresses scattered throughout the world. Third, this meta-complaint database could improve complaint handling in markets lacking vigorous competition. It could do so by making it easier for consumers dissatisfied with the complaint process to attract regulators' attention wherever they may complain. This would incentivize companies to pay more attention when a consumer reaches out with a dispute.

Another consideration for better leveraging the informational power of complaints would simply be for regulators to improve how they process complaints submitted directly to them. The CFPB, as a new agency started in 2011, has raised the bar for governmental complaint processing by following up with companies to check whether they adequately resolve complaints and by posting complaints online.³¹⁹ The preliminary evidence is that this has had a beneficial impact on financial institutions' internal complaint handling systems.³²⁰ Other agencies with a mandate to process complaints, such as the FTC, could follow suit. It may not be fair to expect the FTC to reach the same level of complaint handling as the CFPB because the agencies have different mandates and resources. The FTC's historical complaint resolution rate of close to fifty percent however—to the extent it is comparable to the CFPB's ninety-three percent rate—may indicate substandard performance.³²¹ Intergovernmental agency metrics comparing complaint-handling rates, whether done by the White House or by congressional inquiry, could prod the FTC toward the CFPB's performance levels.

Both of these paths involve costs. Resources devoted to complaint processing are diverted from other functions, such as enforcement and supervision.³²² There are also risks in giving too much power to consumer complaints, leading to inefficient levels of complaint handling. Moreover, agencies' efforts to produce digital tools would face obstacles given firms'

318. The idea would be to establish a yardstick. Cf. Ian Ayres & Amy Kapczynski, *Innovation Sticks: The Limited Case for Penalizing Failures to Innovate*, 82 U. CHI. L. REV. 1781 (2015) (describing how a regulatory system of yardstick penalties could advance policy).

319. See *supra* Section III.A.3.

320. See *id.*

321. See CONSUMER FIN. PROTECTION BUREAU (Fall 2014), *Semi Annual Report 2*, http://files.consumerfinance.gov/f/201501_cfpb_semi-annual-report-fall-2014.pdf (reporting companies responded to over ninety-three percent of forwarded complaints, with another four percent under review); Porter, *supra* note 49, at 83 (explaining that about half of all FTC complaints have historically been resolved, meaning the regulator intervened or received assurance that the complaint was handled by the company).

322. See Porter, *supra* note 49, at 84 (discussing the tradeoff between processing complaints and other regulatory functions).

great technological resources.³²³ These and other costs would need to be weighed closely. However, much of governmental complaint processing is automated, as is the submission of complaints in the private sector. It is thus quite possible that efficient ways of linking public and private complaints, and of processing governmental complaints, are worthy of experimentation.

C. Sunrise Class Actions

The CFPB is currently weighing whether to prevent financial institutions from using mandatory arbitration clauses, thereby reinstating class actions.³²⁴ The discussion above suggests that a legal system with widespread class action availability may not benefit consumers in markets in which the private legal system and regulators are functioning well. At the same time, class actions could improve dispute resolution in markets that lack those features.³²⁵ The CFPB has strong mechanisms in place to guard against under-resourcing and capture, but these safeguards have their limits and other relevant agencies have a weaker institutional design.³²⁶ Because regulation alone will often prove inadequate, it is worth considering how to make class actions available only in the face of evidence of market failures and regulatory inaction.³²⁷ These could be termed “sunrise class actions,”³²⁸ in contrast to the sunset clauses that end after a certain time period. For example, the U.S. Constitution states that appropriations for military operations must last no longer than two years.³²⁹

In a sense, sunrise class actions are a regulatory approach aimed at “inducing attorneys to mimic the results that a healthy, functioning market for

323. See generally Rory Van Loo, *Rise of the Digital Regulator*, 66 DUKE L.J. — (forthcoming 2017) (outlining challenges facing administrative agencies’ use of digital tools).

324. See Emma Gallimore, *Attorney Expects CFPB To Release New Arbitration Rules this Year*, LEGALNEWSLINE, Mar. 14, 2016, <http://legalnewsline.com/stories/510698672-attorney-expects-cfpb-to-release-new-arbitration-rules-this-year>.

325. Cf. Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 389 (2012) (“At present, it is precisely where public enforcement is difficult, compromised, captured, or under-resourced that the flexibility and the entrepreneurial drive behind the class action are most decisive and most significant.”).

326. See Barkow, *supra* note 274, at 16-18 (articulating aspects of the CFPB’s institutional design that insulate it from capture and distinguishing those features from other agencies); Braucher & Littwin, *supra* note 272, at 810-812 (explaining the risk of CFPB capture as well as statutory and institutional factors that may enable the agency to resist capture).

327. Other anti-capture measures are also worth considering, such as linking regulators’ pay to performance. See M. Todd Henderson & Frederick Tung, *Pay for Regulator Performance*, 85 S. CAL. L. REV. 1003, 1007 (2012).

328. The concept of sunrise clauses is commonly discussed in constitutional law, denoting a clause that would become activated after a certain time period. See, e.g., AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 474-75 (2012) (arguing the framers should have used more sunrise clauses); Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, But Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975, 1979 (2015) (exploring sunrise lawmaking); Sofia Ranchordas, *Innovation Experimentalism*, 19 LEWIS & CLARK L. REV. (2015) (discussing how time-limited clauses can be balanced with innovation in regulation).

329. See U.S. Const. art. I, § 8.

legal services would produce.”³³⁰ Developing a set of criteria that would trigger class action availability requires further study, although a robust literature aimed at reining in class actions provides a strong foundation for developing these criteria.³³¹ Three categories of filters are particularly relevant. First, in certifying a class action, judges could look for signs of market failure such as a high industry concentration and high rate of consumer complaints. Second, the current ninety-day period mandated by the Class Action Fairness Act for ensuring that relevant agencies—which means the Attorney General at the federal level—are notified could be used more proactively to determine whether federal consumer agencies will act on the issue, thus avoiding duplicative efforts.³³² Third, the decision as to whether to make class actions available might be informed by the institutional design of agencies in a particular industry. Institutional features such as independent funding and the ease of removing the agency head, as well as an analysis of historical funding levels, are factors that policy makers can weigh.³³³

Scholars have constructed mechanisms that could be seen as sunrise class actions, although not designed for that purpose. For example, to provide aggregate redress under a mandatory arbitration regime, Professors Miriam Gilles and Gary Friedman have proposed that attorneys general could leverage the private bar to bring class action suits on behalf of consumers. Private-sector attorneys would litigate the cases under the attorney general’s powers, thus circumventing any contractual prohibition of class actions.³³⁴ This proposal puts the attorney general in a “litigation gatekeeper” role.³³⁵ More broadly, attorneys general, or under-resourced consumer agencies, could decide when markets have failed or regulation is inadequate, and then could partner with plaintiffs’ firms to create a form of sunrise class actions.

Several limitations are worth considering. Sunrise class actions may work less well for some problems, such as racial discrimination in the marketplace.³³⁶ Such cases might not be adequately policed by reputation-based

330. See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 878 (1987).

331. See William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1442 (2006) (reviewing the literature proposing solutions for limiting unnecessary class actions).

332. See generally *id.*, at 1448 (2006) (describing the ninety-day period in the Class Action Fairness Act and its limitations); Catherine M. Sharkey, *CAFA Settlement Notice Provision: Optimal Regulatory Policy?*, 156 U. PA. L. REV. 1971, 1972 (2008) (describing the current notice requirement, including the Attorney General as the relevant federal agency).

333. See Barkow, *supra* note 274, at 16-18.

334. See Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 624 (2012).

335. See David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 620 (2013).

336. Scholars have offered evidence of racial discrimination in a variety of commercial settings. See, e.g., Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 817-819 (1991) (offering data from an experiment finding evidence of racial and gender discrimination in the sale of automobiles).

mechanisms and vigorous regulation, due to the potential for minority voices to be drowned out.³³⁷ This would suggest that some categories of suits should be widely available and not subject to the additional restrictions of sunrise class actions.

More broadly, sunrise class actions might prove costly and difficult to administer. Increased costs would come from requiring additional litigation to obtain certification. Difficulties in administration would result, for example, from the inevitable disagreement among economists about what evidence establishes market failures, and what conditions are necessary to establish sufficient competition. This disagreement makes it difficult to weigh such criteria.³³⁸

These are not trivial concerns. Nor is the alternative particularly attractive: either allowing class actions as blunt instruments even when regulators would do the job better, or the absence of class actions even when regulators fail.

Conclusion

The private ordering of consumer disputes relies on a complex system. The arbitration tribunal is one actor in this system. Yet for most disputes, the arbitral tribunal—like the public courthouse—is not an option. Instead, the consumer-facing corporation provides the institutional framework for contractual settlement, adjudication, and enforcement.

Much is unknown about this private consumer legal system. Accordingly, this Article does not seek to provide a definitive account. However, based on limited data there is cause for both optimism and concern. In some contexts, the corporation as the de facto courthouse is more responsive to consumers' basic procedural preferences and provides greater substantive redress for a larger number of people than can arbitration tribunals or public courts. At the same time, behind a veil of trade secrecy corporations' dispute systems exploit market failures and use unequal rules of procedure.

It is possible that private actors such as startups will develop innovative solutions to address evolving dispute resolution pitfalls. For now, however, the key procedural decisions happen where only regulators can practically look—inside the corporation. It is thus worth asking whether administrative agencies should use their authority to at least diagnose the heart of the consumer legal system. More importantly, this Article's analysis indicates the need to examine a broader set of interconnected institutions, and highlights new questions with great social significance.

337. As Professor Bagenstos puts it, "Civil rights laws don't enforce themselves." Samuel R. Bagenstos, *Mandatory Pro Bono and Private Attorneys General*, 101 NW. U. L. REV. 1459, 1460 (2007).

338. See, e.g., Rebecca Haw Allensworth, *Adversarial Economics in Antitrust Litigation: Losing Academic Consensus in the Battle of the Experts*, 106 NW U. L. REV. 1261, 1300 (2012).

This perspective has implications well beyond monetary disputes. An individual's credit report can determine the ultimate outcome for an apartment rental, mortgage qualification, or job. Yet three companies control the credit report market, and have established flawed dispute resolution procedures for correcting even egregious errors on peoples' credit reports. Comcast and YouTube regularly stop their own consumers from downloading or posting videos that other large corporations, such as Disney, argue violate intellectual property law.³³⁹ Companies such as Twitter and Reddit are policing hate speech, spam, and bullying.³⁴⁰ In diverse contexts, research into the corporation's rapidly expanding quasi-judicial role would illuminate not only the state of consumer rights, but also what procedural interventions society truly needs.

339. See Chris Morran, *Comcast Can Interrupt Your Web Browsing With Warnings About Potentially Illegal File-Sharing*, CONSUMERIST, <https://consumerist.com/2015/11/23/comcast-can-interrupt-your-web-browsing-with-warnings-about-potentially-illegal-file-sharing> (Nov. 23, 2015).

340. See, e.g., Mike Isaac, *Reddit Steps Up Anti-Harassment Measures With New Blocking Tool*, N.Y. TIMES, April 6, 2016, at B1.