

Consumer Financial Protection and Human Rights

Chrystin Ondersma
Rutgers Law School (Newark)

Follow this and additional works at: <https://scholarship.law.cornell.edu/cilj>

 Part of the [Consumer Protection Law Commons](#), and the [Human Rights Law Commons](#)

Recommended Citation

Ondersma, Chrystin (2017) "Consumer Financial Protection and Human Rights," *Cornell International Law Journal*: Vol. 50 : No. 3 , Article 4.

Available at: <https://scholarship.law.cornell.edu/cilj/vol50/iss3/4>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized editor of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Consumer Financial Protection and Human Rights

Chrystin Ondersma[†]

This summer the Consumer Financial Protection Bureau proposed a rule that would restrict the use of mandatory arbitration clauses in consumer financial credit contracts. With the administration and Congress seemingly eager to pull back on consumer financial regulations, it is crucial to examine the rights at stake. Many financial institutions have agreed to protect and promote human rights, so pressure from consumers, human rights organizations, and consumer protection advocates may succeed even though Congress has declined to promulgate the CFPB's proposed rule. This Article argues that the existing binding, mandatory arbitration system in consumer credit contracts is inconsistent with human rights principles, including property rights, rights to be free from discrimination, and due process rights. This Article then evaluates the CFPB's rule from a human rights standpoint, and explores the CFPB's role in mitigating human rights concerns triggered by arbitration clauses in consumer credit contracts.

Introduction	544
I. Mandatory Arbitration, Consumer Credit, and Human Rights: The Legal Landscape	548
A. The Problem of Mandatory Arbitration in Consumer Credit Contracts	548
B. Mandatory Arbitration in United States Law	551
C. Consumer Financial Protection Bureau Proposal	553
D. A Brief Introduction to Human Rights	555
1. <i>Human Rights Instruments of the United Nations</i>	556
2. <i>Human Rights and the Inter-American System</i>	557
3. <i>The European System</i>	559
II. Human Rights Pertaining to Mandatory Arbitration	559
A. Right to Property	560
1. <i>The Human Right to Property Generally</i>	560
2. <i>Deprivation of Property via Mandatory Arbitration in Consumer Credit Contracts</i>	561
B. Discrimination	562
1. <i>Right to be Free from Discrimination Generally</i>	562

[†] Professor of Law, Rutgers Law School (Newark). The author thanks Jorge Contesse-Singh, Robert Lawless, Melissa Jacoby, Edward Morrison, Mark Weidemaer, Jasmine Simmons, and Yuliya Guseva for helpful comments on earlier drafts, as well as research assistants Jasmine Simmons and Yian Pan.

2. Discrimination in Mandatory Arbitration Under Consumer Credit Contracts	563
C. Due Process	564
1. Process Rights as Human Rights Generally	564
2. Mandatory Arbitration and Due Process	565
D. Effectiveness of Remedies	569
1. Effective Remedies and Arbitration in Consumer Credit Contracts	571
III. The CFPB Proposal and Human Rights	573
Conclusion	575

Introduction

In the fall of 2016, Wells Fargo paid \$185 million in fines, including a \$100 million fine from the Consumer Financial Protection Bureau (CFPB), for fraudulently creating as many as two million checking accounts for its customers without their consent.¹ This practice went on for at least five years. How did the bank escape scrutiny for so long? Customers' account agreements included a clause requiring that all claims be brought in closed-door arbitration proceedings.² Now that the practice has been uncovered, customers who were harmed *still* sue in public court or pursue class action proceedings, despite calls for Wells Fargo to decline to enforce the arbitration clause.³ While some states have sought to challenge certain arbitration clauses as unconscionable, the Supreme Court has held that the Federal Arbitration Act preempts such legislation.⁴

Individuals have been unable to recover billions of dollars in wrongful charges because of mandatory arbitration clauses in consumer credit contracts. Proponents of mandatory arbitration often argue that arbitration is a cheaper alternative to litigation, but a number of consumers have found themselves without sufficient resources to challenge wrongful charges.⁵ One such individual attempted to challenge a \$125 late fee on his Citibank

1. Michael Corkery, *Wells Fargo Fined \$185 Million for Fraudulently Opening Accounts*, N.Y. TIMES (Sept. 8, 2016), http://www.nytimes.com/2016/09/09/business/dealbook/wells-fargo-fined-for-years-of-harm-to-customers.html?_r=0 [https://perma.cc/J7JC-VVC2]; Yuka Hayashi, *Sen. Brown Plans Bill to Ban Forced Arbitration in Wells Fargo Sales Scandal*, WALL ST. J. (Oct. 3, 2016, 5:17 PM), <http://www.wsj.com/articles/sen-brown-plans-bill-to-ban-forced-arbitration-in-wells-fargo-sales-scandal-1475529477> [https://perma.cc/98YN-CF7L].

2. Press Release, Senator Patrick Leahy, Leahy, Brown & Leading Democratic Senators Call On Wells Fargo To End Use of Forced Arbitration on Consumers, (Sept. 23, 2016), <https://www.leahy.senate.gov/press/leahy-brown-and-leading-democratic-senators-call-on-wells-fargo-to-end-use-of-forced-arbitration-on-consumers> [https://perma.cc/4GKT-ZKVG].

3. *Id.*; Hayashi, *supra* note 1 (describing bill proposed by Sen. Brown to ban enforcement of Wells Fargo's mandatory arbitration clause).

4. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 2309 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011).

5. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES (Oct. 31, 2015), http://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html?_r=0 [https://perma.cc/YR5Z-8LSH] [hereinafter NYT Arbitration Article].

card despite being forced to arbitrate.⁶ His story illustrates the tremendous barriers to recovery in such cases.⁷ At the time the Times interviewed him, he had spent \$35,000 over the course of three years to contest the charge that he said ruined his credit—he had yet to obtain any recovery.⁸ One woman took out a \$2000 auto title loan at 300% interest. She was unable to challenge the terms of the loans due to the arbitration clause.⁹ An elderly, disabled woman also pursued arbitration against Wells Fargo, challenging a practice of blocking third party levies on exempt funds and then deducting a \$60 “legal process fee” from the same exempt funds.¹⁰ AAA requires claimants to pay half of the arbitration fee, which is typically \$400 per hour, so she was unable to participate in arbitration.¹¹ In another example, TCF Bank engaged in the now notorious and indisputably wrongful practice of “high-low re-ordering” of overdraft charges whereby banks deduct the largest charges first, regardless of ordering, resulting in multiple minimal charges incurring \$25–\$30 per charge, and resulting in consumers paying “\$40 for a cup of coffee.”¹² Although Wells Fargo and Bank of America both were sued and ended up paying millions, TCF was sheltered by its arbitration clause. Even though it is indisputable that TCF violated state law, it is unlikely that consumers will obtain redress.¹³ After discovering that Citibank was charging them for insurance for which they were not even eligible, customers sought to bring a class action to recover these fees.¹⁴ On the other hand, because the contract they signed included an arbitration clause that required any litigation to be brought to arbitration—and precluded class action—Citibank was never forced to disgorge these profits and individuals never recovered these funds. Although the individual fees are small in cases like this, they result in billions of wrongfully obtained profit for companies when levied upon millions of customers.¹⁵

When consumers of financial products do bring claims in arbitration proceedings, they do not have the benefit of a public proceeding in a fair and impartial tribunal, and their arbitration claims are seldom successful.¹⁶ Even when consumers are deprived of property or discriminated against, closed door arbitration proceedings are often the only avenue—and it is seldom an avenue that results in redress for consumers.¹⁷ As I

6. *Id.*

7. *Id.*

8. *Id.*

9. NAT'L ASS'N CONSUMER ADVOC. & NAT'L CONSUMER L. CTR., Comments Regarding CFPB Notice and Request for Information on the Scope, Methods, and Data Sources for Conducting Study of Pre-Dispute Arbitration Agreements, at 37 (June 23, 2012), http://www.consumeradvocates.org/sites/default/files/NACA.Comments.CFPB_2012-0017.pdf [<https://perma.cc/HL2H-69XM>] [hereinafter NACA and NCLC Comments].

10. *Id.* at 39.

11. *Id.* at 39–40.

12. *Id.* at 53.

13. *Id.* at 53–54.

14. NYT Arbitration Article, *supra* note 5 (noting that Wells Fargo paid \$203 million after trial, and that Bank of America settled for \$410 million).

15. *Id.*

16. See *infra* note 170 and accompanying text.

17. See *infra* note 23.

discuss in my previous paper, *A Human Rights Approach to Consumer Credit*, many of the wrongdoings perpetrated by providers of consumer credit and debt collectors are violations of rights, and raise human rights concerns.¹⁸ For example, creditors and collectors may engage in property deprivation, interference with privacy, and discrimination.¹⁹

This lack of access to fair, public proceedings and effective redress is particularly troubling in light of the substantial reliance on private law suits, as opposed to regulators, to remedy wrongdoing perpetrated by providers of consumer financial products.²⁰ Arbitration clauses have historically been the primary tool for companies to reduce their exposure to liability for conduct that would otherwise violate consumer protection rules, including those designed to protect consumer rights.²¹ Although the Consumer Financial Protection Bureau has succeeded in achieving redress for consumers in several important cases, private enforcement continues to be the primary mechanism for redressing fraud and credit discrimination in the United States.²² When private suits are the primary mechanism for redressing rights violations, as in the consumer credit context, it is crucial that such redress be achieved through due process and that it is indeed available—in other words, that an effective remedy exist.²³ Mandatory arbitration essentially permits providers of consumer credit to treat these rights—the right to property²⁴ and the right to be free from discrimination—as merely default rules that can be circumvented by contract. Without a public forum, due process to achieve redress is not available—and the requisite consent to waive such rights is lacking.²⁵ Additionally, without a class remedy or access to counsel, there is no effective remedy to redress these violations.²⁶ The status quo for consumer credit contracts is thus deeply problematic from a human rights perspective.

This past summer, the Consumer Financial Protection Bureau issued a proposed rule that would prohibit companies from using mandatory arbi-

18. Chrystin Ondersma, *A Human Rights Approach to Consumer Credit*, 90 TUL. L. REV. 373, 415–16 (2015).

19. *Id.* at 377, 386, 416.

20. See CFPB, CONSUMER FINANCIAL PROTECTION BUREAU STRATEGIC PLAN FY 2013–2017, <https://www.consumerfinance.gov/strategic-plan/> [<https://perma.cc/XK4X-KXRK>].

21. See, e.g., David Schwartz, *Understanding Remedy Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F.L. REV. 49, 83 (2003) (explaining how plaintiff was required to arbitrate her claim under the federal Truth in Lending Act).

22. See CFPB, ARBITRATION STUDY: REPORT TO CONGRESS, PURSUANT TO DODD-FRANK WALL STREET REFORM AND PROTECTION ACT § 1028(a), § 10 (Mar. 2015), http://files.consumerfinance.gov/f/201503_cfpb_arbitration-study-report-to-congress-2015.pdf [<https://perma.cc/SR3L-WB6Z>] [hereinafter CFPB Arbitration Study] (examining thousands of public and private filings and suits).

23. One might make this same argument as a matter of fairness or justice; I am using the more universal and specific principles and language of human rights for reasons I discuss in my previous Article and review below.

24. See *infra* notes 138–153 and accompanying text.

25. See *infra* note 60 and accompanying text.

26. See *infra* note 79 and accompanying text.

tration clauses to ban class actions in financial credit contracts.²⁷ The proposal left room for companies to insist on arbitration so long as class actions are permitted.²⁸ The proposal also required companies to report claims filed and awards given and provides for CFPB monitoring of the arbitration process.²⁹ The proposed rule was the result of the CFPB's 728-page study of arbitration agreements in consumer financial products which found that very few consumers bring individual actions against financial service providers, and that class actions provide far greater opportunities for redress than arbitration proceedings.³⁰ However, on October 24, 2017, Congress voted not to allow the proposed rule to take effect.³¹ With the administration and Congress seemingly eager to pull back on both the CFPB's authority and U.S. human rights obligations,³² it is even more crucial to examine the rights at stake. Many financial institutions have agreed to protect and promote human rights,³³ so pressure from consumers, human rights organizations, and consumer protection advocates may succeed, even though Congress declined to promulgate the CFPB's proposed regulation. This Article argues that the existing binding, mandatory arbitration system in consumer credit contracts is inconsistent with human rights principles, and then evaluates the CFPB proposal under a human rights lens. Part I lays necessary groundwork, explaining the problem of mandatory arbitration clauses in the consumer credit context, providing a brief overview of the pertinent legislation and litigation pertaining to mandatory arbitration, and briefly reviewing the argument for a human rights approach to consumer credit, as well as the human rights instruments and bodies at issue. Part II discusses the human rights obliga-

27. Arbitration Agreement: Proposed Rule, 81 Fed. Reg. 32829 (proposed May 24, 2016) (rejected by joint resolution of Congress); *CFPB Proposes Prohibiting Mandatory Arbitration Clauses that Deny Groups of Consumers their Day in Court*, CFPB (May 5, 2016), <http://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-proposes-prohibiting-mandatory-arbitration-clauses-denying-groups-of-consumers-their-day-in-court/> [https://perma.cc/KUU2-MV57] [hereinafter CFPB Press Release].

28. CFPB Press Release, *supra* note 27.

29. *Id.*

30. *Id.*

31. Jessica Silver-Greenberg, *Consumer Bureau Loses Fight to Allow More Class-Action Suits*, N.Y. TIMES (Oct. 24, 2017), https://www.nytimes.com/2017/10/24/business/senate-vote-wall-street-regulation.html?_r=1 [https://perma.cc/Y3BN-4VH6].

32. See Michael Corkery, *Trump Expected to Seek Deep Cuts in Business Regulations*, N.Y. TIMES (Nov. 9, 2016), <https://www.nytimes.com/2016/11/10/business/dealbook/trump-expected-to-seek-deep-cuts-in-business-regulations.html> [https://perma.cc/5S7W-67Q5]; see, e.g., H.R. 193, 115th Cong. (2017); see also Ben Protess & Julie Hirschfield Davis, *Trump Moves to Roll Back Obama-Era Financial Regulations*, N.Y. TIMES (Feb. 3, 2017), <https://www.nytimes.com/2017/02/03/business/dealbook/trump-congress-financial-regulations.html?mcubz=3> [https://perma.cc/84JJ-CNVT].

33. See, e.g., BARCLAYS, *Barclays Group Statement on Human Rights* (2016), <https://www.home.barclays/content/dam/barclayspublic/docs/Citizenship/Policy-Positions/Human%20Rights%20Statement%20November%202016%20vF.pdf> [https://perma.cc/N9HA-K8SG]; BANK OF AMERICA, *Bank of America Human Rights Statement* (2014), http://about.bankofamerica.com/assets/pdf/human_rights_statement_2014.pdf [https://perma.cc/72XY-AGVK]; CITIGROUP, *Statement on Human Rights* (2014), http://www.citigroup.com/citi/citizen/data/citi_statement_on_human_rights.pdf [https://perma.cc/D8LH-GPEW].

tions and principles that bear on mandatory arbitration in consumer credit contracts, and demonstrates that binding, mandatory arbitration clauses in consumer credit contracts are inconsistent with human rights. This discussion addresses both substantive and procedural rights, specifically (1) the right to be free from discrimination, (2) the right to property, (3) the rights to due process and a fair trial, and (4) the right to an effective remedy. Crucially, Part II argues mandatory arbitration places the resolution of human rights concerns (particularly deprivation of property) in an exclusively private realm without ensuring access to an effective remedy that complies with due process principles. Part III evaluates the CFPB proposal in light of these concerns and explores the CFPB's broader role in mitigating human rights concerns triggered by arbitration clauses in consumer credit contracts.

I. Mandatory Arbitration, Consumer Credit, and Human Rights: The Legal Landscape

A. The Problem of Mandatory Arbitration in Consumer Credit Contracts

Presently, many consumers of financial products and services lack the right to litigate grievances of any kind in a court of law. Pursuant to their contracts with financial services providers, they are required to resolve disputes through arbitration. Under the industry's prevailing arbitration clauses, arbitration is both mandatory and binding—that is, consumers have no choice but to participate in arbitration, and, should they lose, they have no further recourse. The arbitration clauses are “pre-dispute” arbitration agreements because consumers agree to be bound before any dispute has arisen—when consumers are unlikely to even consider the possibility of any dispute arising. Further, these consumers are precluded from participating in class action litigation, making legal relief inaccessible or simply impractical when small amounts are at issue. Because the cost to bring such claims would exceed the recovery, such claims are called “negative value” claims. Sixteen attorneys general have expressed concern that the bans on class action in arbitration contracts would result in the proliferation of “unlawful business practices.”³⁴ But the problem with arbitration is not just that it impedes plaintiffs from bringing claims—even when claims are brought in arbitration, procedural protections are sorely lacking, as discussed in greater detail below.

As required by Dodd-Frank, the CFPB conducted a multi-year study of arbitration agreements and court resolutions of consumer financial contracts, examining over 850 consumer financial agreements, 1847 arbitration disputes filed between 2010 and 2012, 562 state and federal class actions filed between 2010 and 2012, 3462 individual claims, and 42,000 small claims. It reported its findings in a 728-page report.³⁵

34. NYT Arbitration Article, *supra* note 5.

35. CFPB Arbitration Study, *supra* note 22, § 1, at 7–8.

The CFPB found that over fifty percent of outstanding credit card loans are subject to pre-dispute arbitration clauses; that rate would be ninety-four percent if not for certain issuers temporarily agreeing to remove the clauses for a defined period pursuant to an antitrust settlement.³⁶ An estimated forty-four percent of checking account contracts also include arbitration clauses.³⁷ The majority of prepaid card, payday loan, student loan, and mobile wireless billing contracts also included arbitration clauses.³⁸ Nearly all of these arbitration contracts included class action bans.³⁹ Three out of four consumers had no idea that they were subject to an arbitration agreement.⁴⁰

Of the 1847 disputes the CFPB examined, over a thousand were filed by consumers.⁴¹ Nearly seventy percent of cases involved disputes over the amount of debt a consumer allegedly owed; forty percent were solely disputing debt owed, while another thirty percent of cases also included one or more affirmative claim against the company.⁴² The average amount of relief sought was about \$27,000, while the median amount of relief sought was about \$11,500.⁴³ Only about twenty-five disputes per year involved consumer claims under \$1000.⁴⁴ While companies were almost always represented by counsel, only about sixty percent of consumers were represented.⁴⁵

The CFPB could not access the results of all cases, but ascertained that roughly a third of cases resulted in arbitrator decisions, and roughly one quarter resulted in settlement.⁴⁶ With respect to affirmative claims against companies, only *thirty-two* consumers obtained any relief.⁴⁷ Only forty-six consumers obtained debt forbearance.⁴⁸ In terms of amounts of recovery, the *total* affirmative relief awarded was \$172,433, while the total debt forbearance was \$189,107.⁴⁹ By contrast, companies were awarded relief in 227 disputes for a total of \$2,806,662 in award amounts.⁵⁰ Further, for amounts under \$2500, only 505 consumers even attempted to arbitrate.

36. *Id.* § 1, at 9.

37. *Id.* § 1, at 10. I arrived at this number based on CFPB's estimate that eight percent of banks (covering forty-four percent of insured deposits) include arbitration clauses in their checking account contracts. *Id.*

38. *Id.* § 1, at 10.

39. *Id.*

40. Will Wade-Gery, *We took a look at arbitration agreements and here's what we found*, CFPB BLOG (Mar. 10, 2015), <http://www.consumerfinance.gov/about-us/blog/we-took-a-look-at-arbitration-agreements-and-heres-what-we-found/> [<https://perma.cc/K6TJ-7N64>].

41. CFPB Arbitration Study, *supra* note 22, § 1, at 11. The others were either filed by the companies or mutually submitted. *Id.*

42. *Id.* § 1, at 11.

43. *Id.* § 1, at 12

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

This is a tiny number considering the numbers of consumers at issue: Verizon, with 125 million customers, had to deal with only sixty-five arbitration actions, while Time Warner, with 15 million customers, was confronted with only seven.⁵¹

Consumers fared far better when they were able to participate in class action litigation. The CFPB studied consumer recovery in consumer financial class action cases between 2008 and 2012; roughly 350 million individuals were members of classes involving consumer financial products or services during those years.⁵² The annual average of settlement amounts was about \$540 million per year; arbitrators awarded more than \$2 billion in cash relief between 2008 and 2012, as well as over \$600 million in in-kind relief. Many settlements also required companies to change business practices.⁵³

In addition to investigating the consequences of the extensive use of arbitration clauses among financial services providers, the CFPB also pursued enforcement actions against wrongful practices perpetrated by financial institutions, most prominently Wells Fargo's practice of opening multiple accounts for customers without their consent. Because of Wells Fargo's arbitration clauses in consumer contracts, it is likely that, but for the CFPB enforcement action, this activity would have gone unpunished. Under the current laws, the bank's arbitration clauses will prevent many of the affected Wells Fargo customers from achieving full recovery.⁵⁴

Judges have been critical about the status quo, with one judge going so far as to say: "[t]he reality that the average consumer frequently loses his/her constitutional rights and right of access to the court when he/she buys a car, household appliance, insurance policy, receives medical attention or gets a job rises as a putrid odor which is overwhelming to the body politic."⁵⁵

51. NYT Arbitration Article, *supra* note 5.

52. CFPB Arbitration Study, *supra* note 22, § 1, at 16.

53. *Id.*

54. Renae Merle, *Wells Fargo customers won't be able to sue the bank over fake accounts*, CHI. TRIB. (Feb. 12, 2017), <http://www.chicagotribune.com/business/ct-wells-fargo-customers-fake-accounts-20160930-story.html> [<https://perma.cc/SRY4-NFTG>].

55. *Knepp v. Credit Acceptance Corp.* (In re *Knepp*), 229 B.R. 821, 827 (Bankr. N.D. Ala. 1999). It is important to acknowledge that there is no guarantee that consumers who are unable to obtain a remedy in arbitration would succeed in state courts. In particular, small damages relative to potential compensation might make individual consumer action in state courts impractical. This is why access to class actions is so critical. Some consumers may be able to succeed in small claims court, and some may succeed in accessing representation via non-profits, pro bono attorneys, or (in cases where damages are substantial) attorneys working on a contingency basis. But without significant reform, many consumers would not succeed in achieving a remedy in state court. Accordingly, because some consumers fail to achieve remedy, it is likely that human rights principles are not respected in state court procedures. Indeed, others have written that without a right to counsel, other rights—such as the right to adequate housing—may not be achievable. See, e.g., Howard Lintz et al., Univ. of N.C. Sch. of Law, *A Basic Human Right: Meaningful Access to Legal Representation*, at 59-62, <http://www.law.unc.edu/documents/academics/humanrights/malr.pdf> [<https://perma.cc/T8HJ-BJTT>]; Risa E. Kaufman, Martha F. Davis & Heidi M. Wegleitner, *The Interdependence of Rights: Protecting the Human Rights to Housing by Promoting the Right to Counsel*,

B. Mandatory Arbitration in United States Law

Ample legal literature discusses the legislative and litigation history of the rise of mandatory arbitration.⁵⁶ Essentially, what began as a congressional effort to ensure commercial entities ability to arbitrate has evolved into a handy mechanism for business entities to evade legal liability, particularly in the form of class action lawsuits. The Federal Arbitration Act (FAA) mandates that arbitration agreements are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”⁵⁷ Although the FAA was initially designed to facilitate arbitration between two commercial entities, beginning in the 1980s companies increasingly used arbitration clauses in form contracts” with employees, consumers, and investors.⁵⁸ Such contracts are presented on a take-it-or-leave-it basis, and consumers are very seldom aware that they have signed such a clause.⁵⁹ Beginning in the 1990s, companies used arbitration clauses to block class action litigation.⁶⁰ Although corporations argue that class actions are unnecessary because arbitration provides

45 COLUM. HUM. RTS. L. REV. 772 (2014). Although a detailed analysis of state court procedures is outside the scope of this Article, to the extent that the problems I describe in the arbitration context are replicated in state courts, reform is necessary in state courts as well. Despite these concerns, arbitration merits independent consideration because, historically, it is the primary mechanism that corporations use to avoid liability.

56. See generally Lauren Guth Barnes, *How Mandatory Arbitration Agreements and Class Action Waivers Undermine Consumer Rights and Why We Need Congress to Act*, 9 HARV. L. & POL'Y REV. 329 (2015); Michael S. Barr, *Mandatory Arbitration in Consumer Finance and Investor Contracts*, 11 N.Y.U. J.L. & BUS. 793 (2015); Shelly Smith, *Mandatory Arbitration Clauses in Consumer Contracts: Consumer Protection and the Circumvention of the Judicial System*, 50 DEPAUL L. REV. 1191 (2001); Anne Fleming, *The Rise and Fall of Unconscionability as the “Law of the Poor,”* 102 GEO. L.J. 1383 (2014); 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 (2015); Daniel R. Higginbotham, Note, *Buyer Beware: Why the Class Arbitration Waiver Clause Presents a Gloomy Future for Consumers*, 58 DUKE L.J. 103 (2008).

57. Federal Arbitration Act, 9 U.S.C. § 2 (2015).

58. Hossam M. Fahmy, *Arbitration: Wiping Out Consumers Rights?*, 64 TEX. B.J. 917, 917 (2001) (citing Barry Meier, in Fine Print, *Customers Lose Ability to Sue*, N.Y. TIMES (Mar. 10, 1997), at A1 (discussing banks' expanded use of arbitration clause)); John P. Roberts, *Mandatory Arbitration by Financial Institutions*, 50 CONSUMER FIN. L.Q. REP. 365, 367 (1996); Sallie Hofmeister, *Bank of America Is Upheld On Consumer Arbitration*, N.Y. TIMES (Aug. 20, 1994), <http://www.nytimes.com/1994/08/20/business/company-news-bank-of-america-is-upheld-on-customer-arbitration.html> [<https://perma.cc/7JFN-FNNW>] (quoting a bank spokesperson noting that avoiding class actions is where the “real money” will be saved due to arbitration clauses).

59. *Id.*

60. See, e.g., Alan S. Kaplinsky & Mark J. Levin, *Excuse Me, But Who's the Predator?*, 7 BUS. L. TODAY 24, 27 (May/June 1998) (“Lenders that have not yet implemented arbitration programs should promptly consider doing so, since each day that passes brings with it the risk of additional multimillion-dollar class action lawsuits that might have been avoided had arbitration procedures been in place.”); see also Bennet S. Koren, *Our Mini Theme: Class Actions*, 7 BUS. L. TODAY 23 (May/June 1998) (quoting industry attorney recommending adopting arbitration agreements because “[t]he absence of a class remedy ensures that there will be no formal notification and most claims will therefore remain unasserted”).

for easy resolution of grievances, in fact most people blocked from class actions due to arbitration clauses end up dropping the claim.⁶¹ Initially many courts struck down arbitration clauses on the basis that they were unconscionable or contravened state laws, but the Supreme Court has since ruled that the pre-emption doctrine precludes states from targeting arbitration clauses for such restrictions.⁶² In 2011, the Supreme Court ruled that California's unconscionability doctrine could not be applied to limit arbitration clauses that precluded class arbitration.⁶³ In 2013, the Supreme Court ruled that the "effective vindication" doctrine could not be used to invalidate a waiver of class arbitration unless Congress creates such an exception to the FAA.⁶⁴ The decision meant that merchants were unable to bring an anti-trust challenge under the Sherman Act, as the case was prohibitively expensive, with expert testimony alone costing more than \$1 million.⁶⁵ Justice Kagan remarked in her dissent, "[t]he monopolist gets to use its monopoly power to insist on a contract effectively depriving its victims of all legal recourse."⁶⁶ In 2015, the Court again held that the FAA preempted California law from restricting class arbitration waivers, and thus prevented California courts from invalidating class arbitration waivers on that basis.⁶⁷

To address these Supreme Court rulings and roll back the reach of the FAA, Senator Al Franken introduced the Arbitration Fairness Act (AFA). The AFA would invalidate any pre-dispute arbitration agreement if it involves an "employment, consumer, antitrust, or civil rights dispute."⁶⁸ The bill was read twice and referred to the Committee on the Judiciary, but has not come out of committee.⁶⁹

Despite the judicial restrictions on state efforts to curb mandatory arbitration, and despite the lack of success of legislative proposals, there have recently been some successful efforts to curtail the use of arbitration clauses in consumer credit contracts. First, the Dodd-Frank Act prohibits the use of arbitration agreements in contracts involving mortgages.⁷⁰ In addition, Dodd-Frank directed the CFPB to study the use of arbitration agreements in other consumer financial products and services and propose restrictions of such agreements if "in the public interest and for the protection of consumers."⁷¹ In March 2015, the CFPB completed and published its three-year study.⁷² The study found that pre-dispute arbitration agree-

61. NYT Arbitration Article, *supra* note 5.

62. AT&T Mobility v. Concepcion, 563 U.S. 333, 344 (2011); American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304, 2309 (2013).

63. *Concepcion*, 563 U.S. at 344.

64. *American Express Co.*, 133 S. Ct. at 2309.

65. *Id.*; NYT Arbitration Article, *supra* note 5.

66. *American Express Co.*, 133 S. Ct. at 2309.

67. DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463, 471 (2015).

68. Arbitration Fairness Act of 2015, S.1133, 114th Cong. (2015).

69. *Id.*

70. Dodd-Frank Wall Street Reform and Consumer Protection Act, 15 U.S.C. § 1639(c)(e) (2010).

71. 12 U.S.C. § 5518(b).

72. CFPB Arbitration Study, *supra* note 22.

ments were being widely used to prevent consumers from seeking relief from legal violations on a class basis, and that, without this option, consumers rarely file individual lawsuits or arbitration cases to obtain relief, particularly for negative value claims.⁷³

C. Consumer Financial Protection Bureau Proposal

Section 1028(b) of the Dodd-Frank Act authorizes CFPB to issue regulations that would “prohibit or impose conditions or limitations on the use of an agreement between a covered person and a consumer for a consumer financial product or service providing for arbitration of any future dispute between the parties,” if doing so is “in the public interest and for the protection of consumers. The CFPB proposed to establish 12 CFR part 1040, which has two primary functions: first, it would prohibit mandatory arbitration agreements from barring class actions, and second, it would provide for CFPB monitoring of arbitration of disputes involving consumer financial products and services.⁷⁴

First, the proposed § 1040.4 would prohibit covered providers of consumer financial products and services from using an arbitration agreement to bar the consumer from filing or participating in class action litigation. The CFPB concluded that allowing consumers to seek relief in class actions would strengthen the incentives for companies to avoid potentially illegal activities, and would also reduce the likelihood that consumers would be subject to such practices in the first instance.⁷⁵ The CFPB also explained that the rule would help level the playing field between compliance-oriented providers and those seeking to eschew liability.⁷⁶

Consistent with the Dodd-Frank Act, the proposed rule would have applied only to agreements entered into after the end of the 180-day period beginning on the regulation’s effective date.⁷⁷ The effective days of the rule would have been thirty days after publication in the Federal Register.⁷⁸ After the effective date, arbitration agreements would have had to include specific language explaining the effect of the new rule.⁷⁹ The regulation would have applied to those providers of consumer financial products and services over which they have jurisdiction; this includes credit card companies, debt management service providers, payday lenders, title lenders, student loan companies, and debt collection agencies.⁸⁰ (It would not include

73. *Id.*

74. Arbitration Agreements, 12 C.F.R. pt. 1040 at 1 (proposed May 3, 2016), http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf [<https://perma.cc/4C3G-BHJP>].

75. *Id.* at 115.

76. *Id.* at 127.

77. *Id.* at 5.

78. *Id.*

79. *Id.* The proposal would also permit providers of general-purpose reloadable prepaid cards to continue selling packages that contain non-compliant arbitration agreements, if they give consumers a compliant agreement as soon as consumers register their cards and the providers comply with the proposed rule’s requirement not to use an arbitration agreement to block a class action. *Id.* at 5–6.

80. *Id.* at 183–84.

auto dealerships, although automobile leases would be covered.)⁸¹

In addition to banning class action in arbitration agreements for covered consumer financial contracts, the regulation also would have provided for CFPB monitoring of arbitration. Section 1040.4(b) would require a covered provider that is involved in an arbitration pursuant to a pre-dispute arbitration agreement to submit specified arbitral records to CFPB.⁸² Although the CFPB explained that it was not seeking to restrict the use of arbitration agreements or prescribe specific methods or standards for the adjudication of arbitrations, it would require covered providers to submit five types of documents with respect to any individual arbitration case: (1) the initial claim and counterclaim, (2) the arbitration agreement, (3) the arbitration award issued (if any), (4) communication regarding claim dismissal due to the failure to pay fees, and (5) communication regarding a determination that agreement “does not comply with the administrator’s fairness principles.”⁸³ The CFPB explained that intended to use the information it collects to continue monitoring arbitration proceedings to determine whether there are developments that raise consumer protection concerns warranting further CFPB action.⁸⁴ In addition, the CFPB would have published these materials on its website increase the transparency of the arbitration of consumer disputes.⁸⁵

Unsurprisingly, industry groups opposed the CFPB’s proposed rules: The U.S. Chamber of Commerce insisted that government enforcement is sufficient to protect consumers,⁸⁶ despite the CFPB’s findings that many class actions provided redress in situations where there was no public enforcement.⁸⁷ The Chamber of Commerce also insisted that arbitration was beneficial and accessible (despite the CFPB’s evidence to the contrary), and that consumers would pay more if the CFPB proposal goes into effect.⁸⁸ The Consumer Bankers Association also opposed the regulation,⁸⁹ and even credit unions expressed opposition.⁹⁰ On October 24, the

81. *Id.* at 183, 200.

82. *Id.* at 201.

83. *Id.* at 340; 12 C.F.R. § 1040.4(b)(1) (2017).

84. CFPB Arbitration Study, *supra* note 22, at 4.

85. *Id.*

86. *The CFPB’s Flawed Arbitration “Study,”* U.S. CHAMBER OF COMMERCE 8-9 (Mar. 8, 2016), <https://www.uschamber.com/issue-brief/the-cfpb-s-flawed-arbitration-study> [<https://perma.cc/UP4D-6QU5>] [hereinafter CFPB’s Flawed Arbitration Study].

87. Arbitration Agreements, 12 C.F.R. § 1040 (proposed May 3, 2016), at 77.

88. CFPB’s *Flawed Arbitration Study*, *supra* note 86, at 8-10, 12, 15-16, 18 (citing, Stephen J. Ware, *The Case for Enforcing Adhesive Arbitration Agreements— With Particular Consideration of Class Actions and Arbitration Fees*, 5 J. AM. ARB. 251, 254-57 (2006)).

89. Maggie Seidel, *CBA Statement on the CFPB’s Proposed Arbitration Rule*, CONSUMER BANKERS ASS’N (May 5, 2016), <http://consumerbankers.com/cba-media-center/media-releases/cba-statement-cfpb%E2%80%99s-proposed-arbitration-rule> [<https://perma.cc/JN8G-TLJL>] (“Arbitration has long provided a faster, better, and more cost-effective means of addressing consumer disputes than litigation or class action lawsuits It is unfortunate this pre-baked proposal is political rather than substantive.”).

90. Christine Hines & Sophia Huang, *Credit Union Opposition to CFPB Arbitration Plan Is Baffling*, AM. BANKER (July 14, 2016), <http://www.americanbanker.com/bank-think/credit-union-opposition-to-cfpb-arbitration-plan-is-baffling-1090173-1.html> [<https://perma.cc/RF4R-9V23>].

Senate voted 51-50 to disapprove the rule under the Congressional Review Act. On November 1, President Trump signed the resolution, so the proposed rule cannot take effect.

D. A Brief Introduction to Human Rights

In my previous two papers,⁹¹ I explored the possibility of using a human rights framework to approach issues related to debt relief and over-indebtedness. In *A Human Rights Framework for Debt Relief*,⁹² I identified human rights principles implicated in debt relief, including bankruptcy and insolvency regimes. In *A Human Rights Approach to Consumer Credit*, I presented normative arguments in favor of a human rights approach to problems related to consumer credit.⁹³ I argued that a consumer protection approach, which has historically focused on leveling the playing field between consumers and lenders, was insufficient to address concerns of consumer confusion and consumer desperation. A human rights approach, I argued, could provide a floor of protection that cannot be circumvented on economic efficiency grounds. Although, in theory, a doctrine like unconscionability could accomplish something similar, arguments based on unconscionability have not been successful in challenging unfair consumer credit contracts. In addition, a human rights lens has the virtue of being universally comprehensible—it is perhaps the only universal language other than economics, and a purely economic lens has not been up to the task of preventing significant harm to consumers. A human rights based analysis is also useful because it is applicable to any proposed consumer financial product or regulation in any country; in an era of globalization where many contracts and consumer financial products may cross country lines, this universal applicability can be particularly beneficial. Finally, companies do not want to be human rights violators. To the extent that a consumer financial product or practice is inconsistent with human rights principles, advocates may succeed in pressuring companies to change such practices. My goal, in proposing a human rights lens, was twofold: first, for human rights advocates to consider consumer credit issues—and they have been doing impressive work in this field; and second, for folks working on consumer credit issues to consider whether legislative proposals and the like are consistent with human rights principles, and to advocate accordingly.

There is good reason to aim human rights principles at mandatory arbitration in the consumer credit context. As discussed in the introduction, private enforcement is the primary way of redressing deprivation of rights, such as property rights and the right to be free from discrimination. Mandatory arbitration has essentially permitted businesses to treat these rights as merely default rules that can be avoided contractually, even when the contract is hardly a meeting of minds. While in theory there is a mech-

91. See generally Ondersma, *supra* note 18; Chrystin Ondersma, *A Human Rights Framework for Debt Relief*, 36 U. PA. J. INT'L L. 269 (2014).

92. Ondersma, *supra* note 91.

93. *Id.*

anism for holding businesses accountable for these violations, that remedy is not effective and lacks due process protections, as I will discuss.

As I have explained in previous articles, a human rights approach to consumer credit does not consist only (or even primarily) of identifying human rights obligations connected to a remedy that is securable in a human rights forum; rather, it also entails identifying accepted human rights principles and methods of promoting these principles as they relate to consumer credit concerns. Courts, legislatures, policymakers, and activists can cite to these rights and principles in advocating for legislative or policy proposals. Even where a treaty has been signed but not ratified, as in the case of the International Covenant on Economic, Cultural, and Social Rights (ICESCR), the broad recognition of such rights can be a powerful driver for legislative change.⁹⁴ Thus, it is useful to examine human rights instruments that have been broadly accepted. These include the International Bill of Human Rights, which includes the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the ICESCR, as well as the human rights instruments adopted by regional bodies that have undertaken human rights obligations.

1. *Human Rights Instruments of the United Nations*

The Universal Declaration of Human Rights recognizes civil and political rights as well as the “economic, social and cultural rights indispensable for his dignity and the free development of his personality.”⁹⁵ While not a treaty, the Declaration is referenced in the preamble to treaties subsequently enacted and is considered part of “customary” international law.⁹⁶ The Declaration affirms the right to “just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”⁹⁷ In addition, it enunciates a right to rest and leisure,⁹⁸ and the right to “a stan-

94. For example, the right to water that advocates in Detroit cited is also a right contained in the ICESCR. For countries that are signatories to the ICESCR, even more pressure can be applied, as governments are required to “progressively realize” the rights contained in the ICESCR.

95. Article 22 of the Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A(III), U.N. Doc. A/810, at 75 (1948).

96. ANTHONY D'AMATO, INTERNATIONAL LAW: PROCESS AND PROSPECTS 123-47 (1986); John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in HUMAN RIGHTS: THIRTY YEARS AFTER THE UNIVERSAL DECLARATION 21, 36-37 (B.G. Ramcharan ed., 1979); MYERS S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 273-74, 325-27 (1980); MYERS S. MCDUGAL ET AL., HUMAN RIGHTS AND WORLD PUBLIC ORDER: THE BASIC POLICIES OF AN INTERNATIONAL LAW OF HUMAN DIGNITY 273-74, 325-27 (1980); Louis B. Sohn, *The Human Rights Law of the Charter*, 12 TEX. INT'L L.J. 129, 133 (1977). In addition, the 1968 United Nations International Conference on Human Rights stated that the Declaration “constitutes an obligation for the members of the international community.” The International Conference of Human Rights, *Final Act of the International Conference on Human Rights*, at 3, U.N. Doc. A/CONF.32/41 (1968).

97. *Universal Declaration*, supra note 95.

98. *Id.*

dard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care[.]”⁹⁹

The International Covenant on Civil and Political Rights, protects individuals’ civil and political rights, including rights to life,¹⁰⁰ freedom of religion,¹⁰¹ expression,¹⁰² and assembly.¹⁰³ It also includes the right to privacy,¹⁰⁴ freedom from discrimination,¹⁰⁵ and freedom from involuntary servitude or forced labor.¹⁰⁶ The United States has signed and ratified the ICCPR.¹⁰⁷ All parties to the ICCPR submit to monitoring by the United Nations Human Rights Committee.¹⁰⁸ On the other hand, redress for human rights violations under the ICCPR is available only pursuant to the First Optional Protocol, which the United States has not adopted.¹⁰⁹ The International Covenant on Economic, Social, and Cultural Rights protects the rights to education, health, and an adequate standard of living, which includes food, clothing, and housing.¹¹⁰ The Committee on Economic, Social, and Cultural Rights recognizes that immediate guarantee of each of the rights enshrined in the ICESCR may not be feasible; parties nevertheless must “take steps” toward realizing the rights, and must provide “minimum essential levels” of each of the rights.¹¹¹ The U.S. signed but has not ratified the ICESCR.¹¹²

2. Human Rights and the Inter-American System

In addition to its commitments to the United Nations, the United States has also acknowledged human rights obligations as a member of the Organization of American States in the Inter-American System. The United

99. *Id.* at 76.

100. *Id.*; G.A. Res. 2200 (XXI), annex, International Covenant on Civil and Political Rights, at art. 6 (Dec. 16, 1966) [hereinafter ICCPR].

101. ICCPR, *supra* note 100, at art. 18.

102. *Id.* at art. 19.

103. *Id.* at art. 21.

104. *Id.* at art. 17.

105. *Id.* at art. 26.

106. *Id.* at art. 8.

107. See generally International Covenant on Civil and Political Rights, signed by the U.S. Oct. 5, 1977, 999 U.N.T.S. 171, https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-4&chapter=4&clang=en [<https://perma.cc/GS4N-6N63>]. The United States signed the ICCPR in 1977 and ratified it in 1992.

108. *Id.*

109. Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI) Annex, at 59-60 [hereinafter Optional Protocol].

110. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, G.A. Res. 2200 (XXI) Annex, at 50.

111. Comm. on Econ., Soc. & Cultural Rights, Rep. on the Fifth Session, U.N. Doc. E/C.12/1990/8, at 84-85 (1991).

112. International Covenant on Economic, Social and Cultural Rights, signed by the U.S. Oct. 5, 1977, 993 U.N.T.S. 3, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en [<https://perma.cc/MEB5-DSPG>]. Pursuant to the Optional Protocol to the ICESCR, the Committee on Economic Social and Cultural Rights can consider complaints from individuals, but only those individuals from the ten countries who have ratified the Optional Protocol to the ICESCR. Optional Protocol, *supra* note 109.

States has signed the American Declaration of the Rights and Duties of Man as well as the American Convention on Human Rights (ACHR).¹¹³ The American Declaration of the Rights and Duties of Man includes civil and political rights as well as economic, social and cultural rights, including property, work, leisure, and social security.¹¹⁴ Under the Declaration, these rights can be limited by the “just demands of the general welfare in a democratic society.”¹¹⁵ The later signed American Convention on Human Rights enshrines in more detail civil and political rights including the right to life,¹¹⁶ humane treatment,¹¹⁷ freedom from slavery,¹¹⁸ right to liberty,¹¹⁹ right to privacy,¹²⁰ and the right to property.¹²¹ In addition, parties agree to “adopt measures . . . with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, scientific, and cultural standards set forth in the Charter of the Organization of American States[.]”¹²² The U.S. signed but did not ratify the ACHR. The Inter-American Commission on Human Rights (IACHR) oversees petitions alleging human rights abuses by an OAS member; such petitions are limited to widespread human rights violations (general petition) or a specific incident or practice affecting numerous victims (collective petition).¹²³ The IACHR first determines whether the member state is at fault; if so, it makes a list of recommendations for the member state to cure.¹²⁴ If the member state fails to cure, the case may proceed to the Inter-American Court—but only states that have recognized the jurisdiction of the Inter-American Court may bring a case in front of it.¹²⁵ Although several states have recognized the jurisdiction of the Inter-American Court; the United States has not.

113. The following twenty-one nations initially signed the OAS Charter in 1948: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, United States of America, Uruguay, and Venezuela. The following fourteen nations joined subsequently: Barbados, Trinidad and Tobago (1967); Jamaica (1969); Grenada (1975); Suriname (1977); Dominica (Commonwealth of), Saint Lucia (1979); Antigua and Barbuda, Saint Vincent and the Grenadines (1981); The Bahamas (Commonwealth of) (1982); St. Kitts & Nevis (1984); Canada (1990); Belize and Guyana (1991). Member States, *Who We Are*, OAS, http://www.oas.org/en/about/member_states.asp [https://perma.cc/DN2E-G77N].

114. OAS, American Declaration of the Rights and Duties of Man, OAS Res. XXX art. 1–28, OEA/Ser.L.V./II.82 doc. 6 rev 1 (1948), <http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm> [https://perma.cc/EP7A-VCV7].

115. *Id.* art. 28.

116. Organization of American States, American Convention on Human Rights art. 4, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 [hereinafter ACHR].

117. *Id.* art. 5.

118. *Id.* art. 6.

119. *Id.* art. 7.

120. *Id.* art. 11.

121. *Id.* art. 21.

122. *Id.* art. 26.

123. *Id.* art. 41.

124. *Id.* art. 51 § 2.

125. *Id.* art. 61 § 2, art. 62 § 3.

3. The European System

The United States is obviously not a part of the European human rights system, but the European Court of Human Rights has the most well-developed jurisprudence and other human rights bodies often look to this jurisprudence in interpreting their own human rights instruments.¹²⁶ All Council of Europe member states¹²⁷ are bound by the European Convention on Human Rights (ECHR). The ECHR protects civil and political rights¹²⁸ such as life,¹²⁹ liberty,¹³⁰ fair trial,¹³¹ and privacy,¹³² freedom from servitude¹³³ and freedom from discrimination.¹³⁴ Additionally, the ECHR provides for a right to property¹³⁵ and a right to education.¹³⁶ The European Court of Human Rights is responsible for adjudicating alleged violations of the ECHR, and individuals, organizations, or contracting nations (on behalf of their citizens) may bring claims to the European Court of Human Rights.¹³⁷

II. Human Rights Pertaining to Mandatory Arbitration

Arbitration clauses interfere with consumers' rights to property and rights to be free from discrimination. In addition, arbitration clauses deprive consumers of due process in the adjudication of these rights, and deprive consumers of an effective remedy in which to vindicate these rights. This part applies these human rights principles—the right to property, the right to be free from discrimination, the right to due process, and the right to an effective remedy—to the context of mandatory arbitration in consumer credit agreements.

126. Lorna McGregor, *Alternative Dispute Resolution and Human Rights: Developing a Rights-Based Approach Through the ECHR*, 26 EUR. J. INT'L L. 607, 609 (2015).

127. The member states include: Albania, Andorra, Armenia, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Republic of Moldova, Monaco, Montenegro, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, San Marino, Serbia, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, "The former Yugoslav Republic of Macedonia," Turkey, Ukraine, United Kingdom. See *Exhibition on 50 Years of the Court: The 47 Member States*, COUNCIL OF EUROPE, http://echr.coe.int/Documents/2010_Expo_50years_02_ENG.pdf [<https://perma.cc/KJU5-6GZV>].

128. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 1-18, Nov. 4, 1950, 213 U.N.T.S. 221, http://www.echr.coe.int/Documents/Convention_ENG.pdf [<https://perma.cc/M5BS-MCDR>] [hereinafter ECHR].

129. *Id.* at 6 (art. 2).

130. *Id.* at 7 (art. 5).

131. *Id.* at 9 (art. 6).

132. *Id.* at 10 (art. 8).

133. *Id.* at 7 (art. 4).

134. *Id.* at 12 (art. 14).

135. *Id.* at 31 (Protocol 1, art. 1).

136. *Id.* at 32 (Protocol 1, art. 2); see also Parliamentary Assembly, Council of Eur., *Resolution 1031 (1994) on the Honoring of Commitments Entered into by Member States When Joining the Council of Europe* (1994).

137. *Practical Guide on Admissibility Criteria*, EUROPEAN COURT OF HUMAN RIGHTS, COUNCIL OF EUROPE, http://www.echr.coe.int/Documents/Admissibility_guide_ENG.pdf [<https://perma.cc/AZF5-YQ7A>].

A. Right to Property

1. *The Human Right to Property Generally*

Several human rights instruments include a right to property.¹³⁸ Although property rights are not included in either the ICCPR or the ICESCR, Article 17 of the Universal Declaration of Human Rights provides for the “right to own property” and asserts and that “[n]o one shall be arbitrarily deprived of his property.” In addition, while the right to property is not enforced by any U.N. body, the ECHR and ACHR both protect the right to property.¹³⁹ According to Article 1 of the first Protocol to the ECHR, “every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.”¹⁴⁰ Pursuant to Article 21 of the ACHR, individuals shall have the right to “use and enjoyment” of property—but such right can be subordinated to “the interest of society.”¹⁴¹ Deprivation of property is permitted only upon “just compensation” and only “for reasons of public utility or social interest . . . according to the forms established by law.”¹⁴²

As I explained in an earlier paper, the European system and Inter-American system have established a broad concept of property under human rights jurisprudence. Under EU human rights law, “possessions” include both existing possessions and possessions in which an individual has a “‘legitimate expectation’ of obtaining effective enjoyment of a property right.”¹⁴³ Future income can even be a property interest if an individual has an “enforceable claim” to the income.¹⁴⁴ In addition, if a national law provides for welfare payments as a matter of right, the payments are property interests protected by Article 1.¹⁴⁵ Even a mere judgment creditor is considered to have a property interest at the moment when it is “suffi-

138. See generally Christoph Schreuer & Ursula Kriebaum, *The Concept of Property in Human Rights Law and International Investment Law*, in HUMAN RIGHTS DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER 743, 744-45, 754-55 (Stephan Breitenmoser et al. eds., 2007).

139. ECHR, *supra* note 128, at 31 (Protocol 1, art. 1); ACHR, *supra* note 116, at art. 21; see also Organization of African Unity, African Charter on Human and Peoples’ Rights, June 27, 1981, O.A.U. Doc. CAB/LEG/67/3/ rev.5, 21 I.L.M. 58 art. 21 (protecting the right to property). In addition, of course, many nations’ constitutions protect property rights as well. See, e.g., U.S. CONST. amend. V.

140. ECHR, *supra* note 128, at 6 (art. 1).

141. ACHR, *supra* note 116, art. 21(1).

142. *Id.* art. 21(2).

143. Kopecký v. Slovakia, 2004-IX Eur. Ct. H.R. 125, 139-40 (citing Prince Hans-Adam II of Liechtenstein v. Germany, 2001-VIII Eur. Ct. H.R. 1); see also Gratzinger & Gratzingerova v. Czech Republic, 2002-VII Eur. Ct. H.R. 399, 401-02.

144. Ian Edgar (Liverpool) Ltd. v. United Kingdom, 2000-I Eur. Ct. H.R. 465, 475; see also Wendenburg v. Germany, 2003-II Eur. Ct. H.R. 347, 353; Levanen v. Finland, App. No. 34600/03, Eur. Ct. H.R. 1, 6-7 (2006); Anheuser-Busch Inc. v. Portugal, 2007-I, Eur. Ct. H.R. 39, 63.

145. Stec and Others v. United Kingdom, 2006-VI, Eur. Ct. H.R. 321, 323; Andrejeva v. Latvia, 2009-II, Eur. Ct. H.R. 71, 105; Moskal v. Poland, App. No. 10373/05, Eur. Ct. H.R. 1, 9 (2009).

ciently established to be enforceable.”¹⁴⁶

The Inter-American Court has defined the right to property as protecting “those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value.”¹⁴⁷ This definition would include rights to payment under contracts. It is important to note that although it may not be feasible to sue for third party deprivations of property in any human rights forum, that does not mean that there is no human right at stake: the Guiding Principles on Business and Human Rights discusses the obligation of businesses to prevent human rights violations and to not commit human rights violations, and states are required to prevent deprivations caused by third parties.¹⁴⁸

2. *Deprivation of Property via Mandatory Arbitration in Consumer Credit Contracts*

In some cases, involving consumer challenges to fees or charges assessed by consumer credit providers, the charges are essentially deprivation of consumer’s property by theft—for example, wrongful overdraft charges deducted directly from the consumer’s bank account. Companies have every incentive to wrongfully charge or deduct small amounts from consumers, as consumers have no capacity or incentive to challenge these practices. It simply does not make sense to pay a \$200 arbitration fee—much less attorney’s fees—to recover a \$50 wrongful overdraft charge, much less smaller overages that consumers may not even notice, but that add up to millions of wrongful gains for corporations. If the contract includes a mandatory arbitration clause and precludes class action, the consumer will have no effective way to challenge this property deprivation.

Thus, the FAA permits deprivation of property without effective recourse. Even though it is not the state doing the taking, this is still a human rights problem, because human rights principles place obligations on third parties and require states to prevent deprivations caused by third parties.¹⁴⁹ That is not to say that one could achieve redress in a human rights forum for such a violation, but nevertheless, in these cases, consumers’ property rights have been violated. Arbitration clauses effectively give businesses the discretion to steal property with impunity; although the state itself is not taking property, it is willing to enforce a contract that facilitates theft and strips the remedy for redressing this theft. That U.S.

146. *Burdov v. Russia*, 2009-I, Eur. Ct. H.R. 71, 95-96; see also *Stran Greek Refineries & Stratis Andreadis v. Greece*, App. No. 13427/87, Eur. Ct. H.R. 1, 22 (1994).

147. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79, para. 74 (Aug. 31, 2001), http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf [<https://perma.cc/P6E7-BW3H>].

148. U.N. Human Rights Council, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, U.N. Doc. A/HRC/17/31, at 1 (Mar. 21, 2011), http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf [<https://perma.cc/4AWR-WQPR>].

149. See, e.g., *id.* at 5.

law does not consider third party deprivations of property to be a constitutional violation does not mean that human rights are not at issue.¹⁵⁰ Similarly, that arbitration has not been viewed as “state action”¹⁵¹ (despite arguments that it should be),¹⁵² does not mean that no human rights violation has occurred. Again, human rights principles are concerned with third party violations of human rights—businesses may not arbitrarily take property, and states may not permit businesses to do so.¹⁵³ That there is no enforceable human rights specific remedy does not mean that human rights concerns do not apply.

B. Discrimination

1. *Right to be Free from Discrimination Generally*

Discrimination on the basis of any status is impermissible under human rights law. Under Article 26 of the ICCPR, all types of discrimination based on “any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” are prohibited.¹⁵⁴ Under Article 1 of the ACHR, convention parties are obliged to “undertake to respect the rights and freedoms” specified and to “ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”¹⁵⁵ Under Article 14 of the ECHR, protected rights and freedoms “shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status.”¹⁵⁶ The European Court of Human Rights has held that distinction between groups are permissible without a rational basis and without a “reasonable relationship of proportionality” between the “means employed” and “object sought.”¹⁵⁷

Further, the U.S. has both signed and ratified the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which requires the United States to “[t]ake effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating

150. See 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, 2935–36 (2015).

151. See Sarah Rudolph Cole, *Arbitration and State Action*, 2005 BYU L. REV. 1, 11 (2005).

152. *Id.* at 3.

153. *The Fair Debt Collection Practices Act*, FINDLAW, <http://smallbusiness.findlaw.com/business-finances/the-fair-debt-collection-practices-act.html> [<https://perma.cc/4XGE-XWQH>].

154. ICCPR, *supra* note 100, art. 26.

155. ACHR, *supra* note 116, art. 1.

156. ECHR, *supra* note 128, at 12 (art. 14).

157. *Religionsgemeinschaft Der Zeugen Jehovas v. Austria*, 2008 Eur. Ct. H.R. 19, <http://hudoc.echr.coe.int/eng?i=001-88022> [<https://perma.cc/P5XT-8YNB>].

racial discrimination wherever it exists.”¹⁵⁸

A number of state and local human rights offices also focus on combatting discrimination. In fact, non-discrimination may be their sole mission. For example, the D.C. Office of Human Rights enforces D.C.’s non-discrimination law, which prohibits discrimination on the basis of “actual or perceived: race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, family responsibilities, genetic information, disability, matriculation, or political affiliation of any individual.”¹⁵⁹ The New York Division of Human Rights: protects individuals “from discrimination in areas such as employment, education, credit, and purchasing or renting a home or commercial space” based on a number of factors, including race, creed, color, national origin, sexual orientation, military status, age, disability, marital status, and prior arrest record.¹⁶⁰ The Maine Human Rights Commission enforces Maine’s anti-discrimination laws, which prevent discrimination on the “basis of race, color, sex, sexual orientation, physical or mental disability, religion, ancestry or national origin.”¹⁶¹ In addition, of course, the United States Constitution and many other state laws prevent discrimination without explicitly framing discrimination as a human rights issue.¹⁶²

2. *Discrimination in Mandatory Arbitration Under Consumer Credit Contracts*

The U.N. Human Rights Committee has expressed concerned with lack of legal representation in civil proceedings, particularly where litigants are racial, ethnic, and national minorities.¹⁶³ In its response to this questions raised in the Committee’s List of Issues, the United States cited the work of the Department of Justice’s Access to Justice Initiative, which was established in 2010 “to help the justice system efficiently deliver outcomes that are fair and accessible to all, irrespective of wealth and status.”¹⁶⁴ Because mandatory arbitration clauses require even claims of race discrimination, such as discriminatory lending practices, to be arbitrated, the FAA may be a law that “has the effect of perpetuating racial discrimina-

158. United Nations International Convention on the Elimination of All Forms of Racial Discrimination art. 2, Dec. 21, 1965, 660 U.N.T.S. 195 [hereinafter ICERD].

159. D.C. CODE § 2-1402.1; D.C. CODE § 2-1402.11.

160. *How to File a Complaint*, NEW YORK STATE DIVISION OF HUMAN RIGHTS, <https://dhr.ny.gov/complaint#howto> [<https://perma.cc/T5FT-E7LB>]; N.Y. EXEC. LAW § 290 (McKinney 2017).

161. ME. REV. STAT. ANN. tit. 5, § 4552 (2016).

162. U.S. CONST. amend. I; U.S. CONST. amend. XIV, § 1; *see also* Jack S. Vaitayanonta, *In State Legislatures We Trust? The “Compelling Interest” Presumption and Religious Free Exercise Challenges to State Civil Rights Laws*, 101 COLUM. L. REV. 886, 886 (2001) (“While the federal government has traditionally taken the lead in promoting and enforcing civil rights legislation, state governments have become aggressive pioneers in fashioning new antidiscrimination laws that have pushed civil rights protections into previously unexplored territory.”).

163. U.N. Human Rights Comm., *List of Issues in Relation to the Fourth Periodic Report of the United States of America*, P8(e) U.N. Doc. CCPR/C/USA/Q/4 (Apr. 29, 2013).

164. U.N. Human Rights Comm., *Replies of the United States of America to the List of Issues*, P29 U.N. Doc. CCPR/C/USA/Q/4/Add.1 (Sept. 13, 2013).

tion.” Under the existing arbitration system, discriminatory conduct on behalf of providers of consumer financial products cannot be effectively challenged.

In addition, human rights discrimination principles require any differentiation in treatment of two groups to at least be justified by a rational basis. For example, Ecuador successfully alleged in human rights court that Spain’s foreclosure laws discriminate against debtors by limiting the defenses against foreclosure available to debtors. The FAA, as interpreted by the Supreme Court, discriminates against consumers and debtors in favor of companies drafting the arbitration clauses.¹⁶⁵ As such, if consumers are uniformly deprived of rights that companies are granted (for example, less access to discovery, as discussed below), this would be impermissible under human rights principles.

C. Due Process

1. Process Rights as Human Rights Generally

Human rights instruments require a fair trial to determine matters concerning rights or obligations; this includes both debtors’ and creditors’ property interests, privacy concerns, and challenges to discrimination.¹⁶⁶ The ACHR, ECHR, and ICCPR all include rights to prompt and fair trials conducted by an “independent and impartial tribunal.”¹⁶⁷ The ACHR and ICCPR additionally require that the tribunal be “competent.” This right of access includes the right to a public hearing,¹⁶⁸ the right to an independent and impartial tribunal,¹⁶⁹ and the right to delivery of justice in “a reasonable time” and fair manner.¹⁷⁰ In determining whether a tribunal is independent, the European Court of Human Rights considers (1) the manner of appointment of its members, (2) the duration of their office, (3) the existence of guarantees against outside pressures, and (4) the question of

165. See *Am. Exp. Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2312 (2013); see also *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343-44 (2011).

166. *Ondersma*, *supra* note 91, at 335.

167. ACHR, *supra* note 116, art. 8 (“Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature.”); ICCPR, *supra* note 100, at art. 14 (“Fair and public hearing by a competent, independent, and impartial tribunal established by law” required in the determination of rights and obligations); ECHR, *supra* note 128, at 9 (art. 6) (“In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”).

168. *Fredin v. Sweden* (No. 2), 1994 Eur. Ct. H.R. 20-22; *Axen v. Germany*, 1983 Eur. Ct. H.R. 25.

169. See *Bridnicka v. Poland*, 2005-II Eur. Ct. H.R. 139; *D.N. v. Switzerland*, 2001-III Eur. Ct. H.R. 1, 13-14; *McGonnell v. United Kingdom*, 2000-II Eur. Ct. H.R. 107; *Daktaras v. Lithuania*, 2000-X Eur. Ct. H.R. 489; *Sander v. United Kingdom*, 2000-V Eur. Ct. H.R. 243.

170. *Robins v. United Kingdom*, App. No. 22410/93, 26 Eur. Ct. H.R. 527, 537 (1998).

whether the body presents an appearance of independence.¹⁷¹

Fair trial rights also include the right to equality before courts and tribunals.¹⁷² This includes rights of equal access to courts and the right to “equality of arms.”¹⁷³ Equality of arms “means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds.”¹⁷⁴ “The principle of equality between parties applies also to civil proceedings, and demands, inter alia, that each side be given the opportunity to contest all the arguments and evidence adduced by the other party.”¹⁷⁵ At least as interpreted by the European Court of Human Rights, fair trial rights include a right of access to a court in decisions involving civil rights and obligations.¹⁷⁶ Although human rights instruments do not guarantee any specific contract or property, once a state has established the scope of such rights, these rights cannot be deprived without a fair, impartial, and competent tribunal.

Human rights principles permit parties to waive their right to a court provided such waiver is not coerced,¹⁷⁷ is unequivocal,¹⁷⁸ and includes “minimum safeguards commensurate to its importance.”¹⁷⁹ Importantly, however, the right to a fair and impartial tribunal cannot be waived.¹⁸⁰

2. Mandatory Arbitration and Due Process

Human rights principles require that consumers have an option to have their civil rights and obligations determined by an independent, impartial, and competent tribunal in a public hearing. This applies to disputes involving property rights as well as contractual obligations.¹⁸¹

171. *Campbell and Fell v. the United Kingdom*, App. Nos. 7819/77, 7878/77, 7 Eur. Ct. H.R. 165, 198-99 (1984).

172. ICCPR, *supra* note 100 art.14.

173. *Delcourt v. Belgium*, 1 Eur. Ct. H.R. 350 (ser. A), 355, 367 (1970).

174. U.N. Human Rights Comm., General Comment No. 32 to Article 14: Right to Equality Before Courts and Tribunals and to a Fair Trial, P13, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007), <https://www1.umn.edu/humanrts/gencomm/hrcom32.html> [<https://perma.cc/29E7-Z6EL>] [hereinafter General Comment No. 32]; see Jixi Zhang, *Fair Trial Rights in the ICCPR*, 2 J. POL. & L. 39, 39-40 (2009).

175. General Comment No. 32, *supra* note 174, at para. 13; see Human Rights Comm., *Jansen-Gielen v. The Netherlands*, Communication No. 846/1999, P8.2 U.N. Doc. CCPR/C/71/D/846/1999, (2001); Human Rights Comm., *Äärelä and Näkkäläjärvi v. Finland*, Communication No. 779/1997, P7.4 (2001).

176. *McGregor*, *supra* note 126, at 623 (citing *Golder v. United Kingdom*, 1 Eur. Ct. H.R. (ser. A) 524, 536-37 (1975)).

177. See *Deweert v. Belgium*, 2 Eur. Ct. H.R. 439, 460-61 (1980).

178. *Poitrimol v. France*, 18 Eur. Ct. H.R. 130, 145 (1993); *Pfeifer and Plankl v. Austria*, 14 Eur. Ct. H.R. 692, 712 (1992); *Oberschlick v. Austria*, 19 Eur. Ct. H.R. 389, 420 (1991).

179. *Suovaniemi v. Finland*, App. No. 31737/96, Eur. Ct. H.R. (1999).

180. *Pfeifer*, 14 Eur. Ct. H.R. at 713; Shirley Shipman, *Waiver: Canute against the Tide*, 32 CIV. JUST. Q. 470, 480 (2013); see also *Suovaniemi*; *Suda v. Czech Republic*, App. No. 1643/06, Eur. Ct. H.R. (2010) (documenting the ECtHR applying these principles to arbitration).

181. See *Demanda Ante El Tribunal Europeo de Derechos Humanos, Ecuador v. Spain* [Demand before the European Court of Human Rights, *Ecuador v. Spain*] (suit filed by

Hence, creditors attempting to enforce their contractual rights must give debtors the right to defend against accusations of default before a fair and impartial tribunal, and debtors as well as creditors should be able to complain of property deprivations before a fair and impartial tribunal as well. In addition, charges of discrimination stemming from consumer credit contracts must be heard by a fair and impartial tribunal.¹⁸²

If arbitration is the only recourse for consumers, the arbitration process would have to comply with due process rights. Under EU human rights law, if a state “formally diverts a dispute to arbitration, it would have to comply with the standards of Article 6(1), including an impartial tribunal and public hearing.”¹⁸³

Arbitration of consumer credit disputes are not public hearings; most arbitration proceedings are kept confidential. The CFPB only gained access to some aspects of some arbitration proceedings because the American Arbitration Association (AAA) agreed to provide the information.¹⁸⁴ Even that information was limited, however, as many cases ended in settlements and few details about such settlements are available.¹⁸⁵

Not only are arbitration proceedings not public hearings, but a number of studies and reports also cast serious doubt on the fairness, impartiality, and competence of arbitrators in many cases. First, the “manner of appointment” of arbitrators is problematic—the business can choose the arbitral organization that will handle arbitration, and arbitrators working for that organization may have an incentive to toe the line so as not to cost the arbitral organization business (by the business designating a different arbitral organization in the contract). In interviews with reporters, over three dozen arbitrators confessed that they felt beholden to companies and feared losing business.¹⁸⁶ Arbitration proceedings also often lack any “appearance of independence.” A Harvard law professor, Elizabeth Bartholet, told Times reporters she overheard two individuals discussing how one arbitrator nearly caused the firm to lose a lucrative client, presumably due to an unfavorable ruling.¹⁸⁷ Based on records and interviews, the Times concluded that “companies can steer cases to friendly arbitrators”

Ecuador against Spain for deprivations of the human rights of Ecuadorian citizens living in Spain under Spain’s foreclosure system).

182. *Ecuador v. Spain*, Eur. Ct. H.R. 26 (2013) (citing H. Lauterpacht, *International Law and Human Rights, Convenio Europeo de Derechos Humanos, el Tribunal de Estrasburgo y su jurisprudencia*, 155); for a description of the case, see Sonya Dowsett, *Insight: In Spain, banks buck calls for mortgage law reform*, REUTERS (Feb. 26, 2013, 7:36AM), <https://www.reuters.com/article/us-spain-mortgage-reform/insight-in-spain-banks-buck-calls-for-mortgage-law-reform-idUSBRE91P09Q20130226> [<https://perma.cc/FNK4-YMEP>].

183. McGregor, *supra* note 126, at 627.

184. CFPB Arbitration Study, *supra* note 22, § 1, at 7-8.

185. *Id.* § 4.9, at 21.

186. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a “Privatization of the Justice System,”* N.Y. TIMES (Nov. 1, 2015), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html?_r=0 [<https://perma.cc/WQ2B-YLYF>].

187. *Id.*

and “some arbitrators cultivate close ties with companies to get business.”¹⁸⁸ Interviews included stories of company lawyers going to a basketball game with the arbitrator in the case, and a plaintiff who was upset to see the company lawyer and arbitrator return from a lunch break in “matching silver sports cars.”¹⁸⁹ As one appellate judge explained, “[t]his is a business and arbitrators have an economic reason to decide in favor of the repeat players.”¹⁹⁰

Bias in favor of repeat players is well documented. Lisa Bingham conducted a series of studies in the 1990s designed to evaluate the effect of repeat players in the arbitration system in employment cases.¹⁹¹ She found that, when arbitrating against employers who arbitrated more than once, employees were significantly less likely to win, and when they did win were awarded significantly lower damages than employees arbitrating against non-repeat employers.¹⁹² Specifically, she found that employees recovered a median of twenty-eight percent and a mean of forty-eight percent of claims against non-repeat player defendants, compared to a median of zero percent and a mean of eleven percent of claims against repeat player defendants. Employees won damages in over seventy percent of cases against non-repeat players—but only won damages in sixteen percent of cases against repeat players.¹⁹³

In a 2007 study of California AAA arbitration cases, Alexander Colvin found similar evidence of bias in favor of repeat players.¹⁹⁴ Employees won thirty-two percent of the time against non-repeat employers, and only 13.9% of the time against repeat player employers. Further, employees won only 11.3% of the time where the case involved both a repeat player-employer and a repeat arbitrator.¹⁹⁵ If the case involved a repeat employer and a repeat arbitrator and the employee was unrepresented by counsel, the employee won in only two percent of such cases.¹⁹⁶

A 2015 study of 5000 also found that consumers facing repeat players—particularly “super repeat” players who defend against large numbers of arbitration actions perhaps designed to substitute for class actions after *Concepcion*—are “strongly disadvantaged in the arbitral forum relative to

188. *Id.*

189. *Id.*

190. *Id.*

191. See, e.g., Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGEORGE L. REV. 223, 235 (1998); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 206 (1997) [hereinafter Bingham, *Employment Arbitration*]; Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108, 115 & tbl.5 (1996); Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369, 374-83 (1995).

192. Bingham, *Employment Arbitration*, *supra* note 191, at 209-10.

193. *Id.* at 232.

194. Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 408 (2007).

195. *Id.* at 430.

196. *Id.* at 434.

consumers facing one-shot defendants.”¹⁹⁷ It is also worth noting that, although some plaintiff’s lawyers are repeat players, they do not enjoy any repeat player advantage—in fact, these cases are less likely to result in a result favorable to the consumer.¹⁹⁸

The Federal Trade Commission has acknowledged that bias and the appearance of bias in arbitration is a substantial problem, and set out to evaluate this issue in a 2010 round table and report. The FTC focused on two potential areas of bias: the individual conduct of the arbitrator, and the arbitration forum as a whole.¹⁹⁹ In assessing individual arbitrator bias, the FTC suggested that the manner in which arbitrators are paid may be conducive to bias. According to participants in the roundtable discussion, “payment per matter provides arbitrators with an incentive to spend too little time on each matter; payment of a fixed salary provides an incentive for arbitrators not to be efficient.”²⁰⁰ In its report, the FTC concluded that because “arbitrators generally are paid per matter, [they] have a financial incentive not to engage in conduct that would result in them receiving fewer cases.”²⁰¹ The FTC report also noted that the skewed success rates for creditors in arbitration cases is suggestive of bias. The report cited a Public Citizen study finding that “collectors and creditors succeeded in at least ninety-four percent of these arbitrations,” and that “arbitrators who decided in favor of firms, as opposed to consumers, subsequently received more matters from the arbitration forum.”²⁰²

In addition to raising concerns about bias of individual arbitrators, the FTC report also suggested that issues of fairness may arise “if a party with matters before an arbitration forum has financial ties to the forum.”²⁰³ In 2009, the National Arbitration Forum (NAF), which represented itself as an impartial entity, failed to disclose that it had significant financial ties to leaders of the debt collection industry.²⁰⁴ While NAF ceased operations after an investigation of the Minnesota Attorney General, concerns about financial incentives remain. For example, one round table member suggested that because arbitrators were paid by creditors or collectors for salary, expenses, and control their work flow, they are more likely to favor their “employers.”²⁰⁵ Roundtable participants suggested that a not-for-profit status would help to ameliorate these issues, but certainly not elimi-

197. David Horton & Andrea Cann Chandrasekher, *After the Revolution: An Empirical Study of Consumer Arbitration*, 104 GEO. L.J. 57, 104, 113–15 (2015) (“consumer win rate was forty-two percent against one-shotters but just thirty-one percent against repeat players (p<.0001)”).

198. *Id.* at 115–16.

199. F.T.C., REPAIRING A BROKEN SYSTEM: PROTECTING CONSUMERS IN DEBT COLLECTION LITIGATION AND ARBITRATION 47 (2010), http://www.ftc.gov/sites/default/files/documents/public_events/life-debt/debtcollectionreport_0.pdf [<https://perma.cc/8MJZ-D54P>].

200. *Id.*

201. *Id.* at 48.

202. *Id.* at 48–49.

203. *Id.* at 51.

204. *Id.* at ii.

205. *Id.* at 51.

nate them.²⁰⁶ Even when the entity is a non-profit, creditors create the terms of the arbitration agreement and pay for the costs associated with arbitration, and thus the risk of bias is not eliminated.²⁰⁷

In addition to this evidence of bias and the unequal distribution of resources, consumers also do not have the opportunity to conduct discovery in arbitration cases.²⁰⁸ This denies them the opportunity to gather and present evidence that may be essential to recovery. In some cases, the defense has withheld crucial evidence—even destroying records in one case.²⁰⁹ Although arbitrators do give some minimal access to discovery, they typically do not permit depositions.²¹⁰ Although limitations on discovery viewed in isolation may not seem problematic, when combined with the repeat-payer effect and the lack of transparency and public record, it is doubtful that anything resembling due process is achieved. Because these practices occur in arbitration proceedings rather than civil court, plaintiffs are not able to appeal and challenge such violations of process. By condoning system in which such proceedings are consumers' only recourse, the FAA runs afoul of due process obligations.

Finally, the CFPB's finding that three out of four consumers had no idea they were subjected to arbitration proceedings at the time they signed the contract suggests that this is hardly a voluntary waiver of trial rights.²¹¹ And even consumers who are aware of the arbitration provisions seldom have an opportunity to opt-out of the clause—it is a condition of using the service. As these clauses are adopted by more and more consumer credit providers, the effect is that waiver of fair trial is essentially a condition of using any consumer credit product, which cannot be acceptable from a human rights standpoint.

D. Effectiveness of Remedies

Closely related to due process rights is the assurance in international human rights instruments of an “effective” remedy or recourse for the redress of violations of the protected human rights.²¹² For example, the

206. *Id.*

207. *Id.*

208. See Horton & Chandrasekher, *supra* note 197, at 65.

209. Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a “Privatization of the Justice System*, N.Y. TIMES (Nov. 1, 2015), <http://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [https://perma.cc/Z7W6-2ELD].

210. See, e.g., Commercial Arbitration Rules and Mediation Procedures, American Arbitration Association R.23 (2013).

211. George H. Friedman, *CFPB Issues Final Report on Arbitration, Telegraphing a Ban or Limits on Arbitration. Should SEC follow Suit?*, SEC. ARB. COMMENTATOR (Mar. 16, 2015), <http://www.sacarbitration.com/blog/cfpb-issues-final-report-arbitration-telegraphing-ban-limits-arbitration-sec-follow-suit/> [https://perma.cc/UFZ4-K8E5].

212. See, e.g., ANTONIO AUGUSTO CANCADO TRINDADE, *THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE 64-65* (2011) (“Article 8(1) is thus, in the correct understanding of the Court, ineluctably linked to the right to an effective domestic remedy under Article 25 of the Convention;” for “true judicial guarantees to exist in a process’ the observance is necessary of ‘all the requisites’ that serve to ‘secure the titularity or the exercise of a right.’”) (quoting IACTHR, *THE RIGHT TO INFORMATION ON CONSULAR ASSISTANCE IN*

ACHR provides for “simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights . . .”²¹³ Signatories of the ACHR also agree to ensure the enforcement of remedies granted.²¹⁴ The ECHR similarly requires “an effective remedy before a national authority” for those whose Convention rights have been violated.²¹⁵ Likewise, signatories to the ICCPR agree to “adopt such laws or other measures as may be necessary to give effect” to Covenant rights and to provide for an “effective remedy” for the violation of the rights.²¹⁶ The Committee on Economic, Social, and Cultural Rights (CESCR) of the United Nations has ruled that Spain’s foreclosure laws resulted in a lack of effective access to the courts to protect the right to adequate housing.²¹⁷

Human rights bodies have discussed the importance of access to counsel in preserving rights. The Human Rights Committee has repeatedly called for states to provide counsel in a variety of civil cases, including discrimination, land disputes, and housing cases. For example, in discussing the Czech Republic’s compliance with the Covenant in the context of housing discrimination against the Roma, the Committee concluded that the Czech Republic should ‘provide legal aid for victims of discrimination.’²¹⁸ The U.N. Special Rapporteur on Adequate Housing concluded that eviction proceedings without civil representation violate human rights.²¹⁹ The European Court of Human Rights has also discussed the

THE FRAMEWORK OF THE DUE PROCESS OF LAW (Oct 1, 1999) (explaining that “for the ‘due process of law’ to exist it is necessary that a justiciable can vindicate his rights and defend his interests in an effective way and in conditions of procedural equality with other justiciables.”).

213. ACHR, *supra* note 116, art. 25.

214. *Id.* art. 1.

215. ECHR, *supra* note 128, at 9 (art. 6).

216. ICCPR, *supra* note 100, art. 2, §2-3.

217. Committee on Economic, Social and Cultural Rights, Communication No. 2/2014, E/C.12/55/D/2/2014.

218. U.N. Rep. of the Human Rights Comm., Concluding Observations—Czech Republic, P16, U.N. Doc. CCPR/C/CZE/CO/2 (2007); see also Kaufman, Davis & Wegleitner, *supra* note 55, at 779 n. 19 (“In commenting on Sweden’s treatment of its indigenous Sámi population, the Committee recommended that the government provide adequate legal aid to Sámi villages in land rights disputes . . . The Committee has made similar recommendations with regard to treatment of asylum seekers by the governments in Switzerland and El Salvador. With regard to Switzerland, Committee recommended that ‘the State party should review its legislation in order to grant free legal assistance to asylum-seekers during all asylum procedures, whether ordinary or extraordinary.’” U.N. Rep. of the Human Rights Comm., Concluding Observations—Switzerland, para. 18, U.N. Doc. CCPR/C/CHE/CO/3 (2009). With regard to El Salvador, the Committee recommended that the government “ensure that persons subject to deportation proceedings benefit from an effective right to be heard, to have an adequate defence and to request that their case be reviewed by a competent authority.” U.N. Rep. of the Human Rights Comm., Concluding Observation—El Salvador, P17, U.N. Doc. CCPR/C/SLV/CO/6 (2010).”).

219. Special Rapporteur on Adequate Housing, *Report on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-Discrimination in this Context*, P68-69, U.N. Doc. A/HRC/22/46 (Dec. 24, 2012) (by Raquel Rolnik).

impact of cost of litigation on access to justice, reasoning that where imposition of fees preclude effective access to the courts, such costs are inconsistent with human rights obligations.²²⁰ The U.N. Special Rapporteur on Extreme Poverty and Human Rights commented on the link between poverty and lack of access to counsel: “[a]ccess to justice is a human right in itself, and essential for tackling the root causes of poverty . . . Lack of legal aid for civil matters can seriously prejudice the rights and interests of persons living in poverty, for example when they are unable to contest tenancy disputes [and] eviction decisions.”²²¹ Relatedly, the Convention on the Elimination of All Forms of Racial Discrimination protects a right to counsel in civil cases where absence of counsel has a disparate impact on racial, ethnic, or national minorities.²²² The Committee on the Elimination of Racial Discrimination criticized the U.S. for racial disparities in civil protection due to the failure to ensure counsel in civil cases. The Committee recommended that the U.S. “allocate sufficient resources to ensure legal representation of indigent persons belonging to racial, ethnic and national minorities in civil proceedings, with particular regard to those proceedings where basic human needs, such as housing, health care, or child custody, are at stake.”²²³

1. *Effective Remedies and Arbitration in Consumer Credit Contracts*

Binding, mandatory arbitration prevents many from enforcing their rights, including rights to be protected from discrimination and property deprivation. As we have seen, there is limited opportunity for consumers to appeal, even when the arbitration proceedings have been a legal process that is anything but due; for example, in cases involving the destruction of evidence.

Although there has been limited human rights specific case law on the issue of arbitration, the Court of Justice of the European Union (CJEU) has decided a case involving mandatory but non-binding arbitration. The Court concluded that mandatory arbitration was permissible where the settlement was non-binding and parties were able to access courts within thirty days of arbitration.²²⁴ In reaching its conclusion, the CJEU noted that, when interpreting Article 6(1) of the ECHR, the European Court of Human Rights (ECtHR) has reasoned that “fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the

220. *Kreuz v. Poland*, App. No. 28249/95, Eur. Ct. H.R. para. 66 (2001); *Ait-Mouhoub v. France*, App. No. 103/1997/887/1099, Eur. Ct. H.R. (1998); *Apostol v. Georgia*, App. No. 40765/02, Eur. Ct. H.R. para. 65 (2006).

221. Special Rapporteur on Extreme Poverty and Human Rights, *Report of the Special Rapporteur on Extreme Poverty and Human Rights*, para. 62, U.N. Doc. A/67/278 (August 9, 2012) (Magdalena Sepúlveda Carmona).

222. ICERD, *supra* note 158, art. 5, 6.

223. Comm. on the Elimination of Racial Discrimination, *Consideration of Reports Submitted by State Parties Under Article 9 of the Convention, Concluding Observations*, P22, U.N. Doc. CERD/C/USA/CO/6 (Feb. 2008).

224. *Case C-317/08, Rosalba Alassini v. Telecom Italia SpA*, 2010 E.C.R. I-02213, paras. 54-55; Charter of Fundamental Rights of the European Union, OJ 2000/C L 364/01

restrictions in fact correspond to objectives of general interest pursued by the measures in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed.”²²⁵ As Lorna McGregor explained, CJEU “appears to be suggesting that the key factors on whether mandatory engagement with agreement-based ADR/PDR violates Article 6(1) turns on the length process; on the requirement to pay fees (which is particularly relevant if it means that the parties cannot advance their claim to a court where agreement fails) and on whether the party can subsequently lodge a case in the national courts where the process has failed.”²²⁶

Of course, the arbitration in consumer credit contracts at issue here is both binding and mandatory, which would be inconsistent with the availability of an effective remedy by human rights standards, at least as articulated by the CJEU. There is no actual alternative remedy in national courts if arbitration is unsuccessful in these cases; claimants have no alternative recourse.

As discussed in the introduction, to the extent that arbitration clauses cut off class actions, this may mean that a variety of human rights violations, from discrimination to property deprivation, lack effective redress. Particularly where the property deprivation is a relatively small amount, it is simply not feasible to bring an action to recover these funds. It is simply not worthwhile for an individual to sue for such small amounts. As one federal judge has observed, “The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for \$30.”²²⁷ Even where harm is substantial, individuals may lack the recourses to challenge such wrongs. The concerns about inequality in situations involving lack of access to counsel also apply to mandatory, binding arbitration. Practically, for many of these deprivations and violations, class actions may be the only way for the deprivations described here to achieve redress: that is, remedies may not be effective absent class action opportunities.

Further, some arbitration clauses prohibit not just class actions but any aggregation method—further placing effective remedy out of reach. The contract at issue in *Italian Colors* included a prohibition on any plaintiff’s counsel sharing resources, as well as prohibiting issue preclusion for prior awards, meaning that the liability would need to be litigated from scratch even where liability for a specific wrongdoing had already been established.²²⁸ The arbitration procedures do not allow for a fair playing

225. Case C-317/08, *Rosalba Alassini v. Telecom Italia SpA*, 2010 E.C.R. I-02213, para. 63; Charter of Fundamental Rights of the European Union, OJ 2000/C L 364/01.

226. McGregor, *supra* note 126, at 624–25.

227. *Carnegie v. Household Int’l. Inc.*, 376 F.3d 656, 661 (7th Cir. 2004).

228. *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); David S. Schwartz, *Understanding Remedy-Stripping Arbitration Clauses: Validity, Arbitrability, and Preclusion Principles*, 38 U.S.F.L. REV. 49, 60 (2016).

field on which consumers can enforce their rights, and access to justice is out of reach.

III. The CFPB Proposal and Human Rights

Viewed from a human rights lens, the CFPB Proposal went a long way toward promoting human rights. To recap, the proposal prohibited class action bans in arbitration clauses—although permitting the class action to be mandated to take place within arbitration. The proposal also included requirements that arbitrators disclose the results of cases, enabling better monitoring. The availability of class actions likely means that more consumers would have been able to access remedies for wrongs that implicate human rights. As discussed, absent the availability of class actions, claims involving discrimination or deprivation of property often have no redress. Preventing arbitration clauses from precluding class actions would have given consumers the possibility of achieving redress without incurring upfront costs. As discussed, if consumers are forced to bear the costs of pursuing their claims, they may not be able to do so, or may have no incentive to do so where the damages in each case are small. This means that human rights violations such as discrimination or wrongful deprivation of property can continue undeterred and without a remedy that is due process compliant.

Although the CFPB proposal would have been a substantial improvement from the status quo, it would not have alleviated all human rights concerns. Because the entire process may still take place within arbitration, if the arbitration process does not meet due process—for example if the arbitrator is not impartial, or if there is no equality of arms—there still would not have been an adequate remedy available for human rights wrongs. Evidence suggests that the existing arbitration process is far from meeting due process and fair trial standards.²²⁹ The increased monitoring of arbitration proceedings might have helped bring the arbitration process closer to satisfying due process obligations, but it would not have mandated a fully public process and fully transparent proceedings. In addition, the proposal did not speak to concerns regarding equality of arms issues—there was no explicit requirement that consumers have equal access to discovery, for example. Thus, had the proposal gone into effect, the CFPB should have focused its monitoring efforts on evaluating the extent to which arbitration proceedings satisfy due process concerns. For example, the CFPB could have requested reports regarding the nature of discovery made available to each side—this need not require disclosure of the substance of the discovery produced.

Even if the arbitration process had improved under this proposal, it may still have been problematic that parties could be both forced to arbitrate and that the results of the arbitration may be binding and final with no access to national courts. If parties could promptly appeal arbitration

229. Arbitration Agreement: Proposed Rule, 81 Fed. Reg. 32,829 (proposed May 24, 2016) (rejected by joint resolution of Congress).

results to district courts, this would go a long way toward satisfying due process concerns. The FTC roundtable discussed above resulted in some proposed solutions to the matter of bias and appearance of bias in arbitration: for example, roundtable participants suggested that arbitration forums “diversify their rosters of arbitrators, rotate matters randomly among arbitrators, and limit the number of matters each arbitrator handles.” In addition, the FTC suggested that “forums should develop, adopt, and vigorously enforce standards prohibiting bias and the appearance of bias for themselves and their arbitrators.” Lastly, participants suggested policies that require more transparency in the arbitrator selection process. In monitoring arbitrators, the CFPB could request more information about arbitrator selection, and could propose standards that limit bias and the appearance of bias, such as prohibiting communication between ex parte communication between the arbitrator and either party.

Precisely because it is unlikely that the arbitration process will immediately transform to satisfy human rights concerns, the CFPB must continue to be empowered to enforce violations of consumer financial protection laws. As the Wells Fargo multiple accounts scandal makes clear, the absence of such enforcement would leave deprivations of rights unremedied.

Human rights and other advocacy organizations could also challenge mandatory arbitration in two ways: First, they could put pressure on Congress by detailing the ways in which the FAA violates human rights obligations. Although this is unlikely to be immediately successful in light of the current congressional make-up, it is important to have reform proposals at the ready when the window of opportunity arises. Second, such organizations could attempt to apply pressure on companies directly, arguing that their mandatory arbitration clauses violate their obligation to respect and promote human rights under the UN Guiding Principles on Business and Human Rights, proposed by John Ruggie and endorsed by the UN Human Rights Council in 2011.²³⁰ Subsequently, the Human Rights Council established a Working Group charged with “disseminating and implementing” the Guiding Principles.²³¹ Under the Guiding Principles, businesses are expected to “avoid causing or contributing to adverse human rights impacts through their own activities” and to “address such impacts when they occur.”²³² In addition, they should prevent human rights harms “directly linked” to their operations, even if they do not cause them.²³³ Because human rights obligations of businesses should be proportional to their “size and circumstances,” large entities will have greater obligations

230. See *Operationalize the UN Guiding Principles on Business and Human Rights*, ACTION2020, <http://action2020.org/business-solutions/operationalize-the-un-guiding-principles-on-business-and-human> [https://perma.cc/57G2-S9PA].

231. *Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, U.N. HUMAN RIGHTS (June 2001), <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx> [https://perma.cc/8BKX-9Y88].

232. ACTION2020, *supra* note 230.

233. *Id.*

consistent with their greater capacity to address adverse human rights consequences.²³⁴ To meet their obligations, business entities should undertake policy commitments, should engage in due diligence, and should develop a process for remediation of harms.²³⁵ Consumers have the capacity to punish companies that do not satisfy human rights obligations. Consumer power has been on particular display lately: faced with boycotts, advertisers have fled Breitbart,²³⁶ and Travis Kalanick resigned from his position on Trump's economic advisory board.²³⁷ Wells Fargo has also been shaken by boycotts of customers, particularly the cities of Seattle and Davis who chose to divest from the bank due to its ties with private prisons and the North Dakota Access Pipeline project.²³⁸

Finally, individual states can also play a role in curbing the human rights concerns around mandatory arbitration.²³⁹ First, states themselves can agree to human rights provisions even though the U.S. is not obligated. Second, states can enact their own consumer protection laws to mitigate some of the damage caused by mandatory arbitration; states can also endeavor to limit the damage of mandatory arbitration with robust unconscionability limits to contract. Although states cannot target mandatory arbitration clauses directly, they can provide robust consumer protections under general contract law and consumer law statutes. To the extent that arbitration clauses are enforced and states are not able to limit them, states can take their own enforcement action against predatory practices. This is not a substitute for due process, but at least is diligent pursuit of an effective remedy while awaiting human rights compliance at the national level.

Conclusion

The existing mandatory, binding arbitration system for consumer credit contracts is inconsistent with human rights. Consumers subject to these clauses lack access to a fair tribunal in which to challenge property deprivations and discrimination. Access to class actions in arbitration proceedings, which the CFPB proposal would have required, may bring us closer to satisfying some of these concerns, but only if the process actually amounts to an independent and impartial tribunal. Perhaps, rather than the company selecting its arbitration organization, arbitration organiza-

234. *Id.*

235. *Id.*

236. Aimee Picchi, *As Breitbart Wages "War" on Kellogg's, Advertisers Flee*, CBS NEWS (Dec. 2, 2016, 8:41 AM), <http://www.cbsnews.com/news/as-breitbart-wages-war-on-kelloggs-advertisers-flee/> [https://perma.cc/C5AV-5AFQ].

237. Andrew Blake, *Uber CEO resigns from Trump advisory council over executive order*, WASH. TIMES (Feb. 3, 2017), <http://www.washingtontimes.com/news/2017/feb/3/travis-kalanick-uber-ceo-resigns-trump-advisory-co/> [https://perma.cc/E9FZ-BCDF].

238. Bill Chappell, *2 Cities To Pull More Than \$3 Billion From Wells Fargo Over Dakota Access Pipeline*, NPR (Feb. 8, 2017, 2:18 PM), <http://www.npr.org/sections/thetwo-way/2017/02/08/514133514/two-cities-vote-to-pull-more-than-3-billion-from-wells-fargo-over-dakota-pipelin> [https://perma.cc/QPE7-3TVA].

239. Peter Spiro, *The States and International Human Rights*, 66 *FORDHAM L. REV.* 567, 569 (1997).

tions could be appointed randomly.²⁴⁰ It would also mitigate human rights concerns if consumers had access to an appeal, although actual access would require an affordable appeals process, including robust access to non-profit legal services. In addition, human rights principles suggest that the public should have access to the proceedings. The human rights analysis here can be useful regardless of which reforms, if any, are passed: human rights organizations and activists can call on consumer financial credit providers to comply with human rights principles by ensuring that consumers are able to effectively achieve redress in situations of property deprivation or discrimination. Such organizations can also analyze which providers of consumer financial products come closest to complying with human rights principles, and can publicize the results of this research—enabling consumers to choose products based upon this information. This can generate economic pressure to comply with the human rights principles discussed here.

The CFPB proposal would have been an important step in better protecting consumers' human rights. In addition, this analysis suggests that, in an era when businesses look to mandatory arbitration as a method for circumventing consumers' rights, it is essential that the CFPB continue to be empowered to deploy their enforcement authority to hold businesses accountable for violations of these rights.

240. This is similar to the suggestion that ratings agencies be randomly appointed to resolve the problem of ratings agencies lowering standards to please the issuers who pay them. See, e.g., Alan S. Blinder, *A Better Way to Run Rating Agencies*, WALL ST. J. (Apr. 17, 2014, 6:55 PM), <http://www.wsj.com/articles/SB10001424052702304572204579503471330762810> [<https://perma.cc/754R-DYLK>].