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Mandatory Arbitration and Distributive Equity: An Essay on Access to Justice

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Abstract

Mandatory arbitration clauses in consumer contracts are widely regarded as problematic because they limit consumer's access to judicial forums, to fair procedures, and potentially to any kind of remedy. But rather than looking at consumers as a group, I examine which sub groups of consumers are affected by this limitation more than others. I argue that in most circumstances, access to courts benefits the elite, not the weak. It is a species of open-access policy that has an unintended regressive effect. Paradoxically, rules that limit the use of pre-dispute arbitrations clauses hurt, rather than protect, weaker consumers, as they mandate a regressive reallocation. I also consider the role of class actions, and whether weak consumers are potentially the indirect beneficiaries of class action litigation. This argument has theoretical merit, but it, too, is limited in ways that are often unappreciated.

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I. Introduction

Mandatory arbitration clauses in consumer contracts are widely regarded as problematic because they limit consumer's access to judicial forums, and potentially to any kind of remedy. "Large areas of U.S life and commerce have silently been insulated from the lawsuit culture."[1] Public courts charge low fees and are cheap for plaintiffs to access, allowing generous procedural opportunities to vindicate their rights, whereas consumer arbitration is costly to launch and stingier in its procedural and remedial options. According to this view, pre-dispute arbitration agreements hurt consumers, and—to the extent permissible under Federal arbitration law—their use should be limited and perhaps even prohibited.

Critics of pre-dispute arbitration agreements also challenge the superficial notion that such clauses represent the joint interests of both businesses and consumers.[2] These arrangements are not negotiated, and are often not even noticed at the time of contracting. They are "paperwork," not mutual assent, Margaret Jane Radin protests, noting that the choice whether to agree to mandatory arbitration is not much of a choice when all vendors who compete in some product space require an agreement to arbitrate.[3]

Consumers' ex ante apathy towards arbitration clauses may indicate a rational response if consumers have little to gain from access to litigation, and if litigation is inferior by being more costly and overly obsessed with ex post accuracy than with quick, cheap, process.[4] Even if arbitration is inferior for consumers, it may be beneficial to agree to it.

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[1] Patti Waldmeir, *How America is Privatizing Justice by the Back Door,* Financial times, June 30 2003, at 12.

[2] See, e.g., Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. 637, 642–43 (1996) ("it is critical to distinguish between commercial arbitration voluntarily agreed to by parties of approximately equal bargaining power, and commercial arbitration forced upon unknowing consumers, franchisees, employees or others through the use of form contracts.").

[3] Margaret Jane Radin: *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* 7-9 (Princeton, 2012)

[4] Gerhard Wagner, *Regulatory Competition in Dispute Resolution* (2013)

As Judge Frank Easterbrook, "people are free to opt for bargain-basement adjudication" because "in competition, prices adjust and both sides gain. 'Nothing but the best' may be the motto of a particular consumer but is not something the legal system foists on all consumers."[5] Since people regularly trade off quality for price, who is to say that a choice to forgo the benefits of litigation is irrational? Arbitration clauses are like other features of the deal—they "all stand or fall together."[6]

But the apathy towards arbitration may be due to something other than a rational trade off. It may indicate cognitive myopia, a failure to account for the problems that might occur when non-conforming products or services are rendered and redress sought. Or, the apathy may simply indicate that consumers do not bother to read contracts (which we know they don't), or that their attention is fully exhausted with other matters (like the quality of the service).

If arbitration is not chosen for its efficiency and mutual benefit, the suspicion then falls on the vendors who draft these clauses for self-serving reasons. The overwhelming conclusion among critics is that arbitration has the "capacity to reduce, if not altogether eliminate, access to the courts and to the law."[7] This concern of limited-access-to-remedy has two primary aspects, one relating to compensation and the other to deterrence. The compensatory concern is based on the thought that litigation provides better remedies because it is cheaper to file and to pursue, granting more effective procedural weapons (like discovery). It is also public and thus has precedential value, and it allows for more substantial remedies. Arbitration, by contrast, is viewed as limiting access to justice and thus denying relief to consumers.[8]

The deterrence concern is also tied to the limited incentive of consumers to enforce small claims through arbitration. But it is primarily founded on one artifact of arbitration clauses: the class-action waiv-

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[5] Carbajal v. H&R Block, 372 F.3d 903 (2004) (Easterbrook, J.).

[6] Oblix v. Winiecki, 374 F.3d 488 (2004) (Easterbrook, J.).

[7] Richard C. Reuben, *First Options, Consent to Arbitration, and the Demise of Separability: Restoring Access to Justice for Contracts with Arbitration Provisions*, 56 S.M.U. L. Rev. 819, 822 (2003). *See also*

[8] Heather Bromfield, *The Denial of Relief: The Enforcement of Class Action Waivers in Arbitration Agreements*, 43 U.C. Davis L. Rev. 315, 341-346 (2009); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 Colum. L. Rev. 1872, 1904-1909 (2006).

ers.[9] Critics believe that "such clauses should not be enforced at all because any gains from aggregate litigation in terms of better incentives to take care ex ante would be lost."[10] As a result, consumers as a group are disfavored, whereas the more powerful businesses benefit.[11]

I will call this dual concern the "limited access to remedy" hypothesis. My goal in this essay is to explore its validity. It turns out, however, that the question whether arbitration is, in general, less accessible to consumers than litigation is difficult to untangle empirically. Instead, I want to ask a subtler question: assuming that arbitration poses different burdens than litigation, which consumer types are affected? Which subgroup of consumers is disfavored, facing greater difficulties in vindicating meritorious claims? And which consumers, perhaps, benefit? If consumers vary in their sophistication, education, psyche, wealth, vulnerability, type and size of injuries, litigiousness, or other traits, does the denial of access to courts hurt weaker consumers disproportionately more? Or, does it hurt the more sophisticated consumers more? Rather than looking at consumers as a homogeneous group—as most of the literature explicitly or implicitly does—my goal is to examine the characteristics of those subgroup of consumers who are likely to be adversely affected.

The concerns over the denial of access to justice would be all the more powerful and urgent if the denial of litigation is disproportionately affecting weak consumers. Indeed, this is a plausible conjecture: those who have less resources and less sophistication, are less likely to be able to pay the upfront fees of filing for arbitration, and thus will be denied any kind of redress.[12] On the other hand, the concerns over access to justice would be weakened if it would turn out that only elite groups of litigious consumers are adversely affected by the limited access to courts, and that—in an unappreciated way, by eliminating an

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[9] Christopher Drahozal & Steven Ware, *Why Do Businesses Use (or Not Use) Arbitration Clauses?* 25 *Ohio State Journal on Dispute Resolution* 433, 444 (2010), find that "all of the arbitration clauses in consumer contracts (20 of 20, or 100%) contained a class arbitration waiver."

[10] Wagner, *supra* note 4.

[11] Russell D. Feingold, *Mandatory Arbitration: What Process is Due?*, 39 Harv. J. On Legis. 281, 284 (2002); Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 Harv. Negot. L. Rev. 171, 193 (2003).

[12] Mark E. Budnitz, *The High Cost of Mandatory Consumer Arbitration*, 67(1) L. & CONTEMP. PROBS. 133 (2004).

implicit cross-subsidy in favor of that sub group—weak consumers benefit from the denial of access to courts.

This question—the differential effect of consumer protections among groups of consumers—is not often addressed analytically by legal commentators. Instead, they often *assume* that mandatory protections are more beneficial to the most needy among consumers. Richard Epstein, for example, has recently conceded that strong consumer protections benefit weak consumers and could have a progressive effect. In commenting on the strict mandatory protections under European contract Law, Epstein was ready to "assume that the less-sophisticated half of consumers stand to benefit from the [protective] regulation and the more-sophisticated half [. . .] are hurt by them, in equal degrees." Indeed, he saw this protective regime "an implicit cross-subsidy of weak consumers by their stronger counterparts."[13] This is an intuitive assumption. Strong consumer protections might benefit *weaker* consumers more because they need them more direly. Strong consumers are less reliant on paternalistic legal protections because they can take care of themselves and rely on reputation, advice, informal sanctions, market research, insurance, or a host of protective substitutes before making a purchase.

This conjecture is plausible; but it is likely false. My goal in this paper is to highlight the opposite possibility, that mandatory protections could be *regressive*, in benefitting the stronger consumers disproportionately, and at times at the direct expense of the weak. I will focus on one type of mandatory protection—access to litigation—but the argument is relevant in other contexts as well, and I will refer to those along the way. My argument addresses primarily the compensatory concern of the limited-access-to-remedy. Intuitively, it can be summarized as follows: access to remedy is like insurance, guaranteeing a make-whole outcome. But like insurance, it is all the more valuable to those with high losses and with the sophistication to file their indemnity claims. If everybody pays the same "premium" for such damage coverage, but only the sophisticates invoke the coverage and collect their damages, these sophisticates are being cross subsidized. A contractual arrangement that eliminates this coverage is detrimental to them but good for everyone else.

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[13] Richard A. Epstein, *Harmonisation, Heterogeneity and Regulation: CESL, The Lost Opportunity for Constructive Harmonisation*, Common Market Law Review (forthcoming, 2013).

What about the public good aspects of class representation? To the extent that litigation, through class actions, produces a benefit to all consumers, then it does not matter that only the privileged few among consumers can realistically launch it. The class representation feature would guarantee the spillover of the benefit to all. This universal benefit could be in the form of class-wide recovery; or, even more importantly, it can be in the form of deterrence vis-à-vis potential offenders. Thus, for access-to-litigation to have any differential effect—either progressive (as imagined by some) or regressive (as argued in this paper)—it must be that class action judgments do not affect all consumers equally, or that class actions selectively address sub-categories of complaints that are more important to some groups, and less to others. These issues will be discussed in the final section of the paper.

There is a surprising flavor to the insights that my analysis, focusing on the divergent interests among heterogenous consumers, delivers. Broadly speaking, the loudest criticism of mandatory arbitration comes from commentators whose main dedication is to the ex-post compensatory role of the law of remedies. They view arbitration as an obstacle to make-whole, corrective justice. By contrast, those more economically minded often highlight the benefits of arbitration in reducing transactions costs and prices. They view arbitration as improving the efficiency of dispute resolution, to the benefit of all. My analysis challenges the validity of these two prevailing perspectives. The ex-post fairness critique of arbitration is misguided because while arbitration may indeed deny some forms of recovery, it eliminates an unfair redistribution. The denial of access can *improve* distributive equity if the access, while equally allocated, is practiced only by a privileged few. The ex-ante incentive perspectives is also incomplete, because the elephant in the room is the deterrent effect of class actions, possibly overshadowing any efficiency gains in dispute resolution costs. But the critical question is not whether arbitration blocks class actions and changes firms' incentives. We can assume it does. Rather, the question to ask is which types of actions are disproportionately affected.

II. "Open Access" and Redistribution

Open access to courts is a species of an open access policy, and so let us begin by thinking more generally about open access within our social order. The ideal of access is fundamental to the allocation of primary goods in a liberal society. Societies provide open access to a variety of basic goods and services like primary education, public parks and beaches, roads, libraries, museums, emergency services, and, of course, courts of law.

There is a strong notion of equality underlying such open access policies. If these goods and services where subject to market allocations, instead of being open to all through government mandates (and funding), the poor and the less sophisticated would disproportionately be priced out. Open access enables those who could not otherwise afford to pay entry tolls and service fees to consume the freely accessed good. Since it is funded by tax revenue, the open access policy is an implicit cross subsidy. If tax revenues are collected more from the wealthy, but the good is available to all and broadly used by lower income citizens, the cross subsidy is a form of progressive, redistributive allocation.

In some important cases, the cross-subsidy brought upon by open access is indeed progressive, favoring low-income people. This is largely the case with respect to primary school education in most big American cities, as well as access to emergency medical care, or to city parks. In the public school context, two important sources of funding are property and income taxes, which are paid largely by higher income property owners. And public schools are more likely to be attended by low-income population, since higher income families often opt out for private education. The same is true for city parks and beaches, a more likely destination of low-income residents who cannot afford remote and luxurious vacation destinations.

But in an important class of cases, the direction of the cross subsidy is often favorable to the middle class. George Stigler called it "Director's Law" of public income redistribution, arguing that public expenditures financed by taxes are often made for the primary benefit of the middle class.[14] Stigler suggested that social security, or tax exemptions for churches, are examples for such pro- middle class redistribution. Social security, for example, taxes most heavily, relative to the benefits they will receive, those who begin work early (instead of continuing in school) or those who die early, all favoring the middle class. Low-income taxpayers pay in a larger share of their income, and, be-

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[14] George J. Stigler, *Director's Law of Public Income Redistribution*, 13 Journal of Law and Economics 1 (1970).

cause they don't live as long after retirement, they fail to reap the benefits of the progressive pay-outs.[15]

The direction of the cross subsidy becomes less obvious, and tends towards the regressive, when we consider open access to, for example, remote parks, libraries, or museums. To access a remote national park, people need to travel a distance, and those with cars, with leisure time, with appreciation for nature, and with disposable income to pay the cost of travel are more likely to access the remote parks. The Indiana Dunes National Lakeshore is indeed open and free to all, but a 45-minute drive from Chicago, it is largely inaccessible to most lower income residents of the city's south side. Access is subject to an implicit cost of approach, or it provides the types of benefits that disproportionately filter out low-income people and draw the wealthy and the middle class. Public expenditures on maintaining this this type of free access are regressive.

Regressivity, as used here (and in the public finance literature) has two facets. Under the first criterion, we measure how the *benefits* that the public expenditures finance are distributed. Whenever poorer populations utilize these benefits at a less than proportional rate, the policy is regressive.[16] This is a weak sense of regressivity, because the subsidies that pay for these benefits might be financed by progressive taxes, suggesting that the overall redistribution does not hurt the poor. The affluent pay more for those benefits that they also happen to access more readily.

The second criterion of regressivity represents a stronger form of inequality. It measures the effect of a particular public expenditures program on the overall inequality of income and welfare distribution.[17] Here, the assessment that expenditures are regressive is made not only on the basis of how the benefits are distributed, but also on who pays

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[15] Geoffrey T. Holtz, *Social Security Discrimination Against African Americans: An Equal Protection Argument*, in *Aging and the Law* 111, 113-14 (Lawrence A. Frolik, ed., 1999).

[16] See, for example, Inge Kaul, et al, eds, *Global Public Goods: International Cooperation in the 21st Century* xxix-xxxii (Oxford 1999). See also Nicolás Estupinán et al., *Affordability and Subsidies in Public Urban Transport: What Do We Mean, What Can Be Done?* 28 (World Bank 2007).

[17] See, for example, Udo Ebert and Georg Tillmann, *Distribution-Neutral Provision of Public Goods*, 29 Social Choice & Welfare 107 (2007). See also Estupianan et al, id., at 22.

for them. The affluent now pay *less* for the benefits that they access more readily. In fact, there is an even stronger form of regressivity, whereby the public expenditure program not only increases inequality, but leaves the poor overall worse off.

Roads, and some forms of public transportation, for example, are regressive in the first sense. First, usage rates of open roads and public transportation may be naturally higher among middle- and upper-income users than poorer users.[18] The poor are less likely to drive cars and enjoy benefits from roads and highways. Many among the poor do not drive (due to disability or poverty), many who do drive do not commute (they are retired or disabled), and many who do commute work close to home. Surprisingly, even bus subsidies may lead to an increase in relative use by middle-income passengers (although such policies can also have other progressive effects).[19] Second, it is usually difficult to *target* the transportation expenditures towards poorer groups, unless projects are specifically aimed at improving the poor's access to infrastructure (e.g. a new Metro stop in a poor neighborhood). More generally, a World Bank study of utilities subsidies—the paradigmatic quantity-based subsidies (ones that are proportional to the amount of the service consumed)—found that of the 25 subsidies considered, *none* were progressive. "The notion that quantity targeting through tariff structures is inherently pro-poor is clearly a misconception."[20] Accordingly, road and transport policies that eliminate the open access—for example, collection of tolls—are often found to be overall progressive.[21]

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[18] For example, 73% of Metro passengers in Washington DC have annual household incomes of $75,000 or more. See S. Ginsberg, S. and L. Stanton, *Would Anyone Win if Metro Raised Fares*?, Washington Post (September 16, 2007). On the other hand, only 34% of bus passengers have similar incomes.

[19] Estupinán et al., at 21. But see Stefan Tscharaktshiew and Geor Hirte, *Should Subsidies to Urban Passenger Transport Be Increased? A Spatial CGE Analysis for a German Metropolitan Area*, 46 Transportation Research Part A: Policy and Practice 285 (February 2012).

[20] Vivien Foster, Jonathan Halpern, Kristin Komives, and Quentin Wodon. *Water, Electricity and the Poor: Who benefits from Utility Subsidies?* 71 (World Bank 2005).

[21] David Banister, *Equity and Acceptability Questions in Internalising Social Costs of Transport,* Internalising the Social Costs of Transport, 153 (OECD 2004). Jonas Eliasson and Lars-Goran Mattsson, *Equity Effects of Congestion Pricing Quantitative Methodology and a Case Study for Stockholm*, 40 Transportation Research Part A

Further, if the costs of roads and motorized transportations services are borne by general taxes and impose externalities on all (pollution, congestion, injuries), and if people of middle income (and up) not only use transportation more, but gain disproportionate access through it to income producing opportunities, thereby crowding out the poor, then the open roads and transportation policy may be regressive in the stronger sense, of increasing the overall degree of inequality.[22] Some American cities are a testament to how good open (publicly subsidized) highways to the suburbs hurt the economic vitality of the inner-city and its low income residents.

Similarly, to access a public library and even more so a museum, people have to appreciate literature and the fine arts, a trait that is correlated with income, and they have to be part of social networks that reward fluency in these media. Surely, some of the services offered by public libraries, like free computer and internet access to local residents, are progressive—benefitting low income people who do not have an internet connected computer at home. But other services, for example, the maintenance of expensive collections of rare works, benefits more the elites.[23] Since they are largely funded by wealthy philanthropists, museums may be regressive only in the weak sense—benefitting the affluent more, without increasing inequality. However, tax credits for the philanthropic class are a form of public expenditure, constituting a transfer from the general budget that funds all programs to the budget of cultural institutions that cater largely to the moderately well-to-do patrons.[24]

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602 (2006). For a helpful review of the literature, see David Levinson, *Equity Effects of Road Pricing: A Review*, 30 Transport Reviews 33 (2009).

[22] Todd Litman and Marc Brenman, *A New Social Equity Agenda For Sustainable Transportation* (Victoria Transport Policy Institute, 2012).

[23] Paul J DiMaggio, *The Museum and the Public*, in Martin Feldstein, ed, *The Economics of Museums* 39 (1991); Juan Prieto-Rodriguez and Victor Fernandez-Blanco, *Optimal Pricing and Grant Policies for Museums*, 30 J Cult Econ 169 (2006).

[24] See, generally, Alan Feld, et al, *Patrons Despite Themselves: Taxpayers and Arts Policy* (NYU 1983); Alan Feld, *Revisiting Tax Subsidies for Cultural Institutions*, 32 J Cult Econ 275 (2008); Michael Rushton, *Who Pays? Who Benefits? Who Decides?*, 32 J Cult Econ 293; Museum attendance is also strongly correlated with education levels.

The pattern that the examples above demonstrate is the following. An open access policy can unintentionally become regressive in the strong sense if two conditions are met:

(1) Wealthier sub-groups are more likely to enjoy the benefits of open access
(2) Poorer sub-groups pay a share for the funding of the open access that exceeds their proportional benefits.

That is, when the proportion paid by the poor is greater than the rate by which they withdraw the benefits, the policy is regressive.

To illustrate this general pattern, consider the following numerical example. Imagine a society in which there are 100 consumers. The rich (20% of population) have a base income of 1000; the middle class (40%) have a base income of 400; and the poor (40%) have a base income of 100.

Consumer type	Frequency	Base Income per consumer
Wealthy	20%	1000
Middle class	40%	400
Poor	40%	100

A social policy is enacted, which provides equal access. The benefit of the policy depends on income: each consumer's direct benefit from the policy equals 10% of its base income. (For example, the policy might be a social insurance plan that pays benefits proportional to income.) The cost of the policy is divided equally across all consumers. (For example, the cost of the insurance benefit is bundled into the price of a product that everyone buys).

In this scenario, each rich consumer enjoys a benefit of 100 from the policy (10% of 1000); each middle class consumer enjoys a benefit of 40; and each poor consumer enjoys a benefit of 10. The total benefits to the citizenry under the policy is

$$20\times100 + 40\times40 + 40\times10 = 4000.$$

Since the benefits of the policy have to be paid for, a total revenue of 4000 has to raised from all consumers. And, if as assumed, the cost of the policy is divided equally across all consumers, then each pays 40 (for a total revenue of 100×40 = 4000, equal to the cost of the program).

As a result, the net income for consumers, which includes their base income, plus the benefit from the program, net of the cost charged, is the following:

Rich: 1000 +100 – 40 = 1060
Middle class: 400 + 40 – 40 = 400
Poor: 100 + 10 – 40 = 70

The following table summarizes this synthetic example:

Consumer type	Frequency	Base Income per consumer	Combined Benefit from program (10% of income)	Net Income per consumer
Wealthy	20%	1000	20×100 =2000	1060
Middle class	40%	400	40×40=1600	400
Poor	40%	100	40×10=400	70

In this example, the program is open to all, but it is regressive because the benefits accrue disproportionately to the wealthy, while the poor pay an equal price. The policy effectuates a net transfer—a cross-subsidy—from the poor to the rich, whereas the middle class is overall unaffected.

To be sure, many policies have effects not only on distribution, but on overall welfare as well. For example, a policy that increases overall welfare could mitigate (but not eliminate) the regressive effect if the poor enjoy some of the increased welfare. Similarly, many policies secure benefits to consumers, at a cost that is only partially borne by them (and partially borne by others, e.g., producers). Still, even if the beneficiary group bears only part of the cost, the division of benefits and costs within the beneficiary consumer group could leave the weakest among them worse off.

In the above example, imagine that consumer have to pay only half of the benefit that they get from the policy. Since the total cost of the policy is 4000, half of the cost, 2000, is borne by consumers—a per-consumer cost of 20. This half-cost can be a result of the efficiency of the policy (generating gross benefit of 4000 at a cost of only 2000), or it could be a result of the successful shifting of part of the cost to some external group ("producers"). Either way, the resulting net income would be 1080, 42, and 90 for the rich, middle-class, and poor, respectively. Still, despite the net improvement in the condition of the consumers as a group, the poor are still worse off, and still partially cross-subsidize the benefit to the rich.

We see that public programs can be evaluated according to their redistributive impact, and that some have (potentially unintended) regressive effects. It is fair to ask why, and to what extent, are these regressive outcomes troubling. Why should we care about distributional equity? Governments, after all, produce a large portfolio of public goods, some to benefit the poor and others to benefit the affluent. If these programs are welfare-enhancing overall, should they be abandoned when the benefits are allocated inequitably? In fact, identifying isolated regressive program is misleading because redistribution should be measured by the overall effect of all programs. Some citizens benefit from program A, others from program B, and it is the combined effect of A+B that should be assess. Further, argue the skeptics, any regressive redistributive effect could be corrected by adequately designing the income tax burdens. Affluent suburbans may not pay directly for their disproportionate use of highways, but their higher incomes could be taxed more heavily.[25] Thus, if building highways, or marinas for yachts, is welfare increasing, it ought to be done notwithstanding its distributional effect.

My purpose here is not to enter the normative debate over the proper scope and method for redistribution. Rather, my goal is descriptive: identify the otherwise unnoticed effects of specific legal policies. New policies are advocated, and reforms are enacted, with express distributive goals, supported by progressive sentiments. To some, the policy of equal access is intended to guarantee greater participation and equality within societal institutions—an effect that cannot be similarly advanced by a mere transfer of cash to the target groups. Unintended regressive effects might, therefore, inform the choice of policy—especially policies like "open access" that should be interested in the relative rates of utilization of the access privilege. Since my ultimate

[25] Steven Shavell, *A Note on Efficiency v. Distributional Equity in Legal Rulemaking: Should Distributional Equity Matter Given Optimal Income Taxation?*, 71 Amer. Econ. Rev. 414 (1981); Louis Kaplow and Steven Shavell, *Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. Legal Stud.667 (1994).

goal here is to evaluate the equity of arbitration clauses that deny access to courts, and since such denial is often regarded as inequitable and hurting the weaker echelons of consumers, the direction of the distributive effect seems to be crucial.

Moreover, while regressive effects of open access policies could always be offset by proper adjustments of income tax burdens, lawmaking does not regularly work this way. Some fiscal programs may be paid for by increased taxes, but numerous laws and policies are enacted singly, unaccompanied by an income tax overhaul. If, as I suggest below, access to litigation turns out to be a regressive policy, it would be difficult imagine that lawmakers would respond by increasing income tax on the benefitting sub-group, to offset the cross-subsidy.

Finally, even if redistribution can be done more effectively and efficiently through direct fiscal means, and even if its overall goals are determined in the aggregate on the basis of some external principles of equity, one would still need to know how various legal rules and policies affect the different groups. The more regressive other programs are, the more progressive the tax system ought to be. How access policies affect relative welfare would thus inform the design of other redistributive measures.

III. Regressive Access Policies

We have seen that open access policies may be regressive. Some benefit the poor, but others benefit the affluent. This section examines a few examples of legal policies that have the unintended cross subsidy of the elite.

1. Mandated Disclosure

Mandated disclosure is a preeminent equal access policy. It distributes access to knowledge, information to all, in equal portions. But free access to information and disclosure does not mean equal utilization of it. The information has to be noticed, read, understood, processed and then used in a way that improves decisions and outcomes. In each one of these steps, the poor and poorly educated benefit less than the wealthy and the better off.

Medical informed consent forms—one of the crown jewel of the mandatory disclosure paradigm—are long and complex, mostly written at a literacy level exceeding that of poor and unsophisticated patients.[26] Similarly, consumer financial disclosures require some financial education and savvy to be useful. "Evidence from studies of consumer credit disclosure rules suggests that it is better-off consumers who tend to make use of information . . . . The poor may rationally decide not to make use of information, if they feel no alternatives will be available to them. Many low-income consumers feel alienated from mainstream lenders and turn to doorstep sellers, in part, to avoid the embarrassment of being turned down."[27] Better educated (and wealthier) consumers know better how to search for information, understand it, ask questions about it, comparison-shop, and receive better advise with it.[28] They are likelier to have baseline education and experience with which to interpret information. In contrast, the less-financially literate are more prone to limited attention and information overload, and—paradoxically (but not surprisingly)—they tend to search less before making choices.[29] Even simple information disclosed in the sale of used cars—the car's safety and repair history, odometer readings, and warranties—seem not to help the poor, who continue to pay more for worse quality cars.

But mandated disclosures not only benefit the better off. In an unintended way, mandated disclosure solutions worsen the relative

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26 S. Michael Sharp, *Consent Documents for Oncology Trials: Does Anybody Read These Things?, 27 American Journal of Clinical Oncology* 570, 570 (2004); Angela Fagerlin et al, *Patient Education Materials About the Treatment of Early-Stage Prostate Cancer: A Critical Review*, 140 Annals of Internal Medicine 721 (2004); Stuart A. Grossman et al, *Are Informed Consent Forms That Describe Clinical Oncology Research Protocols Readable by Most Patients and Their Families?*, 12 Journal of Clinical Oncology 2211, 2212 (1994).

27 Geraint Howells, The Potential and Limits of Consumer Empowerment by Information, 32 J. L. & Society 349, 357-58 (2005). See also William Whitford, *The Functions of Disclosure Regulation in Consumer Transaction*, Wisc. L. Rev. 400 (1973).

28 Barbara O'Neill et al., *Money 2000 Participants: Who Are They?*, 37 J. Extension 6 (1999); Kimberly Gartner and Richard M. Todd, *Effectiveness of Online "Early Intervention" Financial Education for Credit Cardholders* (July 2005).

29 J. Bettman and C. Park, *Effects of prior knowledge and experience and phase of the choice process on consumer decision processes: A protocol analysis*, 7 Journal of Consumer Research, 243-248 (1980).

situation of the poor.[30] If the costs and other burdens of disclosure are borne equally, or even disproportionately, by the less educated poor—those least likely to benefit from the disclosures—they create a regressive wealth transfer. There are some disturbing instances in which this phenomenon has been empirically documented. For example, hospitals must disclose report cards—scores that measure of the quality of treatment they provide, most often mortality rates. There is some evidence that these mandates led hospitals to improve the reported dimensions, but there are also discouraging findings that the disclosure hurt the sicker and poorer patients. Healthier patients found their way to higher rated hospitals, while sicker patients were treated in hospitals with worse grades. Researchers found "marginal health benefits for healthy patients, and major adverse health consequences for sicker patients."[31] Perhaps this is due to the enhanced ability of more sophisticated patients to enter higher quality hospitals, thereby leaving less space or bumping out the less sophisticated and sicker patients (a "musical chairs" dynamic). The disclosure regime—while equally accessible and distributed to all—appears to have made things better for the rich and worse for the poor.

Here, the regressive effect of mandated disclosure is due to its disproportionate propensity to benefit the privileged class. Disclosures are nuts distributed to all, but only those with teeth can bite. And "teeth" are evidently correlated with wealth and privilege. The potential harm to the poor, if it occurs, is due to their relative disadvantage in the "arms race" to obtain the benefits that disclosures reveal.

But mandated disclosure can be harmful to the poor in another, subtler way. Even if disclosures are equally ineffective in warning all people—the poor and the affluent alike—of complex risks, those who face graver risks are disproportionately disadvantaged. Consider the subprime credit markets. Borrowers in these markets are poorer and less financially educated. They face a variety of shady loan practices that are difficult to understand and, if accompanied by some immediate

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30 Kenneth McNeil et al, *Market Discrimination Against the Poor and the Impact of Consumer Disclosure Laws: The Used Car Industry*, 13 Law & Society Rev. 695, 699 (1979); See, generally, Omri Ben-Shahar and Carl E. Schneider, *More Than You Wanted to Know: The Failure of Mandated Disclosure* (Forthcoming, 2013).

31 David Dranove et al, *Is More Information Better? The Effects of 'Report Cards' on Health Care Providers*, 111 J. Pol. Econ. 555 (2003).

and tempting perks, are hard to turn down.[32] There is still a lingering mainstream belief that the way to uproot these practices is to require full and meaningful disclosures.[33] Few, if any, think that these disclosures can be *harmful*. What is regularly overlooked is that, paradoxically, disclosure laws make such unscrupulous behavior by lenders *more* likely.

Lenders that comply with the mandated disclosure statutes are accorded a robust "safe harbor" from fraud claims by borrowers. Almost by definition, there is no fraud when the lender carefully lavished all the mandated disclosures required by the Truth-in-Lending Act and similar right-to-know statutes (sometimes dozens, in not hundreds, of pages of required disclosures). Judge Posner once lamented that "working-class borrowers" do not understand the disclosures and are not helped by them. They "belong to a class of probably gullible customers for credit" who "do not read Truth in Lending Act disclosure terms intelligently," and they are tricked into "overpaying disastrously for credit." Indeed, Posner thought that technical compliance with TILA disclosures should *not* legitimize deceptive lending practices: "So much for the Truth in Lending Act as a protection of Borrowers" he protested. "Suppose [the borrower] were blind. Or retarded. Would anyone argue that shoving a Truth in Lending Act disclosure form in front of her face would be a defense to fraud?"[34]

Notwithstanding an occasional activist judge, like Posner, riding to the rescue of the unsophisticated consumer who could not realistically read the disclosures, the rules are clear: "shoving" a full disclosure form in front of the borrower *is* a defense against fraud. "Defeating all of the potential arguments available to [to the borrower] is a simple and uncontroverted fact: [the creditor] fully complied with the disclosure requirements of both the federal Truth in Lending Act and the Illinois Consumer Installment Loan Act. . . By enacting TILA, . . . Congress has provided all the protection it deems appropriate for borrowers, be

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[32] Oren Bar-Gill, *Seduction By Contract: The Law, Economics, and Psychology of Consumer Contracts* (Oxford 2012).

[33] See, for example, statement by Florida's Attorney General Pam on the importance of full mandated disclosure of fees, at http://www.myfloridalegal.com/newsrel.nsf/newsreleases/7AD2F1581F3BB2A485257895004D18D5 (visited January 14, 2013).

[34] Verna Emery v. American General Finance, Inc. 71 F.3d 1343, 1347-48 (7th Cir. 1995).

they financially astute or ill-informed and gullible."[35] The mere access to information defeats the fraud claim.

This safe harbor created by mandated disclosure is patently regressive. Sophisticated consumers are not confronted with the same predatory lending schemes. They are savvier and can sniff the aroma of deception, and they can safeguard against questionable solicitations by asking better questions. They have a more effective informal network of advice and reputation. Accordingly, the immunity that mandated credit disclosures effectively provide to the creditors is not as harmful to the sophisticates as it is the poor.

2. Mandated Compensation

Tort and products liability, and other rules of compensation in private law guarantee people's access to remedies—an equal right to all victims to be made "whole." When this access-to-remedy is mandatory, and cannot be contracted away, it can create regressive redistributive effects whereby poor consumers subsidize the compensation of wealthier consumers.[36]

Consider tort compensation for automobile accidents, or for injuries arising from defective products. The compensatory scheme operates as insurance, because the losses recovered by victims are spread (through the price of products or through mandatory insurance premiums) to all consumers. This form of insurance creates perverse and regressive cross subsidies, as poor consumers subsidize the broader de-facto coverage of wealthier consumers engaged in the same activity or consumer the same product.

Indeed, in the area of auto accident insurance, advocate for low income minority groups argued against make-whole coverage policies, because—they realized—lost wages are smaller, plaintiff lawyers are harder to find, and jurors are less likely to return high awards, when the injured plaintiffs are very poor.[37] These groups even went as far as aligning with insurers in proposing low-cost no-frill auto insurance policy

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[35] *Id.*, at 1350 (Coffey, J., dissenting)

[36] Charles Fried and David Rosenberg, *Making Tort Law: What Should Be Done and Who Should Do It* 71 (American Enterprise Institute, 2003).

[37] James M. Anderson, Paul Heaton, and Stephen J. Carrol, *The U.S Experience with No-Fault Automobile Insurance: A Retrospective*, 52 (Rand, 2010).

choices designed for poor drivers. Those choices would help people opt out of the general pool and establish a separate insurance pool, free from the cross subsidy. Ironically, advocates like Ralph Nader successfully campaigned against the two-tier choice, invoking the logic of equal access. Nader alleged that the low-coverage option would "unfairly deprive the poor of their right to be fully compensated for pain and suffering" and that it "dehumanized the poor and deprived them of their equal rights."[38]

Similarly, products liability is regarded widely as a method to accord all consumers equal protection and redress in using products. What is less often understood is that this equal-access-to-remedy policy has unintended distributive effects.[39] Since sellers lack the ability to discriminate ex-ante in price between different groups of consumers according to characteristics such as wealth or propensity towards getting into accidents, all customers end up paying an equal implicit premium in the form of a higher product price. However, the products liability awards paid at the end of the day are based on victim-specific characteristics. Accident-prone and high-loss consumers benefit at the expense of safe and low-loss consumers. Specifically, high-income consumers receive greater benefits, since the awards for damages in tort law are correlated with lost income and with consequential harm to property.[40] This cross subsidy in favor of the wealthier consumers is bolstered by the fact they are more likely to seek an attorney and to sue and to recover for their damages.[41] By contrast, first party insurance

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[38] *Id.*, at 53-54; Kenneth Reich, *Nader Draws Criticism by Consumers for No-Fault View*, Los Angeles Times (May 28, 1989) (at http://articles.latimes.com/1989-05-28/news/mn-1604_1_no-fault-insurance-no-fault-system-auto-insurance).

[39] Richard Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 648-49 (1985); James Henderson, *Revising Section 402A: The Limits of Tort as Social Insurance*, 10 TOURO L. REV. 107 (1994).

[40] This point has been made by many writers. See, e.g., Epstein, *id.*, at 650-51; Richard L. Abel, *A Critique of American Tort Law,* 8 Brit. J. L. & Soc'y 199, 202-06 (1981); George L. Priest, *A Theory of the Consumer Product Warranty*, 90 Yale L. J. 1297,1350-51(1981); George Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 Yale L. J. 1521, 1546, 1559-60 (1987); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 Yale L. J. 353, 405-06 (1988); Walter Y. Oi, *The Economics of Product Safety*, 4 Bell J. Econ. & Mngt. Sci. 3 (1973); James R. Garvin, *Moral Hazard, Adverse Selection, and Tort Liability*, 28 J. Ins. Iss. 1, 7 (2005);

[41] See U.S., *Hearings on Punitive Damages Tort Reform Before the Senate Committee on the Judiciary*, 104th Cong. (1995) (WL 149954), cited in Gregory Miller, *Be-*

avoids this cross-subsidy because premiums are lower for below-average income customers.

Thus, in a system where liability is imposed on the sellers, low-income consumers subsidize the high-income ones who buy the same product, either by paying for an implicit compensation fund that benefits the high-income disproportionately, or by paying for safety improvements that reflect the safety preferences of the wealthy. Moreover, for some low income consumers the insurance premium included in the price of the product might become prohibitive and cause them to avoid purchasing the product. While they no longer cross-subsidize the wealthy, the adverse effect on these weaker, poorer, groups further undermines an even more important equal access policy—the equal access to product markets and the participation in the primary activity.[42]

3. Mental Health Insurance

The auto accidents and products liability examples above illustrate a more general phenomenon of mandatory equal access to insurance: elites benefit more from indemnity, even though it is equally available to all. In the liability examples, the elite had larger losses and thus received more de facto coverage for the same price. But the disproportionate benefit of insurance can accrue for a different reason: the higher tendency of the elite to invoke the benefits.

This effect could occur in the area of health insurance. For example, wealthier people are less sensitive to copayments and thus can more easily access the treatment benefits that the poor are equally

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hind the Battle Lines: A Comparative Analysis of the Necessity to Enact Comprehensive Federal Products Liability Reforms, 45 BUFF. L. REV. 241, 273 (1997); Tsachi Keren-Paz, *Private Law Redistribution, Predictability, and Liberty*, 50 McGill L. J. 327, 338 (2005).

[42] For a similar argument on compensation in contract law and the redistributive effect of consequential damages. See, e.g., William Bishop, *The Contract-Tort Boundary and the Economics of Insurance*, 12 J. Legal Stud. 241 (1983); Richard Craswell, *Contract Remedies, Renegotiation, and the Theory of Efficient Breach,* 61 S. Cal. L. Rev. 629, 659 (1988); Gwyn D. Quillen, *Contract Damages and Cross-Subsidization,* 61 S. Cal. L. Rev. 1125 (1988).

entitled to, but have more difficulty to trigger.[43] As health plans and medical bureaucracies become more complex, it is the sophisticates that can better understand and utilize the insurance benefits.[44] Indeed, much regulatory effort has been focused on "health insurance literacy" and on simplifying the disclosures and the "Summary of Coverage" forms that enrollees receive, to afford greater accessibility to the less educated. But results are disappointing. People have difficulty ascertaining what is covered, what it costs, and which plans to choose.[45] As a result, rates of utilization vary, and fall short of treatment eligibility. If there are disproportionate rates of utilization of benefits among people with different wealth and sophistication, it can quickly become regressive in the strong sense, as long as the disproportionate utilization outweighs the higher premiums that the affluent pay.

This regressive effect—a wealth transfer from those with less means to the more affluent—has been documented, for example, in the area of mental health insurance. Barak Richman found that under health plans that provide equal mental health coverage benefits, whites and high-income individuals consume more services than nonwhites and low-income individuals.[46] If health insurance premiums are withheld in equal amounts from all insured workers, this mandate creates a strong-form regressive effect.[47]

In a further study, Richman et al. demonstrate that the greater use of mental health treatments among whites and high-income patients is not explained by greater incidence of mental illness.[48] Nonwhites and low-income individuals simply do not take advantage of their mental health benefits at the same rates as their white and more

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[43] Emmett B. Keeler, et al. *The Demand For Episodes of Medical Treatment in the Health Insurance Experiment* (1988); Joseph Newhouse, et al., *Free For All? Lessons From the RAND Health Insurance Experiment* (1993).

[44] M. Gregg Bloche, *Race and Discretion in American Medicine*, 1 Yale J. Health Pol'y L & Ethics 95, 108 (2001).

[45] Lynn Quincy, *Making Health Insurance Cost-Sharing Clear to Consumers: Challenges in Implementing Health Reform's Insurance Disclosure Requirements*, Commonwealth Fund pub. 1480 Vol. 2 (February 2011)

[46] Barak D. Richman, *Insurance Expansions: Do They Hurt Those They Are Designed to Help?*, 26 Health Affairs 1345 (2007).

[47] *Id*, at p. 1353.

[48] Barak Richman, Dan Grossman, Craig Chepke, & Frank Sloan, *Mental Health Care Consumption and Outcomes: Considering Preventative Strategies Across Race and Class* (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1989038).

affluent coworkers, and to the degree that they seek care for mental illnesses, they are more likely to turn to general practitioners rather than to mental health professionals. Differences in mental health services consumption patterns were also evident across race. For example, it was found that whites take advantage of outpatient mental health benefits four times more often than blacks. Strikingly, there is no significant evidence that higher incidence of outpatient mental healthcare reduces the likelihood of adverse mental health (measured by the probability of hospitalization for mental illness).

If these studies are right – if mental health insurance mandates like the one being instituted under the Patient Protection and Affordable Care Act benefit the elites more – they constitute transfers from nonwhites to whites and from low-income to high-income workers. They increase the equal access to mental health care to all, and they are commonly supported by the rhetoric of access for the weaker, otherwise uninsured, groups. But, as insurance goes, all pay for them through higher premiums, and—regressively—elites enjoy them far more often.

4. *Accommodations for Disabilities*

In general, laws mandating access for people with disability have an important effect that goes beyond income redistribution. Enabling disabled people to access public areas, buildings, and transportation allows them fuller participation in society, and serves the goal of "equal access to societal opportunities."[49] For example, Section 504 of the Rehabilitation Act of 1973 forbids organizations and employers from excluding or denying individuals with disabilities an equal opportunity to receive program benefits and services. It is aimed to "guarantee equality of opportunity" and "equal access" for people with disabilities.[50]

But disability accommodations could be regressive within the eligible class, when they disproportionally benefit the elite among those entitled to the accommodation. Consider the following example. Under the above mentioned Section 504, public school students with disabilities are entitled to accommodations such as additional time on

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[49] Samuel R. Bagenstos, *"Rational Discrimination," Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825, 860 (2003). See, generally, Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA. L. REV., 397, 426-30 (2000); *US Airways v. Barnett*, 535 U.S. 391, 397 (2002).

[50] 29 U.S.C. 701 (b)(1)(F) and (c)(2).

exams and assignments. There is now growing evidence that in reality students from affluent areas are far more likely to enjoy these accommodations than students from poor families. A survey by the U.S. Department of Education's Civil Rights Data Collection shows that students in wealthy districts have nearly *five times more* utilization of the accommodations, relative to the state average. In Illinois, only about 1% of public school students statewide had Section 504 accommodations, compared to 5% in Chicago's wealthy suburbs. The 20 districts with the highest percentages enrollment had 76% white enrollments and all had lower percentage of poverty than the state average, while the 20 districts with the lowest enrollment were only 19% white and far higher poverty than the state average.[51]

Section 504 was designed to level the playing field for people with disabilities in order to afford them equal opportunities. In a broad range of areas, it benefits people with disabilities relative to others. But in some areas, it is a privilege that is not simple or cheap to invoke. First, some measure of sophistication is necessary to know about the available accommodations and rights, and to ask for them. Second, exam accommodations require the qualifying student to be diagnosed as having a learning disability. These diagnostics are expensive and require both financial investment and motivation. And so, like the remote vacation parks that are difficult to reach, equal access is an illusion. With differential propensities to invoke the accommodation, the gap between the sophisticated and the poor re-emerges, and the accommodations end up benefitting high income and elite groups.

The exam accommodations are regressive only in the weak sense. This is not a transfer from the poor to the wealthy, because the advantages accorded to disabled students in wealthy suburbs do not come at the expense of disabled students in poor districts. Instead, the advantages are largely at the expense of healthy students (and disproportionately those from wealthy suburbs). But as long as the accommodations benefit the wealthy and not the poor, the relative opportunities of the wealthy increase. The difficulties attributed to learning dis-

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[51] Diane Rado, *Special help starts as early as grade school — but only for select students*, Chicago Tribune (June 6, 2012), available online at www.chicagotribune.com/news/education/ct-met-accommodations-folo-20120606,0,4860162.story. For the full data, see http://www.ed.gov/news/press-releases/new-data-us-department-education-highlights-educational-inequities-around-teache

abilities then tend to be concentrated more among the poor, contributing to their relative deprivation.

IV. Access to Litigation

Mandatory arbitration clauses deny consumers access to litigation in courts and replace it instead with arbitration proceedings. The working hypothesis among many commentators and courts is that this access denial is a burden to consumers, who would otherwise fare better in securing a remedy through courts. Arbitration is thus viewed as a more effective shield for firms against lawsuits, reducing the firms' liability.

In this section, I will take this premise as a starting point. Some empirical work has contested this view, that arbitration reduces consumers' recovery, suggesting that consumers (or, for that matter employees, who too are often contractually obligated to pursue their complaints through arbitration) actually fair well in arbitration, relative to litigation. But the empirical question remains open and widely controversial.[52] My argument, instead, is that if arbitration indeed reduces consumers' recovery, this effect is potentially favorable not only to firms, but also to the weakest sub-groups of consumers. This is a direct application of the strong form of the regressive cross-subsidy idea. Access to litigation is an open-access policy that, although available to all, it disproportionately utilized by the sophisticated elite, and these benefits are partially funded by the less sophisticated consumers. Accordingly, if indeed arbitration restricts access to lawsuits and to recovery, it removes the regressive cross subsidy.

1. Who Benefits from Access to Litigation?

When access to courts and to litigation is free and unrestricted, who takes advantage of it? In order to pursue any kind of litigation strategy, the aggrieved claimant has to understand that his rights were violated. He also has to believe that a court would share this view and be persuaded that a violation occurred, and have enough of a litigious nature to undertake the ordeal of an adversary court dispute. He then has to find an attorney that would take the case. And, importantly, the claimant has to have the patience to await a remedy that sometimes

[52] See *Symposium on Empirical Studies of Mandatory Arbitration*, 41 Michigan J. L. Reform, Issue 4 (2008).

takes years to secure. True, a settlement might be reached early, but without a credible threat to litigate the case all the way to judgment, the settlement amount would not reflect the merits.

All these are opportunities that some consumers have, and others don't. But the distribution of these features is not random among consumers. Rather, these characteristics are far more likely to be found in wealthier, more educated, and more sophisticated consumers.[53] Take the first link in this chain—the claimant's ability to recognize that a violation occurred. Even this basic link is more likely to be satisfied when the consumer is sophisticated. The consumer has to know his rights, and for that the consumer has to be educated enough to read, understand, and exploit the information written (sometimes in legal language) in the consumer contract, the employment handbook, or other lengthy mandated disclosures that spell out people's rights. For example, if the consumer is shocked about a large unexpected fee that the service provider inserted into the bill, or about non-conforming delivery, or about the personal data that the firm harvested from the consumer's account, the consumer needs to verify that the fee, the product's features, or the data collection practice are violations of the fine print terms, or the promotional materials, or of the privacy policy to which the consumer agreed sometime in the past (or during one of the numerous updates issued in the meantime).

It is well documented that poor, less-educated consumers are less likely to successfully read and understand the terms of the contract. For one, it is no small task to recognize a violation, when it requires reading and understanding contracts and complex legal texts. One study suggests that only 3-4% of the population can understand the language in which contracts are drafted.[54] And to recognize a violation and articulate a complaint, consumers have to be competent in performing non-trivial numeracy skills, including some understanding of risk and probabilities—which they often lack. For example only 18% of respondents in a consumer survey could calculate how much a $200 investment that earns 10% interest per year would yield after 2 years ($242).[55] Or, only

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[53] See, generally, Marc Galanter, *Why the Haves Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Society Rev. 95 (1974).

[54] Alan M. White & Cath Lesser Mansfield, *Literacy and Contract*, 13 Stanford L & Policy Rev 233 (2002).

[55] Annamaria Lusardi and Olivia Mitchell, *Financial Literacy: Evidence and Implications for Financial Education*, TIAA-CREF INSTITUTE TRENDS AND ISSUES MAY, 3 (2009).

16% of sample of surveyed women of above-average literacy answered correctly three basic questions about probability: (1) how often a flipped coin comes up heads in 1,000 tries, (2) what 1% of 1,000 is, and (3) to turn a proportion (1 in 1000) into a percentage.[56]

Not only are illiteracy and innumeracy widespread, they are particularly common among vulnerable people. According to the U.S. Department of Education, income is significantly associated with higher literacy levels. Minorities, and people receiving public assistance, all have lower levels of income and thus literacy.[57]

If a precondition to litigation is to recognize that your rights have been violated, and if only 20% of the population is literate enough to locate such information in legal documents,[58] and if these skills are concentrated in the hands of the educated well-earning elite, then the access to litigation benefits the elite more. Maybe things can be improved by financial literacy campaigns and more "meaningful" disclosures, but as we saw already, mandated disclosure—a regulatory tool that is often employed with the distinct intent to help the poor—only exacerbate the cross-subsidy. The more disclosure-trained and cautious are the readers (who are disproportionately well educated), the greater their relative advantage.

But weak consumers are less likely to seek remedies in court for reasons beyond their poor ability to read boilerplate and understand their rights. The poor and the less sophisticated endure more abuse and exploitation by dealing with lower quality vendors, and as a result their expectations for decent treatment—and for remedies in the event that it is not rendered—may be comparatively depressed.[59]

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[56] Lisa M. Schwartz et al, *The Role of Numeracy in Understanding the Benefit of Screening Mammography,* 127 Annals of Internal Medicine 966 (1997).

[57] National Center for Education Statistics, *Literacy in Everyday Life: Results From the 2003 National Assessment of Adult Literacy* (US Dept of Education, 2007).

[58] Alan M. White and Cathy Lesser Mansfield, *Literacy and Contract*, 13 Stan. L. & Pol'y Rev. 233, 239 (2002) (the "literacy required to comprehend the average disclosure form and key contract terms simply is not within the reach of the majority of American adults.")

[59] For example, low-income parents are more "fatalistic" about children's exposure to hazards and less influenced by safety warnings, even though the children are disproportionately exposed to these hazards. See Klein, Social Influences on Child Accidents, 12 Accident Analysis & Prevention 275 (1980).

Further, even when they are defrauded, the magnitudes of their claims are smaller. True, some violations of rights lead to fixed, lump-sum recovery (e.g., statutory damages), or to recovery that is independent of wealth (e.g., medical expenses). But many violations lead to losses that do depend on income.[60] Wealthier people buy more products and pay higher prices, which account for larger nominal losses when fraud or violation occurs. And wealthier people may suffer larger losses when recovery is measured by earning capacity, lost income, lost property value, lost opportunity, or other consequential harms.

If the poor have lower nominal claims, they also become less attractive clients for attorneys. As it is, there is evidence that only about 5% of individuals with claims who seek private representation are able to obtain counsel.[61] Low claims leave less net recovery once litigation costs are accounted for (and there is plenty of evidence that litigation indeed takes longer than arbitration, and although the possibility of settlements blurs the empirical comparison, settlements in the shadow of costly litigation are likely to be stingier).[62] And among people who go to court and self-represent, the poor and less educated are also less effective in advocating their claims. There is convincing evidence that litigation is a cost effective dispute resolution strategy only for high-stake claims. Most poor consumers don't have such claims; their small cases are cheaper to pursue in arbitration.[63]

Moreover, courts operate slowly and court-awarded remedies take time to secure. The higher the consumer/plaintiff's discount rate, the less valuable is the delayed recovery (even if it is compounded by interest), and the more amenable the consumer to accept a small settlement rather than "vindicate" his legal rights in trial.

Finally, litigation is risky business. The greater uncertainty there is about the outcome of litigation, the less beneficial it is to risk averse

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[60] See Mark C. Weidemaier, *From Court-Surrogate to Regulatory Tool: Re-Framing the Empirical Study of Employment Arbitration*, 41 Michigan J. L. Reform 843, 855 (2008).

[61] Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 Colum. Hum. Rts. L. Rev. 29, 58 (1998); William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 50 Disp. Resol. J. , Oct.-Dec. 1995, at 40, 45.

[62] Widemaier, supra note 60, at 846.

[63] Christopher Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 Mich. J. L. Reform 813, 831 (2008).

plaintiffs, who would either accept lower settlements or drop their suits altogether.[64] It is widely accepted that poorer individuals exhibit higher degrees of risk aversion,[65] and thus value the prospect of the litigation "damages lottery" less.

All this suggests that the litigation right would be more valuable, and more commonly employed, with better returns and larger settlements, by strong consumers—those who know their rights and can effectively pursue them against a sophisticated business opponent or its seasoned insurer. This conclusion is consistent with empirical findings in the area of employee claims—where even when litigation is permitted (that is, not barred by pre-dispute arbitration clauses), there are almost no cases of successful litigation commenced by lower-paid wage workers. Eisenberg and Hill argue that "the absence of cases of this type is likely explained by the fact that lower-paid employees seem to lack ready access to court, as other researchers have reported."[66] Hill concluded that for employees with income below $60,000 litigation is unrealistic, whereas arbitration is.[67] And St. Antoine reports that defendants "wait out most smaller claims, assuming employees will not be able to pursue them in court."[68] Arbitration is more accessible to low-wage claimants, who are less likely to utilize the litigation option even when it exists. If this employment-dispute resolution pattern is general and applies also in other consumer claims, it provides important indication that the access to litigation deals a disproportionate ex-post benefit to high-wage, high-claim plaintiffs.

2. Who Pays for Access to Litigation?

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[64] Uri Weiss, *The Regressive Effect of Legal Uncertainty* (unpublished manuscript, 2005).

[65] Nancy Ammon Jianakoplos and Alexandra Bernasek, *Are Women More Risk Averse?*, 36 Economic Inquiry 620 (1998); M. Levy et al. *Microscopic Simulation of Financial Markets: From Investor Behavior to Market Phenomena* (2000).

[66] Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, Disp. Resol. J., Nov. 2003–Jan. 2004, at 44, 45; see also Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 Ohio St. J. on Disp. Resol. 777, 798, 812 (2003).

[67] Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 Disp. Resol. J., May-Jul 2003, at 8, 10-11.

[68] See, e.g., Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better than It Looks*, 41 Michigan J. L . Reform 783, 790 (2008).

If Litigation is disproportionately accessed by sophisticated elites, it is regressive in the weak sense—a benefit that the poor utilize at a relatively low rate. For Litigation access to be regressive in the stronger sense—increasing the overall degree of inequality in income and welfare—the poor have to bear the cost of litigation at a rate exceeding their utilization of it. That is, the added recovery that litigation affords the elite group of consumers has to be financed, at least in part, by the poor and unsophisticated consumers.

Here, I can only make several conjectures. First, let us return to the assumption mentioned at the outset of this section—that arbitration is cheaper for firms than litigation (an assumption regularly made by many commentators, in suggesting that vendors draft arbitration terms to reduce their legal exposure and save money).[69] The most compelling reason for this assumption is the cost of liability. Arbitration that effectively inhibits lawsuits reduces the liability exposures of firms, and likely also the cost of liability insurance. If the heightened litigation risk is indeed costly to vendors, then some of the cost of access to litigation would be rolled into the price of the service. In highly competitive industries, most if not all this cost would be reflected in higher prices to consumers; whereas in concentrated industries, only part of this cost would be borne by consumers, and the rest by the vendors, depending on the elasticity of demand.[70]

If consumers as a group pay higher prices when they have the right to sue, then those who are less likely to invoke the litigation right end up sharing the cost of the right that others utilize, through higher product prices. The dynamics of this cross subsidy is familiar in various contexts. Take, for example, the right to litigate health benefits. Some legal systems recognize a constitutional claim for "right-to-health," which allows individuals to seek court protection of their right to various medical treatments. A study in Brazil (where such right-to-health is recognized) showed that the litigation that ensued under this access-to-medicine paradigm was largely to the benefit of elites, intended to secure "high-tech" and experimental treatments.[71] The vast majority of

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[69] *Id.*, at 789 ("the history recounted above indicates that employers' resort to mandatory arbitration in the 1980s was triggered far more by the size of jury verdicts and the cost of litigation than by effort to stymie union organizations.")

[70] Richard Craswell, *Passing On the Costs of Legal Rules: Efficiency and Distribution in Buyer-Seller Relationships*, 43 Stan. L. Rev. 361 (1991).

[71] Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 Texas L. Rev. 1663 (2011)

the cases litigated were brought by a privileged minority seeking access to "high-cost medicines, such as new types of insulin for diabetes and new cancer drugs" that were otherwise excluded by health administrators because of low effectiveness. It was shown that the right-to-health litigation was largely concentrated in the richest regions, where a small minority "is able to use the court system to its advantage." Access to courts is otherwise "beyond the means and reach of most poor Brazilians."[72] Further, the cost of these augmented treatments is borne by others. As state resources devoted to health and provision of medications is fixed, such litigation reallocates general health expenditure, which would otherwise benefit broader populations, in favor of the litigating minority.

A nondisclaimable right to litigate is merely a type of mandatory consumer protection, and like any other such protection it effectuates a cross-subsidy in favor of the group that enjoys it more. Mandatory warranties, rights to withdraw, remedies, or quality and safety features make products more expensive, and might well reflect the preferences of some consumers. But for lower income consumers, these protections are harder to afford. If your budget permits only the discounted items in the menu, a mandate to buy high-end high-price offering is bad news.

And so, if consumers have to pay for access to litigation, many of them may prefer low price over free access. As Jim White bluntly put it, "for a nickel or a dime, almost all of us would . . . agree to arbitrate."[73] Especially those among us for whom "a nickel or a dime" matter.

V. Access to Class Actions

I began this essay by identifying a pervasive claim, that consumers as a group are denied access to litigation, and that this denial is harmful to them because litigation is cheaper and more generous than arbitration. I then argued that even if the premise underlying this pervasive claim is true—namely, that litigation is cheaper and more accessible—the conclusions drawn from it overlook important differences among consumers. Some people, primarily the less affluent and the less educated, may benefit less from access to courts, and thus would benefit more from contracts that limit such access and its corresponding

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[72] *Id.,* at 1661-2.

[73] James J. White, *Contracting Under Amended 2-207*, Wis. L. Rev. 723 (2004).

price. Since they don't plan to sue anybody anyway, they don't want to pay for such theoretical privilege.

I now want to consider an important objection to the claim that litigation is regressive. A crucial feature of arbitration, and perhaps the main reason why firms prefer it, is the removal of class representation procedures. Arbitration clauses not only turn plaintiffs away from litigation, they also bar aggregation of suits. And class actions—even if filed solely by the sophisticated and the affluent—benefit the poor. They do so in two ways. First, class actions enable the poor to piggyback on the litigation effort of others, and collect the recovery that every member of the class is entitled to without any deliberate effort. Second, and more importantly, if the threat of class actions changes the behavior of potential defendants—sellers and firms serving the poor—this deterrent effect is a public good benefitting all equally. As long as defendants are forced to pay for their wrongdoing, it doesn't matter who collects—the entire class, the class representative alone, or its attorney. In the same way that punitive damages deter wrongs that are otherwise hard to detect and redress, the inflated awards result from class action serve the interests of potential (non-suing) victims.

This is an important qualification that, if true, diminishes the regressive concern developed in this paper. It would suggest, though, that the problem with pre-dispute mandatory arbitration agreements is not related to the type of arbitration procedures chosen (e.g., ones with high filing fees or stingy discovery)—a concern that many American courts seem to have been honing on[74]—but rather it is solely the class action blockade. Practically, this argument is relevant only to systematic, class-wide wrongs, which qualify for aggregate litigation.

The discussion below will address the two potential class-wide effects of class actions, recovery to all and shared benefit from deterrence. The first effect—the poor piggybacking on the litigation efforts of others—is a phantom. The dynamics of ex post recovery in class actions does not vindicate this interest. Still, the more substantial benefit to the poor may be the second effect—the ex ante deterrence that class actions could potentially engender. It would suggest that class action waivers, implemented through mandatory arbitration, are harmful to the poor, but for a different reason than that which animates American

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[74] *Brower v. Gateway 2000, Inc*., 676 N.Y.S.2d 569 (App. Div. 1998); *Armendariz v. Foundation Health Psychcare Services, Inc*., 6 P.3d 669 (Cal. 2000); *Ex parte Thicklin*, 824 So. 2d 723, 734 (Ala. 2002).

case law. This objection to arbitration rests not on the normative foundation of "access to justice" nor of victims receiving proper corrective redress, but rather on the importance of having bad actors pay for their misdeeds. In fact, deterrence might work best if the payments of class action judgments go to the pocket of rich plaintiffs attorneys, and almost never to compensate the truly poor and the worst off among consumers. The more attorneys benefit by such suits, the more motivated they would be to produce this form of deterrence. But even this deterrence rationale, I argue, is more limited in its scope than appears.

1. Recovery to All?

Consider, first, the proposition that the poor benefit from class-wide recovery: at no cost to them, poor class members recover at least part of their loss. There is plenty of sobering evidence showing that only a small, negligible fraction of the class members actually redeem their share of the class recovery. For example, many class actions end with the attorneys representing the class being paid in cash, but the consumer-members receiving coupons. The average redemption rate of various coupons has been measured somewhere between 1%-6%, mirroring the typical corporate-issued promotional coupon redemption rate.[75] In one consumer class action alleging deceptive business practices, members were entitled to a total potential compensation of $64 million, but redemption was less than $1.8 million.[76] Or, when Ford agreed to a settlement in a class action over the Explorer SUV rollover problem, it was estimated to cost approximately $500 million. But less than 1% of the eligible consumers signed up to collect their recovery.[77] In another case, a proposed class settlement was not approved by the court, citing actual redemption rates that ranged from 0.002% to 0.11% for similar coupons.[78]

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[75] James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 Geo. J. Legal Ethics 1443, 1445 (2005); Thomas a. Dickerson and Brenda V. Mechmann, *Consumer Class Actions and Coupon Settlements: Are Consumers Being Shortchanged?*, 12(2) Advancing the Consumer Interest 6 (2000).

[76] 173 F.R.D. 167, 172 (W.D. La. 1997). See *Roundtable Discussion on Private Remedies: Class Action/Collective Action; Interface Between Private and Public Enforcement*, p. 4, (Working Party No. 3 on Co-operation and Enforcement, Directorate for Financial and Enterprise Affairs, Competition Committee, 2006).

[77] Jef Feeley and Myron Levin, *Ford Accord Garners Less Than 1 Percent Participation*, Bloomberg News, July 7, 2009.

[78] Buchet v. ITT Consumer Financial Corp., 845 F. Supp. 684, 694-95, modified, 858 F. Supp. 944 (D. Minn. 1994).

There are, to be sure, ways to increase participation rates by providing cash payments rather than coupons, auto-enrollment with sticky opt-outs, and other remedial designs. But in many cases any meaningful consumer recovery would require some active steps by the class members, triggering again the disproportionately low participation rate by the poor. They do not know that they are part of a represented class action, they do not read the boilerplate notices about the settlements, and have lesser need for any recovery package other than cash. Ironically, it is utterly possible that various methods to make recovery more accessible would hurt the poor, because their incremental improvement would be the smallest.

Furthermore, since many of the compensation schedules are set in settlement negotiations by the plaintiff's attorneys and the defendants—both of whom have little interest to maximize the payouts to the anonymous class members who are under-represented in these settlement negotiations—the mechanism is inherently likely to shortchange the poorest among the class members. In fact, there is reason to expect that settlements involving lower-educated class members would tend to be especially abusive and self-dealing because class members in such settlements rarely object to the abusiveness of the settlement.

It is possible that the value of class litigation would accrue to all, if the remedy granted is a forward looking injunction or corrective advertising. Attorneys will still get their loadstar fees per their success, and firms will happily comply by tweaking the language of the product label or other negotiated modifications. It is questionable, however, how much benefit these private suits generate for the public.

2. Deterrence

What about the deterrence effect? Do class member—rich and poor alike—enjoy the compliance incentives that the threat of class action creates?

A deterrence effect would arise if class actions lead to substantial judgments and settlements that are paid out. Disgorgement of ill-gotten gains would be powerful deterrent of misconduct. The deterrence effect would diminish if these judgments and settlements are only partially cashed in by consumers. While we know that redemption rates are low, we also know that, businesses do seem to worry about the potential class action liability (or else they would not draft class action waivers through arbitration clauses). And so, it is plausible that costly liability is generated even through partial redemption, forcing businesses to account for it in planning their primary conduct.

Ideally, class actions would target the firms that commit the worst offenses against consumers. They would target producers who deceive consumers (e.g, by falsely labeling products and charging higher prices); or manufacturers of defective and injurious products; or business who fraudulently bill consumers more than they are entitled. But since class actions are often driven by the financial incentives of the attorneys launching them, they notoriously provide particularly generous payouts to the plaintiff's attorneys. As an FTC Commissioner once noted,

> "the problem is that these weapons have been placed in the hands of people who act, in effect, as private bounty hunters but who are not primarily concerned with public benefit. There is heightened need for public oversight to avoid outcomes that underdeter, overdeter or deter the wrong parties."[79]

One problem with class actions is that they are likely to target the firms that have deep enough pockets to pay, not necessarily the worst offenders. Bear in mind that firms with deep pockets are often those that have successfully developed strong brands and have much invested in their reputation. If a feature of the product malfunctions, or if the firm promoted a feature that caused disappointment to consumers, the firm with the strong brand and wide reputation would have more on the line and a stronger incentive to redress the problem to avoid the negative reviews and reputation sanctions, and would do so *even without litigation*.[80] If instead the business stonewalls and refuses to redress a complaint, it may likely be the type of complaint that invokes a technical or frivolous violation, or a matter of minor value.

To be sure, there are many meritorious claims against shady businesses specializing in the gray areas of sub-prime lending (e.g, credit-repair organizations, debt-collection practices), and pursuing them through class actions could be particularly advantageous to the poor.

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[79] Thomas B. Leary, *The FTC and Class Actions*, available at http://www.ftc.gov/speeches/leary/classactionsummit.shtm#N_1_

[80] See, generally, Omri Ben-Shahar, *One Way Contracts: Consumer Protection without Law*, 6 European Review of Contract Law 221 (2010).

Class actions in these areas could at times provide an important supplement to public enforcement. Indeed, many consumer protection statutes specifically envision class actions as an effective way of deterring patterns of violations, and the right to recover statutory damages makes the award of damages in class action easy to administer. Arbitration clauses would effectively shut down this avenue of enforcement in an area that might otherwise benefit from increased deterrence.

Still, it is questionable whether businesses that specialize in deliberate advantage taking of ignorant and poor borrowers would be effectively deterred by the threat of “private attorney general” suits. In such cases, a coordinated regulatory solution might be superior, as an enforcement technique. The worst wrongdoers may not be the ones with the deepest pockets that attract private actions. And an effective enforcement campaign might require a investigative agency-based action against a network of disperse defendants, with forward-looking as well as criminal remedies, rather than anecdotal suits that end up with meek settlement and compensate the lawyers more effectively than the victims.

It is also important to imagine different ways in which firms would be “deterred” by class actions. In general, increased liability could have several effects. First, it could lead firms to shut down an entire activity as unprofitable, and as a result some consumers would be hurt. Usurious lending, for example, has long been regarded by many societies as undesirable, but it surely benefits some high-risk, high-need borrowers. Or, a pharmaceutical drug may be both good and harmful, and shutting down its distribution because of high liability costs may hurt some sub-sectors of patients.

Second, increased liability could lead firms to continue the activity but make sure they comply with the legal standards. Manufacturers of products could take more precautions to prevent injuries. They may design safer products that, for example, pose a lower fire hazard, thus benefitting all customers. But many of the precautions that would be induced by the threat of class action liability would be the drafting of longer warning labels on products, or complying more meticulously with disclosure standards (to remove claims of negligent failure to warn, or of deception). For example, the Concepcions’ claim—that AT&T Mobility defrauded them by advertising “free phones” yet charging sales tax on the retail value—could have the sole effect of longer disclosures.[81] This case, recall, ended up with the Supreme Court validating the arbitration clause and denying access class action litigation. But an opposite result, securing access to class action litigation, could merely put firms on greater guard, to ensure that all advertisements and production paperwork include every possible disclaimer. AT&T would still offer free phones and still charge sales tax on the retail value, but would lawyer-up prior to any public communication as precaution against litigation. This would hardly count as a triumph of consumer protection. Who benefits from these enhanced warnings and disclosures?[82] These are precautions that do not serve all consumers equally. Instead, they interact with consumers' own use patterns, and have greater utility to (the few) consumers who read warning and disclosures—to the sophisticated elite. Access to litigation morphs into access to information, but information—we saw—is often a regressive policy.

Third, there is the price effect. Could it be that class actions improve products and behavior, but render them too costly for the poor? One does not need to subscribe to rational-choice neo-classical economic approach to recognize that better products that are more closely scrutinized by courts cost more in competitive and non-competitive markets alike. People make different price/quality tradeoffs, with some preferring low prices over high quality. If class actions have the ex ante effect of higher prices, it is quite possible that the poor come out as net losers. We are back to Jim White's nickels and dimes.

To be sure, even a sharp price effect is often desirable. For example, when the business is sued for deceptively hiding some service fees, the effect might be higher upfront prices, but here the higher prices are offset by a lower overall latent fees. The higher price is a more salient index for the true cost of the purchase. Higher prices might also be desirable when consumers underestimate the risks and losses that might be associated with some products, and fail to insure or to discount their value. And it is more than possible that these benefits associated with salient upfront prices would accrue disproportionately to the poor, who might otherwise be easier targets for the false allure of low prices.[83]

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[81] AT&T Mobility v. Concepcion, 563 U. S. ____ (2011).

[82] Kesten C. Green and J. Scott Armstrong, Evidence on the Effects of Mandatory Disclaimers in Advertising, 31 J. Pub Pol'y & Marketing 293 (2012).

[83] See, generally, Oren Bar-Gill, Seduction by Contract (Oxford Press, 2012).

In the end, the strongest objection to mandatory arbitration might very well rest on the deterrence rationale. It is possible that various types of socially harmful conduct are insufficiently deterred by public enforcers, and that private class actions could create better incentives, eliminate harmful conduct, and result in more accurate prices—to the benefit of all. But even this rationale for "access to litigation" is tentative and rests on questionable conjectures regarding the distributive benefits of heightened liability. Class action liability may indeed change firms' conduct in a way that benefits those who brought the suits, but in a way detrimental to others.

VI. Conclusion

There is a seductive logic to the access-to-justice advocacy. Consumers *should* be entitled to vindicate their rights in forums that allow them full procedural rights and effective remedies. Boilerplate surrenders of these rights in favor of mandatory arbitration are therefore widely regarded as benefitting businesses, at the expense of consumers. But this logic begins to unravel when consumers are viewed, not as a homogenous army of competent private enforcers, but rather as a heterogeneous class that includes a potentially large subgroup of poor, uninformed, and unlikely-to-sue people. Access to litigation does not help these folks; rather it helps the stronger, more informed, more litigious consumers. It is a type of access policy that has regressive effects.

Ironically, it is this heterogeneity of consumers—the co-presence of weak and strong consumers in the same market—that is the premise currently underlying notions of "access justice." According to this model of justice, mandatory rules (like the one that would secure nondisclaimable access to litigation) are "meant to bring the consumer and the worker into a legal position where she or he is equipped with the necessary set of right so as to participate in and reap the benefits of the [market]" and to "strengthen the position of consumers and workers with a view to enforcing their rights."[84] This notion of "access justice," with the mandatory access to courts and to remedies it guarantees, intends to help "the weaker parties" who are otherwise "excluded from the market or . . . face difficulties in making use of the market freedoms."[85]

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[84] H.-W. Micklitz, *Introduction*, in: The Many Concepts of Social Justice in European Private Law 37 (2011).

[85] Id., at 5.

My conclusion stands in sharp contrast to the “access justice” account. Weak consumers, I showed, are not helped by the access to litigation, or by various other mandatory protections that need to be actively triggered. These entitlements are disproportionately accessible to, and utilized by, the strong, informed, and wealthy. In an unintended and unappreciated way, the surrender of the right to sue in court and its replacement by mandatory arbitration, while detrimental to small groups among the elite, serves best the interest of the weaker echelons of consumers.